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Pioneering the Lens of Comparative Race Relations in Law: A. Leon Higginbotham, Jr. as a Model of Scholarly Activism

Tanya Katerí Hernández[†]

Judge A. Leon Higginbotham, Jr.'s scholarly legacy is one that continues to provide guidance for civil rights activism in the American legal process today. While the Judge's work as a legal scholar is justifiably lauded for its significant contribution to the development of a legal history of slavery and its consequences in the United States, his work also serves another significant role for legal scholars. I refer to Judge Higginbotham's pioneering use of comparative race relations in legal scholarship. In his examination of the South African racial context, the Judge methodically demonstrated the commonalities between the United States and South Africa that allowed each country to sustain racial subordination despite distinctions in culture, history, and demography. In doing so, the Judge served up an enduring lesson for civil rights scholars. In particular, Judge Higginbotham's combined use of racial history and comparative race relations in his legal scholarship demonstrated the global nature of racism and its features, and how racism functions as a societal process that preserves racial hierarchy and privilege across distinct landscapes and cultures. This fundamental insight articulated by the Judge has been implicitly deployed by scholars in a variety of international contexts: comparing the anti-discrimination laws of France with those of the United States,¹ comparing Germany's racial history with that of the United States,² comparing caste-based affirmative action of India with race-based affirmative action of the United States,³ and comparing

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1. Donna M. Gitter, Comment, *French Criminalization of Racial Employment Discrimination Compared to the Imposition of Civil Penalties in the United States*, 15 COMP. LAB. L.J. 488, 505 (1994) (describing the ways in which the United States civil law approach is more effective in addressing racial discrimination than the French criminal approach).

2. Natasha L. Minsker, "I Have a Dream—Never Forget": *When Rhetoric Becomes Law, A Comparison of the Jurisprudence of Race in Germany and the United States*, 14 HARV. BLACKLETTER L.J. 113, 166 (1998) (concluding that the United States would be better served to use a German-inspired recognition of the history of race-based persecution and incorporate that into its legal definitions of race and discrimination).

3. See Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296 (1999) (advocating a reinterpretation of the Fourteenth

legislation-based affirmative action in South Africa with policy-based affirmative action in the United States.⁴ The Judge's juxtaposition of historical and comparative models of race continues to inform the work of current scholars, including myself, and should do so more as we look deeper into the role of race in a diverse society.⁵ Before detailing the ways in which the Judge's pioneering work has informed my own scholarship, an exploration of the Judge's comparative studies will be instructive.

I. THE JUDGE AS RACE RELATIONS COMPARATIST: THE SEARCH FOR DIASPORIC COMMONALITIES

In his examination of the South African racial context, Judge Higginbotham took his role as comparatist seriously, with six separate trips made to South Africa⁶ and five publications on the topic.⁷ What was especially compelling about the Judge's comparative race relations scholarship was his ability to excavate the important commonalities between the United States racial context and that of South Africa, despite their historical and cultural differences.⁸ For instance,

Amendment with an anticaste principal borrowed from India); Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 MICH. L. REV. 1311 (1999) (comparing affirmative action programs in India based on caste with those of the United States based on race).

4. F. Michael Higginbotham, *Affirmative Action in the United States and South Africa: Lessons From the Other Side*, 13 TEMP. INT'L & COMP. L.J. 187, 204-05, 213 (1999) (describing how the judicial interpretation of affirmative action may undermine South Africa's legislation-based program in much the same way the judiciary undermined the United States's policy-based affirmative action programs); Lundy R. Langston, *Affirmative Action, A Look at South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field?*, 13 AM. U. INT'L L. REV. 333, 363 (1997) (comparing the South African affirmative action approach with that of the United States).

5. Some legal scholars have begun to use comparative approaches to analyze matters of race. See GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien Katherine Wing ed., 2000) (providing an anthology of essays with international and comparative analyses of race and gender issues). See also *supra* notes 1-4 and accompanying text. Yet, it should be noted that the use of comparative analysis of race issues has generally been more clearly evidenced in the social sciences. See, e.g., BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA, AND THE UNITED STATES (Charles V. Hamilton et al. eds., 2001) (providing comparative analyses of race issues in Brazil, South Africa and the United States by various scholars in the social sciences).

6. See Anita F. Hill, *The Scholarly Legacy of A. Leon Higginbotham, Jr.: Voice, Storytelling, and Narrative*, 53 RUTGERS L. REV. 641, 641 n.3 (2001).

