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HATE SPEECH AND THE LANGUAGE OF RACISM IN LATIN AMERICA: A LENS FOR RECONSIDERING GLOBAL HATE SPEECH RESTRICTIONS AND LEGISLATION MODELS

TANYA KATERÍ HERNÁNDEZ*

When she passes she calls my attention, but her hair, there's no way no. Her catinga [African] (body odor) almost caused me to faint. Look, I cannot stand her odor. Look, look, look at her hair! It looks like a scouring pad for cleaning pans. I already told her to wash herself. But she insisted and didn't want to listen to me. This smelly negra (Black woman) . . . Stinking animal that smells worse than a skunk.¹

In Latin America, like many countries in Europe, hate speech is prohibited.² Yet Latin America is rarely included in the

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¹ Kia Lilly Caldwell, "Look at Her Hair": *The Body Politics of Black Womanhood in Brazil*, 11 TRANSFORMING ANTHROPOLOGY, no. 2, 2004, at 18, 19 (translating Portuguese lyrics of the widely distributed 1996 Brazilian song, "Look At Her Hair").

² Ley No. 23.593 [Law No. 23.593], de 9 Septiembre de 1988 [Sept. 9, 1988], Penalización De Actos Discriminatorios [Penalization of Discriminatory Acts, B.O. art. 3 (Arg.) (punishing the dissemination of propaganda touting the superiority of a race, color or ethnic group, and the act of inciting the hatred against persons based on their race or ethnic origin with three months to three years of imprisonment); Código Penal [Penal Code], 23 Aug. 1972, art. 281 (Bol.) (punishing the dissemination of ideas through whatever medium that justify racial subordination or incite racial hatred with ten to fifteen years of imprisonment); Ley No. 045, 8 Oct. 2010, Ley Contra El Racismo y Toda Forma de

transnational discussion regarding the regulation of hate speech. Instead, the discourse focuses on a comparison of the advisability of Europe's hate speech regulations and free speech acceptance of hate speech in the United States. As a result, the ability to fundamentally examine the connections between hate speech and inequality, in addition to the most effective legal mechanisms for addressing it, is undermined. It is especially critical to broaden the hate speech debate now that we are seeing an apparent rise in the occurrence of hate speech worldwide.³

Discriminación [Bolivia Law Against Racism and All Forms of Discrimination], art. 16 (Sept. 10, 2010) (punishing the public incitement towards racial hatred or racial defamation with two to four years of imprisonment); Lei No. 7.716, de 5 de Janeiro de 1989, Define os Crimes Resultantes do Preconceito da Raça ou de Côr [Defines the Crimes Resulting from Prejudice against Race or Color], art. 20, *as amended by* Lei No. 9.459, 15 May 1997 (Braz.) (prohibits "acts of discrimination and prejudice carried out by means of communication or publication of any nature" with one to three years imprisonment and a fine); Lei No. 7711, 22 Oct. 1997, Eliminación de la Discriminación Racial en los Programas Educativos y los Medios de Comunicación Colectiva [Law for the Elimination of Racism in Educational Programs and Collective Mediums of Communication], arts. 2, 4 (Costa Rica) (mandating that when publications refer to issues of race, color, and ethnic origin, they do so respecting the principles of respect, dignity and equality for all human beings); Ley No. 62, 29 de diciembre de 1987, Código Penal [Penal Code], art. 295 (Cuba) (criminalizes those who "disseminate ideas based on racial superiority or racial hatred" in addition to criminalizing "those who commit a violent act or incite others to commit one against any race, ethnic group, or group of a different color"); Código Penal [Penal Code], Jan. 22, 1971, art. 212.4 (Ecuador) (criminalizes those who, through whatever medium, diffuse ideas based on racial superiority or racial hatred); Código Penal de Guatemala Decreto No. 17-73 [Penal Code] (Guat.) (punishing racial insults); Ley Federal para Prevenir y Eliminar la Discriminación [Federal Law for the Prevention and Elimination of Discrimination], Diario Oficial de la Federación [DO], art. 9, pfo. XV, 11 de junio de 2003 (Mex.) (prohibiting racially offensive messages and images in mediums of communication); Código Penal de Peru Decreto Legislativo No. 635 [Peru Penal Code Legislative Decree No. 635], 3 Apr. 1991, art. 323 (Peru) (punishing discriminatory speech or action with two to three years imprisonment, and four years where mental or physical abuse or discrimination by a public employee is involved); Código Penal [Penal Code], 20 Oct. 2000, Art. 286, GACETA OFICIAL NO. 5.494 (Venez.) (outlawing "he who publicly incites hatred against other inhabitants" and imposing a sanction of 45 days to 6 months of imprisonment); Ley No. 9.155, 4 Dec. 1933, Código Penal [Penal Code], art. 149.2 (Uru.) (punishing whoever publicly or by any means suitable for dissemination incites any person to racial hatred or contempt or any form of racial "moral" [non-bodily] violence with imprisonment of between 3 and 18 months); Ley No. 9.155, 4 de diciembre de 1933, Código Penal [Penal Code], art. 149.3 (Uru.) (punishing whoever commits an act of moral [non-bodily] racial violence with imprisonment of between six and twenty-four months).

