

**"A *Mulato* Cannot Be Prejudiced":  
The Legal Construction of Racial Discrimination  
in Contemporary Brazil**

by

Seth Racusen

Ed.M. Harvard School of Education  
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Submitted to the Department of Political Science  
in Partial Fulfillment of the  
Requirements for the Degree of

Doctor of Philosophy in Political Science  
at the  
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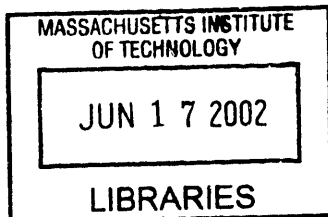
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ABSTRACT

This dissertation, an in-depth empirical study of Brazilian racial discrimination law, examines the trends in complaining and surprising variation in official decision-making over the past decade. I collected more than 300 racial discrimination complaints, police investigations and court proceedings filed since 1989. I claim that Brazil's racial ideology and its theory of racial discrimination as an act of racial prejudice have been jointly constituted and, in turn, fully shape the making and the using of anti-discrimination law. I show that Brazil constructed racial discrimination narrowly compared to US theories of racial discrimination and the Brazilian understanding of other forms of discrimination, such as gender and age.

Brazilians disproportionately file racial discrimination complaints about insults by a neighbor or co-worker. Officials treated these and most allegations as private, interpersonal disputes, even for allegations of firing and other problems protected in the law. I located approximately 40 findings for the plaintiff, a small fraction of the tens of hundreds of allegations, and analyze the variation in judicial inquiry and outcomes.

Brazil's racial ideology and weak rule of law strongly influenced litigation. Defendants destroyed evidence and threatened plaintiffs and witnesses. Officials often erased the testimony of Black plaintiffs and witnesses in their holdings. Defendants often claimed to be *Mulato* or to have treated the plaintiff cordially as evidence of being Brazilian and inherently unprejudiced. Many officials accepted that defense.

I hold the Brazilian theory of racial discrimination as overt prejudicial acts responsible for the use of the law. The law has focused attention on the mind and attitude of the aggressor. Although all judges invoke their ideology in their findings, Brazil's anti-discrimination law has increased that tendency by requiring judges to decide whether a defendant was prejudiced. Instead of providing clear standards to try cases, the law has encouraged judges to consult their own racial ideology.



**"Um *Mulato* Nao Pode Ser Preconceituoso"**  
**A Construção do Conceito Jurídico da Discriminação Racial no Brasil Contemporaneo**

por

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**RESUMO (PORTUGUESE ABSTRACT)**

Esta dissertação, um estudo empírico em profundidade da legislação anti-discriminação racial no Brasil, examina as tendências recentes das denúncias de discriminação racial e a surpreendente variação na jurisprudencia na formulação das decisões oficiais na última década. Eu colhi mais de 300 denúncias de discriminação racial, investigações policiais e processos judiciais desde 1989. Eu afirmo que a ideologia racial brasileira e sua teoria de discriminação racial, como um "ato de preconceito racial", foram constituídas conjuntamente e, por conseguinte, moldaram completamente o processo de elaboração e aplicação da lei anti-discriminação racial. Eu demonstro que a construção do conceito de discriminação racial brasileira é estreita quando comparada com as teorias de discriminação racial norte-americanas, ou mesmo quando comparada o entendimento brasileiro de outras formas de discriminação, tais como gênero e idade.

Disproporcionalmente, brasileiros dão entradas com denúncias referentes a insultos por parte de vizinhos e colegas de trabalho. Autoridades tratam estas e a maioria das alegações como disputas pessoais ou privadas, mesmo em casos de demissões e outras situações previstas em lei. Eu localizei aproximadamente 40 decisões para os queixosos - uma pequena fração das centenas de denúncias - e analizei a variação das logica da interpretação da lei que norteou a jurisprudencia.

A ideologia racial brasileira e a norma fraca da lei ("rule of law") brasileiro influenciaram fortemente nos litígios. Os réus destruíram provas e ameaçaram os queixosos e as testemunhas. Autoridades frequentemente suavizam ou ignoram os depoimentos de queixosos e testemunhas negras em suas decisões. Réus frequentemente alegaram que são *Mulatos* ou que manterem relacionamentos cordiais com os queixosos como evidencia que, sendo brasileiros, nao poderiam ser preconceituosos. Muitas autoridades aceitaram este tipo de defesa.



Eu considero que a teoria de discriminação racial brasileira atua de forma aberta à preconceitos é reponsável pelo corrente uso na que se faz da legislação anti-discriminação racial no país. A lei brasileira concentra sua atenção na intenção e a atitude do agressor. Embora todos os juízes invoquem suas ideologias em suas decisões, a legislação anti-discriminação racial brasileira tem aumentado aumenta essa a tendência de requerer que os juízes decidam se o réu foi preconceituoso. Ao invés de não oferecer padrões objetivos para julgar os casos, a legislação tem encorajado os juízes a consulta rem sua própria ideologia racial.





## Acknowledgments

This has been a *travessia* (journey) in every sense of the word. It has been an intellectual, political, and deeply personal journey. I feel lucky to have had this opportunity to research and to write a dissertation about Brazilian racism and the law. I have made many new friends and colleagues on two continents who have befriended, assisted, and challenged me. It was my good fortune to have chosen to study Brazil - because of the overwhelming generosity of Brazilians: as interviewees, co-researchers, colleagues, hosts, friends and more. São Paulo, where I conducted most of my research, truly feels like a second home: *onde sinto em casa*.

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I had vowed to finish my dissertation before my daughter graduated high school, and while my parents were still alive. Unfortunately, I missed on both counts. I wish to acknowledge the kindness of many family members during my personal *travessia* of the past years, including Amanda, Annette, Brett, Barbara, Carol, Dick, Herb, Jeff, Jennifer Lynn, Lorraine, Marianne, Marvin, Paul, Rhoda, Roslyn, Rudy, and Shanna, as well as the special kindness of Marlene. This work is in the memory of my parents, Bernard and Bernice, who spirit will always animate my heart and soul.



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## Chapter 1      **Brazil, the Ideology of the Nation and Anti-Discrimination Policy**

*Monica<sup>1</sup>, a 28-year-old human resource assistant, had been unemployed long enough to have become familiar with the listings and procedures of the nearby employment agencies in São Paulo, Brazil. She had left applications on file at most of the agencies. Monica noticed an interesting administrative opening at one agency, Global Empregos in late May 1993. Because the announcement was hand written, Monica assumed it was a recent posting of some urgency.<sup>2</sup>*

*Considered Parda (“Brown”)<sup>3</sup> by Brazilian standards, Monica expressed her interest in the administrative position to the receptionist at the agency. The receptionist, Jacianne, consulted the listing and cautioned Monica that the job required experience. Monica indicated that she had significant experience. The receptionist specified, “at least two years.” Monica affirmed that she more than two years experience. The receptionist continued to consult the listing and posed questions about Monica’s age, educational background and typing skills. Monica possessed all the requirements for the job. Jacianne asked Monica where she lived, an unusual question for the position. Monica sought to avoid elimination and responded that she could work anywhere because she had relatives in all zones (boroughs) of the city. Jacianne persisted in knowing which zone. Monica admitted that she lived in the East Zone of São Paulo but reiterated that she had relatives everywhere. Finally, Jacianne stated nonchalantly that the position required a “White” candidate. Stunned and affronted, Monica said, “You must be kidding.” Jacianne confirmed the criterion.<sup>4</sup>*

*Monica had not anticipated that criterion and felt paralyzed. The casualness of Jacianne’s words passed through her. To Monica, Jacianne’s matter-of-fact style suggested that this racist criterion was as natural as requiring an applicant to live in a nice neighborhood or be 18-years-old. Monica studied the receptionist for a moment and realized that she was communicating the agency’s listing and not her personal views. Monica asked Jacianne for the name of the firm. Jacianne declined divulging the name of the firm because of agency policy, but indicated the firm’s general locale. Extremely discouraged and upset, Monica left the agency without saying another word.*

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<sup>1</sup> For the purposes of confidentiality, I am withholding the identity of all principals unless an allegation reached trial court or was reported in the media.

<sup>2</sup> Unless otherwise indicated, the source for incident was an interview conducted by Joelzito Araujo and the author with Monica, August, 1995.

<sup>3</sup> Brazilians identify in “colors” and not “races”. The color terms they use daily differ from the census categories. I present the census categories, “White”, “Brown”, and “Black” in quotations and italicize color terms used in daily life in Portuguese. The term *Parda* is both a census category and a term used on the street.

<sup>4</sup> See Monica’s affidavit in the police investigation, Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 25,067/93. Poder Judiciário de São Paulo. See also Joelzito Araujo, The Exception and the Rule. Tapiri Video. São Paulo, Brazil. 1996.

Monica's allegation portrays a highly-developed etiquette to avoid making explicit distinctions of race or color.<sup>5</sup> In many incidents of alleged hiring discrimination, a recruiter or assistant sought to discourage a "Brown" or "Black" job applicant without making an explicit distinction. In Monica's case, the receptionist was apparently seeking to identify a non-racial criteria to discourage or eliminate Monica's candidacy.

Unlike Monica's allegation, the vast majority of complainants responded to an incident in which an aggressor had insulted them. These insults and humiliations occurred at work, at home, and in public places, often over an extended period. I examine how the underlying Brazilian concept of racial discrimination as an act of racial prejudice shapes the articulation of allegations, the police classification and investigation of those allegations, and the adjudication of the investigations that became full judicial proceedings. I show that Brazil's racial ideology and its theory of racial discrimination have been jointly constituted and, in turn, fully shape the making and the using of its anti-discrimination law.

The anti-discrimination law influences which problems Brazilians report to the authorities. Because the law defined racial discrimination as an act of prejudice, Brazilians disproportionately bring allegations against insults and other incidents with verbalized prejudice. In social surveys, "Brown"<sup>6</sup> and "Black" Brazilians have consistently reported problems in securing work as the principal discriminatory problems

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<sup>5</sup> See daMatta (1991) on the post-slavery development of interpersonal distance mechanisms. See Dzidzienyo (1971) on contemporary "racial etiquette" in overall behavior and Blanco (1978) on the "color etiquette" in identity.

<sup>6</sup> The Black Movement has persuaded some "Black" and "Brown" Brazilians to identify on the basis of race: as *Negro*, part of a unified Black or Afro-Brazilian race. Most "Black" and "Brown" Brazilians consider themselves as the color, "Brown".

they face.<sup>7</sup> However, complainants rarely reported important practices that more covertly reproduce racial inequality, such as hiring discrimination, to the police.

The making of anti-discrimination law has been highly informed by Brazilian racial ideology. The Brazilian Congress defined racial discrimination in the original anti-discrimination law of 1951 as an “act of racial prejudice” and enumerated a series of illegal acts, such as blocking the entrance to a facility or being refused employment. I claim that this formulation equated racial discrimination with the prejudicial attitudes and segregatory practices associated with North American Jim Crow. That understanding of racial discrimination mirrored the Brazilian ideology of race, known as *racial democracy*. According to the ideology of *racial democracy*, Brazilians are a new, “meta-race” of persons “fused” from European, African and indigenous backgrounds, who live in greater harmony than any other people in the world.<sup>8</sup> Thus, the state claimed that a people so specially formed cannot discriminate against each other, and equated racial discrimination with North American segregatory practices. The Congress strengthened the current anti-discrimination in 1989 but used the same understanding of racial discrimination. Through its emphasis on attitudes and verbalized prejudice, the idea of racial discrimination as a crime of prejudice influences the problems Brazilians bring to the law and how officials treat those problems.

This dissertation studies the articulation and resolution of racial discrimination allegations in contemporary Brazil. Of the more than 300 complaints, investigations and

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<sup>7</sup> See Turra, et al, (1995) on the 1995 Datafolha survey. The same distribution of problems was reported in a 1988 Datafolha survey conducted in the city of Sao Paulo. Datafolha, Memo, Survey No. 559A and 559B. May 2-3, 1988.

<sup>8</sup> See Raphael (1981) and Levine (1998).

court cases collected for this study, discriminatory hiring practices have been the most difficult for the state to prosecute and also extremely important in the reproduction of Brazilian racial inequality, extremely high by world standards.<sup>9</sup>

*When Monica reached the street, she resolved to do something although she did not know what that would be. She called the police's emergency number, 9-0, to file a complaint for employment discrimination. The attendant did not know what to do and transferred Monica to someone who asked for the details. The second attendant also did not know how to respond and transferred Monica to a third person. In all, Monica was transferred four times. Monica asked that officer if she could pursue the matter with officers in a passing police car, and the officer acceded.*

*Monica told the two officers in the passing police car that she had just been directed by an officer from 9-0 to address her problem to them. She told them about the incident at Global and her desire to file a complaint for racism. The officers looked at her and seemed surprised. She peered at them, realized they were both Black, and wondered whether that would help or hurt her case. One officer remarked, "How could that be?" She insisted she wished to file a complaint and sought their help. The officers seemed lost. One officer suggested she call 9-0 again so that another car would be dispatched. She implored them to help her and chided them, "You are on duty."*

*The officers remained reluctant to get involved. They agreed to continue on the case but insisted they would stay in the car. One officer asked Monica about the incident and took notes. When she finished, he commented discouragingly that she had no evidence. Realizing that 40 minutes had elapsed since the incident, Monica pressed them again to assist her in filing a claim. One officer responded, "Yes, but it is very complicated." She reiterated that a crime had been committed and that she wanted them to accompany her. Finally, they agreed.*

Monica encountered police indifference and incompetence, rather than the hostility other complainants have reported. The relationship between complainants and the police is extremely important because Brazilians must report allegations of racial discrimination, a criminal offense, to the police. In Brazil, racism became classified as a non-bailable felony by the new constitution of 1988 and the new anti-discrimination law

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<sup>9</sup> The Brazilian distribution of income is among the most inegalitarian in the world. Its gini coefficient was calculated at .60 for 1997, second highest in the world. See 2000 World Development Indicators, Table 2.8: "Distribution of income or consumption", World Bank. 2000, p. 66.

of 1989. The relationship between complainants and the police is also problematic because Brazilians fear the police and bring few problems to the police, preferably to handle problems privately. “Black” and “Brown” Brazilians especially fear that reporting an allegation could be turned against them.<sup>10</sup>

“Brown” and “Black” police comprise a significant portion of the Brazilian military police. Monica wondered if these police would respond more sympathetically than other police and how her allegation would be viewed if two “Brown” or “Black” policemen filed the report. Although proponents of *racial democracy* have often insisted that color does not influence how Brazilians treat each other, color often matters despite appearances.

*Knowing she needed evidence, Monica returned to the employment agency with the two officers. The receptionist did not seem to notice the officers and may have viewed them as Monica’s cousins. Monica asked the receptionist to repeat what she had said earlier. The receptionist calmly recounted the circumstance and showed the ficha (the employment listing) to the officers. The card listed the firm, the position, the salary, and qualifications. It was typed, except the comment written in red ink: “cor branca.” (Color: White). Monica commented excitedly, “Do you see this? Here is the evidence.”*

*The officer asked the receptionist who had written the color criteria. The receptionist suddenly realized what was occurring and became nervous. Monica asked to speak to the manager. The manager sought to intervene genteelly, “What is going on? Have a seat. Would you like a cup of coffee?”*

*Monica declined, “These police officers are here with me, representing me to denounce this racism.” She turned to the officers, “You have the ficha, do whatever you are supposed to do.”*

*The officer asked the manager who had written the color criteria. The manager insisted that someone in the central office and not the local branch had prepared the ficha. “Besides,” he offered “it’s not really important.”*

*Monica retorted, “What do you mean, it’s not really important?”*

*The manager replied condescendingly, “Escuta menina, (Listen young lady) what do you want? A job? A job? Do you want a job?”*

*“No, I don’t want a job.” Monica replied, “I want respect.”*

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<sup>10</sup> See Murilo de Carvalho, et al (1998).

*The manager offered to send her on another interview, which Monica also declined. The manager appealed more directly to Monica's vulnerability as an unemployed worker without response. Finally, he exploded, "Who do you think you are? It's the system, minha filha. (my daughter) This is an employment agency, a commercial enterprise. We supply whomever firms seek: fat, short, Black, White. Whatever they want - it doesn't matter to us. Are you trying to change this system?"*

*Monica maintained her composure, asserting that she was not trying to change the system but that there was "a law on my side." The officers remained uncertain how to respond. One officer left the ficha with the manager while he telephoned the central office for guidance. When he returned, the card had vanished. He threatened to hold the manager, Barbosa, responsible for its disappearance. At Barbosa's behest, Jacianne prepared a new ficha, identical to the original, which the police retained.<sup>11</sup>*

The tremendous informality of Brazilian social practices often masks their discretionary nature. Many aspects of this circumstance, from the receptionist's search for non-racial criteria to the manager's offer of a job, suggested efforts to prevent a problem from becoming visible or challenged. When his etiquette failed him, the manager exploded at Monica in a classic Brazilian assertion of position and authority, "Who do you think you are."<sup>12</sup>

Unable to intimidate Monica, the recruiter literally took the law into his own hands by "losing" the *ficha*, illustrative of the weak Brazilian rule of law. Extensive rule of law problems emerged in many proceedings. Defendants threatened plaintiffs, witnesses, and police officials, including death threats. Numerous defendants destroyed or altered evidence. Powerful Brazilians presume to be able to control the workings of the law. Brazilians overwhelmingly perceive that the law will be used in

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<sup>11</sup> The account of the first and second *fichas* is clearest in the police officer's testimony in the investigatory report, which was corroborated by a disinterested eye-witness. See Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 25,067/93. Poder Judiciário de São Paulo.

<sup>12</sup> See DaMatta's classic discussion of "Do you know who you're talking to" in *idem* (1991).

favor of the wealthy and of Whites.<sup>13</sup> Studies have shown that those perceptions to be accurate.<sup>14</sup>

*Monica left the agency, still not knowing what to do. She called several organizations for assistance: a specialized women's police unit on crimes against women (Delegacia das Mulheres or DM), a prominent organization of the Black Movement (Movimento Negro Unificado), and the principal party of the left, the Worker's Party (Partido dos Trabalhadores). No one answered. She stopped a Black woman on the street who suggested a contact, who referred Monica to a professor, who suggested a lawyer. The lawyer referred Monica to Geledes, the Black Women's Institute, the principal Black organization in São Paulo providing legal assistance for racial problems at that time.*

*Monica informed a lawyer at Geledes that police had arrived but that neither they nor she knew what to do. The lawyer advised her to go with the police to the nearby police station and file a complaint for racism. The lawyer told her to make sure police classified the complaint as racism and not *injúria*. (a personal insult) On the way to the police station, Jacianne seemed nervous. Monica offered her a cigarette and assured Jacianne that the grievance was not directed at her but the hiring criterion.*

Unlike Monica, most racial discrimination complainants did not obtain legal advice before filing their complaints. The particular problems they brought to the police and their presentation of those problems were not strategically informed by their legal interest. The initial framing of a problem was crucial for its subsequent disposition, and the lack of access to legal advice hindered many allegations.

The lawyer's warning to avoid the *injúria* classification reflected the tendency of police to overwhelmingly classify racial discrimination complaints as *injúria*, an injury to one's honor and a much lesser crime than racial discrimination. Because *injúria* is considered a private crime, a complainant must initiate a private legal action for an allegation classified as *injúria*. By contrast, racism is considered a public crime, which

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<sup>13</sup> Murilo de Carvalho, et al (1998).

<sup>14</sup> Blacks receive stiffer sentences, more searches, and generally treated more harshly by the Brazilian criminal justice system. See Cano (2000). See Sergio Adorno, "Racial Discrimination and Criminal Justice in Sao Paulo in Reichmann (1999).

the police are obligated to investigate under the auspices of the Office of the Public Prosecutor. In 1993, most racial discrimination complaints were classified as *injúria* and remained dormant until the six-month time period to privately initiate a legal process had lapsed.

*At the police station, several officers observed Monica and Jacianne without comment. Finally, the police chief asked Jacianne who had written the ficha. She responded that it had been someone in the firm's central office. Monica and Jacianne were escorted into a new room for the filing of the complaint. Monica described an unpleasant female investigator who continually interrupted her and transformed her words. Monica and Jacianne gave substantively similar accounts of the incident. The firm's lawyer attended both interrogatories.*

*When the police chief became aware of the presence of reporters from three prominent newspapers and the major television station, he initiated a formal investigation into Monica's complaint. Lawyers from Geledes, the organization that had provided telephone advice to Monica, arrived. In her deposition that afternoon, the receptionist changed her story. She claimed to have sent Monica on a job interview, and to have only offered her friendly female advice about her appearance.*

*The Folha de São Paulo, (the New York Times of Brazil), reported that Jacianne, contradicted herself by claiming that the ficha had been forged by the police while acknowledging that many firms require White candidates. The firm's lawyer, Silvio Rodrigues, also emphasized that many firms require White candidates.<sup>15</sup>*

The media analyzed the incident more deeply than did the police. Although the immediate investigation of a denunciation of racism was unusual,<sup>16</sup> the police investigation proceeded narrowly and did not scrutinize numerous defendant inconsistencies. Defendant statements to the media that many firms require White candidates, the police focused this potentially major investigation of discriminatory hiring practices on the question of who wrote the missing *ficha*. Although the police did

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<sup>15</sup> Claudio Julio Tognoli, "Estudante Negra Acusa Empresa de racismo". Folha de São Paulo, May 19, 1993.

<sup>16</sup> Another study reported similarly that the São Paulo police investigated between 17 and 21% of the complaints they received in the 1990's. See Holston and Caldeira in Aguero and Stark (1998).



not have to proceed so narrowly, I place their mishandling of this case on the narrowness of an anti-discrimination law that condemns an act of prejudice as a non-bailable felony. The police looked for the potentially guilty felon rather than the potentially discriminatory institutional practices.

*Monica did not hear from the lawyers or officials again. She sought out the lawyers from Geledes on multiple occasions and eventually learned that the investigation had been closed for evidentiary reasons.*

*The criminal investigation revealed considerable discrepancy in the testimony of the employees of Global Empregos. In their testimony to the police two months later, Jacianne and her supervisor, two of the defendants, first declared to have disqualified Monica because she did not possess boa aparência. (good appearance or whiteness)*

*One official from Union Chemicals, the hiring firm, insisted that 30% of its employees were Black and that the firm had not approached Global about the alleged opening. His subordinate, Pedro, conceded that a request for an Office Assistant with boa aparência might have been placed, but insisted that the firm would not require a White candidate. Carlos, Pedro's subordinate, stated that the firm always required boa aparência for professional positions.*

*The third defendant, a manager at Global, testified to definitely having received a solicitation from Pedro the day before the incident for 19 openings, one of which was the Office Assistant opening. He also insisted that the criterion in question was for someone with boa aparência.*

*In their final report to the Public Prosecutor's Office, the police did not examine the inconsistencies between the accounts of the recruiting agency and the hiring firm, the differences among employees, or differences between early and late testimony. Indeed, the final police report rendered an inconsistent account coherent.*

This investigation, like most, failed to produce sufficient evidence to support or refute Monica's allegation. Barbosa, Jacianne's supervisor, had claimed that the *ficha* was lost on his desk. The police did not charge Barbosa with the destruction of evidence. Even in the absence of the *ficha*, the police possessed evidence of its existence, its contents, and its disappearance, according to Monica, the police officer and a disinterested bystander. Moreover, the police investigators did not interrogate the other officer at the scene, a dubious omission in a case with evidentiary problems.

Under the Brazilian civil law system, criminal allegations are truth-seeking inquiries in which police testimony possesses elevated evidentiary value.<sup>17</sup>

The police did not examine the considerable inconsistencies between defendants' testimony or within defendant testimony over time. Jacianne and the recruiter offered different accounts about the disappearance of the *ficha*. The accounts of officials within and between the two institutions differed.

The police report simply noted the claim that Monica lacked *boa aparência*. That suggested that the hiring firm's explanation was self-evident, which it was not. The employment screen, *boa aparência*, first appeared in Brazil after the passage of the first anti-discrimination law in 1951.<sup>18</sup> Although employers have claimed to be expressing desirable employment characteristics, *boa aparência* also connotes whiteness. This employment screen, currently outlawed in two states, demonstrates the deep interpenetration of race and class preferences in Brazil.

Union Chemical officials described *boa aparência* as desirable appearance for employees, such as being clean-shaven, sober and well-groomed - a screen for male sobriety. Jacianne and the recruiter testified that Monica lacked *boa aparência* because she wore jeans and sneakers.<sup>19</sup> Casual dress does not suggest insobriety. However, the police did not examine the inconsistency in the use of the term, *boa aparência*, nor the possibility that it constituted a discriminatory practice, even if it had been the criterion.

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<sup>17</sup> See Aquino (1995) and Chimenti (1995).

<sup>18</sup> See Nascimento (1982).

<sup>19</sup> Departamento de Inquéritos Policiais e Polícia Judiciária (DIPO) Proc. No. 25,067/93. Poder Judiciário de São Paulo.

*The Public Prosecutor declared the case as the word of the victim against the defendant, in which no evidence had been presented on the victim's behalf other than her testimony. He concluded that: "although one repudiates this odious behavior, whose practice unfortunately is veiled . . . the truth is that in this case there was not the necessary level of evidence."<sup>20</sup>*

In assessing the evidence, the Public Prosecutor erased the testimony of the Black officer and the eyewitness who saw the *ficha*. The Public Prosecutor's final recommendations are dispositive for the police investigation. The Prosecutor did not analyze inconsistent defendant testimony, the disposition of the posted job, or the content of the *ficha*.

By accepting the firms' defense that Monica only needed to have *boa aparência* and that *boa aparência* was a non-racial distinction, officials effectively erased color from Monica's allegation. Without the alleged red letters of the missing *ficha*, the police could not address the criteria of color within the incident. This erasure of color contributes to the classification of most racial discrimination complaints as *injúria*, a dispute between individuals. Officials could view some allegations as disputes between individuals if color did not matter.

Defendants often speculated on the strength of the ideology of the nation and the subjectivity of color that if color could not be erased, it could be manipulated. Some defendants emphasized their cordiality in receiving the complainant and that their cordiality demonstrated an inherent lack of prejudice. Defendants, who had a black parent, child, or spouse, or who claimed to be mixed, also argued to be inherently not prejudiced. That claim speculates on the ideology of the Brazilian nation in which a

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<sup>20</sup> See the public prosecutor's closing remarks in Departamento de Inquéritos Policiais e Polícia Judiciária (DIPO) Proc. No. 25,067/93. Poder Judiciário de São Paulo.

*Mulato* embodies the mixing of the nation and cannot be prejudiced against his own brother. Some defendants, conceded committing an allegedly discriminatory act and verbalizing a prejudicial comment, claimed to have been joking or to have spoken without intent to harm anyone. Most judges accepted these defendant claims, to be cordial, *Mulato* or joking, as evidence of being Brazilian and inherently unprejudiced.

I argue that a flawed theory of racial discrimination lies below the myriad of legal problems illustrated in this and other racial discrimination cases. To be sure, the police mishandled the evidence in numerous phases of the investigation. A different prosecutor might have extended the investigation instead of concluding evidentiary problems. However, the underlying theory of a problem generates assumptions for the use of evidence, which influences which facts are considered relevant and how those facts are to be analyzed. The notion of Brazilian racial discrimination as a hostile act of racial prejudice requires the production of a prejudiced defendant who committed the act. The three defendants in the investigation of Monica's allegation were the receptionist, the recruiter and the manager of the employment agency. Officials of the hiring firm, who surely issued the job criteria, were not named. The anti-discrimination law holds individuals rather than institutions as the liable parties for a discriminatory act.

The idea of racial discrimination as an act of prejudice filters the successive stages of filing and litigation racial discrimination. The narrowing of most allegations begins well before officials are involved in the selection processes that occur as a victim considers whether and how to respond to a discriminatory practice. The overwhelming poverty of most Brazilian "Browns" and "Blacks" functions as a tremendous obstacle to the perception and articulation of a discriminatory problem. A poor dark Brazilian may

not recognize whether particular mistreatment is based upon motivation of race or class.<sup>21</sup> The structure of Brazilian identity, color etiquette, and highly discretionary employment procedures also inhibit the recognition or acknowledgment of a discriminatory experience. Under such circumstances, the fear of the police and the distrust of the judiciary make someone who recognizes a problem extremely unlikely to risk retaliation and report it. The problems Brazilians do bring to the police reflect the law's promise to punish "acts of prejudice" and pertain to insults and harassment in a multitude of circumstances. Brazilians possess an awareness that the law punishes racism and a theory of racism as overt phenomena: such as the overt exclusion from a public institution or prejudicial commentary.

Once a complainant places a problem into the public domain, another series of narrowing processes operate. The police have applied the law narrowly and have classified the vast majority of complaints as *injúria*. I argue that the underlying framing of racial discrimination as an act of racial prejudice affects all of those steps: what someone perceives as racism, what practices defendants avoid committing; what problems complainants report to the police; how police classify and investigate those allegations; how prosecutors examine those investigations, and how judges determine whether a discriminatory act occurred and whether the act was motivated by prejudice. I examine these steps in detail, including the development of Brazilian anti-discrimination law since 1951 and the racial discrimination allegations and subsequent court cases advanced by "Black" and "Brown" Brazilians over the past decade. While

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<sup>21</sup> Heringer in Bowser (1995).

my data is incomplete, it represents the most complete study of racial discrimination cases in Brazil to date.<sup>22</sup>

In all, I advance four major claims in this dissertation. First, comparing the Brazilian construction of racial discrimination with the construction in other countries and with the Brazilian construction of other forms of discrimination, (particularly age and gender), I show that Brazil has constructed racial discrimination narrowly. Second, I suggest that the ideology of the Brazilian nation shaped that construction of racial discrimination. I advance this claim as a plausible, but not sufficient explanation for the origins of the legal construction of racial discrimination. Third, I argue that three factors, the ideology of the nation, the theory of racial discrimination as an act of racial prejudice, and the weak Brazilian rule of law, have jointly infused all aspects of using the anti-discrimination law. Fourth, I argue that the legal construction of racial discrimination represents the pivotal influence for the articulation and adjudication of racial discrimination allegations. In the subsequent sections of this chapter, I elaborate four claims, present my overall approach to the study, and sketch the plan of the dissertation.

### **(1) The Narrow Construction of Brazilian Racial Discrimination**

In Brazilian law, racial discrimination is a matter of “racial prejudice.” The prejudicial attitude of an aggressor is central in a complainant’s decision to file and in

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<sup>22</sup> See Prudente (1989), da Silva (1994, 1998), Dora Lucia Bertulio (1989), Brazil, Preliminary: 14th Periodic Report of State Parties to the Committee on the Elimination of Racial Discrimination (CERD) (December, 2000) <http://www.mj.gov.br/sedh/CERD.htm>, Date Consulted: March 18 2002, and Christiano (2001).

the authoritative responses to the allegation by police investigators, public prosecutors and judges. This prejudice-based conception gives a distinctive cast to the legal practices surrounding allegations of race discrimination. Just how to punish prejudice remains a mystery as Lamounier once remarked.<sup>23</sup>

First, the law does not define prejudice. Brazilians sometimes use the terms prejudice, discrimination, racism and inequality interchangeably. Prejudice has multiple meanings in Brazil: hatred, intolerance, preconceived notions about another person based upon ascriptive characteristics, and verbal deprecation. The expression of hatred, as in the explicit hate crimes of Nazi-inspired groups, is the easiest form of prejudice for judges to address. But the notion of prejudice also refers to covert mistreatment by a perpetrator who acts on the basis on preconceived notions - which is a very different kind of prejudice.

Second, the precise role of prejudice in an alleged discriminatory incident is unclear. Upgrading the classification of racial discrimination to a non-bailable felony in 1989 has had the unintended consequence of increasing the emphasis on the causal role of prejudice and stiffening evidentiary standards. Because prejudice needs to provide the criminal motive for the act, judges have often required evidence that a defendant held explicitly prejudicial views toward the complaint and willfully carried out a prejudicial act, which create very high evidentiary burdens for the prosecution.

In many legal systems, racial discrimination has been defined as societal practices with the purpose or effect of unjustifiably differentiating persons from using of

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<sup>23</sup> See Lamounier (1968).

basic societal resources based upon their perceived race, color or origin.<sup>24</sup> The legal measures to combat racial discrimination include civil and criminal laws that protect the right to the full use of, and not the mere entrance to, societal resources. Increasingly, countries are prohibiting indirect discrimination, those societal practices that unintentionally produce discriminatory outcomes. Even France has recently modified its labor code to prohibit indirect forms of racial discrimination.

The understanding of discrimination as unjustified differentiation is not completely foreign to Brazil. Indeed, the Brazilian constitution contains such an understanding, and this constitutional principle of non-discrimination has been applied to allegations of gender and age discrimination. In evaluating allegations based upon this constitutional principle used for employment discrimination allegations based upon age and gender, Brazilian judges employed a two-step burden-shifting analysis of (1) whether an act constituted differentiation on a protected basis, and (2) whether the employer could offer a permissible justification for the differentiation.<sup>25</sup> I refer to this judicial analysis as the logic of unjustifiable differentiation. Brazilian judges have generally shifted the burden of proof to examine the employer's justification for alleged discrimination on the basis of age and gender.

The Brazilian anti-discrimination law did not incorporate a theory of racial discrimination as unjustified differentiation. The Brazilian anti-discrimination law prohibits overt discriminatory acts of racial prejudice. In Brazil, the tendency to view

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<sup>24</sup> Forbes and Mead (1992) analyzed 10 European cases. See also Wrench (1996) and the Report of the European Commission against Racism and Intolerance (ECRI) (2000).

<sup>25</sup> I discuss burden shifting in chapter 2.



discrimination as an act of prejudice has not been limited to racial discrimination. Gay activists have sought to add sexual preference to the protected bases of the anti-discrimination law. Discrimination against women is sometimes characterized in terms of prejudice. However, unlike other forms of discrimination in Brazil, racial discrimination has been predominantly understood as overt acts of racial prejudice. Nor is Brazil the only country to treat racial discrimination narrowly. France has also treated racial discrimination narrowly as criminal overt acts.<sup>26</sup> However, the Brazilian model has been even narrower than the French.

## **(2) The Origins of the Narrow Construction of Brazilian Racial Discrimination**

The prejudice-based approach to racial discrimination reflects a distinctive framework of cognitive assumptions that orients policy in this arena. Specifically, this approach expresses a particular conception of the problem that race discrimination law is meant to address. Brazil incorporated a view of racial discrimination as the segregatory practices characterized as North American Jim Crow into its original anti-discrimination law of 1951. The law punished acts of prejudice, which emphasized the view of segregatory practices as hostile acts, and delineated specific public establishments whose entrances could not be blocked. The 1951 law has been characterized as a symbolic act to assuage an international embarrassment initiated by a corporatist regime seeking to preempt a problem from above.<sup>27</sup> I suggest that conceiving racial discrimination as behaving North American and unBrazilian

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<sup>26</sup> See Gitter (1994) and Bleich (2001).

<sup>27</sup> See Lamounier (1968) and daSilva (1994).

represented a deeply coded image of racism based upon Brazil's view of its nation and its place in the world.

I explore the role of Brazilian race ideology in shaping anti-discrimination law and hypothesize that the original conception of racial discrimination resided in the ideology of the Brazilian nation. One could advance two versions of this thesis. A weaker version would be that the ideology of the nation influenced anti-discrimination law, allowing for other influences and without claiming the centrality of the ideology the nation. A stronger version would minimally argue for the centrality of the ideology of the nation in the framing of anti-discrimination law. Because I do not explore alternative explanations, I advance the weaker claim that the ideology of the nation influenced the origins of anti-discrimination law.

Brazilian national identity developed in the relations Portuguese colonials forged with African and native indigenous persons and also their relationship to other colonials. According to the ideology of the Brazilian nation, Brazilians formed a single race of persons of many different colors formed by blending cultures and persons from Europe, Africa and indigenous persons. According to that ideology, the members of such a specially bonded nation are incapable of discriminating against each other. Brazilian elites had long sought to elevate Brazil's international standing, claiming that the Brazilian path to development, promoted as less harsh and competitive than North American capitalism, permitted an alternative, harmonious racial model to develop. Therefore, elites portrayed racial discrimination as something foreign, particularly North American segregatory practices.

Political and social actors who have disagreed whether racial discrimination exists in Brazil have still defined racial discrimination as an act of racial prejudice. Black activists called pre-textual refusals to serve a Brazilian “Black” or “Brown” patron, such as the empty chairs in a barbershop had all been reserved, prejudicial.<sup>28</sup> Thus, Brazilian Black activists, who challenged the longstanding official view that there was no racial discrimination in Brazil, also defined racial discrimination as the act of racial prejudice. That definition had the unintended effect of producing a legal model difficult to enforce. The 1989 law drew upon the language and underlying ideas, the framework of racial discrimination, of its predecessor.

I suggest that the relationship of the legal construction of racial discrimination to the ideology of the Brazilian nation has explained its power over activists seeking to challenge racial inequality. Nonetheless, in past two years, Brazilians have increasingly filed complaints of racial discrimination and Non-Governmental Organizations (NGOs) have increasingly used the law to criticize *racial democracy* and Brazilian racial inequalities. Growing elements of Brazil’s Black Movement have had trouble using the existing law and have questioned the formulation of racial discrimination as a crime and invoked the discourse of equality and inequality. These developments represent movement from the static framing of racial discrimination. A policy framework, once established, has resilience, but can be changed.

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<sup>28</sup> See Nascimento (1982).

### **(3) Influences on the Use of Anti-Discrimination Law**

I claim that three factors have shaped the use of Brazilian anti-discrimination law: Brazilian racial ideology, the weak Brazilian rule of law, and the legal construction of racial discrimination. I trace the influence of those factors through the filing of complaints, police classification and investigation of complaints, and judicial decision-making.

The three factors jointly influence the filing of complaints. The weak Brazilian rule of law certainly inhibited the filing of complaints. The fear of the police, on the one hand, and the fear of retaliation by an aggressor, on the other, dramatically limited the use of the law. By way of comparison, women's filing at the specialized police units on sexual crimes (DM) has dwarfed the filing of racial discrimination complaints. Thus, I suggest that the rule of law curbs filing in conjunction with Brazilian racial ideology and the concept of racial discrimination.

I also show the influence of the three factors in explaining why Brazilians brought certain problems and not others to the law. I argue that complainants brought the problems that most strongly fit the legal construction of racial discrimination as the crime of racial prejudice. The complaints reflected the general premises, and not the letter, of the law. Further, complainants were more likely to bring complaints against persons of equivalent status and less likely to bring complaints against superiors, particularly the police. That indicates a weak rule of law in which Brazilians fear retaliation from more powerful parties and the police. Thus, I claim that Brazilian legal

consciousness of racial discrimination includes a conception of actionable discrimination as well as an understanding of the likelihood of its enforcement.

Further, I show that police action in classifying and investigation complaints also shows the influence of the three factors. Police classified most allegations as *injúria*, a narrow application of the law that also reflected their diminishing of the significance of the color of the principals. I contend that diminishing reflected their ideology of race. The police classified half of the allegations that included dismissal, actionable as racial discrimination under Brazilian law, as *injúria*. I contend that this classification represented a narrow evidentiary focus on the intent and consequences of a defendant's prejudicial beliefs toward a complainant. Further, public prosecutors often concluded that police investigations had simply documented a disagreement between individuals that could not be resolved: "the word of one against the other." Police handling of these allegations raise questions about competence and training. Still, I emphasize that the evidence they sought was limited and that this limitation reflected the law's condemnation of acts of racial prejudice.

Finally, I claim that judicial decision-making also reflected the three factors. In general, I show a narrowing process that occurred in the processing of complaints. From 1993 to 1995, complainants filed approximately 18 complaints at the specialized unit on racial crimes in São Paulo (DCS) for every allegation that became a case. None of those complainants emerged victorious in their criminal allegation. Extensive rule of law problems emerged in those proceedings. Brazilians were more likely to bring problems against others of equivalent status. I suggest this reflect their fear of retaliation by their supervisors at work or fear of the police. Defendants threatened

plaintiffs, witnesses, and officials, including threats of death, and altered and destroyed evidence. I argue that the three factors combined to hinder the use of this anti-discrimination law.

#### **(4) The Pivotal Role of the Construction of Racial Discrimination**

I claim that the legal construction of racial discrimination represents the pivotal influence in the articulation and adjudication of racial discrimination allegations. I located 40 findings for the complainant in racial discrimination cases over the past decade and examined the variation in the inquiry and outcomes, which point toward the centrality of the ideas in the law. Though these 40 findings represent a tiny fraction of the racial discrimination allegations and court cases, and too small a set to support any definitive argument, they provide suggestive evidence about the Brazilian treatment of allegations of race discrimination.

I suggest that the anti-discrimination law has exerted two major influences on judges. First, the law encourages a narrow reading of the facts by officials who “punish an act of prejudice.” Judges narrowly analyzed the allegations brought before the law. Few of the 40 findings of racial discrimination were based upon the anti-discrimination law. Most of the findings were based upon other legal provisions that address crimes against someone’s honor. I also found that the cited law influenced the judicial logic of inquiry as well as the outcome of the cases. I argue that the alternative legal provisions, such as a moral damage claim for pain and suffering, more closely match certain problems and require less stringent standards of evidence. Further, the Constitution

provides stronger protection for certain problems that are better cast as problems in equality, rather than problems in prejudice.

Second, the theory of racial discrimination in the law has influenced how officials view allegations of racial discrimination, even those advanced under other instruments. Although the legal instrument mattered, the variation in the logic of judicial inquiry did not simply reflect the relevant legal provision. Indeed, most judges viewed an allegation of racial discrimination as an “act of racial prejudice” even when the relevant law did not require a showing of prejudice. Judges employed the logic of punishing prejudice in some cases brought under labor law, which permits a burden-shifting framework. The lack of a burden-shifting legal framework accounts for some of the difficulty of litigating cases under the anti-discrimination law but not under other legal provisions. Thus, Judges have incorporated the narrow theory of racial discrimination into their holdings for litigation advanced under other legal instruments that do not require evidence of prejudice.

Most legal complaints brought by Brazilians generally reflect the prejudice-based construction of racial discrimination. Public officials classify, investigate and adjudicate allegations based upon this prejudice-based construction, and not upon the constitutional protection of non-discrimination. A few judges did apply the logic of unjustifiable differentiation to cases tried under the anti-discrimination law. Thus, I suggest that judicial decision-making reflected the prejudice-based theory of racial discrimination or a judge's racial ideology. I hold the law responsible for that outcome. Although nothing would prevent judges from applying a broader theory of racial discrimination, the anti-discrimination law does not include language that would

generate the necessary standards to guide Brazilian judges beyond their own ideological views of race. Thus, I claim that the understanding of racial discrimination as an act of racial prejudice has been the pivotal factor in explaining the variation in the anti-discrimination jurisprudence.

### **Approach to the Study**

The important scholarship on democratization in Latin America has increasingly emphasized the institutionalization of democracy and the actual use of citizenship rights.<sup>29</sup> These scholars have particularly emphasized the importance of civil citizenship, as the fundamental right to have rights, historically weak in Latin America. According to the seminal work of sociologist T. H. Marshall, civil citizenship refers to the rights of the person: fundamental rights of liberty, speech, and thought, and the right to justice.<sup>30</sup> The tremendous gap between law on the books and practice in Latin America produced a call for the social scientific study of the actual use of civil citizenship in Latin America.<sup>31</sup>

In this close empirical study of the use of civil citizenship rights in Brazil, I draw broadly upon the vast literatures of disputes and discrimination law. I do not contribute to those literatures but apply them to illustrate the dynamics of Brazilian racial discrimination. I study the influence of a theory in the law for articulating and

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<sup>29</sup> See Holston and Caldeira in Agüero and Stark (1998) and O'Donnell in Mendez (1999).  
<sup>30</sup> See T. H. Marshall (1977) for the paradigmatic categorization of citizenship. Latin American scholars persuasively argue that although civil citizenship developed first, in Marshall's schema based upon the history of Great Britain, civil citizenship remains extremely weak in Latin America. See O'Donnell in Mendez (1999), Schor (2000).  
<sup>31</sup> Schor (2000).



adjudicating racial discrimination. I closely examine the steps in filing and official processing because of the extremely problematic nature of breaking a taboo like Brazilian racial discrimination. Each step in the recognition, acknowledgment, and decision to file in response to a perceived discriminatory experience reflects and influences understandings about racial discrimination and viable responses. Each official action in classifying, investigating and evaluating these complaints reflects and influences these understandings, structures the ongoing context between the principals, and exerts wider societal influences. Many official actions, that might appear neutral, narrow the proceedings, and each step in the process influences other steps. Plaintiffs set the agenda, responding to aggressor practices. The reporting of court decisions in the media influences future potential plaintiffs, aggressors, witnesses, and officials.

Studying a taboo poses particular methodological and theoretical problems. Even in a highly mobilized, progressive union, the metalworkers of São Bernardo who spearheaded the opposition to the military regime in the 1970's, union activists staunchly denied the existence of racial discrimination within their plants. I asked union activists in two days of continual meetings in August, 1993, if females were concentrated in any departments of the plants. The activists overwhelmingly responded affirmatively and named specific occupations. When I asked if *Pardos* (census term for "Brown") and *Pretos* (census term for "Black") were concentrated in any departments, all but one activist out of many in many meetings replied negatively. When that activist, a *Pardo*, suggested I visit the furnace department, the other activists strongly opposed his recommendation.

The visit to the furnace department confirmed that activist's suggestion. In a factory that was approximately 10% "Black" or "Brown," the furnace department was approximately 2/3 "Black" or "Brown." My guide, a union activist, had also insisted the factory had no racial discrimination. When he and I reached the furnace department, he did not introduce me to the workers of that department in the same friendly manner as he had in the rest of the factory. He looked at me several times, appeared nervous, announced abruptly that the tour had finished, and left. I guessed that his uncharacteristic behavior indicated that he was unwilling or unable to acknowledge what he was seeing. The composition of the department and my guide's behavior made me wonder as well about the overwhelming opposition of other union activists to the suggestion that i visit the furnace department.

This staunch denial of racial discrimination produces a difficult set of research choices. Without repeated probing, I would have never seen the furnace department and my guide's responses. This denial requires a kind of probing that produces the concern of researcher effect: have I induced the data that I wish to study? For that reason, I sought a body of material produced by Brazilians about Brazilian racial discrimination. I located more than 300 racial discrimination allegations filed with the police in São Paulo, which I have augmented by much supporting data.

These methodological problems in the study of Brazilian racial discrimination have ideological and theoretical underpinnings. The seminal claim about Brazilian racial tolerance and harmony drew upon numerous comparisons with the US. Gilberto Freyre's paradigmatic work influenced the Brazilian state and many comparative scholars. His declaration of Brazil as a *racial democracy* portrayed Brazil through an

image of the US, primarily demonstrating what Brazil was not. Even if Freyre had been right that Brazil was relatively the most tolerant country, that claim says little about Brazil.

Scholars have persuasively shown that Freyre's so-called "harmony" coincided with tremendous inequality.<sup>32</sup> Indeed, the facts of steep racial inequality in Brazil are not in dispute. Scholars have reinterpreted the "harmony" as the "silence"<sup>33</sup> or socialization<sup>34</sup> of Brazilian "Blacks" and "Browns". I argue that "silence", socialization and "racial etiquette"<sup>35</sup> are not state-less phenomena but that Brazilian daily life has been deeply informed by assumptions about the meaning and (un) likely application of anti-discrimination law. Thus, I examine the role of officials in reinscribing societal practices that have reproduced the inequality. The role of the Brazilian state is not revealed by legal rules but by examining how officials have continually applied and interpreted the law. I suggest that these actions represent a sophisticated strategy to avoid and channel potential disputes.

Although my ambitions are comparative, I did not wish to place Brazil within a comparative study framed by North American-inspired concerns. A recent work by Anthony Marx compared the "making of race" in the US, South Africa and Brazil, using the Brazilian case to clarify his important questions about the construction of formal

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<sup>32</sup> See Carlos Hasenbalg (1985) and Nelson do Valle Silva (1985).

<sup>33</sup> See Twine and Sherriff (1994).

<sup>34</sup> See Hasenbalg (1979) and Maria Aparecida Silva Bento Teixeira and Salvador Sandoval, "Discriminacao Racial no Mercado de Trabalho", Relatorio, Undated (circa: 1992), Mimeo.

<sup>35</sup> See Dzidzienyo (1971).

systems of racial domination in the other two cases.<sup>36</sup> That formulation erased the role of the Brazilian state in “making race.” States do not simply enact measures but take important symbolic actions and other measures to avoid and displace conflicts<sup>37</sup>, with significant consequences.

I decided to write a case study about Brazil animated by my North American concerns about race and racism as well as a comparative question about in the relationship of the ideology of the nation to anti-discrimination policy. How does a country’s ideology of its nation influence the possibilities to address racial discrimination? Can a country permit allegations of discrimination by persons it claims to have absorbed into its nation? What is the relationship between national identity, the recognition of difference, and the claiming of rights? This research does not answer that question although it provides suggestive data for future research. Why for example, did France and Brazil develop a narrower framework of racial discrimination, compared to the broader frameworks developed by Great Britain and the US?<sup>38</sup>

Although the story is Brazilian, other Latin American countries also developed an ideology of their nations similar to Brazilian *racial democracy*. Other countries have also denied racial discrimination within their borders and conceived of racial discrimination as North American phenomena, including the Dominican Republic, Venezuela, Colombia, and Puerto Rico.<sup>39</sup> Given that Brazil’s Black movement is the

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<sup>36</sup> See Marx (1998).

<sup>37</sup> See Schattschneider (1960), Offe (1984), and Lamounier (1968).

<sup>38</sup> See Bleich (2000) on the comparison between Britain and France. See Gitter (1994) and Saguy (2000) for important comparisons between France and the US.

<sup>39</sup> There is an extensive literature on this subject. See Minority Rights Group (1995) and (continued...)

strongest in Latin America, I suggest that racial discrimination victims in other Latin American countries face more difficult circumstances and that the Brazilian case could be considered the leading case in addressing racial discrimination in Latin America.

The Brazilian case holds significance for the US as well. The historic “binary” paradigm of two “racial” categories, Whites and Blacks, is evolving, witnessed by the recent adoption of the multi-racial census category. According to demographic analyses, the fastest growing populations least identify within the binary paradigm.<sup>40</sup> What will be the size and significance of the multi-racial category in increasingly diverse US polity of the 21<sup>st</sup> century? Will the multi-racial category change the meaning of other categories as well as the very nature of categories? If the meaning of categories changes in the US, what would be the consequences for public policy? Numerous advocates for the multi-racial category have portrayed the flexibility of Latin American identity as a natural, unqualified virtue. This case study shows that flexibility and ambiguity can benefit the powerful and that color-blind claims can undermine accountability and contestation.

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<sup>39</sup>(...continued)

Wade (1997) in general. See Wade (1993) on Colombia, Wright (1990) on Venezuela, and Hernandez (200) on Puerto Rico. See Banton (1996) and Thornberry (1991) on the general claim of Latin American exceptionalism. Several countries still advance these claims. See Venezuela, 13<sup>th</sup> Periodic Report of State Parties to the CERD, 1996, CERD/C/263/Add.8/Rev.1. See the Dominican Republic, 8<sup>th</sup> Periodic Report of State Parties to the CERD, 1999, CERD/C/331/Add.1. The claims about the inevitable affects of mixing are not limited to Latin American states. See also the Philippines, 14<sup>th</sup> Periodic Report of State Parties to the CERD, 1997, CERD/C/299/Add.12.

<sup>40</sup> Latinos (57.9%) and Asians (48.3%) were the fastest growing populations in the US from 1990 to 2000. The US population increased 13.2% during the decade. See US Census Bureau. Census 2000 PHC-T-1. Table 4. Difference in Population by Race and Hispanic or Latino Origin for the United States and 1990 and 2000. US Census Web-site: <http://www.census.gov>. Internet Release Date: April 2, 2001.

This dissertation explores how the Brazilian construction of race, nation and color informed the definition of racial discrimination in the law. I examine how the law and the ideology influence the claiming and adjudication of rights. Thus, I study how culture and ideology influence the theory of the problem the law addresses. I explore both the cultural forces behind the making of a law, and how that law subsequently reproduces those cultural understandings. The law, once promulgated, legitimizes the understandings that gave rise to it and does not have to be enforced to have that impact. Indeed, officials used the lack of enforcement of Brazil's first anti-discrimination law to legitimate the law's understanding of racial discrimination.

What is particularly unusual in Brazil is how closely this law and societal norms fit. The first anti-discrimination law reflected elite views about racial discrimination. Brazilian social practices adapted to the law, developing new euphemisms for "White" after its passage. The law became the vehicle to express ideas about racial discrimination, particularly the view that Brazil did not have racial discrimination. Judges have absolved defendants for behaving "Brazilian" or following societal norms, reflecting the view of racial discrimination as North American phenomena. As a North American, I do not seek to defend my country from that attack but to explore the consequences of that particular framing for addressing Brazilian racial discrimination.

### **Plan for the Study**

I advance my claims about the narrow construction and consequences of the Brazilian framework of racial discrimination in the following chapters. In the next

chapter, I introduce the Brazilian context more fully and contrast two broad theories of discrimination: discrimination as unjustified differentiation or as over prejudicial treatment. I explore Brazil's complex structure of color identity and the devastating inequality between "Whites" compared to "Browns" and "Blacks." I trace the evolution of the ideology of the Brazilian nation and the public policies it influenced. I explore the obstacles to the use of any law in Brazil and show that the Brazilian understanding of racial discrimination is narrower than how Brazil understands other forms of discrimination and also how other countries define racial discrimination.

The empirical work of the dissertation is presented in Chapters 3 through 6. Chapter 3 examines the ideas behind and within Brazilian anti-discrimination law in tracing its development from 1951 to the present. The chapter will show the influence of Brazilian racial ideology in the formulation of the first anti-discrimination in 1951, that is - the ideas behind the law. The chapter also will show the persistence of the ideas within the law, the Brazilian framework of racial discrimination.

In chapter 4, I examine 200 complaints of racial discrimination filed at the specialized police unit on racial crimes in São Paulo from 1993 to 1995 and show how the Brazilian national framework informed the filing of racial discrimination complaints. First, I show that victims used the law as a bargaining chip against their aggressors in difficult circumstances and filed complaints out of a moral outrage, that was informed by the popular understanding of actionable discrimination and the conception of the Brazilian nation. The symbolic inclusion of "Black" and "Brown" Brazilians within the nation engendered a sense of belonging even though this inclusion was unaccompanied by rights or other recourse to redress wrongs. That image of the inclusionary nation has

accentuated the dishonor of being excluded and mistreated. Thus, I argue that the promise of the law to punish prejudicial acts and the concept of racial discrimination as segregation created a popular understanding of actionable discrimination that does not correspond to real-life practices that reproduce inequality. I show that Brazilians disproportionately complained about prejudicial incidents that matched the spirit and not the letter of the law.

Chapters 5 and 6 examine how public officials have treated the racial discrimination complaints. In chapter 5, I explore how police investigators and public prosecutors in São Paulo classified, investigated, and disposed of racial discrimination complaints from 1993 to 1995. In particular, the chapter examines the overwhelming classification of incidents as *injúria*, an injury to the victim's honor. This chapter analyzes how officials distinguished racial discrimination from *injúria* in the police classification of nearly 200 racial discrimination complaints and their subsequent investigation of 50 of those complaints. The centrality of prejudice in the law led officials to focus on verbal conduct in examining allegations. Because of the influence of the ideology of *racial democracy* and the designation of racial discrimination as a non-bailable felony, officials required very high standards to prove that prejudice was the causal factor for nonverbal misconduct. Failing such high standards, most complaints were treated as *injúria* and then dismissed as interpersonal misunderstandings. The ideology of *racial democracy* problematizes discrimination by obscuring comparisons, treating disputants as individuals, treating victims allegations as "he said/she said."

Chapter 6 examines racial discrimination court cases of the past decade, including numerous cases decided since 1995. Thus, it reflects greater legal innovation



by lawyers and Public Prosecutors. The chapter examines 40 criminal and civil proceedings across the nation based upon the anti-discrimination law and several other legal provisions, with a particular focus on explaining the variation in inquiry and outcomes. The chapter closely examines allegations of racial discrimination in securing employment or using public establishments, which illuminate the problems in treating racial discrimination as an act of racial prejudice. (See the appendix which briefly treats allegations of expressive discrimination.) I argue that the anti-discrimination law compelled officials to apply their own racial ideology to determine the meaning of prejudice and settle allegations.

The last chapter considers the implication of this study for contemporary debates about anti-discrimination policy in Brazil. After summarizing my findings, I explore their implications for future development. First, in light of these findings, I examine the ambitious proposal for a Statute of Racial Equality in a Special Congressional Commission. This proposal dramatically expands the anti-discrimination law, provides for affirmative action and reparations to descendants of slaves. Finally, I examine these changes within a speculative theoretical model about the relationship of the conception of the nation and the notion of racial discrimination.

## Chapter 2      Shaping the Use of Brazilian Anti-discrimination Law

*Since racial discrimination does not exist in Brazil, the Brazilian Government has no necessity to take . . . legislative, juridical or administrative measures to assure the equality of races . . . this type of prejudice is entirely alien to the Brazilian people because of its historical and cultural background.<sup>1</sup>*

- Brazilian Ministry of External Relations, 1970

*Thank God we can affirm that in this country we do not live with a difficult racial problem . . . Gentlemen, we are the inheritors of a luso colonization immunized against racial prejudice.<sup>2</sup>*

- Djaci Falção, Senate President, 1977

This chapter examines the Brazilian context: how its ideology of race, rule of law, and legal definition of racial discrimination hinder the articulation and redressing of racial discrimination allegations. Certainly, racial discrimination victims in any country encounter many obstacles to advance allegations, especially employees harassed by their supervisor or others in a vulnerable relationship to an aggressor. For Brazilian “Blacks” and “Browns,” those difficulties are magnified by the precariousness of using the law to claim any citizenship rights.

Of all rights violations, racial discrimination allegations are among the most difficult to articulate and advance in Brazil. For most of the 20<sup>th</sup> century, racial discrimination was taboo in Brazil. A Brazilian “Black” or “Brown” who objected to racially discriminatory treatment often was accused of being racist and unBrazilian.

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<sup>1</sup> The first Brazilian State Report to the CERD, prepared by the Ministry of External Relations, stated the lack of racial discrimination as the reason for not complying with the CERD’s information requests and attached instead a legal opinion of the Ministry of Justice. See Brazil, Consideration of Reports Submitted by State Parties to the CERD, 1970, CERD/C/R-3/Add.11.

<sup>2</sup> See Senator Falcao’s address on the International Day for the elimination of Racial Prejudice, 1977 in Bertulio (1989, p. 227).

Further, Brazil's Black Movement has often been accused in the past two decades of importing North American racism into Brazil.<sup>3</sup>

This chapter examines how the Brazilian ideology of the nation, its theory of racial discrimination, and its weak rule of law complicate the articulation and redressing of racial discrimination. I argue that the Brazilian theory of racial discrimination is narrow compared to how most countries define racial discrimination and to how Brazil treats other forms of discrimination. Further, I argue that this narrow theory informs the entire process of articulating and adjudicating racial discrimination claims. In this chapter, I examine how the state legitimated the whitening preference and how that preference influenced societal practices and the structure of identity. The extreme poverty of most Brazilian "Blacks" and "Browns" is partially a consequence of state whitening policies. Second, I explore the difficulty of addressing racial discrimination anywhere and how the weak Brazilian rule of law and the idea of discrimination as something unBrazilian have magnified that difficulty. The third section of the chapter compares the Brazilian theory of racial discrimination to other theories of discrimination in Brazil and abroad.

### **The Shape of Color and Ideology of Race**

The widespread poverty of most Brazilian "Blacks" and "Browns" vastly undermines their capacity to use the considerable rights delineated in the 1988 Constitution. The Brazilian state historically adopted preferential policies toward

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<sup>3</sup> Freyre accused Brazil's Black Movement of importing North American racism. See Hanchard (1994).

European immigrants that reproduced and legitimated societal preferences for Whites. These policies and preferences combined to construct Blackness as a taboo. Darker Brazilians avoid circumstances that transmit the stigma of Blackness. I argue that the structure of color and the ideology of the Brazilian nation have combined to delimit the recognition of racial discrimination. In this section, I first examine the color of poverty: the rampant inequality and misery between “Whites” and “Browns” and “Blacks”. Second, I explore how the ideology of the Brazilian nation has shaped the structure of color and the etiquette of color. Finally, I explore how the Brazilian state incorporated and reproduced the ideology of the Brazilian nation in important public policies.

### **The Color of Brazilian Poverty**

Abject poverty blocks the use of citizenship rights because citizens lack the resources to know or to use their rights. Some argue that a minimal threshold of socioeconomic well-being is necessary for a democracy to viably function.<sup>4</sup> I do not enter that debate but emphasize that the depth and extent of poverty in Brazil holds significant democratic implications.

Brazilian inequality between Whites and others exceeds that of South Africa and is among the highest in the world. This rampant inequality has existed since the ending of slavery 110 years ago. The state did not take any measures to remedy the social, political and economic position of “Blacks” and “Browns” at the conclusion of slavery. Indeed, “Blacks” and “Browns” remained outside of the formal labor market

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<sup>4</sup> O'Donnell (1999).

until the industrial intensification of the 1930s and 1940s<sup>5</sup> and remain in tremendously disadvantaged positions within Brazilian society.

All key socioeconomic variables demonstrate this wide gap between “Whites” compared to “Browns” and “Blacks.” One economist dubbed Brazil, “Belgindia,” for combining a first world economy equivalent to Belgium with a third world economy equivalent to India.<sup>6</sup> According to a recent UN Report, Brazilian economic inequality is the highest in Latin America and the fourth highest in the world, ahead of South Africa.<sup>7</sup> Brazilian studies have consistently shown that this vast economic inequality as between Whites and Others.<sup>8</sup>

This vast difference in the quality of life for “Whites” compared with “Blacks” and “Browns” begins at birth. Brazilian “Black” and “Brown” children are nearly twice as likely as “White” children to die during child birth (62.3 to 37.3 per 1000) or before age five. (76.1 to 45.7 per 1000)<sup>9</sup> Brazilian “Black” and “Brown” children are nearly twice as likely as “White” children to have left school (22.4% of “Blacks”, 19.2% of “Browns”, and 12.1% of “Whites”) and much more likely to have entered the labor force by age 10. (20.6% of “Blacks”, 20.0% of “Browns”, 12.1% of “Whites”)<sup>10</sup> Because they enter the labor market earlier and with less education, Brazilian “Black” and “Brown” children

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<sup>5</sup> Fernandes (1965).

<sup>6</sup> See Barroso (1995).

<sup>7</sup> See 2000 World Development Indicators, Table 2.8: “Distribution of income or consumption”, World Bank. 2000, p. 66.

<sup>8</sup> Carlos Hasenbaig and Nelson do Valle Silva conducted many influential, large-scale empirical studies of racial inequality. See their articles in Fontaine (1985) and Wade’s thoughtful critique of their work (1997, 68-73 ).

<sup>9</sup> See Heringer (2000).

<sup>10</sup> See Paulo Singer (1998).

comprise a disproportionately large part of Brazil's vulnerable street children.<sup>11</sup> Finally, among all Brazilians aged 10 and over, "Blacks" and "Browns" have attained two-thirds the schooling of "Whites". (6.2 years to 4.2)<sup>12</sup>

The differential in the educational achievement of Brazilian "Whites" compared to "Browns" and "Blacks" translates into a wider labor market differential. "Blacks" and "Browns" occupy less skilled and more vulnerable labor market positions, earn less and encounter more unemployment than do "White" Brazilians.<sup>13</sup> As of 1998, "Browns" and "Blacks" were between 8% and 19% more likely to occupy vulnerable occupations and were unemployed at rates between 3% and 7% higher than "Whites" in six major Brazilian cities.<sup>14</sup> Even "Blacks" and "Browns" who attain greater education are much less likely than their "White" cohorts to be able to translate their educational gain into economic return.<sup>15</sup> Finally, median family income for all "Black" and Brown families is 42% of that for "White" families (1.32 to 3.12 minimum salaries).<sup>16</sup>

Brazilian "Browns" and "Blacks" live under lower sanitary conditions than "Whites" in the nation and most regions. "Brown" and "Black" households were twice as likely to be without treated water, (35.3% to 19%) or sewage (50.3% to 26.4%) as

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<sup>11</sup> Victoria Ransom reported that at least 95% of the street children in Salvador as of May, 1998, were "Black" or "Brown". See Ramsom (1999).

<sup>12</sup> Heringer (2000).

<sup>13</sup> Inter-American Trade Union Institute for Racial Equality (INSPIR), Map of the Black Population in the Brazilian Labor Market. INSPIR. 2000.

<sup>14</sup> Ibid. The six cities were Sao Paulo, Salvador, Recife, Brasilia, Belo Horizonte, and Porto Alegre

<sup>15</sup> See Nelson do Valle Silva, "Updating the Cost of Not Being White in Brazil" in Fontaine (1985, p. 42-55).

<sup>16</sup> See Marcelo Paixão, *Desenvolvimento Humano e as Desigualdades Etnicas no Brasil: un Retrato de Final de Seculo*. 2000.

“White” households.<sup>17</sup> Further, an older study showed that “Browns” and “Blacks” were twice as likely to live in neighborhoods without garbage collection as “Whites”. (“Browns” 39.5%; “Blacks” 34.1%; “Whites” 18.3%)<sup>18</sup>

The overall differences between Brazilian “Whites” compared to “Browns” and “Blacks” have been recently summarized in a new quality of life measure using the United Nations index of Human Development (IDH). The IDH includes illiteracy, rate of schooling, income, life expectancy and other health factors. According to recent figures, Brazilian Whites enjoy the equivalent standard of living as Costa Ricans (48<sup>th</sup> in the world) and Blacks and Browns enjoy the equivalent standard of living as Argelians (108<sup>th</sup> in the world).<sup>19</sup> Further, these vast racial inequalities were found within Brazilian 7 states and therefore are not explainable by regional concentration.

Finally, the few Black and Brown Brazilians who gained class mobility could not transmit those advantages to their children. Of children from families of moderate or higher socioeconomic status, Black and Brown children were much less likely than White children to translate their parents’ gains into their own socioeconomic advancement. Comparing cohorts of children according to the educational attainment of their father, Black and Brown children stay in school less than their White cohorts across all educational cohorts. Further, Black and Brown children are less likely than White children to be able to secure a labor market return for their own educational achievement. Brazilian Blacks and Browns of all educational levels are concentrated in

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<sup>17</sup> Heringer (2000, p. 9).

<sup>18</sup> Ibid, p. 10.

<sup>19</sup> Paixão, *ibid.*

lower level occupations. The cumulative impact of race inequalities makes mobility gains by Blacks and Browns temporal.<sup>20</sup>

This extreme poverty strongly affects the use of rights. Not only does poverty interfere with the recognition of rights but also depresses the recognition of problems. Poor Brazilians who do recognize a problem are extremely likely to fear retaliation by their aggressor or the police and extremely unlikely to initiate a legal action. These tendencies are magnified by the stigma of color.

### **Societal Practices and the Structure of Color**

Brazilians make color preferences and observe societal practices that avoid or soften the nature of the preferences. Certainly, these practices are not the equivalent of formal apartheid or “Jim Crow” segregation. Nonetheless, I suggest that these societal practices, particularly the deferential aspects of the etiquette of color, socialize Brazilians to develop survival skills and strategies antithetical to the use of rights.

In Brazil, identity within the nation has been a matter of color and not race. The census asks Brazilians for their color according to fixed categories, and Brazilians overwhelmingly identify as “White” or “Brown” and only a few identify as “Black.” In open-ended surveys, Brazilian identify in a plethora of categories, mostly variations of “Brown.” This complex structure of Brazilian color has often been viewed through a North American lens, by Brazilians and North Americans. Gilberto Freyre’s seminal claim that Brazilian race relations represented the most “harmonious” in the world was

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<sup>20</sup> See do Valle Silva (2000).



based upon a comparison to the US.<sup>21</sup> After Brazilians identified in 344 color categories in his research, Marvin Harris concluded that a country with that many categories could have neither races nor racial discrimination.<sup>22</sup> Harris viewed Brazil within assumptions about what race and racial discrimination mean in North America. Instead, I claim that color has been constructed distinctively in Brazil from the US and that racial discrimination can function on a dimension with multiple categories.

Certainly, many visitors have found Brazilians to be extremely tolerant.<sup>23</sup> Brazilians of all colors socialize in common public spaces: on the street, the beach and the bar: a comradery seldom seen in the United States. However, a steep color hierarchy is also observable. In any hotel, the person greeting customers at the front desk is the lightest employee. The chambermaid is the darkest employee and probably Black. The color of employees generally varies according to their degree of customer contact. Positions with more customer contact are held by White or lighter Brazilians, and positions with less customer contact are held by darker or Black Brazilians. Finally, the overall hue of employees indicates the status of the hotel. In a higher status hotel, the majority of employees are relatively lighter than in other hotels.

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<sup>21</sup> Freyre continually advanced this claim. Consider this excerpt from his preface to his classic work, the Master and the Slaves: "So perfect is this fusion that, even though they are now all but lifeless, these old elements, or mere fragments, of the patriarchal regime in Brazil are still the best integrated of any with their environment and, to all appearances, the best adapted to the climate . . . Those hatreds due to class or caste, extended, and at times disguised, in the form of race hatred, such as marked the history of other slave-holding areas in the Americas, were seldom carried to any such extreme in Brazil. The absence of violent rancors due to race constitutes one of the peculiarities of the feudal system in the tropics..." See Freyre (1986, p xii).

<sup>22</sup> Harris (1964).

<sup>23</sup> Many Afro-American and African visitors have initially been impressed by Brazil. See in particular Hellwig (1992).

This color hierarchy reflects Brazil's whitening ideal and functions across the service sector. The most prestigious occupations, such as diplomatic positions, have been historically reserved for Whites. Employers explicitly advertised their preferences to hire Whites until the first anti-discrimination law was passed in 1951.<sup>24</sup> Nogueira reported that approximately 11% of employment advertisements in 1941 contained explicit color references.<sup>25</sup>

After the first anti-discrimination law was signed in 1951, employers dropped the explicit color references and began to use other employment screens such as *empregada do sul* (domestic servant from the south) and *boa aparência*. *Empregada do sul* was a fairly explicit euphemism since the south was and remains the whitest region in the country.<sup>26</sup> Many "Black" and "Brown" parents counseled their children to avoid humiliation in the private sector and to seek jobs in the public sector with clearer entrance requirements.<sup>27</sup> Brazilians employ avoidance as a survival strategy for employment and all other of life.<sup>28</sup>

Brazilians coherently rank themselves and each other on the basis of color. Although Merida Blanco found the same inconsistent labeling as Harris<sup>29</sup>, she showed that Brazilians use a common ranking system within which they recognize their relative position. She showed the differences in categorization to be egocentric, reflecting self-

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<sup>24</sup> See Nascimento (1982).

<sup>25</sup> Nogueira (1942).

<sup>26</sup> See Nascimento, op cit, on the former and the Folha de São Paulo, Nov 30, 1975, on the latter.

<sup>27</sup> See Maria Aparecida Silva Bento Teixeira and Salvador Sandoval, "Discriminacao Racial no Mercado de Trabalho", Relatorio, Undated (approximately: 1992), Mimeo.

<sup>28</sup> See Dzidzienyo (1971), Blanco (1978), and Twine (1998).

<sup>29</sup> See Harris (1964) on the 344 color categories.

placement.<sup>30</sup> This is similar to the construction of age, in which we categorize others as “old” or “young” based on our own age and our perceptions about age.

Brazilians also present their color identity in response to the circumstance.<sup>31</sup> In some instances, Brazilians deferentially claim a darker color for themselves to preempt an insult from someone lighter. Further, Brazilians seek to avoid humiliation through a color etiquette, “When a darker person spoke first, she anticipated the perspective of the lighter, allowing her the best of labels possible and often humbling herself, leaving the lighter the option of raising her.”<sup>32</sup>

Brazilians seek to avoid stigmatizing someone else or being stigmatized. Brazilians are highly aware of the public places they may or may not use. Dzidzienyo has described a Brazilian “racial etiquette” of self-regulating norms that all Brazilians observe. Within this etiquette, “Blacks” and “Browns” know “their place,”<sup>33</sup> expressed by the popular saying, “In Brazil, there is no racism because the Black knows his place.” DaMatta situates this use of personal relationships in the reproduction of inequalities in historical evolution of post-emancipation society:

*We preferred to use the realm of personal relationship, as the privileged place for prejudice . . . in Brazil we have never come to be really afraid of the free black because our system of social relationships was based on a strong hierarchy. What we had to do was simply to adjust the network of social relations and proceed to operate in more internal areas of the system, the body and the house, where legal discussion was banished by*

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<sup>30</sup> Blanco on (1978).  
<sup>31</sup> Sheriff (1994).  
<sup>32</sup> Blanco (1978, p. 160).  
<sup>33</sup> Dzidzienyo (1971).

*definition and where the application of a moral or personal criterion to solve social problems and dilemmas was indisputable.*<sup>34</sup>

Thus, DaMatta theorized the rise of informal practices to maintain social distance as a response to the ending of slavery. This enabled dominant groups to maintain their advantaged position through behavioral practices rather than formal rules.