7. See *infra* notes 8-12 and accompanying text. See also A. Leon Higginbotham, Jr., *Introduction* to WILLIAM J. BUTLER ET AL., *THE NEW SOUTH AFRICA—THE DAWN OF DEMOCRACY: REPORT OF A MISSION ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS AND THE AMERICAN ASSOCIATION FOR THE INTERNATIONAL COMMISSION OF JURISTS* 5 (1994), cited in A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM* 207 (1996); A. Leon Higginbotham, Jr. & S. Sandile Ngcobo, *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, Presentation in South Africa to the Conference on a Constitutional Court for South Africa sponsored by the Constitutional Committee of the African National Congress, the Centre for Applied Legal Studies, University of the Witwatersrand, and the Lawyers' Committee for Civil Rights Under Law (Feb. 1, 1991), cited in A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM* 208 (1996).

8. A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 490-94 (1990) (describing the significant differences between South African and the United States racial histories as being the distinct racial demography in each country and South Africa's unique nation-based policy on race relations as opposed to the United States's state-by-state construction of race policy).

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the Judge's analysis of the judicial system in South Africa was especially appropriate for forging comparisons with the United States. He focused on the ways in which both contexts had long histories of racially exclusionary and racially homogenous judiciaries that resulted in parallel case records of articulated judicial bias.⁹ In fact, the Judge's work carefully demonstrated how the ideologies of apartheid and Jim Crow were reflected in the South African and United States judicial systems, respectively, and how such judicial racism operated to reinforce a general societal ideology that denigrated Blacks in both countries.¹⁰ The central value of this comparative analysis was the revelation that the mere official abolition of racist ideology through law could not completely eradicate some forms of racism in the court system as long as societal racism continued to exist.¹¹ Accordingly, the Judge noted that the abolition of de jure housing segregation in the United States, or a home-land policy in South Africa, would not independently lead to a significant reduction in de facto housing segregation without more direct government action in both contexts.¹² Judge Higginbotham arrived at an important conclusion: civil rights laws would always have limited efficacy if unaccompanied by proactive governmental action.¹³ In his role as an activist-scholar, the Judge communicated this powerful truism to Nelson Mandela directly during South Africa's drafting of a new constitution.¹⁴ This is also an insight that continues to have great relevance for legal scholars and social activists today as the public dialogue about the appropriate limits and forms of government action continues regarding various racial justice efforts like the movement for reparations.¹⁵

Nor did the Judge allow the seeming outward differences in legal systems or racial histories to distract him from the relevance of their commonality in racial subordination. For instance, South Africa's racial demography and resulting racial classification system differed significantly from that of the United States, inasmuch as the Whites in the United States have always been a numerical majority while Whites in South Africa have always been a distinct numerical minority.¹⁶ Furthermore, the apartheid South African racial classification

9. A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028, 1036 & 1040-41 (1993).

10. Higginbotham, *supra* note 8, at 501-03.

11. Higginbotham, *supra* note 9, at 1063 (stating "We must never forget that the mere elimination of apartheid gives no guarantee that a judicial system will run effectively. We should not delude ourselves into thinking that the public will in the long run have any confidence in a system that is ultimately unfair.").

12. A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763, 873-74.

13. Higginbotham, *supra* note 8, at 485.

14. Ruggero J. Aldisert, *A. Leon Higginbotham, Jr.: A Remembrance*, 53 RUTGERS L. REV. 549, 551 (2001) (describing Higginbotham's South Africa trips to confer with Nelson Mandela).

15. See RANDALL N. ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2001) (presenting a detailed case for government payment of reparations for harm of slavery to Blacks).

16. Higginbotham, *supra* note 12, at 775-76.

system distinguished mixed-race persons as racially “Coloured” from presumably monoracial Black Africans,¹⁷ in contrast to the United States widespread usage of a Rule of Hypo-descent for identifying all persons with any discernible African ancestry as Black.¹⁸ Yet, the Judge was clear to assert that such distinctions in racial demography did not alter the salient commonality of Whites having control in both contexts.¹⁹

The Judge’s scholarly ability to see to the core of the labyrinth of racism across distinct racial demographic profiles was facilitated by his prior use of comparative analysis in his earlier studies of United States slave history.²⁰ This is well highlighted in his comparison of the slave colonial history of Pennsylvania with that of South Carolina. While observing that South Carolina had the demographic characteristic of a White numerical minority and Black majority,²¹ and that Pennsylvania had a much smaller percentage of Blacks than even New York or New Jersey,²² he noted that both colonies shared the legislative policy of debasing Blacks.²³ While colonial Pennsylvania did not enact many of the harsher sanctions against Blacks that existed in South Carolina, the Quaker colony did construct an extensive slave code and stringent restrictions on free Blacks that cast them by law into an inferior position from other free residents.²⁴ Thus, despite the Barbados cultural influence in South Carolina and the Quaker influence in Pennsylvania, the Judge was able to see and articulate their central commonalities as racist patriarchies.