³ See Jesse Solomon, *Hate Speech Infiltrates Social-Networking Sites, Report Says*, CNN.COM (Mar. 15, 2010), http://articles.cnn.com/2010-03-15/tech/hate.speech.social.networks_1_web-sites-hate-social-networking-sites?_s=PM:TECH

Expanding the transnational hate speech discussion to incorporate the Latin American context can provide insight about which legal structures are most pragmatic and effective. For persons of African descent in Latin America, there is little enforcement of the criminal law sanctions against hate speech. In contrast, civil law remedies have shown greater success at responding to the harms of hate speech.

Part I of this Article presents the social science research regarding the harms of hate speech. Part II examines the international law sanctions against hate speech and the ways in which they have inspired Latin American hate speech laws. Enforcement of the hate speech laws in Latin America will be assessed in Part III, and the Brazilian litigation regarding the “Look At Her Hair” song lyrics will be examined as a case study in Part IV. With the benefit of the Brazilian case study, the Article concludes that the predominant criminal law approach is a poor vehicle for regulating hate speech. What is needed is a framework of civil remedies that is better formulated to address the harms of hate speech and its hindrance to racial equality.

I. HATE SPEECH HARMS

“Hate speech expresses, advocates, encourages, promotes or incites hatred of a group of individuals distinguished by a particular feature or set of features,” whom are targeted for hostility.⁴ While the English language term “hate speech” is often used as a term of art within Latin American legal publications, commentators appear to use “hate speech” and “discurso del odio” interchangeably. Regardless of which term is used, it is a concept that is globally understood and widely prohibited.⁵

(discussing the report “Digital Terrorism and Hate 2010” released by the Simon Wiesenthal Center for Tolerance, which noted that there was a twenty percent increase in hate-affiliated web pages from the prior year); Petition for Inquiry Filed on Behalf of the National Hispanic Media Coalition, In the Matter of Hate Speech in the Media, Before the Federal Communications Commission (Jan. 28, 2009) (discussing the rise in hate speech in the United States with the growth of conservative talk radio and television, and internet blogs); see also Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship For Our Information Age*, B.U. L. REV. (forthcoming 2011) (noting the troubling “mainstreaming” of cyber hate).

⁴ Bhikhu Parekh, *Hate Speech: Is There a Case for Banning?*, 12 PUB. POL’Y RES. 213, 214 (2006).