Brazilians do not simply avoid discriminatory experiences but often remain silent if they encounter discriminatory experiences. This silence has been characterized as a survival strategy for darker Brazilians<sup>35</sup> and a “stoic dismissal” of racism to preserve an inner soul and a sense of honor.<sup>36</sup> In both accounts, silence represents a strategy to avoid the stigma of Blackness. The next section explores how the state’s legitimation of the ideology of the nation reproduced Brazilian color preferences and this silence about race.

### **The Ideology of the Nation and Brazilian Public Policy**

The Brazilian state historically preferred White over other Brazilians and adopted public policies that reflected and reproduced that preference. Certainly, the state did not introduce the many color terms that Brazilians developed to describe themselves and others. Although the state often portrayed itself as uninvolved in “racial matters,” the alleged policy of benign neglect toward “Blacks” and “Browns” had devastating consequences in the aftermath of slavery. Further, state policies

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<sup>34</sup> DaMatta (1991, p. 154).

<sup>35</sup> See Twine (1998).

<sup>36</sup> See Sherriff (1994).

stigmatized Blackness as the characteristic to avoid and reproduced a discourse that constructed race and racial discrimination as taboo subjects.

Brazilian immigration policies targeted European immigrants as part of a strategy to whiten the population. With the fall of slavery (1888) and the Brazilian monarchy (1889), Brazilian planters feared that “Blacks” and “Browns” could not be controlled without the institution of slavery. Elites sought European immigrants to whiten the population with social, political and economic motivations. In contrast to the lack of assistance to incorporate the descendants of slaves into the dynamic labor market<sup>37</sup>, the state encouraged European immigration and provided many immigrants free passage to Brazil.<sup>38</sup> At the beginning of the first republic (1889-1930), immigration policy was explicitly limited to “persons healthy and able to work” except for “natives of Asia or Africa,” who required Congressional authorization.<sup>39</sup> Although the Immigration Act of 1907 did not contain this explicit ban, officials achieved the same result by selectively enforcing the 1907 law.<sup>40</sup>

In the 1920's, Brazilian Congress reintroduced legislation to explicitly prohibit the immigration of “human beings of the black race.” In the Congressional debates, proponents and opponents desired European immigration. Opponents did not foresee a large Black migration and feared provoking North American antagonisms.<sup>41</sup> Thus,

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<sup>37</sup> See Andrews (1991) and Fernandes (1955).

<sup>38</sup> See Skidmore (1974) and Andrews (1991).

<sup>39</sup> Skidmore (1974, p. 137).

<sup>40</sup> Skidmore (1974, p. 193).

<sup>41</sup> Skidmore (1974, p. 198).

opponents saw an explicit ban as unnecessary and potentially polarizing and managed to block proposed immigration bills in 1921 and 1923.<sup>42</sup>

Elites sought a whiter Brazil while avoiding US dynamics. They debated how long it would take European immigration to effectively whiten the population and concluded between one to four centuries.<sup>43</sup> Their debates were animated by racist views about the inferiority of the Latin “race” and of a “mixed race” framed within the environmentalism of the day. People capable of surviving in the tropics, i.e., Latins, Africans, and indigenous peoples, were supposedly not capable of developing civilization.<sup>44</sup> Brazilian “Blacks” and “Browns” were “without any kind of initiative, lost on unmarked roads like animals strayed from the fold” and could be easily incorporated.<sup>45</sup> By contrast, US segregation forced North American Blacks to forge separate institutions and become self-reliant. Thus, Joaquim Nabucco, an important opponent of slavery, thought that “color in Brazil is not, as in the United States, a social prejudice against whose persistence no character, talent or merit can prevail.”<sup>46</sup> Elites continually sought to avoid the perceived negative consequences of US race relations.

By the 1930's, elites had recognized that European immigration had not sufficiently transformed the population and broadened state policies to manage the “problem” of the nation. Although the state continued to favor one of “three original races” as the key civilizing force in Brazil, “Blacks” and “Browns” were entering the

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<sup>42</sup> Skidmore (1974, p. 196).

<sup>43</sup> Skidmore (1974, p. 71).

<sup>44</sup> Skidmore (1974, p. 72-3).

<sup>45</sup> Skidmore (1974, p. 70-1)

<sup>46</sup> See Skidmore (1974, p.23).

growing labor force for the first time since the ending of slavery.<sup>47</sup> During this decade of significant state-building and industrialization, racial inequalities became more evident in dynamic economic sectors. Many Brazilians migrated to the southeast and encountered color preferences in the labor market. The state faced a potential problem in legitimacy given its color preferences and the need of an expanding industrial economy.

Gilberto Freyre's paradigmatic theory about the formation of the Brazilian nation assumed tremendous significance in the state-building and nation-building of the 1930's. Freyre defended the Brazilian traditions against rapid modernization as providing auspicious conditions for its racial harmony and economic development. He rescued the "Latin race" and the *Mulato* from the prevailing racist pessimism, a progressive contribution. He claimed that no "colonizing people" had been more miscible than the Portuguese and celebrated miscibility as a positive development.<sup>48</sup> Moreover, Freyre transformed the "degenerate" *Mulato* into the *Moreno* who epitomized the blending of language, culture, and people from three continents. To Freyre, the *Moreno* signified Brazilianness: the blending of peoples and the triumph of the nation. Unlike the biological origins of the term *Mulato*, the *Moreno* connoted color and nation.<sup>49</sup>

Getulio Vargas built the Brazilian state through state corporatism. After losing a Presidential election in 1930 through reputedly widespread ballot-stuffing in the rural northeast, Vargas assumed power through a military coup. He subsequently dissolved

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<sup>47</sup> Fernandes (1969).

<sup>48</sup> See Freyre (1946, p. 11).

<sup>49</sup> See Freyre (1966) about the increasing tendency of Brazilians to identify as *Moreno*.

the Congress, presided over the absolutist construction of the Brazilian state, and declared himself “father of the people” and his new regime, the *Estado Novo* (New State).<sup>50</sup> The *Estado Novo* borrowed from the constitution of Mussolini’s Italy: a corporatist state that recognized designated social forces formally registered with the state. This regime controlled social forces in exchange for granting limited citizenship, appropriately termed “regulated citizenship.”<sup>51</sup>

During this era, Brazilian public policy to manage “the nation” expanded beyond immigration policy. The 1934 Constitution continued immigration quotas. The original proposal for the clause explicitly prohibited Black and Japanese immigration.<sup>52</sup> The final version cleverly avoided an explicit ban and set the quota for new immigrants as 2% of the total immigration of each nationality over the previous 50 years.<sup>53</sup> Thus, historical discriminatory practices silently delimited future immigration. Further, the state sought to regulate the lives of its “Brown” and “Black” citizens in many, extremely personal respects. Brazil incorporated eugenic ideas into its Constitution of 1934, requiring public school instruction to “improve the race” and medical examinations to insure that marriages would “improve the race.”<sup>54</sup> The state inserted itself into the most personal of choices and imposed the burden for “improving the race” on darker Brazilians. The state also regulated cultural practices, requiring that *Carnaval* songs portray the easy-going Brazilian *malandro* (highly likeable rogue) as extremely hard-working.<sup>55</sup>

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<sup>50</sup> Levine (1998).

<sup>51</sup> See dos Santos (1979).

<sup>52</sup> Mitchell (1983, p. 19).

<sup>53</sup> Skidmore (1974, p. 198) and Mitchell (1983, p. 19).

<sup>54</sup> See Mitchell (1983) about the adoption of eugenic policies in the constitution of 1934.

<sup>55</sup> Raphael (1981).



Finally, the most important agency in the Vargas regime was the Ministry of Propaganda. (DIP) The DIP exerted strong control over the media<sup>56</sup> and published a magazine, Cultura Política. In its first issue, one article declared the absence of racial prejudice as a Brazilian characteristic:

*One of the most characteristic features of the Brazilian democratic formation is the nonexistence among us of racial prejudice . . . Brazilian nationalism does not nurture racial prejudice; it would cease to be Brazilian if it did. Our incessant racial mixing has been, perhaps, our greatest human experiment.*<sup>57</sup>

The agency synthesized Freyre's contribution to the discourse of the nation and declared racial prejudice as inherently unBrazilian.

The state's political project to absorb Blacks was so effective that the state needed to exert relatively little direct repression of Black political expression. Nonetheless, during the 1930's, the Vargas regime did repress the development of a Black political party.<sup>58</sup> The Brazilian state democratized during the second republic (1946-64) but political space remained limited and controlled by elites.<sup>59</sup> During the military regime of 1964-85, the authoritarian state explicitly enforced the silence about race. Among other acts, the state removed color from the 1970 census, claiming the

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<sup>56</sup> See Levine (1998).

<sup>57</sup> Raphael (1981, pp. 106-7).

<sup>58</sup> See Nascimento (1982) and Hanchard (1994) on state repression of Black political expression during the Vargas era. Vargas closed the Frente Negra when it sought to become a Black political party. Indeed, Vargas had outlawed all political parties at that time.

<sup>59</sup> Michael Mitchell discussed the limited political space of the 2nd republic in Mitchell, "Blacks and the Abertura Democrática" in Fontaine (1985).

information to be “useless and meaningless.”<sup>60</sup> Officials claimed repeatedly that silence, the absence of racial discrimination claims, reflected Brazilian harmony.

In the current era, the Brazilian state has democratized to a much greater extent than during either previous democratic regime. Nonetheless, color preferences persist, and the color of poverty remains disproportionately “Brown” and “Black.” Although the current President has acknowledged and repudiated racial discrimination, his administration encounters the complex societal dynamics described above and many other obstacles to the use of law described below. The next section explores how these factors shape the contemporary use of Brazilian anti-discrimination law.

### **Bringing racial discrimination to the law in Brazil**

Although the use of anti-discrimination law has increased during the past two years, still relatively few Brazilians file racial discrimination complaints. The processes of recognizing, acknowledging and responding legally to a discriminatory experience are problematic in any country, especially so Brazil. In this work, I counter several important interpretations of the lack of racial discrimination complaints. First, the Folha de São Paulo has reported the difficulty in using the law and suggested that it reflects the difficulty in proving an act of prejudice and the lack of understanding Brazilians have of the law.<sup>61</sup> Although I concur that those are contributing factors, I criticize the second argument as inverting causality. The law encourages Brazilians to file about problems

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<sup>60</sup> Brazil's Second Periodic Report of State Parties to the Committee for the Elimination of Racial Discrimination. CERD/C/R.30/Add.77. February, 1972. p. 2.

<sup>61</sup> See Eunice Nunes, “Acusados de Racismo sao absolvidos pela Justica”, Folha De Sao Paulo, August 28, 1994, p. 4.

that produce difficult litigation. Second, an important sociologist, Peter Fry, argues that Brazilian aspirations for a real *racial democracy* hinder the recognition of racial discrimination by victims, aggressors and public officials:

*While the majority of Brazilians of all colors agree that racism exists, they themselves either do not discriminate, discriminate but deny it, do not suffer discrimination, or do suffer discrimination without recognizing it.*<sup>62</sup>

This insightful, sophisticated argument warrants close response.

Unfortunately, Fry collapses many socio-legal concepts in his argument. First, he combines aggressors and victims of racial discrimination into a unitary group of Brazilians who deny or fail to acknowledge racial discrimination. According to Fry, all Brazilians share a common outlook. However, the various parties to racial discrimination complaints differ in their assessments of the existence and meaning of racial discrimination. As one judge noted, a common remark spoken without intent by an aggressor can assume a totally different meaning to a victim.<sup>63</sup> Further, officials often disagreed about the meaning of actions and their understanding of racial discrimination in specific cases. Although Brazilians operate within the overarching ideology of *racial democracy*, they articulate widely differing perspectives, experiences and interests.

Second, Fry does not meaningfully assess the dynamics of reporting racial discrimination. Aggressors do not willingly admit discriminating in any country. That fact is not particularly Brazilian. Racial discrimination victims encounter tremendous difficulties in bringing a complaint to the law in any country. The power dynamics

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<sup>62</sup> See Fry in O'Donnell (1999, p.197).

<sup>63</sup> See Proc Cível N. 672/93. 21<sup>st</sup> Vara Cível; Forum Central. São Paulo.

between principals that lead to a discriminatory incident constrain the potential complainant from filing a complaint. Cross national studies about the problems complainants perceive and bring to court have consistently found racial discrimination to be the least reported problem.<sup>64</sup> Even in the supposedly litigious US, most individuals who suffer discrimination do not file a grievance.<sup>65</sup> The Brazilian construction of race and racial discrimination as taboo vastly adds to those difficulties.

Third, Brazilians are loathe to bring any problem to justice. Many potential complainants fear retaliation by a more powerful aggressor. The weak Brazilian rule of law offers victims no real protection from retaliation. Indeed, the police have been deservedly criticized not protecting, but abusing citizens.<sup>66</sup> Conservative officials, many appointed during the military era, preside over overburdened courts that yield slow results.<sup>67</sup> Studies show a Black civilian is much more likely to be stopped and three times more likely to be murdered by the police compared to a White civilian, and that Blacks are the only Brazilians who fear the police more than criminals.<sup>68</sup> Although Fry admits these problems, he does not assess how these factors hinder the use of the law.

Finally, Fry narrowly interprets limited empirical data to bolster his argument. Brazilians acknowledge more racially discriminatory experiences than Fry claims. Fry contends that the “majority” or “Brown” and “Black” Brazilians do not suffer or recognize discrimination. This commentary fails to acknowledge that a sizable minority of

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<sup>64</sup> See Miller and Sarat and Fitzgerald (1980-1).

<sup>65</sup> Bumiller, (1984).

<sup>66</sup> See Holston and Caldeira in Agueor (1998), Cano (2001), and Pinheiro in Mendez (1999).

<sup>67</sup> See Rosenn (2000) who discusses the increased cases after the new constitution and the overloading of the courts. Apparently, the STF issued 86,000 decisions in 1998, compared to 115 for the US SC in 1999-2000.

<sup>68</sup> Cano (2001).

Brazilian Blacks and Browns recognize discriminatory experiences. He cites the 1995 Datafolha study which reported that 29% of Brazilian “Blacks” and “Browns” identified racially discriminatory experiences. My secondary analysis of the same survey shows that 37% of the Blacks and Browns actually reported discriminatory problems. Further, many discriminatory experiences were not captured by a limited survey instrument.<sup>69</sup> Under any assessment, a sizable minority of Brazilian “Blacks” and “Browns” acknowledge racial discrimination in social surveys.

The limited filing of racial discrimination complaints represents a significant voicing of a problem once taboo. The usage of the law since 1989 has increased, reflecting Black movement mobilization against racial discrimination. Although most complainants filed without direct assistance from NGO's,<sup>70</sup> the Black movement succeeded in placing racial discrimination in the consciousness of ordinary Brazilians.

Each step in the process of responding to an allegedly discriminatory incident tends to narrow the scope of an allegation. Few victims actually file a complaint in response to a discriminatory incident. The problems they did bring to the police were narrower than the range of discriminatory problems they identified in surveys. Officials narrowed the problems that could pass through the successive stages of classification, investigation and adjudication and narrowed the scope of most allegations as they advanced. The Brazilian ideology of race, the definition of racial discrimination as an act of prejudice and the weak rule of law each contribute to these narrowing processes.

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<sup>69</sup> I discuss this in Chapter 4 (footnote 14).

<sup>70</sup> This was true for the first part of the decade. The circumstance may have changed in the past two years.

The next two sections treat the filters that function before and after the filing of an allegation.

### **Filters Prior to the Allegation**

In social surveys, Brazilian “Browns” and “Blacks” report workplace problems, particularly in hiring and promotion, more highly than other discriminatory problems.<sup>71</sup> They are least likely to bring problems in hiring and promotion to the law. I suggest that the narrow definition of racial discrimination as an act of prejudice and the fear of employer retaliation combine to thwart the perception and the willingness to report problems.

First, a potential claimant needs to recognize a problem, which possesses cognitive, political and institutional aspects. How individuals come to perceive a problem is generally not well understood.<sup>72</sup> Detecting racially discriminatory experiences in Brazil is complicated by widespread society denial. Because of rampant mistreatment on multiple bases, a poor “Black” or “Brown” may not know whether particular mistreatment is based on race or class.<sup>73</sup>

Second, a potential claimant needs to be willing to acknowledge a problem.<sup>74</sup> To admit to racial discrimination in Brazil or most Latin American countries represents

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<sup>71</sup> See Turra, et al, (1995) on the 1995 Datafolha survey. The same distribution of problems was reported in a 1988 Datafolha survey conducted in the city of Sao Paulo. Datafolha, Memo, Survey No. 559A and 559B. May 2-3, 1988.

<sup>72</sup> See Felstiner, et al (1980-1).

<sup>73</sup> See Heringer in Bowser (1995).

<sup>74</sup> I borrow from Forbest and Mead (1992), Gitter (1994), Bumileler (1984), and Felsinter (1980-1) in delineating the steps to filing a grievance. This second step would also apply to a problem such as spouse abuse..

an admission of “being the type of person who might be discriminated against - not only Black, but by association, untrustworthy, stupid and so on - as if it might be their fault that they were discriminated against.”<sup>75</sup> Further, identifying as “Brown” in Brazil not only represents an identity of being “not White” but also of being “not Black.” Thus, a “Brown” Brazilian might be even more reluctant to perceive or acknowledge an incident of racial discrimination.

Third, a potential claimant needs to be aware of possessing rights.<sup>76</sup> This includes a sense of entitlement and the possession of sufficient personal autonomy to claim those rights. The weak tradition of citizenship and the strong tradition of deference jointly inhibit this recognition. In one illustrative incident reported in 1989, a housewife filed a racial discrimination complaint for her domestic servant who had been refused a haircut in a local saloon.<sup>77</sup>

Fourth, a potential claimant needs to be aware of having specific rights violated.<sup>78</sup> This entails a conception of the particular violation, in this instance, the understanding of racial discrimination as an “act of prejudice.” Certain kinds of problems, such as being racially insulted or explicitly excluded from a public establishment, have been portrayed by officials or the media as acts of prejudice.<sup>79</sup>

Mobilization, an extremely important factor in each of these processes, plays a crucial

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<sup>75</sup> See Wade (1997, p57), who discusses the reluctance of Blacks in Columbia to acknowledge discriminatory experiences.

<sup>76</sup> See O'Donnell in Mendez (1999).

<sup>77</sup> See daSilva (1994).

<sup>78</sup> See Bumiller (1988) Forbes and Mead (1992).

<sup>79</sup> The so-called Katharine Dunham “affair”, which occurred just prior to the Congressional passage of the 1951 anti-discrimination law, exemplifies the Brazilian notion of racial discrimination. In that circumstance, Dunham was unable to use a reservation made for her by the US embassy as a hotel in São Paulo.

role in informing citizens of their specific rights. Brazil's Black movement has not challenged the understanding of racial discrimination as an "act of prejudice" but has insisted that discrimination represents a serious crime against human dignity, that no one deserves, and has created considerable awareness of the existence of the law.

Individuals view certain problems as residing within the province of the law.<sup>80</sup> In North America, individuals tend to bring more tangible problems, such as divorce, bankruptcy, and adoption, rather than more personal problems, such as social snubs.<sup>81</sup> As Table 2.1 shows, Brazilians are more likely to press a "divisible" problem, pertaining to work, a government allowance or an inheritance, and much less to report a conflict with a neighbor, the collecting of arrears, an eviction, or a problem of a criminal nature.<sup>82</sup>

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<sup>80</sup> See also Miller and Sarat (1980-1, p. 563).

<sup>81</sup> See Zemans (1983).

<sup>82</sup> See FIGBE, PNAD, Volume 1: Justiça e Vitimização, 1988, Table 1.2, p 3.



**Table 2.1: Problems Brought to Court, 1988 Census Bureau Household Survey**

	% of Brazilians* with problem	% who brought problem to court	% brought to court by other Party	No Judicial Action
Work-related	2.3%	61.6%	5.0%	33.4%
Pension	0.8%	51.6%	21.8%	26.6%
Inheritance	1.3%	43.5%	5.1%	51.4%
Marital separation	2.4%	37.2%	16.5%	46.3%
Conflict over land holdings	0.4%	34.1%	17.2%	48.6%
Property eviction	1.2%	25.3%	17.6%	57.0%
Small criminal problems	2.1%	14.6%	13.3%	72.0%
Collecting arrears	1.2%	13.8%	14.7%	71.5%
Conflict with neighbors	1.3%	8.7%	6.2%	85.1%
Total**	10.3%	33.5%	12.1%	55.7%

\* Brazilians 18 and over.

\*\* Please note that the sum of the columns exceeds the totals because individuals could identify multiple problems.

Source: 1988 PNAD, Volume 1: Justiça e Vitimização, Table 1.2, p 3.

Filing about certain problems, such as racial discrimination, diverges from these considerations. For example, Bumiller found that US discrimination victims filed complaints when they had been "harmed beyond a tolerable level."<sup>83</sup> Their complaining did not represent the most tangible problems. Indeed, their experiences had often entailed "intangible harms," name-calling and other insults that were difficult to translate into legal actions.<sup>84</sup> Thus, filing about racial discrimination may reflect other, moral considerations, more than legal calculations.

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<sup>83</sup> Ibid, p49.

<sup>84</sup> Bumiller (1984).

**Table 2.2: Responses to Discriminatory Experiences, Rio de Janeiro, 1987**

Response	Distribution
No response.	57.9%
Denounced in the media or reacted verbally.	20.2%
Left job.	18.9%
Other.	3.0%

Source: Jorge Aparecido (1987).

Fifth, a potential claimant needs to be aware of a legal channel and possess sufficient confidence in the law and the channel to file a complaint. Until the new anti-discrimination law was passed in 1989, most “Blacks” or “Browns” did not consider using the law to voice individual problems. Indeed, some who tried to use old law had found themselves on trial and even accused of being racist.<sup>85</sup> In a 1987 survey of “Blacks” and “Browns” who reported encountering discriminatory experiences, none of the respondents had sought legal recourse. (See Table 2.2) In response to the experience, 58% of respondents took no action, 20% denounced the circumstance in the media or reacted verbally, and 19% left the job.<sup>86</sup> Thus, the “exit” option, leaving the job, equaled the “voice” option, expressed through the media rather than the law. In another 1987 survey, none of the interviewees mentioned the law when asked how to combat racism. Cognizant of the old anti-discrimination law, these interviewees viewed it as too weak or ineffective to use.<sup>87</sup>

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<sup>85</sup> See Hanchard (1994).

<sup>86</sup> See Heringer (1989, p. 39) for the study conducted by the Comissão de Religiosas Seminaristas and Agentes de Pastoral Negros in 1987.

<sup>87</sup> See Monteiro (1987).

The weak Brazilian rule of law inhibits the claiming of most problems.

Brazilians fear retaliation from more powerful Brazilians, who presume to be able to influence whether, how and when any law might be utilized. Roberto DaMatta described the response, "Do you know who you're talking to," that a Brazilian asserts to translate his status into special treatment.<sup>88</sup> Similarly Rosenn described the widespread use of the *jeitinho*, personalized access around a bureaucratic problem.<sup>89</sup> This discretionary use of the law is reflected in a popular expression attributed to Vargas: "For my friends, everything; for strangers, nothing; and for my enemies, the law."<sup>90</sup>

Brazilians possess little faith in their legal system. Most Brazilians view the criminal justice system as favoring the wealthy and Whites and to apply the law more rigorously against "Blacks" and "Browns" and the poor.<sup>91</sup> As a result, most Brazilians (80%) do not report crime, such as robbery or physical aggression, because they fear or do not trust the police<sup>92</sup> or do not wish to involve judicial officials.<sup>93</sup> For example, in a national study conducted by the Brazilian census bureau, Brazilians reported bringing one out of three serious problems to the police. (See Table 2.1) Finally, they delay bringing any problem to the police. In one study, many claimants reported problems that were so long-standing they no longer could recall when the original incident had

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<sup>88</sup> DaMatta (1991).

<sup>89</sup> For an excellent treatment of Brazilian legal culture, see Keith S. Rosenn, "Brazil's Legal Culture, the Jeito Revisited", Florida International Law Journal, Vol: 1, N. 1, Fall 1984, p. 1-43.

<sup>90</sup> Rosenn (1984, p. 15).

<sup>91</sup> About two of three respondents said that if a Black and white were tried for the same crime, the Black would be treated more rigorously. 95% said the poor would be treated more rigorously. See Murilo de Carvalho, et al (1993, p. 49).

<sup>92</sup> See Murilo de Carvalho, et al (1993, p.39).

<sup>93</sup> Ibid.

occurred.<sup>94</sup> The delays and reticence to report crimes represent a “code of silence<sup>95</sup>,” in which aggressors widely presume potential witnesses to remain silent.

Poor Brazilians report much fewer problems than other Brazilians. Table 2.3 shows that Brazilians of higher educational attainment were three times more likely to initiate a complaint as those without education. (82.6 to 29.3 complaints per 1000 problems, respectively). Among their reasons for not filing a complaint, Brazilians without instruction were especially concerned about possible retaliation from their aggressor. The lower rate of reporting problems and the higher rate of fearing retaliation support the contention about the relationship between social well-being and the use of rights.<sup>96</sup>

**Table 2.3: Actions Initiated Per 1,000 Employed Adults, 1988 Household Survey**

Education	Actions Initiated
Without instruction	29.33
1-4 Years	51.15
5-8 Years	63.81
9-11 Years	65.33
12 Years+	82.56
All	55.36

Source: 1988 PNAD Volume 1: Justiça e Vitimização, Table 1.3, p 3.

Brazilian “Blacks” and “Browns” possess more reason to fear the police than do other poor Brazilians. “Blacks” and “Browns” were much more likely to be have been threatened by the police (3.6% to 1.2%) - which surely suggests why they are much less

<sup>94</sup> See Sussekind (1999).

<sup>95</sup> DaSilva on the “code of silence”

<sup>96</sup> See Murilo de Carvalho, et al (1993, p.39).

likely to go to the police.<sup>97</sup> For example, only one in ten Blacks, compared with one in four Whites, reports petty theft.<sup>98</sup> Potential “Black” witnesses may fear that reporting a crime would make them vulnerable to police accusation for other crimes.<sup>99</sup>

Finally, a potential claimant needs considerable resources to advance and sustain a racial discrimination complaint. These resources include legal resources to advance an allegation, financial resources to support litigation and compensate for job loss, and emotional resources, because of the charged nature of the proceeding. The potential role of mobilization is extremely important for each of these steps: from creating the consciousness of rights to supporting the use of rights. The next section examines the filtering processes that occur after the filing an allegation.

### **Filters from the Filing of an Allegation**

Authorities classify an allegation into legal categories that shape subsequent legal processing. A complainant’s initial characterization of an incident is a decisive factor for subsequent processing. In France, another civil law country, courts have been unwilling to consider evidence against a violation not initially named by a complainant.<sup>100</sup> That places a very high burden on a complainant to know the law, and magnifies the importance of the access to legal assistance. Although Brazil is more flexible than France in this regard, a complainant must initiate a new process for a legal violation not initially identified.

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<sup>97</sup> Murilo de Carvalho, et al (1993, p.39).

<sup>98</sup> Murilo de Carvalho, et al (1993, p.198).

<sup>99</sup> Murilo de Carvalho, et al (1993, p.66-67).

<sup>100</sup> Gitter (1994).

Authorities narrow the scope of an allegation in the process of classification. Since racial discrimination is a crime, Brazilians must report a discriminatory act to the civilian police, who serve as an arm of the Public Prosecutor's Office. Most Brazilians filed a racial discrimination complaint at their local police department. Some filed complaints at the specialized Women's Unit on Violence (DM). In São Paulo, Brazilians primarily filed complaints at the *Delegacia das Crimes Raciais* (DCS) established in 1993 to receive and investigate racial discrimination complaints.

The police have applied the anti-discrimination law and the criminal code to classify problems, which narrowed allegations. The police did not apply the Constitution, Brazil's labor code, or consumer code, each of which provides stronger coverage for many of the racial discrimination allegations received. Further, the police did not generally refer victims elsewhere to pursue other legal remedies, in particular to the Public Prosecutor Office which is empowered to pursue criminal and civil legal matters.

The police often viewed problems as personal misunderstandings between individuals and classified allegations accordingly. That view reflected the influence of racial ideology and the definition of racial discrimination in the law. If color does not shape societal relations, as *racial democracy* has asserted, racial discrimination allegations represent disputes between individuals. Further, police narrowly classified allegations according to the understanding of racial discrimination as acts of prejudice that privileged the role of verbalized prejudice. Most complaints satisfied that requirement but did not constitute violations of the enumerated clauses of the anti-discrimination law.

Most victims did not secure legal counsel nor did the police offer victims counsel or other services before filing their complaint. By contrast, police at the specialized women's units use an intake process that includes taking a detailed history.<sup>101</sup> That protocol recognizes the problematic nature of a woman filing against her spouse and makes her complaint a deliberative act. The police at the DCS did not accord racial discrimination victims any special treatment. Further, racial discrimination complainants encountered difficulty in getting other police to take their allegations seriously, particularly when others arrived with gunshot wounds or other visible problems.<sup>102</sup>

State officials are obligated to initiate legal action against a public crime, such as racial discrimination. Once the police classify an allegation as racial discrimination, officials are obligated to initiate a criminal investigation. Police fact-finding generally sought to identify evidence that a "discriminatory" act was committed and that the defendant demonstrated prejudice toward the complainant. That fact-finding has been strongly influenced by the definition of racial discrimination and police biases. (See Figure 2.0) Collecting evidence and questioning principals are not simply technical acts but narrow the allegations.<sup>103</sup> The police questioned the complainants closely and rarely settled disputed facts. By the end of most investigations, an interpersonal dispute had been rendered the "word of one against the word of the other," the Brazilian version of "he said - she said."

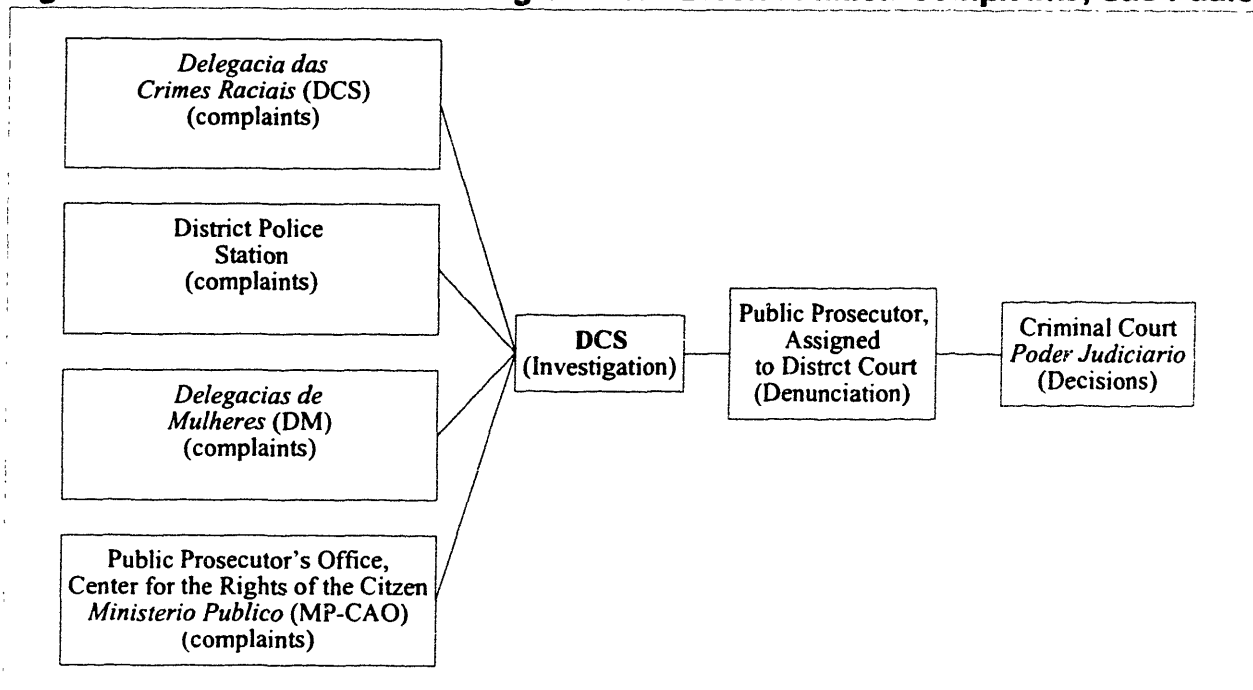
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<sup>101</sup> See Soares (1993).

<sup>102</sup> Several lawyers from Geledes discussed the difficulties, August, 1996.

<sup>103</sup> See, in general, Mehmi (1992).

**Figure 2.2: Institutional Processing of Racial Discrimination Complaints, São Paulo**



In classifying and investigating these complaints, the DCS functioned as an investigatory arm of the Office of the Public Prosecutor, to whom it presented its final report of each investigation with supporting affidavits and evidence. The Public Prosecutor retains responsibility for the classification and investigation of the incidents, and issues a recommendation to the judiciary branch on each investigation. Public Prosecutors generally followed the DCS classification and investigation of allegations. After receiving the final police report, the Public Prosecutor determines whether to prosecute a defendant, the first step of a judicial proceeding, or to close the investigation.<sup>104</sup> A Judge could order further investigation or assign a new prosecutor

<sup>104</sup> See Paulo Cezar Pinheiro Carneio, *O Ministerio Publico no Processo Civil e Penal*. Rio de Janeiro: Editora Forsense. 1995.



but generally followed the Prosecutor's recommendation for the disposition of an investigation.

The few allegations that advanced to a court proceeding were generally narrowed in court. The civil law system historically treated judges as bureaucrats who apply, rather than interpret the law.<sup>105</sup> Historically, Brazilian judges were not supposed to try allegations about problems not named in the law but to dismiss such allegations as omissions that the legislator needed to address. This strengthens the majoritarian impulse of the judiciary. Judges have occupied a historically weak position<sup>106</sup> that reflects the assumptions of the civil law system and Brazilian politics. Thus, the Brazilian judiciary has been characterized as a "defendant's jurisdiction in which being sued is generally not cause for major concern."<sup>107</sup> Most judges narrowly applied the anti-discrimination law to the allegations of racial discrimination and absolved most defendants.

The courts have become overburdened in the past decade that provides for slow justice and compounds a complainant's vulnerability to retaliation. Like many developing countries, Brazil spends relatively little on the judiciary and relatively more on the police, compared with developed countries.<sup>108</sup> The ratio of population to judges, one important indicator, is much higher in Brazil than in developed countries: one per 29,542 in Brazil compared to one per 3,448 in Germany and one in 7,692 in Italy.<sup>109</sup> Thus, Brazil's overburdened courts now hear a tenfold increase in litigation since the

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<sup>105</sup> Merryman (1994).

<sup>106</sup> See Meili (1993).

<sup>107</sup> See Meili (1993, p. 29) quoting Pres Filho

<sup>108</sup> See Pinheiro (1998).

<sup>109</sup> Pinheiro (1998, p27).

passage of the new Constitution.<sup>110</sup> Further, low salaries and institutional weaknesses make Brazilian officials more vulnerable to corruption because the institutions do not provide adequate incentives.

Although tremendous color and power biases influenced the results, some complainants succeeded in the either initial proceeding or a subsequent appeal. Some judges did not apply the law narrowly but expanded its reach in their holdings. Black movement mobilization affected many outcomes. The Black movement strategically advanced litigation responding to racist communication in the media that vastly widened the audience of the disputes.<sup>111</sup> In those cases, the Black movement placed *racial democracy* on trial with uneven judicial success but succeeded in reaching the broader public. In the few victories in employment discrimination litigation, the most difficult cases, plaintiffs reframed their allegations from a problem in prejudicial attitudes to a problem in equality. That transformation entailed Black movement mobilization, new legal representation, a venue change, and the claiming of constitutional rights.

These transformations represented the mobilization of the law to reach a problem, an outcome dependent upon social and political mobilization. Not all social and political mobilization succeeded in reframing a problem or prevailing in court. Certainly, social forces had other objectives in their mobilization, such as dramatizing a problem. In considering why some mobilization succeeded in reframing a problem or prevailing in court, I draw upon Yngvesson and Mather's emphasis on the role of

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<sup>110</sup> See Rosenn, (2000).

<sup>111</sup> Schattsneider (1960).

language in the transformation of disputes.<sup>112</sup> Although more powerful parties tend to use language more effectively than others,<sup>113</sup> the use of language is not simply a question of power, resources, or technical capacity. I do not examine why a plaintiff reframed a problem but the impact of how a plaintiff framed a problem. I hypothesize that racial discrimination in Brazil needs to be reframed as a problem of equality rather than prejudice and dislodged from its historic relationship to the ideology of race.

### **The Underlying Theory of Racial Discrimination**

I claim that the underlying theory of racial discrimination informs the filtering processes described in the previous section: the complainant's processes that result in filing a racial discrimination allegation and official handling of the allegations. In this section, I compare the Brazilian theory of racial discrimination to its theory of other forms of discrimination and to the theory of racial discrimination in other countries, particularly the US.

A law contains a theory of discrimination, expressing views about the nature of a harm and the rights violated, that render a harm as a civil or criminal infraction. That determination informs theories of liability and standing and the analysis of evidence. By harm, I refer to the harm to the potential complainant: loss of a job, other concrete resources, one's honor, or other material or nonmaterial attributes. Does an insult by one's supervisor primarily injure one's honor or one's conditions of work? Under the

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<sup>112</sup> See Mather, Lynn and Barbara Yngvesson, "Language, Audience and the Transformation of Disputes," Law & Society Review, Vol. 15: No. 3-4, 1980-1.

<sup>113</sup> See O'Donnell in Mendez (1999).

Brazilian notion of discrimination as an expressive act, an insult represents an injury to the victim's honor although the constitution prohibits discrimination in workplace conditions. In the US, the emphasis on outcomes within its theories of employment discrimination provided the foundation McKinnon used to develop a theory of harassment as a form of discrimination.<sup>114</sup> Thus, a harm can be viewed as a violation of more than one right.

The notion of a harm as a criminal or civil problem has significant implications for the collection and analysis of evidence. Further, the civil law tradition places greater emphasis on confession and other direct evidence of a crime, such as documents.<sup>115</sup> The nature of permissible evidence and the relative burden on each party to produce evidence strongly influences the outcome of a case.

The Brazilian Congress has authorized judges to use a burden-shifting evidentiary framework for many problems recognized as important and complex and involving inherently unequal parties. The use of that framework lessens the imbalance in power and access to information between the parties and avoids placing an undue burden on the plaintiff.<sup>116</sup> In Brazil, the Consumer Code<sup>117</sup> and the Labor Code<sup>118</sup>

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<sup>114</sup> See MacKinnon (1979).

<sup>115</sup> See Kant de Lima in Hess (1995).

<sup>116</sup> The Brazilian doctrine of burden-shifting recognizes the inequality of parties in access to information and enables burden-shifting to strengthen fact-finding and to avoid placing too onerous a burden on plaintiffs. See Jose Luciano de Castilho Pereira, "Algumas Consideracoes Sobre a Distribuicao do Onus da Prova", Web-site of the Associação dos Magistrados da Justiça do Trabalho da Décima Região (Amatra-X); <http://www.solar.com.br/~amatra/>, downloaded: December 19, 2001.

<sup>117</sup> The Brazilian consumer code employs the broadest burden-shifting framework. See Carlos Alberto Bittar, "Defesa do Consumidor: Reparacao de Danos Morais em Relaxoes de Consumo", *Revista do Advogado*, n. 49, December 96, p. 24-31.

<sup>118</sup> Labor judges are empowered to use burden-shifting as necessary. They are obligated to (continued...)

specify the use of burden-shifting for particular allegations. Further, judges often use a burden-shifting approach to settle allegations of rape, the corruption of minors and other discreet problems that complicate the collection of evidence.<sup>119</sup>

Other aspects of the structure of law, not necessarily linked to the underlying theory of harm, influence the use of rights. Rights can be enumerated or unconditional. An unconditional law provides a stronger conception that can attach the discriminatory infringement to basic constitutional rights.<sup>120</sup> Further, the depth and thoroughness of a listing of rights, specifying sites and social practices, matter tremendously, especially for an enumerated law. Prohibited employment discrimination might pertain to application processes, promotion, disciplinary action, firing, compensation, and overall conditions of employment.<sup>121</sup>

The concept of the harm has implications for standing and liability. Must a victim come forward or could a state identify a problem through testing or other methods? Who should be held liable for a discriminatory employment ad: the newspaper publishing the ad, the employment agency who placed the ad, and/or the employer? Under a model of discrimination as direct, overt acts, the law tends to require the harmed party to initiate the action against the individual (s) who performed the act. France developed a theory of accomplice liability in its racial discrimination law that holds a recruiter liable as an accomplice to an employer committing a

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<sup>118</sup>(...continued)

use a burden-shifting framework to examine an allegation of unjustified dismissal because of the presumption of the continuity of the employment contract. See Luciano de Castilho Pereira, *op. cit.*

<sup>119</sup> See Mirabete (2000, p. 292).

<sup>120</sup> See Palley.

<sup>121</sup> See Forbes and Mead (1992) and Gitter (1994).

discriminatory act.<sup>122</sup> The possibility of a class action lawsuit increases the access to justice because it shares the high costs for bringing a given suit.<sup>123</sup>

The remedies the law fathoms reflect its delineation of harm, standing, and liability. The severity of a penalty can have an inverse relationship to its application. Thus, a severe measure, intended to communicate strong condemnation, can have the unintended effect of reducing the likelihood of enforcement.<sup>124</sup> Further, some analysts believe that fiscal incentives and fines are more effective than punitive measures.

Although the Brazilian approach to racial discrimination corresponds to the US theory of disparate impact, I find it narrower in several respects. First, the Brazilian model has been limited to overt acts, requiring direct evidence of prejudice such as an employer verbally admitting to have not hired someone because he or she is Black. Most employers know not to make such a statement after an anti-discrimination law has been passed. By contrast, indirect evidence is admissible in racial discrimination allegations in the US and employment discrimination claims in Brazil on the grounds of age, gender and height.

Second, the civil law system of Brazil compounds the narrowness of its theory racial discrimination. In the US, the theories of discrimination are unified and investigators simultaneously seek evidence admissible under its various theories in advance of the issuance of a charge. An investigator pursues direct or indirect evidence for an investigation of individual discrimination. Brazilian prosecutors charge a

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<sup>122</sup> Gitter (1994).

<sup>123</sup> Garro (1999).

<sup>124</sup> See Gitter (1994).

defendant prior to the investigation and police investigators only seek evidence admissible under that charge. If investigators cannot substantiate that charge but a different one, the Prosecutor closes the investigation. Perhaps, the complainant will subsequently file a complaint, or the Prosecutor will subsequently issue a denunciation for the other, more promising charge. Often, the statute of limitation to file the new complaint has expired before this second round can begin, exhausting a plaintiff's rights.

Further, a civil law system traditionally expects legislators to specify crimes and judges to implement but not interpret the law.<sup>125</sup> A Prosecutor may only charge a defendant for a crime explicitly prohibited in the law. This principle of *tipicidade* (that the crime is named in the law) seeks to protect defendants from unjust prosecution and the legislative function from judicial usurpation. Brazil has recently expanded that judicial role by empowering judges to reason by analogy under the civil code.<sup>126</sup>

Third, the criminalization of racial discrimination in Brazil further limits the charge that can be issued. The criminal model treats an alleged violation as lying outside of the conduct of behavior permitted in a society. It entails a notion of blame for a crime against the state. For example, French racial discrimination law viewed the discriminator as someone who "must account to society for his actions."<sup>127</sup> The designation of a harm as a crime stipulates intent to cause the harm. Consequently, Brazilian courts have required direct evidence and the criminal standard of evidence "beyond a doubt," higher than the civil standard of "more likely than not." The criminal

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<sup>125</sup> Merryman (1994).

<sup>126</sup> Santos (1998).

<sup>127</sup> Gitter (1994).

focus on intent increases the focus upon the aggressor's point of view<sup>128</sup> in the handling of a proceeding. Although a criminal measure seems to communicate a more serious condemnation by the state, a civil instrument provides easier evidentiary standards and broader theories of discrimination. Further, legislators are unlikely to treat a indirect discrimination as a criminal activity. As of 1992, eight European countries had combined civil and criminal instruments combating racial discrimination.<sup>129</sup>

In all, I discuss four theories of discrimination: overt individual discrimination, covert individual discrimination, direct systemic discrimination, and indirect systemic discrimination. The first theory, individual overt discrimination, represents the narrowest notion of racial discrimination and views racial discrimination as an act of prejudice: openly, overt acts such as visibly blocked entrances and a defendant saying, "I will not serve you because you are Black." This theory resembles the US theory of disparate treatment shown through direct evidence, under which a defendant committed a visible, audible act of direct discrimination. In the US, very few cases have proceeded this way.

The second theory, individual covert discrimination, corresponds to the theory of individual disparate treatment in the US, which allows indirect evidence and allocates the burden of proof between plaintiff and defendant. This theory prohibits practices without overt commentary that make impermissible distinctions that cannot be justified. Under this theory, after verifying that an employer refused a qualified Black candidate for a position, the court examines the employer's justification. Brazil applies this theory of discrimination to employment discrimination allegations advanced on grounds of age,

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<sup>128</sup> See Freeman (1989) and Fitzpatrick (1987).

<sup>129</sup> Forbes and Mead (1992).



sex and other physical characteristics. This Brazilian theory of discrimination, contained in its constitution, corresponds to individual disparate treatment based upon indirect evidence in the US.

The other two theories of discrimination, direct systemic discrimination and indirect systemic discrimination, have no Brazilian counterparts. The former, the US theory of systemic disparate treatment, prohibits widespread discriminatory practices, that affect a targeted class rather than an individual. The latter corresponds to the US theory of systemic disparate impact: facially neutral practices that produce unjustifiable discriminatory outcomes to a target class. For both theories, plaintiffs rely on statistics to advance an inference of discrimination. Other countries have increasingly adopted that theory of discrimination and have developed stronger theories of disparate outcome than the US.<sup>130</sup> Even France, which historically treated racial discrimination similarly to Brazil, has recently incorporated the theory of indirect discrimination into its labor code.<sup>131</sup> The next sections examine these theories of discrimination, mostly as used in the US and Brazil, with limited discussion of the French case.

### **Overt Individual Discrimination**

The theory of overt individual discrimination views discrimination as direct hostile expressions of prejudice. This theory addresses the most pronounced discriminatory acts, such as an employer refusing to hire a Black applicant explicitly, "I

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<sup>130</sup> Hunter (1998).

<sup>131</sup> See Lara Marlowe, "French racism law needs changing, says group, The Irish Times, Web-site: [www.reland.com](http://www.reland.com), September 5 2001, consulted: March 6, 2002.

will not hire you because you are Black". In the US, this approach corresponds to the theory of individual disparate treatment in those few instances in which a plaintiff could substantiate a claim through direct evidence of impermissible motivation. Despite this correspondence, the theory of discrimination contained in Brazilian anti-discrimination law is narrower than the US theory of individual disparate treatment with direct evidence. This is indicated in the language of the two laws. The US law prohibits certain discriminatory acts "on the grounds of" while Brazil punishes acts "of prejudice". The Brazilian model requires a much more demanding for causality for an act "of prejudice" that is classified as a non-bailable felony.

In Brazil, this theory of discrimination was explicitly contained in the anti-discrimination laws of 1951 and 1989 and the constitution of 1987. The first anti-discrimination law of 1951 outlawed "acts resulting from race or color prejudice", such as the refusal to serve, receive, or lodge a client or customer by a commercial establishment; the refusal to admit a student to a school, or the denial of work in the public or private sector. This definition of discrimination as "acts of prejudice" and the specific practices enumerated limited the scope of the law to publicized segregatory mechanisms of the United States.<sup>132</sup> The constitution of 1987 addresses racial discrimination in several clauses, one of which makes the "practice of racism" a "crime that is subject neither to bail nor to the statute of limitations and is punishable by imprisonment, according to law."<sup>133</sup> The anti-discrimination law of 1989 continued to

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<sup>132</sup> Gilberto Freyre's speech to the House of Deputies, July 17, 1950, was entitled "Against Prejudice of Race in Brazil", as reprinted in a volume of his collected works. Freyre, Quase Política, Livraria Jose Olympio Editora, 1966, p 191.

<sup>133</sup> Title II, Chapter 1, "Individual and Collective Rights and Duties", Clause 42 in Dolinger and (continued...)

define racial discrimination within the causal, criminal model that promised to “punish those crimes resulting from prejudice of race or color” and upgraded racial discrimination from a misdemeanor to a felony.

In the US, investigators seek evidence of overt and covert individual discrimination jointly. Under the US framework, a plaintiff must advance a viable inference of discrimination, which an employer can rebut with a legitimate business reason for the action. The plaintiff can then rebut, arguing the justification to be pre-textual if the employer presented false information, similarly situated persons were treated differently, the presence of general bias, or through statistical evidence.<sup>134</sup> The plaintiff retains the overall burden of persuasion, but the burden-shifting approach distributes evidentiary burdens, requires defendant justification, and provide plaintiffs access to defendant evidence that may be helpful in the preparation of their rebuttals.

Plaintiffs can advance a viable inference through direct or indirect evidence, which will be examined under covert individual discrimination, the next section. In *Slack v. Havens*, four black women working in the bonding and coating department of a plant alleged discriminatory lay off because of their race. Their supervisor had asked them to perform a heavy cleaning of the department, which they refused and they were fired. They were offered their jobs the next day if they agreed to perform the clean-up, which they again refused. (*Slack v Havens*, 522 F. 2<sup>nd</sup> 1091, 1975)

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<sup>133</sup>(...continued)

Rosenn, op cit., p. 387.

<sup>134</sup> For a useful survey of plaintiff rejoinders to employer justifications under individual disparate treatment, see Mack, et al, (1992).

In its analysis of this case, the court relied on two elements. First, the plaintiffs' supervisor had made discriminatory remarks to them, saying that "colored people should stay in their places" and that "colored folks are hired to clean because they clean better". The Court held that these comments constituted direct evidence of direct discrimination. The Court also found indirect evidence of discrimination, noting that the firm offered no reason why white co-workers were not required to perform that clean-up. Within the US theory of disparate treatment, a court examines the comparative treatment of plaintiffs and comparable others.

In these allegations with a direct statement of intent and a discriminatory action, courts seek to evaluate the relationship between the animus and the action. US judges have viewed the animus as causal if (1) two occur simultaneously, or (2) are logically related. A statement by an employer, "women are not good sailors", shortly before a woman was denied a position, was understood to infer causality. (*Grant v. Hazelett Strip-Casting Corp*, 880 F. 2<sup>nd</sup> 1564 1989) Prejudicial remarks by a defendant are generally taken as evidence of intent. (*EEOC v Alton Packaging Corp*, 901 F.2d 920; 1990; *Slack v Havens*, 522 F. 2<sup>nd</sup> 1091, 1975) In addition, the regular expression of bias or slander may also establish intent. However, courts have also held that isolated "stray remarks" (*Price Waterhouse V. Hopkins*, 109 S. Ct. 1775, 1989; *Powell v. Missouri State Highway*, 822 F. 2<sup>nd</sup> 798, 1987) do not demonstrate intent. Finally, a firm cannot rebut causality by arguing that an employee who made prejudicial remarks associated with a discriminatory action only reflects that employee's state of mind. (*Slack v Havens*, 522 F. 2<sup>nd</sup> 1091, 1975)

The Brazilian notion of punishing prejudice is narrower than the US model of disparate treatment with direct evidence and is distinctive from the logic of inquiry generated by the other three theories of discrimination. Instead of a three stage model which shifts the burden of proof, most Brazilian judges require the plaintiff to advance a viable allegation of discrimination that the defendant can then counter. The defendant is not obligated to justify the action, as required by the other theories of discrimination, but may refute the allegations.

Brazilian judges require direct evidence of "disparate treatment" in which the discriminatory act not only harms someone on the basis of race but also demonstrates prejudicial motivation. For that, most judges require a three prong showing of (1) direct evidence of the discriminatory act, (2) direct evidence of the defendant's prejudice toward the complainant, and (3) evidence of the causal relationship between those two. Each of those prongs represents a high evidentiary standard of evidence. A defendant can rebut any of the three prongs to refute an allegation. Thus, a defendant might convince a judge that not to be a "prejudiced person", not to hold prejudicial views toward the defendant, or that those views did not constitute motivation, rebutting the second or third prongs. Brazilian courts depart from the US theory of disparate treatment with direct evidence in the handling of the second and third prongs. Instead of inferring causality from timing or logic, Brazilian Judges generally scrutinize defendant prejudicial commentary narrowly and require direct evidence of causality.

The Brazilian approach to racial discrimination resembles the French model that punishes expressive racism.<sup>135</sup> The French Penal Code defines racial discrimination as “any distinction made against physical persons on the grounds of origin, sex, family situation, state of health, disability, habits, political opinion, trade union activities, or actual or supposed membership or nonmembership of a given ethnic group, nation, race or religion.” That language (“on the grounds of”) limits the scope of discrimination to direct discrimination. The subsequent clause of the penal code defined the specific offenses: “refusing to provide goods or services; interfering in the normal exercise of any economic activity whatsoever; refusing to hire, penalizing or dismissing an individual; or placing discriminatory conditions on an offer of employment.”<sup>136</sup>

The French criminal model of combating racial discrimination has been widely acknowledged as ineffective. The vast majority of the approximately 100 French convictions per year have been for racial insults.<sup>137</sup> On the average, less than ten convictions for other acts of discrimination, such as employment discrimination, have been registered per year since 1972.<sup>138</sup> French anti-discrimination law has been less

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<sup>135</sup> Bleich (2000).

<sup>136</sup> Fourteenth periodic reports of States parties due in 1998: France. 05/07/99. CERD/C/337/Add.5. (State Party Report) <http://www.hri.ca/fortherecord2000/documentation/tbodies/cerd-c-337-add5.htm>

<sup>137</sup> See Marlowe (2001) and the Eleventh periodic reports of States parties due in 1992: France. 07/13/93. , CERD/C/225/Add.2. (State Party Report), United Nations Human Rights Website, <http://www.hri.ca/>, downloaded January 6, 2001.

<sup>138</sup> See Bleich (2001), Forbes and Mead (1992), European Commission Against Racism and Intolerance, 1999, and Marlowe (2001).

effective than Britain<sup>139</sup> or the US.<sup>140</sup> Further, courts do not shift the burden of proof to employers under criminal code allegations.<sup>141</sup>

### **Individual Covert Discrimination**

The theory of Individual covert discrimination corresponds to the larger body of discriminatory practices without open defendant admission of intent. In covert cases, judges infer intent from the defendant's conduct if deemed discriminatory. I contrast the US theory of disparate treatment and the Brazilian theory of employment discrimination as unjustifiable differentiation on the basis on age, gender, and height. Under the theory of disparate treatment in the US, plaintiffs can show discriminatory practices and intent through a broad array of direct and indirect evidence. The distinction between overt and covert discrimination matters more in Brazil where the charge must be issued prior to the investigation. The Brazilian theory of unjustifiable differentiation, based upon constitutional protection of certain aspects of employment discrimination, potentially offers much stronger coverage the statutory protection of discrimination in the US.

In the overwhelming majority of US discrimination cases, plaintiffs allege individual disparate treatment through indirect evidence.<sup>142</sup> Under the US burden-shifting approach, a plaintiff first advances a viable claim of racial discrimination. A viable claim generally must satisfy the four prongs of the McDonnell-Douglas *prima*

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<sup>139</sup> Bleich (2001).

<sup>140</sup> Gitter (1994).

<sup>141</sup> Ibid.

<sup>142</sup> Brooks (2000).

*facie* showing of discrimination: that a plaintiff (1) belongs to a protected group (2) applied for a job for which he was qualified and the employer was seeking applicants; and that the employer (3) rejected the plaintiff and (4) continued to seek candidates after the rejection. For the second prong, a plaintiff must have applied for, and not simply inquired about, the position in question. (*Wanger v G.A. Gray Co*, 6<sup>th</sup> Circuit, 1989) However, if a plaintiff had no knowledge of a particular vacancy and the defendant was aware of the plaintiff's interest, an application was not needed.

The Brazilian theory of individual covert discrimination, contained in the constitutional clauses guaranteeing equality before the law and outlawing employment discrimination, is linked to the Brazilian notion of equality. The Brazilian notion of equality draws from Aristotle's dictum that equality, the equal treatment of equivalent persons, does not require the equal treatment of persons not equivalent.<sup>143</sup> That notion of equality turns on a determination of whether persons are equivalent. Human beings possess unique qualities, some of which societies legitimately use in their routine differentiation of persons: specifying requirements for employment and other functions.

In his definitive treatment of these question, Brazilian legal scholar Celso Bandeira de Mello asked how to distinguish legitimate societal differentiation from impermissible violations of the Brazilian principle of equality. His answer required analysis of the relationship of three aspects: (1) the discriminatory factor, (2) the justification for the treatment, and (3) the relationship between the justification and

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<sup>143</sup> See Mello (1993, p. 10).



normative constitutional values.<sup>144</sup> The Mello doctrine evaluates whether an alleged employment infraction violates the constitutional provision of equality before the law. This entails a two-step burden-shifting analysis, whether the alleged facts describe a violation of the principle of equality, and whether the employer's justification is constitutional. For the latter, judges have increasingly invoked *razoabilidade* (reasonableness), a standard of justification to determine if a particular criterion is "reasonable" for a particular position.

The concept of *razoabilidade* draws from North American notions of procedural and substantive due process and the German notion of proportionality. The standard has four characteristics: (1) "internal," whether a rational relationship exists between the means and the ends of a policy; (2) "external," whether the policy is consistent with the constitution; (3) the "necessity" of a measure: particularly whether a less onerous alternative exists; and (4) proportionality, the proportionality between the burdens and benefits of a measure.<sup>145</sup> The first two characteristics resemble the rational basis standard in the US that asks whether a policy implements a legitimate interest of state and demonstrates a rational basis between its means and ends. The third element corresponds to the higher US standard of strict scrutiny which asks whether a policy is necessary. Finally, the fourth element originates from the German notion of proportionality.

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<sup>144</sup> Mello (1993, p 20-21).

<sup>145</sup> See Luis Roberto Barroso, "*Razoabilidade e isonomia no Direito Brasileiro*" in Viana, etc (2000, p. 31) .

*Razoabilidade* represents a more demanding standard of review in Brazil than the US requirement that an employer provides a “reasonable” business justification for a job criterion. *Razoabilidade* sharply contrasts the highly idiosyncratic nature of selection processes in Brazil. Finally, the protection against employment discrimination as a fundamental constitutional right strengthens the standard of review.

In practice, inconsistent judicial burden-shifting has been the greater problem than the judicial standard to evaluate an employer’s justification. The courts have most consistently used burden-shifting in scrutinizing employer rationales for a discriminatory criterion based upon height and age. Among numerous clauses that prohibit discrimination, the constitution provides specific protection against employment discrimination in wages, duties and hiring criteria on the basis of sex, age, color or marital status.<sup>146</sup> Thus, the allegations of employment discrimination specified in this clause, age and gender, should receive equal or stronger protection than for unspecified grounds, such as height and weight. The next three sections examine jurisprudence of employment discrimination allegations on the grounds of age, gender, height and weight. I examine the jurisprudence of Brazil’s Supreme Federal Court (STF), the ultimate authority for the constitution, and the Superior Court of Justice (STJ), the highest appeal court for most civil or criminal allegations.

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<sup>146</sup> See Title II, Chapter II, "Social Rights", Article 7, Chapter 30 in Dolinger (1992, p. 392).

## Employment Discrimination on the Grounds of Age

The Brazilian Constitution explicitly prohibits employment discrimination on the basis of age. The Supreme (STF) and Superior (STJ) Courts have generally held that age limits violate the principle of *isonomia* (equality before the law) if the minimum age requirement is above the legal minimum for a minor or the maximum age requirement is less than the age of compulsory retirement.<sup>147</sup>

A 1989 law in the state of Rio Grande do Sul had established 40 years-of-age as the maximum age for a candidate for the position of *Procurador do Estado* (State District Attorney). In one case, the Court recognized that this requirement violated the principle of *isonomia* and the employment discrimination clause and consequently examined the state's rationale for the requirement. The Court rejected the State's claims: that "science recommended" this age requirement and that the possessed an organizational interest in having a District Attorney serve 30 years, as unconstitutional on the argument that the Constitution had not included those stipulations.<sup>148</sup> Citing other rulings against age limitations,<sup>149</sup> the court reiterated that a permissible age requirement needed to be "indispensable in the exercise of certain functions."<sup>150</sup> Finally, the Court declared that age could not be used as an employment screen for other

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<sup>147</sup> Recurso Especial N. 8.983-0 Amazonas. Superior Tribunal de Justica. 6/8/94. (Website: <http://www.stj.gov.br/webstj/default.htm>).

<sup>148</sup> Voto de Senhor Ministro Antonio de Padua Ribeiro, Relator, P 0038.

<sup>149</sup> The court cited Recurso em Mandado de Seguranca No. 697- RJ, Superior Tribunal de Justica (90115345, 4/2/91, Diario da Justica, 18/3/91) and Recurso em Mandado de Seguranca No. 709 - RJ, Superior Tribunal de Justica (900011949-9, 28/8/91, Diario da Justica, 23/9/91) and 3 other cases. See p. 0042-0044.

<sup>150</sup> Ibid, p. 0039.

capacities, such as maturity, reliability or technical capacities.<sup>151</sup> The Court generally,<sup>152</sup> but always<sup>153</sup>, overruled age requirements.

### **Employment Discrimination on the Grounds of Sex**

The Constitution also protects against employment discrimination on the grounds of sex. However, the Courts, especially the Superior Court (STJ) did not shift the burden to examine the employer's rationale as regularly in these cases. The Courts often upheld the existence of separate male and female occupations without scrutinizing the rationales for the particular occupation.<sup>154</sup>

In one case, a female applicant had been rejected for a position as a military doctor in the state of Rio de Janeiro. A 1968 state law had restructured the medical corps of the military police and created new female positions as dentists, veterinarians, and pharmacists, leaving the vast majority of positions reserved for men. The plaintiff was refused admission to take the public service examination for the broader listing of positions. The Superior Court (STJ) held that the existence of a male listing was not discriminatory because of the existence of the female listing, and that the use of separate lists was reasonable. The Court instructed that she could viably claim discrimination if she were refused entrance to the public service examination for the

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<sup>151</sup> Arguição de Inconstitucionalidade no Recurso em Mandado de Segurança No. 1.178-0-RS (91.0014501-7). Superior Tribunal da Justiça. *Diário de Justiça*. 10 Out. 1994.

<sup>152</sup> The STF also struck down age requirements for the position of *Magisterio* in Rio Grande do Sul. See Recurso Extraordinário, RE-212.066-9, Mauricio Correa, Rio Grande do Sul, Supremo Tribunal Federal, 12-Mar-99. See also Agravao Regimental em Agravo de Instrumento n 156537/RS, Supremo Tribunal Federal.

<sup>153</sup> The Court upheld requirements that a public driver be 35 and a Professor of Public Magistrates be 45. See Marcia Dometila Lima de Carvalho (1998)

<sup>154</sup> Carvalho, (1998, p. 5).

female listing.<sup>155</sup> Thus, the Court did not shift the burden to examine the rationale for the separate listings.

In a companion case, the Supreme Court (STF) reached a different outcome. The State of Rio de Janeiro had refused Thereza Christina de Brito Cavalcanti, another female applicant, entrance to the public service examination to be a military doctor. Like the previous plaintiff, she alleged discrimination on the grounds of sex. The state rejoined that no law permitted a woman to occupy such positions and that under a civil law system, that omission prevented the state from admitting her to the examination. The STF accepted her appeal and reaffirmed that the lack of a law could not justify a constitutional violation. The Court conceded that certain circumstances not applicable in this instance, such as direct combat, could permit gender distinctions. Thus, the court shifted the burden of proof and scrutinized the state's rationale for the gender requirement for the particular position.<sup>156</sup>

The Courts did not justify their failures to shift the burden of proof to examine the employer's specific rationale for separate occupations. In another case, Francis Helen Dornelas Gimenez has succeeded had her application to take an entrance examination upheld by the highest court of the State of Mato Grosso do Sul. The State appealed the ruling that the refusal to admit women to the military police of the state violated the principle of equality. The Reporting Judge of the Superior Court (STJ), Luiz

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<sup>155</sup> Recurso Extraordinario N. 912953. See Marcia Dometila Lima de Carvalho. "A Proibição Constitucional de Discriminação e a Sua Eficiacia no Ambito do Direito Aplicado." Website of the Procuradoria Regional da Republica 5a Região. (Federal District Attorney, 5<sup>th</sup> region). [Http://rosa.pop-pe.rnp.br/prr5r/art6.hmt](http://rosa.pop-pe.rnp.br/prr5r/art6.hmt). Consulted December 1, 1998.

<sup>156</sup> Recurso Extraordinario N. 120305-4 Rio de Janeiro. Superior Tribunal de Justica. (Downloaded from the website) 8/9/94

Vicente Cernicchiaro, asserted that certain military activities are appropriate for men and not women, but did not specify which activities. Moreover, Judge Cernicchiaro did not examine the activities in question and the state's justification for the discriminatory criteria. He simply asserted that this job was appropriately designated.<sup>157</sup>

Although some of these rulings might represent unspecified but still legitimate exemptions for military occupations, the court's failure to shift the burden of scrutiny in the next case does not seem justifiable. In this case, the STJ held that it possessed the power as an employer to select a candidate for the STJ by a majority vote. The Court had passed over the top candidate on the list, who was female. The Court held it did not have to examine the possibility of sex discrimination because of its prerogative as an employer.<sup>158</sup> An employer's prerogative is bounded by the Constitution.

The Supreme Court (STF) also upheld temporary measures that allowed men to hold positions and gain promotions on the female occupation list. A State law in Pernambuco permitted men to attain positions in the Special Women's Police Force (*Quadro Especial de Oficiais de Policia Femina*) without allowing women access to the regular police force, (*Quadro de Oficias Policias Militares* or *QOPM*) which was exclusively male. Katia Garcia Pinto Soares to Araujo successfully gained a court injunction to enter the *QOPM* and subsequently asserted her right to a promotion. The State Court declared the law an unconstitutional violation of *isonomia* and ordered that her promotion to First Lieutenant. The State appealed that decision to the Supreme

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<sup>157</sup> Recurso Especial No. 173.312 - Mato Grosso do Sul,, Superior Tribunal de Justica, November 23, 1998.

<sup>158</sup> MS 0270, cited by Carvalho (1998).

Court and justified the law as a temporary measure to address the shortage of qualified female applicants. Katia responded that she possessed the constitutional right to a promotion in her sector, which happened to be the male sector. The Supreme Court declared that the existence of the separate lists showed the fundamental distinctiveness of the functions by their very "nature." Further, the Court defended the state law, arguing women had not received the same opportunity to enter the male sector because there had not been a male labor shortage. The Court did not act to reinstate the state law but denied Katia her promotion.<sup>159</sup>

### **Employment Discrimination on the Grounds of Height and Weight**

Although discrimination based upon physical characteristics, other than a physical handicap, is not explicitly protected by the constitution, the courts consistently scrutinized employer rationales for allegations of employment discrimination based upon height and weight. The Superior Courts have closely examined the rationales for the height requirements of the police, position by position. This careful scrutiny defied expectation since height is not a protected category and the judiciary has an interest in police investigatory capacities. As much or more than other police, the Brazilian police rely upon intimidation in their protective and investigatory capacities. Thus, the Supreme Court (STF) predictably upheld the height requirement (5' 3") for regular police who "face circumstances that require the commanding of respect from citizens at their

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<sup>159</sup> Recurso Extraordinario RE-225.721-7 PE, Supremo Tribunal Federal (STF) Ilmar Galvao, Pernambuco, February 22, 2000.

first encounter.”<sup>160</sup> Even so, the Court offered a reason for the use of the height standard in this case, rather than simply asserting the criterion as a fact of “nature,” as the Courts did in many of the rulings on gender.

In another case, the STF held that candidates for “desk jobs” should not be held to that same height standard as street police. The plaintiff, Oleide Gomes Katsuragi, a female applicant for the position of *escrivão* (Official), stood 1.59 meters (5' 2 3/4"), 1 centimeter (3/8") short of the female requirement. She petitioned the trial court and was permitted to take the entrance examination. The state appealed the order, and the State Appeal Court upheld the state law that required the minimum height. The plaintiff appealed the State Court's decision.

The STF acknowledged that the employment discrimination clause does not directly address height discrimination. However, the court sought to expand coverage to height and argued that the employment discrimination clause could be applied to height via the protection of public employees.<sup>161</sup> That claim stretches the language of the two clauses. Further, the Court reasoned that the omission of height from the protected hiring criteria does not permit an employer to stipulate height requirements without a socially acceptable reason. The court reiterated that a discriminatory criterion possess a relationship to a job function, and noted that an *escrivão* does not need to be intimidating. Therefore, the Court did not uphold the height requirement.

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<sup>160</sup> Recurso Extraordinario RE-148.095-5, Marco Aurelio, Supremo Tribunal Federal (STF) February 3, 1998.

<sup>161</sup> The Court was referring to article 39, inciso 2. See Dollinger (1992).



The Court clearly expanded the meaning of the constitutional protection against employment discrimination on behalf of this woman. The court noted that this plaintiff was only one centimeter shy of the requirement and that this was a “reasonable height” for a woman by Brazilian standards. Although its holding was extremely suggestive that height standards particularly discriminate against women, the court advocated a case-by-case approach and asserted that in this case a height requirement for the position of *escrivã* (Official) could not be constitutionally justified.<sup>162</sup>

After upholding height requirement for line officers and allowing desk police an exemption, the Court next had to determine whether to uphold the height requirement for the position of *Delegado* (police chief). In this case, the Court considered whether to view a *Delegado* as a desk official or as the commander of all police, including line officers. Posed that way, the answer would seem to be the latter.

The plaintiff, Ubertina Lopes Brandao, a female *escrivã* of 14 years, sought an injunction to take a public exam to become a *Delegado*. The STF majority reasoned that the *Delegado* functions primarily within the police and therefore does not need to possess an intimidating presence. Further, the court argued that the increasing democratization of Brazil requires a strict approach toward discriminatory factors “not absolutely necessary.”<sup>163</sup> A dissenting judge conceded that height was not needed for a desk job but argued that a *Delegado* does not simply exercise the functions of a desk job. Noting that many *Delegados* had been assassinated or attacked by *Marginais* (the

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<sup>162</sup> Recurso Extraordinario RE-150.455-2, Marco Aurelio, Mato Grosso do Sul, Supremo Tribunal Federal (STF) December 15, 1998.

<sup>163</sup> Recurso Extraordinario RE-140889, Marco Aurelio, Mato Grosso do Sul, Supremo Tribunal Federal (STF), December 15, 2000.

extreme poor), he insisted that the height requirements for a *Delegado* should be the same as for a line officer.<sup>164</sup> Thus, the Court again overruled a height criterion on behalf of a female candidate.

The Court also scrutinized other physical characteristics closely. Sidney Moura da Silva, a candidate to enter his 3<sup>rd</sup> year in the cadet academy, had successfully fulfilled the preliminary requirements and then failed the physical examination on the grounds that his dental problems and obesity made him unfit for military service. The trial court ordered that he be allowed to complete the entrance procedures. The Supreme Court received the State's appeal which had been denied by the State's Appeal Court. The Supreme Court reiterated that a discriminatory criterion must have a rational and necessary justification, and held that the State had not fulfilled its obligation. Thus, The STJ did not grant the State's appeal, arguing that dental problems are correctable, and that neither problem actually impeded his ability to serve in the military.<sup>165</sup>

Thus, the Courts scrutinized allegations of employment discrimination on the basis of age, height and weight consistently and gender inconsistently. The Court applied standards most consistently in its analysis of the employment allegations advanced on the basis of age and height. By contrast, the Courts often upheld the structure of separate male and female occupations without shifting the burden of evidence to examine the justification.

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<sup>164</sup> See Mauricio Correa's opinion in *op. cit.*, p. 780.

<sup>165</sup> Recurso Especial N. 214.456 - Ceara (99/0042341-0) Superior Tribunal de Justica. (Website: <http://www.stj.gov.br/webstj/default.htm>)

## Direct Systemic Discrimination

The theory of direct systemic discrimination pertains to discriminatory practices that harm a protected group on impermissible grounds that cannot be justified. Brazil has not developed a theory of systemic discrimination but potentially could recognize the collective interests of Black consumers in a class action suit.<sup>166</sup> In the US, courts employ the burden-shifting approach, similar to the three stage model used for individual disparate treatment. For allegations of systemic discrimination, plaintiffs primarily use statistics to establish an inference of discriminatory practice. Plaintiffs may also offer specific evidence of practices to strengthen the showing of discriminatory treatment. In an allegation of discriminatory hiring, plaintiffs must show a statistically significant gap between the demographic make-up of either the actual applicant pool or relevant labor market compared to either new hires or the overall work force.<sup>167</sup>

In response, defendants possess a greater burden than when responding to an allegation of individual disparate treatment. Defendants must refute the inference of discrimination by contesting either the statistical results or methods or by providing a persuasive explanation for the apparently discriminatory practices. A persuasive explanation could include showing that the under-represented group lacked interest or qualifications, or did not seek, the positions in question. (*EEOC v Sears, Roebuck & Co*, 7<sup>th</sup> Cir 1988)

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<sup>166</sup> Consumers can bring class action suits. NGO efforts to advance litigation against racist social communication as violations of the collective interests of Black and Brown consumers have thus far encountered successful challenges to their standing.

<sup>167</sup> Brooks (2000).