Hence, one of the Judge’s many scholarly contributions was his leadership in demonstrating the operation of racism in its many forms, locations, cultures, and myriad racial demographic profiles. This is a contribution with an enduring significance to policymaking and academic scholarship alike. As the United States racial demographic profile changes to reflect a greater racial diversity and declining number of White-identified residents,²⁵ contemporary commentators speculate that racism will decline and race will lose its significance simply by virtue of the change in racial demography.²⁶ These are commentators

17. See Sheila T.L. Van der Horst, *The Effects of Industrialisation on Race Relations in South Africa*, in *INDUSTRIALISATION AND RACE RELATIONS: A SYMPOSIUM 97*, 99-100 (Guy Hunter ed., 1965).

18. F. JAMES DAVIS, *WHO IS BLACK: ONE NATION’S DEFINITION* 4-6 (1991).

19. Higginbotham, *supra* note 12, at 775-76.

20. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR—RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1980).

21. *Id.* at 154, 458 n.2.

22. *Id.* at 268.

23. *Id.* at 308.

24. *Id.* at 308-09.

25. See *A New Minority: Male Whites*, REC. N. N.J., Aug. 1, 1984, at C17 (providing government statistics that indicate that decline in White population has reached “dramatic” proportions); see also William A. Henry III, *Beyond the Melting Pot*, TIME, Apr. 9, 1990, at 28 (predicting that Whites will soon become a minority group).

26. See Andrew Friedman, *Behind the Big Numbers, a Million Little Stories*, N.Y. TIMES, Mar. 18, 2001, § 14, at 6 (stating that increasing diversity of New York City reflected in the 2000 United States

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who could learn much by reading the work of Judge Higginbotham that speaks to the enduring character of race and racism across different racial contexts and cultures. Indeed, the Judge's scholarly example has informed my own research into the comparative civil rights systems of Latin America and the United States, in my effort to debunk the notion that a changing racial demography magically erases racism.²⁷

II. AN INSPIRATION FROM THE JUDGE—THE LATIN AMERICAN RACE RELATIONS COMPARISON

At first blush, it might seem odd to compare the civil rights structures of two Americas with such distinct racial histories. But the Judge's scholarship taught me to probe beyond even structural differences. Historically, Latin America had a much longer and more extensive experience with African slavery than the United States.²⁸ After slaves were emancipated (in numerous instances many years later than the United States),²⁹ Latin American society continued to be organized as a racial and color hierarchy with Whiteness valued over both Blackness and Indigenous ancestry.³⁰ Contemporary Latin America maintains this racial hierarchy in its hiring practices, access to education, and all other segments of society.³¹ Thus, after probing beyond the structural differences, I discovered that despite the absence of a legally mandated system of racial segregation like Jim Crow or apartheid, Latin America has effectuated a similar subordination of its residents of African ancestry and of indigenous origin.

Census "will not only transform the city but will also alter how Americans think about race"); Martin Kasindorf & Haya El Nasser, *Impact of Census' Race Data Debated*, USA TODAY, Mar. 13, 2001, at 2A (quoting former Census Bureau Director Martha Farnsworth Rice as saying "this is the beginning of the end of the overwhelming role of race in our public life").

27. Tanya Kateri Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Anti-Discrimination Laws, A United States-Latin American Comparison*, 87 CORNELL L. REV. (forthcoming 2002).

28. HERBERT S. KLEIN, *THE ATLANTIC SLAVE TRADE* 210-11 (1999) (observing that less than six percent of Africans brought to the Americas settled in what became the United States while the majority settled in Latin American countries and particularly Brazil).