⁵ Jurisdictions which have laws prohibiting hate speech include, but are not limited to: Criminal Code R.S. 1985, c. C-34, s. 1, § 319(2) (Can.) (prohibiting the

The significant harms hate speech incites have engendered a widespread international consensus that it should be illegal. When hate speech is permitted to be propagated, it encourages a social climate in which particular groups are denigrated and their discriminatory treatment is accepted as normal. Even the presumably free speech absolutist United States has come to implicitly acknowledge the hate speech infringements on equality through employment discrimination laws regarding racial and sexual harassment.⁶

public incitement or willful promotion of hatred against any section of the public distinguished by color, race, religion, ethnic origin, or sexual orientation); No. 110 Narodne Novine [NN] [Penal Code], Oct. 21, 1997, art. 174 (Croat.) (forbidding any violation of the human rights on the basis of a difference in race, religion, political or other belief, property, birth, education, social position or other characteristics, or on the basis of gender, color, or national or ethnic origin, as well as forbidding any assertions of the superiority of one such status group over another); Straffeloven [Criminal Code], ch. 27 § 266B (Den.) (forbidding statements that threaten, ridicule or hold in contempt a group due to race, skin color, national or ethnic origin, faith, or sexual orientation); Race Relations Act, 1976, c. 70 § 6(1) (Eng.) (forbidding the incitement of racial hatred); Saadkaan [Penal Code], ch. 11 § 8 (Fin.) (forbidding the spread of statements or other information where a certain race, national, ethnic, religious or comparable group is threatened, defamed or insulted); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I art. 5(2) (Ger.) (limiting the right of freedom of expression to the provisions of general laws and the right to personal honor); 1978. évi IV. Törvény a Büntet Törvénykönyv (Criminal Code) (Act IV of 1973 on the Criminal Code) (Hung.) (classifying the incitement of hatred against the Hungarian nation or any national, ethnic, racial group or certain groups of the population as a felony offense); General Penal Code No. 19, Feb. 12, 1940, art. 233a (Ice.) (punishing the ridicule, calumny, threat, insult or assault of a person or group of persons based on their nationality, color, race, religion or sexual inclination); Human Rights Act 1993 §§ 61, 131 (N.Z.) (punishing any incitement of hostility or contempt against anyone in New Zealand or who may be arriving to New Zealand on the basis of color, race, or ethnic or national origin); Straffeloven [The General Civil Penal Code] May 22, 1902 § 135a (Nor.) (imposing a fine and a sentence of up to three years on any publicly uttered discriminatory or hateful expression inciting hatred, persecution or contempt of anyone based on color, national or ethnic origin, religion, life stance, homosexuality, lifestyle or orientation); Serbian Penal Code ch. 28 § 317 (Serb.) (punishing instigation of national, racial, or religious hatred or intolerance among the ethnic peoples and communities of Serbia); Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 10 (S. Afr.) (prohibiting hate speech based on race, gender or disability); BROTTSBALKEN [BrB] [Criminal Code] 16:8 (Swed.) (imposing a fine or imprisonment for threats or expressions of contempt against a group of persons due to their race, color, national or ethnic origin or religious belief).

⁶ See CATHARINE A. MACKINNON, ONLY WORDS 45-51 (1993) (discussing a plethora of employment discrimination cases in which the defendant's hate speech has been understood as the primary form of illegal harassment in the workplace). In contrast, outside of the employment sector, public utterance of

Hate speech creates discord in the community, harms the target group, and infringes upon equality.⁷ For instance, the knowledge that anti-Semitic hate propaganda was clearly connected to the rise of Nazism informed the development of international laws against hate speech.⁸ Discourse analysis and philosophy scholars have similarly noted that racism is taught and legitimated through public discourse.⁹

[R]acism is often based on, legitimated by, or acquired by discourse. It is through this discourse that dominant group members learn the dominant ideologies of their group, as well as the norms, values and attitudes that organize the daily social practices of everyday discrimination and exclusion. Daily discrimination has reasons, and these reasons need to be acquired, reproduced and legitimated within the dominant groups. Prevalent social representations about indigenous or black people thus not only explain the reasons of unequal treatment but also need to show up in the many elite discourses of the dominant groups.¹⁰

hate speech is viewed as protected speech in the United States, and as a result facilitates the continued harassment of victimized racial groups and women. See LAURA BETH NIELSEN, *LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH* 168 (2004) (describing judicial protection of the constitutional right to utter hateful speech in public irrespective of its public value and harm to the targeted groups).