In the US, judicial analysis of systemic disparate treatment was largely developed through two important cases. In the first, the *International Brotherhood of Teamsters v US*, the Supreme Court held that the virtual absence of “minority” workers, unexplained, could establish an inference of discrimination. In some areas in which African Americans constituted over 30% of the population, virtually none of the drivers were African American. Plaintiffs showed a “preponderance of evidence” of discriminatory placement practices through this statistical analysis and accompanying evidence of over 40 instances of discrimination. (*International Brotherhood of Teamsters v US*, 431 US 324, 1977)

In the second case, *Hazelwood School District v US* (433 US 299, 1977), the Supreme Court refined the analysis of statistical inference of discrimination. The Government had initiated an action against the school district for discriminatory hiring practices. The Court of Appeals had issued a finding against the district based upon comparing the overall teaching force with the St. Louis labor market. In 1972 and 1973, the proportions of African American teachers in the Hazelwood teaching force were 1.4% and 1.8%, respectively. African Americans comprised 15.4% of teachers in the city of St. Louis. The School District appealed based upon comparing the composition of new hires to the local market, which it argued to be the relevant comparison. Of the new hires, 3.5% and 4.1% were African American in 1972 and 1973, respectively. African Americans comprised 5.7% of teachers in the local area. The Court remanded the case with a series of questions about statistical inference, holding that defendants could rebut based upon contemporary hiring. In *Hazelwood*, the court found that the relevant labor pool needed to be tailored based upon qualifications and circumstances.

## **Indirect Systemic Discrimination**

The theory of indirect systemic discrimination pertains to practices that unintentionally disadvantage a protected group. This theory of discrimination, known as systemic disparate impact in the US and indirect discrimination in Europe, prohibits facially neutral practices that have the consequence of disadvantaging a group without intent. This theory of discrimination differs from direct systemic discrimination in that the defendant's state of mind is irrelevant.

The disparate impact theory developed in the US through Supreme Court jurisprudence beginning with a landmark 1971 case, *Griggs v Duke Power Co.* (401 US 424) The defendant, Duke Power, had modified its procedures to require an intelligence test for entrance and transfer within the plant, which disadvantaged the plaintiffs. Plaintiffs did not show that the company intended to discriminate. However, Duke Power was requiring entrance examinations that were disadvantaging the plaintiffs without having determined their relevance for any position. The court held that a defendant's viable usage of a test depends upon the relationship of the test to job performance. Title VII of the Civil Rights Act authorized validated testing that possesses a "reasonable measure of job performance."

In disparate impact litigation, plaintiffs show adverse impact through statistics. US judges employ the burden-shifting approach in which a persuasive allegation of discrimination shifts the burden of proof to the employer to justify the practice. Permissible employer justifications can include worker safety and the skills necessary to perform a job, but not customer preferences or criteria unrelated to performance.

Further, an employer must be able to demonstrate and not merely assert business necessity. Finally, plaintiffs have an opportunity to show a justification to be pretext.

Language combating indirect discrimination had preceded Griggs. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) developed a widely disseminated, authoritative definition of indirect racial discrimination, ratified by the UN General Assembly in 1965. The CERD established a highly detailed definition of racial discrimination:

*Any distinction, exclusion, restriction or preference based upon race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*<sup>168</sup>

The CERD language addressed subtler racial discrimination by prohibiting a *distinction* or a *preference*. The CERD also pertained to indirect discrimination by prohibiting acts that have the *purpose* or *effect* of causing specified disadvantages. Finally, the protection of human rights and fundamental freedoms from being *nullified* or *impaired* by the action provided broad, unconditional coverage of rights.

Subsequent to Griggs and the CERD convention, the UK prohibited indirect discrimination in its Race Relations Act of 1976. The European Union issued a directive in 1997 for its member states to provide protection against indirect discrimination and harassment.<sup>169</sup> Even France, which historically punished expressive discrimination, recently prohibited unjustifiable indirect discrimination on the ground of race in its labor

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<sup>168</sup> See Thornberry (1991, p. 261).

<sup>169</sup> Web-site of the Public & Commercial Services Union, London, England. <http://www.pcs.org.uk/equality/briefings/eurodir.htm>. Consulted January 9, 2002.

code.<sup>170</sup> Ironically, other countries now apply disparate impact theory more broadly than does the US to claims against seniority systems, for comparable worth, and Constitutional rights.<sup>171</sup>

The US Supreme Court modified the US approach in *Wards Cove Packing Co v. Atonio*. (490 US 642, 1989) The Court required plaintiffs to show a causal relationship between a specific employment practice and the alleged adverse impact, narrowed the use of statistical comparisons to the relevant labor pool, and altered the balance of assumptions in the later stages of burden-shifting toward defendants. In the Civil Rights Act of 1991, Congress revised that holding by allowing a plaintiff to identify the specific practice that caused the alleged impact or to show that the elements of an employer's hiring practices could not be disaggregated<sup>172</sup>.

### **Conclusion**

This chapter has shown the difficulty of bringing a racial discrimination allegation to the law in Brazil. A Brazilian complainant faces the burdens that any racial discrimination victim faces, magnified by the considerable problems in the Brazilian rule of law, the dynamics of Brazilian race ideology, and the definition of racial discrimination in the anti-discrimination law. The problems in the rule of law exacerbate the vulnerable position of most potential complainants. A racial discrimination complainant is at severe risk during a pending judicial proceeding against a supervisor.

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<sup>170</sup> See Marlowe (2001).

<sup>171</sup> Hunter (2000).

<sup>172</sup> Rosseberry (1999).

Racial discrimination was framed by Brazilian race ideology as a taboo. That framing was especially punctuated by authoritarian regimes in the 1930s and 1960s as well as by democratic regimes. Articulating an allegation of racial discrimination represents an admission of belonging to the stigmatized population. Brazilians who complained about racial discrimination have been called racist and unBrazilian. Historically, public policy reenforced Brazilian color preferences, and officials promoted the Brazilian race ideology in their public pronouncements.

Finally, the legal definition of racial discrimination as an act of prejudice has narrowed the set of problems individuals bring to the law and influenced how officials have handled their allegations. Although I discussed four theories of discrimination, I particularly distinguish the notion of discrimination as prejudicial acts contained in Brazilian law to the other three theories of discrimination, which treat discrimination as a problem in equality rather than a problem in attitudes.

The predominant handling of racial discrimination claims in Brazil as overt acts of prejudice resembles the US theory of individual disparate treatment with direct evidence. Even so, the Brazilian version is narrower, because judges closely scrutinize evidence of prejudice and require direct evidence of the causal relationship between that prejudice and the discriminatory act. In the US, judges view prejudicial statements by a defendant or evidence of general bias as evidence of motivation. Most Brazilian judges have scrutinize prejudicial remarks and causality closely and require prejudicial remarks to demonstrate hostile intent against the complainant on the grounds of color. A general prejudicial statement does not satisfy those grounds. In the US, a judge will infer causality between the prejudicial comments and discriminatory action if a plaintiff



can show by the timing or the existence of a logical relationship between the elements. Brazilian judges rarely infer causality but require direct evidence of the relationship between commentary and the action. Brazilian judges have often accepted a defendant rejoinder to not have intended to offend anyone with prejudicial commentary, which leaves plaintiffs with an extremely high burden of persuasion.

Some of the differences between the handling of problems in Brazil and the US owe to the difference between the civil law and common law systems. In the US, investigators simultaneously gather direct and indirect evidence. In Brazil, the Public Prosecutor must issue the specific charge prior to investigation. That fact narrows the scope of the investigation, extends the length of proceedings if a complainant decides to pursue an uninvestigated, alternative afterwards, and often exhausts the complainant's rights by exceeding the time limit for filing. In this area, Brazilian procedures are superior to French procedures, which does not permit the complainant to pursue another legal channel.

In contrasting the Brazilian theory of racial discrimination to the other theories of discrimination, I emphasize the significance that Brazil defined racial discrimination as a criminal act of prejudice, punishable as a non-bailable felony. This criminal model encourages judges to exact high standards for intent and causality. Further, the Brazilian model is narrower than the French model, which extends liability to "accomplice" institutions and permits NGOs standing to advance litigation. The lack of accomplice liability hindered numerous cases of employment discrimination. Brazil's version of a class action suit, the articulation of collective interests, such as children, consumers, and the environment, does not explicitly extend to racial discrimination

claims. Efforts to advance a claim as a violation of the interests of Black consumers have encountered problems of standing.

Unlike the judicial handling of most Brazilian racial discrimination allegations, Brazilian courts have analyzed employment discrimination on other grounds, such as gender, age and height, as problems in equality with constitutional protection. That analysis has included a burden-shifting approach that resembles the US handling of individual disparate treatment. Although judges have been uneven in shifting the burden of proof in these cases, their inquiry did not focus on defendant prejudice but generally on the appropriateness of entrance criteria. In the vast majority of racial discrimination cases, judges did not examine the reasonableness or uniform application of hiring criteria or any employment practice.

The Brazilian constitutional prohibition of employment discrimination in selection, hiring criteria, and conditions of work on the grounds of color, age, gender or marital status could potentially provide strong protection for allegations of direct discrimination. The extension of constitutional protection to the allegations of height discrimination illustrated this potential.

This chapter has explored the factors that shape the use of Brazilian anti-discrimination: its rule of law, the ideology of the Brazilian nation, and its definition of racial discrimination. The next chapter examines the making of Brazilian anti-discrimination law and particularly explores the role of the ideology of the nation in the legal definition of Brazilian racial discrimination.

### Chapter 3 The Legal Construction of Racial Discrimination as an Act of Prejudice

*The agents of [racial] injustice are almost always gringos who are ignorant of our traditions and insensitive to our old customs of racial fraternity.<sup>1</sup>*

- Senator Afonso Arinos de Melo, 1950

*Racism is currently punished as a misdemeanor, which allows persons who commit discriminatory acts to pay fines . . . and which has stimulated the growth of racist practices . . . By making racism a crime, with commensurate penalties, Brazil would leave the list of discriminatory countries.<sup>2</sup>*

- Senator Carlos Alberto Caó, 1988

This chapter examines the role of the ideology of the Brazilian nation in the legal construction of Brazilian racial discrimination. I suggest that Brazilian Senators drew upon the ideology of the Brazilian nation in passing the anti-discrimination law of 1951 that made racial discrimination an act of racial prejudice and prohibited segregatory acts. That language made the expression of racial prejudice the key aspect of the offense and created an evidentiary burden difficult to meet. This framing of racial discrimination has persisted in the law, even as the Black movement has tried to make the law a tool of social change. Brazil's Black movement succeeded in upgrading racial discrimination from a misdemeanor in the 1951 law to a non-bailable felony in the 1988 Constitution. Although the new Constitution contains two notions of racial discrimination, unjustified differentiation, and the prejudicial model, the new anti-discrimination law of 1989 employed the 1951 understanding of racial discrimination as an act of racial prejudice.

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<sup>1</sup> For Arinos's discussion of gringos, see Andrews (1991, p. 184).

<sup>2</sup> Carlos Alberto Caó, Justification for his proposed law, N. 668 of 1988. Diário do Congresso Nacional. Section 1. (June 15 1988, p. 2208-9).

The use of the narrow framework in 1989 poses a question about why Brazil's Black movement primarily viewed racial discrimination as an act of racial prejudice and advanced the criminal model. With very different ideological motivations than Brazilian elites, Brazil's Black activists have defined racial discrimination as an act of racial prejudice since 1946. Their argument that racial prejudice constitutes a crime against the nation and should therefore become a felony used the discourse of the nation to counter the trivialization of racial discrimination as a misdemeanor. As such, activists had inverted Brazilian avoidance of racial discrimination and insisted that racial discrimination existed with serious consequences. However, this inversion remained within the conceptual framework of racial discrimination, which I argue has bounded all actors. Thus, I suggest that the anti-discrimination law of 1989 represented symbolic politics to dramatize the existence of racial discrimination. Further, I suggest that this law demonstrates the strength of the Brazilian framework of racial discrimination and its proximity to the discourse of the nation.

This chapter examines the text of the laws, proposed laws, and selected Congressional testimony since 1951 to analyze the relationship between ideology and the theory of discrimination in the evolution of Brazilian anti-discrimination policy. First, the chapter will show the influence of *racial democracy* in the definition of racial discrimination in the original anti-discrimination law. I also trace the ideas in the legal projects of key Black activists at the time of the first law and during the redemocratization era of 1978-88, and consider the ideas in the new constitution of 1988, the new anti-discrimination law of 1989, and its subsequent amendments. Finally, I compare the anti-discrimination law to legislation combating discrimination

against women, the disabled, and indigenous Brazilians to demonstrate the narrowness of the conception of racial discrimination and to argue that the theory of discrimination remains bounded by the ideology about the Brazilian nation.

### **The Making of the Afonso Arinos Act of 1951**

The notion that racial discrimination consisted of harsh racial segregation in contexts with open group tensions, such as in the United States, long preceded the making of the first anti-discrimination law in 1950. The comparison to the US had played a critical role in Gilberto Freyre's paradigmatic work and state ideology in the 1930's and 1940's.

Getulio Vargas's authoritarian regime ended shortly after the second world war,. Although forced from power, Getulio Vargas strategically formed two political parties, the PSD and PTB, that dominated electoral politics during Brazil's second republic (1946-64). Vargas himself was elected Senator in 2 states and Federal Deputy in 6 states in 1946.<sup>3</sup> He was elected President in 1950, indicating a strong continuity in political actors during the transformation of political institutions. Vargas's control of political space from above in the 1930's was replaced by "societal corporatism", control by political parties. Vargas had captured significant support among "Blacks" and "Browns" because they were among the "people" that some of his *Estado Novo* policies had reached. Although the PTB was able to retain this political support among poorer

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<sup>3</sup> See Schneider (1991, p. 159-161).

“Browns” and “Blacks”,<sup>4</sup> the party did not provide political space to articulate concerns of Brazilian “Blacks” and “Browns”.

The decades of the 1930's and 1940's were a time of rapid modernization in Brazil that made racial discrimination a more visible phenomena. Many Brazilians migrated to the industrial southeast to seek employment in the developing sector. Many Brazilian “Blacks” and “Browns” were barred from textiles and other industries in São Paulo through 1945. Many public sector positions, including the Civil Police, the diplomat corps, and higher military positions, also restricted “Black” and “Brown” applicants.<sup>5</sup> These preferences were more visible in a competitive labor market than in the Northeast, and the reporting of discriminatory incidents increased during this period.

At the beginning of the 2<sup>nd</sup> Republic, a group of Black activists led by Abdias Nascimento formed a theatrical group, the Black Experimental Theater (TEN), that articulated Black cultural and political concerns. Because of Brazil's absorptionist politics, Black mobilization has often focused on cultural activities to remind Brazilians of their Blackness.<sup>6</sup> TEN organized a national Convention of Blacks (CNNB) in 1945 that mixed politics and culture. The CNNB proposed the creation of an anti-discrimination law in its summary statement sent to the major political parties.

The CNNB proposal would have designated “prejudice of race and color” as a “crime against the nation” and prohibited the crime of prejudice in private firms, civic

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<sup>4</sup> See Amaury de Souza, “Raca e Politica no Brasil Urbano”, *Revista de Administracao de Empresas*, Vol 11: n 4, October/December, 1971, p61-70.

<sup>5</sup> See Abdias Nascimento, *Combate ao Racismo*, Vol. 5. Brazilian Congress. 1985.

<sup>6</sup> See Hanchard (1994) and Nascimento (1982).

associations, and public or private institutions.<sup>7</sup> The CNNB also proposed positive policies that would have provided targeted educational and universalist economic opportunities. First, the state would enable access and provide funding to Blacks to attend any secondary and higher educational institution. Second, the state would provide tax incentives to stimulate the growth of small business initiatives by all Brazilians. The underlying premise of these proposals was that Blacks, like other Brazilians, would be able to pick themselves up by their “bootstraps”.

The self-help theme was also voiced at the first Congress of Brazilian Blacks (CNB) organized by TEN in 1950. At the conclusion of their joint presentation, “Blacks, Prejudice, and Methods of Eradicating Prejudice”, Jorge Prado Teixeira and Rubens da Silva Gordo cited Booker T. Washington’s admonition to become self-reliant. The exercise of some social rights mattered more than the acquisition of broader rights.<sup>8</sup>

The other component of the CNNB proposal was the negative sanction that defined racial discrimination as the crime of “racial prejudice”, designated as a crime against the nation, a crime of the highest order. In so doing, the CNNB used the concepts racism, prejudice, discrimination, and inequality somewhat interchangeably. In that sense, prejudice was a fundamental part of the inequality Blacks faced in Brazil and elsewhere. In another, more specific sense, prejudice was understood as the pervasive condition which “Blacks” faced, which included widespread misery. Teixeira and da Silva Gordo characterized the following circumstances as racial prejudice:

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<sup>7</sup> See the *Convenção Nacional do Negro Brasileiro*, “Letter to the Brazilian Nation”, November 11, 1945 in Nascimento (1982, pp 111-113).

<sup>8</sup> See Jorge Prado Teixeira and Rubens da Silva Gordo’s presentation, to the CNB in Nascimento (1950, p.138).

*An illustrious Black arrives in Brazil seeking to get accommodations suitable to her accomplishments. She manages to secure better housing only to find that she can't actually stay there. A Black traveler arrives at an older city in rural São Paulo, goes to a barbershop and is discreetly expelled . . . We could cite innumerable circumstances that demonstrate the existence of this pernicious phenomena, called racial prejudice.<sup>9</sup>*

Thus, the Brazilian denial of access to public accommodations occurred through relatively subtler discouragement, compared to the visible strife in other countries. The contrast to the United States continually framed the discussion of Brazilian racial discrimination. The continued thwarting of darker Brazilians, particularly in locations deemed for Whites, occurred without signs that said "White only". The explanation that the empty barber chair was not available because another customer had already made an appointment was thereby characterized as prejudicial rather than discriminatory. That characterization placed more importance on the underlying motive than the explanation, the behavior or the consequences.

Nascimento explicitly distinguished the prejudice faced by the Brazilian Black from racial discrimination in the United States. He argued that this condition of "racial prejudice" existing in Brazil could not be "confused with the discrimination of races in the United States".<sup>10</sup> Thus, he defined racial discrimination as separation and hostility, contrasted to "racial prejudice", the general predicament facing the Brazilian Black. Certainly, racial tension has been more evident in the US than in Brazil, partially a result of mobilization against inequality. This characterization of the two types of racism reflected the dominant portrayal of racial discrimination as a North American problem.

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<sup>9</sup> Ibid.

<sup>10</sup> Nascimento's report to the same panel is given in *ibid*, p 133.



In 1946, Senator Hamilton Nogueira proposed an anti-discrimination law based upon the 1946 proposal of the CNNB. He justified his proposal upon the many restrictions "Blacks", "Browns", and Jews faced in the military, diplomatic careers and Brazilian society:

*Does a racial question exist in Brazil? Perhaps it does not in law but in fact, not only in relations to our Black brothers but also in relation to our Jewish brothers. It is a social fact: the restrictions in the entrance of Blacks to the military academy, naval academy, academy of aeronautics, and principally diplomatic careers.<sup>11</sup>*

Nogueira's proposal would have made racial discrimination a misdemeanor and a crime against the nation.

Nogueira's proposal was rejected by the Senate majority leader, Nereu Ramos. Senator Ramos insisted that the project's objective to prevent the differentiation of persons based upon race and color had already been achieved. Further, Senator Ramos guaranteed that Blacks and Jews would not face any future restrictions to enter a diplomatic, military or civil position.<sup>12</sup>

Emblematic of Brazilian politics, the only "Black" legislator at the time, Claudino Jose da Silva of the Brazilian Communist Party, (PCB) also opposed the project because it would "restrict the wider sense of democracy" of the new Constitution. Da Silva argued, similar to Ramos, that the formal equality delineated by the non-discrimination clause of the 1934 Constitution was a sufficient legal guarantee.<sup>13</sup>

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<sup>11</sup> See Alves (1966, p. 30).

<sup>12</sup> See Nascimento, op cit, p. 85-6.

<sup>13</sup> Ibid.

Four years after the defeat of Senator Nogueira's proposed anti-discrimination law, Katherine Dunham, the North American "Black" dancer and anthropologist, was refused admittance to a São Paulo hotel when she attempted to use the reservation placed for her by the US embassy. In what became a defining moment in Brazilian history, Dunham did not observe Brazilian "racial etiquette" and publicly protested this discriminatory act. Afterwards, Senator Afonso Arinos de Melo of the conservative UDN, drafted Brazil's first anti-discrimination law in a single weekend. Arinos, also a noted jurist and scholar, claimed that this incident, in light of discriminatory experiences that his "Black" chauffeur had also encountered in 1950, compelled his response. He reported that a Spanish employee had prevented his chauffeur from entering a confectionary store in Rio de Janeiro with his "White" wife and their two children.<sup>14</sup>

The Arinos Act outlawed "acts resulting from race or color prejudice" and specified a series of prohibited practices punishable as misdemeanors. His formulation made prejudice the central feature of discrimination. The listed prejudicial acts included the refusal to serve, receive, or lodge a client or customer by a commercial establishment; the refusal to admit a student to a school, or the denial of work in the public or private sector. The definition of discrimination as "acts of prejudice" and the enumeration of discriminatory practices corresponded to the "Dunham incident" and vastly limited the scope of the law to the segregatory practices of North America.<sup>15</sup>

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<sup>14</sup> See Arinos de Melo Franco (1965, p. 178).

<sup>15</sup> Gilberto Freyre's speech to the House of Deputies, July 17, 1950, was entitled "Against Prejudice of Race in Brazil", as reprinted in a volume of his collected works. Freyre, Quase Política, Livraria Jose Olympio Editora, 1966, p 191.

In justifying his proposal, Arinos argued that the absence of "Blacks" in many public careers demonstrated the limitation of the constitutional principle of racial equality before the law. Further, he claimed that these glaring racial disparities in the public sector granted the private sector full license to discriminate.<sup>16</sup> He denounced prejudice as "one of the most shocking manifestations of disrespect to human rights and dignity of the human being." He noted that Gobineau's racist theory of superiority had been repudiated by Brazilian studies of international significance:

*In Brazil, scientists and eminent writers have contributed to clarifying, on the international stage, the errors and injustice arising from prejudice of race. With a mestiço people, a country of immigration . . . it is natural that studies of Cultural Anthropology and the Sociology of Race [in Brazil] have been considerably developed.*<sup>17</sup>

Arinos's agenda extended beyond the proposed law. His remarks surely alluded to Brazil's project to place its race relations as an international model, realized in the UNESCO conference that had occurred one month earlier. Arinos naturalized the concept of a *mestiço people* and the role that a country with such a people could play within comparative social science.

Arinos secured the reluctant support of Gilberto Freyre, a fellow Senator at the time, who questioned the viability of a legal instrument to combat racial discrimination.<sup>18</sup> Arinos and Freyre viewed the "Dunham incident" as exceptional phenomena that

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<sup>16</sup> See Degler (1971).

<sup>17</sup> Arinos's speech to the Congress was reprinted in Afonso Arinos, "Preconceito de Raca ou de Cor", Revista Brasileira de Criminologia, Vol. 5(17), October/December, 1951, p. 24-26.

<sup>18</sup> In fairness to Freyre, he had also supported Nogueira's proposal in 1946. However, he did emphasize his reluctance to Arinos. See Arinos, (1965, p. 179).

demonstrated foreign cultural influences on Brazil, as Freyre suggested to the Congress:

*It is not surprising that this [the Dunham incident] occurred in São Paulo: because in São Paulo commercialism, mercantilism, business, the dollar, ["dollarism"], immediacy, all the 'isms' which are inseparable from the vigorous and triumphant civilization in industrial America operate in São Paulo with a vengeance.<sup>19</sup>*

Freyre's speech conveyed little concern for the problems facing the Brazilian Black. Instead, Freyre touched on a central theme of his own work of a distinct, Brazilian, "tropical" style of development. (*tropicalismo*) In Freyre's *tropicalismo*, the meeting of man, nature, and economic development proceeded distinctly in Brazil from North American capitalism. He highlighted the role of the *bandeirante mestiço* ("mestizo" cowboys who spoke Tupi and generally adapted indigenous culture and life-style.) in colonizing São Paulo and establishing the basis for the Brazilian style of development and the Brazilian nation. In his view, the clash between the values of western capitalism in contemporary São Paulo and this *bandeirante* Brazilianness provided the conditions for the Dunham incident. To Freyre, racism, defined as objectionable incidents with exclusionary content, was fundamentally unBrazilian and consequential to the cultural values engendered by North American-style industrial capitalism. Freyre shared Arinos's concern that the Dunham incident could become an embarrassment for Brazil at a time when "international scientists had come to study Brazilian culture as an example of the peaceful solution of the struggles between human groups", referring

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<sup>19</sup> Freyre, Quase Política. Livraria Jose Olympio Editora. 1966.

to the impending UNESCO study.<sup>20</sup> At the time Arinos presented his bill, Freyre was lobbying the UNESCO office to add Recife, his site of expertise, as a study site.<sup>21</sup>

Arinos also saw racial discrimination as quintessentially unBrazilian in which the guilty party was neither Brazilian nor cognizant of Brazilian culture.<sup>22</sup> In contrast to the "ignorant gringo", Arinos tributed the *old customs of racial fraternity*, evocative of both Freyre's *tropicalismo* and the concept of "racial etiquette". Was Arinos defending "racial etiquette" or criticizing US culture from the vantage of a prominent third world politician? Most likely he intended both. His defense of Brazilian "racial fraternity" and his criticism of North American culture represented customary responses to charges of racial discrimination. The Brazilian press also blamed foreigners for the incident: "Hardly ever do we come across a situation where the behavior of a Brazilian leads to circumstances of this sort . . . The hand that dared to close that door surely was a foreign one."<sup>23</sup>

Arinos argued that the law was necessary as an "effective instrument of anticipation and of orientations for social evolution". Arinos warned that if the law were not enacted, Brazil's future social peace was endangered, which could lead to a

*real struggle of the races, the terrible problem debated since Independence in the United States without solution . . . The question of the Black in the United States, because of its formidable international influence, has become a serious international problem for democracy.*<sup>24</sup>

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<sup>20</sup> Freyre, *ibid.*, p \_\_\_\_.

<sup>21</sup> Maio, *op cit*, on Freyre's lobbying to include Recife in the UNESCO study.

<sup>22</sup> Andrews, (1991, p. 184)

<sup>23</sup> This appeared in Correio Paulistano, cited by Fernandes (1955).

<sup>24</sup> See Afonso Arinos, "Preconceito de Raca ou de Cor", Revista Brasileira de Criminologia,  
(continued...)

Plinio Barreto, a fellow Senator and supporter of the law, similarly argued, "I urge you to put a stop to this state of affairs, the worsening of which will contribute to the establishment among us of a genuine battle between the races."<sup>25</sup> Many years later, Arinos spoke at a Commemoration of the International Day for the Elimination of Racial Discrimination at the Candido Mendes University in Rio de Janeiro where he echoed these sentiments, "The law wasn't only an initiative of mine, but was the result of a current of Brazilian thinking that saw the country threatened by antagonisms."<sup>26</sup> In this aspect, the law represented a "conflict avoidance" measure by a democratic corporatist state to manage society by preempting potential problems.<sup>27</sup>

When he presented the law, Arinos acknowledged more of a racial problem than many Brazilians wished to admit. He received many letters and phone calls opposing his proposal in 1950. One opponent, a colonel, insinuated that Arinos's grandfather was *Mulato*, a sharp insult among members of the elite.<sup>28</sup>

Brazilian Blacks and Browns responded with mixed views of the new law. At the time of the law's passage, many hoped the law might produce societal change and represent their "day in the sun" and a "new day" for Brazil.<sup>29</sup> Activists and other Brazilians hoped the law would bring recognition to a long submerged problem and that racial prejudice would no longer be characterized as a "Black" problem but a Brazilian problem. As noted sociologist Florestan Fernandes reported, some Brazilians even

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<sup>24</sup>(...continued)

Vol. 5(17), October/December, 1951, p. 25.

<sup>25</sup> Cited by Andrews, (1991, p.185).

<sup>26</sup> Jornal do Brasil, March 3, 1974.

<sup>27</sup> Lamounier (1968).

<sup>28</sup> See Arinos de Melo Franco (1965, p. 178).

<sup>29</sup> Florestan Fernandes, "A Luta Contra o Preconceito de Cor" in idem (ed, 1955, p 218).

thought that Whites might be inhibited from certain behavior, and that the law might empower “Blacks” and “Browns”:

*Before this law, the Black didn't go to certain places and do certain things out of fear of being offended. The law gives legal guarantees to Blacks, which will break the fear of the White.*<sup>30</sup>

Some speculated that this change would create further contact between Whites and Blacks, which became the real agent of change.

Others feared that the law might aggravate the circumstances of the Black. Some thought that the law would be easily avoided and that Whites could easily articulate non-racial reasons to refuse Blacks. Others thought that the law would never be implemented because Whites would never prosecute other Whites. Some foresaw that the focus on prejudice would be a problem because of the difficulty of detection. Finally, some thought that Blacks would need to become more careful and not develop a “false sense of equality” but accept the “position he occupies”. Otherwise, “Blacks” might provoke prejudice even in places it had not existed.<sup>31</sup>

Fernandes reported that these divergent views were not simply between persons but within their responses. Many of those who defended the law also thought it would be easily circumvented. Those of greater mobility, particularly those who identified themselves as *Mulato Claro* (light mulatto)<sup>32</sup>, tended to see the law as a threat to their circumstances and expressed the fear that it would exacerbate problems. These respondents strongly stressed the importance of the conduct of Whites and Blacks in

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid, p 218-9.

<sup>32</sup> This term emphasizes someone's proximity to whiteness. In the 1995 Zumbi survey, discussed in chapter 3, most persons who self-identified as *Mulato Claro* identified as “White” according to census categories and were seen as “White” by the interviewer

terms consistent with “racial etiquette”. Fernandes speculated that the anxiety was a response to his inquiry into a shame-producing subject that was routinely avoided.<sup>33</sup>

Black activists criticized the law as only being capable of helping a small fraction of more mobile Blacks and called for direct economic assistance to Blacks.<sup>34</sup> Their comments were prophetic as researchers found only a handful of judicial cases and only two convictions during the 38 year period the Arinos Act served as the law of the land.<sup>35</sup> Carlos Hasenbalg found only one conviction in 48 incidents that had been reported in the media in the 1970's.<sup>36</sup> Brazilian public officials often claimed that this absence of convictions proved that Brazil had no racial discrimination. The President of the Brazilian Supreme Court (STF) proclaimed in 1986 that the Arinos Act had been an effective deterrent evidenced by its lack of use.<sup>37</sup>

Many newspaper articles reported the lack of use of the law over its 38 years of vigor. Arinos lamented the failure of the law:

*I would like it very much, and I really hope that someday there may be a judgment under the law, that a bar or restaurant [which had discriminated] might be closed, that a public official who had committed this crime might be fired. But nothing ever went that far.*<sup>38</sup>

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<sup>33</sup> Fernandes, op cit.

<sup>34</sup> See Eccles (1989, p. 26).

<sup>35</sup> George Reid Andrews cites a 1980 newspaper article. See Andrews, op cit., p. 185.

<sup>36</sup> See Carlos A. Hasenbalg, “Excepcionalidade do Corriqueiro: as Noticias sobre Discriminacao Racial na Imprensa”, Revista de Cultura Contemporanea, Ano 1, N. 7, January 1979, p. 75-88.

<sup>37</sup> Djaci Falção, speech to the Conference on the Commemoration of the International Day for the Elimination of Racial Discrimination. See Bertulio, (1989, p 198).

<sup>38</sup> Andrews (1991, p. 185).



Arinos admitted the difficulty of using the law and finding anyone racist: "How could you prove that the directors of a school were racist when they told a father that there were no openings for his children?"<sup>39</sup>

Whatever other motivation Arinos may have possessed, there can be no doubt that the project sought to minimize a foreign affairs embarrassment, particularly in the context of the UNESCO study. Anti-discrimination law became equated with Arinos personally, as it remains to this day. He has said that this law was "certainly the most historically durable of my entire parliamentary career", which was quite illustrious, and added that "if I did anything important, it was this."<sup>40</sup>

The Afonso Arinos Act publically defined racial discrimination in Brazil as racial segregation, an extremely enduring formula. This law formalized popular ideas about race, color, and discrimination which portray racially discriminatory practices as visible, hostile antagonisms and racial separation. Further, the lack of application of the law signaled Brazilians about permissible behaviors and legitimated these subtler social practices. The framing of racial discrimination as hostile, segregatory acts motivated by racial prejudice and its classification as a misdemeanor strongly shaped the responses of Black activists to anti-discrimination law for the next forty-odd years.

### **Revising the Arinos Act**

Black activists did not mount a challenge to the anti-discrimination law until the late 1970's, a delayed response that one activist described as being "anesthetized" by

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<sup>39</sup> Estado de São Paulo; May 20, 1978, p.34.

<sup>40</sup> Arinos, op cit., p177.

the existence of the law.<sup>41</sup> This delay in challenging the 1951 law also reflected the historical difficulties in organizing on the basis of race and the limits in democratic space in Brazil. Brazilian corporatist politics during the post-war period of the second republic, 1946-64, were less authoritarian than had been the Vargas regime in the 1930's. Nonetheless, the dominant parties, two of which had been founded by Vargas and his allies, retained their corporatist influences and did not articulate racial politics.<sup>42</sup>

In 1964, a military coup ended Brazil's second republic and made discussion of race and racial discrimination explicitly taboo. The government removed color from the 1970 census.<sup>43</sup> The Brazilian ambassador criticized a UNESCO brief in 1972 which stated that discreet discrimination still existed in Brazil as a legacy of slavery. In 1977, the government suspended the Brazilian activities of the IAF for having supported Black cultural organizations.<sup>44</sup> Several prominent Black activists and intellectuals who had discussed Brazilian racism, particularly Abdias Nascimento, lived in exile during this period. Other prominent exiles who had also criticized the thesis of *racial democracy* included the important sociologists Florestan Fernandes and Otavio Ianni and the current President, Fernando Henrique Cardoso.

One of the earliest acts of Black activists during the challenge to the military regime was the symbolic burial of the Arinos Act because of its ineffectiveness in São

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<sup>41</sup> See Alves (1980).

<sup>42</sup> See Levine (1998) on Vargas's support among Blacks during the 1930's. See Glaucio Ary Dillon Soares and Nelson do Valle Silva, "Charme Discreto do Socialismo Moreno", Revista de Ciências Sociais, Vol 28, no. 2, 1985, p252-273.

<sup>43</sup> See Nobles (2000).

<sup>44</sup> See Eccles (1985, p 116).

Paulo in 1978.<sup>45</sup> A group of Black lawyers and activists in São Paulo sought to upgrade racial discrimination from a misdemeanor to a felony and a crime against fundamental human rights and to broaden the conception of discrimination to include indirect, unintentional discrimination. This group held a conference in 1979, II Semana Brasileira de Cultura Negra [SBCN] that critiqued the Arinos Act and proposed a new law. According to the report, Brazilian Blacks face many subtler and more profound problems than the direct acts of discrimination. The report described a vicious cycle, in which Blacks were undereducated, unable to compete economically, and consequently marginalized. The authors viewed the law as the appropriate channel to address these problems.<sup>46</sup>

The SBCN report conceded that the Arinos Act had brought attention to the problem of racial discrimination but criticized its ineffectiveness and narrowness, illustrated by its articles. Article 2 of the Arinos Act prohibited discrimination in public accommodations and protected the making but not necessarily the using of reservations. Article 3 prohibited discrimination in social clubs “open to the public” which provided a loophole for establishments that could claim “special publics”, ie private status. Article 4 prohibited discrimination in other establishments but only pertained to the entrance and not the use of those establishments.<sup>47</sup> Further, the law’s specification of acts in 1951 was obsolete by 1979 because of changes in societal practices, partially a consequence of new avoidance strategies.<sup>48</sup>

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<sup>45</sup> See Gonzalez (1985, p. 128).

<sup>46</sup> See Abdias do Nascimento, Combate Ao Racismo. Discursos Proferidas.1983. p 90.

<sup>47</sup> do Nascimento, 1983, p95.

<sup>48</sup> Ibid.

Finally the SBCN Report criticized the classification of racial discrimination as a misdemeanor as being too lax. Accordingly, the classification of a crime reflects and communicates an assessment of the gravity of the harm. Misdemeanors are viewed as "innocent" acts that do not cause real damage but either violate a minor rule, such as a parking violation, or pose a temporary danger to society, such as harboring illegal arms. "Racial prejudice" impeded the exercise of rights, stigmatized appearance, and attacked human dignity, thereby causing significant harm to the Brazilian "Black". Thus, the current law minimized the problem of racial discrimination, provided an insufficient deterrent to potential aggressors and insufficient compensation to victims. Since the Brazilian penal code had already condemned offenses to the dignity of persons, the Report called for treating racial discrimination more seriously than a misdemeanor:<sup>49</sup>

*If the law defines the physical elimination of persons as a punishable crime, discrimination of color, race or ethnicity through an act that also morally destroys the human being, wounding his dignity, must unquestionably be defined as a crime and not a mere misdemeanor.*<sup>50</sup>

In its conclusion, the Report argued that the peaceful existence of many races was indispensable in a country like Brazil. "Racial prejudice" endangered that co-existence and, thus, warranted the status of felony.<sup>51</sup>

Based upon the proposal advanced by this group of lawyers and activists, Adalberto Camargo, a "Black" Deputy in the National Congress, proposed a reformulation of the law in 1979.<sup>52</sup> His proposal also defined racially discriminatory acts as the criminal acts of racial prejudice: "[Those] acts or omissions, resulting from

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<sup>49</sup> do Nascimento, 1983.

<sup>50</sup> do Nascimento, 1983, p. 91.

<sup>51</sup> Prudente, p245-6.

<sup>52</sup> See the Jornal da Tarde, 11/9/79.

prejudice of race, ethnicity or color, in a clear or unclear manner, that result in differential treatment that offended or disadvantaged persons materially or morally.”<sup>53</sup> He expanded the prohibited acts to include those committed in a “clear or unclear manner”. Prejudicial intent could have been demonstrable by result. The language that the differential treatment had “disadvantaged” or “offended” the victim either “morally” or “materially” might have moved judicial attention from a determination of the oppressor’s intent and toward the victim’s harm. Finally, the proposal also prohibited covert discrimination:

*The restricting of any rights mentioned (free choice of employment or profession, according to each's potential; choice of school or religion for an individual and their children; locale of residence, transportation) either directly or indirectly, in moral or material prejudice, because of motives of race, ethnicity or color, will be considered aggravations.*<sup>54</sup>

This proposal could have addressed covert discrimination because the blocking of rights could have occurred “directly or indirectly”. Further, the protected rights were not only the access to facilities but the “free choice of employment . . . according to each’s potential”. That would have extensively increased protected rights. The prohibition of acts committed the “motives of race, ethnicity or color” limited the scope of the proposal to direct discrimination, and naming of acts “resulting from prejudice” would have limited the scope further.

Senator Abdias Nascimento, who returned from exile in 1979, advanced two proposals in 1983 that sought “compensatory action” for racial discrimination. One proposal would have required all public agencies to fill 20% of their staff with “Blacks”

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<sup>53</sup> See Nascimento, op cit, and Prudente (1989).

<sup>54</sup> Prudente, op cit.

and "Browns". This proposal would have established a "Black" category, estimated to comprise 40% of the population at the time,<sup>55</sup> to determine eligibility and divided the opportunities among men and women. Nascimento's proposal stipulated numerous compensatory measures by employers. An employer could establish a preference for "Black" or "Brown" candidates over "White" candidates as the "tie-breaker" for candidates with equivalent qualifications. Further, an employer could create educational or training programs to increase the number of qualified Blacks in a firm's hiring pool or internal labor force. Finally, the proposal provided fiscal incentives and disincentives for employer compliance and non-compliance.<sup>56</sup>

Senator Nascimento proposed another law that would have prohibited direct and indirect discrimination, which could be proven by evidentiary tests. He sought to "strongly punish racism and racial discrimination" and argued Brazil should treat racism as a "crime against humanity", equivalent to anti-semitism and apartheid. His proposal defined two forms of discrimination, direct and "empirical", or indirect, discrimination:

*It is not necessary to prove explicit declarations, intentions, opinions or subjective activities from the responsible party or parties to allege discrimination . . . . If instead it could be shown, based upon an empirical test, that a given action affected persons pertaining to a defined group out of proportion to the census: in either smaller proportions in the cases of positive effects (hiring) or larger proportions in the case of negative effects (layoffs).<sup>57</sup>*

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<sup>55</sup> See Nobles' discussion of the role of the Brazilian Census in the shaping and interpreting of the categories and the efforts of the Brazilian Black Movement to contest those meanings. Nobles, op cit.

<sup>56</sup> See Projeto de Lei n. 1332/1983 in Abdias Nascimento, Combate Ao Racismo, Camara dos Deputados, Brasilia, 5th Volume, 1985, p. 35-39

<sup>57</sup> Nascimento's other legislative proposal in 1983, Projeto de Lei n. 1661/1983, is given in Prudente, op cit, p.259. Nascimento had lived in the US during the military dictatorship, during which time he became familiar with North American law.

Evidence of direct discrimination consisted of the spoken word or the “subjective activities” of the defendants, which might have enabled alternative methods to show intent. Nascimento’s proposed use of statistics might have opened the possibility of systemic or collective claims. The use of the proposed empirical tests would certainly have expanded the law to address indirect discrimination. Finally, he distinguished compensatory measures for historically disadvantaged persons from “discriminatory” measures, which countered the prevalent idea that all distinctions are discriminatory. Nascimento’s proposal, undoubtedly influenced by his exile in the US,<sup>58</sup> would have opened evidentiary possibilities that still do not exist.

Nascimento proposed in 1984 that 40% of diplomatic openings be reserved for candidates of the “Black ethnicity”. The Brazilian diplomatic corps has continually been extremely White, acknowledged by Arinos in 1950 and 1988. However, the House Commission on the Constitution and Justice ruled the project to violate the constitution:

*The unconstitutionality of the project is flagrant . . . The allocation of a specified number of opening for candidates of the Negra ethnicity in fact constitutes discrimination against other ethnic groups . . . Violations of the constitutional principle [of equality] should be contested by judicial means and not by the creation of privileges which are as discriminatory as those the project seeks to rectify.<sup>59</sup>*

This assertion of the principle of non-discrimination effectively denied the possibility of remedy.

Brazilian officials treated other of Nascimento’s proposals to remedy past racial discrimination as discriminatory. His proposed increase in the percentage of “Blacks

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<sup>58</sup> Conversation with Anani Dzidienyo, who is completing an authoritative biography of Abdias Nascimento.

<sup>59</sup> Do Nascimento’s proposed law 3196/84 was cited by Bertulio (1989, p. 216-7).

and *Mestiços*" in the public service received a similar fate. The House Commission on the Constitution and Justice (CCJ) also found that proposal unconstitutional but based a different, more pragmatic argument:

*If we admit this precedent, we can expect future laws reserving 10% for jobs in the public and private sector for Reds, then for Yellows, etc, until few or new openings will remain equal in the Constitutional sense.*<sup>60</sup>

By enumerating other possible claims without addressing the legitimacy of any claims, this holding diminished the claims of Brazilian "Blacks" and "Browns".

Congress approved a more modest proposal by Nascimento to create a "Black" Commission that would receive and investigate racial discrimination complaints and develop policy proposals addressing the cultural, educational, occupational, and other economic interests of the "Black" Community. This Commission had a short, symbolic mandate that would last until May 13, 1988, the centennial of the abolition of slavery. The CCJ initially considered this proposal as a form of "positive" discrimination and therefore unconstitutional. According to that opinion, this proposal discriminated against the not-included "races" and could not constitutionally redress "negative" discrimination.<sup>61</sup>

In 1985, Congress passed a slight revision to the Arinos Act that did not incorporate Nascimento's or Camargo's proposals. This revision added sex and marital status to the prohibited forms of prejudice.<sup>62</sup> It also updated fines, since currency and monetary value had changed dramatically since 1950. For example, the lone conviction

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<sup>60</sup> The proposed law 2,206/79 of Deputy Edson Khair was cited by Bertulio (1989, p. 217-8).

<sup>61</sup> See the Parecer of Projecto de Resolucao n. 172-A in Abdias Nascimento, Combate Ao Racismo, Camara dos Deputados, Brasilia, 4th Volume, 1985, p. 44-48

<sup>62</sup> See Bertulio (1989).



in the 1970's of a bar in Minas Gerais for blocking the entrance of two "Black" students had resulted in a \$10 fine.<sup>63</sup> This modification did not alter the definition of racial discrimination as segregatory acts nor its classification as a misdemeanor. The efforts of Black activists to expand the conception and upgrade the classification of acts of racial prejudice had not yielded legislative change.

### **Constitution-Making Activities**

Black activists realized their decade-long quest to upgrade the criminal classification of racial discrimination in Brazil's new Constitution. The new Constitution made the welfare of all, free from racial prejudice one of the fundamental principles of the republic and discussed racism, racial discrimination and unequal treatment by reason of color in ten clauses,<sup>64</sup> three of which were key. These clauses contained diverse notions of racial discrimination: including the attitudinal conception of racial discrimination and a notion of unjustified differentiation. The clause that upgraded racial discrimination from a misdemeanor to a non-bailable crime reflected the attitudinal approach that defines racial discrimination as the act of racial prejudice.

Brazil's transition from the authoritarian military regime of the 1960's and 1970's to the democratic election of its President in 1989 occurred through the political and extra-political mobilization of broad sectors of society. A broad anti-regime party, the MDB, united many elements opposed to the dictatorship, and achieved decisive support

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<sup>63</sup> Andrews, op cit, p 185.

<sup>64</sup> See Mitchell (2000, p. 7).

in several elections, termed a transition through elections.<sup>65</sup> Several Brazilian popular movements, particularly labor, clergy, rural, and women's movements, must also be credited with forging the democratic opening.<sup>66</sup>

This period of considerable societal mobilization culminated in a highly participatory constitution-making process beginning in 1987. Although the Black Movement did not play a significant role in forging the democratization, Black activists became increasingly vocal and mobilized during the 1980's. Many participated in the other movements and created spaces to articulate racial concerns. Several ran openly as Black candidates for political offices in the 1982 elections and fared poorly.<sup>67</sup> Activists also encountered difficulties advancing an explicit racial agenda within the newly founded political parties.<sup>68</sup> Of the new parties, the PDT<sup>69</sup> (Democratic Worker's Party) was the first to provide a political forum for the articulation of Black issues. On his return to Brazil in 1979, Abdias Nascimento assumed a visible position within the PDT as its spokesman for race. Many activists participated in the Worker's Party (PT) and the PDMB (successor to the MDB) which provided more limited space initially to articulate racial concerns.<sup>70</sup> Activists also organized within autonomous

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<sup>65</sup> See Bolivar Lamounier, "Authoritarianism Brazil Revisited: the Impact of Elections on the Abertura", Stearn (1989, p 43-82).

<sup>66</sup> See Sonia Alvarez, "Policitizing Gender and Engendering Democracy" in Stearn (1989, p 205-251); Margaret E. Keck, "The New Unionism in the Brazilian Tradition", in Stearn (1989, p 252-298); and Maria Helena Moreira Alves, "Interclass Alliances in the Opposition to the Military in Brazil: Consequences for the Transition Period" in Eckstein (1989, p. 278-298).

<sup>67</sup> See Valente (1986).

<sup>68</sup> See Joao Baptista Borges Pereira, "Aspectos do Comportamento Politico do Negro em Sao Paulo", Ciencia e Cultura, Vol 34: n 19, October, 1982, p. 1286-1294.

<sup>69</sup> The PDT was the successor to the PTB that Vargas had founded in 1944. Its leader, Lionel Brizola, had been extremely vocal in the PTB during the 2nd republic.

<sup>70</sup> See Gevanilda Gomes dos Santos, "Partidos Politics e Etnia Negra". [Master's (continued...)]

organizations. Several national Black umbrella organizations identified changes in anti-discrimination law prominently among other important demands: seeking to eliminate the Arinos Act, replace it with a constitutional clause for racial equality, and a declaration of racial prejudice as a crime.<sup>71</sup> A national convention of 63 Black organizations from 16 states placed the criminal upgrading of racism at the top of the demands it presented to President Sarney in 1986. The convention also sought to outlaw the employment criterion, *boa aparência*.<sup>72</sup>

The Constitutional Convention began February 1987 with an elaborate structure to incorporate popular participation, based upon the work of the Constitutional Commission chaired by the same Senator Arinos, now near the culmination of his career.<sup>73</sup> Of the more than 500 elected representatives to the Constitutional Convention, seven were "Black". These seven represented 1% of the delegates to the Constitutional Convention in a country whose population was officially and minimally 45% "Black" and "Brown". Four of these seven articulated "Black" concerns and participated in a Sub-Commission on "Blacks", Indigenous Populations, Disabled Persons, and Minorities. (hereafter: Sub-Commission)<sup>74</sup>

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<sup>70</sup>(...continued)

Dissertation: Univeristy of Sao Paulo]. 1992.

<sup>71</sup> Nascimento, op cit., 1985, p. 53.

<sup>72</sup> See articles in the Jornal de Brasil, August 18 and 27, 1986, the appendix from Belo Horizonte in Carlos Micheles, et al, 1989, and Glouria Moura, "Negro, Sociedade, Constituinte." São Paulo em Perspectiva. Vol. 2: No. 2. April/June 1988.

<sup>73</sup> This Arinos Commission had had only one Black member, Helio Santos, among approximately fifty members.

<sup>74</sup> The term used to describe a "Black" who identifies as "Black" is *Negro assumido*, to distinguish from Blacks who do not identify as Black. That Black identity needs to be "assumed" is also evident from the title of an important work about the psychology of Brazilian racism, Tornar-se Negro, [Becoming Black]. See Moura, op cit.

The Sub-Commission was established under the Commission on the Social Order, which significantly compartmentalized the issues in front of the Sub-Commission. By comparison, a full Commission on the Equality of Men and Women was established.<sup>75</sup> The quantity of proposals and the political mobilization of the women's movement dwarfed the articulation of the Black Movement. Moreover, the needs of Brazil's "Black" and "Brown" citizens were not as fully articulated as those of other constituencies addressed by the Sub-Commission,. This might have been a consequence of the relative mobilization of the different constituencies, the relative perception of groups as deserving,<sup>76</sup> or the clarity of group identity. Although all identities are socially constructed, women, Indians, homosexuals, and disabled persons are much more clearly identified categories in Brazil.

The deliberations of this Sub-Commission illuminate how the efforts to achieve race equality have been bounded by individualist fairness and deference to tradition. Brazilian Black Movement activists wished to secure opportunities to enable individual "Blacks" and "Browns" to succeed on socio-economic terms. Most activists discussed a highly inegalitarian Brazil that discredited but disagreed about the policy implications: to what degree the problem primarily pertained to the social-cultural sphere or the political-legal sphere. Some felt that racial discrimination was a cultural problem because Brazilian "Blacks" and "Browns" were unlikely to recognize their African heritage.

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<sup>75</sup> Carlos Micheles et al, 1989, p.64.

<sup>76</sup> See Jose Antonio Carlos Pimenta and Lourierdes Fiuza dos Santos, "O Negro e a Ordem Social", in Vania Lomonaco Bastos and Tania Moreira da Costa (orgs.), Constituinte: Temas em Analise, Caderno CEAC, University of Brasilia. Year 1, N. 1. 1987. P 112.

The Sub-Commission considered three proposals to strengthen the legal rights of "Blacks" or "Browns": the upgrade of the criminal classification of racism, the extension of the constitution principle of non-discrimination to the equality of conditions, and the adoption of compensatory measures for victims of discrimination. These proposals, the only proposals that addressed the legal rights of "Browns" and "Blacks", also pertained to the other groups in front of the Sub-Commission. However, the Sub-Commission considered positive, compensatory measures not limited to direct victims for other groups, including indigenous populations, disabled citizens, and gay Brazilians, that did not pertain to "Blacks" and "Browns".

Of these three proposals, the Sub-Commission considered and approved the upgrading of the criminal classification of racial discrimination without controversy. That clause was incorporated into the Sub-Commission's final report and the Constitution. Most of the controversial discussion pertained to the second and third proposals, about what might be done to combat discrimination and to promote equality.

Florestan Fernandes testified at the initial meeting of the Sub-Commission about the manifestations of Brazilian prejudice:

*Rarely do Brazilians have the courage to admit being prejudiced. Our prejudice is not open, systematic (compared to the US). It is covert and indirect, which permits the "White" and "Black" to have a conviviality with false appearances, which has negative consequences for the "Black", producing a tremendous uncertainty as to whether or not to combat prejudice, because the situation might only worsen . . . The result of this is that the "Black" comes to see the world through the eyes of the "White".<sup>77</sup>*

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Assembleia Nacional Constituinte, Diário, Year 1, Supplement 62, May \_\_, 1987, p142

Fernandes discussed the psychology of Brazilian color domination. He elaborated his often-cited comment that Brazilians have the “prejudice of not being prejudiced” and the impact that this denial has upon discriminatory practices. Fernandes noted that the failure of anti-discrimination law has contributed to the uncertainty for the Brazilian Black who recognizes mistreatment. Without a credible sanction, the fear of reprisal outweighs other considerations. Brazilian “Blacks” and “Browns” see the world through the ‘eyes’ of the White prevent problems from arising.

Fernandes argued that the existence of the Arinos Act mattered but that the critical factor is for the protected groups to have the capacity to use the law. He described criminal justice officials, from the police to the judge, as acting “negligently (in applying the law) because they are united by a solidarity of race, class, region.”<sup>78</sup>

Leila Gonzalez, a sociologist and Black Movement activist, testified at the second panel, that Brazil was extremely racist and in that regard “similar to the US”. She drew that comparison pointedly and depicted a hierarchical society in which “each knows his place”. Gonzalez argued that African influences were visible in the language and culture, but that the ideology of *racial democracy* was a “theatrical discourse” that disguised the “real apartheid” in Brazil.<sup>79</sup> The second speaker, Helena Teodoro, also criticized the traditional view of the US as the racist country and Brazil as the exception. She proposed new public school curriculum that include the African past.<sup>80</sup>

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<sup>78</sup> Ibid, p143.

<sup>79</sup> Op cit, May 20, 1987, p. 121-2.

<sup>80</sup> Ibid, p. 122-4.

After this biting critique of Brazilian *racial democracy*, the Sub-Commission's *Relator*, (official reporter, an influential position) Alceni Guerra of the conservative PFL, questioned whether racial segregation existed in Brazil:

*As I speak here today . . . I look out toward the audience and see a pretty White woman sitting next to two extremely pretty "Black" women, persuading me that racial segregation is not that much of a factor in Brazil . . . I remember some individual segregationists, who believe in that ugly phenomena, racial segregation.<sup>81</sup>*

Guerra redirected the discussion from the attack on Brazilian racism to a subjective that equated racial discrimination as racial segregation practiced by individuals. In contrast to this segregation, Guerra described the interaction of Brazilians across color lines in very personal terms:

*Could there be anyone of my generation who has not loved a "Black" woman? I'm not speaking sexually but really of love - to sit together, holding hands, talking, to take pleasure in trading ideas . . . I've had "Black" supervisors, co-workers and subordinates . . . Some excellent friends, including doctors, are married to "Black" women . . . including brothers and cousins of my father.<sup>82</sup>*

Guerra further redirected the discussion from the tremendous problems Brazilian Blacks face to the more comfortable realm of personal relations.

Guerra argued that segregation, a legacy of slavery and the regional concentration of Brazilian slaves in the North, posed a cultural, rather than legal question. He thought this problem could be solved by education, "In those places . . . where this hideous crime of segregation exists, it can be corrected through a process of education. Culture will change afterwards."<sup>83</sup> Further, he saw racial discrimination as

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<sup>81</sup> Ibid, p. 129.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

an individual characteristic rather than societal phenomena. Based upon this account, Guerra concluded that the law only needs to guarantee formal equality:

*I am not disposed to include in the constitution any article that favors any racial segment: not "Blacks", not Whites, not Asians, not Indians. Liberty before the law is absolute justice: liberty and equality.*<sup>84</sup>

Guerra restated most tenets of *racial democracy* and advocated a narrow conception of state action that would seek to change individual attitudes. To Guerra, racial preferences were neither permissible nor justifiable to remedy discriminatory practices.

Guerra's provocative defense of *racial democracy* placed his opponents on the defensive. Although other participants criticized his comments, they also assured Guerra that no one had favored the policies he found objectionable. As Helena Teodoro insisted, she sought was the condition of equality, "I don't wish to discriminate because I know what it is to be discriminated against. I wish to be equal. I wish there to be opportunities for others to liberate themselves."<sup>85</sup> Helena Teodoro emphasized mechanisms to increase equality in choices rather than equality in circumstances. She emphasized the Brazilian principle of non-discrimination and individualist achievement, and opposed the possible use of preferential policies in education, training or employment.

Lelia Gonzalez proposed "starting gate equality" policies to address the real circumstances of those competing for society's goods: "constitutional mechanisms that bring about an effective beginning for conditions of equality for the 'Black' community in

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<sup>84</sup> Ibid.

<sup>85</sup> Helena Teodoro, published in the Assembleia Nacional Constituinte, Year 1, Supplement 62, May 20 1987, p. 131.



this country."<sup>86</sup> Ricardo Dias, of the Conselho da Comunidade Negra in São Paulo, a state agency addressing "Black" issues, concurred. A speaker from Bahia also advocated concrete proposals that could bring about conditions of equality of opportunity and not the equality of outcomes, "We don't want to require that someone be hired simply because he is "Black", but to promote equality of conditions and prohibit discrimination."<sup>87</sup>

Only one speaker Helio Costa, advocated affirmative action at the Sub-Commission. Costa argued affirmative action would create a necessary requirement for firms whose employees are not reflective of society to hire Blacks.<sup>88</sup> Most participants expressed many reservations about affirmative action. Ricardo Dias opposed reserving public sector openings for "Black" workers. Dias objected that any mandated target seemed arbitrary and suggested that "Black" workers could become vulnerable in firms where they had already exceeded the mandated target. Further, Dias worried that poorer "Blacks" would not really be able to benefit from affirmative action:

*Unfortunately, because of marginalization, "Blacks" are not prepared today for all posts . . . in particular, administrative posts. If we require 60% of the openings, we will not be able to fill them across the firm.*<sup>89</sup>

As did other speakers, Dias called for equality of access to education and technology. This important articulation of the problems of accumulated disadvantage did not generate linkage between educational and labor market policy.

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<sup>86</sup> Lelia Gonzalez, op cit, p130.

<sup>87</sup> Ibid., p. 137-8.

<sup>88</sup> Ibid. p. 133.

<sup>89</sup> Ibid, p.134-5.

Perhaps the deeper concerns behind the objections to affirmative action were pragmatic. Benedita da Silva believed that the principle of equality would also yield a principle of proportionality, without creating the opposition that equality of outcomes would engender, "It is politically preferable to demand equality that reflects our presence in the population, because if we demanded 30 positions, it would open a heated debate."<sup>90</sup> Representative da Silva specifically voiced the concern that the Sub-Commission not encounter the fierce opposition that had befallen Senator Nascimento's proposals in 1983. This concern for equality generated a clause in the Sub-Commission's Report that the state would 'promote social, political and economic equality' which was incorporated in the text of the constitution.

The Sub-Commission considered a proposal to provide compensatory remedies to victims. These compensatory measures were defined as preferences for particular citizens or groups of citizens to insure their equal access to the labor market and other social resources. The Sub-Commission recommended such measures to victims who had demonstrated concrete claims of discrimination:

*The adoption of compensatory measures to enforce the constitutional principle of equality toward individuals or groups who were victims of proven discrimination, will be considered.*<sup>91</sup>

This provision is fully consistent with a color-blind framework that only offers redress to victims of specific claims.<sup>92</sup> By compensating victims, that clause would have

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<sup>90</sup> Ibid, p. 133.

<sup>91</sup> The Report of the Sub-Commission was published as the AnteProjeto: Assembleia Nacional Constituinte, VII - Comissão de Ordem Social, VII-c - Subcomissão dos Negros, Populações Indígenas, Pessoas Deficientes e Minorias. Approved May 25, 1987. See page 3.

<sup>92</sup> See Edley (1996) on the color-blind framework. Most opponents of racial preferences in  
(continued...)

represented a concrete advance beyond a commitment to punish “acts of racial prejudice” which punishes perpetrators. The Sub-Commission included this provision in the its Report, but it was not incorporated into the Constitution.

The Constitution included three clauses that addressed racial discrimination. First, it established the welfare of all citizens, regardless of origin, as one of the four fundamental objectives of the Brazilian Republic: "To promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination."<sup>93</sup> This clause commits the state to insure the well-being of all citizens, which could provide the basis for further governmental action.

Second, in its detailed chapter on social rights, the Constitution protects workers from discriminatory treatment in hiring criteria, performance of duties, and salary: "Prohibition of any difference in salary, in performance of duties and in hiring criteria by reason of sex, age, color or marital status."<sup>94</sup> This clause offers substantive coverage for equal treatment in the workplace, pertaining to hiring, duties, and salary. Unlike the anti-discrimination law, this clause does not punish acts of prejudice but prohibits discrimination based upon race, color or other bases. However, this clause does not mention promotion or dismissal and falls short of international standards.<sup>95</sup>

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<sup>92</sup>(...continued)

the US still would concede remedies to victims with proven claims.

<sup>93</sup> See Title I, "Fundamental Rights", Article 3, Chapter IV of the 1988 Constitution of the Federative Republic of Brazil, in Dolinger and Rosenn (1991, p. 384).

<sup>94</sup> See Title II, Chapter II, "Social Rights", Article 7, Chapter 30 in Dolinger and Rosenn, (1991, p. 392).

<sup>95</sup> Indeed, the potentially most far-reaching victories among the racial discrimination cases occurred through a case in the labor courts, based upon this clause. See chapter 6.

Third, the Constitution promised to punish racism: "The practice of racism constitutes a crime that is subject neither to bail nor to the statute of limitations and is punishable by imprisonment, according to law."<sup>96</sup> This formulation makes racism a much more serious crime than had the anti-discrimination law of 1951, by upgrading the crime from a misdemeanor to a non-bailable felony. After pressing to upgrade racial discrimination for a decade, the Black Movement claimed a historic victory.

### **New Anti-Discrimination Law of 1989:**

After achieving the Constitutional victory in upgrading the criminal classification of racism, the Black Movement sought to implement the Constitutional provision punishing racism in new anti-discrimination law. In 1988 Brazil publicly recognized the 100th anniversary of the formal abolition of Brazil slavery. Senator Carlos Alberto Caó, the primary sponsor of the anti-discrimination law, (PDT), argued that "Black" citizenship had been constrained since the ending of slavery:

*Although a century has passed since the ending of slavery, we have still not completed the political revolution begun in 1888. Diverse forms of racial discrimination, veiled or ostentatious, continue to effect more than half the population, composed of Blacks or their descendants, who still do not fully enjoy the rights of citizenship. Since the practice of racism brings about the equivalent of a civil death, we must transform it into a crime.<sup>97</sup>*

To Caó, treating racial discrimination as a misdemeanor was an insufficient deterrent that equated racial discrimination with parking tickets and communicated the state's

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<sup>96</sup> See Title II, Chapter 1, "Individual and Collective Rights and Duties", Clause 42 in Dolinger and Rosenn (1991, p. 387).

<sup>97</sup> Caó's speech to the Congress was quoted in Da Silva (1994, p. 134).

tolerance. Thus, he saw the upgrading of racial discrimination to a felony as necessary to communicate the state's intent to fully prohibit racial discrimination.<sup>98</sup>

Caó's supporters in the Senate also stressed the importance of this law to communicate the new intentions of the state. Senator Amaury Muller (PDT) asked how Brazil could communicate that differentiation on the basis of the color of skin, hair, or eyes, was unacceptable and intolerable unless the crime was upgraded from a misdemeanor.<sup>99</sup> Another of Caó's colleagues, Senator Mauricio Correa (PDT) stressed the communicative aspect of the law:

*More than a consequence of constitutional principles, the existence of anti-discrimination legislation is incontrovertible. We must have full constitutional and legal support for the application of **severe punishment** to those who, in the exercise of their rights, forget about the rights of others and the obligations of citizenship.<sup>100</sup> (emphasis added)*

Mitchell has rightly argued that this measure represented a tremendous break from previous eras by communicating the state's condemnation of racial discrimination.<sup>101</sup>

Senator Jose Paulo Bisol, of the Brazilian Socialist Party (PSB) thought that the law violated the proportionality between a crime and its punishment. He argued that blocking of access to an elevator, one article of the law, really constituted a 'misdemeanor', and did not deserve such a severe penalty. Thus, he predicted that

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<sup>98</sup> This line of rationale is summarized from a speech Caó gave on the floor of the Senate, May 11, 1988, the 100th anniversary of the abolition of slavery, and a lengthy interview given in a Black Movement newspaper. For the former, see, Diario do Congresso Nacional II, May 11, 1988, published June 15, 1988, p.2208-9. For the latter, see Paquim, March 10-16, 1988, Year 19: N 972.

<sup>99</sup> Diario do Congresso Nacional II, published September 16, 1988, p.3175.

<sup>100</sup> Diario do Congresso Nacional II, op cit, published November 24, 1988, p.3480.

<sup>101</sup> Mitchel (2000).

judges would not really apply the law.<sup>102</sup> In so doing, Senator Bisol downplayed the seriousness of the “service elevator”, an important discriminatory mechanism used in many buildings to differentiate Brazilians.<sup>103</sup> However, his question about the relationship between the severity of a law and its deterrent value would prove prophetic for the application of the law. Senator Leite Chaves similarly argued that the deterrent value of a law was not expressed by its severity but the certainty of its enforcement.<sup>104</sup>

The law continued the definition of racial discrimination within the causal, criminal model that promised to “punish those crimes resulting from prejudice of race or color.” This conception of discriminatory acts as expressions of prejudice makes the acts mere phenomena and secondary to the motivation, the key juridical concept. The classification of racial discrimination as a non-bailable felony increased the penalties that could be awarded, heightened the evidentiary requirements given the possible imprisonment of defendants, enumerated new protected sites, and broadened some of the coverage. The law incorporated provisions from its predecessor, the Arinos Act, that prohibited the refusal to serve individuals because of race or color prejudice in employment, education, commercial establishments, and the armed forces. In addition, the new law prohibited the denial of access to public transportation, public buildings and all elevators and increased criminal sentences for all criminal acts.

The law created three sets of rights: non-discrimination in (1) public places, (2) employment or other contractual relations, and (3) familial and personal matters. The first set of rights provides protection to enter a public place, such as a restaurant, hotel

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<sup>102</sup> Diario do Congresso Nacional II , op cit., published November 24, 1988, p.3481.

<sup>103</sup> See Paulo Sergio Pinheiros, " ", Folha de São Paulo, Date, page.

<sup>104</sup> Diario do Congresso Nacional II , op cit. published November 25, 1988, p.3610.

or other public establishment or resource Most clauses (articles 6-12 in Table 3.3) prohibit the blocking of access and the refusal of service, which most strongly express the idea of racial discrimination as racial segregation.

**Table 3.3: Anti Discrimination Act of 1989 (7716/89)\***

Specific Right	Site or Location	Article
Selection may not be blocked:	● Any position in the public sector or Armed Forces.	3
	● Private sector employment.	13
	● School enrollment.	4
	● Spouse.	6
Access to public place may not be blocked nor service refused	● Stores	14
	● Hotels	5
	● Restaurants	7
	● Social clubs	8
	● Hair saloons	9
	● Public transportation	10
Access to a public place may not be blocked:	● Building entrances and elevators	11
Well-being assured in use of institution:	● Familial and social life.	12

\*Source: Silva (1998).

The second set of rights provides protection to access to a job or position in the armed services. The employment clauses are weak, addressing the entry to, and possibly exit from, a firm. The public sector coverage guarantees the right to any position, which might cover promotion. The private sector coverage prohibits blocking access to work.

Finally, the third set of rights protect one's personal and family life, delineated in article 14. This clause protects one's daily enjoyment of an institution, the family, and the right to one's choice in marriage. This protection is stronger than the employment clauses which protect neither choice nor daily enjoyment.

In the Senate, the clause protecting familial and social life generated a predictable controversy.<sup>105</sup> Senators sought to balance the right of Brazilians to marry and interact freely, the role of the mother-in-law in insuring marital choice, and importance of the Brazilian nation. Senator Mauricio Correa (PDT) advocated punishing: "any interference or refusal of any party of any Brazilian or person coming to Brazil helping to construct the grandness of this land."<sup>106</sup> He subordinated the rights of the mother-in-law to preserve the fiction of the nation as the fusion of persons.

Senators did not display the same level of concern about interference with choice in other clauses. Senators feared that employers, school administrators and others would be overly restricted and unable to function effectively, seeking to protect the market from legal intervention. Senator Leite Chaves (PMDB) asked how a judge would view a school without openings that refused a prospective student. Senators did not invoke larger ideological questions in this much shorter discussion.

The law was passed by Congress in January, 1989. President Sarney vetoed four clauses of the anti-discrimination law. Of the four vetoed clauses, three would have increased the severity of the law, and a fourth would have expanded the ambit of the law. That fourth clause would have expanded the basis of the law to include discrimination motivated by social, economic, political, or religious reasons.<sup>107</sup> That language would have significantly expanded the basis of the law.

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<sup>105</sup> Senador Nelson Cameiro (PMDB) Diario do Congresso Nacional II, (November 24 1988, p.3480).

<sup>106</sup> Diario do Congresso Nacional II (November 24, 1988, p.3481).

<sup>107</sup> See President Sarney's justification for the veto, Mensagem No. 09, January 5, 1989; Published in the Diario Oficial, January 6, 1989. See the criticism of the vetos by Oswaldo Barbosa Silva, 1st secretary to Deputy Cao, Indicao, January 23, 1989. (on file)



Caó was singled out for his role in sponsoring the new law, which became known as the *Lei Caó*. Senator Cid Saboa Carvalho, PMDB, attacked Caó after the passage of the law and accused him of being prejudiced and embarrassed by the condition of the Black. Responded Caó, "Like most Blacks, I always suffer this type of manifestation . . . Racial prejudice is generally not directly manifested "<sup>108</sup> Although he had feared that the new law might stir an "antagonism between Blacks and Whites"<sup>109</sup> , Senator Afonso Arinos proclaimed that the new law was a "legislative advance".<sup>110</sup>

### **Amendments: Closing the *Injúria* Loophole**

Black Movement mobilization continued to grow in the period since the Constitution. Some activists attained governmental positions, and several state and municipal governments established Black Councils. Numerous NGO's gained prominence for legal advocacy and other initiatives. Similar to the political opportunities in 1988 as the centennial of the ending of slavey, 1995 provided opportunities as the 300<sup>th</sup> anniversary of the birth of Zumbi, a leader of escaped slaves who established an autonomous colony in the 18th century. The Black Movement effectively contrasted the two commemorations by portraying Zumbi as a courageous subject of his own history.

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<sup>108</sup> A newspaper article was cited in Ferreira's thesis. "Caó, de diabo e alferes a deputado", Jornal do Brasil, 12/15/88. Ricardo Alexino Ferreira. A Representação do Negro em jornais no centenario da abolição da escravatura no brasil. [Master's Thesis: USP] 1993. p88

<sup>109</sup> See Andrews (1991, p. 186).

<sup>110</sup> Ferreira cited another article, "Caó e homenageado na assembleia do Rio", O Globo, 6/18/88. Ferriera, op cit, P. 70.

Despite only a handful of Blacks elected to Congress, the Black Movement succeeded in securing three amendments to the anti-discrimination law of 1989: in 1990, 1991 and 1997. These amendments have constituted real victories for the Black Movement and expanded the scope of the law. The first two amendments expanded legal coverage to address racist portrayals in the media:

*To practice, induce or incite discrimination or prejudice of race, color, religion, ethnicity or national origin through means of social communication or publication of any nature.*<sup>111</sup>

The clause prohibits acts that "practice, induce or incite" prejudice or discrimination. The last two verbs, the "induce" or "incite" standards, are more difficult to satisfy than the "practice" standard, and effectively require an effects test of audience response.<sup>112</sup>

The police have classified most racial discrimination allegations filed under the new law as *injúria*, an injury to one's honor and a much lesser crime than racism.<sup>113</sup> Unlike racial discrimination, which is a public crime, *injúria* is a 'private crime' in Brazil. The offended party must seek private representation because the state has no legal requirement to prosecute *injúria*. Allegations of *injúria* are less likely to receive a full police investigation or judicial proceeding. The classification of *injúria* treats the alleged

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<sup>111</sup> See Osorio Fabio Medina and Jairo Gilberto Shafer, "Dos Crimes de Discriminação e Preconceito - Anotacoes a Lei 8.801, de 21.9.30". Revista dos Tribunais. Ano 84. April 1995. Vol: 714. P. 333.

<sup>112</sup> See Apelação Criminal N. 153.122-3/0 (São Carlos), Tribunal de Justiça do Estado de São Paulo, February 1995.

<sup>113</sup> See Racusen, "Reclamando Cidadania No Mercado de Trabalho em São Paulo." in Munanga (1996). See also discussion of Research Report by Center for Workplace Relations (CEERT) in "Racismo Acontece Mais No Trabalho". Folha de São Paulo. Sept. 3, 1997.

acts as a violation of a personal nature rather than a loss of a protected resource, and makes racial discrimination a problem between individuals.