29. *Id.*

30. Robert J. Cottrol, *The Long Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 TULANE L. REV. 11, 63 (2001).

31. See BANCO INTERAMERICANO DE DESARROLLO, *COMUNIDADES DE ANCESTRÍA AFRICANA EN COSTA RICA, HONDURAS, NICARAGUA, ARGENTINA, COLOMBIA, ECUADOR, PERÚ, URUGUAY, Y VENEZUELA* 221 (1996) (describing the similarities in poor socioeconomic status of persons of African descent as compared to Whites across Latin America). See also Tanya K. Hernández, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. 1135, 1142-1150 (2000) (describing contemporary racism against Afro-Cubans in Cuba); Karen De Witt, *Black Unity Finds Voice in Colombia*, N.Y. TIMES, Apr. 18, 1995, at A5 (describing racism against Afro-Colombians in Colombia); David L. Marcus, *Melting Pot Comes to a Boil: Brazilians Blur Color Lines, but Racism Stands Out Clearly*, DALLAS MORNING NEWS, Jan. 16, 1994, at 1A (describing racial bias against Afro-Brazilians in Brazil); Calvin Sims, *For Blacks in Peru, There's No Room at the Top*, N.Y. TIMES, Aug. 17, 1996, § 1 at 2 (describing Afro-Peruvians' discontent with being relegated to menial jobs).

A. *Racism Across Different Racial Classification Systems*

Yet, the Latin American system of race-based privilege was instilled without the deployment of rigid racial classifications like those in the United States. Instead, an intermediate space was allocated for persons of mixed-race ancestry known generally as Mulatto (denoting a Black-White mixture) or Mestizo (denoting an Indigenous-White mixture).³² Some scholars have viewed the distinction in racial classification as conclusive evidence that racial discrimination does not exist in Latin America.³³ However, the Judge's scholarly legacy encouraged me to inquire further into the significance of mixed-race racial classifications.

In his study of antebellum Virginia's treatment of interracial sex, the Judge considered the United States history of mixed-race classifications. Therein, the Judge excavated Virginia's varied treatment of the Mulatto racial classification, and demonstrated the manner in which the racial classification was reinterpreted over time in order to sustain White privilege.³⁴ In particular, the Judge traced how Virginia's statutes became progressively more restrictive in their definition of Whiteness by enlarging the definition of Mulatto, once emancipation dissolved the slave-based method of distinguishing social status and government officials encouraged mass European immigration to the United States.³⁵ Thus, while Virginia had historical variation in its recognition of mixed-race Mulattos, each transformation of the category was consistent with sustaining racial hierarchy and the maintenance of racial discrimination. Similarly, in Latin America the use of Mulatto and Mestizo mixed-race classifications does not denote a racially harmonious society, but rather is particularly useful in sustaining racial hierarchy in a demographic setting in which non-

32. See, e.g., Sabrina Gledhill, *The Latin Model of Race Relations*, in CARLOS MOORE, CASTRO, THE BLACKS, AND AFRICA app. 1, at 355 (1988) (explaining that the Latin American model of race relations is structured upon recognition of a Mulatto class and the premise that miscegenation will solve racial problems).

33. See, e.g., William W. Megenney, *The Black Puerto Rican: An Analysis of Racial Attitudes*, 35 PHYLON 83 (1974) (describing popular notion of Latin America's more benign race relations).

34. A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989).

35. *Id.* at 2020-2021 ("As race became the sole means of identifying those who belonged to the lower caste [after emancipation], the legal definition of race became more exclusive and maintenance of white racial purity became more important. In the early twentieth century, Virginians made the first change in their definition of mulatto in 125 years. From the Act of 1785 to 1910, a mulatto or 'colored' person was someone who had one-fourth or more Negro blood. In 1910, that category was expanded to include anyone with one-sixteenth or more Negro blood, and many people previously classified as white became legally colored. Then, in 1924, in a statute frankly entitled 'Preservation of Racial Integrity,' the legislators for the first time defined 'white' . . . as someone who had 'no race whatsoever of any blood other than Caucasian' or no more than one-sixteenth American Indian blood. In 1930, the Virginia legislature defined 'colored' in a similar, though slightly less restrictive, way as any 'person in whom there is ascertainable any Negro blood.'"). See also Tanya Kateri Hernández, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731, 738-39 (1997) (discussing government preference for European immigration in reaction to the acquisition of citizenship by emancipated slaves).