⁷ See, e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.) (denying free expression protection to hateful expressions of little value, such as those of defendant high school teacher who during class described Jewish people as a people of profound "evil" who "created the Holocaust to gain sympathy").

⁸ See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 17, 27 (Mari J. Matsuda et al. eds., 1993) (describing the role of Nazism in shaping the Universal Declaration of Human Rights).

⁹ See TEUN A. VAN DIJK, *RACISM AND DISCOURSE IN SPAIN AND LATIN AMERICA* 92 (2005) (explaining that racism is a learned behavior propagated by mass media and political and didactic discourse); See also ALEXANDER TSEHIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* 96 (2002) (describing how derogatory stereotypes about racial groups instruct negative overarching social thought about them and reinforce the factionalization of ethnic groups).

¹⁰ VAN DIJK, *supra* note 9, at 95.

In addition, hate speech imposes direct health harms on racialized groups.¹¹ In short, hate speech directly implicates a nation-state's pursuit of racial equality.

In fact, political discourse and elections become healthier and more moderate in jurisdictions that enact hate speech legislation such as Britain, Germany, Austria, the Netherlands, India, and post-apartheid South Africa.¹² Of course as an empirical matter, it

¹¹ See generally Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 362 (2009) (summarizing the literature that details the psychosocial harms of depression, repressed anger, diminished self-concept, impairment of work or school performance, inability to sleep, increased blood pressure, and negative childhood development). Moreover, individuals are harmed by the continued bombardment of hate speech messages and their recurrence repeatedly in life in ways that make each instance inflict a cumulative harm. See RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 66–69 (1997) (describing how the cascading effects of racist speech hurt targeted racial groups by building a culture that stigmatizes racial groups).

¹² See Parekh, *supra* note 4, at 218. While it is true that Denmark also has hate speech legislation, yet nevertheless suffered great public discord regarding the September 2005 publication of cartoons that violated the Muslim ban on depicting the Islamic prophet Muhammad, it appears that much of the actual violence was generated by extremists outside of Denmark disinterested in utilizing the Denmark hate speech legislation for peaceful political engagement. See Daniel Howden et al., *How a Meeting of Leaders in Mecca Set Off the Cartoon Wars Around the World*, INDEP., Feb. 10, 2006, <http://www.independent.co.uk/news/world/middle-east/how-a-meeting-of-leaders-in-mecca-set-off-the-cartoon-wars-around-the-world-466109.html> (citing Sari Hanafi, Associate Professor at the American University in Beirut, as describing the cartoons as an opportunity for Arab governments to highlight the pitfalls of Western democracy). See also *Protesters Killed as Global Furor Over Cartoons Escalates*, MIDDLE EAST TIMES, Feb. 6, 2006 (describing violent protests at Danish embassies in Beirut, Syria, Tehran, and deaths following protests in Nigeria, Libya and Afghanistan after police fired into the crowds). In contrast, within Denmark, Muslim organizations filed a blasphemy and hate speech criminal complaint with the police. While the complaints against the Danish newspaper were dismissed, the newspaper did issue a public apology. See Gwladys Fouché, *Danish Court Dismisses Muhammad Cartoons Case*, GUARDIAN (Oct. 27, 2006, 1:42 PM (BST)) <http://www.guardian.co.uk/media/2006/oct/27/pressandpublishing.race?INTCMP=SRCH> (describing the dismissal of the case by the city court in Aarhus, Denmark, where the offending publication was based); *Honourable Fellow Citizens of the Muslim World*, JYLLANDS-POSTEN, Aug. 2, 2006, <http://jp.dk/udland/article177649.ece> (publishing a letter from the Editor-in-Chief of Jyllands-Posten, Carsten Juste, about the newspaper's benign intentions). Moreover, the public disturbances that occurred within Denmark appear to have been set off more by concern with police harassment of ethnic minorities and the deportation of Tunisians without trial, rather than violent protest regarding the cartoons. See Frances Harrison, *Danish Muslims in Cartoon Protest*, BBC NEWS, Feb. 15, 2008, available at <http://news.bbc.co.uk/2/hi/7247817.stm> (describing the protests that occurred in connection with the republication of the offensive cartoons in 2008 as one