**Table 3.4: Amendments to Anti Discrimination Act of 1989 (7716/89)**

Specific Right	Site or Location	Article
Outlawed the practice or inducement of any kind of prejudice. <sup>a</sup>	Means of communication	20
Enjoyment of personal honor, restriction of personal insults that refer to race, ethnicity, religion or national origin. <sup>b</sup>	Anywhere	140 <sup>c</sup>

<sup>a</sup> As amended by 8,081/90 and 8,182/94. Santos (1998).  
<sup>b</sup> As amended by 9,459/97. Santos (1998).  
<sup>c</sup> Article of the Penal Code. Santos (1998).

The classification of the complaints as *injúria* has been widely reported in the media, and Black legislators, lawyers and activists determined to address this problem. Senator Paul Paim (PT) sponsored the third amendment that sought to close the *injúria* loophole. This amendment expanded the definition of the proscribed acts: "*This law will punish those crimes resulting from **discrimination or prejudice of race, color, ethnicity, religion, or national origin.***" (new language emphasized) This language extended the basis for all discriminatory acts in all sites to include ethnicity, religion and national origin. Further, the expansion of the law to condemn "crimes resulting from discrimination" expressed a causal complexity that could yield unintended problems.

Further, the amendment of 1997 placed race, color, ethnicity, religion or national origin in Brazil's penal code which the police utilize to classify allegations. Although *injúria* remained a private crime, the creation of a legal category could influence police

to take allegations more seriously and might better fit the majority of allegations.

Finally, this amendment punished *injúria* with references to race, color, ethnicity, religion or national origin which does not require prejudicial intent.

Finally, this new amendment also stiffened the punishments for *injúria* with references to race, color, ethnicity, religion or national origin. Stiffening penalties can inhibit criminal activity and also judges already reluctant to enforce a law. An influential human rights official in São Paulo, Luiza Nagib Elug, warned that "*the penalty is very weighty and weighty penalties tend not to be enforced.*" An important legal scholar, Damasio de Jesus, stressed that the new amendment violated the principle of 'proportionality' between a crime and its punishment. He noted that a crime against honor had become equivalent to unintentional murder.<sup>114</sup>

Most significantly, these amendments continued the theoretical model of the legislative initiatives of the Black movement. These amendments sought to address the gaps in an enumerated criminal law that primarily punished acts of prejudice. The theoretical conception of racial discrimination was largely intact from 1951.

### **Comparative Note: the Brazilian Construction of Other Forms of Discrimination**

Brazil has not constructed other forms of discrimination so narrowly, akin to narrowing of racial discrimination to racial segregation. Discrimination against women, Indigenous persons, or the disabled, has not been similarly narrowed to segregation or an act of prejudice.

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<sup>114</sup> Eunice Nunes, "Nova Lei contra o racismo tenta punição mais eficaz", Folha de São Paulo, May 17, 1997, p3-2.

The constitutional rights and implementing laws passed for other groups reflect broader conceptions of discrimination. The collective interests of the disabled are discussed in a complex, ambitious law to improve the position of the disabled person. The law established individual and collective rights and criminalized discrimination, broadly conceived. This law guaranteed the constitutional rights of disabled persons "free from discrimination and prejudice of any type". This unconditional guarantee is much broader and stronger than the protections in enumerated sites in the anti-discrimination law of 1989. The clause created a new public agency with enforcement powers and required policies to establish labor market positions in both public and private sectors.<sup>115</sup> This last objective was implemented by a law in 1991.<sup>116</sup>

Other groups gained "positive" rights to concrete resources. Women secured the possibility of fiscal incentives to firms that employed women in the new Constitution, which specifically provided "*protection of the job market for women through specific incentives, in the terms of the law.*"<sup>117</sup> The women's movement also secured a law that requires that 20% of the candidates nominated for public office be female.<sup>118</sup> The Worker's Party (PT) and its associated trade union confederation (CUT) instituted stronger goals for their leadership bodies.

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<sup>115</sup> Public Law n. 7.853 of October 24, 1989. Brazilian Congressional Library Website. <http://bdtextual.senado.gov.br/>. Consulted March 7, 1997. Signed October 24, 1989.

<sup>116</sup> See Rosana Beraldi Bevervanco Ludwig, "Criminalização do preconceito. Recusa na admissão do trabalhador portador de deficiência." Genesis, Revista de Direito do Trabalho. Curitiba. N. 25. January 1995.

<sup>117</sup> Dolinger and Rosenn (1991, p. 392).

<sup>118</sup> Public law 9,100/95 in the "Report on the Situation of Human Rights in Brazil, the Organization of American States, 1997, Web-site of the Organization of American States, <http://www.cidh.oas.org/countryrep/brazil-eng/index%20-%20brazil.htm>, consulted: April 1, 2002, p. 133.

In 1999, the Brazilian Congress substantially modified the Brazilian Labor Code to protect the position of female workers. This law protect most aspects of the employment relationship, including selection criteria, salary, advancement, training opportunities, and firing, from differentiation on the basis of gender, race, family status or pregnancy. An exception was allowed for criteria "required by the nature of the activity to be performed".<sup>119</sup> This law effectively implements several Constitutional clauses and could provide a new impetus for anti-discrimination litigation.

Other groups gained recognition as entities with legitimate collective interests. A law of 1985 established broad powers in the Public Prosecutor's Office to uphold the collective rights of children, consumers and those with common environmental concerns.<sup>120</sup> Efforts to use this law to articulate claims on behalf of Black customers have encountered standing problems. Indigenous Brazilians gained numerous rights in the new Constitution. First, they gained the fundamental recognition as a group with rights: *"The social organization, customs, languages, creeds and traditions of Indians are recognized, as well as their original rights to the lands they traditionally occupy."*<sup>121</sup>

Further, the new Constitution broadened the conception of who is an Indian. The Constitution overturned a 1973 law that had categorized Indians according to degree of their assimilation: "isolated", "undergoing the process of integration" or "integrated" and

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<sup>119</sup> See Section 1, Article 1 of Public Law 9,799/99 of May 26, 1999. Web-site of the President, <http://presidencia.gov.br/ccivil/03/Leis/L9799.htm>. Downloaded: October 17, 2001.

<sup>120</sup> See Catia Aida Silva, "Brazilian Prosecutors and the Collecitve Demancs: Bringing Social Issues to the Courts of Justice," paper presented to the 2000 Annual Meeting of the Latin American Studies Association, March 2000.

<sup>121</sup> See Barroso (1995).

designated their rights based upon the relative 'incapacity' of the category.<sup>122</sup> The 1988 Constitution dissolved this historic linkage between rights and degree of assimilation which gave substantive new meaning to the recognition of collective rights.<sup>123</sup>

Thus, in contrast to the broader conception of discrimination and the delineation of positive rights for other groups, "Blacks" and "Browns" gained few particular rights. Brazil has had a much easier time considering discrimination, injustice, and remedies on other axes of inequality.

This circumstance has changed in the past year. The prominent articulation of Brazilian Blackness in the preparatory meetings in the Americas for the UN Conference on Racism in Durban, South Africa in September 2001 and in the Conference produced a demand and expectation of substantial government policy response. Senator Paulo Paim introduced an ambitious new legal project in 2000 that remains in committee but has been implemented in part by other proposals. In the fall of 2001, President Cardoso issued a decree for affirmative action in Brazilian public ministries and public higher education. I will treat these changes more fully in the concluding chapter. Still, as I will show, the theory of racial discrimination contained in Paim's law remains narrow.

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<sup>122</sup>

Ibid.

<sup>123</sup>

The Report on the Situation of Human Rights in Brazil, the Organization of American States, 1997, Web-site of the Organization of American States, <http://www.cidh.oas.org/countryrep/brazil-eng/index%20-%20brazil.htm>, p 94.

## Conclusion

The Brazilian legal construction of racial discrimination remains very narrow. Most clauses of the anti-discrimination law of 1989 protect the admittance to a public establishment, rather than the full, equal enjoyment of the locale. The most clearly protected aspect of the employment relationship is hiring, while many aspects, such as non-promotion and workplace harassment, remain unprotected. The enumeration of sites limits the scope of the law particularly in a civil law country. Civil law judges seldom interpret the law broadly or adopt judicial activism necessary to apply the law to problems omitted in the law. Finally, the law punishes acts of prejudice, which makes the acts the mere vehicles for the prejudice, and continues the theory of racial discrimination as racial segregation.

Although the 1951 anti-discrimination law acknowledged a problem that supposedly had not existed, its theory of racial discrimination was defined within the ideology of *racial democracy*. In keeping with Brazil's claim that racial discrimination only occurred elsewhere, the law promised to punish specified "acts of racial prejudice". That formulation linked the concepts of prejudice and discrimination, and made prejudice the causal aspect of discriminatory acts. The law prohibited segregatory practices, such as blocking the entrance to a public facility. The law declared racial discrimination illegal, immoral, and unBrazilian. The Arinos Act reflected elites responses to concrete allegations of domestic racial discrimination.



**Table 3.5: Evolution of Brazilian National Anti-Discrimination Law**

		<b>Definition</b>	<b>Basis</b>	<b>Sites</b>	<b>Classification</b>
1951	Arinos Act <sup>1</sup>	Acts resulting from prejudice.	Race or color.	Refused access to enumerated public facilities.	Misdemeanor
1985	Arinos Act Amended <sup>1</sup>		Added sex and marital status.		
1988	Clauses in new Constitution <sup>2</sup>	Promotion of the "well-being of all"	Origin, race, sex, color, age and any other forms of discrimination.	A "fundamental objective of the republic"	
		"Any discrimination whatsoever"		"Fundamental rights and liberties"	Felony
		"Any difference ... by reason of " of established basis.	Sex, age, color or marital status.	"Salary, performance of duties and hiring criteria."	
1989	Caó Law <sup>3</sup>	Acts resulting from prejudice.	Race or color.	Refused access to service to expanded list of enumerated public facilities	Felony
1990 & 1994	Caó law amended <sup>4</sup>		Added religion, ethnicity, or nationality for communication.	Added racist communication.	
1997		Acts resulting from discrimination or prejudice.	Added religion, ethnicity, or nationality for all clauses.	Expanded coverage of discriminatory communication.	
		Defamation referring to basis.	Pertaining to expanded basis.	New category of Criminal Code for insults with racial references.	Misdemeanor with larger penalties.

**Sources:**

<sup>1</sup> Public Laws 1390/51 and. 7437/85. Bertulio (1989).

<sup>2</sup> Title 1, art. 3-IV & 4-VIII; Title 2; Chapter 1, Art 5-XLI and 5-XLII; and Chapter 2, art. 7-XXX. Silva (1998)

<sup>3</sup> Public Law 7716/89. Silva (1998).

<sup>4</sup> Public Laws 8081/90, 8182/94, and 9459/97. Santos (1998).

The functionality of framing racial discrimination as racial segregation soon became apparent. The law inhibited explicit discrimination, and societal practices changed to circumvent the scope of the law. Indeed, the law resulted in only a few convictions in its 40 years of vigor. Public officials claimed the lack of use of the law proved its effectiveness and that Brazil had no racial racial discrimination. I suggest that the law, written within the ideology of *racial democracy*, bolstered a central tenet: that Brazil has no racial discrimination.

With very different ideological commitments than the elites, Brazilian Blacks also defined racial discrimination as the crime of racial prejudice. Black activists contested *racial democracy's* claim that there was no racial problem in Brazil, but still viewed racial discrimination as North American. To Black activists, the excuse given to Black customers that "all the empty barber chairs had reservations" seemed secondary to the motive of prejudicial exclusion. Thus, from the 1940's, Black activists characterized these dynamics as prejudicial and distinguishable from North American separation,

Unlike the anti-discrimination act of 1951, the anti-discrimination act of 1989 was sponsored by a prominent Black Senator and championed by organizations in the Black Movement. The new law upgraded the criminal classification of racial discrimination from a misdemeanor to a felony and expanded the list of prohibited acts beyond the 1951 law. The principal innovation of the 1989 law was to protect familial and social well-being, which surely reflected the *racial democracy's* insistence about the importance of mixing for the continuation of the nation. Unquestionably, the new law has represented a stronger channel to articulate problems of racial discrimination.

Nonetheless, Brazil remains poised to fight the wrong problem. The new law, based upon *racial democracy's* definition of racial discrimination, conflates racial discrimination and

racial segregation and inflates the causal requirements for prejudice within a discriminatory act. The law provides no direct remedies to the victim and punishes the perpetrator. The law neither addresses unjustified differentiation nor a concept of harassment. Prejudicial intent is not only necessary to prove an allegation, but represents the central aspect of the discriminatory incident. Despite the intention its, the continued reliance on this theory of racial discrimination has left many discriminatory practices outside of the purview of the law.

The continued reliance on a flawed policy model poses two questions. First, why has Brazil conceived race discrimination so differently from other forms of discrimination? I suggest the difference in the construction of race discrimination originates in the difference between the conception of identity. Women have always been understood as a distinct category, persons to be dominated but whose differences could be permitted. While also subjected to severe oppression, indigenous persons have been more likely to be romanticized and recognized.<sup>124</sup> In the colonial period, arguments against slavery were much more likely to make a case for the 'noble' Indian than for the African slave. Brazilian elites have historically viewed Blackness as threatening and specifically sought to absorb Blacks. *Racial democracy* offered Blacks a cultural space and Browns slight status gains, always within an absorptionist nation. Since Blackness was to be absorbed, the problems of Blacks also had to vanish. Within the ideology of the nation, Brazilian racial discrimination could not exist.

Second, why has Brazil's Black movement advocate a criminal measure based upon the theory of racial discrimination as the 'acts of racial prejudice', knowing that it was difficult to

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<sup>124</sup>

See Wade (1997).

specify those acts?<sup>125</sup> Most Black sponsored initiatives and proposals have remained with the dominant framework of the criminalization of racism.<sup>126</sup> Avoiding proposals for affirmative action was politically pragmatic in 1988. However, neither pragmatic politics nor weak political position could explain why the stronger Constitutional clause on employment discrimination was not incorporated into the principal initiatives for anti-discrimination policy.

Black activists insisted that Brazilian discriminatory practices were extensive and central in shaping the lives of most Brazilians. Their advocacy of a severe law punishing prejudice represented a symbolic act emanating from a discourse of protest.<sup>127</sup> That conception of racial discrimination counterposed but did not rework the premises of *racial democracy*. The condemnation of acts of racial prejudice focuses on the mind and spirit of the aggressor rather than the consequences for the victim. I suggest that the reliance on the criminal, attitudinal model of discrimination as prejudice reflects the problematic created by a dominant discourse. I claim that an effective challenge to dominant discourse requires reconstructing racial discrimination from a problem in prejudice to a problem in equality.

Under any circumstance, transforming a symbolic law that conflicts with societal norms into an effective policy that enable real social change requires time and resources.<sup>128</sup> In the past five years, new ideas about using the law as a tool have emerged after a longer period of more frozen thinking. The 1997 amendment to the law, that created a criminal category for

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<sup>125</sup> On the difficulty of characterizing the moment, see Alves (1980, p. 188).. On the difficulty of proving discriminatory intent, see Valente (1995, p. 80).

<sup>126</sup> One activist, João Batista de Jesus Felix, of a Black student group at USP, thought that a non-bailable sentence was too strong. Another activist, a Black lawyer who has tried cases under the law for Geledes, an ONG combating racial discrimination, Sonia Nascimento, felt that the penalties were too strong. Folha de São Paulo, 1997. \_\_\_

<sup>127</sup> See da Silva (1994).

<sup>128</sup> See Paul A. Sabatier, "An advocacy coalition framework of policy change and the role of policy-oriented learning therein", Policy Sciences, vol 21, 1988, p. 129-168.

insults referring to race or color which, has produced important successes. (See the appendix)

Lawyers have innovated in their litigation strategies. Black activists have increasingly recognized the limitations of the criminal model and have proposed civil legislation that addresses unjustified differentiation, including affirmative action policies. The next chapter examines the impact of the 1989 law on popular notions of discrimination and contemporary racial discrimination complaints filed in São Paulo between 1993 and 1995, prior to these other changes.

## Chapter 4 Breaking Taboo: Responding to Racially Discriminatory Experiences

The contemporary voicing of racial discrimination complaints represents a dramatic change for a problem once taboo. Voicing racial discrimination remains a risky proposition for complainants who face retaliation by their aggressors and cannot reliably expect the law to be enforced.

This change is evident in the tenor and volume of incidents. In 1952, shortly after the first anti-discrimination law had been, Milton Gonçalves, who later became a noted actor, was barred from a dance at the São Paulo Athletic Association that his White friends had just entered. The guard asked Milton apologetically to wait for his supervisor. The supervisor, a *Mulato*, informed Milton that “the members won’t like seeing a *Crioulo* [SR: define] on the dance floor . . . so please don’t make a problem.” Gonçalves threatened to use the new law. The supervisor retorted, “Do you really think the police are going to close this club on your account?” That response awakened Gonçalves:

*I woke up and realized the club really wasn’t going to be closed. And then, the world collapsed around my head. Not one [of my friends] returned to find out what had happened to me . . . I realized that I was alone in the world. It was a violent, profound sensation . . . I felt that I couldn’t trust anyone ever again, not even my own family.<sup>1</sup>*

In 1952, the guard’s laughter at the threat to invoke the law reverberated loudly.

In 1993, shortly after the passage of the new anti-discrimination law, Rosa was not permitted to use the main elevator to visit her friend in a residential building in São Paulo. The doorman, Jose, informed her that visitors were supposed to use the rear elevator. She questioned him because the policy was not posted. He responded belligerently that “he made

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<sup>1</sup> Milton Gonçalves’s interview in Harold da Costa, *Fala Criolo*. (1982)

the law in the building.” They continued to quarrel. When Rosa threatened to file a racism complaint with the police, Jose relented and permitted her to use the main elevator.<sup>2</sup> By 1993, the threat to use the law was more credible, even though the law was still rarely enforced.

The number of racial discrimination complaints increased dramatically after the passage of the anti-discrimination law in 1989.<sup>3</sup> Significant societal mobilization in 1988, 1995, and 2000 increased the visibility of racial discrimination. Black movement organizations increasingly offered legal resources to denounce an act of racial discrimination. Additional centers within Public Prosecutor’s offices have opened to assist victims of racially discriminatory acts. Surely, this societal mobilization altered the overall climate to encourage some reporting of a once taboo problem.

Still, the overall level of reporting remains low. From June 1993 to November 1995, the specialized police department on racial crimes in São Paulo (DCS) registered approximately two complaints a week. I estimate that at least two additional complaints were filed at the other police departments in the municipality of São Paulo during that time.<sup>4</sup> The rate of filing and investigating racial discrimination complaints increased since 1995. According to a governmental report, an average of 7.5 weekly complaints and 4.9 weekly investigations were registered in the state of São Paulo during 1999. That data implies an unusually high rate of investigating complaints (65%), more than three times higher than the rate of investigating

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<sup>2</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 11.416/94. Poder Judiciário de São Paulo. August, 1994..

<sup>3</sup> See Ricardo Alexino Ferreira, “A Representação do Negro em Jornais no Centenario da Abolição da Escravatura no Brasil.” [Master’s Thesis: University of São Paulo] 1993.

<sup>4</sup> Half of the investigations performed at the DCS responded to complaints filed at other police stations. I would conservatively estimate that as many complaints elsewhere as at the DCS. However, I suspect thjat many complaints filed elsewhere were lost or not referred and that the number of complaints filed elsewhere exceeded the total at the DCS from 1993 to 1995.

complaints (19%) in the 1990s.<sup>5</sup> I estimate that Brazilians filed 26 racial discrimination complaints that yielded 4.9 investigations per week in São Paulo in 1999.<sup>6</sup>

Even that estimated rate of reporting racial discrimination was dwarfed by the filing of complaints at the women's specialized police units. For example, the Special Units for women in the city of Rio de Janeiro in 1992 registered a minimum of 10,087<sup>7</sup> visits and 6,460 complaints.<sup>8</sup> These figures increased through 1994. In São Paulo, the special units for women registered 21,525 complaints in 1995.<sup>9</sup> At least 4,000<sup>10</sup> of the complaints were classified as an injury to honor, the classification accorded the majority of complaints at the DCS. In 1995, women brought 77 complaints against honor and 414 total complaints per week to the women's *delegacias*. From 1993 to 1995, Brazilians brought two weekly complaints to DCS. In 1999, Brazilians reported between 7.5 and 26 weekly complaints to the police in the state of São Paulo.<sup>11</sup>

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<sup>5</sup> See Holston and Caldeira in Aguero (1999).

<sup>6</sup> I found the reporting of the number of investigations to be more accurate than the reporting of complaints and, thus, claim that the rate of filing complaints was probably higher than reported. Thus, I applied the 19% investigation rate from the 1990's to the 1999 reporting of investigations.

<sup>7</sup> Luiz Eduardo Soares (coordinator) et al, Violencia Contra a Mulher, Levanto e Analise de Dados Sobre o Rio de Janeiro em Contraste com Informacoes Nacionais. Nucleo de Pesquisas/ISER. October 1993. Page 3.

<sup>8</sup> Lelia de Andrade Linhares Barsted, Violencia Contra a Mulher e Cidadania: Uma Avaliacao das Politicias Publicas. Cadernos CEPIA. 1994. Pages 32-34.

<sup>9</sup> The number of complaints in São Paulo is given in 'Ocorrencias Policias Registradas Nas Delegacias de Policia de Defesa da Mulher, Segundo as Regoes Municipios de São Paulo'. Fundação SEADE web-site. (<http://www.seade.gov.br>) This data was based upon reports of the Secretaria da Seguranca Publica - SSP/Delegacia Geral de Policia.

<sup>10</sup> The nature of the complaints metropolitan São Paulo is given in 'Ocorrencias Policiais das Delegacias de Policia de Defesa da Mulher Região Policial da Grande São Paulo'. Fundação SEADE web-site. (<http://www.seade.gov.br>) This data was also based upon reports of the Secretaria da Seguranca Publica - SSP/Delegacia Geral de Policia. in the data for 1994-6, 3 out of the 105,550 complaints registered were classified as racism.

<sup>11</sup> Given that half of the investigations processed at the DCS were based upon complaints filed at other police stations, a conservative estimate would be that several complaints  
(continued...)



This chapter investigates why Brazilians brought any allegations of racial discrimination to the police and why they brought certain problems and not others. The nature of the problems brought to the police holds tremendous significance for the overall handling of allegations of racial discrimination. Of all problems “Blacks” and “Browns” have brought to the police, the highly reported problems, insults and humiliations conveyed by co-workers or neighbors, have been the least likely to be investigated and the most likely to be dismissed as a personal misunderstanding. In particular, why have they brought so many complaints of overt incidents with verbalized racial prejudice and so few about the denial of key resources, such as securing a job?

The chapter draws primarily upon the formal complaints Brazilians have filed with the police between 1993 and 1995 and the racially discriminatory experiences they have reported in a prominent national survey of 1995. The combined use of survey data and police station complaints increases the range of problems examined and enables comparisons of why certain circumstances and not others were reported to the police. The first section presents the methodology for the chapter, including the categorization of problems Brazilians reported to the police. The second section maps the experiences Brazilians view as discriminatory: including the qualitative and quantitative nature of the problems from the various sources. The third section compares the problems reported in the survey and the complaints filed at the police station and explores explanations for the reporting trends. The chapter will show that the conception of the nation and the legal construction of racial discrimination, operating within the constraints of the weak rule of law, best explain the use of the anti-discrimination law.

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<sup>11</sup>(...continued)

were also filed each week at other police units in São Paulo. The ratio of complaints to investigations for the complaints received at the DCS was 5 to 1.

## Methods

The primary data are the complaints filed at the DCS in São Paulo from 1993 to 95, which form the richest source of information about what Brazilians perceive to be legally actionable. The first several complaints to the DCS were reported in the newspaper, the Folha de São Paulo, and the work of the DCS received considerable press coverage.<sup>12</sup> Of 302 complaints or investigations handled by the DCS between June 1993, and November 1995, 213 were filed by individual Brazilian “Browns” and “Blacks” with sufficient documentation for analysis in this chapter.<sup>13</sup> The 213 selected complaints generally reflected the problems reported in the larger universe. However, several allegations of discriminatory police misconduct could not be located during field work.

The complaints contain uneven information. The complaints report the date and location of the alleged incident and usually name an aggressor. Generally, the age, gender, and occupation of the complainant is also listed. Some complaints included a roster of witnesses for the complainant. However, the treatment of color was highly inconsistent and incomplete. Color is given for all complainants and only a few defendants. Initially, the DCS listed complainants as *Parda* (Brown) or *Preta* (Black), the census color categories. During its

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<sup>12</sup> The opening, the initial complaints and investigations of the DCS all received press coverage. During its first three years of operation, many subsequent investigations also received press coverage. The unsuccessful judicial outcomes for the DCS investigations received repeated coverage. See, for example, “Brasil abre primeira delegacia anti-racista”, Folha de Sao Paulo, June 8, 1993, p37; “Delegado registra primeiros BOs da Delegacia Racial”, Folha da Tarde, June 10, 1993; “Delegacia anti-raicismo instaura 1<sup>o</sup> inquerito”, Folha de Sao Paulo, June 15, 1993; “Delegacia anti-racismo tem segundo caso em 15 dias”, Folha de Sao Paulo, June 23, 1993. See also “Acusados de racismo sao absolvidos pela Justica”, Folha de Sao Paulo, August 28, 1994, p4; “Impunidade Cordial”, Folha de Sao Paulo, August 23, 1998.

<sup>13</sup> Of the 302 complaints or investigations, I located sufficient documentation on 251 for analytic purposes. Of the 251, 13 were initiated by organizations, 1 did not have a named victim (newspaper ad), and 237 had direct victims. Of the 237 complaints with direct victims, 213 were filed by Brazilian “Blacks” or “Browns”.

first year of operation, the DCS changed its methodology and all classified “Brown” and “Black” complainants as *Negra* (Black race). Finally, the description of the incident varies significantly from a sentence to a page.

In analyzing these complaints, I examined the characteristics of the complainants, the alleged aggressors and their prior relationship. I coded the aggressor’s behavior, including use of verbal prejudice, physical threats, or other forms of intimidation. Further, I also coded whether a resource was thwarted or denied, whether others participated or observed the incident, the history of the problem, and the power relationship between principals. Information on their prior relationship was seldom available but sometimes could be inferred. The measures of the aggressor’s behavior, the thwarting of the resource, and whether the incident was public or private indicate the degree to which the alleged mistreatment violated societal norms. Finally, I also categorized the site of the aggression and tabulated these characteristics.

Whenever possible, I also drew upon information from the subsequent investigation or judicial proceeding, which presented additional information about the defendant and the prior relationship of the principals. The investigations generally include testimony from each of the principals and witnesses as well as statements from the Public prosecutor, the lawyer for the defendant, and sometimes a lawyer for the complainant.

I compared selected characteristics from the DCS data to the 1995 Datafolha survey (DFS). This major national survey included three questions about racial discrimination. I used the survey reporting as a proxy for perceived objectionable incidents and the police reporting as a proxy of perceived actionable incidents. I selected DFS respondents from the metropolitan southeast as the most comparable population to the DCS complainants. I

compared the sites and problems reported by survey respondents and complainants. Further, I compared selected characteristics of the complainants and the survey respondents to determine whether the complainants represented a biased sample.

There are several important limitations in these methods. First, I rely on police records. The reliance on any single source can present problems and these records pose particular problems. Since most Brazilians fear the police and the police asked few questions, the circumstances of the victim were not strongly presented. Little information was included in the record about the alleged act, the overall circumstances, or prior relations between the principals. In particular, allegations about recurrent problems provided scant information about the history of the principals.

Second, there is the problem of population comparability. The metropolitan southeast, the universe of DFS respondents, includes Rio de Janeiro, Belo Horizonte and other smaller cities in addition to São Paulo, but represents the most comparable population segment to DCS complainants. The selection criteria for respondents, the determination of which respondents would be asked for discriminatory experiences, and the incompleteness of the items about discriminatory experiences each pose methodological limitations that I consider as I draw the comparisons.<sup>14</sup>

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<sup>14</sup> The DFS selected respondents ages 15 and up. Several DCS complainants were considerably younger. Further, the DFS did not ask all Brazilians if they had experienced discrimination but only those who self-identified as "Black" or "Brown". However, an aggressor's perception of someone's color is probably a stronger correlation of discriminatory experiences. The interviewer's perceptions of the respondents' color would have represented a proxy for that. Further, subjective color identity and perceptions of discriminatory experiences are mutually constituted. How Brazilians perceive mistreatment is shaped by their subjective color identity. Thus, I claim all Brazilians should have been asked the question about discriminatory experiences. Finally, many respondents initially indicated they had no experienced discrimination but reported specific (continued...)

Third, there is also the problem compatibility of the problems reported as discriminatory. What exactly did survey respondents consider to be a discriminatory experience? The qualitative data from the interviews was not preserved,<sup>15</sup> which limits the comparison between survey reporting and police station complaints. I created categories in the DCS data and disaggregated the DF data as much as possible to maximize comparability. Finally, the general trends in the reporting of problems to the police do not just pertain to the DCS, São Paulo, nor the 1993 to 1995 period.<sup>16</sup> Similar trends in the nature of incidents have been reported for the cities of Rio de Janeiro,<sup>17</sup> Salvador,<sup>18</sup> Brasilia,<sup>19</sup> Florianopolis,<sup>20</sup> Belo Horizonte,<sup>21</sup> and the state of Alagoas<sup>22</sup> during the past decade.

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<sup>14</sup>(...continued)

discriminatory experiences after being prompted. The four prompts were extremely limited in scope.

<sup>15</sup> In general, the staff at the Datafolha was extremely helpful. Unfortunately, the uncoded data from the open-ended question about the site of discrimination was not saved after data entry. Written correspondence, September, 1995.

<sup>16</sup> Hedio Silva Junior conducted a study of 250 complaints filed in 15 police stations in the city of São Paulo between July, 1996 and May, 1997. He reported similar findings for the nature of problems, as well as their classification by the police. See "Direito e Relacoes Raciais" and "Racismo Acontece Mais no Trabalho" in the Folha de São Paulo, September 3, 1997, pages 3-4.

<sup>17</sup> A lawyer from the NGO CEAP, Gustavo Proenca, reported that CEAP had received about 40 complaints in the year since SOS Racismo had opened which had resulted in about 20 formal complaints, which had mostly been classified *injúria*. Folha de São Paulo, August 26, 1997, p. 3.

<sup>18</sup> Two lawyers in Salvador reported the *injúria* problem in interviews in August, 1995.

<sup>19</sup> A lawyer in Brasilia reported the *injúria* problem in an interview in August, 1995.

<sup>20</sup> For Florianopolis, cite meeting with lawyer, August, 1996, conversations with Nogueira, September, 1998.

<sup>21</sup> A lawyer for SOS Racismo, a project of the Municipal Office of the Black Community in Belo Horizonte, Beatriz Rios, discussed the problems in processing cases. According to Rios, many denunciations have not become processes because of the lack of evidence, and those that did were classified *injúria*. Email correspondence: "Racial Lista", June 29, 1999. Subject: BH.

<sup>22</sup> An EMAIL correspondence documented the treatment of most complaints as *injúria* by the Ministerio Publico in Alagoas. "Racial Lista", June 27, 1999. Subject: Alagoas.

## Map of Discriminatory Problems

Figure 4.1 categorizes discriminatory problems according to the site of a problem and the functional nature of the resource denied. The sites include employment, education, residence, public places and personal relations. The functional nature of the incidents includes on-site mistreatment in the routine use of a resource; the refusal of access or service in a public establishment; or the blocking of a contractual relationship. On-site mistreatment included insults and harassment at work, in school, with neighbors or in other circumstances. The incidents reported in on-site mistreatment constitute problems in maintaining and enjoying one's current position at a job, residence, school, or family. Those incidents represented the types of disputes that daMatta discussed in which an aggressor sought to invoke his superiority over a perceived inferior.<sup>23</sup> The limited access to public establishments, such as banks, stores, bars, restaurants, public buses or public places, included institutional and individual discriminatory practices. The last category, the blocked contractual relations used primarily in employment, education and housing, corresponds to the concept of structural discrimination. The last two categories represent circumstances in which complainants may have been contesting places normally reserved for Whites. That caveat certainly applies to some of the allegations of hiring discrimination. In general, the categories possess common characteristics in behavioral treatment and the relationship of the alleged aggressor to the victim. The next three sections present the major categories of problems reported.

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<sup>23</sup>

See daMatta (1991).

**Figure 4.3: Categories of Discriminatory Problems**

	<b>On-site mistreatment</b>	<b>Refused access or service to public Places</b>	<b>Blocked contractual relations</b>
<b>Employment</b>	Workplace conditions		Hiring, Promotion or Firing
<b>Education</b>	Classroom treatment		Education Selection
<b>Residence</b>	Relations with neighbors	Use of social or service elevator	Residential Selection
<b>Public Facilities &amp; Places</b>		Entrance to public facilities, public establishments,	
		Police mistreatment	
<b>Personal</b>	Personal and familial relations		Choice of Spouse

**On-site Mistreatment in the Routine Use of Resources:  
Insults and Harassment at Work, Home and School**

More than 70% of the problems brought to the DCS pertained to mistreatment encountered during routine activities at work, in school, with one's neighbors or in personal relations. Of the three categories of problems, these incidents were the most likely to include verbal prejudice. Of the three categories, these incidents were the least public and the least likely to have third party witnesses or participants. There were no protected resources at stake in these incidents, and the anti-discrimination law was not amended until 1997 to address these problems.<sup>24</sup> Typically, a co-worker, neighbor, student or family member had insulted the complainant in these incidents. Some of the alleged aggressors possessed real power over the complainant, particularly teachers and supervisors. In many contexts, the principals had a prior, long-standing problem. The next sections elaborate these incidents.

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<sup>24</sup> See Celi Santos (1998).

## Workplace Problems

The majority of the insults reported at the DCS occurred in the workplace.<sup>25</sup> Most of the alleged aggressors possessed horizontal relations with the complainants, such as co-workers (18) or clients (14). Alleged aggressors were also the victim's supervisor or superior (16) or subordinate (8). Co-workers, superiors, and clients each composed about 25% and subordinates composed approximately 12% of the alleged aggressors.

In many of these incidents, the complainant was performing routine duties prior to the incident. In one case, a Black secretary informed a customer that her boss was not available for a meeting, and the customer responded by insulting the secretary.<sup>26</sup> In other incidents, the alleged aggressor was trying to prevent the complainant from fulfilling her duties. Generally, there were no resources entailed such as promotions or salary changes. In 16% of the complaints, the complainants identified other participants or observers. The following complaints illustrate these characteristics:

*Roberto, a 30-year-old assistant metalworker, had worked for two months in a metalworking firm without a problem. When he submitted a medical note one day, he was verbally offended by the owner, who told him to "get out of here, you nauseating Black."<sup>27</sup>*

*Daniel Correa, a Black attendant training in the emergency room of a large hospital in São Paulo, became aware of a patient who was still awaiting treatment and tried to attract the attention of the emergency room doctor on duty. When that doctor finally entered the patient's room, he insulted*

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<sup>25</sup> Of the 129 incidents of harassment or insult categorized for this study, 62 or 48.1% occurred in the workplace. See also Hedio Silva Junior's study of 250 complaints filed in 15 other police units in São Paulo between July 1996 and May 1997 in which 60% of those incidents had occurred at work. See Fernanda da Oscossia, "Racismo Acontece Mais no Trabalho," *Folha de São Paulo*, September 3 1997, p. 3-4.

<sup>26</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 023/93. Polícia Civil do Estado de São Paulo.

<sup>27</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 060/94. Polícia Civil do Estado de São Paulo.



*Daniel in the presence of the other attendants, "What I hate most is urine and Crioulos."<sup>28</sup>*

*Leonilda took care of her neighbor's children. Her neighbor owned the building and constantly provoked her. One morning, Leonilda's neighbor opened the window to the washing area and said half-jokingly "Work, Preta, work," and called her a slave.<sup>29</sup>*

Most workplace insults occurred privately as in the cases of Roberto and Leonilda. In Leonilda's case, the harassment was couched humorously. The aggressor and many officials often portrayed the complainant as humorless.

Daniel Correa's complaint was unusual. Daniel had attempted to get the doctor to attend to a patient whom the doctor had been ignoring, perhaps for reasons of a racial or class nature. The doctor, clearly annoyed by this initiative by a subordinate, rebuked Daniel publicly to reassert his authority. After Daniel reported the incident, the doctor openly confirmed his comments in his deposition to the police. This sharply contrasted the denial by most aggressors of their comments when called to testify. This doctor assumed he would not be prosecuted.

These incidents constituted the reassertion of authority by a superior. Many incidents might have constituted workplace harassment in the US or other countries. Brazil does not have such a concept. In Ruben's case, the record only mentions the one incident. However, such treatment by the owner of a firm could not have boded well for his career. The DCS received and did not investigate many similar complaints because they constituted *injúria*, a private crime without state responsibility. (See Chapter 5) In most allegations of dismissal,

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<sup>28</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Inquerito Policial, Proc. No. 15,793/95. Poder Judiciário de São Paulo.

<sup>29</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 055/95. Policia Civil do Estado de São Paulo.

harassment had preceded the dismissal, suggesting serious potential consequences.

Although not all harassment must lead to dismissal, complainants certainly faced the danger of retaliation. Without a concept of harassment, the police treated the incidents as verbal insults, which leaves an incomplete picture of the circumstances.

The majority of the workplace insults occurred between persons of equivalent status, illustrated by the following:

*A 21-year-old Black female financial analyst arrived at a store to verify an error. The attending merchant had not apparently committed the error. However, he offended her on her arrival: "Close your mouth, Negra . . . because I don't like Negros"<sup>30</sup>*

*A 26-year-old security guard at a school, was responsible for checking the identification of all students entering the main entrance. One student neglected to show her identification. When he asked her to show her identification, she refused and insulted him, saying that he could not even be called a citizen: "Monkey, Black without preparation and who cannot even be called a citizen"<sup>31</sup>*

*Lorenzo worked as the doorman in a building. A White visitor arrived with a dog, and Lorenzo informed him that he could not use the social elevator because he had a pet. The visitor responded with a common epithet that Blacks always commit a blunder "Shameless Negro, slave, Preto, when you don't puke on the way in, you puke on the way out"<sup>32</sup> . . . you damned worthless tool of the administrator."<sup>33</sup>*

In each of these cases, the offended individual was performing his or her duties. The commentary directly impeded the employee from fulfilling his or her duties and attacked the

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<sup>30</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 068/95. Polícia Civil do Estado de São Paulo.DCS

<sup>31</sup> Departamento de Comunicação Social (DCS). Inquérito Policial, 039/95. Polícia Civil do Estado de São Paulo.

<sup>32</sup> This highly used, derogatory expression means that someone will either create a problem on the "way in" or the "way out".

<sup>33</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 091/95. Polícia Civil do Estado de São Paulo.

person's fundamental humanity and basic capacities. In the cases of the student and the visitor with the dog, the aggressor did not wish the victim to fulfill those duties.

In many complaints, a customer used the victim's color to undermine his or her functioning when the customer did not like the outcome.<sup>34</sup> The security guard served in a "gatekeeper" capacity at the school, apparently a difficult societal role for a "Brown" or "Black" Brazilian to occupy. Consider the customer who insulted a secretary for informing him that her boss was not available for an appointment.<sup>35</sup> The employment screen, *boa aparência*, was apparently devised for occupations with considerable customer contact in anticipation that certain customers would be offended if served by a Brazilian "Black" or "Brown." These incidents suggest the precarious position of "Black" and "Brown" Brazilians performing service occupations with considerable customer contact. A complaint by a disgruntled White customer could result in the dismissal of a Black employee by a supervisor, without consideration of the motivation or content of the customer's complaint or the employee's prior work record.

This precariousness was expressed with a special symbolism in one of the incidents in which Lorenzo, the Black doorman, told a White visitor with a dog to use the service elevator. Service elevators are now recognized as mechanisms that have served to separate and disrespect Blacks. Officially, service elevators were to be used by building employees, such as domestic servants, but many doormen have required "Black" and "Brown" Brazilians to use those elevators. The man with the dog most was undoubtedly highly insulted that a Black doorman had asked him to use the service elevator.

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<sup>34</sup> See Blanco (1978, p. 173) who described the use of color as a transformative resource within fights that began as disputes over something else.

<sup>35</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 023/93. Polícia Civil do Estado de São Paulo.

In the incidents collected, supervisors, co-workers and subordinates mistreated “Blacks” and “Browns” exercising their responsibilities. The verbal incidents might be classified as insults or harassment, the latter whenever an allegation described multiple occurrences, a public incident, or a particularly pernicious comment.

In these instances, the aggressor felt threatened, by either being stopped by a Black gatekeeper or being evaluated by a Black financial analyst. These aggressors sought to use the complainant’s color as a way of transforming the circumstance and regain power. These incidents indicate the difficulty for some Whites to accept “Blacks” and “Browns” in authoritative roles. How might have these aggressors reacted if the other party were White? Did aggressors use color to behavior that was troubling or a relationship that was threatening? Would aggressors have used another characteristic if color was not available? Those questions are beyond the scope of this research. Recall that subordinates insulted Black superiors as well. I suggest that these incidents indicate that color is a key aspect of the Brazilian social hierarchy.

### **Classroom Mistreatment**

Classroom mistreatment tended to be much more public than workplace mistreatment, occurring either in front of an entire class or between groups of students. The teacher often initiated the alleged incident, a humiliating experience. Here are excerpts from the few complaints filed of this nature:

*The teacher of a seven-year-old Black student incited the other students to hit him because he was Black. The teacher warned the student this would happen again.*<sup>36</sup>

*The teacher and fellow students ridiculed a ten-year-old Black student. The teacher said that the 'Negro generally makes a problem' and continually mistreated him. On the day of the complaint, the other students called him a monkey.*<sup>37</sup>

*The teacher humiliated a 19-year-old female student in front of the entire class, calling her "Pele's niece" and "Benedita da Silva."<sup>38</sup> The teacher continued, "You're Black and you still keep talking during the class. You have really bad prospects for your future. This truth must hurt, but you are Black." This humiliation was so strong that other students left the classroom with her. Four of these students were listed as witnesses.<sup>39</sup>*

*A 19-year-old female student was taunted by three students. One said, "Look at her hair, it's not our type." The three then called her a monkey.*<sup>40</sup>

These incidents portray severe humiliation. Unlike the other forms of daily harassment, classroom mistreatment primarily entailed vertical power relationships. Teachers command tremendous power over their students. Secondly, as indicated by the four incidents, this harassment was often very public and effectively constituted public humiliations by their teacher and fellow students. Arguably the "vertical distance" between teacher and student was the largest for any of the categories of incidents. Students are certainly more psychologically vulnerable to their teachers than employees are to their supervisors, even if

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<sup>36</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 026/95. Polícia Civil do Estado de São Paulo.

<sup>37</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 071/95. Polícia Civil do Estado de São Paulo.

<sup>38</sup> The teacher was referring to Pele, the famous Black soccer player, and Benedita da Silva, the most celebrated Black female politician in Brazil.

<sup>39</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 075/95. Polícia Civil do Estado de São Paulo.

<sup>40</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 015/94. Polícia Civil do Estado de São Paulo.

the employees are more economically vulnerable. This was the least reported type of daily harassment.

### **Residential Harassment**

Disputes in one's residence generally occurred between neighbors, often as a part of longer-standing disputes between families. These disputes included verbal and nonverbal harassment and demonstrations of angry emotions, such as spitting, threats of a physical or nonphysical nature:

*One victim's mother reported that her six-year-old daughter had been continually offended by a 50-year-old neighbor. On the day of the complaint, the neighbor had told her, "Stop looking at me, you little ugly Black. Go back in your house, you little ugly Black."<sup>41</sup>*

*After a difference of opinion about the administration of their building, the neighbor insulted the complainant: "Nauseating Black. You shouldn't be able to live here but in the slum. You shouldn't be able to live with Whites . . . I'd like to shoot you."<sup>42</sup>*

Residential harassment contained virulent racial epithets often accompanied by threats of violence. Many neighbors alleged being told they should not be able to live with Whites but only in "slums" or "slave quarters." In other circumstances such as hiring in which a recruiter truly possessed the power to deny a resource, such virulent insults were rarely communicated. In resident harassment, aggressors generally could not deny a material resource to their "Black" or "Brown" neighbor. These status-oriented disputes between persons of equivalent

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<sup>41</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 065/94. Polícia Civil do Estado de São Paulo.

<sup>42</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 060/95. Polícia Civil do Estado de São Paulo. DCS.

standing suggest that aggressors without real power over their victims were more likely to become virulent.<sup>43</sup>

### **Personal Harassment**

The allegations of personal harassment described the most private circumstances. These alleged incidents occurred within families, among friends, or between persons with daily contact outside of structured contexts such as work or residence. The following case, which became widely publicized, illustrates the multiplicity of alleged harms contained in some complaints:

*Kelly Christina had cared for the baby of Rogerio Cesario de Almeida, a bar-owner in the neighborhood in which they both lived. She was dismissed after six months without pay. Neither of these facts was disputed by the parties. According to Kelly, she was dismissed after refusing Rogerio's sexual advances. Afterwards, Kelly approached Rogerio at his bar on numerous occasions to obtain her back pay. He repeatedly refused and insulted her. The circumstances escalated over a two-year period, and he provoked other customers in his bar, his and Kelly's common neighbors, to join the harassment. On the day Kelly filed her complaint, Rogerio was washing his car and sprayed her with dirty water as she was passing. He called her "Urubu" (Indigenous)<sup>44</sup> "monkey" and "nauseating Black." When Rogerio continued the verbal abuse in the presence of the police chief, he was jailed and charged with racism.<sup>45</sup>*

This incident began as a private act, alleged sexual harassment, followed by a dismissal without pay. Those acts had no witnesses. It became increasingly public as Rogerio verbally abused Kelly when she requested her back pay. In this case, her former employer was an

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<sup>43</sup> This finding conforms to daMatta's argument that personal differentiation arose at the ending of slavery, replacing the traditional mechanisms of differentiating master and slave. See DaMatta (1991).

<sup>44</sup> In this context, Rogerio called Kelly a savage.

<sup>45</sup> Poder Judiciario. Proc. No. 141/91 18<sup>th</sup> Vara Criminal. São Paulo.

influential figure who brought their dispute into their common neighborhood. In general, personal harassment occurred between intimates, friends, family members, or others of equivalent status in a personal relationship. In this instance unlike most, resources, the loss of a job and the denial of back pay, were also involved. Further, Kelly was unable to enter or leave the neighborhood without passing Rogerio's bar because of its location. The victim's inability to avoid the aggressor was characteristic of many of the daily insults and harassments reported at the DCS.

### **Refused Access or Service to Public Places**

Brazilians filed complaints in this category in response to being refused access or service to public facilities, public ways, and other public places. Many complaints pertained to restrictions entering stores or banks, in which a victim often entered and was subsequently followed, discouraged from shopping or insulted at the point of purchase.

Brazilian "Browns" and "Blacks" suffer severe humiliations in banks. At the revolving security door to banks, security guards often stop "Black" and "Brown" customers by triggering the metal detector. Once the metal detector has been triggered, guards often force Black customers to strip. In some case, the security guard triggered the alarm rather than a metal object on the customer's person.<sup>46</sup> In other cases, the security guard prolonged the incident and taunted the Black customer.<sup>47</sup>

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<sup>46</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Inquerito Policial. Proc. No. 1.197/94. Poder Judiciário de São Paulo.

<sup>47</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 041/94. Policia Civil do Estado de São Paulo.



In most cases, the alleged aggressor was a vendor, a salesman or a security guard, functioning as a gatekeeper who had not devised but followed institutional policy. Some incidents included menacing physical aspects by security guards or the police. Most incidents had large audiences, except for the restricted use of the social elevator, in which a doorman blocked a complainant's access privately.

## Stores

Allegations of discriminatory access to stores were widely reported. Customers were discouraged from shopping often by the body language of being followed by a security guard as well as verbal comments. These problems were sometimes covert but certainly not subtle because of that body language:

*A 67-year-old ceramic artist, Dilce Pires da Silva, and her 34-year-old daughter entered their neighborhood supermarket on a rainy spring evening. They were followed by the store's security guard for approximately 30 minutes. Inhibited by this treatment, they asked for an explanation. The guard, Jose Carlos Dona, responded with a common racial epithet, "I'm going to continue to follow you until you leave because when Blacks enter, it's only to rob." Offended, they sought the store's manager and were physically blocked by the security guard, who then allegedly punched Ms. Pires da Silva. According to his account, the blow was accidental and part of a scuffle. When the manager intervened, he made the security guard apologize.<sup>48</sup>*

*A 58-year-old military reserve officer was shopping for some clothing with his wife. The salesman insulted him with a common racial epithet, "This Black won't buy anything, he'll only look and leave . . . [because] Blacks don't buy, they just look and go."<sup>49</sup>*

*Mona, a 35-year-old self-employed merchant, sought to buy cleaning products at a store. The security guard met Mona at the entrance and told her that the product she sought was located at the front of the store. The*

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<sup>48</sup> Poder Judiciario. Proc. No. 688/94. 7<sup>th</sup> Vara Criminal. São Paulo.

<sup>49</sup> Poder Judiciario. Proc. No. 353/95. 19<sup>th</sup> Vara Criminal. São Paulo.

*saleswoman, possibly the owner, also sought to block Mona's entry and informed her that the particular product was sold out. Mona countered by indicating that she was seeking other products as well.<sup>50</sup>*

Security guards and store clerks sought to "protect" their respective establishments for their White customers. Their objective was to shadow "Black" and "Brown" customers until they left the store. Ms. Pires da Silva was able to enter but was followed and harassed. The military reserve officer was insulted while shopping.

The incidents tended to be covert in that aggressors sought to thwart and discourage a customer without formally prohibiting entrance. However, these incidents certainly were not subtle. Mona immediately perceived not being welcome because of the guard and saleswoman's manner and body language. Although neither said "do not enter," Mona sensed an unspoken barrier. In Ms. Pires da Silva's case, the incident began with the body language of the security guard. His behavior escalated to physical violence and overt insults in response to Ms. da Silva's protests. In the third incident, the saleswoman apparently sought to preemptively block Mona from entering. It is easier to covertly impede the entrance to a facility than to inhibit subsequent use of the facility. This saleswoman was less overt than the salesmen and security guards of the other incidents.

### **Other Public Places or Public Ways**

I distinguish public establishments from other public places and ways, such as a sidewalk, public transportation, or a social club. In contrast to the choreography of thwarting a customer's movement in a store, these aggressors had to block a victim from passing a single

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Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 035/95. Polícia Civil do Estado de São Paulo.

entrance or occupying a particular space, such as a seat in a restaurant. Thus, I speculate that these restrictions tended to be more blatantly communicated because a fixed resource had to be granted or impeded:

*A customer in a bakery<sup>51</sup> was not being served coffee with the other customers in the section reserved for eating and drinking coffee. Once she threatened to report the incident to the police, she was offered a cup of coffee.<sup>52</sup>*

*A 22-year-old teacher was insulted by the driver on a public bus, "You shameful Neguinha! You don't even know how to cook and you think you know more than me, the driver."<sup>53</sup>*

*Flora, a 16-year-old Parda, and her Branca friend, Adriana, went to a night club with invitations. They were blocked from entering by one of the guards, who said, "I'm not going to let this Neguinha enter."<sup>54</sup>*

The bus-driver insulted the teacher for not knowing how to function in "her place," the kitchen. Aggressors often invoke "place" directly or indirectly in these insults. He managed to assert his superior position and humiliate her for her position in that formulation. In other complaints, a bus driver had refused passenger seeking to board without such an insult, but this driver resorted to the insult after permitting her access.

In the first incident, the customer threatened to use the law to effectively receive service. Surprisingly, that threat often opened access to a facility initially blocked. Although aggressors were unlikely to fear the formal outcome of a legal proceeding, most aggressors still seemed highly determined to avoid the reach of the law.

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<sup>51</sup> In São Paulo, most bakeries have a section for eating and drinking, much like a delicatessen in the US.

<sup>52</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Inquerito Policial, Proc. No. 24.160/95. Poder Judiciário de São Paulo.

<sup>53</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 046/94. Policia Civil do Estado de São Paulo.

<sup>54</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 50.841/95. Poder Judiciário de São Paulo.

## **Police Harassment**

Police harassment, often physical and coercive, illustrated a different aspect of Brazil.

The following incident began as a problem in a supermarket with the store's security guard that became transformed into police harassment, because the security guard was also a policeman. This incident illustrates the coercive implications of the body language of many aggressors:

*Marisa, a 45-year-old Parda from the Brazilian Northeast, was shopping at a popular supermarket, Pão de Acucar, in a middle class neighborhood of São Paulo with her friend, Antonia, and her daughter, Alexandra. The three were being followed by Gil, a policeman working as a store security guard. Marisa and Antonia had previously encountered problems with Gil at other supermarkets in the chain. He pointed at them, made obscene gestures, and generally made fun of them to other employees. As they left the store, Gil called Alexandra, "a little whore."*

*The three headed toward a nearby street where they were trapped by a passing police car. One policeman told them to stop because they were "suspects." Gil arrived on foot with another supermarket employee. Alexandra asked why they had been stopped. The officer responded violently - slapping, kicking, punching, and pulling their hair. The three became very scared. One officer threatened, "Nordestinos (derogatory: persons from the Northeast) have to die." In the scuffle, Marisa's arm was broken and Antonia's right leg, right arm, back and head were all bruised. Alexandra also suffered bruises on her back and head.*

*Another police car arrived, and the aggression stopped. One officer from this car spoke to the three victims, asked Gil the reason for the aggression. He stated that the three were thieves and asked that they be searched. Antonia insisted that she would only be searched by a female, which was respected. A female officer cruelly strip-searched Alexandra about ten times in a nearby luncheonette. A policeman, also the security guard at the luncheonette, jeered at them, called them "Negras, thieves, Nortistas" (another term for Nordeste) and threatened their lives. Nothing was found during the search, and Marisa produced a receipt for her purchases. The female officers did not register a formal complaint.*

*Marisa became physically weak, troubling because of her heart condition, but the police refused to help.*<sup>55</sup>

This incident typifies the coercive side of Brazil: visible, overt, physical, and not at all subtle. Gil, the store's security guard, later alleged that Antonia had been pointing her finger at him, pretending to have a gun, and that he had felt threatened. In a previous incident, Gil had accused Antonia of having a gun, which had proven groundless.

The three women demonstrated tremendous composure during the incident and afterwards. When Marisa and Antonia were later called to identify the police who beat them, they were again threatened by one officer, "Do you two want me to get rid of you?" Complainants brought few incidents of this nature to the DCS.

### **Service Elevator**

The service elevator constitutes a distinct and more discreet mechanism of differentiation. The service elevator communicates color differentiation through class differentiation similar to the *boa aparência* employment screen and the treatment of Black customers as suspects. The forced use of the service elevator has been called "social apartheid"<sup>56</sup> by producing apartheid-like differentiation without the explicit mention of color. In many buildings in São Paulo, Rio de Janeiro and Salvador, built with two elevators, the service elevator was designated for domestic servants. In practice, many doormen have routinely treated all "Blacks" as domestic servants.<sup>57</sup>

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<sup>55</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 8.713/94. Poder Judiciário de São Paulo.

<sup>56</sup> See Roberto Pompeu de Toledo, "O apartheid vertical", Jornal do Brasil, December 4, 1988, Caderno B, p. 4.

<sup>57</sup> In some buildings in Rio de Janeiro, a second elevator could not be built, and  
(continued...)

*Maura, a 61-year-old retired Black woman, had been repeatedly stopped by a neighbor from using the social elevator in her residence. On the day of the complaint, her neighbor told her she couldn't use the elevator because Maura didn't "know her place." She called Maura's attempt to use the elevator a provocation and stopped her from entering the elevator on the floor where they both resided. The building manager reported witnessing other problems, including that the aggressor had called the woman "Negra" in a residents' meeting.<sup>58</sup>*

*Gisele, a 29-year-old teacher, called upon a friend. The doorman asked her to use the service elevator. Gisele, a Parda, asked why she couldn't use the social elevator and did not receive a coherent response. After she asked to speak to the manager, she was permitted to use the social elevator.<sup>59</sup>*

*A 33-year-old Black journalist, was stopped repeatedly from using the social elevator in the building she worked. On this occasion, the doorman permitted her to use the social elevator when she protested his racism.<sup>60</sup>*

In the first incident, the aggressor possessed no real power to prevent Maura from using the elevator and familiarly invoked "place" in her insult. In the last two incidents, complainant threats to file a legal action or speak to a superior surprisingly succeeded in halting apparently discriminatory incidents. Both complainants were professional which undoubtedly increased the credibility of their threat. However, their complaints did not prosper because they had managed to use the elevators.

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<sup>57</sup>(...continued)

dividers were erected inside the single elevator to effect the differentiation. See "Uma Saida para Ter Das Entradas" in Jornal Do Brasil, Caderno B/Especial, December 4, 1988, p. 5.

<sup>58</sup> Poder Judiciario. Proc. No. 0174/95, 15th Vara Criminal. São Paulo.

<sup>59</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 46.069/95. Poder Judiciário de São Paulo.Policial.

<sup>60</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Inquérito Policial, Proc. No. 11.416/94. Poder Judiciário de São Paulo.

## **Blocked Contractual Relations**

The most concrete acts of discrimination were the least reported. In these incidents, the allegation pertained to the loss of a resource: either being fired or not hired, not being admitted to a school, or not being permitted to purchase or rent a residence. These blocked contractual relations, particularly in employment, were the most covert practices in the complaints. Prejudicial motives were often revealed in the alleged incidents by a receptionist or recruiter who apparently sought to discourage or disqualify an applicant through non-racial criteria. Firing was the most overt practice within this category. An employee was often insulted in front of coworkers at the moment of dismissal.

### **Hiring**

The highly discretionary nature of Brazilian hiring practices offers fertile ground for discriminatory practices. For many jobs filled through employment agencies, employers apparently indicate racial criteria. The skilled staff screen candidates and apparently seek to eliminate the "Black" or "Brown" applicants based upon other attributes. I suspect that the complaints reported to the DCS represent the more explicit of these covert acts in which a staff member violated the etiquette of using non-racial criteria to eliminate the "Black" or "Brown" applicant:

*Vanda, an unemployed 35-year-old "Parda," noticed an advertisement for an experienced cashier at a pharmacy. She possessed considerable experience and inquired about the opening but was told that four applications had already been received. She returned the next day with her white neighbor, Lina. They verified that the pharmacy was still advertising for the position. Vanda was again told about the four previous applicants. However, Lina was asked about her experience and for her documents. She possessed no relevant experience and claimed her documents were at home. Vanda called the police while Lina placed her*

*own photo on Vanda's materials. The police arrived and counseled Lina to continue the application process. Lina gave the manager the fabricated identification card and Vanda's reference letters. Lina received the full list of additional documentation she would need to supply to enter into employment at the drugstore.<sup>61</sup>*

*A 34-year-old experienced lathe operator, who was Parda, applied for a job as a lathe operator and was told that he couldn't work at the particular shop because there 'weren't many with your face, your Black face'.<sup>62</sup>*

*Two Parda students applied to be a production assistants on a TV program, "Japan Pop Show." They were told that their "bio-types" were not "useful" and to look for opportunities elsewhere in dance: in "Afro", 'punk', 'samba', etc.<sup>63</sup>*

Agency staff seemed to prefer covert techniques whenever possible. In Monica's case, presented in the first chapter, only after she had exhausted the secretary's non-racial criteria, which might have subtly eliminated another candidate, did the secretary indicate the color criteria. Indeed, the discouragement of Vanda's application was accomplished without any explicit reference. The manager who discouraged Vanda did not directly tell her that Blacks were not eligible for the cashier's position, although this certainly appeared to have been the pharmacy's policy, nor had he even told her that the position was filled. Furthermore, he did not refuse to supply an application. All he said was that he had already received four applications. During her cross-examination, Vanda admitted that she had not asked to complete an application because she had been effectively discouraged. The manager communicated the necessary cultural cues to discourage her from seeking employment

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<sup>61</sup> Poder Judiciário. Proc. No. 374/95. 8<sup>th</sup> Vara Criminal. São Paulo.

<sup>62</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 014/93. Polícia Civil do Estado de São Paulo.

<sup>63</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 019/93. Polícia Civil do Estado de São Paulo.



without ever directly rejecting her. This incident reveals the particularities of the covert incidents in which distinctions or exclusions occur without specific reference to race or color.

## Housing

The incident described in the complaints filed about housing discrimination resembled the complaints about seeking employment through an employment agency:

*Alberto, 33 and a planner at a metropolitan planning agency in São Paulo, and his wife, Catia, sought to rent an apartment in Lapa, a middle class neighborhood, from West Realtors and Administration Limited. Edward, the broker and his assistant, Dione, received them very courteously. Alberto indicated that he was seeking a house in the value of 70,000-90,000 cruzeiros. (\$ 246-\$316<sup>64</sup>) Eduardo indicated that nothing was available and then remembered a listing available for 90,000 \$CZ. He located the record and held it momentarily. Catia asked for the record and when she examined the yellow card, she was surprised to find the following: "Rent only to a couple. Don't rent to Blacks, Japanese or Nordestinos." She asked for a xerox of this criminal requirement. Eduard disappeared with the card into the back of the realty and did not return.<sup>65</sup>*

A sophisticated coding system was evident in this incident and in Monica's case.

Eduardo's hesitation after locating the card may have indicated a momentary indecision about how to improvise an alternative to the typed racial preferences. His disappearance immediately afterwards indicated he understood the significance of his mistake. The listing was intended as a cue to guide his actions and not to be seen by the prospective buyer. His disappearance effectively protected the realtor, the seller, and himself from the liability ensuing for verbalizing the seller's racial preferences. The employment structure of the realtor

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<sup>64</sup> Folha de Sao Paulo. Edicao 2000. Economic Indices. CD-ROM

<sup>65</sup> Ministerio Publico do Estado de São Paulo, Procuradoria Geral de Justica. Centro de Apoio Operacioanal das Promotorias de Justicias de Defesa dos Direitos Constitutioncias do Cidadão (CAO DCC) 0382/92.

provides tremendous flexibility. A broker working on commission can easily be dismissed and replaced, thereby protecting the selection process from transparency.

## **Dismissal**

Dismissal represented a very different social practice. Unlike hiring, in which skilled human resource professionals seek to utilize non-racial criteria to eliminate prospective candidates, supervisors often fire individuals while insulting them publically. The following supervisors used extremely overt methods to dismiss their employees:

*AG, 51 years old, had been working for 10 months as the porter in his residence. LM, another tenant of the building, vowed she would fire him when she became responsible for the building because "she didn't like Blacks in the front entry . . . [and] hated Blacks and homosexuals." Two weeks later LM became responsible for the building, and AG was dismissed four weeks later.<sup>66</sup>*

*Laura, a 28-year-old female nursing assistant, worked in a hospital in São Paulo. The defendant, a doctor, said, "Get that Black out of my department because I don't like working with that Black." Afterward, Laura was transferred to another area of the hospital and later fired.<sup>67</sup>*

Firing was the most overt discriminatory allegation of blocked contractual relations. In contrast to the discreet human service professional, the supervisor was blunt and often insulted the employee at the moment of firing without the customary fear of revealing prejudicial attitudes. The cavalierness of supervisors might be attributed to their presumption of impunity under a weak rule of law. However, what would then explain the discreet behavior of the selection agents? Most likely, the difference in the contexts contributes to the difference

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<sup>66</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 8.663/94. Poder Judiciário de São Paulo.Policial.

<sup>67</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 7.781/95. Poder Judiciário de São Paulo.Policial.

in the behaviors. The recruiter is responsible only for selection and has no interaction with individuals beyond candidacy. Supervisors possess daily power over employees and likely seek to assert that power. Firing a Black employee in front of others could simultaneously humiliate the fired employee and intimidate those remaining in response to perceived threats to his position.

### **Aggregate Findings**

Why have Brazilians brought any problems to the police and why have they particularly brought certain problems and not others? How have they used the law in these objectionable incidents? This section compares results from the 1995 Datafolha survey to the aggregate findings from the SP complaints and investigations. I examine who files, what kinds of complaints they bring, and the bargaining dynamics before incidents are brought to law.

### **Comparing Complainants and Others**

Under a weak of rule, racial discrimination complainants are extremely vulnerable to retaliation.<sup>68</sup> Their legal, financial, political and social resources could significantly affect their likelihood of reporting and succeeding.<sup>69</sup> In São Paulo from 1993 to 95, individual mobility might be the strongest indicator of filing. To consider the possible class bias among complainants, I compare all "Black" and "Brown" respondents from the metropolitan southeast (MSE) in the 1995 Datafolha Survey to those MSE respondents who named discriminatory

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<sup>68</sup> See Julie B. Olson-Buchanan, "Voicing Discontent: What Happens to the Grievance Filer After the Grievance." *Journal of Applied Psychology*. Vol. 81: No. 1. 1996.

<sup>69</sup> See Bumiller (1988) who persuasively discussed the problematic nature of protesting discrimination.

problems and to the DCS complainants. Table 4.5 compares the age and gender of those three groups.

**Table 4.5: Age and Gender of Complainants and Selected Survey Respondents\***

Characteristics		All Respondents	Reported Discrimination	DCS Complainants
Gender	Male	51.0%	55.8%	34.0%
	Female	49.0%	44.2%	66.0%
Age	16-25	31.7%	28.1%	23.1%
	26-40	43.4%	50.0%	52.7%
	41+	24.9%	21.9%	24.1%
<b>N</b>		<b>284</b>	<b>103</b>	<b>213</b>

\* Selected "Black" and "Brown" survey respondents from the metropolitan southeast.  
Source: Secondary analysis of 1995 Zumbi Survey.

MSE survey respondents who reported discriminatory experiences were representative of the gender and age of all MSE respondents. Respondents who reported discriminatory experiences were typically male and middle-aged, but the differences between this group and other respondents were not statistically significant.<sup>70</sup> The 26-to-40-year-old age cohort, more likely to report discriminatory experiences than the other cohorts, grew from adolescence into their twenties during the latter part of the redemocratization period when the Black Movement had become more visible. This cohort may have been most influenced by the Black Movement and the democratizing period.

DCS complainants possessed a similar age distribution to MSE respondents who reported discriminatory experiences. However, the gender difference between survey reporters and DCS complainants was large and statistically significant. Whereas males were more likely than females to voice discriminatory incidents, females were much more likely than

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I used the T-test to calculate the statistical significance of the difference between the proportion of DCS complainants and the proportion of survey respondents who identified a particular discriminatory problem. I calculated statistical significance based upon a 95% confidence interval. See Hubert M. Blalock, Jr, Social Statistics. McGraw-Hill. 1960.

males to bring those problems to the DCS. Women brought 66% of the complaints to the DCS.

The preponderance of female complainants had implications for the kinds of problems reported. Women filed 80% of the complaints about a problem in the residence and most of the problems in the service elevator. Attendants treated Black female visitors as domestic servants.

Occupational differences between MSE respondents, those who reported discrimination, and DCS filers are given in Table 4.6. Those who reported a discriminatory experience in the survey were more likely than other respondents to be working in the public sector, in a liberal profession or another occupation with a working card,<sup>71</sup> and less likely to be a housewife or unemployed. None of these occupational differences was statistically significant.

Most DCS complainants worked in the formal economy. They worked as domestic servants, cleaning persons, and street vendors, among other service occupations. Complainants were much more likely than MSE respondents to be working with a working card or in the liberal professions. DCS complainants also participated in the workforce in greater numbers than MSE respondents who reported discrimination. That difference was statistically significant. DCS complainants were much less likely to be housewives, retired or the unemployed compared to survey respondents.

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<sup>71</sup> Brazilians obtain a working card from the Labor Ministry to be able to apply for certain jobs. The card conveys health benefits, retirement and a list of rights and contractual obligations. Upon hiring an employee, the employer is obligated to sign the card, which then becomes a certified employment record.

**Table 4.6: Occupation of Complainants and Others in Metropolitan Southeast**

Characteristics		Respondents <sup>1</sup>	Reported Discrimination <sup>1</sup>	DCS Complainants <sup>2</sup>
Occupation	<b>Total Working</b>	<b>65.8%</b>	<b>73.1%</b>	<b>78.4%</b>
	Public functionary	8.3%	11.3%	12.0%
	With working card	29.1%	32.2%	39.7%
	Without working card	6.9%	5.4%	7.2%
	Employer	1.7%	3.0%	1.0%
	Self-employed	9.3%	9.6%	7.2%
	Freelancer	7.0%	5.9%	3.8%
	Liberal profession	1.8%	3.9%	7.2%
	Unpaid family	1.4%	1.8%	
	<b>Total Not-working</b>	<b>34.2%</b>	<b>26.9%</b>	<b>19.0%</b>
	Housewife	14.0%	9.6%	3.3%
	Retired	6.6%	4.9%	3.3%
	Student	5.7%	3.9%	8.6%
	Unemployed	7.9%	8.5%	3.8%
	<b>Unknown</b>			<b>2.9%</b>
<b>N</b>		<b>284</b>	<b>103</b>	<b>213</b>

Source:

<sup>1</sup> Secondary analysis of Zumbi survey, respondents from metropolitan southeast region. Datafile furnished by Datafolha.

<sup>2</sup> Selected complaints filed by Brazilian "Blacks" and "Browns" at DCS in São Paulo, 1993-95.

This gender disparity of complainants may be a result of experience. *Preta* women surely face the most intense discriminatory practices of all Brazilians, in the frequency and vehemence of mistreatment. Their complaints against neighbors responded to vicious attacks on their children and their family. Many of these complaints were filed in response to long-standing disputes. The frequency and intensity of the mistreatment, the attacks against loved ones, and long-standing feuds that exhaust the private possibilities for resolution could outweigh the disincentives to filing.

For working women, the stigma against filing may have mattered less than for men. Filing a complaint represents an implicit acknowledgment of being Black in a country that offers incentives to lighten. Anyone harboring hopes of lightening herself or her children would not wish to file a complaint. The relatively high use of Women's Delegacias is contrary to the

general avoidance of disputes. The most visible organization assisting “Blacks” and “Browns” with legal problems in São Paulo from 1993 to 1995 was Geledes, the Institute of Black Women. Thus, for working women, the stigma against filing may have mattered even less, and women may have developed a culture to complain about certain problems.

Demographics mattered but not as expected. I did not find the expected class bias. The group that complained the most did not possess the most material resources, but had experienced the severest harassment and had developed social and political resources. Women of all occupations were the most likely complainants at the DCS.

### **Complaining about What Kinds of Problems**

In the following subsections, I consider alternative explanations for the kinds of problems Brazilians have brought to the law. I show that complaints do not reflect the most prevalent problems, the letter of the law, nor media coverage of racial discrimination. Instead, I claim that Brazilians brought problems to the police that contained verbal prejudice because of the overall conception of racial discrimination as the act of racial prejudice. Finally, I explore the presence of the legal consciousness of racial discrimination in the bargaining dynamics between principals prior to the filing of a complaint.

### **Prevalent Experience**

To consider whether this reporting reflected the most prevalent experiences, I compare the problems voiced to the police with the problems reported in the 1995 Datafolha survey. The Datafolha asked “Browns” and “Blacks” whether they had “ever felt discriminated against

because of . . . [their] color.”<sup>72</sup> The 420 respondents who responded affirmatively were asked in which situations this had occurred, hereafter the **volunteered sites**. All 2,025 “Black” and “Brown” respondents were also asked if they had experienced discrimination “because of their color” in specific sites (hereafter **prompted sites**): “ (1) seeking a job; . . . (2) gaining a promotion, . . . (3) buying or renting housing; . . . (4) studying in school.”<sup>73</sup>

A broad convergence emerged in the types of problems voiced to the police and to the survey interviewer. (See table 4.7) Over 70% of the legal complaints pertained to daily mistreatment, primarily in the workplace or the residence. Over 50% of MSE respondents also volunteered problems in daily mistreatment. Refused access or service to public places was the second category of problems most often identified and blocked contractual relations was third.

Statistically significant differences emerged in the voicing of specific sites and categories.<sup>74</sup> Brazilians were much less likely to report a problem in contractual relations to the DCS (10%) than in the survey (23%), a statistically significant difference. Many more respondents identified problems in blocked contractual relations when prompted than volunteered. Prompted reporting can provide a more accurate measure than volunteered

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<sup>72</sup> The survey questionnaire was printed in a preliminary report of the Datafolha survey: “300 Anos de Zumbi - Os Brasileiros e o Preconceito de Cor”, June, 1995, p. 157-160.

<sup>73</sup> Ibid.

<sup>74</sup> I also used the T-test to calculate the statistical significance of the difference between the proportion of survey respondents who identified a particular discriminatory problem and the proportion who identified another discriminatory problem. I calculated statistical significance based upon a 95% confidence interval. See Hubert M. Blalock, Jr, Social Statistics. McGraw-Hill. 1960.



reporting when probing a taboo subject.<sup>75</sup> However, the prompted questions were not extensive and did not ask about firing, among many other problems. Thus, I surmise that the discrepancy between the survey results and the DCS complaints probably exceeded my findings.

**Table 4.7: Discriminatory Problems Perceived and Reported by Analytic Category**

Category of Discriminatory Problems	Metro SE: Datafolha, Volunteered 1995 <sup>1</sup>	São Paulo: DCS Complaints, 1993-5 <sup>2</sup>
Blocked contractual relations	22.9%*	10.0%
Refused access or service to public Places	25.1%	19.1%
On-site mistreatment	53.0%*	71.1%
<b>N</b>	<b>80</b>	<b>213</b>

SOURCES:

<sup>1</sup> Secondary analysis of Zumbi survey, respondents from metropolitan southeast region. Datafile furnished by Datafolha.