Whites have been a majority or significant proportion of the population.³⁶

In short, the value of comparative race relations scholarship is the clarity it can lend to an inquiry into the existence of racism across mutating systems of racial discrimination and classification. The particular value of the Latin American-United States comparison, is that Latin American Blacks and persons of indigenous ancestry have long experienced what is relatively new for subordinated persons of color in South Africa and the United States: racial oppression without the official mantle of legally mandated segregation. Latin America thus serves as a clear example of the danger of presuming that freedom from legally mandated segregation and the existence of anti-discrimination laws alone are tantamount to racial justice. The historical component necessitated by a thorough comparative analysis also provides the helpful reminder that matters of race are never static and constantly respond to elite concerns about threatened racial status and privilege. Moreover, with the continued focus on globalization as presumably dissolving cultural distinctions and status,³⁷ the Judge's scholarship can assist us in not losing sight of the global nature of racism. He himself stated:

There is a nexus between abolition or the diminution of those precepts [of racial inferiority] advocated by the slavemasters in power in the American colonial and

36. Tanya Kateri Hernández, "Multiracial" Discourse: Racial Classifications in an Era of Color-blind Jurisprudence, 57 MD. L. REV. 97, 121-26 (1998).

37. At its most expansive, "globalization" can be defined as the heightened awareness of international connections amongst nation-states and corporate interests. ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 8 (1992) (describing globalization as including "the intensification of consciousness of the world as a whole"). In the economic context, globalization refers to the increasing economic interdependence of nations in the global economy. This envisions a universal marketplace, without borders, in which the free market has an infinite number of buyers and sellers for the exchange of goods. The hope is that in transcending national boundaries the free market will enable companies to operate more efficiently and prosperously, with benefits for workers and consumers alike. JEREMY BRECHER & TIM COSTELLO, GLOBAL VILLAGE OR GLOBAL PILLAGE: ECONOMIC RECONSTRUCTION FROM THE BOTTOM UP 15-16 (1994). Critics of globalization assert that embedded in the concept is a "myth of oneness" that overlooks the gender and race hierarchies inherent in the global economy, which is structured to exploit poor working women. Zillah Eisenstein, *Stop Stomping on the Rest of Us: Retrieving Publicness from the Privatization of the Globe*, 4 IND. J. GLOBAL LEGAL STUD. 59, 63-64 (1996); see also ANNETTE FUENTES & BARBARA EHRENREICH, WOMEN IN THE GLOBAL FACTORY (1983) (describing the impact of the "global factory" on women in various parts of the world); Hope Lewis, *Global Intersections: Critical Race Feminist Human Rights and Inter/National Black Women*, 50 ME. L. REV. 309, 312 ("Women of color struggle to survive within their own rural villages, urban centers, and nation-states, but their hard-won participation at these levels can be undermined by the global fluidity of capital and culture."). The corporate efficiencies that are achieved through globalization only benefit a very small elite and are tied to the decline in working and social conditions for workers world-wide, because globalization is premised on the mobility of capital—in other words, the flexibility of moving corporate operations from one country to another in search of the cheapest wages. BRECHER & COSTELLO, *supra*, at 16, 24, 51-53 (labeling the consequences of globalization as a "race to the bottom"). In this way, the modern transformation from domestic to foreign production, known as globalization, starts to look like old-fashioned imperialism. Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 OR. L. REV. 567, 571 (1997). The wide-scale protests that recently took place in Seattle, Washington and Washington, D.C. at the meetings of the World Trade Organization, the International Monetary Fund and the World Bank were all centered on the harms of globalization. Margaret Graham Tebo, *Power Back to the People*, A.B.A. J., July 2000, at 52.

antebellum periods and the efforts in this decade to advocate universal human rights for all. The more we appreciate the extraordinary injustice of the original precepts, the more persistent we will be in eradicating the vestiges of those precepts in the United States and the equivalent denigration throughout the world.³⁸

B. *Coalitional Struggles Against Racism By Focusing on the Centrality of White Privilege and Hierarchy*

Thus, comparative analysis has the potential to facilitate crucial racial coalitions internationally for combating racism. Indeed, the 2001 United Nations World Conference Against Racism held in Durban, South Africa, was a venue for such international racial coalitions. One active participant at the U.N. Conference stated:

There is no way that US anti-racists can go to Johannesburg, Durban, Beijing and Rio and see the world suffering caused by our own government, and then come back to fight for "democratic rights" inside the US without the most explicit strategic commitment to a world movement against racism, national oppression, world war and imperialism.³⁹

In fact, the U.N. Conference resulted in non-government organizations (NGOs) establishing "a foundation for global coalition and an emancipatory framework to dismantle structural racism worldwide."⁴⁰ For instance, there is now great hope that the coalition of NGOs will be a powerful international lobby for discussing the issue of reparations for slavery and other remedies for continued race discrimination.⁴¹