may instead be that the egalitarian nature of the societies is what first creates the moderate political discourse that leads to hate speech legislation. Nevertheless, such jurisdictions chose to enact hate speech legislation because there is little social value in racist speech whose basic purpose is to degrade others, deny them their identity as human beings, exclude them from the entitlements of the basic social and constitutional covenant, and expose them to violence. By denying human dignity to some people, hate speech attacks the very basis of democratic systems.¹³

Yet, it should be noted that the regulation of hate speech can be viewed as a danger to democracy.¹⁴ This alternative vision of hate speech regulation as a harm arises out of the concern that regulation is a form of censorship that can hinder expressive platforms for advocating racial equality, and thus lead to selective prosecution targeted at unpopular political minorities.¹⁵ The history of the Civil Rights Movement in the United States is emblematic of the importance of having unfettered free speech rights to demonstrate, march, and express dissident perspectives about the existence of white supremacy and need for social justice.¹⁶ Indeed, the First Amendment of the U.S. Constitution has

prompted by distrust of the media's marginalizing attitude towards Danish Muslims).

¹³ See Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 364 (1998-1999) (analogizing hate speech with obscenity, which provides such little value to society as to fall outside "constitutional protection of free speech").

¹⁴ See Robert Post, *Hate Speech*, in EXTREME SPEECH AND DEMOCRACY 123, 136 (Ivan Hare & James Weinstein eds., 2009) (expressing concern that hate speech regulations may "have the counterintuitive effect of undermining democratic cohesion" by those who are silenced and then question the democratic legitimacy for censorship).

¹⁵ See generally ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (providing a series of essays discussing free speech and its possible regulation).

¹⁶ See SAMUEL WALKER, THE RIGHTS REVOLUTION: RIGHTS AND COMMUNITY IN MODERN AMERICA 91 (1998) (observing that "the protection of allegedly offensive speech has been central to the growth of a more inclusive community in America"); see also NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 62 (1995) (stating that free speech has played an important role in the advancement of women's rights and arguing that restrictions on free speech hurts the feminist cause).

historically enabled civil rights proponents to articulate their political speech even when socially unpopular.¹⁷

However, the contemporary insistence that the history of the Civil Rights Movement should effectively bar any consideration of hate speech regulation ignores the domestic and global shift to embrace the value of racial equality. It is no longer the case that blanket questioning of the human status of racial minorities can be considered a continuing topic of debate.¹⁸ Today, the universal value in the formal equality of all human beings provides a very different context for the consideration of hate speech harms and regulation. Against the backdrop of a universal condemnation of ideologies of racial superiority, racist speech has no political value.¹⁹ Nor is a racist epithet equivalent to a generally offensive epithet like "murderer."²⁰ This is because racist epithets are embedded in the notion that the core of what constitutes a racial minority is problematic and inferior. In contrast, generally offensive epithets like "murderer" simply refer to the action or choice an individual has made, and not their intrinsic humanity. Similarly, the concern with avoiding McCarthy-like censorship abuses of the past is also historically over-determined. This is because contemporary censorship "occurs less through explicit state policy than through official and unofficial privileging of powerful groups and viewpoints."²¹ In fact, it has been noted that

¹⁷ See WALKER, *supra* note 16, at 89–100 (providing examples from U.S. history that illustrate the role of free speech in allowing unpopular groups to be heard and recognized).