<sup>2</sup> Selected complaints filed by Brazilian "Blacks" and "Browns" at DCS in São Paulo, 1993-95.

Brazilians reported different problems of on-site mistreatment in the survey and to the police. (See table 4.8) Fifty-eight percent of the police complaints pertained to problems at work or at home. In the survey, only 31% of respondents who identified discriminatory problems named these problems. Although some problems the Datafolha called "bad commentary" may have occurred between neighbors, the difference between the police reporting and the survey reporting is statistically significant.<sup>76</sup> Problems in classroom treatment were identified at higher rates in the survey (13%) than to the police (4%). These differences

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<sup>75</sup> A survey on discrimination used in the US, Canada and Australia included considerably more detailed prompts. See Herbert M. Kritzer, Neil Vidmar, and W.A. Bogart, "To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances," Law & Society Review, vol. 25: no. 4, 1991. In Brazil, because of the taboo nature of discrimination, an open-ended item by itself will only yield a limited response.

<sup>76</sup> Even if all of the problems the Datafolha classified as "bad commentary" occurred between neighbors, the difference would still be statistically significant.

in the reporting of problems in the workplace, residence or classroom, the principal sites of daily mistreatment, were all statistically significant.

**Table 4.8: Summary of Rate of Survey Reporting and DCS Filing for Specific Sites**

		Datafolha, Metro SE: 1995		São Paulo: DCS
		Prompted <sup>1</sup>	Volunteered <sup>1</sup>	Complaints 1993-5 <sup>2</sup>
Blocked Contractual Relations	Hiring	45.0%*	18.8%*	4.5%
	Promotion	31.6%*	3.3%*	
	Firing		0.0%*	4.5%
	Education Selection	10.9%*		
	Residential Selection	12.6%*	0.8%	1.0%
Refused Access or Service to Public Places	Service Elevator		2.2%	3.0%
	Entrance to facilities		19.6%	10.1%
	Police harassment		3.3%	1.5%
	Other problems			4.5%
On-site Mistreatment	Workplace Conditions		18.5%*	34.2%
	Classroom treatment		12.9%*	4.1%
	Neighbors		0.0%*	23.7%
	Personal Relations		11.9%	9.1%
	Bad commentary		8.7%	
<b>N</b>		<b>103</b>	<b>80</b>	<b>213</b>

SOURCES:

<sup>1</sup> Secondary analysis of Zumbi survey, respondents from metropolitan southeast region. Datafile furnished by Datafolha.

<sup>2</sup> Selected complaints filed by Brazilian "Blacks" and "Browns" at DCS in São Paulo, 1993-95.

The differences in the reporting of problems of refused access to, or refused service in, a public place by MSE respondents and DCS complainants were slight. Brazilians were more likely to name problems in refused access or service to public establishments in the survey (25%) than to the police (19%). This difference was not statistically significant. Within the larger category, most problems were reported at equivalent rates to both sources. Higher

incidence of police harassment has been reported in other surveys than reported here.<sup>77</sup>

Respondents may have been reluctant to admit such problems in the 1995 survey.

MSE respondents reported problems in hiring and other contractual relations more highly than DCS complainants. Even without the prompted reporting, hiring and promotion were the principal contractual problems identified. Brazilians were four times more likely to voiced hiring problems in the survey than to the police. They identified problems in securing a promotion at a low rate in the survey but did not bring any problems in securing a promotion to the police. These differences were statistically significant. Firing was the only contractual problem claimed at the police station and not mentioned in the 1995 survey.

Respondents reported problems in contractual relations at statistically higher levels when prompted than volunteered. Twice as many persons named problems in securing work after being prompted, compared to those who had volunteered the problem. Respondents were ten times more likely to name problems in promotion after being prompted by the interviewer. They rarely brought these contractual problems to the police. Thus, these findings indicate an overall convergence in what Brazilians view to be discriminatory but differences between what they perceive to be discriminatory and actionable, the problems they bring to the police.

## **Provisions of the Law**

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<sup>77</sup> A Datafolha survey conducted in April, 1997, showed that nearly half of Brazilian "Blacks" and "Browns" were stopped by the police, compared to one-third of Brazilian "Whites". The survey also reported significant differences in the likelihood of being insulted and assaulted. In the same survey, there were no differences in being stopped according to social class. See Rodrigo Vergara, Folha de Sao Paulo, April 6, 1997.

Given the weak Brazilian rule of law, the provisions of a law seem unlikely to explain reporting trends.<sup>78</sup> Indeed, reporting to the DCS from 1993 to 1995 was not correlated with the provisions in the law. The police regularly applied the law to four problems that were reported at low rates: hiring, firing, elevator, and personal and familial relations and that represented 15% of all problems reported. (See Table 4.9) The problems most complainants brought to the police, on-site mistreatment at work or home, were generally classified as crimes against “honor.” The police role in classifying incidents will be assessed in the next chapter.

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Sufficient data does not exist to measure the impact of the law over time, such as changes in reporting before and after the 1989 new anti-discrimination law. Claim rates were fairly constant across the three years of the DCS data collected, approximately ten claims per month. An important study of the complaints reported in the media from 1989 to 1994 showed fluctuations throughout without any overall upward or downward trends. See Guimaraes (1998). The reporting of discrimination in surveys decreased slightly from 1987 to 1995 in the metropolitan southeast. Since there was an increase in publicity about racism and the anti-discrimination law over this time period, this finding is counterintuitive. Surely, neither the amount of discrimination in the country decreased nor the perception of discrimination decreased during that time. The slight decrease must be methodological.

**Table 4.9: Application of Anti-Discrimination Law to Allegations DCS, 1993-5**

Nature of Alleged Conduct	Problem	N	Anti-discrimination law applied
Contractual Relations	Hiring <sup>1</sup>	8	87.5%
	Firing <sup>1</sup>	10	50.0%
Access to Public Places	Service Elevator <sup>2</sup>	9	44.4%
	Public Establishments <sup>3</sup>	24	12.5%
	Public Places & ways	11	0.0%
On-site Mistreatment	Workplace conditions	69	0.0%
	Classroom treatment	6	0.0%
	Relations with Neighbors	54	0.0%
	Personal Relations <sup>4</sup>	4	50.0%
	All		10.8%
	N	195	21

\*The police classified 13 complaints as unspecified "racism."

SOURCE: Selected complaints filed by "Blacks" and "Browns" DCS, through November, 1995.

<sup>1</sup> Articles 3, 4, and 13 offer limited coverage against employment discrimination in the public, private and military.

<sup>2</sup> Article 9 prohibits the restricted use of the social elevator.

<sup>3</sup> Articles 5, 7, 8, 9, 10, and 12 prohibit the restricted entrance to, or refused service in, stores, hotels, restaurants, social clubs, hair saloons, and public transportation.

<sup>4</sup> Article 14 prohibits the interference in familial and personal life.

## Media Coverage

Public officials send signals about the likelihood of enforcement. With weak public institutions combating racial discrimination during this period, the media may have provided important signals about enforcement. Certainly, media coverage has brought visibility to racial discrimination. After gaining a well-publicized victory in August 1995, one local Black organization received at least three racial discrimination complaints a day after having received only two complaints a month for the previous two years. That effect lasted at least a month.<sup>79</sup> Newspaper coverage about concrete cases influenced some plaintiffs and their witnesses.<sup>80</sup>

<sup>79</sup> João Carlos Nogueira claimed that the rate of claiming tripled during the next month. Interview with Nogueira, August, 1996.

<sup>80</sup> For example, a witness in the 1991 newspaper case in Aracatuba explicitly referred to the (continued...)

These developments reflect democratization from the control of the media under Brazil's authoritarian regime.

**Table 4.10: Discriminatory Problems Reported to the Media or the Police**

	National Media, 1990-5 <sup>1</sup>	São Paulo: DCS Complaints, 1993-5 <sup>2</sup>
Blocked contractual relations	8.5%	10.0%
Refused access to Public Places	59.2%*	19.1%
On-site mistreatment	32.9%*	71.1%
<b>N</b>	<b>201</b>	<b>213</b>
SOURCES:		
<sup>1</sup> Guimaraes (1996)		
<sup>2</sup> Selected complaints filed by "Blacks" and "Browns" DCS, through November, 1995.		

Media coverage could influence how Brazilians define racial discrimination. However, the problems individuals brought to the police station have not reflected the patterns in media coverage. (see table 4.10) The most visible problem in the media has been access to public establishments.<sup>81</sup> The most widely popularized incident in the first half of the 1990's was the so-called "Cinderella" case, in which the daughter of the Governor of Espírito Santo was insulted and punched for using a social elevator.<sup>82</sup> Approximately 60% of the problems reported between in the media 1990 and 1995 pertained to the access to public places, and public ways.<sup>83</sup> Few problems were reported in blocked contractual relations, at work or with one's neighbors.

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<sup>80</sup>(...continued)

1989 case against the school principal in Campinas. See *Apelação Criminal N. 141.820-3/2 (Aracatuba)*, Tribunal de Justiça do Estado de São Paulo, February 1995.

<sup>81</sup> See Hasenbalg (1979) and Guimaraes (1996).

<sup>82</sup> See Antonio Sergio Alfredo Guimaraes, "Racism and restriction of individual rights: publicized racial discrimination", Paper presented at the Annual Meeting of the American Sociological Association, 1996.

<sup>83</sup> Ibid.

## **Most Blatant Experiences**

When so few complaints are filed, the complaints might represent an extreme: either extremely blatant and severe problems or incidents committed by extremely biased, aggressive individuals. That would be in keeping with Gilberto Freyre's arguments and even some of his critics, who have discussed the smooth handling of racial tensions. I examine the behavior of aggressors, including their use of verbal prejudice, physical threats, or other forms of intimidation in the alleged incidents.

Aggressors behaved differently in the various categories of allegations. (See table 4.11) Aggressors insulted the complainants in most alleged incidents of on-site mistreatment. In blocked contractual relations, aggressors generally thwarted applicants through subtler behaviors. Aggressors mixed verbal and physical communication in their refusals to provide service of access to public places. Aggressors met complainants at the entrance to a facility or followed them inside, using body language to deny the use of the facility. Aggressors behaved most overtly in on-site mistreatment and the most covertly in blocked contractual relations. They combined covert and overt tactics in refusing service or access to a public place. Since complainants highly reported on-site mistreatment and hardly reported blocked contractual relations, these findings generally support the notion that Brazilians reported the most overt incidents.

**Table 4.11: Selected Characteristics of DCS Complaints, São Paulo 1993-95**

Categories of Problems:	N	Verbal prejudice	Death Threat, Other Threat, or other Physical	Resource Denied or Thwarted*	Recurrent problem*	Participation, Observation of Others*	Vertical relations*
On-site mistreatment	129	90%	8%	5%	21%	19%	20%
Public Places	38	63%	18%	37%	9%	32%	64%
Contractual relations	16	44%	13%	100%	0%	32%	94%
Total	183	80%	13%	19%	15%	20%	35%

SOURCE: Selected complaints and investigations received at the DCS, June 1993 to November 1995.

Aggressor behavior varied more within the specific problems grouped within these categories. (See Table 4.12) In the four principal types of on-site mistreatment, at work, at home, at school and in personal relations, aggressors consistently abused the complainant verbally. Within that overall pattern, residential disputes were the most virulent and most likely to include spitting, physical threats, and violence. Classroom mistreatment was the most public and recurrent problem, generally instigated by teachers. Some workplace harassment was committed by supervisors. (26%) Classroom mistreatment was the most likely to entail vertical power relations.

Aggressors behaved more covertly in denying the access to elevators than in denying access to other public places. Doormen thwarted the use of elevators by invoking building policy and seldom insulted the complainant. Aggressors in public places were likely to follow the complainant and often insult the complainant with a prejudicial remark.



**Table 4.12: Selected Characteristics of DCS Complaints, São Paulo 1993-5**

Incident:	N	Verbal prejudice	Death Threat, Other Threat, or other Physical	Resource Denied or Thwarted*	Recurrent problem*	Participation or Observation of Others*	Vertical relations*
Workplace Conditions	62	96%	6%	2%	17%	16%	26%
Residence	52	83%	15%	8%	25%	22%	6%
Personal Relations	9	89%	0%	11%	0%	0%	11%
Classrooms	6	100%	0%	0%	67%	67%	83%
Public Places	33	68%	20%	36%	8%	35%	65%
Social elevator	5	20%	22%	40%	11%	0%	40%
Firing	10	40%	20%	100%	0%	40%	90%
Hiring	6	50%	0%	100%	0%	17%	100%
All	183	80%	13%	19%	17%	20%	35%

SOURCE: Selected complaints and Investigations received at the DCS, June 1993 to November 1995.

Aggressors behaved more covertly in refusing to hire an applicant rather than in firing an employee. Although likely to verbalize a prejudicial remark, the recruiter's prejudicial comment generally expressed a racial preference, that a job required someone to be White, rather than a racial insult. The supervisor who verbalized a prejudicial comment often humiliated the complainant with a racial insult in front of co-workers. Although both aggressors were likely to verbalize their prejudice, the nature of their verbal comments differed dramatically.

In general, complainants more often brought the more overt problems to the police. Nonetheless, they seldom brought two overt problems in personal relations or classroom mistreatment. Further, they were more likely to bring overt problems with articulated prejudice

than with physical assault. I next consider why they brought any problems to the police and then reconsider why they brought certain problems.

### **Interpretation**

Brazilians reported certain overt discriminatory problems more than others. In the next two sections, I examine the dynamics in the incidents prior to reporting to consider why complainants reported any problems as well as why they brought certain problems and not others. I show that victims and their aggressors bargained during the incident. Aggressors often “blackened” their victims by calling them *Preta* or *Negra*, regardless of the person’s color. In response, their victims often invoked the anti-discrimination law and waited for evidence of discriminatory intent. Finally, I show that complainants and witnesses most often discussed the aggressor’s articulation of verbal prejudice as the discriminatory aspect of the incident. Thus, I claim that the legal construction of racial discrimination as the act of racial prejudice influenced complainants during the discriminatory experience and their responses to that experience afterwards.

### **Bargaining Within the Actionable Incidents**

In general, these incidents do not portray “Blacks” and “Browns” seeking to break into new social spaces in Brazilian society, but to function within the spaces they already occupy: their jobs, their residences and their nearby stores and establishments. Complainants bargained with their aggressors within many incidents and pursued strategies I interpret as informed by their understanding of the anti-discrimination law. In those circumstances, the

alleged aggressor had often insulted a victim to reassert superior position. Brazilians of lesser standing have historically invoked their relationship to a powerful person to settle such a dispute.<sup>84</sup> In this era, some complainants invoked the law as a bargaining tool with their aggressors.

Most principals presumed that the anti-discrimination law would not be enforced. Most complainants pursued other strategies before filing a complaint. Further, the high rate of recurrent problems, particularly in the workplace and residence, suggests reticence to report these problems.

Most aggressors presumed that the anti-discrimination law would not be enforced. For example, in 1989 Jose Parilha Filho, a taxicab driver and manager of a residential building in Aracatuba, a town near São Paulo, sought to place an ad with a local newspaper for a White doorman. In response to a receptionist's objection that he could be prosecuted for racism, he insisted that "it was he who was paying." After the ad was published, Jose Parilha Filho rhetorically asked a reporter in an interview, "Can't I hire a person of the color I wish?"<sup>85</sup> (See chapter 6)

That presumption of immunity was evident in other instances. When Rogerio was brought to the police station to face an allegation of racial discrimination, he threatened the police investigator on duty. A doctor, stopped at the scene of an accident by a Black police officer in Salvador, told him that she was not going to show a *Crioulo* her license.<sup>86</sup> Finally, a

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<sup>84</sup> DaMatta (1991).

<sup>85</sup> See *Apelação Criminal N. 141.820-3/2 (Aracatuba)*, Tribunal de Justiça do Estado de São Paulo, February 1995, p. 12.

<sup>86</sup> This event occurred in approximately 1998. (on file)

doctor in São Paulo calmly admitted to the police investigator that he had told an attendant that the “thing he hated most was urine and *Crioulos*.”<sup>87</sup>

In addition to presuming their own immunity from the anti-discrimination law, aggressors routinely “blackened” the complainants. Regardless of the color of the complainant, aggressors called the victim *Preta* or *Negra* in 55% of the incidents. Whenever the aggressor referred to the color of the complainant, the aggressor called the complainant *Preta* or *Negra*, even complainants listed as *Parda*, *Morena*, *Morena Parda*, or *Morena Clara*<sup>88</sup> in the police records. In 58% of the incidents with a brown victim, an aggressor called that victim *Negra* or *Preta*.

I found aggressor tactics within the incidents to reflect the Brazilian norm of thwarting rather than denying the use of a resource whenever possible. Aggressors were much less likely to insult a victim seeking employment or the use the social elevator. I suggest that these social norms reflect the legal construction of racial discrimination and popular assumptions about the law’s enforcement.

Victims anticipated and responded to aggressor tactics. Before filing their complaints, complainants pursued other strategies. The first was to thwart a perceived elimination. When a complainant suspected racism, one strategy was to extend an interaction and avoid possible

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<sup>87</sup> Even the police investigator was surprised by this admission. He noted that most defendants deny allegations during the investigatory phase. Departamento de Inquéritos Policiais e Polícia Judiciária (DIPO) Inquerito Policial, Proc. No. 15,793/95. Poder Judiciário de São Paulo.

<sup>88</sup> *Morena* and *Parda* are the two most common terms for “Brown”. *Parda* is the census term and connotes an intermediate color. *Morena* generally connotes a lighter color, represents a flexible category, and is suggestive of the nation. For example, a blond woman insisted she was *Morena*. *Morena Clara* is a light *Morena*, most likely a brunette. See Stephens (1989, p. 319-325).

elimination. For example, Maria's entrance to a store was shielded by the security guard and the saleswoman informed her that the product she sought was not available. Maria countered that she was also seeking other products, seeking to continue the interaction as if the sales clerk had responded, "Would you like something else?" Similarly, when Monica suspected the motivation for repeated questions about her residence, she countered that she could live anywhere in the city to avoid the elimination.

Some complainants sought to elevate the dispute. After the owner of a building reprimanded her for using the social elevator, the governor's daughter of the state of Espírito Santo in the famous "Cinderella" incident responded, "Don't you recognize me." Thus, she invoked her own status unsuccessfully, and I suspect few "Brown" or "Black" Brazilians can viably say, "do you know who you're talking to." A more successful tactic, used by a woman stopped from using an elevator in São Paulo, was to ask to speak to the manager.

Some complainants threatened to call the police or use the anti-discrimination law. One customer in a bakery was not served coffee until she threatened to report the incident to the police. In another incident, a woman was prevented from using the social elevator in the building where she worked until she protested the doorman's racism. In another case, when a woman discovered a discriminatory rental listing, she declared the listing to be criminal, and the real estate agent promptly disappeared. In each of these instances, aggressors responded to the threat, either seeking to undo the aggravation, such as serving the cup of coffee, or avoiding the aftermath. Under both responses, aggressors sought to make the problem disappear, which as the next three chapters explore, had significant evidentiary consequences.

Aggressors were much more likely to call a lighter complainant *Neguinho* or *Negrinho*. (diminutives: literally “my little Negro”) Whereas aggressors rarely used those terms overall (6% of the allegations), they called complainants identified as *Pardo Neguinho* or *Negrinho* in 19% of the allegations. I suggest that aggressors recognized the color of their victims as they blackened them.

Aggressors were also more likely to tell a lighter complainant he or she was out of place. In 3% of the overall complaints, the aggressor told the complainant he or she was out of place: that the *lugar de Negro* (“place of the Black”) was in the *favela*, the slave quarters, Africa, or somewhere else and not here. In 19% of the incidents with a *Parda* identified complainant, aggressors spoke about the victim being out of place.

What was the significance of this linguistic variation? Perhaps, Brazilian “Browns” brought different problems. Of the few complaints at the DCS in which the complainant was identified as *Parda*, a disproportionate number pertained to hiring. Of seven complaints filed about hiring problems, four were filed by persons identified as *Parda*. *Pardas* were less likely to complain about workplace harassment and more likely to complain about a problem in access to a public place. Thus, *Pardas* were more likely to bring a problem that contested a new “place.” Perhaps that finding suggests a greater likelihood for *Pardas* to contest new places in society since *Pardas* were less likely overall to voice problems.

“Brown” aggressors used the same language as Whites to “blacken” complainants, calling a complainant “Black” who was also Brown. Similar to White aggressors, Brown aggressors did not call any victims *Morena* or *Parda*. However, Brown aggressors used the language less aggressively, calling Brown victims *Preta* or *Negra* in 36% of the incidents.

They did not tell their victims they were out of “place” nor did they use the diminutives: *Negrinho* or *Neguinho*. Thus, I suggest that “Brown” aggressors used the common blackening language less aggressively.<sup>89</sup>

The use of this common pejorative language by *Parda* aggressors might seem to support the idea of an exit, that lighter *Pardas* are able to act White. However, the idea of exit suggests that someone has “passed” to the other side as an accomplished social fact. These data do not support the idea of an color exit, but rather portray color as a highly contested terrain. A *Parda* aggressor in one incident could be the victim in another. Further, being lighter did not provide an exit from mistreatment during an incident. Finally, *Parda* aggressors used the common pejorative language less aggressively. Thus, I suggest that ‘exit’ is too strong a concept for the possibility that someone lighter can use color to gain temporary advantages or gains, always subject to ranking and reordering processes.

### **Why Complain about These Problems**

Blatant racial epithets or an explicit racial distinction, that “Blacks can’t apply,” triggered the recognition that an experience was “racist” and actionable. In a previous study, those who reported discriminatory incidents in the media indicated a greater intent to file with the police if the incident entailed physical aggression, including death threats, or verbal aggression.<sup>90</sup> I found reporting to be associated with verbal prejudice rather than with physical threats or

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<sup>89</sup> In the police records, the police identified aggressors as either “White”, “Yellow” (Asian) or “Brown”. No aggressors were identified as “Black”. This might reflect police lightening of “Black” aggressors or “Blacks” were not aggressors in these incidents.

<sup>90</sup> Site Guimaraes (1996, Tabela 30).

aggression. Even in incidents with physical threats or aggression, the verbal prejudice seemed to trigger the reporting of these incidents to the police. The flagrancy of a problem did not indicate the likelihood of filing a complaint. Victims were more likely to bring certain problems with verbal aggression over other problems, including those with physical aggression.

For example in the Aracatuba case, witnesses denounced the attitude of the building superintendent who wanted to hire a white doorman as racist.<sup>91</sup> In Monica's case, the explicit color criterion for the job triggered her response and the moral outrage of the investigating police. In the judicial records, victims continually referred to the aggressor's language or attitudes as the racist aspects of the incident. Verbal conduct overshadowed nonverbal conduct or consequences in the understanding of racism.

Many of the highly reported overt incidents had an extended history before being reported. Even in the problems they were most likely to report, Brazilians often delayed bringing the problems to the police. Despite my original expectations, aggressors did not behave cordially at the outset of the incidents with a history. Instead, the allegations with a history describe severe abuse that escalated. At minimum, one of four problems with neighbors was recurrent, often part of a long-standing family feud. Undoubtedly, many more problems were recurrent than noted.<sup>92</sup>

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<sup>91</sup> The several witnesses criticized the defendant's "attitude". Poder Judiciario. Processo. No. 141/91 18<sup>th</sup> Vara Criminal. São Paulo.

<sup>92</sup> Prior problems were recorded infrequently in the complaints, only when the victim's account of the incident mentioned prior problems. The DCS did not use an intake form, similar to the one used at the women's delegacias, that inquired about prior history.



Individuals often waited to file. Kelly Cristina suffered two years of aggressions by Rogerio and only reported a complaint when his actions became fully unbearable. In other instances, hiring or difficulties at banks, victims needed multiple experiences to verify their suspicion that particular treatment had a racial aspect. Vanda did not complain about being refused at the pharmacy until being refused at the third pharmacy in the chain and seeing her White neighbor offered a position.

Complainants demonstrated multiple reasons for filing:<sup>93</sup> to obtain self-respect, to reprimand an aggressor, and to stop mistreatment. Their moral outrage was evident even in the police records. For example, Monica refused the job offered by the recruiter once the police had arrived.<sup>94</sup> Antonia, one of the three victims of the police harassment instigated by the supermarket security guard, called the incident the most humiliating of her life. As she filed a complaint in the face of continued intimidation by police at the station, she expressed the hope that “justice existed.”<sup>95</sup>

Victims’ moral outrage was informed by legal and societal constructions of racial discrimination. The overwhelming majority of complaints filed at the DCS responded to explicit racial insults. The strongest overall indicator of the reporting trends was whether an incident was overt or covert, followed by the relationship between the principals. These factors reflect the influence of the legal construction of racial discrimination as the criminal acts resulting from racial prejudice and the weakness of the Brazilian rule of law, respectively. The victims’

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<sup>93</sup> See Merry (1990) whose working class complainants in the US also brought “private” problems to court, largely out of desperation.

<sup>94</sup> Interview conducted with Monica Aparecida, August, 1995.

<sup>95</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Inquerito Policial No. 8.713/94. Poder Judiciário de São Paulo.

understandable fear of retaliation, in the context of a weak rule of law that did not create a level field of justice, fueled their reluctance to file complaints about certain problems. “Black” and “Brown” Brazilians were more likely to bring a problem with the police to the media than to the DCS.

Racial discrimination victims used the media as an alternative channel to articulate problems, either in lieu or support of legal complaints. One out of every five problems reported in the media pertained to police harassment, barely reported to the DCS. With relatively little likelihood of legal victory, complaining to the media could also have more immediate effects. Prior to the new anti-discrimination law, Brazilians were much more likely to denounce an incident in the media than to report it to the police. That tendency has been reversed.<sup>96</sup>

The allegations suggest the presence of the anti-discrimination law in the strategies and actions of the principals during the incident. David Engels posits two concepts of legal consciousness: a narrower concept of the technical knowledge of, and competence in using, the law and a broader concept of popular perceptions of the law and institutions.<sup>97</sup> That the incidents most likely to be brought to court were the least likely to become fully processed counters the concept of legal consciousness as technical knowledge. The latter, the broader concept of legal consciousness as popular consciousness about the law and institutions, more closely approximates Brazilian use of its anti-discrimination law. Fueled by a moral outrage,<sup>98</sup>

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<sup>96</sup> Guimaraes (1999) in his closing chapter speculates that reporting to the police is greater than reporting to the media.

<sup>97</sup> See David M Engels, “How Does Law Matter in the Constitution of Legal Consciousness” in Garth and Sarat (1998, p. 119).

<sup>98</sup> The moral aspect of filing a complaint may emanate from the ideology of the nation. Officials have often claimed the nation encompasses Brazilians of all colors. The symbolic  
(continued...)

insulted beyond toleration,<sup>99</sup> and informed of a legal alternative, Brazilians have increasingly invoked the new anti-discrimination law in response to discriminatory incidents.

### Conclusion

This chapter has presented incidents Brazilians brought to the DCS in São Paulo from 1993 to 95 and examined why they have brought certain problems and not others. I have shown the presence of the legal framework of racial discrimination in the discriminatory incidents, the bargaining between principals, and victims' decisions to file complaints. I refer to this presence as a legal consciousness, in that Brazilians possess understandings of objectionable and actionable discrimination.

The legal consciousness of racial discrimination has exerted three influences on private actors. First, the legal consciousness of racial discrimination influences Brazilians about which troubling circumstances might be actionable. I argue that Brazilians disproportionately file complaints about incidents involving verbal prejudice because of the law's promise to punish acts of racial prejudice.

Second, aggressors and complainants generally presumed the law would not really be enforced. That perception affected the conduct of the principals within the incidents. For example, aggressors openly insulted their victims during the alleged incident, regardless of

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<sup>98</sup>(...continued)

inclusion of Black Brazilians and the highlighted role of the *Moreno* within the Brazilian nation may engender a sense of honor even though few rights ever accompanied that honor. Influenced by this image of belonging to the nation, excluded individuals may file complaints when they recognized the reason for not being included.

<sup>99</sup> This was also Bumiller's conclusion from her interviews with US racial discrimination victims. See Bumiller (1984).

witnesses. They destroyed evidence and threatened the well-being of the defendant. In several instances, they threatened officials. Further, aggressors called their victim *Preta* (Black) and *Negra* (Black race) during the discriminatory incidents, independent of the perceived color identity of either party. Aggressors used color to assert a status advantage and expected that their victims would not challenge their behavior and that officials would not support a darker litigant over a lighter defendant.

Third, complainants invoked the anti-discrimination law within the incidents to rebuff their aggressors, even though they knew it was unlikely to be enforced. Complainants used the law as a bargaining chip to rebuff and negotiate with an aggressor even if nothing came of it.

Thus, the likelihood of winning was not complainants' primary consideration in filing. Victims filed complaints that most strongly fit the legal construction of racial discrimination as the act of racial prejudice. The complaints reflected the general premises, but not the letter, of the law. Many officials have argued that the lack of fit between the complaints and the law has demonstrated popular ignorance of the law.<sup>100</sup> I argue that the problem was quite different. The divergence between the law's preamble and its provisions sent highly ambiguous signals to Brazilians. Brazil's new constitution and anti-discrimination law have strongly condemned racial discrimination. That condemnation received widespread publicity and undoubtedly encouraged victims to file complaints. The anti-discrimination law's emphasis on prejudice has

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See Eunice Nunes, "Acusados de Racismo sao absolvidos pela Justica", Folha De Sao Paulo, August 28, 1994, p. 4.

encouraged victims to file claims against aggressors whose actions may not actually be prohibited by the law.

Although the high reporting of overt incidents corresponds to the legal construction of racial discrimination as an act of prejudice, not all overt incidents triggered complaints. The most prevalent complaints were filed in response to overt incidents that contained explicit verbal racial epithets. Not all verbal incidents or unexplained exclusions were reported. Classroom mistreatment stands out as being under-reported. I hypothesize that the fear of addressing teachers, because of the power relations between student and teacher, explains that under-reporting. Incidents involving persons of equivalent status were much more likely to become the subject of complaints.

These reporting trends do not simply reflect the legal construction of racial discrimination but also consideration of the likelihood of enforcement. Given a weak expectation of enforcement, Brazilians tended not to report authority figures. This strategy represents the legal consciousness of Brazilians by reflecting the concept of racial discrimination in the law as well as the likelihood of legal enforcement. In bringing complaints, individuals considered the law's theory of racial discrimination, the general viability of the law, and their expectations of its enforcement.

The law has provided a strategic channel for individuals to contest problems. Their decision to file a specific complaint reflected their assessments of the viability of the channel and their specific circumstances. They brought problems that reflected the law's conception of racial discrimination, which also reflected the societal conception: acts of prejudice and acts of segregation.

The chapter may seem to present contradictory arguments. In exploring why “Black” and “Brown” Brazilians used the law, I suggest they were motivated by their desire for moral self-respect. The records reveal a desire for justice in the sense of obtaining personal redemption rather than vengeance. That suggests complainants using the law as a channel, independent of the ideas in the law. In exploring which problems Brazilians bring to the police, I emphasize the influence of the ideas in the law. Although the two arguments may appear contradictory, they are not. I suggest that Brazilians filed complaints because they desired moral self-respect and they selected problems to bring to the law that reflected the legal construction of racial discrimination. The next chapter examines the role of officials in the construction of racial discrimination complaints as *injúria*.

## Chapter 5 The Construction of Racial Discrimination Complaints as Interpersonal Misunderstandings

*The **discussion or misunderstanding** between Maria and Jose does not constitute an act specified by the anti-discrimination law. . . . It was only an **isolated act and a heated discussion**.*<sup>1</sup> (emphasis added)

*The defendant is of the color Negra, and could not conceivably have any prejudice.*<sup>2</sup>

Brazilian police have classified the vast majority of contemporary racial discrimination complaints as *injúria*, an injury to one's honor. They classified only a small fraction of those complaints as violations under the new anti-discrimination law. Officials generally treated a defendant's objectionable verbal and nonverbal conduct as discrete, unrelated elements and privileged verbal misconduct in their classification and investigation of the allegations. The police even classified allegations with actionable nonverbal conduct, such as firing, as a harm against the victim's honor. The Public Prosecutors characterized most investigated investigations as a misunderstanding between individuals in recommending the closing of an investigation. Official actions successively narrowed the scope of most allegations of discriminatory treatment to a misunderstanding between individuals.

The police appropriately classified some allegations as *injúria*. However, other allegations classified as *injúria* could have been treated as infractions of the anti-discrimination law or other statute. The overwhelming classification of the complaints as *injúria* vastly diminished the severity of the allegations and the state's responsibility for legal action.

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<sup>1</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 9.871/95. Poder Judiciário de São Paulo .

<sup>2</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 50.841/94 Poder Judiciário de São Paulo.

Allegations classified as *injúria* were much less likely to become the subject of an investigation or a full judicial proceeding.

This chapter asks why the police applied the anti-discrimination law so narrowly, classifying most complaints as *injúria*, and why the vast majority of investigations of *injúria* and racial discrimination were characterized as misunderstandings. The chapter explores the relationship between many factors that have contributed to the overuse of *injúria* and the dismissal of most allegations. Police officials and prosecutors have often claimed that individuals have not understood the law and have brought the wrong allegations, often without evidence, to explain the overuse of *injúria*.<sup>3</sup> According to officials, individuals predominantly complained about personal insults that had not denied protected rights, which they inexorably viewed as *injúria*. Lawyers and activists in the Black Movement have argued that the widespread use of the *injúria* classification has been rooted in the racial bias of criminal justice officials.<sup>4</sup> Surely these factors contribute to the narrowing of allegations by officials.

Although I draw on the insights of the human rights activists and the Black movement, I emphasize the role of ideas, the ideology of *racial democracy* and the legal construction of racial discrimination, in official decision-making. Police handling of allegations focused upon communicated prejudice and downplayed the nonverbal aspect of the incident. Most allegations contained verbal prejudice and passed this bar for condemnable verbal behavior. However, police treated the verbal and nonverbal conduct as discrete elements and privileged the verbal conduct in their classification and investigation of incidents. Officials did not

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<sup>3</sup> Folha de São Paulo (FSP), 9/16/95, p3-2. 6/25/95, p1-2.

<sup>4</sup> See in particular, Sueli Carneiro, Irohim, Volume 1, 1997.



examine the veracity of a defendant's account and failed to settle most evidentiary disputes. A defendant only needed to counter the allegation to achieve an evidentiary tie. Officials viewed these insults as slight infractions, classifying most complaints as *injúria* and dismissing most investigations as misunderstandings between individuals.

The next section of this chapter explores the trends in the classification of racial discrimination complaints at the DCS in São Paulo. Following this, the chapter examines the distinction between racial discrimination and *injúria* according to the law and legal scholarship, extremely influential in a civil law system. Third, the chapter explores influential jurisprudence before and after the new anti-discrimination law of 1989, with a focus on the distinction between racial discrimination and *injúria*. Then, the chapter analyzes the classificatory and investigatory processes conducted by the DCS and the Prosecutor's Office. Finally, the chapter concludes by considering explanations for the overuse of *injúria* and the disposal of investigations as personal misunderstandings. I argue that the best explanation is the joint influence of the legal construction of racial discrimination and Brazilian *racial democracy*, the ideology behind that construction.

### **The Processing of Racial Discrimination Complaints, São Paulo 1993-95**

The most frequently cited complaints at the DCS, daily insults and verbal humiliations at work and in other settings, were the most likely to be classified as *injúria*. The DCS effectively construed these complaints as disputes between individuals that resulted in the injury to the complainant's honor. Most allegations containing verbal and/or nonverbal components were

constructed as *injúria*. This section introduces Brazilian criminal justice procedures, the classification of the complaints, and the impact of the classification on subsequent processing.

Most Brazilians filing a racial discrimination complaint initially contacted their local police department or one of the specialized women's units. In São Paulo, the Delegacia das Crimes Raciais (DCS) was established in 1993 to receive and treat racial discrimination complaints. Most likely, the filing at other police stations significantly exceeded the filing at the DCS.<sup>5</sup> However, based upon many reports, victims preferred reporting an incident at a specialized police agency rather than a district station.

Any complaint classified as racial discrimination was supposed to be forwarded to the DCS in São Paulo for further investigation during the 1993 to 1995 period. During that period, officials forwarded complaints to the DCS classified as *injúria* if they deemed the insult to be of a racial nature. The DCS investigation included interviews with the victim, the defendant, and any named witnesses.<sup>6</sup>

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<sup>5</sup> Sufficient data was not collected to fully compare how often Brazilians used the DCS compared to the district station. Almost half of the investigations that the DCS performed between 1993 and 1995 were in response to complaints processed at other police stations, primarily the local district police station. Therefore, no more than half of the complaints filed in the city during those 3 years were filed with the DCS. Most likely, the filing at the other stations exceeded filing at the DCS. Three complaints were filed at the DCS for every complaint that was investigated. It seems inconceivable that only 3 complaints were filed at the local police station for every complaint forwarded to the DCS. Specifically, the police on duty may or may not have been aware of the procedure (cite law) to forward complaints to the DCS. Secondly, given the confusion about discrimination and *injúria*, many complaints may not have been forwarded out of questions about the classification. Either the victim reporting the allegation or the police classifying the allegation may not have recognized the complaint as having a racial aspect. There are many other factors as well, but suffice to say that considerably more complaints must have been filed in the district stations.

<sup>6</sup> See in general Adilson Mehmi, *Inquerito Policial*. Editora Saraiva. 1992.

The DCS classified 75% of the complaints it received from individuals or other police stations as crimes against honor, overwhelmingly *injúria*. I collected sufficient information for this analysis on 195 complaints filed by Brazilian Browns or Blacks between 1993 and 1995. Nearly 10% of the complaints received multiple classifications. Table 5.1 presents the primary classifications for these complaints. As the table shows, 18% of the complaints were classified under one of the provisions of the anti-discrimination act or as unspecified racial discrimination. Police also applied other articles of Brazil's criminal code. For example, they classified some allegations about harassment in public places as crimes against personal liberty.

Allegations with multiple classifications often contained multiple aspects, such as the incident in which a woman was insulted in a store, chased into the street, and physically threatened. Some contained allegations of physical and verbal assaults and threats. The Police classified some allegations as "unspecified racial discrimination," without identifying a specific clause of the anti-discrimination act, including "racial discrimination" (10), "racial prejudice" (3), "racism" (2), or the "preservation of rights" (1). These classifications suggest police uncertainty about the anti-discrimination law and particular allegations. Several allegations with multiple classifications included unspecified discrimination. In three complaints forwarded to the DCS, district police investigators cited the outdated anti-discrimination law of 1985 without identifying the applicable clause of that law.

**Table 5.12 : Classification of Racial Discrimination Complaints by DCS, 1993-95**

<b>Classification of Allegation</b>	<b>N</b>	<b>%</b>
Crimes against Honor	147	75.4%
Anti-discrimination Law	21	10.8
Unspecified Racial Discrimination	13	6.7
Crimes against Liberty	13	6.7
Other	1	0.5
<b>Total</b>	<b>195</b>	

SOURCE: Selected complaints filed by Blacks and Browns, DCS, April 1993 through November, 1995.

The classification of allegations varied according to whether the alleged incident contained verbal and/or nonverbal conduct. As table 5.2 shows, allegations of verbal misconduct in the workplace or residence were most likely to be classified as *injúria* and least likely to be classified under an article of the anti-discrimination law. Allegations including both verbal and nonverbal conduct were also very likely to be classified as *injúria*, although these problems were also classified as racial discrimination or a crime against personal liberty. Finally, allegations that were predominantly nonverbal, such as employment discrimination, were the most likely to be classified under the anti-discrimination law. In all, allegations of hiring and firing discrimination, prejudicial marital interference, and discriminatory access to an elevator were most likely to be classified as discrimination.

**Table 5.13: Criminal Classification of Specific Problems at DCS, 1993-95**

Nature of Alleged Conduct	Problem	N	Article of anti-discrimination law (%)	Unspecified racism (%)	Crime against honor (%)	Crime against personal liberty (%)	Other (%)
Nonverbal	Hiring	8	87.5	12.5	0.0	0.0	0.0
	Firing	10	50	0.0	40.0	10.0	0.0
Verbal and Nonverbal	Service elevator	9	44.4	22.2	22.2	11.1	0.0
	Entrance to establishments	24	12.5	16.7	50.0	20.8	0.0
	Public places & ways	11	0	0.0	72.7	18.2	9.1
Verbal	Workplace conditions	69	0	1.4	97.1	1.4	0.0
	Classroom treatment	6	0	33.3	66.7	0.0	0.0
	Relations with neighbors	54	0	5.6	88.9	5.6	0.0
	Personal relations	4	50	0.0	50.0	0.0	0.0
	All		10.8	6.7	75.4	6.7	0.5
	N	195	21	13	147	13	1

SOURCE: Selected complaints filed by Blacks and Browns, DCS, April 1993 through November, 1995.

The nature of the allegations differed tremendously for discrimination in hiring and discrimination in firing. That police treated some instances of firing under the anti-discrimination act requires little explanation. Most individuals who mentioned being fired in their allegation were also insulted by their superior in front of other workers.

The frequent classification of allegations as hiring discrimination under the anti-discrimination law requires explanation. Chapter 4 showed that these complaints were the least likely to contain prejudicial verbal conduct. Therefore, why did the police who, like other Brazilians and public officials, understand discrimination as an overt act, classify covert hiring discrimination as racial discrimination? Allegations of employment discrimination were not really candidates to be classified as *injúria*. Although these allegations did not contain explicit racial insults, victims alleged that race was an explicit criterion for their rejection in most allegations. These allegations possessed more witnesses and supporting evidence than most

and pertained to the loss of an explicitly protected resource. Thus, these allegations were the most difficult to classify as *injúria* and the most likely to be classified as racial discrimination.

Another frequently applied clause of the anti-discrimination law was Article 11, which prohibits discriminatory restrictions to the use of public elevators. Most allegations of this type were classified as racial discrimination. Increased publicity about discriminatory restrictions in elevator usage, the so-called “Cinderella case” and other publicized incidents, has coincided with the passage of several state laws that prohibit such restrictions. Perhaps, this increased visibility enabled the police to more readily classify these allegations as racial discrimination.

Perhaps the greatest surprise was the application of the first clause of Article 14 of the anti-discrimination law to personal problems, specifically two allegations of interference with romance. Police broadly applied the first clause of article 14, against interference in marriage, to two allegations. I suggest that the treatment of these allegations sharply contrasts the narrowing of most racial discrimination allegations and that this application surely reflects *racial democracy’s* claim that Brazilians freely “inter-marry.”

In Table 5.2, I distinguish public establishments, stipulated in the law, from public places and public ways, which were not. Allegations that transpired in the latter category were very likely to be classified as *injúria*. Thus, an insult communicated on the sidewalk was routinely classified as *injúria*. In an enumerated site, a complainant also needed to show the refusal of access or service and verbalized prejudice.

The DCS often classified an allegation for restricted access to a public establishment, a public place, or use of elevators as a crime against personal liberty. Crimes against public liberty include constraintment, kidnapping, physical violence, and physical or verbal threats of a

serious nature.<sup>7</sup> The DCS applied that classification to incidents involving a physical threat, a death threat, detainment, or other physical hindrance. Nonetheless, the DCS was more likely to consider these allegations as a crime against honor.

As mentioned above, the DCS classified many incidents as racial discrimination without reference to a specific provision of the law. DCS police were probably uncertain about applying the law to the facts of the case. However, other police probably classified incidents as unspecified racial discrimination out of ignorance of the law.<sup>8</sup> In several allegations, (see table 5.3), an individual had been insulted in an unstipulated location, such as the street, or manner, such as harassment by a neighbor, co-worker, teacher, or fellow student. In the unspecified incidents that had occurred in a public establishment, a victim had entered and received unsatisfactory or no service.

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<sup>7</sup> See Title I, (Crimes Against a Person), Chapters 6 (Crimes Against Individual Liberty), articles 146 to 149 of the penal code. See Brazilian Penal Code, CDGraf Web-site, [Http://www.cd-graf.com.br/](http://www.cd-graf.com.br/), Downloaded: December 28, 1997.

<sup>8</sup> Guimaraes reported that police in Salvador were confused by the law and confused discrimination and *injúria* in their classification. He argued that police there were genuinely offended by certain incidents which they classified as discrimination and judges determined to be *injúria*. See Guimaraes (1998).

**Table 5.14: Sites of Unspecified Racial Discrimination Complaints**

<b>Allegation</b>	<b>N</b>
Residence (harassment)	3
Store	3
Elevator	2
School (harassment)	2
Work (hiring, harassment)	2
Social club	1
Total	13

\*DCS classified complaints of racial discrimination without a specified article of the law.

SOURCE: Selected complaints filed by Blacks and Browns, DCS, April 1993 through November, 1995.

The DCS classification held tremendous importance for the subsequent processing of an allegation. One-third of DCS complaints were investigated and 1/16 became a full judicial proceeding. (see table 5.4). Of allegations classified as *injúria*, 20% were investigated and 3% resulted in a judicial process. In all, one of every 18 complaints resulted in a full judicial proceeding. That ratio was 37:1 for allegations classified as *injúria*, 13:1 for allegations classified as a crime against personal liberty, and 4:1 classified under the anti-discrimination law. An allegation classified as *injúria* was nine times less likely than one classified as racial discrimination and three times less likely than one classified as a crime against liberty to reach a Brazilian court.

The classification of *injúria* effectively limited the viability of a claim. An allegation's classification reflected how the police characterized the allegation. An allegation that was classified as *injúria* was effectively viewed as a "she said/he said" situation, an interpersonal dispute in which the state has little interest. Once so characterized, incidents had little chance to prosper during this period.



**Table 5.15**  
**Outcomes for Complaints Received, DCS, 1993-95, by Criminal Classification**

<b>Classification</b>	<b>Complaints (N)</b>	<b>Investigated (%)</b>	<b>Judicial proceeding (%)</b>	<b>Complaints per judicial process (N)</b>
Article of Anti-discrimination Law	21	81	23.8	4.2
Crime against Personal Liberty	13	69.2	7.7	13
Unspecified Racism	13	61.5	7.7	13
Crime against Honor	147	20.4	2.7	36.8
Other	1	0	0	-
<b>Total</b>	<b>195</b>	<b>32.8</b>	<b>5.6</b>	<b>17.7</b>

SOURCE: Selected complaints filed by Blacks and Browns, DCS, through November, 1995.

In violation of its obligation to combat a public crime, the DCS did not investigate 19% of the racial discrimination complaints but did investigate 20% of the claims classified as *injúria*. Between 40%<sup>9</sup> and 54%<sup>10</sup> of the DCS investigations between 1993 and 1995 responded to allegations of *injúria*. After 1996, the DCS was directed to not investigate allegations of *injúria* but refer such allegations to the specialized small claims courts. (*Juizados Especiais das Pequenas Causas*.)

Not only was it questionable for the DCS to investigate these alleged *injúria* incidents, but the investigation also exhausted the rights of the victim. The distinction between the representational requirement for public and private crimes thwarted some plaintiffs. In many instances, the Public Prosecutor dismissed an investigation of *injúria* for being initiated by the wrong party, another prosecutor in the Public Prosecutor's Office. In these instances, the public prosecutor recommended the investigation because the offended individual was

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<sup>9</sup> The 40% figure is from the data I collected for the 1993-1995 period. Of 68 DCS investigations that were studied for the dissertation, 29 had previously been classified as *injúria*. The DCS performed more investigations than I was able to collect.

<sup>10</sup> A 1996 DCS report showed that *injúria* was the alleged crime in 54% of their investigations in 1994 and 1995. "Estatística Geral: 1994-1995," 3ª Delegacia de Policias de Investigacoes Sobre Crimes Raciais, Mimeo, August, 1996.

obligated to initiate the allegation of a private crime. Often, the six-month time period during which the plaintiff could bring such a private allegation had been effectively exhausted during the DCS investigation. In those instances, the investigations exhausted the rights of the victims, who would have been better off by being informed at the outset that the state would not prosecute *injúria*.

Although the classification influenced the likelihood of an allegation would be investigated, the decision to investigate although reflected mobilization. Getting an allegation investigated required legal mobilization, either gaining the support of an NGO or a political official or obtaining a lawyer. In every instance in which a lawyer was involved until 1995, the DCS investigated the pending allegation.

Another factor that prompted an investigation was the plaintiff's social status, in keeping with the Brazilian rule of law. (see table 5.5). Complaints filed by children, the unemployed, housewives, and those working without a working card were much less likely to become investigated. None of their complaints became full judicial processes. Complaints filed by public functionaries, students, and freelancers<sup>11</sup> were more likely than the average to be investigated and become full judicial processes. Nonetheless, an extremely lengthy investigation was conducted because of his stature.<sup>12</sup> No other factor, such as the number of witnesses, the overall visibility of an incident, or even the power relationship between the parties, was correlated with the likelihood that an allegation would be investigated.

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<sup>11</sup> Freelancers include artists, athletes, and other occupation of some status.

<sup>12</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Inquerito Policial. Proc. No. 32.459/94. Poder Judiciário de São Paulo.

The greater likelihood of public functionaries and students having their allegations investigated was especially reflected in the processing of their allegations classified as *injúria*. Fifteen percent of the complaints by a student or public official that were classified as *injúria* resulted in a judicial process. For everyone else, less than 1% of the complaints classified as *injúria* became a judicial process. This finding highlights the role of mobilization and social standing in securing a legal response. That allegation by the famous soccer player, which generated an extensive investigation, was routinely ignored when filed by a housewife. Students and public officials possess more resources for legal mobilization than most other complainants.

**Table 5.16: Disposition of DCS Allegations According to Occupational Status**

<b>Classification</b>	<b>Complaints (N)</b>	<b>Investigated (%)</b>	<b>Judicial proceeding (%)</b>	<b>Complaints per judicial process (N)</b>
Unemployed	8	12.5	0	-
Housewife	7	14.3	0	-
Working without working card	13	23.1	0	-
Small business/self-employed	11	18.2	0	-
Liberal profession	14	28.6	0	-
Retired	7	28.6	14.3	7.0
Working with working card	79	30.4	3.8	26.3
Other	7	42.9	0	-
Public Functionary	23	43.5	17.4	5.7
Student	18	44.4	11.1	9.0
Freelancer (Athlete, Artist)	8	50	12.5	8.0
Total	188	30.4	5.9	16.9

SOURCE: Selected allegations filed by Brazilian Blacks and Browns at the DCS in São Paulo, June 1993 to November 1995.

### **Racial Discrimination and *Injúria* in the Law**

The legal construction of racial discrimination as the act of racial prejudice led police to focus upon verbal conduct and to consider the distinct elements of prejudice rather than the

totality of an allegation. The Police viewed allegations of verbal conduct, unaccompanied by nonverbal conduct strictly stipulated by the law, as clear instances of *injúria*. The Police also classified many allegations that contained verbal and nonverbal conduct as *injúria*. This section examines the legal construction of honor and racial discrimination in the new Brazilian constitution, Brazil's criminal code, and the thinking of important judicial scholars, three highly influential sources for jurisprudence in a civil law system.

The Brazilian Constitution of 1988 made the "dignity of the individual" a fundamental principle of the republic.<sup>13</sup> In addition, the Constitution established "privacy, private life, honor and image of persons" as "inviolable" rights. Brazilians can seek damages for the infringement of these rights.<sup>14</sup> Dignity, connoting self-esteem, and reputation comprise two key elements of a person's honor. That the Constitution specifically enumerated honor, the broader concept, and image, a subset of honor, indicates the overall importance of honor and the special emphasis upon image. This focus on image reflects a broader emphasis on social reputation and the class bias of the Brazilian legal system.

Compared to the Constitution, Brazil's criminal code, operating within the civil law tradition, seeks to delineate all potential problems between persons and the state. The criminal code was written in 1941 during the *Estado Novo* dictatorship and was patterned on the criminal code of Mussolini's Italy.<sup>15</sup> Crimes are ranked according to broader Brazilian values. First, "public crimes" are distinguished from "private crimes." "Public crimes" are

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<sup>13</sup> The 1988 Constitution, Article 1 inciso 3, in Dolinger (1992).

<sup>14</sup> Ibid, 1988 Constitution, Title ii, chapter 1, Article 5, inciso 10.

<sup>15</sup> See Roberto Kant de Lima, "Bureaucratic Rationality in Brazil and the in the United States: Criminal Justice Systems in Comparative Perspective", in Hess (1995).

considered crimes against the state, regardless of the identity of the victim, and require state prosecution. These public crimes include crimes against national security, public safety, or another public good. By contrast, “private crimes” are considered to be a crime committed against an individual and can only be processed upon the initiative of the harmed party.<sup>16</sup>

In all, the criminal code delineates twelve broader categories of crimes, based upon the designated target of the crime. These twelve categories include crimes committed against property, patrimony, family, persons, the dead, religion, custom, the organization of work, public security, public faith, and public administration.<sup>17</sup>

Crimes committed against persons are punished much less severely than the other eleven crimes. Crimes against persons include crimes against a person’s life, liberty, and honor. Of these crimes against the person, crimes against life, particularly murder, are the most severely punished, and crimes against honor are the least severely punished.

The criminal code delineates three types of crimes against a person’s honor: *calúnia*, *difamação*, and *injúria*. *Calúnia*, the most serious of the crimes against honor, is the false accusation of committing a crime. *Calúnia* would have been the appropriate classification for Black customers falsely accused of stealing. *Difamação* (defamation) is to falsely accuse a person of committing a non-criminal activity, such as commenting that someone was working too slowly.

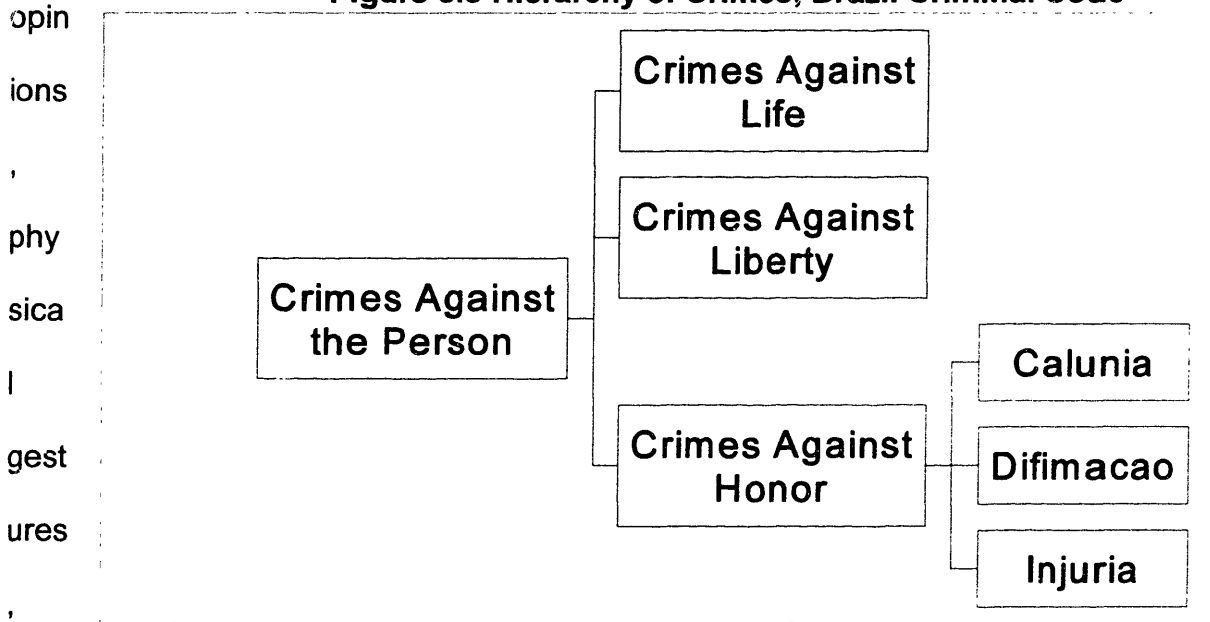
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<sup>16</sup> Leila Linhares Barsted and Jacqueline Hermann, “Legal Doctrine and the Gender Issue in Brazil”, American University Journal of Gender, Social Policy & the Law. 1998/1999. N. 7. Lexis/Nexis Academic Universe.

<sup>17</sup> See Brazilian Penal Code, CDGraf Web-site, [Http://www.cd-graf.com.br/](http://www.cd-graf.com.br/), Downloaded: December 28, 1997.

In contrast to *calúnia* and *difamação*, *injúria* is an insult that does not pertain to a “fact” but to a negative “quality,” such as calling someone “common.” This includes the expression of

**Figure 5.3 Hierarchy of Crimes, Brazil Criminal Code**



and other offensive acts.<sup>18</sup> Brazilian legal scholars interpret the criminal code to differentiate *injúria* according to the perceived gravity of the offense. These distinctions largely reflect class biases that someone of some prestige had his or her reputation sullied.

Brazilian criminal code identifies two types of honor that can be harmed through the crime of *injúria*: self-esteem and social reputation. The latter category, the loss of social reputation, is generally reserved for incidents that have an audience and consequently viewed to cause the graver harm.<sup>19</sup>

Legal scholars distinguish absolute and relative *injúria*. In general, *injúria* is viewed to be dependent upon circumstances: the place, the ambience, the “quality” of the persons, the

<sup>18</sup> See Barbosa (1995, p. 43).

<sup>19</sup> See in general Barbosa (1995) and Oliveira (1994).

nature of their relationships, the way the words were spoken, the acts, the intentions of the parties. Thus, something offensive in one context might be innocuous in another. Absolute *injúria* describes insults that would offend anyone in any context and do not require contextual analysis.

Of the many contextual factors in the interpretation of relative *injúria*, scholars emphasize the “quality” of the principals: “Among persons who normally treat each other in a low fashion, offensive words lose their meaning.”<sup>20</sup> Scholars treat the class of the principals as the key factor in evaluating verbal conduct. The perceived harm increases with the status of the victim. Thus, to call a wealthy person a “vagabond” in his boardroom represents a greater offense than to call a street child a “vagabond.” This emphasis upon the “quality” of the persons among the contextual factors parallels the emphasis upon social reputation over self-esteem. Both associate the significance of a crime with the victim’s position in the social hierarchy.

Scholars also distinguish between the harm to one’s common and special honor. Common honor is the honor all Brazilians possess, while special honor is possessed by a member of a particular group. Objective honor, a subset of special honor, is one’s reputation in relationship to a specified group.<sup>21</sup> Most racial discrimination allegations contained commentary that harms the “special honor” of the complainant.

Deep-seated class assumptions inform how legal scholars apply the categories of *injúria* and evaluate the seriousness of concrete harms. These assumptions pose major problems for Black and Brown complainants whose allegations are categorized as *injúria*. The

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<sup>20</sup> Barbosa (1994, p 44).

<sup>21</sup> See Barbosa (1995, p.14).

complainant's status is generally lower than the aggressor's. How much honor are judges willing to ascribe to a Black or Brown plaintiff? The logic of the *injúria* analysis is that the harm conveyed is directly proportional to the status of the victim. Judges must believe the plaintiff possesses sufficient honor to be able to show harm, which judges seem reluctant to acknowledge. In general, the honor of persons at the bottom of the Brazilian hierarchies of color, class, and gender has not been coherently addressed in the law.

Racial discrimination complaints can be viewed as allegations of verbal misconduct, nonverbal misconduct, or both. Allegations of only nonverbal misconduct do not fall into the analytical boundary between racial discrimination and *injúria*. Thus, I examine allegations that contain verbal conduct.

First, consider allegations of only injurious verbal conduct, which officials overwhelmingly classify as *injúria*. Injurious commentary can be considered a crime under the criminal code, or under Article 14 or Article 20 of the anti-discrimination law. Calling someone *Negra* or *Preta* is commonly understood as a prejudicial insult that legal scholars deemed a special type of *injúria*. Racial discrimination, the crime of racial prejudice, has been implicitly viewed as a special type of *injúria*, a relationship explicitly recognized in the 1997 amendment to the anti-discrimination law of 1989.<sup>22</sup> That amendment created a new subcategory in the chapter on crimes against honor of the criminal code for *injúria* with references to race, color, ethnicity, origin, or religion. That language suggests that the key distinction between racial discrimination and *injúria* is whether the injurious language contained a reference to race,

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<sup>22</sup>

See Celi Santos (1998).



color, ethnicity or origin, or expressed racial prejudice and the intent to communicate that prejudice.

How can a judge distinguish a prejudicial communication and a racial reference?

Prejudice has multiple meanings. Hatred or intolerance is the clearest meaning, referring to explicit hate crimes such as those committed by Nazi-inspired groups. The notion of prejudice as preconceived notions includes covert mistreatment by a perpetrator who acts through a veil of prejudice, which makes prejudice the least transparent aspect of a circumstance. Does the operative distinction reside in intent, required for prejudice, or the content of the remarks? What standards should a judge use to determine the severity of the harm?

One clause of Article 14 pertains prejudicial interference in one's "familial and social well-being." A racial insult generally viewed as *injúria* could generate a claim under this clause if it interfered with "familial well-being." How have judges defined "familial and social well-being," the governing concept, and distinguished it from "non-familial well-being" or other values, such as reputation or honor? Is self-esteem covered? What if the perpetrator was not a family member but interfered in a family's "well-being?" Further, what constitutes a "family?" Thus far, this potentially broad clause has been narrowly applied.

Article 20 of the anti-discrimination law prohibits "practicing, invoking, or inciting prejudice or discrimination [on the basis] of race, color, ethnicity, religion, or national origin." Verbal conduct viewed as *injúria* if spoken "on the street"<sup>23</sup> could constitute an Article 20 claim if deemed "social communication." The Constitution defines social communication as the

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<sup>23</sup> In an influential case discussed later in the chapter, Limongi distinguished a verbal insult spoken "on the street" from a viable Article 14 claim. See *Apelação Criminal N. 141.820-3/4-01*. Tribunal de Justiça de São Paulo. February, 1995.

“manifestation of thought, creation, expression and information, in any form, process, or channel,”<sup>24</sup> which includes publications of any nature, such as books, magazines, pamphlets, cassettes, videotapes, papers, or public discourse, and material with a circulation open to the public, whether verbal or printed, including written materials, illustrations, or speech, such as speech in a meeting. This turns upon the meaning of a “public place.” Depending upon the context, speech between two persons in a public place could be viewed as social communication.<sup>25</sup>

Since *injúria* can be committed in the media or in public places and an article 20 infraction can now occur anywhere, the site of the communication cannot comprise the key distinction between Article 20 and *injúria*. The verbs may clarify the difference: a defendant who “induced” or “incited” others would be appropriately prosecuted under Article 20. Still, the distinction between the “practice” of prejudice and injurious conduct that only refers to elements of race, color, ethnicity, or origin is not that clear.

Thus, the distinction between the application of racial discrimination or *injúria* to allegations that only contain injurious verbal conduct depends upon the meaning given to the concepts: familial well-being and social communication. This boundary is the most complicated because the conduct prohibited by articles 14 and 20 overlaps with conduct classified as *injúria*. Judges must determine the key distinctions between these overlapping categories.

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<sup>24</sup> Article 220 of the Constitution, cited by Osorio Fabio Medina and Jairo Gilberto Shafer, “Dos Crimes de Discriminação e Preconceito - Anotações a Lei 8.801, de 21.9.30”. Revista dos Tribunais. Ano 84. April 1995. Vol: 714. P. 333.

<sup>25</sup> Medina and Shafer, op cit.

Further, consider the racial discrimination complaints of both alleged verbal and nonverbal conduct occurring in public establishments and other settings. The classification of these complaints depends upon the interpretation of the specific clauses of the law to the context in question. The anti-discrimination law prohibits specific conduct in public establishments and specified sites. Negative commentary uttered outside of those specifically delineated sites is classified as *injúria*. The insult of a customer at a designated site, who was not refused service or entrance, has generally been treated as *injúria*. The lack of service has also been treated differently than refused service and generally has been treated as *injúria*.

Finally, the boundary between legal categories has particular implications in a civil law country. The traditional conception of a judge within a civil law country is that of a bureaucrat who applies the law to the cases before him. In a civil law country, judges dismiss allegations not specifically named in a law. Thus, a non-specified racial discrimination allegation becomes *injúria* by default. Brazil has recently empowered its judges to use “analogy, custom, and general principles of law” in deciding how to handle omissions.<sup>26</sup> The next section will explore how public officials have applied the law to the allegations they received and approached the boundary between racial discrimination and *injúria*.

### ***Injúria* and Racial Discrimination in Practice before 1989**

Prior to the passage of the new anti-discrimination law in 1989, racial discrimination had already been viewed as a matter of disputes between individuals in which one Brazilian allegedly harmed the honor of another. Consider the allegation of a young Black man who had

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<sup>26</sup> The principle of “legal reserve” in the penal code empowers judges to apply that clause from Article 4 of Brazil’s civil code. See Santos, (1998, p14).

been prevented from entering a club in a small town near São Paulo in \_\_\_\_\_. [SR: get year] The club rejoined that its employees had refused him because he was a “stranger,” and the Court accepted that argument. The Court did not consider whether all “strangers” to the city were refused entrance to the club but simply codified the club’s rationale for the exclusion. This finding was upheld by an appeal court, which became part of the summary jurisprudence<sup>27</sup> about racial discrimination: “Prejudice of race or color in serving a person of color is a misdemeanor only if the motive can be demonstrated.”<sup>28</sup>

Judges reinscribed the sanctity of the private domain. A plaintiff had alleged that she and her friends had been prevented from entering a party in São Paulo in 1986 on racial grounds. The defendants, club employees and owners, claimed that the event had been a private party to which the plaintiff had no invitation and denied that any Black had ever been prohibited from entering the club. One defendant acknowledged that the *Paulista* (São Paulo resident) bourgeoisie would react negatively if Blacks were admitted. Either club officials feared losing clientele if Blacks were admitted or actually shared the view of the *Paulista* bourgeoisie. Since the law only punished acts of racial prejudice, the distinction between those two possibilities would seem crucial. If club officials shared the prejudicial views, that would clearly constitute an act of prejudice under any interpretation of the law.

Officials did not consider the implications of the one defendant’s remark nor whether other nonmembers were blocked entrance. The public prosecutor found the evidence insufficient. The judge held that the “absurd opinion” of the particular defendant was

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<sup>27</sup> The *sumula* is a summary of a judicial holding that a court issues for precental reasons. Only appeal courts issue *sumulas*. See Rosenn (2000).

<sup>28</sup> See *Apelacao Criminal N. 40.837, São Paulo in Bertulio, (1989, p. 210).*

immaterial since she had not received the plaintiffs.<sup>29</sup> Moreover, the judge speculated upon whether the plaintiff's color was even a factor consideration in the incident:

*The plaintiff was not barred because of the racial question and not because she is really Negra. She appears even more White than Mulata in the photos . . . There is not racial segregation, it practically does not exist in Brazil. Negros are loved and worshiped not only in sports, music, film, etc. The Mulatas without any doubt are desired by most men, White, Black, or Yellow.*<sup>30</sup>

The judge's speculation upon her color was immaterial to the facts in question, since she was dark enough to have been barred from entering the club. In the judge's eyes, the plaintiff was a sexually desirable *Mulata* and even "more White than *Mulata*." This apparent flattery reflected the construction of the *Mulata* as an object of male sexual desire within Brazilian *racial democracy*.

Judges treated elements of the allegation as distinct elements and privileged the verbal conduct. Consider a Black lawyer's alleged discriminatory exclusion from an elevator in a São Paulo residential building in August 1979. The doorman had informed her that she could not use the social elevator because she was Black, which he did not deny during the proceedings. The judge found that the doorman had "injured" the lawyer and "offended" her dignity when he prohibited her use of the elevator in explicitly racial terms. Since the elevator was not an enumerated site of the Arinos Act, the prevailing anti-discrimination law, the judge found the alleged crime atypical of the law and dismissed the case. The judge characterized the incident as an affront to the plaintiff's honor, rather than an exclusion not covered by the law.<sup>31</sup>

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<sup>29</sup> Processo Criminal No. 134/85, 8<sup>th</sup> Vara Criminal. São Paulo. See Prudente (1989, p. 241-242).

<sup>30</sup> Ibid.

<sup>31</sup> Processo Criminal 1.267/79, 17<sup>th</sup> Vara Criminal. Sao Paulo. See Prudente (1989, p. 239-

Judges required evidence that a defendant's prejudice constituted the only visible motive and accepted most defendant rationales to the contrary. For example, Senator Arinos presided over a case a Black medical student had been refused employment at an upscale Rio de Janeiro medical clinic in 1977. The student had recorded the director explicitly stating that he refused the student out of fear that clients might not like having a Black psychiatrist. Arinos ruled that the director was not racist, but was only responding to the preferences of his clientele.<sup>32</sup>

This jurisprudence effectively upheld Brazilian customs. Legal scholars generally concurred and naturalized Brazilian customs. Lucio Nogueira depicted a "natural separation" that existed in rural cities in which groups of Blacks frequented different clubs than Whites.<sup>33</sup> He justified this "natural" phenomenon because private clubs retained the right to serve only their members. Another scholar, Manoel Carlos da Costa Leite, argued that the staff of a social club could legitimately refuse someone's entrance to a club based upon his dress, hygiene, or other "repugnant" factors.<sup>34</sup> Thus, scholars justified legal decisions that upheld the exclusion of Blacks based on explicitly nonracial criteria that naturalized racist perceptions. The next section explores the evolution of this jurisprudence.

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<sup>31</sup>(...continued)

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<sup>32</sup> Eccles (1989) cited a column by Vidal in the New York Times, June 5, 1978.

<sup>33</sup> See Paulo Lucio Nogueira, Contravenções Penais Controvertidas, Sao Paulo: Editora Selecoes Juridicas, 1978, p. 265.

<sup>34</sup> Nogueira, (1978, p. 263).

## Distinguishing *Injúria* and Racial Discrimination in Practice since 1989

Contemporary racial discrimination jurisprudence has become much more extensive since the significant expansion of the law in 1989. Many more allegations have been filed, investigated, and tried.<sup>35</sup> Nevertheless, judges apply a similar overall logic of legal inquiry from the earlier cases to more complex allegations. The analysis of the cases continues to focus on the verbal conduct of the principals rather than differential treatment. The increased scope of the law, combined with the criminal elevation of discrimination to a non-bailable felony, have had the unintended consequence of increasing judicial restraint and raising the standards of proving discrimination.

This section examines how judges have treated allegations of verbal misconduct under Article 14, Article 20, or the category of *injúria*. Could Article 14, which pertains to one's "familial and social well-being, protect a person insulted publicly in the neighborhood in which she lived and worked? The defendant, a local merchant, called Silvana a "Black whore," "crazy *Preta*," and "Black monkey" when she passed in front of his store. Shocked and humiliated by his aggression, Silvana left quickly.<sup>36</sup> The public prosecutor denounced the defendant for violating Article 14, noting that others overheard the commentary and that the

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<sup>35</sup> See the Versao Preliminar do Decimo Quarto Relatorio Periodico relative a Convecão Internacional sobre a Eliminacão de todas as formas de Discriminacão Racial. (Preliminary Version of the 14th Period Report to the CERD), December 2000, Ministry of Justice Website, <http://www.mj.gov.br/sedh/CERD.htm>, downloaded, March 18, 2002. Apparently, the final report counted 142 cases. See Juri Dantas, "No Brasil, 142 respondem nos tribunais por actes racistas". October 13 2001, Web-site of the Folha de Sao Paulo, <http://www.uol.com.br/folha/>, downloaded: October 22, 2001.

<sup>36</sup> Processo Criminal N. 256/93. 8<sup>th</sup> Vara Criminal. São Paulo. Poder Judiciário.

plaintiff lived and worked as a merchant within the immediate area and thus would be embarrassed in front of people she knew.<sup>37</sup>

The judge dismissed the case, finding that neither article 14 nor the anti-discrimination law applied. He did not accept the prosecutor's argument about the context and found that the incident only attacked Silvana's honor and constituted simple *injúria*:

*Racism is that which the law 7716 says . . . [acts that] impede or block the entrances to certain enclosed places. . . . In the present case, it is not the impediment of a marriage, because the victim is already married, and it is not the impediment of family well-being, because the defendant did not in any way interfere with the family of Silvana. . . . The social well-being also was not interfered with, because the defendant did not go to the place of Silvana's commercial enterprise, nor was her social relationship with others impeded.*<sup>38</sup>

The judge's ruling represented a narrow, literal interpretation of the provisions of the law. The pertinent question was simply whether the defendant's actions constituted a valid Article 14 claim. On that question, the judge ruled that nonverbal misconduct did not constitute an Article 14 violation, based upon a literal reading of the clause. However, why would her work and not her consumptive activities constitute social well-being? What if such treatment in her own neighborhood affected her business or her family's "well-being" in the neighborhood?

The judge ruled that the context for this incident was neither marital, familial, nor social. Further, he held that the verbal misconduct did not constitute racism but *injúria*, because the commentary could have been directed at a White woman: "To offend an Afro Brazilian with the words and expressions mentioned would not really be racism, because Whites or yellows

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Ibid.

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Ibid.



could also be called prostitutes, . . . vagabonds, monkey-like.”<sup>39</sup> That remarkable finding cannot stand inspection.

In explaining that holding, the judge distinguished racial discrimination as the injury to one’s “special honor,” the honor harmed by association with a specified group from *injúria*, the “common honor,” of any individual Brazilian. Although that distinction might be valid, his application of that distinction to the facts of the case was flawed. All Brazilians are aware of the racist implication and tremendous humiliation in calling a Black woman: “Black whore,” “crazy *Preta*,” and “Black monkey.” Undoubtedly, these terms have been used against White women, which does not lessen their impact against a Black woman.