Domestically, the use of comparative analysis to examine the racial histories of all residents of color can help elucidate the ways in which racial hierarchy thrives when all non-Whites are viewed as distinct from Whites but positioned differently from Blacks in order to discourage cross-racial solidarity.⁴² In order to continue striving towards the end of racial stratification, with our increasingly globalized United States population, it will be especially important to follow the Judge's example in focusing on the centrality of systemic racial privilege.⁴³ A comparative race relations approach may help prevent immediate

38. HIGGINBOTHAM, *supra* note 7, at 206.

39. Eric Mann, *WCAR's Challenge to the Anti-Racist Left*, POVERTY & RACE, Jan.-Feb. 2002, at 7, 9. See also john powell [sic], *Post-Durban Implications for the US Civil Rights Agenda*, POVERTY & RACE, Jan.-Feb. 2002, at 14, 15 (observing that Durban set in motion the recognition that "national and regional movements must be linked to the emerging global movement, not out of strategic preference, but because of necessity predicated by the era of globalization").

40. Powell, *supra* note 39, at 15.

41. Samuel L. Myers, Jr., *The Economic Implications of WCAR*, POVERTY & RACE, Jan.-Feb. 2002, at 3, 4.

42. See, e.g., VIJAY PRASHAD, *THE KARMA OF BROWN FOLK 157-71* (2000) (providing a comparative analysis of the racialization experience of immigrants from India in the United States with that of African-Americans for the purpose of highlighting those factors which inhibit cross-racial solidarity and maintain differential access to privilege despite the commonality of racial discrimination).

43. For instance, in the Judge's analysis of colonial race relations, the Judge observed that a key

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acceptance of the notion that the mere existence of a diverse racial population is equivalent to racial harmony or the end of White supremacy. As ethnic studies scholar Evelyn Hu-DeHart exhorts: “[W]e may have to look through brown and yellow and red to see white and black, in that white and black are sometimes filtered through other colors, so that black and white are also brown and yellow.”⁴⁴ If society fails to seek out both the manner in which Whiteness continues to be valorized and the way in which racial hierarchy is maintained in a multiracial society, our society runs the real risk of having people of color bringing interracial grievances against one another rather than working towards a mutually beneficial end to racism.⁴⁵ In short, comparative race relations scholarship provides those concerned about racial equality with a needed mechanism for asserting that race and racism continue to be salient in our society and a necessary focus of our legal system. With all the forces that currently exist that mistakenly emphasize the contrary,⁴⁶ comparative race relations scholarship offers a tool for demonstrating the continued role of race and racial hierarchy in an increasingly diverse society.⁴⁷

factor in the long-term maintenance of slavery in the United States was the purposeful distinction made between White indentured servants and Black slaves that often discouraged the two subordinated groups from joining forces to resist the exploitation of the colonial labor system. HIGGINBOTHAM *supra* note 20, at 26-28 (discussing the elite fear of an alliance among White indentured servants, Indians, and Blacks and the ways in which the legal system assisted in asserting status distinctions between White indentured servants and Black slaves to discourage mutual cooperation). *See also id.* at 392 (noting the harshness of the colonial labor system for all powerless workers like indentured servants and slaves alike).

44. Evelyn Hu-DeHart, *21st Century America: Black and White and Beyond*, in RACE IN 21ST CENTURY AMERICA 79, 86 (Curtis Stokes et al. eds., 2001).

45. *See* ERIC K. YAMAMOTO, INTER-RACIAL JUSTICE 8, 236-53 (1999) (noting the increasing number of interracial race-based legal grievances between non-White minorities and the difficulty the parties encounter in recognizing the White supremacy aspects of their interaction). *See also* Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1724-1733 (2000) (describing the complexity of intra-racial color discrimination claims amongst Blacks and their role in continued race discrimination).

46. *See, e.g.*, THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 109 (1984) (stating that the “battle for civil rights was fought and won—at great cost—many years ago”); STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY (1995) (describing the deterioration in the social commitment to race-based programs and legal remedies for racial equality).

47. *See* Howard Winant, *Racial Democracy and Racial Identity: Comparing the United States and Brazil*, in RACIAL POLITICS IN CONTEMPORARY BRAZIL 98, 100 (Michael Hanchard ed., 1999) (stating that “the comparative analysis of race responds to the growing awareness of race as a global phenomenon whose importance, far from diminishing in the postindustrialist, post-cold war, postmarxist, and incipient postapartheid world, is in fact increasing”). *See also* David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?* 46 AM. J. COMP. L. 719, 724 (1998) (stating “[i]n recent years changing legal, economic, and political circumstances as well as changing intellectual tools and expectations have increased the potential value of different kinds of comparative law information . . .”).