¹⁸ See Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1647–48 (2010) (noting that racial equality as a fundamental aspect of justice is a relatively settled point of modern social and legal organization for which robust debate is no longer necessary). The iconic desegregation case of *Brown v. Board of Education*, 347 U.S. 483 (1954) marks the beginning of a gradual shift in the United States towards embracing the value of racial equality. Internationally, this shift is manifested by the United Nations Declaration on the Elimination of All Forms of Racial Discrimination in 1963, and the United Nations Convention on the Elimination of All Forms of Racial Discrimination in 1965.

¹⁹ See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 167–208 (1995) (arguing that from a civic republican perspective, racial epithets contribute nothing of value to the public dialogue that is crucial to democratic self-government as deliberative democracy).

²⁰ See WALKER, *supra* note 16, at 107 (arguing that regardless of one's political views, social value subsists in the shouting of "murder" within the context of defining social boundaries in controversial topics such as abortion).

²¹ MACKINNON, *supra* note 6, at 77; see also David Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 190, 191 (David Kairys ed., 3d ed.

in countries with hate speech laws, the laws have not been disproportionately abused to censor government critics or against racial minority group members.²²

Alternatively, the speculation that hate speech may have “value” in operating as a kind of safety-valve outlet for racial hatred that thereby obviates racial violence, is undermined by the social science studies of the subject.²³ For instance, in a 2005 economic analysis of hate crimes and the influence of hate speech, it was determined that raising the costs of engaging in hate speech will tend to deter hate crime rather than increase the rate of hate crime.²⁴ In a related vein, other research has shown that across many countries, the main source of racist beliefs stems not from an individual’s daily experiences but rather from the racist speech prevalent in public discourse and racially biased media sources.²⁵ Indeed, linguists note that language itself organizes habits of mind and influences perception in different cultures.²⁶ Moreover, social psychologists have documented that implicit (unconscious) biased attitudes and beliefs are learned in large measure through passive

1998) [hereinafter *Freedom of Speech I*] (positing that despite rhetoric touting the power of free speech in the U.S. democratic system, Americans feel disenfranchised in the U.S. political system). *But see* Corey Brettschneider, *When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion*, 8 PERSP. ON POL. 1005, 1009 (2010) (arguing that though the state may protect the expression of illiberal speech, it may also promulgate state policies designed to criticize such speech publicly).

²² See Sandra Coliver, *Hate Speech Laws: Do They Work?*, in STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 363, 365 (Sandra Coliver ed., 1992) (observing that in France, for example, “[m]ost local prosecutors are ill-inclined to initiate hate speech prosecutions and thus there is scant concern about overzealous or even selective prosecutions”).

²³ See TESIS, *supra* note 9, at 110 (stating that empirical evidence demonstrates that hate speech has no cathartic effect on majority groups even as it harms minorities). “Hate speech is not a harmless release for misethnic attitudes. It does not mitigate threats to minorities. To the contrary, during opportune times, it inflames and recruits persons who can be catalyzed to wreak havoc on outgroups.” *Id.* at 117.

²⁴ See Dhammika Dharmapala & Richard H. McAdams, *Words That Kill? An Economic Model of the Influence of Speech on Behavior (with Particular Reference to Hate Speech)*, 34 J. LEGAL STUD. 93, 132 (2005) (concluding that the author’s economic model supports the implication that imposing increased costs upon hate speech deterred hate crimes).

²⁵ See VAN DIJK, *supra* note 9, at 5–6 (opining upon research which indicates that stereotypes and prejudices regularly promulgated through mass media are a primary “source of racist beliefs”).

²⁶ See GUY DEUTSCHER, *THROUGH THE LANGUAGE GLASS: WHY THE WORLD LOOKS DIFFERENT IN OTHER LANGUAGES* (2010).

exposure to mass media and other modes of public discourse.²⁷ In turn, implicit bias unconsciously influences outward actions in ways that can perpetuate and aggravate structural inequalities in the workplace and elsewhere.²⁸ In fact, studies have shown that when individuals are immersed in situations where they are repeatedly exposed to racialized examples of African Americans, respondents show a higher rate of implicit bias than when exposed to non-racial stimuli or positive images of African Americans.²⁹ In short, to the extent that hate speech is an act of "racial venting," "racial venting" appears to increase hate crime rather than decrease it, and, in turn, an environment containing racist speech increases implicit bias and its influence on racist conduct.