Finally, the judge argued that Silvana’s status as a merchant proved that “in Brazil there is practically no racism.” He also noted the popularity of “those with darker skins” in sports and music, the popularity of *Mulatas*, and the marriage of Whites and Blacks, and argued that Brazil does not have racism:

*In Brazil Whites marry Blacks and have children normally and naturally and in truth, we are a country where approximately half are of darker skin, which is why laws 1390 (anti-discrimination law of 1951) and 7716 (anti-discrimination law of 1989) are very little known and remembered. Here we do not have rigorous and cruel racism like other nations where non-Whites are segregated, separated and do not enjoy equal rights. That is racism.*<sup>40</sup>

Thus, the judge invoked *racial democracy*’s image of racial discrimination: the “cruel racism” in segregated societies. He explicitly exempted Brazil and any action taken in Brazil from that possibility because of the presence of persons with “darker skin” and marriage between persons of different colors.

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

The next, highly publicized, case effectively defined the judicial standards for what constitutes “familial and social well-being.” As mentioned in Chapter 4, Kelly Christina brought an Article 14 allegation against Rogerio Cesario de Almeida, her employer in 1989. Rogerio had dismissed Kelly Christina, a 20-year-old student, in late 1987 after six months of caring for his baby. Kelly had not been paid. Rogerio claimed Kelly Christina had been babysitting on a voluntary basis while she claimed she had been dismissed after refusing Rogerio’s sexual advances. Kelly subsequently sought her back pay from Rogerio at his *barzinho* (cafe) in their neighborhood on numerous occasions. Rogerio repeatedly refused and insulted her.

The circumstances escalated over a two-year period, and he provoked other customers in his bar, their common neighbors, to join the harassment. On a day Rogerio sprayed her with dirty water from washing his car and insulted her, she filed a complaint. Rogerio continued the verbal abuse in the presence of the police chief, who imprisoned him for racism.<sup>41</sup> Rogerio threatened that his own relatives in the police would retaliate. The police chief initiated an investigation based upon a charge of racism<sup>42</sup> and was subsequently transferred to a different precinct.<sup>43</sup> Rogerio was detained for two days and subsequently threatened Kelly on at least three other occasions.

This case presents the question of how to characterize the discriminatory crime. The public prosecutor denounced Rogerio based upon Article 14, arguing that Kelly Christina's tranquil “social life” had been destroyed. He noted that Rogerio had insulted Kelly Christina in front of other patrons so often that these other persons had begun to participate. Rogerio's

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<sup>41</sup> Processo Criminal N. 141/91. 18<sup>th</sup> Vara Criminal. São Paulo. Poder Judiciario.

<sup>42</sup> “Racismo punido.” Revista Veja. Dec 6, 1999. P.105.

<sup>43</sup> “Delegado-assistente foi transferido por autuação”. Diario Popular. Jan. 5, 1990.

children, for whom Kelly Christina had cared, also joined in the ridiculing Kelly Christina. Five material witnesses testified in Kelly Christina's behalf to these incidents.<sup>44</sup>

At the closing of the case, a new public prosecutor argued that Article 14 connoted habitual conduct and required evidence of repeated interference.<sup>45</sup> He argued that only one incident had sufficient evidence, when Rogerio had insulted Kelly Christina in front of the police chief. Thus, the discriminatory moment had been narrowed to one instance. The judge accepted the repeatability requirement and only found evidence of one incident. Consequently, he held that this crime constituted *injúria*.<sup>46</sup>

Kelly received weak representation from the Public Prosecutor. Antonio Carlos Arruda, a lawyer with Geledes, officially served as an auxiliary to the Public Prosecutor's Office during the proceeding and advocated more forcefully for Kelly. Arruda appealed the trial court decision on the grounds that it had failed to consider Kelly's social context, suggesting that Article 14 ought to protect one's social and family well-being on one's street. The Public Prosecutor opposed the appeal, conceding that Rogerio had insulted Kelly Christina within a "climate of animosity originating from their employment relationship," which acknowledged an ongoing dispute.<sup>47</sup>

Celso Limongi, a noted jurist and member of *Juizes Para Democracia*, (a progressive association of Brazilian judges), presided over the State Appeal Court. Limongi declared Rogerio's conduct to be "lamentable," but he fully the prior ruling that only one incident.

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<sup>44</sup> Four of the five witnesses testified that the harassment had occurred multiple times. *Apelação Criminal N. 133.180-3/7*. Tribunal de Justiça do Estado de São Paulo.

<sup>45</sup> *Ibid*, p. 148.

<sup>46</sup> *Ibid*, p. 162-3.

<sup>47</sup> See, *ibid.* p. 172-177 for Arruda's argument for the appeal, and p. 179-180 for the Public Prosecutor's reason against the appeal.

Further, Limongi ruled without explanation that the governing clause, “family and social well-being,” of article 14, only protected conduct within a family or home and not insults on the street.<sup>48</sup>

In so doing, Limongi established standards for Article 14 claims. First, he emphasized the use of the conjunction “and” in “familial and social well-being.” He ruled that Article 14 protected against interference with either marital well-being, or familial and social well-being. He did not define what he meant by familial and social well-being. Second, the objectionable conduct needed to be demonstrably habitual. A single injury to someone’s honor would only constitute a crime against the person’s honor. Finally, the objectionable conduct could not occur on the street. These standards all narrowed the scope of protected conduct. The first two standards, though highly restrictive, could be justified by the language of the clause. The third standard was neither stipulated by, nor consistent with, the clause. Interference in marriage is broadly prohibited and not limited to specific physical locations. Indeed, one’s “familial and social well-being” could be impeded or blocked on the streets or anywhere. What about a long-standing feud between two neighboring families? Could the Limongi interpretation of “familial well-being” offer any protection to Brazil’s street children or others living on the street?

In another case, a complainant advanced an unusual Article 20 claim for a public insult by her neighbor. Her neighbor had allegedly promised not to “rest until she had thrown this *Preta* out of the building” and posted a letter on her door, which called the complainant a “cursed old Black.”

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<sup>48</sup> Ibid, 194-199.

Did that letter constitute racist social communication? The Constitution defines social communication as the “manifestation of thought, creation, expression and information, in any form, process, or channel,”<sup>49</sup> which could include a pamphlet or speech between two persons in a public place, depending upon the context. The Court ruled that this letter, unlike a pamphlet that constitutes social communication because an unlimited number of persons can receive it, was posted on a door where only a few neighbors could see it. This ruling made the actual audience of a communication the central factor in determining what is meant by social communication and deemed her door a “private place.” If her door opened to the street, posting that letter would presumably constitute racist social communication. Since unreceived communication can be prosecuted under Brazilian law, the holding narrowly protected the private sphere in the expression of prejudice.

In this holding, the Court cited Limongi’s finding in the Kelly vs. Rogerio case to rule that this case only constituted *injúria*. The Court applied without justification the more difficult standard that a perpetrator must “incite” and not simply “practice” racist communication. Since Article 20 uses the conjunction “or,” this interpretation was not mandated. The Court interpreted the “incite” standard to require evidence that a third party was incited to commit an act prohibited by the anti-discrimination law. That interpretation essentially would have required a double conviction in order for a complainant to win a single Article 20 case. Based

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Article 220 of the Constitution, cited by Osorio Fabio Medina and Jairo Gilberto Shafer, “Dos Crimes de Discriminação e Preconceito - Anotacoes a Lei 8.801, de 21.9.30”. Revista dos Tribunais. Ano 84. April 1995. Vol: 714. P. 333.

upon the “incite” standard and a determination that the defendant did not intend to offend the victim, the appeal court overturned the conviction.<sup>50</sup>

The use of the “incite” standard implicitly makes the communicator’s point of view the relevant standard, asking whether persons were sufficiently influenced by the perpetrator to violate the anti-discrimination law. The perspective of the victim is fully irrelevant to the “incite” standard.

These cases differentiated racial discrimination and *injúria*. A hallway within an apartment building is not sufficiently public to warrant protection from racist social communication. Conversely, the street was viewed as too public to protect “family and personal well-being.” Thus, judges narrowly construed the sites delineated in the anti-discrimination law. This narrow interpretation of Articles 14 and 20 placed most racial discrimination allegations within the realm of injuries to one’s honor.

### **Classification of Racial Discrimination Complaints, 1993-95**

The DCS classified the racial discrimination complaints with a logic similar to the jurisprudence and legal scholarship: focusing upon the communication of prejudice, the site of the communication, and questions of intent. The police treated each element of the allegation separately. For example, consider that the DCS classified half the allegations in which a complainant had been fired as *injúria*:

*A customer purchased some goods with a credit card from a 22-year-old female employee at ‘Today’s Baby’ and asked that the receipt be*

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<sup>50</sup> Habeas Corpus N. 241.301-3, 2<sup>nd</sup> Camara Criminal, (São Paulo), Tribunal de Justica de Sao Paulo.

*predated, an inflation-fighting strategy. The employee had been instructed not to predate receipts and refused. The customer angrily telephoned the owner. When the owner asked which staff member was on duty, the customer identified her as the “one of color.” She was subsequently fired.<sup>51</sup>*

*The Director of the Hospital offended a nursing assistant twice. During the second incident, the assistant verbally defended herself. She was called “dirty nigger,” “Black animal,” and subsequently fired.<sup>52</sup>*

*A packing assistant was asked to carry a box at work. He agreed but was finishing another task. The supervisor insulted him for the delay, calling him a “Black son of a bitch.” The assistant was fired two days after this incident.<sup>53</sup>*

Why were some allegations considered violations of the anti-discrimination law while others were considered crimes against the victim’s honor? In the five allegations of firing that the DCS classified as violations of racial discrimination, the victim was fired in the same moment as she was insulted. In these allegations of firing that the DCS classified as *injúria*, the firing occurred sometime before or after the verbal insult. In these allegations, the DCS treated verbal and nonverbal conduct as separate elements and emphasized the verbal conduct.

The DCS continually gave special attention to verbal conduct. The DCS classified an incident as *injúria*, in which an officer stopped famous soccer player for using a cellular telephone while driving a car, based upon the officer’s verbal insult. The nonverbal conduct, the racial profiling for “driving while Black,” infringed upon his personal liberty and constituted a

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<sup>51</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 069/95. Polícia Civil do Estado de São Paulo.

<sup>52</sup> “Negro era bicho”. Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 018/94. Polícia Civil do Estado de São Paulo.

<sup>53</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 037/94. Polícia Civil do Estado de São Paulo.

false accusation of a crime: stealing the car. However, the DCS only considered the verbal conduct in its classification.<sup>54</sup>

The DCS applied the law narrowly to allegations of nonverbal conduct. Article five of the anti-discrimination law outlaws the blocking of an entrance or the refusal to serve a customer in a commercial establishment. Once the customer crossed the physical threshold of the facility, the complainant would need to show an explicit refusal on racial grounds. The DCS did not apply the law to non service or even expulsion. If the incident failed that standard, the DCS generally concluded the complaint constituted *injúria*:

*A woman sought a particular product and the store's staff did not respond. She asked again, still without response. Finally, the merchant said that he was not selling anything and that she should leave: "Get out of here, Neguinha . . . what does you want, Neguinha . . . gets of here, Neguinha."<sup>55</sup>*

*A woman was waiting with her friend, a car dealer. A lawyer who worked at the firm said to her friend, in her presence, "Make sure that the next time you return, you don't bring this fucking Preta here, because when they don't defecate on the way in, they defecate on the way out."<sup>56</sup>*

*A security guard accused a 22-year-old male, accompanied by his middle-aged aunt, of stealing chocolate at a supermarket. In response to his denial, the security guard slapped him. His aunt tried to intervene. Officials searched them, found nothing, and apologized. In their apology, they emphasized this was a common mistake.<sup>57</sup>*

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<sup>54</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Inquerito Policial. Proc. No. 32.459/94. Poder Judiciário de São Paulo.

<sup>55</sup> The merchant said: "sai daqui sua *Neguinha*. O que voce quer *Neguinha* . . . sai daqui *Neguinha*". In certain contexts, *Neguinha* (little *Negra*) can be an affectionate term but not in this context. It is a more complex term than "Nigger" illustrates the domination and cultural embeddedness of Brazilian racism. Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 003/93. Policia Civil do Estado de São Paulo.

<sup>56</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 024/94. Policia Civil do Estado de São Paulo.

<sup>57</sup> Departamento de Inquéritos Policiais e Policia Judiciaria Inquerito Policial Proc. No. 0940/94. Poder Judiciário de São Paulo.



The alleged nonverbal conduct prevented these individuals from using the facilities. The first two complaints warranted prosecution as *ameaça*, for threatening against someone's return, and interfering with the complainant's consumptive rights.

The third incident was classified as *injúria*, *injúria real*, and *constrainment*, all emanating from the search. *Injúria real*, a more serious type of *injúria*, includes a physical aspect and is punished more severely. Constrainment, a crime against one's personal liberty, is a more serious classification than a crime against honor and is still more severely punished.<sup>58</sup> However, the fact that the victims were falsely accused of stealing did not result in the characterization of *calúnia*. Officials have often viewed the accusation of a poor person of stealing as an understandable response by a security guard to that person's poverty.<sup>59</sup> Generally, a poor Brazilian does not possess sufficient standing to be able to allege false accusation of a crime.

The DCS's narrow interpretation of the site reinscribed the sanctity of the private domain. In so doing, the DCS followed the narrow judicial interpretation of Articles 14 and 20, discussed above. Approximately 25% of the problems reported to the DCS pertained to a problem with a neighbor, often the culmination of a longer-standing dispute between families. Might the following disturb "familial well-being":[HERE: grammar-checker]

*A complainant's mother reported that her six-year-old daughter had been continually offended by a 50-year-old neighbor. On the day the complaint*

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<sup>58</sup> Constrainment (Title I, Chapter 6, Article 146 of the Criminal Code) can be punished by a sentence of 3 months to two years. See Brazilian Penal Code, CDGraf Web-site, [Http://www.cd-graf.com.br/](http://www.cd-graf.com.br/), Downloaded: December 28, 1997.

<sup>59</sup> See Proc Cível N. 672/93. 21<sup>st</sup> Vara Cível; Forum Central. São Paulo.

*was filed, the neighbor had told her daughter, "Stop looking at me, you little ugly Black. Go back in your house, you little ugly Black."<sup>60</sup>*

*Another complainant was also repeatedly insulted by her sister-in-law. They shared the same house peacefully for the first six months. Then, the sister-in-law decided to expel the complainant and her family, and repeatedly accused her of living off them: "Get these Blacks out of here. . . . we're going to throw you in the street. You unemployed vagabond living on my salary."<sup>61</sup>*

The first incident was an allegation against a neighbor who did not belong to the family. Arguably, the victim's social and familial well-being was impeded since the aggressor tried to confine the child inside. Further, the continual insulting of her daughter also affected the familial well-being. Applying Article 14 to the first allegation would have required an official to view the circumstance through the complainant's lens and consider its impact on her life.

Numerous workplace incidents described nonverbal conduct, such as interdepartmental transfers and discretionary assignments to the most difficult, unpleasant work, that might have constituted difference in the "performance of duties" based upon color, prohibited by the constitution. Consider the possible application of that standard to the following allegation of workplace discrimination classified as *injúria*. A supervisor told Catia, a product assistant of 3½ years that she was working "very slowly, like a turtle" and to work faster. Catia responded that she was "only one person" and requested help. Her supervisor, Rosa, allegedly screamed at Catia in front of her co-workers that she wanted Catia to work faster "right now" and that she was "ordering and not asking" her. Rosa continued to humiliate Catia, "Close your mouth, you *Negra safada*." (immoral Black) Catia did not respond fearing further reprisals. She received

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<sup>60</sup> Departamento de Comunicação Social (DCS). Boletim de Ocorrência, 065/94. Polícia Civil do Estado de São Paulo.

<sup>61</sup> Departamento de Inquéritos Policiais e Polícia Judiciária Inquerito Policial. No. 203/94. Poder Judiciário de São Paulo.

two written warnings that day. The owner witness this incident without comment. Rosa insulted Catia the next day, telling her “You have no shame . . . if you had any shame, you wouldn’t say my name . . . the place of the monkey isn’t working but in jail.” Rosa threatened to fire Catia if she went to the police.

The Public Prosecutor declared that the incident only constituted an allegation of *injúria*, and not a crime resulting from prejudice against race or color.<sup>62</sup> There was no consideration of the context of the complaint and implications either for the nature of the allegation or the veracity of evidence. Had Rosa retaliated against Catia for bringing the case? Had she intimidated other potential witnesses from testifying, a context that Jorge da Silva called a “code of silence?”<sup>63</sup> The limited record of this investigation suggested that much more than Catia’s honor was harmed. The anti-discrimination law did not pertain to differentiated performance of duties based upon or color. This allegations also raises questions about the investigation of incidents, the subject of the next section.

### **Investigation of Racial Discrimination Complaints, 1993-95**

The consummate construction of racial discrimination allegations as verbal interpersonal disputes occurred during the DCS’s investigation of allegations. The classification phase emphasized the injury to the victim’s honor and the objectionable verbal conduct of the perpetrator. The investigatory phase took that focus one step further. By the end of the

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<sup>62</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 147/95. Poder Judiciário de São Paulo.

<sup>63</sup> See Jorge da Silva (1994).

investigation, the DCS and the Public Prosecutor's office generally concurred in viewing most allegations as misunderstandings between individuals.

The DCS's failure to verify the veracity of defendant evidence and thoroughly investigate key evidentiary disputes in the investigations of nonverbal misconduct allegations was evident in the following case. João, a security guard at a firm, alleged to have been fired, forced to sign a statement that his dismissal was based upon "just cause", and have been told that "Blacks are worthless" and that he was "worthless." The question to examine was the circumstances of his signing the dismissal. The DCS did not clarify that question and simply concluded that he had resigned in ambiguous circumstances. The Public Prosecutor found that the investigation to represent the "word of the victim against the word of the defendant" and recommended dismissal.<sup>64</sup> The failure to investigate this allegation has troubling implications of intimidation. The DCS did not establish the veracity of any of any allegations and essentially left the dispute as a private matter between employer and employee.

In many investigations, the defendant was a security guard or other functionary enforcing an institution's policies. Often, that defendant quit or was fired after the incident, which benefitted both the defendant and the firm. The firm could claim that it had addressed the problem. Further, the defendant might not be easily located and therefore could not provide incriminatory evidence against either himself or the firm. The DCS did not treat these dismissals or resignations as legal maneuvers that warranted further inquiry.

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<sup>64</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 540/95. Poder Judiciário de São Paulo DIPO. In an elevator case, officials used the same language, declaring the incident as the word of one against the other. Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 11.416/94. Poder Judiciário de São Paulo

To illustrate the impact of the missing defendant, consider the case in which the security guard had falsely accused a middle-aged woman and her nephew of stealing chocolate. When officials found no stolen goods on their persons, they apologized. They insisted that the guard had made a “normal” mistake and denied any further wrongdoing. Despite that denial, the company transferred the security guard to another store and then fired him three days later. The company claimed to have resolved the problem as soon as it had discovered the guard's violation of company policy.

The DCS failed to investigate the guard's conduct. The company was able to use its evaluation of his conduct and its response to preempt officials from doing the same. If his conduct warranted transfer and dismissal by the company, why did not his conduct warrant full investigation by the DCS? According to a witness for the victim, one of the managers had acknowledged previous problems with that security guard. Was the guard following company policy as he understood it or acting independently? The DCS did not clarify relevant company policy in practice nor these other questions. The public prosecutor recommended closing the investigation based upon the lack of evidence and the fact that no enumerated right had been violated.<sup>65</sup>

Thus, the DCS's failure to investigate and settle the key facts in these disputes was often used by the public prosecutor to justify absolving the defendant. In a case with many witnesses, the DCS investigation left many unresolved evidentiary questions. A 25-year-old student was physically expelled from a bank by a guard who apparently thought she had cut ahead of others in a line. The student had left her place in line to use a bank card. The

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<sup>65</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 0940/94. Poder Judiciário de São Paulo

person behind her in the line apparently permitted her return. The guard apparently asked several customers if they had a problem with her return to the line. It was a disputed fact whether anyone heard his question or responded. According to the complainant, the guard punched her, called her a “fucking nigger,” and expelled her from the bank.<sup>66</sup>

The DCS classified this incident as *vias de fato* (fighting in a public place, a misdemeanor) and *injúria*, which mischaracterized the alleged crime. *Vias de fato* is a scuffle between persons on the street. A security guard who initiates a scuffle with a customer harms her personal liberty.

In the investigation, the DCS failed to adequately investigate the evidentiary impasse. The security guard and two other bank employees testified that the guard had intervened only after several customers protested her return to the line. According to the student’s account, she had asked a bank official to help her return to the line because her bank card had not worked. The official suggested that she ask other customers before resuming her place, which she claimed she did. The security guard produced no material witnesses who substantiated his account. The DCS did not investigate if any customer had objected to the student’s return to the line or had agreed to let her return. Finally, even if she had cut in line, would that justify the guard’s behavior?

The DCS reserved its sharpest questioning solely for the student, based upon a theory of overt racial discrimination. The DCS asked the student whether the guard had told her to leave or that Blacks were not permitted in the bank. Further, she was asked whether she had questioned the guard if her expulsion was based upon her color. In these questions, the

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<sup>66</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 36.400/94. Poder Judiciário de São Paulo.

guard's verbal conduct was treated as more important than his nonverbal conduct, and the student's verbal conduct became part of the inquiry, asking her what she had said while being expelled.

The DCS's final report to the Public Prosecutor's Office presented the guard's view, without recounting the student's version or the account of her friend who had been there. The DCS failed to resolve controversial facts and diminished the student's account. In his final, handwritten argument, the public prosecutor found no evidence of the alleged acts, except for her friend's testimony, and therefore recommended dismissal. The prosecutor did not direct the DCS to fill the evidentiary gaps.<sup>67</sup>

In allegations that included both objectionable verbal and nonverbal conduct, the DCS's investigation consistently focused on the verbal conduct. For example, Antonia, a 2\_ year-old Black woman, entered a bakery with her mother and was refused service by one of the attendants. Apparently, Antonia and the attendant had a common romantic interest. Consequently, the Public Prosecutor characterized the incident as a "misunderstanding" with "contradictory evidence." However, the evidence was not contradictory. That Antonia was refused service was undisputed. The question was whether the attendant's refusal to serve Antonia constituted a discriminatory action. The DCS failed to analyze the key question. Was the refusal motivated by the defendant's prejudice towards her and/or by personal factors? The personal aspect trumped consideration of the potentially prejudicial motivation.<sup>68</sup>

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<sup>67</sup> See the public prosecutor's closing argument. Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 36.400/94. Poder Judiciário de São Paulo.

<sup>68</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 29.788/95. Poder Judiciário de São Paulo. 1995.

In most allegations of objectionable verbal conduct, the DCS investigation minimized the alleged insult. In one case, the victim, a Black military policeman, pulled over a defendant for driving a car with illegal plates. The driver refused to sign the citation, saying “this must be something of the *Preto*” and “I don’t like this race.” The Black policeman’s account was corroborated by another military policeman at the scene. The DCS classified the allegation as *injúria*, when it should have been *desacato*, an insult against a public official and a more serious allegation. The DCS classification functionally removed the policeman’s credentials. In the investigation, the defendant’s husband described her as a “nervous person” and admitted that she had told him that she had said she did not “like this race.” The defendant also acknowledged that statement in her testimony. The Public Prosecutor argued that not “liking this race” was not an injurious statement, but only a personal opinion: “to like or not to like is only an opinion.”<sup>69</sup> Since *injúria* is the expression of an opinion, that argument fails in its application of the criminal code.

In another investigated allegation, Maria, a Black food server, had alleged that she was insulted by Jose, a co-worker. Maria asked Jose for his meal coupon, and he complained that he had not received the meal coupons to which he was entitled as a public employee. Frustrated by her lack of responsiveness to his problem, he told her that “the place of the *Negro* is in the *senzala* (slave quarters) and that the *Negro* shouldn’t be able to work in governmental agencies.” He continued to insult her, saying that there should be “more Whites working here,” calling her a “dirty *Negra*,” and then declaring “that this could only happen with

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<sup>69</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 29.657/96. Poder Judiciário de São Paulo.



a *Negra*,” a common racial epithet. Several co-workers witnessed the events and corroborated Maria’s account. Nonetheless, the public prosecutor recommended the closing of the investigation:

***The discussion or misunderstanding between Maria and Jose does not constitute an act specified by the anti-discrimination law. . . . It was only an isolated act and a heated discussion.***<sup>70</sup> (emphasis added)

This alleged incident did not violate the anti-discrimination law. However, the characterization of the verbal conduct as a misunderstanding ignored the allegation that one party offended the other. Calling it a “heated discussion” or “misunderstanding” disregarded the content of the communication.<sup>71</sup>

The DCS failed to take the word of the victim over the perpetrator even when the supporting evidence was very strong. In another allegation, a journalist called a victim “vagabond” and “dirty Black who has many lovers.” This comment was confirmed by two witnesses. One witness testified that the defendant did not “take any orders from anyone she perceives as inferior.” The police performed an *acareação*<sup>72</sup> between the principals because of the alleged evidentiary impasse. The principals repeated their prior statements, which were conflicting. Using this technique, the DCS reinscribed and formalized the evidentiary impasse.

Further, the DCS offered the defendant the defense of being Brazilian, by arguing in its report to the public prosecutor that the defendant had a “person of color in her family and

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<sup>70</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 9.871/95. Poder Judiciário de São Paulo

<sup>71</sup> Ibid.

<sup>72</sup> The *acareação* is an investigatory technique to resolve evidentiary impasses and inconsistent testimony. The principals, and sometimes their witnesses, are recalled in a group meeting, where each is required to repeat testimony in front of the others. The police ask additional questions, but do not actually resolve evidentiary impasses in the collected investigations.

couldn't be prejudiced." Consequently, the public prosecutor recommended the closing of the case for being a private crime, *injúria*.<sup>73</sup>

Defendants often sought to use their own color to manipulate the judicial proceedings. In one case, a defendant had insulted a co-worker for over ten years, corroborated by four witnesses. The overheard insults included "monkey, *Preto*, son of an incompetent whore." In the investigation, the defendant denied making any of these statements and claimed to be a *Pardo*, "just like the victim," and that he could not discriminate against someone of the "same race."<sup>74</sup> In another instance, a defendant sought to use the victim's light color to manipulate the proceedings, claiming not to have viewed her as Black.<sup>75</sup>

The use of color by defendants to manipulate proceedings played upon the ideology of the nation. Claiming not to have realized someone was Black played upon the commonly held notion that Brazilian color is indeterminate and does not really matter. Claiming one's own genetic proximity to blackness, often expressed by identifying oneself as *Mulato*, a seldom-

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<sup>73</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Inquerito Policial. Proc. No. 47.251/95. Poder Judiciário de São Paulo

<sup>74</sup> Ibid.

<sup>75</sup> This was alleged by the defendants in a highly celebrated incident that took place in June, 1993. Ana Flávia Peçanha de Azeredo, the 19 year old black daughter of the Governor of Espírito Santo, was riding an elevator to visit a friend. The owner of building and her son entered the elevator, and the owner demanded, "Who is occupying the elevator?" Ana Flávia responded, "No one. I just got here". The owner persisted, "You must learn that only residents are allowed here, and not Blacks or poor." Ana Flávia asked for a "little respect". Teresina, the owner, shouted, "Close your mouth. You can't pass for a domestic servant." Her son, Rodrigo, threatened to punch Ana Flávia if she said anything. Ana Flávia asserted softly, "Don't you recognize me, please give a little respect." Rodrigo threatened her more harshly and then punched Ana Flavia while his mother held her arms. During the subsequent investigation requested by the governor, Teresina and Rodrigo insisted to not be racist. Said Teresina, "To me, she's not black, she's only a *menina bronzeada*." In this case, officials did not accept the response. See "Cinderella Negra", *Veja*, N. 128, July 31, 1996; and Processo No. 024930099890, 2nd Vara Criminal, Poder Judiciario, Estado do Espirito Santo, 1993.

used term with biological connotations, occurred frequently. Defendants also cited their Black wives, girlfriends, children, parents, or other relatives. The claim that a *Pardo* could not discriminate against another *pardo* invoked the work of Gilberto Freyre and the ideology of the nation. Despite the strength of the ideology of Brazil as a *racial democracy*, no evidence has shown that a *Pardo* is less prejudiced than a *Branco* against another *Pardo* or a *Preto*.<sup>76</sup>

DCS investigations consistently failed to settle the key facts in question. Once the DCS failed to settle key differences, the Public Prosecutors generally recommended the closing of the case because of insufficient evidence, characterizing an allegation as “the word of one against the other”, the Brazilian version of “he said/she said”. Officials only had to produce an evidentiary impasse, which was readily available.

### **On the Overuse of *Injúria***

To what extent did the DCS overuse the *injúria* classification? Most allegations classified as *injúria* were appropriately classified. However, the DCS classified nearly 80% of its complaints as *injúria*. Guimaraes found that approximately half of the complaints reported to the DCS legitimately constituted a crime against a person’s honor, which would suggest an overclassification of *injúria* in about one-quarter of the cases.<sup>77</sup> I estimate that over 40 allegations (28%) classified as *injúria* could have been processed under the anti-discrimination law, the Constitution, or other Brazilian legal codes (see table 5.6). Many allegations that included firing, long-standing harassment by neighbors, and insults by supervisors, subordinates, or coworkers at work constituted harms to honor that might have been

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<sup>76</sup> See Turra (1995).

<sup>77</sup> See Guimaraes (1998).

prosecuted under other laws. By interpreting the enumerated sites and the rights protected within those sites more broadly, officials could have applied the anti-discrimination law to at least 25 additional allegations. My estimate is based upon a literal application of clauses on firing, use of elevators and public establishments, and an expanded application of Article 14 to long-standing family disputes involving children. Article 20 could have been applied to disputes that occurred in public places, such as a racial insult in a tenants' meeting. At least 16 allegations could have been prosecuted by the Public Prosecutor's Office under the Constitution or the consumer code.

Thus, I agree with Guimaraes that officials overused the honor designation in approximately 25% of the complaints and treated most allegations as verbal misunderstandings, even allegations of nonverbal mistreatment. The vaunted subtlety of Brazilian racial discrimination contributes to the paucity of complaints and the nature of complaints reported, but it does not explain official action. Despite official claims about evidentiary problems,<sup>78</sup> the use of the *injúria* classification was not correlated with the amount of evidence presented in the complaint.<sup>79</sup> The contention that victims brought the wrong problems, such as insults without denial of access to enumerated places, cannot account for the overuse of the classification of *injúria* by the DCS and the weak investigations that failed to settle the key evidentiary facts and were subsequently dismissed as misunderstandings between individuals.

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<sup>78</sup> See Eunice Nunes, "Acusados de Racismo sao absolvidos pela Justica", Folha De Sao Paulo, August 28, 1994, p. 4.

<sup>79</sup> I compared the number of witnesses in the complaints investigated and those uninvestigated and found no difference.

**Table 5.17**  
**Alternative Legal Classification for Selected Crimes of *Injúria*, DCS, 1993-95**

	Incidents of <i>injúria</i>	Reclassified under Act 7716	Reclassified under Consumer Code or Constitution
Firing	4	4	
Service elevator	2	2	
Establishments	10	5	5
Public places	10		
Workplace	67		7
Classrooms	4		4
Neighbors	49	12	
Personal	2	2	
Total	148	25	16

SOURCE: Selected complaints and investigations classified as *injúria* at the DCS in São Paulo, June 1993 to November 1995.

The official construction of racial discrimination complaints as *injúria* and misunderstandings between individuals has effectively thwarted most complaints received and discouraged additional filing of other problems. The fuller application of the anti-discrimination law and other legal instruments to these allegations would have sent a very different message to Brazilians about how the state and the law view these complaints. Thus, the overall impact of the failure to apply the law vastly exceeds estimates for the overuse of *injúria*. A more aggressive posture by officials would have qualitatively altered the reporting in the media and the popular perception of the racial discrimination complaints. The routine focus of the DCS and the Public Prosecutors' office upon honor and objectionable verbal conduct reproduced the view of the complaints as personal insults outside the purview of the state.

The construction of racial discrimination as an act of racial prejudice produced the focus upon verbal conduct. The key evidentiary question was not whether victims were treated discriminatorily but whether defendants behaved prejudicially. That focus on prejudice yielded

other consequences that narrowed the cases, such as the role of evidence that a defendant could not be prejudiced, akin to a finding that a husband could not abuse his wife. Thus, a judge concluded that a polite, cordial recruiter could not receive a Black applicant prejudicially.<sup>80</sup> Each analytic step moved the focus of the inquiry toward what the defendant said and thought and not what he did and with what result.

Finally, how do these findings about the actions of the DCS and the Public Prosecutor's Office compare to other Brazilian officials? The treatment of the overwhelming majority of racial discrimination allegations as misunderstandings across Brazil has been reported by Black movement organizations and state agencies handling discrimination allegations.<sup>81</sup> In a study of the police in Salvador, Guimaraes reported the predominant classification of racial discrimination allegations as misunderstandings. He also reported that the police confused *injúria* and discrimination and mistakenly classified discriminatory incidents as *injúria* as well as the inverse. He suggested that the police found certain insults highly offensive, which they then categorized as discrimination.<sup>82</sup>

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<sup>80</sup> Proc. No. 374/95. 8<sup>th</sup> Vara Criminal da Capital. Poder Judiciario. São Paulo.

<sup>81</sup> The majority of the 100 complaints received by the Public Prosecutor's Office in Salvador, Brazil pertained to racial injury and treatment as a thief as of late, 1998.. See Marcos Vita, "Rempresaria e condenanda por racismo na BA", Folha de Sao Paulo, September 14, 2000, P C4, Web-site: <http://www.uol.com.br/>, consulted: December 21, 2000. The same problem was reported for Alagoas as of the middle of 1999. See email of Jane Braga of June 27 1999, <http://www.racial.cjb.net>. Most of the 150 complaints received by the agency, Disque-Racismo, in Rio de Janeiro, in its first month, pertained to disputes between neighbors or family members. See article by Rosalia Lemos, Jornal do Brasil, August 23 2000, <http://www.jb.com.br/t>.

<sup>82</sup> See Guimaraes, et al, (1996).

Thus, other officials, less informed than the DCS investigators, may have relied more on their own racial ideology and less directly on the application of the law. In the conclusion, I will explore differing explanations for the overuse of *injúria* by the DCS and other officials.

### Conclusion

I consider five explanations why officials overused the *injúria* designation from 1993 to 1995.<sup>83</sup> First, perhaps officials viewed the mistreatment of complainants as normal for persons of lower social status.<sup>84</sup> The racial profiling of Black customers seemed justifiable to many public officials. Even a judge, who authored a highly reasoned opinion and demonstrated strong sympathies toward the victim, found that a security guard “understandably” viewed a wet, Black customer as a thief.<sup>85</sup> In his view, the Black customer had overreached her social class by shopping in a middle-class store. That view naturalized her mistreatment. Therefore, officials viewed complaints as *injúria* because they saw the problems as minor irritations for persons accustomed to such treatment.

However, the rampant mistreatment of middle-class Black plaintiffs and celebrities, who could not plausibly be mistaken for thieves by the security guards nor seen as deserving of such treatment by public officials, this explanation. Officials construed several celebrities’ allegations as misunderstandings. I suggest that color foreshadows the Brazilian conception

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<sup>83</sup> Please note that the high use of *injuria* continued past 1995, although I do not claim that the reasons were necessarily the same.

<sup>84</sup> See Roberto Kant de Lima, “Bureaucratic Rationality in Brazil and the in the United States: Criminal Justice Systems in Comparative Perspective”, in Hess (1995).

<sup>85</sup> See Proc Cível N. 672/93. 21<sup>st</sup> Vara Cível; Forum Central. São Paulo.

of standing and that the class of a complainant does not independently explain official response.

Second, the officials used the *injúria* category to readily dismiss these allegations similar to their thwarting of most citizenship rights of poor Brazilians.<sup>86</sup> While the general conservatism of Brazilian public officials has been widely discussed,<sup>87</sup> this explanation is still not sufficient to explain the overuse of *injúria*. For example, between 1994 and 1996, only 16% of the allegations women filed at the women's specialized police units (DMs) in São Paulo were classified as a crime against honor. Further, the classification of these allegations as a crime against honor decreased during that period. Most complaints women brought to the DMs contained a violent aspect. The police might have minimized these allegations by classifying them as lesser crime in the criminal code, as a threat rather than as an assault. However, incidents classified as a threat declined dramatically, and the incidents classified as a cruel, physical assault increased dramatically from 1994 to 1996.<sup>88</sup> Thus, the DMs did not equivalently narrow the complaints women brought. Compared to the persistent classification of racial discrimination allegations as *injúria*, the DM's increasingly recognized the gravity of the allegations.

Third, perhaps the narrowness of an enumerated anti-discrimination law caused officials to overuse *injúria*. Any enumerated law will contain omissions. Many allegations describe problems that had either been omitted from, or ambiguously addressed by, the law. While the

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<sup>86</sup> See Maria Celia Paoli. "Citizenship, Inequalities, Democracy, and Rights: the Making of a Public Space in Brazil", Social and Legal Studies. Vol 1 (1992), p 143-159. Sage.

<sup>87</sup> See Meili (1993) and Pinheiro in Mendez (1999), among others.

<sup>88</sup> See "Ocorrências Policiais Registradas Nas Delegacias de Policia de Defesa da Mulher, Segundo as Regoes Municipios de São Paulo". Fundação SEADE web-site. (<http://www.seade.gov.br>)



enumerated clauses contributed to the narrow application, officials applied the potentially broadest clauses, articles 14 and 20, narrowly. Further, most officials narrowly interpreted the protection of rights within the enumerated sites, such as the blocked entrance or refused service standards for a public establishment. Thus, I argue that the limitations of the enumerated clauses does not independently explain the construction of most complaints as common misunderstandings.

Fourth, most officials privately agreed with the tenets of the ideology of *racial democracy* and applied that ideology in classifying, investigating and adjudicating the claims. In this view, the actual text of the law mattered less than officials' private convictions. Brazil's ideology of *racial democracy* does not contend that Blacks are equal to Whites but that color does not matter in life outcomes. Officials did not view Black plaintiffs as being entitled to equal treatment, but contended that color had not affected their mistreatment. Officials often saw this mistreatment rooted in the social standing of complainants.

This explanation suggests that the overuse of *injúria* emanates from the conception of the nation. The tenets of *racial democracy* disarm the concept of discrimination by problematizing comparisons and claiming that color does not have little or no significance. Consequently, officials view most disputes as conflicts between individuals. Many officials have accepted defendant claims that color had not influenced their behavior, demonstrable by their personal relationship to blackness. This assertion that color does not matter was also reflected in the staffing of key offices handling racial discrimination. The DCS and the Center for Citizenship at the Public Prosecutor's Office (MP-CAO) were staffed and directed by White

officials between 1993 and 1996.<sup>89</sup> In addition to being White, neither the DCS nor the MP-CAO had an articulated connection to the Black movement or the state agency specializing in Black affairs during the period of the study.<sup>90</sup> These limitations undoubtedly contributed to the weak application of the law, dismissal of most complainant testimony, and incomplete investigations.<sup>91</sup>

Fifth, officials constructed the allegations as misunderstandings because of the law's overall promise to punish prejudice. The concept of discrimination in the law does not address differential treatment nor permit an analysis of the discriminatory nature of harassment. Without a concept of differentiation, the logic of the inquiry focused on the verbal articulation of prejudice and did not examine harassment. Thus, the many allegations against neighbors that satisfied the standard of repeated insults required for an Article 14 claim might have been viewed as a form of harassment that functionally discriminates. Instead, the verbal conduct was viewed as words alone. The law permitted and compelled officials to apply their own racial ideology to determine the meaning of prejudice and to investigate and evaluate defendant motive.

This chapter has narrowed the explanations of the overuse of the *injúria* classification in the legal construction of racial discrimination in the law, and the ideas within and behind that

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<sup>89</sup> Two secretaries at the DCS viewed themselves as Black and *Morena*, respectively.

<sup>90</sup> By contrast, the Delegacia in Rio had a staff person assigned during its brief, 4-month existence from the State Agency on the Condition of the Black (SEDEPRON). The specialized women's police units are directed by women, trained in the problems associated with domestic violence. The establishment of those units in every municipality and the transformation of the units to provide fuller and more appropriate services represented tremendous gains by the women's movement.

<sup>91</sup> Even after the women's delegacias were transformed by being staffed by women, an important subsequent issue was the training of those women in the specific needs of domestic abuse victims. The DCS had not received the equivalent orientation.

construction, the ideology of *racial democracy* held by officials. In examining the DCS officials and others in São Paulo, both factors seemed operative. In extrapolating to police elsewhere in Brazil, I suggest that their personal ideology of race was more central to their classification of allegations. To the degree that the law has generally codified Brazilian racial ideology, the distinction between the two explanations cannot be fully deduced in these findings. But I argue that the construction of Brazilian anti-discrimination law as the act of racial prejudice required officials to draw on their own ideology of race to determine what is prejudice. For most officials, that ideology was the ideology of *racial democracy*. The next chapter will examine the surprising variation in outcomes and will explore the influence of the ideas in, and behind, the law upon official decision-making.

## Chapter 6 Judging Discriminatory Allegations as the Acts of Racial Prejudice

*The victim's testimony does not demonstrate to the necessary degree the practice of the penal crime in question. The victim affirmed arriving at the drugstore and being treated by the defendant in a courteous, cultured fashion.*<sup>1</sup>

Within the broader trend of viewing most racial discrimination allegations as disputes between individuals, judges have issued at least 40 criminal or civil findings of racial discrimination in the past decade. Although those findings constitute a small fraction of the overall allegations, this still represents more variation than reported by officials, Black movement activists, or the media.<sup>2</sup> This chapter explores the surprising variation within a difficult overall legal climate.

Some variation in the findings reflects legal changes over the past decade. Since the anti-discrimination law amendment of 1997 added the category of racial *injúria* to the criminal code, lawyers have increasingly filed racial discrimination claims as moral damages or as racial *injúria*. (See the appendix) Half of the 40 findings for the plaintiff resulted from allegations of moral damages, civil actions that seek compensation for personal or material harm, for racially discriminatory harms. The number of findings of racial *injúria* also exceeded the findings under the anti-discrimination law.

Some variation reflects the growing divergence in the use of legal instruments. Individual cases pursued in multiple venues have yielded different outcomes. This chapter examines the logic of inquiry and the outcomes of the racial discrimination cases according to

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<sup>1</sup> Proc. No. 374/95. 8<sup>th</sup> Vara Criminal da Capital. Poder Judiciário. São Paulo.

<sup>2</sup> The lack of convictions under the 1989 anti-discrimination law has been widely discussed. Often, numerous convictions of racial discrimination have been reported as the first or second conviction.

the type of allegation and the cited legal instrument. To what degree does the variation in outcome reflect the legal instrument?

I analyze judicial logic of inquiry as key to the settling of the allegations in this chapter. By logic of inquiry, I refer to a judge's overall approach to the facts, to the central questions the judge frames that organize the facts. This overall approach shapes which facts are deemed relevant and how the facts are evaluated, including the view of testimony by plaintiff and plaintiff witnesses compared to defendants and defendant witnesses. I suggest two logics of inquiry. The first, dominant and shaped by the overall conception of racial discrimination as an act of racial prejudice, is the logic of "punishing prejudice", which requires that a defendant committed a discriminatory act, held prejudicial views toward the plaintiff, which constituted the criminal motive. A second logic prohibits unjustifiable differentiation on the basis of race and does not require explicitly prejudicial views and direct evidence of causality. Whenever a judge used that second logic of inquiry, he found for the plaintiff.

This chapter examines discrimination in employment and public establishments, "behavioral" problems that illustrate the trouble in punishing prejudice. I examine police investigations and judicial cases that emanated from the DCS combined with cases across the country. Those outcomes are complemented for statistical purposes by 23 findings reported by the media, the black movement, or the judiciary. In the qualitative section, I discuss all findings for the plaintiff and selected illustrative cases from the many findings in favor of the defendant. First, this chapter will present a map of all cases and a summary of the findings for problems. The chapter then examines judicial holdings for discrimination in securing

employment and other resources and access to public establishments. Finally, the chapter evaluates the variation in the inquiry and outcomes in these cases.

### **Mapping the Legal Proceedings**

This section surveys 60 racial discrimination decisions reached between 1989 and 2001. For the proceedings that originated as DCS complaints or at the MP-CAO (Center for the Protection of the Citizen in the Public Prosecutor's Office in São Paulo) and for several other cases, full investigative records with testimony and argumentation by all parties were located. For most cases, I only located judicial opinions. The statistical analysis in this section includes the 38 decisions collected and 23 opinions reported by the media, an organization in the Black Movement, or a government agency.<sup>3</sup> Because of vast differences in the biases of these sources, I compare actual findings of racial discrimination and not the percentage of victories.

This chapter examines the fit between racial discrimination problems brought to the law, the actual legal instrument (s) used, the logic of inquiry, and the outcome. This section maps the problems, the instruments and the findings of discrimination. I have categorized the cases into four classes of problems, according to the categories presented in Chapter 4: (1) restricted contractual relations, such as hiring, firing or access to education or housing; (2) limited access to public establishments and public places, (3) on-going harassment at work, in one's

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In total, the author consulted three commercial databases of Brazilian jurisprudence, six Brazilian law journals, the web-sites of numerous entities in the Black Movement and the Offices of the District Attorney, Public Prosecutor, and the Judiciary for most Brazilian states and the nation. These judicial opinions were augmented by newspaper articles about other cases.

residence, at school, or in one's personal life, and (4) racist social communication. The first three categories represent the problems individuals reported to the DCS in São Paulo. Allegations of racist social communication, the last category, were primarily advanced by Black Movement groups in response to televised broadcasts, radio transmissions, and other forms of popular media. Although the chapter focuses on the first two categories, this section examines all four categories to establish the broader trends in variation.

The four categories of problems can be viewed as primarily expressions of prejudice or as differentiated treatment. On-going harassment and racist social communication represent the former, the expression of prejudice, and the central determinations pertain to the form and content of the communication. The lack of access to public places and discriminatory hiring, firing or other selection mechanisms, represents the latter, differentiated treatment, which poses questions of harm and loss of protected resources.

Plaintiffs primarily used three legal instruments: the anti-discrimination law of 1989, the honor clause of the Criminal Code, or the moral damages clause of the Civil Code. Of these instruments, the anti-discrimination law provides the most specific model of discrimination, prohibiting specified conduct in particular locations, and offers the severest penalties. Most provisions of the law specify those public establishments whose staff can neither block the entrance nor refuse to serve persons based upon prejudicial motive. The law does not expressly protect the actual use of these establishments. Further, the law punishes "acts of racial prejudice" as non-bailable felonies. That formulation does not simply require prejudice for evidence but makes the act a vehicle for the prejudice. Thus, only the anti-discrimination law expressly requires a show of prejudice.

Since 1997, a viable claim of racial *injúria*, an injury to one's honor, only requires an injurious reference to race or color not limited by location. *Injúria* includes the expression of opinions, physical gestures, or other acts offensive to the victim.<sup>4</sup> Judicial determination of the gravity of an insult requires assessing how much someone's reputation suffered, which has class biases. Judges must believe the plaintiff possesses sufficient honor to be able to show harm, which they have not always conceded to a poor Black or Brown plaintiff.

Similarly, a moral damage claim is not site-specific. A moral damage claim alleges a material or non-material loss and requires evidence of pain and suffering or concrete loss. The loss for material and even patrimonial damages can be calculated. For example, the patrimonial aspect of the loss of a child estimates lost earnings. However, the compensation for the moral loss, the grief, the pain, and the suffering, is understood as incalculable and of such a deeply personal nature that cannot be known by someone else. Thus, judges recognize that the law provides little guidance for a judgment in a moral damage claim, widely viewed as a complex judgment.<sup>5</sup> A plaintiff may advance a moral damage claim after a defendant is convicted under the anti-discrimination law or as an independent action.

Each allegation of racial discrimination might be best addressed by a particular legal provision. Insulting commentary, either verbal insults or through social communication, might be best addressed under the anti-discrimination law, the criminal code for *injúria*, or the civil code for moral damages. Allegations of discriminatory treatment in employment or public

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<sup>4</sup> See Barbosa (1995, p. 43).

<sup>5</sup> See Miguel Reale, "Moral Damages in Brazilian Law," in Dolinger (1992). See also Sonia Maria Teixeira da Silva, "Breve Estudo Sobre Dano Moral" and Telmo Aristides dos Santos. "A incompetencia da Justica do Trabalho para Processar e Julgar Pedido de Indenização por Danos Morais." Journal Teia Juridica. Web-site: [www.teijuridica.com/af/esdanmor.htm](http://www.teijuridica.com/af/esdanmor.htm). Consulted: April 21, 2000.



establishments might be best addressed under the anti-discrimination law, the civil code for moral damages, or the constitution. In general, I hypothesize that claimants would fare better under those alternatives to the anti-discrimination law that do not require a causal role for prejudice.

Brazilian courts have issued thirty-seven findings of racial discrimination in the past decade. Table 6.1 presents the nature of the problem and the statute utilized for 35 of these findings. First, comparing the rows, the problem that yielded the most findings of discrimination was the limited access to a public establishment, followed by verbal harassment. Most of these successes were registered under legal statutes other than the anti-discrimination law of 1989. I located five findings of discriminatory social communication and virtually no findings for hiring or firing discrimination. Second, comparing the columns, allegations of moral damages, primarily in response to restricted access to institutions, yielded the greatest number of findings of discrimination. In addition, judges issued nine findings of *injúria* for verbal harassment with racial references. The *injúria* clause has yielded more findings for the plaintiff in four years than has the anti-discrimination in its 12 years. In contrast, I located six convictions under the anti-discrimination law: three for social communication, two for blocked access to public establishments, and one for marital interference.

Some of the variation in the aggregate findings conformed to my speculation about the fit between problems and legal provision: such as the relative success of addressing verbal harassment as a claim for racial *injúria* or moral damages. However, why was the anti-discrimination law successful for allegations of discriminatory access to a public establishment

or discriminatory communication and not for allegations of employment discrimination? I found no findings for the plaintiff in any allegation of discriminatory hiring, and only two findings for discriminatory firing under other provisions. Further, why did allegations of discrimination in public establishments fare better as moral damage claims than did allegations of discriminatory firing?

**Table 6.17 Findings of Racial Discrimination by Problem and Statute, 1989-2001**

Alleged Problem	Honor (Penal Code)	Moral Damages (Civil Code)	Anti-Discrimination Law	Other	Total
Public establishments	1	9	2	1	13
Verbal Harassment	8	5			13
Social Communication		2	3		5
Marital Interference			1		1
Firing		1		2	3
Hiring					0
<b>Total</b>	<b>9</b>	<b>17</b>	<b>6</b>	<b>3</b>	<b>35</b>

Source: Database of collected or published judicial opinions.  
(Please note missing data in 5 published opinions).

How do the national findings for the plaintiff compare to the investigations the DCS conducted between 1993 and 1995? Table 6.18 compares the distribution of national findings of racial discrimination to the investigations conducted by the DCS. The share of findings for the plaintiff that resulted from an allegation of verbal harassment or a blocked entrance to an establishment, the two most highly investigated problems, generally reflected the share of the DCS investigations into those problems. Most victories in allegations of verbal harassment occurred after the 1997 amendment to the anti-discrimination law. That change in the law and

jurisprudence indicates some systemic responsiveness to the legislative initiatives and legal strategies of the Black Movement.

The share of findings for the plaintiff in allegations of racist social communication, the most successful use of the anti-discrimination law, exceeded its share of DCS investigations. This outcome is explainable by Black movement mobilization. Groups rather than individuals generally advanced allegations of racist social communication in response to racist commentary on television, radio, the press, or other media. These cases provided strategic opportunities for these organizations to publicly critique racist communication in public and judicial forums.<sup>6</sup> Given the evidentiary difficulties for most cases, advancing cases with relatively less evidentiary complications constituted an important strategy to mobilize the law.

Mobilization alone does not fully explain the outcomes. Highly mobilized cases in employment discrimination that were unsuccessful. Indeed, there were no discriminatory findings in hiring discrimination and no findings of discriminatory firing under the anti-discrimination law.

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<sup>6</sup> See, for example, the web-sites of CEAP, (<http://www.ceap.org.br>) the NGO in Rio that initiated the process against the lyrics of the Tiririca song, and Geledes, (<http://www.geledes.com.br>) the NGO in São Paulo that initiated processes against Tiririca, and several TV shows. At one time, CEAP posted a survey about its initiative on the Tiririca case and other cases.

**Table 6.18: Distribution of DCS Complaints and Investigations, 1993-5, and National Findings of Racial Discrimination, 1989-2001**

Alleged Problem	DCS, 1993-5		National Findings for the Plaintiff, 1989-2001 <sup>c</sup>
	Complaints <sup>a</sup>	Investigations <sup>b</sup>	
Verbal harassment	66.5%	44.9%	37.1%
Public establishments	22.4%	32.0%	37.1%
Hiring and firing	9.2%	14.1%	8.6%
Communications		6.4%	14.3%
Marital	1.0%	2.6%	2.9%
All	100.0%	100.0%	100.0%
	197	78	35

**SOURCES:**

a Collected Complaints filed by Brazilian "Blacks" and "Browns" at DCS in São Paulo, 1993-95.

b Collected DCS investigations in São Paulo, 1993-95.

c Database of collected or published judicial opinions.

(Please note missing data in 5 published opinions).

Do regional differences contribute to the differences reported between DCS investigations and the national findings? Most published findings were issued in the south or southeast regions of Brazil. (See Table 6.19) That variation could indicate more findings of racial discrimination or greater media attention. In all, I located nine findings for the plaintiff in São Paulo, followed by seven in Rio de Janeiro and Rio Grande do Sul. Most important, the patterns in the findings do not vary by state except for the high number of moral damage findings in Rio de Janeiro. However, I located more findings for the plaintiff based upon moral damages than the other legal provisions in the rest of Brazil as well. Thus, regional differences do not seem to influence the findings reported in Table 6.17.

**Table 6.19: Findings of Racial Discrimination By State and Statute, 1989-2001**

State	Honor (Penal Code)	Moral Damages (Civil Code)	Anti-Discrimination Law	Other	Total
NE Bahia	1	1			2
CW Goiás		1	1		2
Parana		1			1
S Rio Grande do Sul	1	3	2	1	7
Santa Catarina	1			1	2
Belo Horizonte		1	1	1	3
SE Rio de Janeiro	2	6			8
São Paulo	4	2	2		8
<b>Total</b>	<b>9</b>	<b>17</b>	<b>6</b>	<b>3</b>	<b>33</b>

Source: Database of collected or published judicial opinions.  
(Please note missing data in 7 published opinions).

Thus, the aggregate findings for the plaintiff varied according to the legal instrument and the nature of the allegation. The next sections examine qualitatively the logic of inquiry by legal provision in discrimination cases for contractual relations and public establishments, respectively.

### **Contractual relations**

Restricted hiring and promotion, perhaps the most important practices for the reproduction of economic inequality, were both highly cited in the national survey conducted by the Datafolha in 1995.<sup>7</sup> Brazilians brought few allegations of discriminatory hiring and no allegations of discriminatory promotional practices to the police. These cases illustrate the manipulation of legal processes. Most defendants fought the cases in court and the workplace

<sup>7</sup> See Turra (1995).

and generally won in both settings. Within this category, there were four types of cases. The first category pertains to recruitment discrimination, specifically discriminatory employment ads. These cases were tried under the employment articles, Articles 3 and 4, but resemble Article 20 cases for racist social communication. In those instances, the question was whether the content of those ads articulated discriminatory hiring criteria. The second and third sections pertain to hiring and firing, respectively. In these areas, the question was not the content of a communication, but an assessment of behavior and its consequences. The last category includes several important cases pertaining to choice in housing, education, and marital partners.

### **Recruitment discrimination**

In the most highly publicized of four proceedings against recruitment discrimination, Jose Parilha Filho, a taxicab driver and manager of a residential building in Aracatuba, a town near São Paulo, sought to place an ad in a local newspaper for a White doorman in 1989. In the presence of a cleaning woman, a receptionist at the newspaper advised him that such an ad was illegal. Nonplused, Jose insisted that "it was he who was paying." The secretary altered the ad, to soften the discriminatory aspect, to read, "preferred White", which was published the next day.

The Public Prosecutor denounced Parilha under article 4 of the anti-discrimination law for blocking private sector employment and built a strong case against Parilha. In all, four material witnesses without any direct interest corroborated the allegations. Parilha raised three counter-claims that he had not committed a discriminatory act. First, he argued that

Parilha has been misunderstood and only sought a doorman with *boa aparência*. Given the evidence, the judge did not find that defense credible. Second, Parilha used the secretary's revision of the ad against her, arguing that the words and, therefore, the criminal act were hers, another ill-fated argument. Third, he contended that a valid Article 4 claim must have obstructed an actual hiring which had not occurred since Parilha had not hired a White. This claim was patently false since because had hired a White, who only lasted one week. Finally, Parilha argued that he could not be racist because he was a *Moreno* and accepted his adopted Black son as his own. The judge did not find this argument to be pertinent to the facts.

Instead, the judge found overwhelming evidence that Parilha had committed the alleged act and convicted Parilha for violating Article 4. Parilha appealed on the grounds that he had not intended to discriminate. The District Attorney, Irahya Baptista de Abreu, found his intent discriminatory because of his insistence that the ad be published even though he was explicitly warned about the consequences.<sup>8</sup> Parilha had rhetorically asked a reporter during a published interview, "Can't I hire a person of the color I wish?"<sup>9</sup> The appeal court denied Parilha's claim but the minority judge advanced a new argument that a condominium was not a private enterprise but a mixed public-private enterprise not protected by Article 4. The court majority held that similar to other enterprises with diverse structures, such as unions, private foundations, and cooperatives a condominium possesses a legal status equivalent to a private enterprise and should be considered a private enterprise under the law. Since the anti-

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<sup>8</sup> In addition to her argument in the proceedings, Abreu later criticized the final outcome of the case in Irahya Baptista Abreu. "O Racismo e a Jurisprudencia do Egregio Tribunal de Justica do Estado de São Paulo." Jacques de Camargo Penteado (org ) 10 Anos da Constituição e a Justiça Penal. Justiça Penal. N 6. Ed. Revista dos Tribunais. 1999.

<sup>9</sup> See Apelação Criminal N. 141.820-3/2 (Aracatuba), Tribunal de Justica do Estado de Sao Paulo, February 1995, p. 12.

discrimination law prohibited employment discrimination in the public sector in article 3 and the private sector in article 4, the majority argued to apply the law according to the “spirit of the law” and not based upon narrow economic reasoning.<sup>10</sup>

However, the minority judge outranked the majority judges and prevailed. Parilha appealed to the State Court of Appeal based upon the holding of the minority judge that a mixed economic enterprise could not violate article 4. That judge was part of a unanimous court that held that certain enterprises, including condominiums, could not be considered private firms nor subject to Article 4 of the anti-discrimination law.<sup>11</sup> The District Attorney, Baptista de Abreu, criticized that decision.<sup>12</sup> This holding reflected the traditional role of a civil law judge to only apply the law to a specified crime and not to a crime omitted by legislators.

Geledes, the Black Women’s Institute, and the Bank Workers Union protested two employment ads published the *Folha de São Paulo* in 1992 as employment discrimination and racist social communication. The police investigated their allegations but were unable to identify a defendant and the investigations were closed. These ads sought, respectively, an administrative assistant “between 18 and 25 years, blond or Japanese, with *boa aparência*” and a waitress who was “experienced, White.”<sup>13</sup> The three potentially liable parties, the employment agency, the newspaper, and the hiring firm, denied responsibility for each ad. The firm placing the ad claimed to be seeking an employee with knowledge of the Japanese

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<sup>10</sup> Ibid.

<sup>11</sup> See *Apelação Criminal N. 141.820-3/4 - 01 (Aracatuba)*, Tribunal de Justiça do Estado de São Paulo, June 1996. *Revista dos Tribunais*. (Citation)

<sup>12</sup> Abreu, *op cit*.

<sup>13</sup> See Proc. No. 786/92 Ministério Público do Estado de São Paulo. Centro de Apoio Operacional das Promotorias de Justiça de Defesa dos Direitos Constitucionais do Cidadão. March, 1993, for the civil action. See Departamento de Inquéritos Policiais e Polícia Judiciária (DIPO) Proc. No. 18.610/92. Poder Judiciário de São Paulo, July 1995, for the criminal investigation.



language and not someone of Japanese descent. The firm asserted that whomever prepared the ad mistakenly equated language competence and national origin. Since the ad stipulated that someone be blond or Japanese, that assertion does not seem persuasive. Nonetheless, the Public Prosecutor accepted that explanation and recommended the closing of the investigation.

The Public Prosecutor found the second ad, which sought a White waitress, to be discriminatory but again failed to identify the liable party. The manager at the employment agency had many employees and claimed to have no idea or record of who placed the ad in question. The representative from the *Folha de São Paulo* described the impossibility of knowing which employee in a large office pool received the particular ad. Without locating a defendant, the Public Prosecutor recommended the investigation be closed. However, since this investigation was also conducted as a civil investigation, the firms could have been held as the responsible parties.<sup>14</sup> In this instance, neither the civil nor the criminal investigations advanced to a judicial proceeding. The civil prosecutor recommended pursuing a criminal case and the subsequent criminal prosecutor suggested pursuing a civil action for moral damages. The last of these employment ads was placed in May, 1994. The problem of identifying the defendant also stalled this case. The ad sought an attorney possessing *boa apresentação* (good "presentation"), preferably of Japanese descent. In the subsequent investigation, police were not able to identify who had placed the ad. The firm did not offer a counter interpretation for the content of the ad. The firm contended that it had not hired any applicant who answered the ad and therefore committed no employment discrimination. On

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<sup>14</sup> Neither firm denied an employee was responsible but only it could not identify which one. Brazilian firms are responsible for the actions of their employees under Brazil's civil code.

that basis, the Public Prosecutor recommended closing the civil proceeding and suggested that the plaintiffs initiate a criminal action,<sup>15</sup> a questionable recommendation since a criminal case cannot prosper without a named defendant.

### **Discriminatory Hiring**

The first employment case illustrates the problems in treating alleged hiring discrimination under a concept of discrimination as an act of prejudice. In this case, Katia applied for a public relations job at Fuji Film through an employment agency in São Jose in the state of São Paulo in July, 1991. She completed an application that asked for her race, and was scheduled for an appointment the next morning. Katia arrived promptly and remained in the waiting room the entire day while the firm interviewed the other candidates. When Katia asked why she had not been interviewed, the receptionist informed her that Fuji did not hire Blacks or *Nordestinos* (persons from the Northeast region).<sup>16</sup>

The Public Prosecutor in São Jose denounced the firm on an article 4 claim for private sector employment discrimination which initiated the criminal investigation. The receptionist denied telling Katia the motive for not being interviewed. The defendant, the recruiter at the employer agency, also denied the allegation. Fuji claimed that she was not considered because she was married and would be unavailable to travel. Further, the firm emphasized

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<sup>15</sup> This preliminary civil proceeding was not a formal investigation. See *Pecas de Informacao* no. 032/94. Ministerio Publico do Estado de Sao Paulo. Centro de Apoio Operacional das Promotorias de Justica de Defesa dos Direitos Constitucionais do Cidadao. May, 1994.

<sup>16</sup> Andre Lozano, "Estudante acusa empresa de discriminação racial", *Folha de São Paulo*. August 11, 1993. P32.

that 20% of its employees were Black or *Nordestino* and that Pele, the Black soccer star, was its spokesperson.<sup>17</sup>

First and second instance courts found the firm's responses compelling. The judge declared that the alleged act would be "revolting" and "very serious" had it occurred but found no evidence to support the allegation. However, neither the trial nor the appellate judges shifted the burden of proof to examine the allegation of differential treatment nor the hiring criteria. Why was Katia kept waiting all day? Did the firm ask Katia or the other candidates about travel availability? Could the firm prove that the job required travel that Katia could not fulfill? Did the firm hire an applicant who was single, and would it require that of a male applicant? Instead, judicial inquiry focused on whether Katia could prove what she alleged the secretary to have told her.<sup>18</sup>

The second case also illustrates the use of the logic of punishing prejudice and the weak judicial recognition of a Black plaintiff's honor. In 1993, Georgina sought employment at a bank in the southern state of Santa Catarina. She requested an application from Janice, one of the employees. At the moment that, Acyr, another employee, indicated that the bank did not need any employees, Georgina saw others preparing employment applications. Acyr said he could not find any forms and asked her to return in a week. A reporter interviewed Georgina and Acyr and published an article quoted Acyr, "Look at the bank, there is not a single Black. Bearded Whites and Blacks work at a Japanese bank only if the bank has a night shift."

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<sup>17</sup> "Compania nega acusação", *Folha de São Paulo*. August 11, 1993. P32.

<sup>18</sup> Apelação Criminal N. 124.181-3/0. Quarta Câmara Criminal do Tribunal de Justiça do Estado de São Paulo. August 1993.

Georgina filed a criminal suit for racial discrimination against Acyr and a civil suit for moral damages against the bank. In response to the civil suit, Acyr emphasized that he had asked Georgina to return, maintained contact with her, and not blocked her employment. The bank also contended that Georgina's employment had not been blocked since she returned the following week. Further, the bank argued that the Acyr's comments reflected his personal views and not bank policies.

The Public Prosecutor argued that Acyr had not blocked or impeded Georgina's employment and that no evidence had shown that the bank had any openings. After expressing sympathy for Georgina, the judge acknowledged the bank's liability for employee actions and for hiring someone "capable of committing an act of discrimination". However, he found no evidence of discrimination and adopted the bank's argument that Georgina's return to the bank actually undermined her claim. Finally, the judge focused on whether Georgina had actually overheard Acyr make the comment published in the newspaper. First, the judge ruled that the comment did not constitute discrimination but only *injúria*, which accepted the bank's claim that Acyr's comments reflected his personal views. Second, the judge found that Georgina learned about Acyr's comment in the newspaper and not personally. Although the judge reasoned Georgina had not been personally humiliated, someone's honor can be harmed through the press under Brazilian law..

The finding that the allegation only constituted *injúria* and not discrimination ignored Georgina's allegation and made Acyr's statement the only actionable act. Her allegation, that others were applying for jobs, had not been investigated nor scrutinized. Had the firm actually accepted any applications during the several weeks she sought employment? Further, why

did her return to the bank demonstrate nondiscrimination, particularly if she was repeatedly refused? The judge viewed her return to the bank as evidence of the cordiality of the defendant. In many allegations of discriminatory hiring, judges assessed the personalities of the principals which complainants lost. Georgina lost the civil and criminal allegations.<sup>19</sup>

In the third case, the DCS focused on the articulation of prejudice rather than the facts of differentiation in its investigation of alleged discriminatory hiring in 1994. Derejane, an unemployed model and Black movement activist, applied for a job selling cellular phones. After completing her application, which included a technical exam about cellular phones and a psychological exam, she was scheduled for an interview. She learned that next day that her candidacy had failed because one of the managers did not want Blacks working at the firm. She filed a racial discrimination complaint at the DCS.

The DCS investigated an Article 4 claim for private sector employment discrimination. The DCS sought to locate anyone who had heard the manager, Xião Lin, state his color preferences. A friend of Derejane in the employment agency, who had heard Xião Lin's comments, was unwilling to testify.

The DCS also gathered information that revealed a highly discretionary hiring process. The administrative assistant who screened the applicants viewed Derejane initially as a very strong candidate. She allegedly stopped favoring Derejane's candidacy after the technical test. If so, why did she schedule Derejane for an interview? This testimony was contradicted by her superior, Daniel, who claimed not to have authorized any tests. Daniel testified to be

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<sup>19</sup> Apelação Cível N.96.010194-2. 4<sup>th</sup> Camara Cível, Itajai. December 3, 1998. Jurisprudencia do TJSC. Web-site of the Tribunal de Justica de Santa Catarina. <http://tjfolio.tj.sc.gov.br/>. Consulted: August 6, 1999.

seeking candidates he could train and to be primarily concerned with skills, self-presentation and confidence, that a model presumably possessed. Further, not all applicants had to take the tests, and Daniel could not explain why some and not others were tested.

The firm released information on the candidates indicating Derejane was highly ranked for the 5 or 6 openings.<sup>20</sup> Of the 17 candidates, Derejane was among 11 marked as a “serious” candidate and among 8 ranked as “excellent”. Of the 8, only Derejane possessed training in sales.

In its final report, the DCS summarized the evidence without noting the facts of the hiring process. The DCS made no reference to the firm’s ranking of the candidates. Nor did the DCS inquire about the candidates’ relative scores on the tests, how the firm determined which candidates would take the tests, why the firm used tests not authorized by the manager, and which candidates the firm hired. Instead, the DCS report focused upon the lack of testimony about Xião Lin’s expressed preferences. The Public Prosecutor noted that Derejane’s application had not mentioned her color, which he contended decisively proved the lack of discrimination.<sup>21</sup> Thus, he held that highly discretionary conduct cannot be discriminatory if color is not articulated.

The fourth case, initially discussed in Chapter 4, resulted in a full judicial proceeding that illustrates the problem of adjudicating employment discrimination by punishing prejudice. Vanda, an experienced cashier, inquired about a cashier opening at a pharmacy in São Paulo. Eduardo, a pharmacy official, told her four applications had already been received. Vanda and

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<sup>20</sup> Roberto Militão, an important lawyer in the Black movement, defended Derejane. His disclosure request resulted in the release of this information.

<sup>21</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 16.231/94. Poder Judiciário de São Paulo.

her White neighbor Lina, who suspected discrimination, verified that the pharmacy was still advertising for an experienced cashier the next day. When Vanda inquired, she was again told that there had already been four applicants. When Lina inquired, she was asked about her experience and documentation, which she was permitted to retrieve. Lina possessed no relevant experience but prepared Vanda's documents with her own photo. Vanda called the police, who counseled Lina to continue the application process. The manager requested Lina's professional card and her reference letters and gave her the list of additional documents needed for formal admission into employment at the drugstore.<sup>22</sup>

During their subsequent investigation of an article four claim for employment discrimination, the police gathered the facts without investigating the discretionary nature of the hiring processes or the inconsistencies in defendant testimony. Eduardo testified that an official from the pharmacy's central branch informed him on the day Vanda applied that the job had been filled and that Eduardo had forgotten to take down the sign. However, why was Vanda and not Lina turned down on the second day? The official's solicitation of Lina's credentials was not explained by the placard in the window. Moreover, the evidence the firm provided about the previously-filled-job referred to an entirely different position filled ten days prior to Vanda's inquiry. By contrast to this inconsistent defense, a policeman fully corroborated Vanda and Lina's testimony.

The company mobilized to Eduardo's defense, supplying a lawyer and a registry of its "Black" and "Brown" employees, three of whom served as witnesses. One Black defense witness testified that 25% of the 3000 workers and two of the 12 supervisors were Black. He

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<sup>22</sup>

Proc. No. 374/95. 8<sup>th</sup> Vara Criminal da Capital. Poder Judiciario. São Paulo.

and another Black defense witness used identical words in defending Eduardo's character, that "in no moment did the defendant demonstrate any racist sentiment or restriction against persons of color."

The judge accepted Eduardo's claims without comment. The judge emphasized that Eduardo had received Vanda in a courteous fashion, which Vanda acknowledged in her testimony. The judge accepted the defendant's claim to be inherently unprejudiced because he considered himself *Mulato* and had hired other Black applicants.

Further, the judge placed Vanda and Eduardo's personalities on trial to Eduardo's strong advantage. He found Vanda to be not assertive enough and speculated that she had not asked for an application because she was easily discouraged. The judge suggested she was overly sensitive because she admitted having been previously rejected at other branches of the pharmacy and therefore suspecting racism. If the position had really been filled, why did her behavior matter? The firm had not offered a coherent explanation for Eduardo's refusal to accept Vanda's application and his invitation for her to return. If the position had really been filled, why did Eduardo ask her to return? The judge held that Eduardo's invitation to return as evidence of his cordiality and that Eduardo did not possess the necessary intent, which "could not be seen in the conduct of the defendant, to the necessary degree, the specified crime of racial discrimination." Although the judge indirectly acknowledged the differential treatment by suggesting a civil action against the firm might have more promise, he did not analyze that differential treatment.<sup>23</sup>

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Ibid.



## Discrimination Dismissals Under the Anti-Discrimination Law

The weakness of the Brazilian conception of racial discrimination also hindered the litigation for discriminatory firing. A law punishing acts of prejudice poses the wrong questions. Instead of inquiring about an employer's rationale for a dismissal, judges demanded evidence of prejudicial motivation. In general, judges placed no evidentiary burdens upon employers to demonstrate their rationale and accepted without scrutiny an employer's predictable response that a firing was based upon job performance.

Two complainants out of an undeterminable larger universe<sup>24</sup> prevailed in challenging their dismissals through other venues. The successful cases ultimately drew upon Constitutional protections that treat discrimination as a problem in equality rather than a matter of racial prejudice. The section examines four police investigations in São Paulo that failed to become full judicial proceedings, two unsuccessful cases processed under other legal instruments, and the two successes.

In the first DCS investigation, the police received inconsistent defendant allegations of alleged performance problems that led to the dismissal of two cleaning staff. Djanete, one of the fired staff, brought an article 4 claim against her supervisor at her cleaning agency. Her supervisor alleged that Valter, the branch manager for a bank that had many cleaning

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Only for a limited period in SP do I have any data about racial discrimination allegations brought to the system. Thus, I can report that the DCS treated half of the complaints that involved firing as injuria, and I can also report none of the investigations of discriminatory firing resulted in a conviction in a judicial proceeding. For the rest of Brazil, I located processes either through web-sites maintained by a Public Prosecutor's Office or the Judiciary, a site of the Black Movement, or a commercial judicial database. A majority of those proceedings resulted in a victory. I am certain that there is a bias in all of those sites toward reporting victories, and so I have not calculated that percentage. For example, none of the judicial proceedings in Sao Paulo that resulted from DCS allegations yielded criminal convictions.

contracts with the agency, threatened to terminate the cleaning contract “if that *Neguinha* (my little *Negra*)<sup>25</sup> entered the bank again,” referring to Djanete. Agency managers feared losing the numerous contracts with other bank branches and replaced Djanete and Maria, the other Black cleaning staff, with a blond manager a *Clarinha* (fair-skinned, diminutive for *Clara*), respectively. The cleaning agency considered Djanete an excellent employee and retained her in its central office.

The DCS did not investigate the inconsistencies in Valter’s account. He alleged a problem between Djanete and Elsa, another employee at the bank, as the reason for her removal. Although Elsa allegedly filed a negative report about Djanete, Elsa denied having any problems with Djanete in her own testimony. Valter also alleged that he sought Maria’s dismissal for insubordination. Managers of the cleaning company, who had inspected the site, doubted his allegations about either problem.

This case illustrates the inability of the law to address institutional dynamics. The discriminatory act was seldom performed by a single person at one institution. The cleaning agency reassigned Djanete after Valter’s threat. How should liability be apportionated between the two institutions? In this instance, Djanete’s supervisor at the cleaning agency was the sole defendant. The DCS’s final report did not address the institutional complexity nor the numerous evidentiary problems, such as Elsa’s denial of having had problems with Djanete. The Public Prosecutor recommended the closing the investigation because Djanete’s removal from the bank was performance-based. Since he had not reviewed the negative

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Valter insisted that he called Djanete *Neguinha* affectionately. However, the meaning of *Neguinha* depends upon relationships and context. If spoken by one friend or intimate to another, *Neguinha* can express affection. However, aggressors generally communicated condescension through their use of *Neguinha*, as in, “What does this *Neguinha* want”?

report allegedly filed about Djanete, and since Elsa, the author of that report, denied having had problems with Djanete, the Public Prosecutor's conclusion was unsubstantiated.<sup>26</sup>

In the second case, a DCS investigation of the firing of a Black doorman, police accepted claims about the complainant's performance without documentation. AG, 51 years old, had worked for ten months as the doorman in his residence. LM, another tenant of the building, vowed to fire him when she would become responsible for the building because she "didn't like Blacks in the front entry way . . . [and] hated Blacks and homosexuals". Two weeks later, LM became responsible for the building. She dismissed AG two weeks after that. He filed a criminal action about her comment and a formal labor action seeking back pay. Two residents who witnessed the incident verified AG's account. LM countered that she fired AG because the building had been poorly kept, which was unsubstantiated in the first round of interviewing. In a second round of interviewers, the building's owner claimed that AG had been taking long lunches and that the building was poorly maintained.

The DCS acknowledged two versions of the incident without settling the facts in dispute. The DCS originally classified the crime as *injúria* for Luiza's verbal comment. The Public Prosecutor did not analyze the possible relationship between the comment and the firing. He conceded that Luiza had offended the complainant but found the dismissal to have been performance-based. Neither her prejudicial threat to fire AG nor the change in her explanation for the firing altered the assessment of her credibility nor lead to further questioning of her rationale that the dismissal was performance based. An explicit threat to fire a Black based upon openly prejudicial views was disassociated from the actual act of firing. This case

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Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 27.329/93. Poder Judiciário de São Paulo. November, 1995.

represents a failure to apply the Brazilian theory of discrimination since the complainant produced unrefuted evidence of an “act of prejudice”.<sup>27</sup>

The third DCS investigation, regarding the alleged firing of a Black nursing assistant, included a late change in the plaintiff’s testimony and unusual interventions by the Public Prosecutor’s Office, both suggestive of possible legal manipulation. Lu, a 28-year-old female nursing assistant, had worked in a public hospital in São Paulo for two years. She testified that her supervisor, Dr. Wilson, had generally mistreated her. Other Black employees at the hospital also testified to having had difficult experiences with Dr. Wilson. On the day in question, a patient rudely gave Lu a medical prescription which Lu filled without comment. Afterwards, several staff heard Dr. Wilson declare his desire to get “that Black [Lu] out of my area, because I don’t like Blacks.”

The DCS investigated the claim as an article 3 violation of public sector employment discrimination. The nursing chief testified that she could not remember whether the doctor had referred to Lu as “that *Negra*” when he asked to have her taken off the floor. She acknowledged that Lu had possessed a good working record and conceded that Dr. Wilson had an abrasive manner. Dr. Wilson admitted to having asked that Lu be transferred and that he may have mistreated her for being Black. Dr. Wilson claimed that he intended no animosity in calling Lu “that *Negra*”, and insisted his overall relationship with Lu was professional. Thus, the the investigation established the basic fact that Dr. Wilson requested Lu’s transfer.

Uncharacteristically, the Public Prosecutor’s office requested the DCS to examine the circumstances of the dismissal. The story changed during the subsequent inquiry. Both Lu

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<sup>27</sup> Departamento de Inquéritos Policiais e Polícia Judiciária (DIPO) Proc. No. 8.663/94. Poder Judiciário de São Paulo.

and the head of nursing claimed that Lu had asked to be dismissed prior to the incident in question. That these identical changes in testimony by the plaintiff and the key defendant witness occurred simultaneously raises questions about the role of the Public Prosecutor's Office in this case. Certainly, most investigations would have benefitted from a more aggressive posture by the Public Prosecutor's Office. Nonetheless, why had the Public Prosecutor specifically requested further inquiry into this dismissal and not others? Neither the police nor the Public Prosecutor examined the change in testimony but simply accepted the later statements as the facts. Thus, the Public Prosecutor concluded that no evidence had shown that Dr. Wilson treated Lu prejudicially nor that he had intended to fire her.<sup>28</sup>

The next DCS investigation, the firing of two Black factory workers, revealed the strongest allegations of coercion and demonstrated the overlap between race and sex harassment in the workplace.<sup>29</sup> Matilde and Jorge worked in the same department of a factory under Alberto, their supervisor. Matilde alleged that Alberto reprimanded her repeatedly for having long hair and told her repeatedly that he "didn't like Blacks". She claimed that he gave her the hardest, dirtiest assignments. Other employees confirmed her allegations. One day, Matilde responded to Alberto's reprimands that "she was doing what she could" and was fired.

The DCS investigation also revealed a pattern of mistreatment against Jorge. Jorge claimed to have been a model employee, which others corroborated, and to have worked for

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<sup>28</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 7.781/95. Poder Judiciário de São Paulo.

<sup>29</sup> Another case, not included here, also demonstrated the connection between race and sex harassment. In that instance, Humberto Molinari, a prominent doctor in a public hospital in São Paulo, allegedly fired his executive secretary because she refused his advances. Proc. No. 356/95. 15<sup>th</sup> Vara Criminal. Poder Judiciario São Paulo. That allegation was part of the background in the animosities between Kelly Christina and Rogerio, the bar owner who sprayed her with dirty water and publically insulted her. See *Apelação Criminal N. 141.820-3/4-01*. Tribunal de Justica de São Paulo. February, 1995.

Alberto for six months without incident. During this time, Jorge became friendly with a new female employee in the department, who allegedly became Alberto's lover. After this, Alberto began to mistreat Jorge, and telling him that he "didn't like Blacks" and insulting him publically and privately. Jorge was fired the day after Matilde. On the day after his firing, Jorge, Matilde, and Matilde's boyfriend were all threatened by a teenager sent by Alberto, that they would be harmed if they were not careful.

Numerous witnesses testified to widespread sexual and racial harassment in the department. Edna alleged being reprimanded for simply talking to Matilde, who Alberto always referred to as 'that *Neguinha*'. Further, Edna alleged that all departmental employees knew that Alberto assigned the easiest, best-paid machine to whoever he was dating. Moreover, Alberto made obscene gestures to all women in his department with his tongue, and made unwanted sexual advances as well. Edna thought that she had been fired for refusing his invitations to dinner. Zelda complained about numerous unwanted sexual advances by Alberto to management without response.

The testimony of other witnesses partially supported Alberto's account. He admitted to having fired Matilde for her comment, which he viewed as insubordination. Alberto claimed this was the second time she had responded that way to his criticism. Three production workers testified on Alberto's behalf and agreed that Matilde had disrespected hm. However, one of the three also testified that Matilde had been an excellent worker and that Alberto was very controlling. However, a manager acknowledged problems in Alberto's style. Further, no one supported Alberto's allegations about Jorge's allegedly poor performance. Based upon the perceived evidentiary deadlock, the DCS conducted an *acareação* (an investigation of all

witnesses in a group) in October with six workers supervised by Alberto. The *acareação* failed to settle the evidentiary questions about the dismissals.

In its final report, the DCS presented individual testimony and avoided the unsolved evidentiary questions and deeper problems. The DCS restated Matilde's and Jorge's accounts as well as Alberto's claims to have fired them for work-related reasons and that no other Black employee had ever alleged a prejudicial firing. The report focused upon the verbal communication and not the allegedly widespread harassment.

The firm fired Alberto after the police had held the *acareação* and before the DCS issued the final report. Remarkably, neither the DCS report nor the Public Prosecutor's final recommendations mentioned the firing. The Public Prosecutor recommended closing the investigation because the dismissals were work-related. He did not consider the circumstances for their dismissal nor request further information about Alberto's dismissal.<sup>30</sup>

### **Discriminatory Dismissals in the Labor Courts**

Plaintiffs also challenged their dismissals through the Labor Courts. Brazil's Labor Courts, a distinct forum from civil or criminal courts, are composed of three judges selected by employers, labor representatives, and the judiciary, respectively. Most Brazilians view the Labor Courts as more sympathetic than criminal courts.<sup>31</sup>

The Brazilian Labor Code, which guides the Labor Courts, grants judges the discretion to shift the burden of proof as needed and obligates that shift for allegations of unjustified

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<sup>30</sup> Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 43.362/94-1. Poder Judiciário de São Paulo.

<sup>31</sup> See especially Murilo de Carvalho, et al (1993, p. 46-53) about popular attitudes toward the criminal and labor courts.

dismissal because of a presumption of continuity.<sup>32</sup> Nonetheless, labor courts did not always shift the burden of proof and lower level courts used the logic of punishing prejudice to reject allegations of discriminatory firing. The first two cases contested the dismissal of two Black employees from the same (CEF) Bank in Florianopolis and were decided separately on the same day in different courts.

In the first case, the Court analyzed a moral damage claim as if it was a criminal action against racial discrimination and found for the company based upon the absence of prejudice. In this case, João sought moral damages for having been unjustly dismissed. The judge stipulated that prejudice against the employee needed to be demonstrated to advance a viable claim of moral damages for an unjustified dismissal. That requirement placed a steep evidentiary burden on the plaintiff prior to evaluating grounds for dismissal. The Court ruled that the firm was “absent of the alleged racism” because it had hired Blacks, including several supervisors and had also laid off Whites. This comparison to laid-off Whites did not compare the treatment of João to other similarly qualified employees. Further, the hiring of Black employees does not address the question of discriminatory layoffs. The court argued that João never suffered discrimination while working, which also did not speak to the question. Thus, the Court concluded on questionable grounds that there had been no discrimination, and that the firm had simply exercised its right to rescind the plaintiff’s contract.<sup>33</sup>

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<sup>32</sup> See Jose Luciano de Castilho Pereira, “Algumas Considerações Sobre a Distribuição do Ônus da Prova”, Web-site of the Associação dos magistrados da Justiça do Trabalho da 10a região. [Http://www.solar.com.br/~amatras/jlcp1.html](http://www.solar.com.br/~amatras/jlcp1.html). Consulted: December 19, 2001,

<sup>33</sup> Recurso Ordinário 5128/97, 3<sup>rd</sup> Turma, Tribunal Regional do Trabalho da 12<sup>th</sup> Região.  
(continued...)



In the second CEF case, the judge used the logic of punishing prejudice to reach the same conclusion as the first judge. Pablo was one of 33 employees on temporary contract who were dismissed from a larger pool of 114 employees who had taken an aptitude test. He challenged the relevance of the test given that his expertise and professional responsibilities in the firm resided in computer technology. The judge rejected that claim without explanation. Pablo alleged that his direct supervisor, Evair, stated that he wished to “get rid of the Blacks in the department”. The judge accepted the testimony of one witness to having heard that statement. Although un rebutted, Evair’s statement was not viewed to be sufficient evidence of motive. The judge also noted that other Black workers had survived the dismissal, and that Pablo had not been poorly treated while being dismissed. Neither of those holdings addressed the questions about Pablo’s dismissal.<sup>34</sup>

The next two cases illustrate the consequences of applying the different logics of inquiry. Each of the plaintiffs lost in trial court based on one legal instrument and eventually advanced successful appeals based upon constitutional protection. In both cases, the constitutional protections triggered scrutiny of employer practices, which led to the appeals.

In the third case, the plaintiff initially filed unsuccessfully under the anti-discrimination law before seeking Constitutional protection. Thus, this case followed the trajectory of the São Paulo cases and then departed, which led Brazilian film maker Joelzito Araujo to call this case

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Web-site: Sistema de Consulta a Jurisprudencia, TRT 12<sup>th</sup> Region.  
Http://www.trt12.gov.br/consultas/jurisp.htm. Consulted: August 6, 1999.

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Recurso Ordinario 4988/97, 1st Turma, Tribunal Regional do Trabalho da 12<sup>th</sup> Região.  
Web-site: Sistema de Consulta a Jurisprudencia, TRT 12<sup>th</sup> Region.  
Http://www.trt12.gov.br/consultas/jurisp.htm. Consulted: August 6, 1999.

the “Exception”.<sup>35</sup> Vicente Espirito do Santo, an employee with 17 years of service with Eletrosul, a public utility in the southern state of Santa Catarina, was dismissed as part of a plant-wide layoff in March, 1992. Three witnesses overheard his supervisor, Vaner, discussing Vicente’s inclusion on the dismissal list, “Let’s clean the department and fire that *crioulo*.”<sup>36</sup>

A criminal investigation under the anti-discrimination law was initiated. The firm claimed that its dismissal list was developed to retain the “maximum technical capacity”. The President of the Association of Professional Employees at Eletrosul, Claudio Corradini, testified that the Association did not know the criteria for comprising the list. Further, Claudio reported that the Firm’s Director of Engineering publicly had admitted that political partisanship had played a role in the dismissals. Finally, the firm had not conducted a personnel evaluation in over 8 years. However, the Public Prosecutor ignored the discretionary nature of the dismissal list and recommended the investigation be closed. The prosecutor argued that since Whites were also dismissed and since others were also dismissed without just cause, Vicente’s dismissal was economic and not racially motivated.<sup>37</sup>

Vicente’s union hired a law firm specializing in labor disputes, *Advocacia Trabalhista*. The firm filed an action in labor court alleging that Vicente possessed seniority at a public firm, and therefore enjoyed Constitutional protection from unjustified dismissals.<sup>38</sup> According to

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<sup>35</sup> Joelzito Araujo’s video portrayed this case, Monica’s case, and the case of Kelly Christina. See Araujo, The Rule and the Exception, Tapiri Video, Sao Paulo, 1997.

<sup>36</sup> The use of the verb *limpar*, to clean, and another verb also used, *clarear*, to lighten, represent highly evocative guttural responses of cleaning out undesirable, elements that are not to be assimilated.

<sup>37</sup> Inquerito Policial n. 596/92; 3<sup>rd</sup> Vara Criminal, Estado de Santa Catarina.

<sup>38</sup> See theCodigo Penal, article 203 and article 3, inciso IV, of the Constitution: “to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination”, and article 4 of the Constitution: “Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners resident in

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Nogueira, a leader in the Black organization NEN (Nucleo de Estudos Negros) that supported Vicente's case, the firm did not want to face a labor court proceeding. The law firm and NEN's legal advisors saw the Constitution and not the anti-discrimination law as providing the strongest legal protection<sup>39</sup>

The first instance Labor Court rejected Vicente's claim to possess workplace security and therefore viewed his dismissal as simply part of a company-wide dismissal. The Court based its ruling on the fact that Vicente had not taken the civil service test required of public employees to attain the seniority status. In the Court's view, Vicente's request for reinstatement constituted special treatment not available to other dismissed workers. The court dismissed the case, 2-1 over the vote of the labor judge, and held that a finding for Vicente would have constituted reverse racism.<sup>40</sup>

Vicente successfully appealed that finding to the Regional Labor Court of Santa Catarina, which found that Vicente's request had not constituted reverse racism and remanded the case to the district court. Vicente's union, other unions, the Brazilian Ministry of Justice, NEN, and other Black movement NGO's mobilized support for this hearing.<sup>41</sup>

The new Court interpreted the Constitution very differently. First, it noted that Vicente had entered the firm before the public service examination had been required. Therefore, he

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the country the inviolability of the rights to life, liberty, equality, security and property, on the following terms." For the former, see Dolinger (1992) and the latter, see Noronha (1991).

<sup>39</sup> The author particularly wishes to thank Dora Lucia Bertulio, Nilo Kiloway, Vicente Espirito do Santos, and João Carlos Nogueira.

<sup>40</sup> 1<sup>st</sup> instance Labor Claim 412/92: Proc. N 412/92; 2<sup>nd</sup> Junta de Conciliação e Julgamento de São Jose. Santa Catarina. 12<sup>th</sup> Region, Tribunal Regional do Trabalho. March 25, 1993.

<sup>41</sup> Unpublished Letter of Vicente's lawyer. See Nilo Kaway Junior, "A ação de Vicente Franciso do Espirito Santo contra o racismo". October 1996. On file.

could not be denied seniority and possessed Constitutional protection from an unjustified dismissal.<sup>42</sup> Further, the Court ruled that Vicente should not be denied his rights, under the caveat of reverse racism, because other workers may have accepted unconstitutional treatment. Finally, the Court held that all firms, even those undergoing economic difficulties, were subject to the Constitution. Since Vicente possessed seniority and the firm was subject to the Constitution, the court scrutinized the firm's dismissal process to ask if this was an unjustified dismissal.

The dismissal process did not stand up to that scrutiny. Judge Ramos asked how could a large firm determine which 2,000 employees to dismiss on technical grounds without issuing a written record of those technical criteria, evaluations of the technical capacities of all workers, and a method to indicate the relative assessments. Without evidence of such deliberation, he concluded that the dismissal process was discretionary with likely racial motivation. The Court did not find that the motivation of the dismissal to be definitely racist, nor was such a finding necessary under the Constitution. In January, 1995, Judge Ramos ordered Vicente's reinstatement into the firm, a finding that the firm unsuccessfully appealed up to the Superior Labor Court.<sup>43</sup>

In the fourth case, the plaintiff, by a teacher with the national training service (SENAI) in Belo Horizonte, unsuccessfully alleged moral damages and then appealed based upon the Constitution. The trial court judge issued a finding characteristic of the logic of punishing prejudice. The teacher, Vicente, had been publicly insulted by his supervisor and reassigned to a department that paid 10% less. His supervisor was overheard calling him a "worthless

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<sup>42</sup> Chapter VII, section 1, article 37 of the Constitution in Dolinger (1992).

<sup>43</sup> Processo. n. 0412/92, Poder Judiciario, Justica do Trablaho, 12<sup>th</sup> Region, Jan 16, 1995.

Black” who should return to the *tronco* (slave quarters) and that the constitution was written in pencil. Vicente protested the reassignment as a violation of company policy, and was subsequently harassed repeatedly by his supervisor.

Vicente sought moral damages resulting from an unjust dismissal that was racially motivated, and the firm rejoined that his dismissal was based upon incompetence. Even though this was an allegation of pain and suffering, the judge issued a finding based upon the logic of the criminal model of punishing prejudice. The judge acknowledged animosity between Vicente and his superior, Gilberto, that led to the reassignment. The firm argued that Gilberto’s comments reflected his personal attitudes and fired Gilberto while the case was pending. The Court accepted this argument. Not only did the court state that the “animosity” was of an “eminently personal nature” and not the responsibility of the firm but that the supervisor’s conduct was rooted in his “abominable personality”. The Court held that since the firm fired Gilberto, this “discriminatory attitude” was his and not the firm’s. Under Brazil’s civil code, relevant since Vicente sought moral damages, firms are liable for the actions of their employees.<sup>44</sup>

Vicente unsuccessfully appealed to the regional labor court (TRT) of Minas Gerais. The Court upheld the argument that the discriminatory treatment constituted private acts that originated in the “personal relationship” of Vicente and his supervisor . Further, the Court noted that Vicente had not informed SENAI of the problems in a timely fashion.

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<sup>44</sup> Recurso Ordinario 16,860/96, 3rd Turma, Tribunal Regional do Trabalho da 3rd Região. EMAIL Correspondence of Isabela Figueiredo, Director of Documentation, Legislation and Jurisprudence of the TRT of the 3<sup>rd</sup> Region, Minas Gerais. August 8, 1999.

The Superior Labor Tribunal (TST) accepted Vicente's appeal seeking reinstatement and back pay for an unjustified dismissal that was discriminatory. Although the TST acknowledged that it could not hold an employer responsible for personal problems rooted in the "human nature of its employees", it upheld the firm's overall responsibility for the conduct of its employees, based upon the Civil Code. The Court ruled that numerous documented acts demonstrated Gilberto's prejudicial motive, which it held responsible for Vicente's reassignment and dismissal. Further, the Court reasoned that firm's dismissal of Gilberto with just cause supported Vicente's allegation. In support of its holding about the discriminatory nature of Gilberto's behavior, the court cited four constitutional clauses, including the clause protecting against employment discrimination, and two international conventions (ILO 111/58 & 117/62) which Brazil had signed. This was the only case that drew upon the constitutional clause against employment discrimination that was the successful basis for employment discrimination cases advanced on the grounds of age, gender and height discussed in chapter 2.

Finally, the TST ruled considered and rejected SENAI's argument that a worker does not possess the right to reinstatement because no law authorizes that right. First, the Court asserted its power from the Labor Code (article 8) to reason by analogy and employ general legal principles to analyze problems not specifically addressed, such as Vicente's allegation. Second, the Court held that Vicente's dismissal was not an ordinary arbitrary dismissal but one that constituted a discriminatory offense against humanity. Third, it held that such a discriminatory act could legitimately be nullified under the Labor Code. (article 9) Thus, the reinstatement of Vicente, as a worker dismissed discriminatorily, would not infringe upon, but

restore the employment relationship. In its unanimous holding, the Court explicitly upheld a worker's right to seek reinstatement for discriminatory dismissal and awarded Vicente reinstatement with back pay.<sup>45</sup>

### **Securing Other Resources**

Allegations of discrimination in securing other resources posed similar and important legal questions. In a widely publicized case in 1990, Maria Thereza Ferraz Ramos Ferris, the principal of a grammar school in Paulina, near São Paulo, publically insulted a Black teacher by closing the front door of the school in her face and telling her that the place of the Black is in the *senzala*. (slave quarters) The ensuing police investigation revealed that the principal had been insulting the teacher, Ana Augusta, for over a year, and had also been severely mistreating Black school-children. Parents alleged that the principal had denied their children lunch and water breaks. Further, the principal allegedly transferred many Black children from the school.

The Public Prosecutor initiated two cases: one for offending the teacher's honor, and a second for blocking the children's access to attend the school. I discuss the latter, an article 6 claim under the anti-discrimination law for discriminatory access to a public school. In that action, the Public Prosecutor charged Maria Thereza with the compulsory transfer of seven Black students from a public school based upon racial prejudice. She rejoined that as principal, she had simply carried out a transportation order from the mayor's office. Further,

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<sup>45</sup> Embargos Declaratórios em Recurso de Revista n. TST-ED-RR-381.531/97.8, Vicente Batista de Souza v. SENAI, Serviço Nacional de Aprendizagem Industrial, Tribunal Superior de Trabalho- Decided: December 12, 2001. 1st Turma. Downloaded from the TST web-site: <http://www.tst.gov.br/> February 20, 2002.

she contended that the transportation order was not discriminatory because White children were part of the transfer and that Black children remained in the school afterwards.

The first instance Judge, Antonio Jeova da Silva Santos, perhaps the only Black judge in the state at the time, scrutinized the principal's defense and found her treatment of the transferred Black children to be unquestionably discriminatory. He held that the transfer of White children did not diminish the allegation because of differentiated treatment. He emphasized that the principal compelled Black children, who wished to remain in the school, to transfer, including children within walking distance of the school. Further, in response to their parents' questions, the principal replied that she "didn't like Blacks". The defendant was overheard saying, "Enough Blacks in this school. I'm going to do a cleaning here. I will start with the students and will continue with the Black teacher." In all, 26 Black parents testified that their children were transferred, insulted or mistreated by the principal. Thus, the Principal's verbalized prejudice provided causal motivation for the discriminatory transfer of Black children. Judge da Silva Santos found her guilty.<sup>46</sup>

Until the case reached the State Appeal Court, the evidence of discriminatory practices seemed incontrovertible. After her conviction, Maria Teresa readmitted several Black children who had been part of the transfer. Although the original facts had not changed, the Appeal Court found merit in Teresa's case and ruled the evidence to be conflicting. The court acknowledged that her behavior had been prejudicial, that she had made derogatory statements and that she had discriminatorily mistreated the Black children and Black teacher. However, the court was not persuaded that she implemented the transportation order in a

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Processo N. 307/90, Foro Distrital de Paulinia. Poder Judiciario, Sao Paulo.



discriminatory fashion. First, the court reasoned that the order could not have been racially discriminatory since more White than Black children had been transferred. Further, 70 Black children remained in the school after the transfer, including two of the original seven plaintiffs who lived within walking distance. Finally, the court accepted her claim that she was simply carrying out a mayoral order.<sup>47</sup>

The Appeal Court did not consider whether the transfer plan disproportionately impacted Black children. The Court did not compare the percentage of Black students before and after the transportation order nor whether the students on the list reflected the composition of the school. Instead, the court drew its statistical inferences from faulty comparisons. Further, the Court did not examine discretionary practices, such as the inclusion of Black children within walking distance on the list. This case, strongly criticized in a recent report of the OAS,<sup>48</sup> required a theory of systemic, not individual, discrimination. Without such a theory, the State Appeal Court enjoyed tremendous leeway in its assessment of the evidence.

In an allegation resonant with the circumstances of Monica's case, missing evidence thwarted the following investigation of alleged housing discrimination. A couple sought to rent an apartment from a realtor in Lapa, a wealthy neighborhood of São Paulo in May, 1991. Eduardo, the broker, initially claimed not to have any listings in Lapa, and then located a listing for an apartment for 90,000 cruzeiros. [\$316<sup>49</sup>] For a moment, he held the listing and said

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<sup>47</sup> Apelacao Criminal n. 122.669-3.3 ( Campinas), Tribunal de Justica do Estado de Sao Paulo, Quarta Camara Criminal, May 16, 1994.

<sup>48</sup> See the "Report on the Situation of Human Rights in Brazil, the Organization of American States, 1997, Web-site of the Organization of American States, <http://www.cidh.oas.org/countryrep/brazil-eng/index%20-%20brazil.htm>. Consulted: April 1, 2002.

<sup>49</sup> Folha de Sao Paulo. Edicao 2000. Economic Indices. CD-ROM

nothing. The husband asked for the yellow card and discovered the following criteria, “Don’t rent to Blacks, Japanese, and *Nordestinos*.” The woman informed Eduardo that this criteria constituted a crime and requested a copy. Eduardo took the card and disappeared into the back office, never to be seen again. The couple reported the incident to the police.

The police investigation proceeded along familiar grounds. Managers at the firm denied having discriminatory listings and rejoined that the firm employed workers of “all races.” The co-owners alleged that the couple had over-reacted to an expensive listing and submitted an expensive listing, for a different apartment, as evidence. The police did not locate the original listing nor Eduardo during the investigation.

The final police report of the criminal investigation summarized the testimony without acknowledging the evidentiary gaps. One of the investigating police had noted the irregularity in not locating the broker, the receptionist, or the listing. The Public Prosecutor surprisingly criticized the police report. He questioned the firm’s inability to locate Eduardo or provide his address and recommended an aggressive plan of action to locate Eduardo, that would include charging the owners with false testimony, if warranted, and speaking with other agents. The police did not follow his plan, and he did not remain on the case.

The final police report defended the investigation from that criticism. Remarkably, the report asserted that Eduardo’s testimony would not have yielded any new facts. Without Eduardo’s testimony, the firm’s defense was hearsay since the co-owners were not material witnesses. Public Prosecutors in both the civil and the criminal investigations concluded that

no evidence of discriminatory action had been unearthed and recommended closing the respective investigations.<sup>50</sup>

### **Access to Public Places**

The discrimination cases in public establishments revealed the narrowness of the Brazilian conception of racial discrimination. The anti-discrimination law explicitly protects the right to enter and not be refused service in certain public establishments. What if a customer entered a premise without being refused service and was then hindered from shopping or treated as a criminal? Most officials did not view defendant actions after a complainant entered an establishment, other than an explicit refusal for service on racial grounds, as racial discrimination. I group the cases according to the cited legal instruments: violations of the anti-discrimination law or moral damage claims.

### **Criminal Litigation for Public Establishments**

Defendants and officials mocked the plaintiff's point of view in the first case. Artur, a 58 year old Black in the military reserves alleged that, while shopping with his wife, a salesman insulted him, saying that "this Black won't buy anything, he will just look and leave." Artur and his wife decided to leave the store. The salesman apologized, explaining that he was speaking to "someone else who had just left". Artur had not seen anyone leave and did not accept that explanation. The salesman added, "If you don't want to buy anything, you entered with bad

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Ministerio Publico do Estado de São Paulo, Procuradoria Geral de Justicia. Centro de Apoio Operacional das Promotorias de Justicias de Defesa dos Direitos Constitutioncias do Cidadão (CAO DCC) 0382/92.

intentions,” and he and another salesmen told Artur and his wife to leave. Artur complained to the manager without consequence and returned the next day to speak to the manager. The two salesmen insulted him again insulted the next day, “Go back to the whore who bore you” and “Don’t come back here, you Black.” Artur returned a third time and filed a formal complaint at the store. When management learned of the 2<sup>nd</sup> incident, it dismissed the salesman because of the “gravity of the situation”.

Although management dismissed the salesman, it adopted his account of the incident for its defense. In his testimony, the salesman confirmed using the word, *Negrão*, (*Negro*, of the Black race) but claimed he had directed the comment toward someone else who was “passing on the other side of the street”. Co-workers testified to this fact. However, no one could identify that individual, who was allegedly a regular customer. In a second round of questioning, a manager testified that this customer customarily dressed in White, always browsed the merchandise in front of the store, and sometimes made purchases. Thus, defense witnesses offered contradictory accounts of the location of the unidentified customer.

The Public Prosecutor argued for the salesman’s conviction. He noted that the other customer, allegedly the object of the salesman’s insult, had not been produced. Further, he argued that the defendant’s claim about the intended object of the commentary was not plausible, “Any person of reasonable perception distinguishes between being the object of a look and commentary directed toward someone else.” Indeed, this “other customer” defense mocked the plaintiff’s perceptions. The Public Defender aggressively placed Artur on trial, alleging that he “carried a natural tendency to be offended because racial prejudice

unfortunately remains a social reality". According to the Public Defender, Artur heard words that triggered this "natural tendency" and overreacted.

The judge accepted this defense that Artur was hypersensitive and had misperceived the salesman's remarks. He argued that the store was "frequented by Blacks and persons of all class backgrounds." Further, he claimed that the salesman used the term, *Nego*, (variation of *Neguinho*, perjorative for *Negro*) which he held was not prejudicial<sup>51</sup>, but only referred to a "person, type, or individual". Thus, this judge claimed a color term he viewed as non-derogatory did not convey prejudice or causal intent. The judge concluded that the expulsion, even if proven, would not constitute a discriminatory infraction but a different, unnamed infraction to which the defendants had not had the opportunity to defend themselves. The judge could have requested the Public Prosecutor's Office to initiate that proceeding.<sup>52</sup>

In another case, a Black woman ordered two *pingados* (*café com leite*, a strong coffee with milk) in a bakery for herself and her White friend. The waitress told her that they were seated in the wrong section, reserved for lunches and to move to another section to order coffee. While they had been waiting to be served, a man seated next to them had received his *pingado*. The customer demanded to be served without moving. Her friend suggested the possible racial motivation for the lack of service, and she called the police.

In its initial report, the DCS declared a stalemate in the facts between the two versions. The Public Prosecutor directed the DCS to investigate three additional questions: (1) had the defendant mentioned the race of the plaintiff; (2) had they actually observed the other

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<sup>51</sup> Although *Nego* and *Neguinho* can be affectionate terms, context matters tremendously. See Thomas M. Stephens, Dictionary of Latin American Racial and Ethnic Terminology, University of Florida Press, 1989.

<sup>52</sup> Proc. Criminal N. 353/95. 19<sup>th</sup> Vara Criminal. Forum Central. São Paulo. April 24, 1996.

customer being served or merely drinking the coffee (“in which case he might have been served elsewhere and brought the coffee to that section”); and (3) had the White friend been served coffee?

In that rare intervention, the Public Prosecutor’s questions reveal a narrow conception of racial discrimination. The first question, whether race was mentioned, sought direct evidence of overt discrimination. The second question, whether the next customer had been served, sought indirect evidence by comparison of comparable treatment. However, the question was framed from the defendant’s viewpoint and offered the defendant an alibi. The final question, whether the White friend been served, might seem to have elicited evidence of comparable treatment but did not. The White customer accompanying a Black customer is not similarly situated to other White customers.

The combination of these questions shifted the investigation toward a particular interpretation of the facts. In response to the second question, the plaintiffs testified to having seen the White customer receive the coffee. The police omitted this central fact from its final report. Instead, the police emphasized the other two questions, suggesting that the absence of mentioning race and the lack of service of the White friend demonstrated the lack of discrimination.

In his conclusion, the Public Prosecutor recommended closing the investigation because no evidence showed that the waitress’s refusal to serve the Black customer was motivated by color prejudice. He emphasized that her White friend had not been served and that the attendants claimed that the two were seated in the wrong location.<sup>53</sup>

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Departamento de Inquéritos Policiais e Policia Judiciaria (DIPO) Proc. No. 24.160/95.  
(continued...)

In an alleged discriminatory restriction to the entrance of a public establishment, a 16-year-old *Parda* and her 19-year-old White friend were not permitted to attend an event at a social club even though they possessed invitations. The club was crowded, and guards were admitting small groups of about five at a time. When the plaintiff and her friend reached the front of the line, they encountered a long delay. Finally, the head security guard, a *Pardo*, stated: "I'm not going to let this *Neguinha* enter."

In the DCS investigation, the security guard denied the allegations. He asserted that the club regularly welcomes many "different" clients, including Blacks. A witness stated club policy that guests wearing sneakers could not enter. The DCS did not clarify if that policy was relevant and if anyone was wearing sneakers. In its final report to the Public Prosecutor, the DCS investigator mentioned that the security guard was Black and reasoned that, "The defendant is of the color *Negra*, and could not conceivably have any prejudice." The guard had not made that claim.

The Public Prosecutor placed the complainant on trial and suggested she caused the problem. First, he noted that another Black had entered at the same time. However, that fact did not address why the complainant was not permitted to enter the club. Further, he discounted the testimony from the plaintiff's friend, who also testified to the explicit racial exclusion. Finally, the Public Prosecutor speculated that the plaintiff's protest had probably motivated the security guard's discretionary reaction. The prosecutor concluded that, "Even

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<sup>53</sup>(...continued)

Poder Judiciário de São Paulo.

though the [security guard's] behavior was condemnable, this was not an actionable circumstance."<sup>54</sup>

Allegations of discriminatory access to public elevators arose from less visible encounters between a plaintiff and a defendant. In the first of the elevator cases, Gal entered a residential building to visit a friend. Jorge, the doorman, called Gal's friend and told her that no one answered and told her to use service elevator. She asked to speak to the manager, who informed Jorge that visitors were permitted to use the social elevator and allowed Gal to use social elevator. Gal filed a complaint for racial discrimination because of the doorman's discriminatory attitude.

The police investigation unearthed inconsistent defendant explanations for the doorman's behavior. The building manager explained that according to building policy, anyone carrying a package would use the service elevator. The police did not find whether Gal had a package. Jorge claimed his motivation to have her use the service elevator was security, because neither he nor the persons in the apartment knew her. The police did not confirm those conversations nor building elevator policy about unidentified persons. The Public Prosecutor recommended closing of the investigation in a hand-written note: "There was no intent to discriminate because the defendant was only following the norms of the building."<sup>55</sup>

In another elevator case initially discussed in chapter 4, a doorman prevented Rosa from using the social elevator to visit her friend, Mina, an employee in a unit of a residential building. Jose, the doorman, informed her that visitors were supposed to use the rear elevator.

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<sup>54</sup> Departamento de Inquéritos Policiais e Polícia Judiciária (DIPO) Proc. No. 50.841/94. Poder Judiciário de São Paulo.

<sup>55</sup> Departamento de Inquéritos Policiais e Polícia Judiciária (DIPO) Proc. No. 46.069/95. Poder Judiciário de São Paulo.



Rosa confirmed that the rear elevator was a service elevator, as she had suspected, and refused. The doorman insisted. When she alleged racism and threatened to call the police, the doorman relented and let her use the social elevator. Raquel filed an allegation of racial discrimination with the DCS.

In their testimony in the DCS investigation, Jose and other building staff offered four different explanations for making Rosa use the service elevator. According to these accounts, Jose asked Rosa to use the service elevator because (1) the social elevator was broken, (2) she lacked authorization to enter the building, (3) he thought she was a cleaning person, and (4) all employees and visitors to the particular unit were required to use the service elevator. The claim that the social elevator was broken lacked credibility since Rosa was actually permitted to use the elevator. The second claim about lack of authorization was directly contradicted by the testimony of Mina and two other witnesses. Third, if Jose really thought Rosa was a cleaning person, why would it matter whether the social elevator was broken? Finally, Rosa's friend, Mina was unaware of a policy that visitors to the unit must use the service elevator.

Despite these inconsistent explanations, the DCS report concluded that the evidence represented the "word of one against the other." The Public Prosecutor viewed all testimony as hearsay and recommended dismissal due to insufficient evidence. Further, the Prosecutor argued that this incident constituted a disagreement between two individuals because the plaintiff was not ultimately blocked from using the social elevator.<sup>56</sup>

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Departamento de Inquéritos Policiais e Polícia Judiciária (DIPO) Proc. No. 11.416/94. Poder Judiciário de São Paulo.

In another allegation that reached the State Appeal Court of São Paulo, a security guard allegedly told two Black visitors to use the service entrance through the garage because “all Black domestic servants use the service entrance”. The two were visiting their friend Denise, who descended when she learned of the problem. She requested that the security guard contact her by intercom in the future to authorize a visit in accordance with building policy. The trial court convicted the defendant who simply denied making the racist comments and produced no supporting witnesses.

The security guard appealed the conviction on the grounds of not having had the opportunity to present evidence.<sup>57</sup> The Offices of the Public Prosecutor and the District Attorney opposed the appeal. The defendant alleged having been persecuted by Denise, the friend of the two plaintiffs. The Court noted that a witness for the defendant testified to having heard him tell the plaintiffs to enter. The Court did not inquire whether and when this had occurred. The plaintiffs had testified to using the elevator after Denise intervened. Finally, the Court noted the existence of an inconsistency in the plaintiffs’ testimony, without actually discussing it, and discounted their testimony.

The Appeal Court declared that “Prejudice of whatever sort, principally of race and color, must always be combated vigorously” but held that blocking an entrance was not discriminatory unless prejudicial motive could be shown. Incredibly, the judges remarked that the plaintiffs could not be certain that the guard’s comments were directed at them. This rationale entered by the Court about two plaintiffs’ perceptions of remarks made in a hallway is even bolder than defendant claims that one customer, Artur, could not perceive remarks

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<sup>57</sup>

Proc Criminal N. 123/91. 3<sup>rd</sup> Vara Criminal. Poder Judiciário de São Paulo. São Paulo.

directed toward him in a store. Finally, the court reasoned, the case had advanced because of Denise's "animosity" and the defendant's foolish behavior: "This would not be a case if the defendant had behaved properly."<sup>58</sup>

Officials settled most of the allegations in São Paulo by privileging the defendant's point of view, narrowly applying to law to protect the physical entrance to the establishment, and drawing faulty comparisons. Courts decided two cases brought under the anti-discrimination law very differently in the southern state of Rio Grande do Sul. In the first of these cases, three plaintiffs had been permitted to enter the social club but required to remain outside the dance hall. They were told that people "were not used to dancing with Blacks" and that "the place of the *Negro* was outside the dance hall". A trial court sentenced the defendants under the anti-discrimination law, which they appealed alleging insufficient evidence for a criminal conviction.

The Appeal Court granted the defendants' appeal. One defendant, the son of a club manager, testified that he had never seen a *Moreno* dance at the club and that he thought the mostly German clientele would have surely complained if the *Morenos* had danced. This Court did not accept defendant claims to not be prejudiced but only to be following club policy that reflected the prejudicial preferences of members. Unlike cases in São Paulo in which judges only condemned restrictions to the physical entrance, the judge condemned this restriction in which Blacks were permitted to enter the club but not the dance hall.<sup>59</sup>

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<sup>58</sup> Apelação Criminal N. 115465-3/6. Tribunal de Justiça do Estado de São Paulo.

<sup>59</sup> Apelação Criminal n. 295.121.793. 2<sup>nd</sup> Câmara Criminal, Tribunal do Estado do Rio Grande do Sul. Revista dos Tribunais. Ano 86. V738. April 1997, p 525-6.

In a second case from Rio Grande do Sul, which had also occurred in 1990, a judge drew explicit comparisons to comparable other persons, in this instance: other customers. Three defendants had been denounced for blocking the access of three Blacks from a social club because they were not members. Two of the defendants claimed that the club did not hold public dances, and that the plaintiffs needed to have been members or invited guests. The defendants were convicted, which they appealed as representatives of a private club established only for members and their families. The Offices of the Public Prosecutor and the District Attorney opposed the appeal.

The Appeal Court accepted the case but unanimously confirmed the original decision. First, the Court sought to determine whether the three Blacks were indeed treated differently. The defendants insisted that they did not permit the plaintiffs to enter because they were neither members or invited guests. The Court noted that the club maintained two entrance lines, one for members and their invited guests and the other for the public, and that the plaintiffs had tried to purchase tickets on the line for the public. Police testified to observing tickets being sold to others who did not have to show a membership card. Thus, the court concluded that the plaintiffs were not permitted to enter because of color and that they were subjected to requirements "not given to other persons".<sup>60</sup>

The Court then shifted the burden of evidence to scrutinize the club's explanation for the exclusion of the three Blacks. Plaintiffs had been told that the event was only for members and that Blacks could not enter. One plaintiff was told that one Black, but not a group of three, could enter. The Court held that the membership criteria was a pre-text. Further, a White

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Apelação Criminal n. 294.084.561. 4<sup>th</sup> Camara Criminal do Tribunal de Alcada, Rio Grande do Sul. Revista dos Tribunais. Ano \_\_. V. 715. May 1995, p 518-20.

friend of the plaintiffs, who regularly frequented the club as a non-member, was not permitted that evening to purchase tickets for his Black friends nor was he permitted to enter accompanied by them. Unlike the holding in São Paulo that the bakery's refusal to serve a White friend demonstrated the non-racial basis of the refusal to serve a Black customer, the Court focused on the treatment comparable others. On all counts, this holding sharply contrasted the holdings in São Paulo.<sup>61</sup>

### **Moral Damages**

The complainant litigated the following case as a violation of the anti-discrimination law and subsequently as a claim for moral damages, which allows for comparison of the logic of inquiry. On a rainy evening in September 1993, Dilce Pires da Silva and her daughter were closely followed by a security guard for 30 minutes in supermarket in a middle-class neighborhood of São Paulo. When Ms. Pires da Silva asked why they were being followed, the guard responded, "Blacks only enter the supermarket to rob". He then blocked them from complaining to management and hit Ms. Pires da Silva in the ensuing scuffle.

The Public Prosecutor offered an extremely expansive argument in his denunciation of the security guard. The prosecutor argued that the guard had refused their "free access" to the supermarket, that being able to shop required "unrestrained access" to the store and the "physical and spiritual" liberty necessary to be able to exercise the civil, social and political rights protected by the Constitution. The store mobilized support for the guard and presented a listing of its Black workers, two of whom testified to never having suffered discrimination at

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Departamento de Inquéritos Policiais e Polícia Judiciária (DIPO) Proc. No. 24.160/95. Poder Judiciário de São Paulo.

the store. The judge did not accept the Prosecutor's expansive argument but applied the law literally. He absolved the guard of racial discrimination because he had not blocked their physical entrance to the store nor refused to serve them.<sup>62</sup>

Ms. Pires da Silva filed a civil suit against the store alleging moral damages for the treatment by the guard. In contrast to most judges who dismissed cases for conflicting evidence, this judge analyzed the conflicting testimony and drew inferences from the facts to address omissions and resolve conflicts. He inferred from the victims' display of their money that the guard must have accused them of not being able to pay. Thus, he reasoned that the plaintiffs had been morally aggrieved, independent of what the guard had actually said.

The judge analyzed some of the conflicting facts as owing to differences in point of view. He noted that the incident could have major or minor repercussion, depending upon the point of view. To the defendant, the phrase would be a "banality said without premeditated intention to offend". To the offended, the offense would seem very large. The judge located Brazilian racism within that difference in the repercussion for the aggressor and the victim.

Then, the judge put the victims on trial. He noted that they had entered the store soaked from the rain and poorly dressed, and suggest that this attracted the security guard's attention in an upper middle class neighborhood. In the judge's view, the security guard reacted to the victims' social class and race: "Brazilian racism isn't ostentatious, . . . [but] built into the culture of the people, not as racism, but more as the social conditions possessed by persons of the color *negra*."

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Proc. Criminal N. 688/94. \_ Vara Criminal, Forum Central. São Paulo.

Although he acknowledged two points of view, the judge clearly sided with the aggressor. In so doing, he combined two distinct insights. First, Brazilian racial assumptions are continually expressed in countless daily interactions. Second, he viewed the lower position of the darker poor as a social given. In his view, Ms. Pires da Silva's social status triggered the security guard's natural reaction. Finally, the judge ruled the event was of "minimal repercussion", resonating with his analysis that defendant would perceive the comment as banal. The judge found for the plaintiff but ordered the store to pay a modest award, only slightly higher than the store's settlement offer during the criminal investigation.<sup>63</sup>

The other moral damages case demonstrated a very different conception of racial discrimination. Judge Raupp, an unusual jurist who has upheld health benefits for same-sex couples<sup>64</sup>, carefully constructed comparisons for the treatment of the plaintiff and scrutinized defendant rejoinders. Victor Hugo da Silva Pires sought compensation for being mistreated at the CEF bank in Porto Alegre. On September 5, 1997, he attempted to transfer 605 *reais* (\$554<sup>65</sup>) from his checking account to his wife's account. The teller questioned his identification and showed it to other workers. The security guard was summonsed, who called the military police. Finally, the military police viewed the documents and confirmed there was no problem. Pires sought moral damages for the harm, alleging discriminatory treatment. The bank contested his account, claiming that it trains its employees extensively to guard against

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<sup>63</sup> See Proc Cível N. 672/93. 21<sup>st</sup> Vara Cível; Forum Central. São Paulo.

<sup>64</sup> See Raupp's opinion. Ação Ordinária N. 96.0002030-2 and 960002364-6. 19<sup>th</sup> Vara Justiça Federal. Comarca de Porto Alegre. <http://www.ajuris.org/br/sent9.html>. Web-site of Ajuris Jurisprudencia. Consulted May 10, 1997.

<sup>65</sup> Folha de Sao Paulo. Edição 2000. Economic Indices. CD-ROM

fraud and to treat customers well. The bank emphasized that it has many clients from all walks of life and that the teller was only performing her professional duties.

Judge Raupp organized his inquiry around two questions with comparative premises. Was the plaintiff treated inadequately? If so, was that inadequate treatment based upon grounds of race or ethnicity? On the first question, he found that Pires was unquestionably treated inadequately. He noted that the police officer, without the extensive training of the bank employees, was able to immediately and correctly determine the validity of the identification card. The officer found no marks on the plastic that might have indicated any alteration. Thus, Judge Raupp argued that the lengthy examination of Pires's identification was unnecessary and performed without explanation. Further, Victor, unlike Dirce Pires, was well-dressed. His documents were in good order and he possessed other documentation as well. There was nothing about him that was or could have been claimed to "provoke" this treatment:

*Nothing - clothes, conduct, language, appearance - absolutely nothing was invoked as a reason for the persecution and criminal distrust . . . All there was at a maximum were doubts (unfounded as the military police and subsequent facts have shown) about the condition of his identification card.*<sup>66</sup>

Thus, the treatment was inadequate which brought him to his second question, motive.

To evaluate racial motive, Judge Raupp analyzed the circumstance comparatively and scrutinized defendant responses. Although the bank wished to present the incident as routine, Raupp viewed the facts outside of their "surface appearance".<sup>67</sup> Although validation of

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<sup>66</sup> Ação Ordinaria N. 98.0018334-5. 10 Vara da Circunscrição Judiciária do Porto Alegre. Poder Judiciário, Justiça Federal. Nov. 3, 1999; Zumbi Escritório Nacional web-site. <http://www.enzp.org.br/sentenca4.htm>. Consulted: December, 2000. See p. 28

<sup>67</sup> Ibid, p 11.



identification might appear routine, he asked how a similarly situated White customer would have been treated:

*If a well-dressed white person presented a document, what would have occurred? Would the police have been called without explication to the individual? Certainly not.*<sup>68</sup>

Raupp argued that a white customer would not have been so treated. Raupp argued that no plausible explanation existed, other than discrimination, for the fact that nothing was said to Mr. Pires during the incident. Thus, Raupp scrutinized the conduct of bank employees, asking whether their behavior could be justified. His analysis that societal practice needed to be “removed from its appearances”<sup>69</sup> represented a sophisticated approach to the concept of pretext within US jurisprudence. He argued that such an approach was necessary for the judiciary to be able to adequately analyze racist practices that are often “camouflaged by enumerable subtleties.”<sup>70</sup>

## Conclusion

This chapter has examined the surprising victories and variation in judicial findings in contemporary Brazilian public establishment and employment discrimination cases, litigated under the anti-discrimination law and other legal instruments. The public establishment cases pose the question whether the right to enter and not be refused service also implies the right to the full liberty to use the establishment. Judges have been more likely to protect the rights of Black consumers who allege moral damages than violations under the anti-discrimination act.

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<sup>68</sup> Ibid, p 28.

<sup>69</sup> Ibid, p 10.

<sup>70</sup> Ibid. p 9.

The hiring and firing cases, many of which would have constituted valid allegations in the US under the theory of individual disparate treatment<sup>71</sup> and in Brazil under constitutional prohibition of employment discrimination, pose questions about the litigation of Brazilian racial discrimination. What constitutes an opening? If a company posts a listing on its window or she sees others completing applications, can a complainant infer that an opening exists? Given the ambiguities of Brazilian hiring procedures, does requesting and not receiving an application indicate sufficient interest in a position for the purposes of alleging discrimination? Finally, can multiple institutions be held responsible for an allegation, relevant for recruitment and hiring allegations?

Most judges did not ask whether defendants treated the complainants differently by requirements “not given to other persons.” Instead, judges sought evidence of a discriminatory act that violated the anti-discrimination law, defendant prejudice, and a clear relationship between the prejudice and the violation. Judges often enacted a high requirement for a show of causality. In AG’s allegation for discriminatory dismissal, the judge acknowledged the defendant’s prejudicial threat to fire AG but did not associate that threat with the actual dismissal.

In most cases in this chapter, the state failed to produce sufficient evidence of a discriminatory act or defendant prejudice. Defendants generally responded to allegations by denying the discriminatory act, prejudice, or causality. In many instances, defendants and the courts attacked complainants for being too sensitive (being predisposed to suspect

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<sup>71</sup> Police investigations did not customarily seek to clarify the disposition of the positions and in many instances, did not definitively show that someone else was hired or that the position remained opened.

discrimination) or too oblivious (not knowing whether a comment was directed toward them), too timid (not applying for a job) or too assertive (in seeking access to a social club). Sometimes, defendants justified their actions, such as the claim that Derejane's poor score on the technical test was the reason not to hire her as well as the frequent claim that the job performance of a fired employee had been unsatisfactory. The courts seldom required a defendant to justify discriminatory treatment. A shifting burden of proof not only produces important evidence but allows the court to scrutinize the evidence, employer's justification, to evaluate motive. For example, Eletrosul justified Vicente dismissal as based upon technical criteria, which sounds like a business necessity. Upon court scrutiny, Eletrosul was unable to concretely demonstrate its definition and application of that criteria to determine which employees to dismiss. Courts seldom scrutinized defendant responses for consistency, required defendant justifications, or scrutinized justifications for *razoabilidade*.

The cited law influenced the judicial logic of inquiry and the outcome. This is evident in the cases tried under multiple laws as well as considering hypothetically how certain cases might have fared under other legal provisions. First, consider the two findings of discriminatory dismissals. The first of which was initially litigated under the anti-discrimination law. In that case, Judge Ramos ruled found insufficient evidence of prejudicial motive. Even in his finding of an arbitrary dismissal of a public employee, the judge, Judge Ramos, acknowledged a lack of evidence for a finding of prejudicial motive. The plaintiff could not have secured a finding under the anti-discrimination law. In the second case, the supervisor who reassigned the plaintiff verbalized his prejudicial views in front of students on numerous occasions, which might have persuaded a judge to issue a finding under the anti-discrimination law. However,

judicial assessment of defendant prejudice, particular whether it could have been the causal factor, varied widely and that outcome could not be assured.

Consider also the Dirce Pires cases, in which the 68 year-old woman was followed and punched by the security guard. The judge in the original criminal case absolved the defendant because the law had not expressly prohibited his behavior. Her civil case faced an easier burden of proof and resulted in a finding of moral damages. Could a judge have found that the bank teller in the other moral damage case, who delayed the inspection of a client's identification, was prejudiced and had acted on prejudicial motive? In that case, Judge Raupp found no other plausible explanation in a moral damages case. However, he could not have issued a criminal conviction without more explicit evidence of motive. A moral damage claim faces an easier burden of proof.

Second, although the legal instrument mattered tremendously, the variation in the logic of judicial inquiry cannot be simply explained according to the relevant law. In several cases heard in Rio Grande do Sul, judges surprisingly used the logic of differentiated behavior in findings under the anti-discrimination law. Those judges held that entering a social club but not being permitted to dance was not permissible and compared how Black plaintiffs and other prospective clients were treated. Moreover, judges ruled for the defendant in two moral damage allegations of discriminatory firing based upon the logic of punishing racial prejudice. In these cases, these judges used the logic of punishing prejudice, even though prejudice is not required for a moral damages claim.

Thus, I claim that the anti-discrimination law has had two influences, directly shaping jurisprudence handled under it and indirectly shaping all racial discrimination jurisprudence

because it has defined the juridical concept of racial discrimination. Most judges employed the logic of punishing prejudice, emphasizing the verbal conduct of the defendant and requiring very high standards that a defendant might “be prejudiced”. Further, judges also used the three prong test for cases brought under other legal instruments, that do not require a showing of prejudice or prejudicial motivation. Thus, I claim the racial discrimination law has influenced how judges define racial discrimination even for allegations brought under other instruments.

## Chapter 7 From Prejudice to Equality: Reframing Brazilian Racial Discrimination

*Popular struggles are a reflection of institutionally determined logic and a challenge to that logic. People can only demand change in ways that reflect the logic of the institutions that they are challenging. Demands for change that do not reflect the institutional logic . . . will probably be ineffective.<sup>1</sup>*

The Brazilian recognition of racial discrimination has grown tremendously in the past decade. Brazilian Blacks have increasingly turned to the law to articulate racial discrimination, a nearly taboo subject a decade ago. Despite the many problems discussed in this dissertation, plaintiffs have prevailed against large, powerful defendants, including a few decisions that have reached Brazil's highest courts. None of that could have been imagined a decade ago.

Black Movement mobilization grew qualitatively across the decade strategically capitalizing on opportunities presented by national observances commemorating the ending of slavery (1988) and the birth of Zumbi, an important leader of escaped slaves (1995). The Black Movement increasingly invoked international institutions to gain additional political clout for their political agenda within Brazil.

In the past year, the tremendous mobilization by Brazil's Black Movement has resulted in historic policy change in combating racial discrimination: the adoption of affirmative action for federal agencies and public universities. Strategic mobilization by activists in preparation for the Third UN Conference on Racism in Durban, South Africa September 2001 created a political context that prompted governmental response. Many Brazilian Black activists played prominent roles in the preparatory meetings and

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<sup>1</sup> Crenshaw, (1988, p 1367).

the conference.<sup>2</sup> International institutions, such as the World Bank, the Inter American Development Bank, the Organization of American States, and the International Lawyer's Committee on Human Rights, each took important initiatives that recognized the significance of these developments and of Latin American racial discrimination. While President Cardoso deserves credit, his government needed to substantively respond to such broad, internationally supported initiatives.<sup>3</sup>

Although the overall movement to frame racial discrimination as a problem in equality rather than a problem in prejudice is a positive development, the new policies have encountered problems originating from Brazilian racial ideology and the Brazilian structure of color. In particular, the new initiatives have encountered the complexity of Brazilian color for identifying and verifying the identity of the subject class.

Moreover, the understanding of racial discrimination remained strongly linked to ideas of the past: a theory of racial discrimination as overt acts of prejudice. An ambitious new Congressional proposal sponsored by the Deputy Paim who authored the 1997 amendment to the anti-discrimination, remains in special commission is likely to be approved in some form. Many of Deputy Paim's proposals have been adopted during the two years since he introduced the proposal in Congress. The proposal vastly expands the agenda of anti-discrimination policy and represents a very positive

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<sup>2</sup> Brazil's Black Movement was instrumental in the preparatory meetings in the Americas leading to the UN Conference. At the Conference, Edna Roland, founder and President of an important NGO addressing health issues, Fala Preta, was designated a Conference Rapporteur.

<sup>3</sup> President Cardoso steadfastly opposed the implementation of affirmative action prior to the Durban conference. The resignation of a prominent member of the Brazilian delegation to Durban, Hedio Silva, in protest of the lack of concrete policies just before the conference may have added to the pressure.

contribution. Nonetheless, his proposal's theory of racial discrimination continues the criminal model. Despite proposing important new coverage to the anti-discrimination law of 1989, this new measure may not increase the viability of future litigation.

Clearly Brazil will emerge from the next period with a broader conception of racial discrimination than it has today. Undoubtedly, affirmative action policies will create opportunities and have the shifting the understanding of discrimination to a problem in equality. Increasing elements within Brazil's Black Movement have advanced conceptions of racial discrimination as a problem in equality, rather than a problem in prejudice. Still, I suggest that the dynamic discussed in this thesis persists: that at the moment of change, the ideology of the past persists in structuring the new ideas. A narrow theory of racial discrimination, linked to a powerful underlying racial ideology, still persists in the making and use of anti-discrimination law even in a period of considerable Black Movement mobilization. In this final chapter, I will summarize the findings of my dissertation and consider several possible counter-arguments to my arguments. I also briefly sketch the historic changes of the last year to illustrate the continued presence of the past on this moment of exciting change. Finally, I advance a speculative theory about the relationship of anti-discrimination policy to the ideology of the nation.

### **Summary of Findings**

This dissertation has shown the difficulty of trying racial discrimination under the current anti-discrimination law. I claim that Brazil's anti-discrimination law has been constructed more narrowly than anti-discrimination clauses in the constitution and anti-discrimination laws elsewhere and argue that this narrowness explains the difficulties in



articulation and resolution of racial discrimination claims. The reader could reach alternative conclusions about the nature of the difficulties. The centrality of mobilization is fully evident, particularly given the influence of a weak rule of law. The influence of judicial ideology is also fully evident. However, I contend that a close examination of the variation in inquiry and outcomes as well as the relationship between causal influences will show that the theory of racial discrimination as an act of prejudice was the central factor. The successful appeals on employment discrimination litigation, the most difficult cases to advance, occurred by transforming the disputes from an allegation of an “act of prejudice” to an allegation of “unjustifiable differentiation.” In the next sections, I assess my evidence against the claims I advanced and the outset and consider the counter-arguments in some detail.

#### **(1) Narrow Construction of Brazilian Racial Discrimination**

My first claim is that Brazil has narrowly conceived of racial discrimination in its law, compared to how it conceives other forms of discrimination and to how other countries conceive of racial discrimination. I argued that the central aspect of this narrowness is the construction of racial discrimination as a criminal “act of prejudice.”

In Chapter 2, I compared Brazilian racial discrimination law in theory and practice to other forms of discrimination in Brazil and to racial discrimination elsewhere, particularly the US, and showed Brazilian construction of racial discrimination to be narrow. The Brazilian model approximates the US theory of individual disparate treatment proven by direct evidence of prejudice. The Brazilian approach is still narrower because judges generally have not inferred the causal relationship between a

prejudicial statement but required direct evidence of causality. The Brazilian model also resembles the French criminal theory of racial discrimination, but includes narrower conceptions of standing and liability. The Brazilian theory of racial discrimination is a theory of overt discrimination, a poor fit for a country that prides itself on cordiality and that has its share of covert practices.

I also compare the Brazilian theory of racial discrimination as an act of racial prejudice to its theory of employment discrimination on the basis of age and gender as unjustified differentiation. That comparison is vulnerable to the limitations of my data and the criticism that I turned an empirical question into a doctrinal question. I compared the handling of employment discrimination claims on the basis of racial prejudice to the claims advanced on the constitutional protection of employment discrimination on the grounds of age and sex. That comparison revealed that judges routinely handled allegations of age discrimination according to the doctrinal analysis of inequality and allegations of sex unevenly.

The Brazilian Constitution contains multiple notions of racial discrimination, reflected by the difference in the logic of analysis applied in the various cases. I argue that the central idea of Brazilian racial discrimination is contained in its anti-discrimination law. The Brazilian Congress did not implement a broader conception of racial discrimination but prohibited an act of prejudice in the 1989 law. The Congress clearly intended to “punish prejudice.” Nonetheless, public and private actors differ as to the meaning of racial discrimination, as the allegations suggest. Thus, I do not claim to present an absolute tendency, but a central understanding of a problem.

The theory of punishing race prejudice does not entail burden-shifting. Under that theory of overt discrimination, a plaintiff shows that an act of prejudice was committed. The necessary evidence resembles a showing that a fight or other criminal act occurred as much as a showing differential treatment. Burden-shifting has less utility for the plaintiff who must produce evidence "beyond a shadow of a doubt" rather than evidence "more likely than not." Further, the admissibility of indirect evidence is also a consequence of the notion of a harm and dramatically affects the cases.

Finally, perhaps the central problem in the anti-discrimination law is the criminalization or "felonization" of racial discrimination, or alternatively, the lack of burden shifting and the admissibility of indirect evidence. Undoubtedly, these are important aspects of using the law. Judges are reluctant to apply a law that treats crimes as a non-bailable felony. Police investigators only seek direct evidence of overt discrimination. Judges do not shift the burden of evidence, an extremely important mechanism to adjudicate complex problems. I counter that the theory of racial discrimination as a hostile act of prejudice advances the conception of the harm and thereby governs these important elements of the law.

## **(2) Origins of the Narrow Construction**

I suggest that the original conception of racial discrimination resided in the ideology of the Brazilian nation. One could advance two versions of that thesis. The weak version would claim that the conception of the nation influenced the anti-discrimination law, allowing for other causal influences. A stronger version would argue

that the conception of the nation was the central of the factors for the development of the Brazilian theory of racial discrimination. As I do not explore alternatives, such as the role of religion, I advance the weaker claim in this section and speculate about the stronger version at the end of the chapter.

I certainly concede a Brazilian tendency to treat problems punitively and I do not claim that racial ideology would explain that tendency. Nor do I claim that Brazilian racial ideology alone could explain the legal definition of racial discrimination as a criminal act of prejudice. The unusual role ascribed to prejudice in the Brazilian definition of racial discrimination could have religious or cultural underpinnings. The definition of discrimination as an act of prejudice resembles a religious notion of discrimination as sin. I do not refute these other explanations, but emphasize the role of the Brazilian ideology of its nation for the construction of racial discrimination as exclusionary, hostile acts.

In Chapter 3, I showed that the first anti-discrimination law was framed within the prevailing racial ideology, Brazilian *racial democracy*. The law defined racial discrimination as an act of prejudice and identified specific segregatory mechanisms. The original law was conceived within the bounds of Brazilian racial ideology that viewed racial discrimination as something that occurred in the United States.

Other countries, including several other Latin American countries, have also advanced a conception of racial discrimination as something foreign and North American. This is similar to a tendency in many countries to condemn apartheid rather

than to address their domestic racial discrimination.<sup>4</sup> However, I claim that the significance of the reference to the US in Brazil is not simply conflict avoidance but fundamentally related to Brazil's ideology of its nation. The US comparison has a particular resonance within Brazil.

It is the continued power of the theory of racial discrimination as an act of prejudice in the current era that I seek to explain: why has anti-discrimination law sponsored by progressive Black Congressmen continued to rely upon an old theoretical model. Certainly, the Black movement's use of the original model, upgraded to a felony, represented a serious condemnation of racial discrimination. Perhaps, this approach represents symbolic politics<sup>5</sup>: the politics of protest incorporated into policy, a legacy of the regime-opposition politics of the 1970's and 1980's. Further, the use of the old theory of racial discrimination could represent pragmatic use of an opportunity structure, an available political language for a problem.<sup>6</sup> Those explanations do not seem adequate because the constitution contains multiple theories of racial discrimination and the 1989 law still used the 1951 theory of racial discrimination. I suggest that the 1989 law cannot be explained without reference to the ideology of *racial democracy* that gives meaning to the criminalization of racial discrimination and defines racial discrimination as North American.

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<sup>4</sup> See Banton (1996) and Thornberry (1991).

<sup>5</sup> Jorge da Silva (1994).

<sup>6</sup> See Donna Saguy's comparison of the framing of sexual harassment in France and the US in Saguy (2000).

### **(3) Influences on the use of the law**

Brazilian “Blacks” and “Browns” have repeatedly identified hiring and promotion as their primary discriminatory problems in social surveys. Nonetheless, complainants seldom brought allegations of hiring discrimination and have not brought allegations of discriminatory promotion to the police. Of all allegations of racial discrimination, allegations of hiring discrimination have encountered the greatest difficulty in legal proceedings. Police investigations sought to identify prejudicial commentary by the defendant who denied employment to the complainant. The more sophisticated judicial analysis of evidence in employment discrimination allegations on the basis of age, sex and height was not used in these cases. I seek to explain the overall trends in filing, classification, investigation and adjudication, and compare the handling of the racial discrimination allegations, an internal comparison, and compare the handling of employment discrimination allegations on the basis of racial prejudice to other grounds, an external comparison.

I argue that three factors, the Brazilian ideology of race, its weak rule of law, and the narrow legal construction of racial discrimination, have combined to shape the use of the law. I showed that the three factors are highly evident in the articulation and official handling of allegations. The problems Brazilians brought to the police set the legal agenda for racial discrimination. Brazilians brought certain problems, with verbalized prejudice generally expressed by someone of equal standing. I claim that these problems reflected the law's premise to punish prejudice and the weak Brazilian rule of

law, in which victims were unlikely to complain to the police about problems with other police or with powerful individuals.

I also showed that the three factors influenced police, prosecutorial and judicial handling of the allegations. The predominant police classification of allegations as *injuria* largely removed color from the proceedings. Defendants destroyed evidence and intimidated plaintiffs and potential witnesses. Police reports often erased the testimony of Black plaintiffs and witnesses. Defendants effectively claimed to be *Mulato* as evidence of being inherently unprejudiced. Official actions reflected the influence of racial ideology and a weak rule of law. Finally, the focus in the law on prejudice led officials to emphasize the attitudes of the principals and often treat disputes as contests between personalities.

A reader might question the importance of the law in the overall outcomes, because the disputes were over-determined either by the weak rule of law or by the racial ideology of officials. In a weak rule of law, the judicial proceedings test the political will and power of private interests and their public allies, representing political contests conducted in court. Like all political disputes, the relative mobilization of the parties, the overall political context and many other important political factors intervene.<sup>7</sup> While power and mobilization undeniably influenced these proceedings, the variation in inquiry and outcomes was not explained independently by considerations of power and mobilization. Even small employers defeated employment discrimination allegations while larger firms in powerful communications industry lost in other allegations. The

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<sup>7</sup> The relative power of the principals would especially matter when the rule of law is weak. See DaMatta (1991), Mendez (1999), and da Silva (1999).

data suggests that rule of law and mobilization by the principals were extremely influential but not explanatory factors.

Another counter-argument would be that a judge's ideology determined the outcomes, that the content of the law did not matter. Judicial findings reflected personal racial ideology rather than the law.<sup>8</sup> Many judges, steeped in *racial democracy*, would likely have found similar holding under any legal instrument. Some judges, committed to the "spirit" of the law and the broader constitutional notions of discrimination, applied the narrow instrument broadly. However, the data do not support a view of racial ideology operating independently of the law. Other judges condemned defendant behavior and lamented not being able to apply the anti-discrimination law to particular cases. For those judges, the particulars of the law mattered. Several cases, litigated on multiple instruments, also suggested that the particular instruments mattered. While judicial ideology mattered, the data do not support the argument that judicial ideology independently prevailed and that the law did not matter. Thus, I argue that three factors, the rule of law, official ideology and the theory of racial discrimination as an act of prejudice, jointly influenced judicial decision-making and the overall filing and processing of racial discrimination allegations.

Finally, one might argue that the problem was not simply a judge's ideology, but rather a lack of judicial scrutiny of any defendant's testimony.<sup>9</sup> Most officials accepted defendant testimony without analyzing the accuracy of testimony or examining

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<sup>8</sup> Jorge da Silva (1994) argued this. Fry's commentary that judges reflect the broader society strongly suggests that the personal ideology of officials might explain the outcomes. See Fry in Mendex (1999) and also Sueli Carneiro, *Irohim*, Volume 1, 1997.

<sup>9</sup> Meili discussed the view of Brazil as a defendant's jurisdiction in Meili (1993, p. 29).



inconsistencies in the accounts. Thus, that lack of scrutiny in the racial discrimination cases was matched in the sex discrimination cases by upholding employers' prerogatives (including their own) without examining the justification and without holding that a particular circumstance should be exempted from scrutiny. Thus, Courts upheld sex differentiation in the military as a "natural" condition without always scrutinizing the particular differentiation. However, the difference between the handling of employment discrimination on the grounds of age and height differed dramatically from the predominant handling of racial discrimination. Judges scrutinized those cases carefully. That gender has also been treated peculiarly does not show that the problem in the handling of racial discrimination allegations resides independently in the problem of low judicial scrutiny.

#### **(4) Centrality of the definition of racial discrimination**

Of the three factors that influence the articulation and resolution of racial discrimination claims, I argue that the theory of racial discrimination as an act of prejudice is central. I base this upon comparing outcomes and the logic of inquiry in the various cases. Compared with employment discrimination claims on other grounds and racial discrimination cases about other problems, the employment discrimination claims based upon racial prejudice enjoyed the least success. The two successes were advanced on the broader theory of racial discrimination in the constitution. Thus, I claim that the theory of racial discrimination matters.

In the racial discrimination cases, the relative power and mobilization of the principals did not seem to independently explain the outcomes. Perhaps the greater difficulty in the employment allegations of the racial discrimination cases reflects the nature of employer-employee relations.<sup>10</sup> An employer might defend itself more vociferously than a large supermarket. Certainly, employers wield more concentrated power than do other defendants and can control evidence by inhibiting potential witnesses, enforcing a “code of silence.”<sup>11</sup>

However, that argument about employer tenacity cannot explain the variation in employment discrimination litigation based upon the grounds of the litigation. Employment discrimination claims on grounds other than race were more successful. In employment discrimination cases on the grounds of age, height and sex, judges often shifted the burden of proof to examine employer rationale for allegedly discriminatory job criteria. I suggest that employer tenacity alone does not explain this variation. Why would employers oppose racial discrimination allegations more fiercely than allegations of sex or age discrimination? The answer would seem to reside in their racial ideology as well as strategical considerations about their workforce. Moreover, even if employers were more tenacious than other defendants, why would the judiciary be more responsive to their overtures? The racial ideology of the judiciary seems implicated as well.

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<sup>10</sup> This power explanation draws upon notions of interest articulation set within Brazilian socio-legal dynamics. Fear of retaliation has strongly limited the use of law in Brazil. See in particular the Murilo de Carvalho, et al (1993) and da Silva (1994). Black workers have been much more likely to leave a job than report a violation. See Jorge Aparecido Monteiro, Color and Work in the Public Sector, IUPERJ, 1987. I suggest that these factors may indicate that employers mobilize more than other defendants. .

<sup>11</sup> Da Silva (1999).