It is thus interesting to note that the characterization of U.S. law as ignoring the connections between hate speech and inequality is

²⁷ See Nilanjana Dasgupta, *Color Lines in the Mind: Implicit Prejudice, Discrimination, and the Potential for Change*, in TWENTY-FIRST CENTURY COLOR LINES: MULTIRACIAL CHANGE IN CONTEMPORARY AMERICA 97, 109 (Andrew Grant-Thomas & Gary Orfield eds., 2009) (suggesting that the mass media should highlight diversity because "it is often the primary vehicle by which the public learns about who is valued and who is not.").

²⁸ See John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 524-25 (1997) (detailing a series of experiments showing implicit racial bias); Russell H. Fazio et al., *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. PERSONALITY & SOC. PSYCHOL. 1013, 1018-19 (1995) (indicating that white students demonstrating negative associations with black faces in testing, generally behaved less friendly or less interested when interacting with blacks); Allen R. McConnell & Jill M. Leibold, *Relations among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 440 (2001) (linking implicit association test results with intergroup discrimination and explicit prejudice); Denise Sekaquaptewa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 75, 81 (2003) (stating that results of experiments gauging implicit stereotyping of blacks in white subjects can predict behavior in interracial interactions).

²⁹ See Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 806-07 (2001) (asserting that race bias is reduced when positive images of African Americans are shown); B. Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. PERSONALITY & SOC. PSYCHOL. 815, 815 (2001) ("[S]tereotypes and group attitudes may indeed be activated spontaneously from memory, without the perceiver's intent, merely triggered by exposure to a relevant stimuli cue in the environment."); see also Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1284 (1992) (discussing social stereotypes of certain racial and ethnic groups and the role of hate speech in inscribing them).

of recent vintage.³⁰ Before the enactment and effective enforcement of civil rights laws, U.S. courts upheld convictions for hate speech as group defamation excludable from free speech protection.³¹ With the advent of the Civil Rights Act of 1964 and its widespread enforcement in the 1970's, a new approach to hate speech was articulated that drew the line at incitement of imminent violence (an elevated standard that is notoriously difficult to meet).³² It would seem that with the imposition of legal constraints on the acts of racial segregation and exclusion, group defamation was transformed into free speech that permits an "outlet" for racist expression. In turn, the racial outlet propagates and recycles racist stereotypes and ideologies that maintain traditional race-based hierarchies without the need for explicit Jim Crow laws of exclusion in the United States.³³

In Latin America, where Jim Crow state-mandated exclusion never existed, racist speech about Afro-descendants is ubiquitous and facilitates the social exclusion of Afro-descendants.³⁴ In addition to the term "negro" (black/negro) being derogatory,

³⁰ See Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1536 (2003) (explaining that judicial restriction of hate speech in the United States is relatively new).

³¹ See generally *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding an Illinois criminal statute that prohibited publication, writing, and pictures denigrating people by race, color, or religion, in a case where defendant distributed a leaflet concerned with the Negro "invasion" of white neighborhoods and persons).

³² See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that government cannot punish inflammatory speech unless there is an intent to incite likely lawless action in a case where an Ohio criminal statute would have been applied against a televised Ku Klux Klan rally where crosses were burned and speech regarding the desire to seek revenge against blacks and Jews was articulated).