Moreover, consider that the few allegations of employment discrimination that succeeded on the grounds of race were advanced as constitutional claims that did not require showings of prejudice. The two successful cases of employment discrimination on the grounds of race were adjudicated in labor courts on the basis of constitutional protection. Those cases were unsuccessfully advanced initially under the anti-discrimination law and as a moral damage claim. In one case, the judge found the dismissal arbitrary and unjustified, with strong evidence of prejudicial motivation. but noted that he could not have definitively held that the dismissal was an act of prejudice.<sup>12</sup> The anti-discrimination law pertains to a much narrower set of employment problems than the constitution. Given that successful adjudication of employment discrimination cases on grounds of age, gender and color were reached based upon constitutional protection, I argue that the law's theory of discrimination matters.

In contrast to the burden-shifting framework used to evaluate employment discrimination allegations on the grounds of age and gender, the theory of racial discrimination of most Brazilian officials limited the gathering and analysis of evidence. By punishing an "act of prejudice," the law focuses judicial attention on the aggressor's behavior and not the harm to the complainant. Further, racial discrimination is a non-hailable felony. Most Brazilian judges require direct evidence of an unstated three-prong test: (1) that a discriminatory act occurred, (2) that the defendant held prejudicial views toward the complainant, and (3) that those prejudicial views constituted the criminal motive for the act. Prosecutors have had the greatest difficulty showing the second or

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<sup>12</sup> Proc. N 412/92; 2<sup>nd</sup> Junta de Conciliação e Julgamento de São Jose. Santa Catrina. 12<sup>th</sup> Region, Tribunal Regional do Trabalho. Jan 16, 1995.

third prongs, that a defendant held prejudicial views against a complainant or that those views constituted criminal motivation for the alleged act, very demanding evidentiary standards.

Certainly, nothing would have prevented a public prosecutor or judge from evaluating allegations according to a logic of unjustified differentiation. The law did not require the narrow use of evidence, but it has focused public and private attention on the mind and attitude of the aggressor. I argue that the legal construction of racial discrimination as an act of racial prejudice has sanctioned and encouraged judicial reliance on ideology. Although all judges invoke their ideology in their findings, Brazil's anti-discrimination law increases that tendency by requiring a determination of whether a defendant was prejudiced. To determine whether an act was committed on prejudicial motivation requires judges to consult their own racial ideology. Instead of providing a clear standard for unjustifiable differentiation, the law has been easily incorporated by officials into their own ideology of the nation.

### **Current Developments**

Deputy Paulo Paim (PT), who sponsored the important 1997 amendment to the 1989 anti-discrimination act, introduced an ambitious new anti-discrimination law, the Statute of Racial Equality to the Congress in June 2000. Paim's proposal has been assigned to a special Commission on Racial Equality, established to revise the proposal. During this time, several of its most controversial clauses, the provision of affirmative

action in higher education and public ministries, have been adopted by executive decree and separate legislative action.<sup>13</sup>

The bill's broad anti-discrimination agenda defends "those who suffer prejudice or discrimination in function of their ethnicity, race or color." While that language only prohibits direct discrimination, the formulation makes "Blacks" and "Browns" the subjects rather than the objects of policy and lessens the importance of showing prejudice. The measure proposes important institutional changes, creating permanent "Councils in Defense of Racial Equality" on the federal, state, and municipal levels. These Councils are to be composed of representatives of state agencies and NGO's linked to "population suffering racial prejudice."<sup>14</sup> President Cardoso established a National Council to Combat Discrimination (CNCD) last fall similar to the Paim proposal.<sup>15</sup>

Of Deputy Paim's broader agenda, I examine the historic adoption of affirmative action and the impact of his proposals upon the anti-discrimination law of 1989, respectively. Two new laws will alter the student body at two State Universities in Rio de Janeiro (UERJ and UENF). One law establishes a target that 50% of the university seats would be filled by public school students, a measure with class and color implications.<sup>16</sup> A second law stipulates a 40% target for *Negra* and *Parda* students that

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<sup>13</sup> The Statute of Racial Equality. Projeto De Lei N<sup>o</sup> 3198, DE 2000 (Do Senhor Paulo Paim - PT). Representative Paim's Web-site. <http://www.camara.gov.br/paulopaim/031982000.htm>.

<sup>14</sup> See Title I, article 6. Ibid.

<sup>15</sup> Decreto N. 3.952, October 4, 2001, Presidencia da Republica, Web-site of the President, <http://presidencia.gov.br/ccivil/03/decreto/2001/D3952.htm>. Downloaded: January 17, 2002.

<sup>16</sup> Public Law 3,708 of Nov, 9, 2001, Public Law 3,524/2000, State of Rio de Janeiro, Web-site of the State of Rio de Janeiro, [Http://www.alerj.rj.gov/top\\_leis\\_ordinarias.htm](Http://www.alerj.rj.gov/top_leis_ordinarias.htm), Consulted: December 8, 2001.

will include any *Negra* and *Parda* students eligible under the provision for public school students. In other words, if *Negras* and *Pardas* comprise half of the public school students, 30% of the other seats for incoming students would be filled by *Negras* and *Pardas*.<sup>17</sup>

Brazilians appear mixed about the new era of affirmative action. One recent study showed that 57% of all students and 50% of Black students at one of the State Universities in Rio de Janeiro (UERJ) disagree with “quotas.”<sup>18</sup> Illustrative of a much wider societal controversy, Milton Goncalves, a prominent Black actor, stated in an interview with Globo that it would be difficult to establish quotas for Blacks in Brazil, where no one wishes to be Black.<sup>19</sup> However, most Black movement activists favor affirmative action, which was not true in earlier periods.

The first of Cardoso’s ministers to establish affirmative action was the Minister of Agriculture, Raul Jungmann. Jungmann issued an order in September 2001, that 20% of his staff be *Negro*. The order also stipulated that firms contracting with his agency establish goals that 20% of their staff be “Afro-descendents” and 20% be women.<sup>20</sup>

Jungmann’s order created considerable controversy. Certainly, as the first minister to initiate affirmative action, an extremely controversial policy, Jungmann would

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<sup>17</sup> Public Law 3,524/2000, State of Rio de Janeiro, Web-site of the State of Rio de Janeiro, [Http://www.alerj.rj.gov/top\\_leis\\_ordinarias.htm](http://www.alerj.rj.gov/top_leis_ordinarias.htm), Consulted: December 8, 2001.

<sup>18</sup> I do not know the wording of the question, which generally is extremely important in attitudinal research about affirmative action. Diego Escosteguy e Luciano Pires, “Pesquisada UERJ mostra que cerca de metade dos alunos da universidade nao concorda com sistema de reerva de vagas.”

<sup>19</sup> Interview with Milton Goncalvez, “Solução provisoria”, *Globo*, Dec 17, 2001

<sup>20</sup> Roberto Cosso, “Cotas Para Negros Esbarra em falta de criterios”, *Folha De Sao Paulo*, December 16, 2001

encounter tremendous resistance. Moreover, important questions about identifying and verifying the subject class, recognized complications, immediately surfaced.

Jungmann, who defines himself as *Pardo*, controversially specified that affirmative action in his agency would target *Negros* and not *Pardos*. According to a 1999 household survey conducted by the Census Bureau, the population estimates included 5.4% *Preta* and 39.9% *Parda*. When questioned about his agency's targets, Jungmann acknowledged he might revise the policy if the data were correct.<sup>21</sup>

Further, the agency had not established criteria or procedures to verify who qualifies under any criteria. Some favor a subjective standard, based upon an applicant's stated identity. Jungmann acknowledged this problem and planned to establish a commission to address that question. Despite these controversies, the Ministry of Agriculture hired eight new Blacks within the first three months.<sup>22</sup>

The Federal Supreme Court (STF) was the second federal institution to adopt a quota system. The STF policy pertained to persons hired through contracted services. The STF target was also set at 20%.<sup>23</sup> The President of the STF, Marcio Aurelio, stated his intention to expand the coverage to additional employees. In addition to the tremendous symbolic importance of the STF adoption of affirmative action, Aurelio publicly defended affirmative action as consistent with the constitutional principle of equality.<sup>24</sup> In addition to noting that affirmative action had been adopted for women,

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> "Negros ganham vagas no STF". Correio Braziliense. 12/01/2002. EMAIL of Ivair dos Santos.

<sup>24</sup> "A discriminação e a lei: Marco Aurélio fala sobre ações afirmativas e igualdade."  
(continued...)

children, adolescents, and those physically different, he argued that the provision of equality required treating similar persons similarly and persons in different circumstances differently. This measure, which he saw as temporary, would seek to address inequality of circumstances.

During the fall, the Minister of Education, a strategic position given the intention to create opportunities in public universities, opposed affirmative action and proposed preparatory programs instead. By December, President Cardoso had established affirmative action in all cabinet agencies: that 20% of positions without civil service examinations would be available for "Blacks" and "Browns." The Ministry of Justice would only contract with firms who could assure that 20% of their employees are "Black" and "Brown." That figure would be encouraged but not required of firms contracting with other Ministries. Cardoso's order affects 300,000 contracted workers in the federal public service, the lowest rung of the federal workers. The Minister of Education favored the proposal as of December but insisted that merit be used for new hiring.<sup>25</sup>

Although many favor a subjective approach that allows an applicant to declare identity, several prominent Black activists and officials favor a process that includes verification. Most activists seem to favor a subjective declaration, particularly in consideration of the difficulty for a Brazilian to declare him or herself Black.<sup>26</sup> Wania

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<sup>24</sup>(...continued)

Consultor Juridico Web-site. Deceber 17, 2001.  
[Http://www.consultorjuridico.com/SR/Marco\\_Aurelio\\_11\\_20\\_01.htm](http://www.consultorjuridico.com/SR/Marco_Aurelio_11_20_01.htm).

<sup>25</sup>Solano Nascimento and Beatriz Velloso, *Epoca*, "A semana", 12/16/2001.

<sup>26</sup>Edna Roland and Sueli Carneiro, both extremely prominent activists, adopted this view, as did Paulo Sergio Pinheiros, the current National Secretary of Human Rights, See José Maria Mayrink, "Negro, que me quero negro: Auto-identificação deve dispensar documento e prova para cotas". *O Estado De S. Paulo*. January 13, 2002. EMAIL from (continued...)



Santana, newly appointed Secretary of Human Rights in Rio de Janeiro and a prominent Black Movement activist, advocated a verification process that would allow applicants to declare their identity and prove their identity, if challenged.<sup>27</sup> The procedures and grounds for the challenge, as well as the necessary evidence for responding, would need development. Another prominent Black Movement activist, attorney Hedio Silva, believes the new policies will be subject to innumerable court challenges if a formal procedure is not adopted. He advocates the use of a federal identification card.<sup>28</sup>

That controversy has provoked a new round of discussion in Brazil's Census Bureau about the problematic nature of Brazilian color categories. Brazilians use color terms differently across the country. In the South, the Whitest region, officials believe "Blacks" tend to identify as *Pardo* rather than *Preto*. In the Northeast, many persons with indigenous heritage identify as *Pardo*. As the Jungmann controversy shows, *Pardo* is the category in question.<sup>29</sup>

The Ministry of Agriculture recently implemented Cardoso's order. Needing 31 contracted employees including drivers, receptionists, and delivery staff, Jungmann established a target of six. A manager from the agency, "Capital," which hired the new employees, stated that they reviewed photos attached to the applications screened out "candidates who truthfully were *Morenos* . . . [who] we did not consider . . . *Negros*."<sup>30</sup>

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<sup>26</sup>(...continued)

Ivair dos Santos.

<sup>27</sup> Solano Nascimento and Beatriz Velloso, *Epoca*, "A semana", December 16, 2001.

<sup>28</sup> José Maria Mayrink, *op. cit.*

<sup>29</sup> "IBGE utiliza conceitos que não identificam bem a cor: Pardo é soma de variáveis como mulato, sarará, enxofrado e burro-quando-foge." *O Estado De S. Paulo*. January 13, 2002. EMAIL: Ivair dos Santos.

<sup>30</sup> Solano Nascimento and Beatriz Velloso, "A semana", *Epoca*, December 16, 2001.

The Senate has approved a measure that would establish quotas for positions at public and private universities. Applicants would declare their color before taking the entrance examinations. The sponsor of the law, Senator Rocha (PDT) proposed establishing a federal identification card, but leaving the verification procedures to be developed by the implementing agencies. A total of 245,000 public university seats and 970,000 private university seats will be affected.<sup>31</sup> If not enough “Black” and “Brown” applicants have satisfied the established minimum, the remaining slots will be filled by the overall pool of applicants.<sup>32</sup>

Deputy Paim’s proposal also expands the notion of harm to include the health problems of “Afro-descendants” and broader workplace protection to include advancement and lack of promotion. The law’s most controversial chapter calls for reparations to the descendants of enslaved Africans. The law also strengthens the collective rights in the Constitution to the descendants of *Quilombos*, the escaped slave communities.

The law modifies existing legislation, in particular, the 1989 anti-discrimination act. It prohibits the blocking of promotion and other professional advancement in the public and private sector. The proposal also prohibits private sector differentiation in the conditions of work or salary and the use of *boa aparência* or photographs in private sector hiring. The language of those clause addresses direct discrimination.

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<sup>31</sup> “Afro-brasileiros podem ficar com 20% de vagas.” Povo. April 18, 2002. EMAIL: Ivair dos Santos.

<sup>32</sup> Thiago Vitale, “Senado aprova cotas para negros.”. Correio Braziliense. April 18, 2002. EMAIL: Ivair dos Santos.

The proposal vastly expands the scope of current anti-discrimination law. It has influenced the political agenda since Senator Paim introduced it, and several clauses have already been adopted. In its current form, the proposal does not modify the theory of racial discrimination as an act of prejudice and its strengthened workplace protections refer to the 1989 law rather than the constitution. By referring to the 1989 law as governing the clauses on workplace protection, the law has not modified the theory of racial discrimination in the anti-discrimination law and may not provide a more effective basis for future litigation.

Thus, Paim's proposal contributes to the re-framing of racial discrimination as a problem in equality rather than only a problem in prejudice. The weight of the proposal is to create new opportunities, which implicitly recognizes that discrimination is a problem in equality. The law does not address indirect discrimination, although the provision of affirmative action could open the possibility of the use of statistical data in future lawsuits. Thus, I suggest that even as Brazil re-frames its understanding of racial discrimination, that re-framing remains bounded by old ideas. In the next section, I advance a speculative theory about the relation of anti-discrimination law to racial ideology.

### **A Speculative Theory of The Relationship between Anti-Discrimination Law and the Ideology of the Nation**

I suggest that the complications for implementing affirmative action stem from the challenge of delineating policy beneficiaries from a flexible subjective color category. These vexing questions reflect the use of color as a category with positive

policy implications: who identifies as “Brown,” what that identification signifies, how the claims can be verified, and the entitlement for those claims. I do not view these questions as intractable but as reflecting the interaction of the past and the present. I claim that similar color questions will cloud anti-discrimination legislation as it becomes more seriously applied.

I advance three claims about the relationship of a framework of racial discrimination and the conception of the nation. First, under any circumstance, the conception of the nation will be reflected in the construction of racial discrimination. The conception of the nation influences how a state conceives difference and other issues key to the framing of racial discrimination. Second, despite that relationship, the framing of racial discrimination is not a given, but can shift through other changes. Racial discrimination could be re-framed in terms of other core societal beliefs, such as fairness, equality, or compassion for others; a shift in the conception of the nation; changes in other core beliefs, such as the view of beneficiaries; or an actual change in beneficiaries. Third, I argue that the fusionist/absorptionist conception of the nation particularly resists change and complicates the framing of racial discrimination.

First, I claim that under any circumstance, the conception of the nation will be reflected in the construction of racial discrimination. Even when other core beliefs also inform that framework, the construction of the nation would still influence the framework of racial discrimination. The ideology of the nation has profound impact on many key factors: the definition of discrimination and of protected groups, how individual and group claims are received, and the opportunity structure for group formation. A definition of racial discrimination requires a conception of persons within the nation, a recognition of

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difference among those persons, and a framework to determine which differentiations are justifiable. The definition of discrimination is linked to the conception of rights enjoyed by societal members.

The conception of the nation designates societal members and groups. Although many states claim neutrality, most states prefer certain members over others and communicate those preferences in immigration, citizenship, language, and other policies. These preferences and policies have implications for the standing of groups in society and their formal relationship to the state. This influences whether group racial discrimination claims would be permitted and the opportunity structure for group mobilization. Does the nation permit groups to make claims and how does it address such claims? Group mobilization influences the law and the settlement of cases. Further, the relative standing of a group influences how a particular policy is viewed.<sup>33</sup> Thus, affirmative action policies in the US enjoy widespread support for a target group such as disabled veterans. In Brazil, preferential policies have been historically easier to advocate for women than for "Blacks" and "Browns."

Brazil claimed to be a "fusionist" country that claims to produce a "new people" by blending persons and cultures. However, Brazilian state policy toward the Indian was expressly assimilationist before the Constitution of 1988. The underlying assumption of "assimilationist" policy compared to "fusionist" policy is that the "other" must be

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<sup>33</sup> Footnote on the impact of standing of a target group for the view of a policy. See A. Schneider and H. Ingram, "Social Constructions and Target Populations: Implications for Politics and Policy," American Political Science Review, vol. 87, 1993, pp. 334-347. Others argue that universalist policies will always be more popular. See Paul M. Sniderman, Edward G. Carmines, and Geoffrey C. Layman, "Beyond race: social justice as a race neutral ideal." American Journal of Political Science, v. 40 (Feb. '96) p. 33-55

transformed. In the assimilationist model, the dominant group views the other as capable of adapting<sup>34</sup>, and Brazilian law had linked the rights of indigenous persons to their degree of assimilation until the new constitution of 1988.<sup>35</sup> As I show in Chapter 2, Brazil thought that Blacks, unlike indigenous persons who could be civilized, required total transformation and adopted “absorptionist” policies that placed a burden on darker Brazilians to lighten.<sup>36</sup>

Perhaps “fusion” does not exist. Despite fusionist claims, a dominant group seems highly unlikely to move ‘as far’ as other groups in developing the culture of the ‘new person’. Instead, the dominant group in a fusionist nation would seem likely to control the terms of the exchange: to retain power, rights and resources, and to permit the symbolism of the ‘new person’ and also protect its own image. Indeed, the dominant group more easily retains power in a state that appears more inclusive than openly exclusionary or openly “absorptionist.” Thus, the portrait of Brazil as the “fusion” of three races might be interrogated as an effective strategy to avoid conflict. “Fusion” offers a more legitimate account of state intentions that Brazilians have more plausibly accepted. The fusionist discourse provided a moral ground for the Brazilian state to claim neutrality that would be much more difficult to sustain for a state openly seeking to assimilate or absorb “others.” Thus, it represented an effective political discourse to displace a potential conflict.

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<sup>34</sup> See Barroso (1995).

<sup>35</sup> Ibid.

<sup>36</sup> See Mitchell (1983).

Moreover, the current question about the Brazilian *Pardo* reflects state policies to absorb and fuse the Brazilian “Black” and “Brown.” Had the Brazilian state declared its absorptionist policies publically without fusionist pronouncements, it is difficult to imagine the widespread acceptance of *racial democracy*. Further, the extremely ambiguous position of the *Pardo* reflects these mixed political intentions and the mixed societal responses.

Second, the framing of racial discrimination can shift through other changes. Powerful societal mobilization, such as the US Civil Rights Movement of the 1960's or the anti-apartheid mobilization in South Africa, changed the boundaries and enabled the re-framing of those conflicts. Interests might invoke other core societal values, such as equality, fairness, or compassion for others to produce a smaller shift in the re-framing of a policy arena. A shift in the conception of the nation could contribute to the re-framing of racial discrimination.

Indeed, the current Brazilian constitution contains two theories of racial discrimination. The attitudinal conception of discrimination has predominated although the conception of racial discrimination as unjustified differentiation has animated some litigants and a few jurists. I seek to explain why the theory of racial discrimination as an act of racial prejudice has had such power as well as to explain the variation within the complaints and the jurisprudence. The current agenda discussed in the previous section shows the increasing view of racial discrimination as a problem in equality rather than a problem in prejudice.

Third, I argue that the fusionist/absorptionist nation particularly resists change and complicates the framing of racial discrimination. Thornberry characterized four

relevant approaches to the incorporation of members of a nation: corporate pluralism, integration, assimilation and fusion.<sup>37</sup> These approaches vary in how much difference they tolerate: from pluralism, at one extreme, to fusion and assimilation, at the other. A country with clearly defined groups more readily perceives discrimination and permits group mobilization than a country without clearly defined groups. In contrast to the other conceptions of the nation, the fusionist and assimilationist nations have the greatest trouble admitting discrimination. Brazil was not alone in claiming that the formation of its nation preempted discriminatory beliefs and practices. Individual discrimination claims have been viewed as unpatriotic in the fusionist or assimilationist nation. National culture may reflect subordinated persons to a limited degree that can farther problematize group formation: "Assimilation is nothing but one form of totalizing, in that it is out to destroy the possibility of counter-narratives and, hence, the possibility of challenge and change."<sup>38</sup> With group claims unrecognized and group formation problematic, individual claims of discrimination can encounter serious difficulties in being taken seriously in a fusionist society.

States adopt distinct approaches at different moments in their history. I suggest that each choice constrains future choices: a country that "fused" a new people could have difficulty pursuing a plural approach that explicitly recognized groups. I suggest that transitions are possible and that choices at one moment have consequences for

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<sup>37</sup> Thornberry also discussed separatism, the coercive policies of apartheid or Jim Crow, which does not claim to be incorporative and is not part of my discussion. See Thornberry (1991).

<sup>38</sup> Adeno Addis, "Individualism, Communitarianism, and the Rights of Ethnic Minorities," Notre Dame Law Review, V: 66, p1240



future policies. The difficulty of transition from an all-encompassing national identity has also been experienced in Eastern Europe.<sup>39</sup> Brazil's Black Movement has in a sense challenged Brazil to become a "real" fusionist nation and to acknowledge the African presence within that nation. I claim that the re-framing of racial discrimination as a problem in equality remain hindered by the national discourse about the nation because that discourse created an illusion of fusion that makes discriminatory acts into criminal acts against the nation, an extremely difficult legal model.

### **Re-framing Racial Discrimination as Equality**

My argument is not that Brazil cannot re-frame racial discrimination without changing its national ideology but rather that Brazilian racial ideology complicates the re-framing. In the past two years, racial discrimination has been increasingly framed as a problem in equality rather than a problem in prejudice. The magnitude of proposals to create positive opportunities for Brazilian "Blacks" and "Browns" represents a major refocusing of the agenda from insults to opportunities, which will surely influence the notion of racial discrimination. The adoption of affirmative action may well make the use of statistics in racial discrimination litigation a more viable line of reasoning.<sup>40</sup>

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<sup>39</sup> Chantal Mouffe discussed Slavoz Zizek's study of nationalism in Eastern Europe, that "the desire for a community conceived as *Gemeinschaft* is fraught with dangers . . . An organic unity can never be attained, and there is a heavy price to be paid for such an impossible vision." in Mouffe (1992, p. 5).

<sup>40</sup> Consider that STF President Aurelio discussed the use of statistics to insure the *razaoabilidade* of affirmative action: the relationship between policy goals and results. "A discriminação e a lei: Marco Aurélio fala sobre ações afirmativas e igualdade." Consultor Jurídico Web-site. Deceber 17, 2001. [Http://www.consultorjuridico.com/SR/Marco\\_Aurelio\\_11\\_20\\_01.htm](http://www.consultorjuridico.com/SR/Marco_Aurelio_11_20_01.htm).

Legal activists recognize the limitations of the criminal model.<sup>41</sup> New legal channels exist to contest workplace discrimination, particularly the recent modification of Brazil's labor code.<sup>42</sup> Unfortunately, the primary legal mechanisms associated with racial discrimination have continued to reinforce the notion of discrimination as a problem in prejudice.

One measure of how far this re-framing will go is the future treatment of *injuria*. The majority of allegations classified as *injuria* occurred in the workplace. While the allegations harmed the complainants' honor, the allegations also infringed upon the complainants constitutional right to equal conditions in the workplace. A meaningful re-framing of *injuria* might place the harm in its context. Will judges be willing to examine the context of verbal conduct, a possible infringement of workplace conditions, or will they continue to view prejudicial comments as contextless talk? Contextless talk, however insulting, will only be viewed as an injury to one's honor.

Jungmann's dilemma about *Pardo* eligibility for affirmative action also affects anti-discrimination law. In many professions, employers prefer "White" to "Brown" to "Black." If forced to hire "Black" or "Brown," most employers would hire "Brown." How would a court view an allegation advanced by a *Preto* to have been discriminatorily passed over in favor of a *Pardo*? Although the Constitution prohibits employment discrimination on the basis of color, I suspect many judges would dismiss that allegation.

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<sup>41</sup> See da Silva (1994), Silva Junior (2000). Roberto Militao circulated a proposal for a civil anti-discrimination act in the middle 1990's and Joaquim Barbosa has also discussed the importance of a civil measure. (On file)

<sup>42</sup> See Public Law 9,799/99 of May 26, 1999. Web-site of the President, <http://presidencia.gov.br/ccivil/03/Leis/L9799.htm>. Downloaded: October 17, 2001.

If Brazilian anti-discrimination law becomes more seriously applied, Brazilian color categories will assume new significance in court. Defendants have already argued to be *Mulato* and inherently unprejudiced. Employers have already produced registers and testimonials of their “Black” and “Brown” workers to prove they do not discriminate. Thus, I speculate that the controversial preference for *Preto* over *Pardo* might sometimes be necessary to overturn a color hierarchy.<sup>43</sup> That notion is contrary to the efforts of the Black Movement to create a unified race category.

Further, Brazil will need to explore the efficacy of policies that provide opportunities on the basis of color and class. The adoption in the State of Rio de Janeiro of class and color-based openings in public higher education may demonstrate the relative viability of each policy. Many poor Brazilian “Browns” and “Blacks” have more clearly identified on the basis of class than color. Some have suggested that class-based policies may be the more effective route to reach the “Brown” and “Black” poor.<sup>44</sup> I believe that the combination of class and color preferences are extremely important and that Brazil will need to experiment with these policies. Although this issue touches contemporary US debates, I suggest that Brazilian dynamics cast a different light over the discussion because color has not formed as strong a basis of identity as class.

None of this suggests that Brazil has or will become the US. Speculation about convergence seems premature. Whether the US is heading southward or Brazil is

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<sup>43</sup> See Leonard M. Baynes, “If It’sn Not Just Black and White Anymore, Why Does Darness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy”, University of Denver College of Law,

<sup>44</sup> See Eccles (1985).

heading Northward faster remains to be seen. Brazil does not portray the North American future as it adopts multi-racial categories and a more flexible notion of race. Even with Brazil adopting affirmative action at the time the US has virtually abandoned affirmative action, the two countries' structures of color and policy approaches to combating racial discrimination seem distinct.

Advocates in the US for the multi-racial category have often claimed that Brazilian flexible color identity represents a more natural model to organize identity because it allows choice.<sup>45</sup> Because of the tremendous stigma for being "Black" in Brazil, I argue that the "choices" are not "natural" nor are the actors fully free to "choose" any identity, and that defendants often manipulated color during legal proceedings by claiming to be *Mulato*.<sup>46</sup>

The Brazilian case suggests that a "natural" ordering of color does not exist and that unacknowledged color preferences can have a devastating impact when combined with a persuasive inclusive ideology. At this current juncture when Brazilians are again looking Northward and North Americans are increasingly looking southward, I suggest much can be learned by the exchange but little to be emulated in either direction. At this moment, Brazil, the country of "natural" identity is struggling how to classify *Pardos* and

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<sup>45</sup> Tanya Hernandez summarizes and critiques these views in Hernandez, *Multiracial Matrix: the Role of Race Ideology in the Enforcement of Anti-Discrimination Law, A United States - Latin America Comparison*. *Cornell Law Review*, vol 87. (2002)

<sup>46</sup> In a country in which *Mulato* is the least likely term to be used on the street for someone to describe himself as "Brown," the "choice" of that term in the courtroom is striking. I suggest that the reason the term is used in the courtroom is the same reason the term is generally avoided. *Mulato* represents the biological mark of Blackness. The other color terms for being "Brown," *Moreno* and *Pardo*, terms of flexibility, do not carry that same connotation. I suggest that defendants must have calculated that *Mulato* identity represents the strongest evidence they could present for not being prejudiced.

what significance to grant that classification. The US, the country with the more developed legislation and jurisprudence against discrimination, has moved away from affirmative action toward its own "color-blind" doctrine. The Brazilian experience indicates that color-blindness cannot simply be declared as a destination reached.

There is truly nothing natural about how states categorize societal members in all country. Problems in the categories become evident whenever we give the categories meaning: by discrimination or by policy responses to that discrimination. Ultimately, the many questions about color are thorny but not fully intractable. The provision of opportunities in Brazil according to any criteria will produce an incentive for Brazilians to identify according to that criteria. If public agencies prove to be as serious as the Ministry of Agriculture in implementing these new policies, the policies will change Brazil. As Brazil changes, the problems about defining and confirming eligibility will grow. In noting this, I do not argue that Brazil should shy away from the policies, because the new policies have already provided concrete opportunities to "Blacks" and represent the most concrete incentive to claim to identify as *Preto* or *Pardo* in Brazilian history. For that the latter purpose alone, the policies should prove extremely valuable.

## **Appendix      Race, Nation and the Punishment of Expressive Discrimination**

Problems in expressive discrimination have gained increased attention during the past decade. Organizations in the Black movement have particularly focused upon cases against racist social communication. These cases offered strategic opportunities not available through most litigation. The evidentiary problems that emerged in other cases did not appear in these cases. The occurrence of these events, images available through mass media, could not be disputed. Compared to co-workers in litigation over discriminatory firing, radio listeners, the material witnesses for an allegation of racist social communication, risk relatively little by testifying. Further, the interpretation of the facts was highly controversial, which was the motivation for bringing these cases: to critique popular media images publically. Third, these cases were tried publically<sup>1</sup> and legally and generated more media coverage than other problems. These cases generated the greatest successes under the anti-discrimination law.

Nonetheless, the difficulty faced by this category of jurisprudence is how to evaluate the content of allegedly racist communication. Would a judge require an expression to be "prejudicial" or, for example, to contain a "racial reference?" Further, how would a judge determine whether a communication was "prejudicial" since any communication will be viewed differently by different persons? Finally, must someone intend to insult an audience? For example, would a joke that communicates a racial slur

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<sup>1</sup> See, for example, the web-sites of CEAP (<http://www.ceap.org.br/>), the NGO in Rio that initiated the process against the lyrics of the Tiririca song, and of Geledes (<http://www.geledes.com.br/>), the NGO in São Paulo that initiated processes against Tiririca, and several TV shows. The former included a survey about its initiative on the Tiririca case and other cases.

constitute a prejudicial act, because of the content, or a non-prejudicial act because of a lack of intent? These issues were magnified for allegations of racist social communication

This appendix examines how judges adjudicated actions filed against racist social communication and other acts of expressive discrimination, such as individual insults. These cases better fit the legal construction of racial discrimination as an act of prejudice than the types of cases considered in Chapter 6. Nonetheless, judges evaluated the content of the communication and the harm conveyed subjectively, often relying upon ideology, and often privileging the viewpoint of the aggressor. That viewpoint of the aggressor was evident in judicial evaluation of the content of communication and the standing of Black movement organizations to advance an allegation. The logic of punishing prejudice was problematic even for allegations of expressive discrimination.

The jurisprudence in this appendix is subdivided into two sections: commentary of a “private” nature and public communication. The latter circumstance involves a speaker, a receiver and an audience, indeed multiple audiences, which vastly complicates the evaluation of prejudice. Article 20 of the anti-discrimination law prohibits the “practice” or the “inciting” of racial prejudice through social communication. Although a judge could use either standard, judges often used the “incite” standard, which shifted analysis toward the aggressor’s viewpoint. Further, the “incite” standard suggests a test of consequence: were any persons incited by the communication to commit an act of prejudice? That standard views the communication through the eyes and ears of potential aggressors.

## Daily Harassment

Complainants brought allegations against insults and harassment by two legal instruments: as racial *injuria* or a claim of pain and suffering. Neither of these legal provisions requires a show of prejudice: the former is defined as an insult to someone's honor that included a racial reference, and the latter is less specific. Racial *injúria* claims might be linked to prejudice because of the relationship of the amendment to the anti-discrimination law. I examine whether judges evaluated these claims according to the relevant legal instrument or the legal construction of racial discrimination as an act of racial prejudice. Must plaintiffs show expressions of prejudice, prejudicial motivation, or injurious expressions? What role must prejudice play in the alleged incidents, and what evidence is necessary to sustain such an allegation?

### Racial *Injúria*

In the first case, the plaintiff, Ronaldo, an Assistant Security Manager at a club in Rio de Janeiro, assisted a club member whose membership had lapsed in September 1997. After he had escorted her out of the club, she shouted at him from her car, "fucking *Crioulo*, shameless *Crioulo*." She returned to make obscene gestures and again shout from her car, "*Crioulo* has to die." He filed a complaint seeking moral damages for the harm to his honor.

The Public Prosecutor denounced the defendant for racial *injuria*. He argued that the member's actions constituted racial discrimination, displayed her intent to offend Ronaldo, and attacked Ronaldo's moral integrity in an "insidious manner." Thus, the



Prosecutor argued that the incident constituted *injúria* motivated by racial prejudice and that her comments sufficiently demonstrated racial animus. The judge scrutinized defendant testimony and noted that she gave three different versions of the facts under oath and only admitted to having spoken one obscene comment. He sentenced her to an alternative sentence of 16 months of community service and a modest fine.<sup>2</sup> In this case, the judge did not stipulate that *injúria* had to be motivated by racial prejudice but did find this defendant's actions to have been motivated by racial prejudice.

In handling the second *injúria* case, officials also scrutinized defendant testimony and held that the defendant had committed *injúria* motivated by racial prejudice. In this case, a problem between two long-standing neighbors emerged after the plaintiff complained to the defendant about being disturbed by her dogs. The defendant, Anna, then displayed pictures of monkeys eating bananas on her windows, played recordings of monkeys, and spoke loudly and provocatively to her dogs loudly, such as "let's go to the monkey's house." When Moto asked her to stop, she responded, "Monkeys don't have the right to live in an apartment" and that the plaintiff should "return to the cage." Moto initiated a complaint against Anna for *injúria*.

The Public Prosecutor denounced the defendant for aggressively attacking the plaintiff as a Black man. Further, he countered the defendant's argument that she displayed the materials because she liked animals. The prosecutor noted that this would not explain why the photos on the windows faced outward. The defendant argued

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<sup>2</sup> Proc. Criminal N. 8.133 2 Vara Criminal, Comarca da Ilha do Governador, Rio de Janeiro. Web-site of the District Attorney of São Paulo. <http://www.pgse.sp.gov.br/dh/>. Consulted: 2/21/2000.

that the six-month period to report a crime like *injúria* had passed and that the case should be summarily dismissed. The judge conceded that some problems in the allegations had occurred more than six months earlier but ruled since the troubles had continued, the case remained valid. The judge found that the defendant had attacked the “race” of the plaintiff. He ruled that this incident constituted *injúria* motivated by race, which he called “disguised *injúria*” practiced in a “reflective and premeditated mode.” The penalty was the same as previous case, 16 months of community service and a small fine.<sup>3</sup>

### **Moral damages**

Allegations of moral damages based upon racial discrimination require no particular link to racial prejudice. In the first moral damage case, the judge ruled that moral damages can be awarded based upon an act without additional evidence of causal motive. The case from Belo Horizonte originated in another dispute between neighbors. Georgina contended that her neighbor, Y, had called her “monkey, fucking *Nego, urubu*” in their neighborhood and publicly offended her. The judge ruled that this insult offended the plaintiff’s self-esteem and harmed her image in her community. This finding was based upon the conduct and not a showing of pain and suffering by Georgina.<sup>4</sup>

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<sup>3</sup> Proc. Criminal N. 01398152692, 6<sup>th</sup> Vara Criminal, Comarca de Porto Alegre. TJRS. Web-site of the District Attorney of São Paulo. <http://www.pgse.sp.gov.br/dh/>. Consulted: 2/21/2000.

<sup>4</sup> Apelação Cível N. 233.078-3. Terceira Camara Civil do Tribunal de Alcada do Estado de Minas Gerais. Web-site of the District Attorney of São Paulo. (continued...)

In a second moral damage case, the judge also did not require evidence of prejudicial motive. A domestic servant sought her back pay from her former employer. In front of his daughter, he called her a “dirty black” and other insults. The plaintiff had won an initial finding of moral damages and appealed for a larger award. In the first instance, the plaintiff had sought 200 minimum salaries (SM)<sup>5</sup> and received an award of 6 SM. The plaintiff, a mother of 8, earned 1 SM per month and the defendant, a supermarket owner, earned much more. The appeal judge found no questions in the facts and increased the award to 12 SM.<sup>6</sup>

In the next case, the judge held that a racial reference was not sufficient for a moral damage claim. The plaintiff and two neighbors jointly descended in the social elevator in their residence in Niteroi, Rio de Janeiro. One defendant’s dog nuzzled closely to the plaintiff. That defendant remarked that the plaintiff’s color had attracted the animal. As they arrived in the lobby, that defendant said that “Queen Isabel<sup>7</sup> was guilty for this.” In the lobby, one defendant asked Antonio, a bystander, if “the *Criola* had created a problem.” The dispute escalated and their shouting attracted the attention of passers-by on the sidewalk.

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<sup>4</sup>(...continued)

<http://www.pgse.sp.gov.br/dh/>. Consulted: 2/21/2000.

<sup>5</sup> Brazilian wages are measured in minimum salaries. One minimum salary has generally varied between \$60 and \$120 dollars per month, depending upon the exchange rate.

<sup>6</sup> Apelação Cível n. 55.179-5 de Parana. 4<sup>th</sup> Camara Cível. Associação dos Advogados de São Paulo. Web-site. <Http://www.aasp.org.br/frjurisa.htm>. Consulted September 5, 1999.

<sup>7</sup> Queen Isabel emancipated Brazilian slaves in 1888. The defendant allegedly insinuated that if the plaintiff were in a state of slavery and knew her place, the defendants would not have had to ride with her in the elevator.

The judge recognized the animosity in the incident but questioned whether the defendants had attacked the honor of the plaintiff. The only fact he admitted was the testimony of the bystander about what had occurred in the lobby. Further, he ruled that the term *Criola* is not offensive because it only connotes a person born in Brazil with darker skin. The judge noted that the plaintiff considered the incident as an affront to her, particularly as an owner of a condominium by the defendants, who were only tenants. From this, he inferred that her attitude, which he characterized as elitist, had generated the complaint.<sup>8</sup> Thus, the judge held the complainant at fault.

In another moral damage case in Volta Redonda, Rio de Janeiro, a judge ruled an insult to only constitute an irritation and not real suffering. A woman and her mother sought moral damages from a neighbor who allegedly had blocked their access to their garage and offended their dignity, calling them “monkeys” who did not know how to drive.

The judge organized his inquiry around the impact of the defendant's language and not simply the words. The Judge argued that a moral damage harm represents an attack on a person's well-being and causes “sickness, suffering, sadness, and humiliation.” He differentiated such harm from an irritation, or a commentary “without consequences.” He viewed this incident as such: verbal aggression within the bounds of normal behavior. He did not examine the victims' testimony nor the context of the

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<sup>8</sup> Processo Cível N. 903/99, 2<sup>nd</sup> Vara Cível, Comarca de Niterói; RJ. Web-site of the National Zumbi Law office. <http://www.enzp.org/br/sentenca1.htm>. Consulted {DATE}.

language.<sup>9</sup> This holding was later overturned on appeal after CEAP, an important Brazilian NGO in Rio, intervened.<sup>10</sup>

In another moral damage case, a “White” successfully sued for moral damages after being called a Black *favelada* (*favela* resident) and other derogatory racial expressions. The plaintiff, an employee at the Brazilian Mail and Telegraphs, was insulted by two customers who claimed to be responding to her lack of attentiveness. One defendant invoked her Brazilianness, and emphasized that she had been raised by two Black women and that she had never committed a discriminatory act. The judge ruled that the alleged act had been incontrovertibly committed and that the defendant’s past did not absolve her for her current conduct. Further, he reasoned that their comments showed their intent to offend and humiliate the plaintiff. The plaintiff’s Whiteness did not emerge directly in the holding. Within the Brazilian conception of harm to reputation, a White arguably loses more by being called Black. Indeed, the judge awarded a higher sentence 80 SM to this White plaintiff than other judges awarded to Black plaintiffs.<sup>11</sup>

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<sup>9</sup> Processo Cível N. 088/99, 6<sup>th</sup> Vara Cível da Comarca Volta Redonda; Web-site of Escriitorio. Zumbi <http://www.enzp.org.br/sentenca5.htm>; Consulted [DATE].

<sup>10</sup> See Pai e filho são acusados de racismo.” Folha De São Paulo, May 12,2000. Pag c10. Archive of the Folha de São Paulo. [Http://www.uol.com.br/folha/arquivos/](http://www.uol.com.br/folha/arquivos/) Consulted January 22, 2001.

<sup>11</sup> Processo Cível N. 1.413/95, [COURT], São Paulo. Web-site of the District Attorney of São Paulo. <http://www.pgse.sp.gov.br/dh/>. Consulted: 2/21/2000.

## Interference in Familial and Social Well-being

In two of the few article 14 cases, judges evaluated the defendant's behavior very broadly. In one case, a mother allegedly influenced her son to break up with his Black girlfriend. This court extended article 14 protection to include premarital romance. Not surprisingly, it was difficult to prove exactly what she had said when that led to this result. The first instance judge absolved the mother, Sueli, because of insufficient evidence as to what she had said and when she had said it. A district attorney successfully reopened the case, arguing that even if identifying an exact date were impossible, there was no question about what had been accomplished.<sup>12</sup> Further, the district attorney dismissed an argument made previously that the defendant's cordiality exonerated her from responsibility.<sup>13</sup> The fact that an article 14 allegation about a romance was heard at the first and second instances represented significant expansion of the "social and familial well-being" clause.

In the other case, a defendant insulted his nephew and girlfriend, calling her "*Negra*, disgraceful *Preta*, everything about that *Negra* . . ." The defendant was convicted in the trial court for an article 14 violation and threatening behavior. The Appeal Court found the behavior to constitute interference with his nephew's choice of spouse, sufficient for an article 14 claim, and that his did not have to successfully end

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<sup>12</sup> Proc. Criminal n. 321/95, 15<sup>th</sup> Vara Criminal. São Paulo. P. 38.

<sup>13</sup> Recurso em Sentido Estrito n. 194.509-3. SP, 1996. AJURIS Website: of the Associação dos Juizes do Rio Grande so Sul. (<http://www.ajuris.org.br/>). Consulted: December 15 1999.

their romance to have been interference.<sup>14</sup> Judges in these cases required much less direct evidence than for the balance of presented in Chapter 6.

### **Racist Social Communication**

Commentary construed as *injuria* if said without an audience could constitute racial discrimination if communicated through an established channel of social communication. One case, discussed in chapter 5, posed the question whether a letter posted on a resident's door in an apartment building could constitute social communication. The court refused to consider that letter social communication and courts have required racist social communication to have been committed through established means of communication.

The allegations considered in this section allege racist communication through established means of communication. These cases ask how the anti-discrimination law is applied to the content of the communication. How have judges determined whether or not communication is viewed as discriminatory? Must the communicator have "practiced" or "instigated" racism, and how have judges determined whether the communicator committed a prejudicial act? How have judges balanced the views of the speaker, offended parties and other audiences? Must an audience have responded unanimously to have standing?

The difference between article 20 and a moral damage claims for racist social communication is considerable. Article 20 requires the communication of prejudice and

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<sup>14</sup> Apel. Criminal .....(on file)

defendant prejudicial intent. Judges often require that a defendant “incite” rather than “practice” prejudice, which makes the standard higher. Moral damage allegations require neither of those, but an assessment of harm by an offended party. The questions in these cases are how judges determined if the content of a communication constitutes discriminatory (article 20) or harmful (moral damages) communication. Further, which parties does a judge consider in making those allegations? If an audience were divided, could the offended members bring a viable claim? How differently do judges make these determinations for an article 20 or moral damage claim?

### **Article 20**

Does a broadcast with only White children constitute racist communication? If so, whose rights were abrogated by the broadcast: Black children who might have appeared in the broadcast, or audience members wishing to receive non-racist communication? Maria Alice Alves, a production assistant, was fired after she had included seven Black children in the pool of children to appear on Do Re Mi, a children's television show. Two of the seven Black children participated on the show but did not appear in the broadcasts. The other five Black children remained in the reserve pool during the entire filming of the six shows.<sup>15</sup>

An article 20 claim for racist social communication under the anti-discriminated was initiated after an article had appeared in the national magazine, Veja. Wanderley, the producer, had children from a larger pool rotate on and off the show because of

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<sup>15</sup> “Racismo no Ar”. Veja. May 13, 1991. P. 89.



fatigue. He alleged firing Maria for breaking internal rules, which he claimed were usurping another employee's responsibilities for recruiting students. He denied that the treatment of these seven children was discriminatory and supplied a tape from another show to prove Black children have appeared. He emphasized that the seven children received lunch and T-shirts like the other children.

The Secretary for Justice and Defense of the Citizen, a human rights advocate, Luiza Nagib Elug, found two very different accounts of the facts. She argued the case to be "her word against his" and that Wanderley's responsibility for why "the Black children remained in the reserve group and not in front of the camera" could not be confirmed.<sup>16</sup> The Public Prosecutor accepted Wanderley's account to have fired Maria Alice for breaking internal rules. Further, the Prosecutor concluded that there had been no crime: "It is one thing to suffer racial discrimination, it is another to appear or not on a TV program."<sup>17</sup>

That was a remarkable assertion. Clearly, the children had been excluded from the show. The sole controversy was the responsibility for the exclusion. Neither Wanderley's allegation about the rules Maria Alice had broken nor Maria's allegation, supported by another worker, that another employee had been similarly fired in the previous year was investigated. Finally, the finding emphasized the fact that the children received their lunches, shirts, and courteous treatment, which did not address the question about racist social communication. Finally, there was no consideration of

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<sup>16</sup> SJDC- 97.267/92. Secretaria da Justica e da Defesa da Cidadania. Ministerio Publico do Estado de São Paulo.

<sup>17</sup> Inquerito Policial n. 729/92. Policiais Civil de Sao Paulo. 23rd Distrito Policial, Perdizes.

whether an all-white broadcast constituted racist social communication from the vantage of the audience.<sup>18</sup>

A second case in São Carlos, São Paulo, addressed the audience's rights to receive non-racist communication. In reading a police report about a crime committed by three persons, a young disc jockey, Junior Oliveira, editorialized that "of the three, it must have been the Black." He continued his offensive commentary, repeating other common racist sayings, that this could "only be something of Blacks."

The police received many complaints from the Black community and began an investigation. The police notified the director of the station to produce a copy of the program, which he claimed the station had not saved. Four witnesses testified to having heard Junior Oliveira make the alleged comments and to having been offended by those comments. Oliveira denied the allegations but provided no supporting evidence. The judge found him guilty, arguing that the defendant had a burden to either produce the tape or other evidence. Further, the judge argued that four listeners were sufficient: "The evidence produced is exhaustive. It is not necessary to survey all listeners to confirm what was said." He sentenced Oliveira Junior to a two year conditional sentence of service to the Black community.<sup>19</sup>

Oliveira appealed, arguing biased evidence had convicted him, and the appeal court accepted the case. The court noted that the defense failed to produce any evidence and that the witnesses who testified against him "spoke with a single voice." The court found that Oliveira had committed the "practice" of discriminatory

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<sup>18</sup> Ibid, p. 214.

<sup>19</sup> Proc. Criminal 618/91 2<sup>nd</sup> Vara Criminal de São Carlos.

communication with the potential to “incite” others. The court clarified the ambiguity of that holding in considering the sentence. The Court found the communication to be “short, brief, without major elaboration . . . without consequences” and that Junior Oliveira was young and “betrayed by deep-seated societal prejudice against the Black, . . . even more so because of his youth.” Therefore, the court reduced his sentence from the provision of community service to a Black community organization to the monthly reporting to a judge.<sup>20</sup>

Written material provides clearer evidence of the facts and requires greater forethought in communication, which could alter judicial interpretation of intent. The next case included written communication that attacked the conception of the Brazilian nation. Two Brazilians initiated a campaign for three southern states, Rio Grande do Sul, Santa Catarina and Parana, to secede and form a new nation, the Federal Republic of Pampa Gaucho. These three states are the whitest Brazilian states. The two defendants, Irton Marx, the leader of the initiative, and Darvi, appeared on radio and TV shows; circulated fliers; published a book, “Ideological Program of the Government of the Republic of Pampa Gaucho”; sought elected office; and advocated for a plebiscite from October 1991 until May 1993. The Federal Public Prosecutor’s Office denounced the separatist aspects of the campaign as a crime against national security and the racist aspects of the campaign as an article 20 violation of the anti-discrimination law. The defendants were found guilty on the national security charge, which they appealed,

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<sup>20</sup> See *Apelação Criminal N. 153.122-3/0* (São Carlos), Tribunal de Justiça do Estado de São Paulo, February 1995.

and absolved on the charge of racism, which the Federal Public Prosecutor's Office appealed.

The State Appeal Court accepted both appeals. On the charge of racist social communication, a majority found that Marx lacked both prejudicial intent and the "capacity to convince" anyone:

*The law punishes ideas, prejudice or segregation, prejudice or discrimination. However, the potential must be shown for the incitation of racial segregation or racism. . . . incitation represents the initiative to shape others' views and the will to discriminate.*<sup>21</sup>

That argument required the "incite" standard rather than the "practice" standard without explanation and also held that unsuccessful communication as failing the incite standard. Accordingly, ineffective racist ideas are not actionable under article 20.

A minority judge argued that the content of the book, Ideological Program of the Government of the Republic of Pampa Gaucho, contained many racist tracts. The book opposed the celebration of Afro-Brazilian culture and counseled Brazilian "Blacks" and "Browns" not to "miscegenate," Whiten, or be "emotional." This Judge argued that these ideas, if advanced by a Black, might have been viewed as radical proposals within the Black movement, such as the advice to modernize, not to marry Whites, and not to lighten. However, he argued that free will matters and that this advice was therefore racist, considering its advocates and the context.<sup>22</sup>

Marx's advice about "miscegenation" and "Whitening" simultaneously affronted Brazilian Blacks and the ideology of *racial democracy*. His discourse had little prospect

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<sup>21</sup> Apelação Criminal N. 96.04.19980-3. 1<sup>st</sup> Camara do Tribunal Região Federal. Revista dos Tribunais. Year 1986. V. 742. August, 1997. P. 479-490.

<sup>22</sup> Ibid.

of reaching a wider audience. This decision protected extreme racist social communication that was widely disseminated but ineffective.

In another case also entailing written communication, Marccone Formiga, a columnist for the newspaper, Correio Brazilianense, compared a prominent Black Senator, Benedita da Silva, to a monkey in an article entitled "Humor Negro." Senator was campaigning for the Mayoralty of Rio de Janeiro. The Public Prosecutor denounced Formiga for writing a racist article that violated Article 20. Formiga was absolved by the trial court. The Public Prosecutor's Office appealed that the column, even if not racist, offended the collective interest. The District Attorney supported the appeal, arguing that impunity for such a crime would violate constitutional protection of Senator da Silva's honor.

The State Appeal Court accepted the case but found unanimously for the defendant. The Court upheld the trial court decision based upon the "incite" standard and argued that a single isolated word in a discussion or written piece cannot constitute instigation.

The Court ruled that a single joke, even one that lacked "good sense," cannot be a crime: "To tell jokes transmitted through any means of social communication does not constitute an article 20 violation." The Court argued that humor, even racist humor, is in the "nature and the spirit of Brazilians" and warned about the consequences of taking racist humor seriously:

*To take a single joke, which is in the nature and the spirit of Brazilians, as racial prejudice, will have serious consequences . . . that will animate the*

*angry and publicity-seeking, and will cause bloody racial struggles, . . . a virus which devastates peoples and nations.*<sup>23</sup>

The Court did not assess the views of the offended party or audience.

The judge held that the author did not hold prejudicial views or intent. He noted that Formiga had discussed “many eminent Blacks” in previous columns, and offered a positive assessment of a meeting between Benedita da Silva and President Mitterand’s wife. The judge excused the columnist for a lack of preparation: “[When] sarcasm against certain peoples . . . becomes gross, [this] shows more a lack of preparation in expressing humor by the speaker rather than racial prejudice.”

Finally, the Court attacked the Black Movement, a third party to the case supporting the plaintiff, for having no sense of humor and being unrepresentative of the vast majority of Brazilians who face great problems daily with “good humor.” According to the Court, the MNU (the prominent organization of the Black Movement) would also “declare Pele racist for marrying only White wives.” The Court thoroughly absolved Formiga on the charge of racist communication.<sup>24</sup>

The Public Prosecutor for the Federal District of Brasilia appealed the decision to the Federal Superior Court of Justice, which refused the case on technical grounds. The Superior Court could not reexamine the facts in the appeal. Without reexamining the facts, it could not overturn the trial court’s determination that the defendant had no prejudicial motive. Finally, the court reiterated that Formiga’s comparison of Senator da

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<sup>23</sup> Apelação Criminal N. 14.291/94. 1<sup>st</sup> Turma Criminal of the Tribunal de Justica do Distrito Federal. Website of the Tribunal de Justica do Distrito Federal e dos Territories. <http://www.tjdf.gov.br/>. Consulted 8/6/99.

<sup>24</sup> Apelação Criminal N. 14.291/94. 1<sup>st</sup> Turma Criminal of the Tribunal de Justica do Distrito Federal. Website of the Tribunal de Justica do Distrito Federal e dos Territories. <http://www.tjdf.gov.br/>. Consulted 8/6/99.

Silva to a monkey was a joke and claimed that Formiga only intended to tell a “prejudicial story” and not actually insult the Senator.<sup>25</sup>

Another article 20 case about a newspaper column yielded a different result. Jose Alexandre Fonseca, a columnist for the newspaper, O Municipio, in Belo Horizonte, wrote an article with prejudicial commentary about Elizabeth do Nascimento Mateus, President of the local union of University Professors. Professor Mateus had initiated a legal action on behalf of university professors. In the column, Fonseca called Professor Mateus “*Negra*” and accused her of seeking to destroy the University. Fonseca concluded, “We know that from the study of skin color at the University that the color of the skin does not indicate the good or bad character of a person. Nonetheless, I miss the whip and the *pelourinho* (pillory used during slavery).”<sup>26</sup>

The Public Prosecutor denounced Fonseca's column as racist. He acknowledged his column was contrary to the community interest but alleged that he wrote it spontaneously like a “radio announcer.” He claimed to have intended only to sharply criticize Professor Mateus's behavior as a union leader and not to “practice” prejudice or offend her honor.

The judge did not accept Fonseca's arguments. He read the column as insinuating that a Black who acted politically deserved to be punished like a slave, which

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<sup>25</sup> Recurso Especial N. 157805. Distrital Federal (97/0087460-5). 5<sup>th</sup> Turma, Superior Tribunal de Justica. Web-site of the Superior Tribunal de Justica. <http://www.stj.gov.br/>. Consulted: 5 de junho de 2002.

<sup>26</sup> Apelação Criminal N. 133.955/5 . 2<sup>nd</sup> Camara Criminal do Tribunal de Justice de Minas Gerais. Revista dos Tribunais. Ano 88. V738. April 1999, p688.

effectively denies Black political rights. The judge found Fonseca's column to gravely injure Professor Fonseca's honor and ordered a five-year alternative sentence.<sup>27</sup>

The State Appeal court accepted Fonseca's appeal. Fonseca argued that the column did not have the capacity to incite others but might have constituted *injúria*. Further, he insisted that, if it were *injúria*, he claimed no prejudicial intent. Finally, he contended that the conviction violated his liberty of the press.

The Court rejected his arguments. The Court found that the column constituted racism and not *injúria* because it would "send" Professor Matteus "back to slavery" with other Blacks but had not discussed her personal failings. The Court held that *injúria* is committed against a person and harms that person's subjective honor by attacking her physical, moral and intellectual attributes: "The crime of racial prejudice cannot be confused with the crime of *injúria*, which protects the subjective honor . . . [while] the former is the manifestation of sentiment in relation to a race."<sup>28</sup>

Second, the Court held that Fonseca's column demonstrated his intent. The Court implicitly agreed that his conduct had not met the "incite" standard but ruled that the "practice" standard was sufficient. A concurring judge noted that the defense had argued that only two words out of 88 lines had allegedly communicated racial prejudice. The judge rejoined that those two words sufficiently demonstrated Fonseca's color prejudice beyond a "shadow of doubt."<sup>29</sup>

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<sup>27</sup> Proc. Criminal N. 1.321/96, Comarca de Ponte Nova. Poder Judiciário do Estado de Minas Gérias. Amauri Pinto Ferreira. June 29, 1998. See Código Penal, article 33, 2<sup>nd</sup> letter, b for the type of sentence.

<sup>28</sup> Apelação Criminal N. 133.955/5 . 2<sup>nd</sup> Camara Criminal do TJMG. Revista dos Tribunais. Ano 88. V 738. April 1999, p 686-90.

<sup>29</sup> See the concurring opinion in *ibid*.



Finally, the Court ruled that the liberty of the press does not offer unconditional protection but is also subject to the constitution, which guarantees the equality of all and repudiates racial prejudice. The Court reduced the sentence to two years of reclusion and a third year suspended sentence.<sup>30</sup>

In his column for the Tribunal do Ceará, published, April 1997, Cláudio Silveira Cabral Ferreira wrote a column that denigrated Brazilian Blacks and Indians as “sub-races.” His article, entitled “More Victims of *Feijoada*,” (a bean speciality, the Brazilian national dish) provoked responses from many entities, which pressured the State Public Prosecutor's Office to initiate a criminal action against him for racism, under article 20. The article also said: “*feijoada* is not a meal for a civilized people.” The defendant published a retraction that it had been a joke and he had “never had the intention to demonstrate any prejudicial thought in relation to persons of the black race or indigenous, or toward musicians from Bahia.”<sup>31</sup>

The trial court judge, Francisco Pedrosa Teixeira, viewed the column as in “tremendously bad taste” but absolved the defendant. Teixeira held that racial prejudice entails the non-acceptance of daily life with another race, which he claimed did not apply. The Public Prosecutor appealed the sentence to the State Tribunal de Justiça. The State Court absolved the defendant because of the lack of proof of intent.

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<sup>30</sup> Ibid.

<sup>31</sup> Dr. Walter Monacci, “Jornalista é absolvido do crime de racismo”, Web-site of the Associação de Jornais de Bairro (AJORB), [Http://www.ajorb.com.br/01-08-aj-forum-imprensa.htm](http://www.ajorb.com.br/01-08-aj-forum-imprensa.htm). Fórum-lei De Imprensa, September 27, 2001.

The State appealed this decision to the federal STJ, which refused the case on similar grounds to the case against Fonseca. Judge Scartezzini argued again that reconsideration of the "intent" was impossible without reexamining the evidence and that this represented a question that the STJ could not address. In this case, the STJ noted that it needed to "demonstrate unequivocally the subjective element, criminal intent," which was not possible without reopening the case.<sup>32</sup>

### **Moral damages**

Prominent Brazilian NGO's initiated moral damage allegations of racist communication in two extremely public cases. In the first case, the public prosecutor in São Paulo initiated a civil action against Benetton Textiles and its publicity agent for a national publicity campaign that featured an image of two children. A blond, blue-eyed, White child was laughing and hugging a sad, apathetic, Black, child. The Public Prosecutor received indignant responses from many social sectors protesting the ad.

The Prosecutor's Office received reports about many children being upset by the ad. Eunice Prudente, the legal scholar, reported a young girl whose classmates had asked her why she was not wearing her hair like the "devil" of the ad.<sup>33</sup> The Prosecutor's Office commissioned a study by a specialized state agency (Procon) which found that a majority (56.4%) of interviewees perceived the ad as prejudicial against the "Black

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<sup>32</sup> Superior Tribunal do Justica. Sexta Turma. Recurso Especial (RESP) 273.067 - Ceara. CD (2000/0083110-7). 18 Fev 2002. Data do DJ. Web-site, consulted, Feb 19, 2002.

<sup>33</sup> Prudente's testimony is on p 8.

race.”<sup>34</sup> Thus, the Public Prosecutor argued that the ad affronted the public interest and individual rights, protected by the constitution and the Consumer Code, from abusive or discriminatory publicity.

Benetton contended that the plaintiff did not possess standing to bring the case in the name of the Black community, and that the cited laws protecting collective interests did not apply. The judge held that the Public Prosecutor’s Office did have standing to bring this action under the Consumer Code and that Blacks offended by the ad were protected as consumers from abusive publicity. The Brazilian Code for the Defense of the Consumer conferred the power to defend the rights and interest of consumers to the Public Prosecutor’s Office. Further, the Court held that the standing of the Public Prosecutor’s Office was enhanced by the participation of Geledes in the litigation.

The judge claimed that all parties had merit in their arguments regarding the content of the communication. Nonetheless, he particularly questioned the plaintiff’s testimony that the portrayal of the Black child made her appear like a devil in a subordinate position.<sup>35</sup> He noted that the study submitted by the Public Prosecutor’s Office included many respondents who viewed the ad positively. He inferred that the impact of the ad was mixed. He argued that with a mixed assessment about the offensive nature of the ad, the allegation encountered the constitutional protection of liberty of expression and communication. He held that the protection of expression was

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<sup>34</sup> Proc. Cível n 1.913/92. 36th Vara Cível. São Paulo. April 1993. P. 9.

<sup>35</sup> See the trial court judge’s argument, *ibid.*, p 7-8.

fundamental and that to make the principle of equality of the races central in this case would represent special, discriminatory treatment.

The Public Prosecutor's office appealed the finding, arguing that the evidence was not adequately considered. Geledes joined the appeal while the Office of District Attorney opposed the appeal. The District attorney attacked the study and its allegation of harm to the Black community. The District Attorney noted that in response to the question, "what do you think of the ad," a "majority" (actually 34.1%) of interviewees viewed it as "good or interesting," 18.2% thought it demonstrated unity, and 8.2% viewed the ad as "prejudiced, racist."<sup>36</sup> In response to another question, "what was dishonored by the ad?", 36.8% said nothing and 25.4% said the black child. The district attorney argued that this second question was biased in its construction. Although the District Attorney conceded that many were upset by the ad, it concluded that the majority of the population, the target of the ad, did not respond that way.<sup>37</sup>

The Court accepted the opinion of the District Attorney's Office. The judge argued that the research did not conclusively establish its offensive character and showed that the "majority opinion" favored the ad. Thus, the Court argued that the ad did not affront public interest or denigrate the image of Blacks. This Court also held that the constitutional protection of liberty of expression took precedence over a mixed public response and maintained the original finding for the defendant.<sup>38</sup>

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<sup>36</sup> Ibid., p. 2023-4.

<sup>37</sup> Ibid, p. 2016-2026.

<sup>38</sup> Ibid.

A minority judge agreed with the finding for the defendants but questioned the standing of the Public Prosecutor's Office. He would not have granted the appeal. He interpreted the evidence as revealing a divided Black response and argued that this division indicated that no collective rights had been violated and that, therefore, no one possessed standing to bring the case. Whereas the court majority had argued that a majority of an audience needed to be offended, this judge found that standard weak. He argued that the advancing of this allegation was contrary to Brazilian development. He revealed his ideology of race underneath the question of standing in portraying the Public Prosecutor's office as "inject [ing] racial conflict" into Brazil:

*In reality, the theme of injury or affront to the Black race must be seen more as speculation . . . in reality in a country like ours and the rest of Latin America, to attempt to inject racial conflict is a gesture of pure ignorance, rooted in a lack of understanding of our history and development, because what we have today in culture, music, gestures, customs, conversation, food, in all areas, is the result of ethnicity of a mixed race.<sup>39</sup>*

The second case raised a different question about the audience and an allegation of racist social communication. What if an audience was offended but the object of alleged racist communication was not? A popular singer, Tiririca, wrote a song "Look at the Hair on Her"<sup>40</sup> that ridiculed his mother. Tiririca compared his mother's hair to a "brillo" pad, and insulted her for smelling worse than a dirty animal. Tiririca claimed to be only teasing his mother for always wearing the same clothes to his concerts.<sup>41</sup>

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<sup>39</sup> See the opinion of Judge Olavo Silveira, *ibid.*, p 2044-2046.

<sup>40</sup> The name of the controversial song was: "Veja os cabelos dela" (see her hair).

<sup>41</sup> Tirica interview in Veja, 1999.

Black movement organizations initiated lawsuits in numerous jurisdictions against the release of the song and won one action that resulted in the recall of the album and an injunction on Tiririca from performing the song live for a year. Tiricia was eventually absolved of all charges in this highly visible racial discrimination case. In Rio de Janeiro, a judge absolved the songwriter in a criminal process because of lack of intent.<sup>42</sup> The Judge ruled that “If a popular composer used racist expressions in his music without the intention of offending anyone, this is not prejudice . . . a mere reference to someone’s color and hair.” Instead, racist communication requires criminal intent and will to offend an “indeterminate number of persons” of a race.<sup>43</sup> Although he found that Tiririca “practiced” discriminatory communication, the judge ruled that discriminatory communication required intent. Criminal prejudice was not simply the holding of racist ideas but the conscious, willful communication of those ideas to offend others. The Court held that Tiririca had not intended to offend anyone.

A civil judge in São Paulo held that Tiririca not only lacked intent but that his humor was quintessentially Brazilian. This civil judge denied a moral damage claim brought by the Black Commission of the PMDB against Sony Music for the release of the song. According to the judge, Tiririca had not intended to hurt anyone but only to entertain. He found that the song expressed important aspects of Brazilian tradition, “The exploration of this theme in Brazilian music is very old, well-known, tolerated and affectionate, evidence that the most important aspect of race is the ethnic-cultural

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<sup>42</sup> Andrea Wellbaum. “Justica Absolve Tiririca” JT Web. <http://www.jt.com/br/noticiais>. Feb 18, 1998. Consulted 8/5/99.

<sup>43</sup> Ementa. 1998.050.01069. Tribunal de Justica do Estado do Rio de Janeiro. Web-site. <http://www.tj.rj.gov.br/>. Consulted March 28, 2000.

formation of the Brazilian people.”<sup>44</sup> In other words, Brazilians customarily joke about race.

In a civil case filed in Rio de Janeiro, a judge found that a plaintiff, Carlos Alberto Ivanir dos Santos, the President of CEAP, had been offended by the song and awarded moral damages. The trial court held that an offended individual can legitimately bring an action for moral damages. The court ruled that someone who offends society is liable for the damages suffered by each individual and granted Ivanir standing:

The fact that an offense attacked a great many persons ... with the objective of deprecating the Black race, comparing one of them to a monkey, would be impossible to process if they all pleaded, which cannot constitute reason to absolve the agent causing the damage.<sup>45</sup>

Since Ivanir had not sought collective damages but only individual damages, the Court found no problems in standing.<sup>46</sup> A minority judge disagreed and argued that one person could not bring the case against a song attacking an entire race.

Tiririca appealed this decision based upon the lack of standing and his lack of motive. The State Appeal Court of Rio de Janeiro ruled that moral damages can only be awarded to an eligible state agency or designated non-governmental entity.<sup>47</sup> Like the

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<sup>44</sup> Email correspondence, [Http://www.racial.cjb.net](http://www.racial.cjb.net). June 8, 1999..

<sup>45</sup> Apelação Cível N. 2.462/96 - Nona Camara Cível do Tribunal de Justiça do Estado do Rio de Janeiro. Web-site of the District Attorney of São Paulo. <http://www.pgse.sp.gov.br/dh/>. Consulted: 2/21/2000.

<sup>46</sup> Apelação Cível N. 2.462/96 - Nona Camara Cível do Tribunal de Justiça do Estado do Rio de Janeiro. Web-site of the District Attorney of São Paulo. <http://www.pgse.sp.gov.br/dh/>. Consulted: 2/21/2000.

<sup>47</sup> The collective interests of Blacks were not been formally declared in the law nor have their Black interests as “consumers”, protected in the law, been generally upheld. See Catia Aida Silva, “Brazilian Prosecutors and the Collective Demands: Bringing Social Issues to the Courts of Justice,” paper presented to the 2000 Annual (continued...)

other criminal courts, the State Appeal Court found that the defendant had not demonstrated motive to insult anyone. Further, the court ruled that individuals could not bring claims for moral damages in the name of the “collective interest.”<sup>48</sup>

### Conclusion

This appendix has briefly presented judicial findings in expressive prejudice, either daily insults or racist social communication. These cases, compared with those in Chapter 6, better fit the Brazilian legal construction of racial discrimination as the acts of racial prejudice. An anti-discrimination law that punishes prejudice can be applied more readily to problems involving the expression of prejudice. The appendix has shown the relative viability of these allegations as well as the unevenness and difficulties in punishing any “act of prejudice.”

Remarkably, the cases of marital interference had significant evidentiary problems and still resulted in a criminal conviction. In one case, the judge ruled that the fact that the couple had broken up, in light of the mother’s wishes, was sufficient evidence of her actions, even though no one could identify exactly which words had been decisive. That evidentiary standard was never applied to hiring cases. There seem to be two different explanations for this variation. The first is that the defendant in the marital cases was an individual representing herself and relatively less powerful than other defendants, who often were backed by an institution. Second, in this area alone,

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<sup>47</sup>(...continued)

<sup>48</sup> Meeting of the Latin American Studies Association, March 2000. See also Rosenn (2000) Ementario. 1996.001.02462. Tribunal de Justica do Estado do Rio de Janeiro Web-site. [Http://www.tj.rj.gov.br/](http://www.tj.rj.gov.br/). Consulted March 28, 2000.



the prestige of the national ideology of race was on the side of the plaintiff. It is a fundamental aspect of Brazilian *racial democracy* that anyone can marry whom she chooses.

The other successes in this appendix demonstrate the efficacy of the Black movement in articulating problems and responsiveness of the law and legal system to that articulation. The post-1997 *injúria* cases, the moral damage cases, and the social communication cases all indicate this responsiveness. The existence of the new legal category, racial *injúria*, was an important development by naming a problem in the criminal code that had been summarily dismissed by police as he said/she said. Officials take racial insults more seriously because of the mere existence of the category. Thus, not only has racial *injúria* been a viable litigation strategy since 1997 but moral damages cases have also yielded larger awards.

The incite standard of article 20 was not required by the law. Despite the grammatical use of the conjunction “or,” judges did not feel obligated to explain why they chose a particular standard. If judges were issuing sterner sentences for “inciting” rather than “practicing” prejudice that would seem to be warranted from the clause. A finding of racial discrimination should result from an act that did any of the three: practice should be sufficient. Whenever a judge required a standard stronger than the practice standard, the finding tended toward the defendant. Indeed unless a country was significantly polarized, the use of the incite standard will defeat most allegations. That standard, did anyone commit a racist act because of a broadcast, effectively requires a double conviction.

Judicial notions of prejudicial content were highly informed by a judge's acceptance of *racial democracy*. Most judges viewed jokes about color as belonging within the national tradition. For those judges, a comment that could be claimed to have been said in jest would not be prejudicial. Only a few judges rejected the "humor" defense. For most judges, unmistakable prejudicial commentary required a reference to slavery.

The success in the social communication cases also results from amendments to the original law and Black movement mobilization. Allegations of racist communication in the media were the most likely to be voiced by organizations rather than individuals. The evidentiary problems that most cases encounter are immediately solved by the nature of the problem. The defendant cannot credibly deny that he or she committed the alleged act, the prevalent response by most defendants. Further, the disincentives to testify are not as powerful as in other cases. Many more potential witnesses without a dependent relationship to the defendant can come forward for a social communication allegation.

Although racial discrimination cases can pose conflicts between the rights of the defendant and the rights of the plaintiff, that conflict was most sharply posed by allegations of prejudicial expression. Freedom of expression is a fundamental constitutional right in Brazil. While all defendants might wish to respond that an allegation infringes upon their rights, that argument possess the strongest constitutional foundation for these cases.

Allegations against prejudicial commentary are based upon laws that limit the constitutional right to free speech. *Injúria* is an injurious opinion and racist social

communication is the expression of a prejudicial opinion through established media. The constitution protects the dignity of the individual and the well-being of all from prejudice and discrimination, as fundamental principles. Thus, the conflict is between constitutional claims: the protection of defendant liberty of expression versus the protection of a citizen's honor and right not to receive racist communication. Brazilians cannot claim a single right in the Constitution without consideration of the other rights and responsibilities contained in the constitution.<sup>49</sup> The constitutional protection of the liberty of expression is not unconditional and cannot protect racist social communication or communication that injures another citizen's honor. Opinions to the contrary warrant appeal to Brazil's Supreme Court.

Criminalization of racial discrimination generally creates steep evidentiary burdens because of judicial reluctance to incarcerate offenders. Only a small minority of the complaints was treated as racial discrimination, and most of those were dismissed. When Brazilian judges needed to determine motive in those few cases with incontrovertible evidence in which the facts strongly fit the law, they invoke theories about personality and prejudice that are highly influenced by the beliefs of *racial democracy*. The upgrading of racial discrimination in Brazil has generated an instrument extremely difficult to use.

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<sup>49</sup> Brazilian judges have upheld that citizens and institutions governed by the constitution cannot choose specific clauses without consideration of the entire document. A firm's constitutional right to hire and discharge workers is subject to other constitutional provisions See Processo. n. 0412/92, Poder Judiciario, Justica do Trabalho, 12<sup>th</sup> Region, Jan 16, 1995.

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