³³ At least one author suggests an alternative theory for the jurisprudential shift away from enforcing group-based racial defamation. Samuel Walker suggests it was caused, in part, by the decision of civil rights groups to prioritize other racial justice litigation agendas to the exclusion of advancing hate speech restrictions that might undermine their goal for promoting individual rights. See SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 15-16, 104-107 (1994); see also David Kairys, *Freedom of Speech I*, *supra* note 21, at 192-94 (describing the transformation of the law of free speech in the U.S. as a history of political struggle by progressive movements to empower people with expansive freedoms of expression).

³⁴ See TEUN A. VAN DIJK, *supra* note 9, at 95 ("It is through this discourse that dominant group members learn the dominant ideologies of their group, as well as the norms, values and attitudes that organize the daily social practices of everyday discrimination and exclusion.").

Afro-descendants are stereotyped and referred to as inherently criminal, intellectually inferior, overly sexual, and animalistic.³⁵ Because the racialized stereotypes of Afro-descendants are pervasive, they are commonly understood to smell like animals and, in particular, monkeys.

In addition to the commonalities in anti-black expression in Latin America, each country has also developed its own subset of derogatory phrases for blacks and blackness.³⁶ In Argentina, "negro de mierda"³⁷ ("shitty negro") is a popular expression, and "negro" is viewed as the worst of insults.³⁸ As a result, even children's songs in Argentina are replete with anti-black references.³⁹ In Brazil, Afro-descendants are referred to as "macaco" (monkey), "besta" (animal), "vagabundo" (bum), "filho de puta" (son of a whore), "safado" (insolent person), "ladrão" (thief), and "nega fedorentas" (stinking nigger).⁴⁰ In fact, the Brazilian insults are viewed as being coterminous with blackness. This also is unfortunately manifested in Brazilian primary school textbooks in which black people are consistently depicted as animal-like, as socially subordinate, and in other stereotyped

³⁵ See Peter Wade, *Afro-Latin Studies: Reflections on the Field*, 1 LATIN AM. & CARIBBEAN ETHNIC STUD. 105, 107–09 (2006) (explaining the various stereotypes associated with dark skin in Afro-Latin studies).

³⁶ There is also a whole panoply of racial epithets reserved for denigrating indigenous communities in Latin America. See generally VAN DIJK, *supra* note 9 (exploring the discourse and racism of the elite classes in Spain, and in Latin America, focusing on Mexico, Argentina, Chile, and Brazil).

³⁷ Corina Courtis et al., *Racism and Discourse: A Portrait of the Argentine Situation*, in RACISM AND DISCOURSE IN LATIN AMERICA 13, 32 (Teun A. van Dijk ed., 2009). In fact, a young Argentinean created the Facebook page "Extermination of the (Negros de Mierda) Shitty Negroes." Carlos Neri, *Un Grupo Argentino "Exterminación de los Negros de Mierda" Indigna en Facebook*, MOEBIUS, March 2, 2008, <http://enmoebius.com.ar/?p=972>.

³⁸ Marina Ari, *Argentina: Empanada, Asado de Vaca y Mucho Racismo*, KAOS EN LA RED, May 22, 2010, <http://www.kaosenlared.net/noticia/argentina-empanada-asado-vaca-mucho-racismo> (stating that "negro" is one of the worst insults in Argentine culture).

³⁹ See *Piden que Un Libro Infantil que Fomenta El Racismo sea Quitado de Circulación*, MDZ ONLINE, May 27, 2010, <http://www.mdzol.com/mdz/nota/212497/> (describing Argentinean children's book and CD with lyrics "I like the white, long live the white, let the black die").

⁴⁰ VAN DIJK, *supra* note 9, at 136–37 (describing "everyday [racialized] conversation" in Brazil).

manners.⁴¹ In Colombian newspapers, even the polluted air of Cali is blamed on the presumed dirtiness of blacks.⁴² In Costa Rica, blacks are typically described as “pigs,” “stinking,” “unkempt,” and “ugly.”⁴³ In Cuba, “doing things like a black person” is a common expression to describe a poorly done task or acts of delinquency.⁴⁴ In fact, the Cuban Academy of Sciences found in 2003, that dozens of Cuban phrases are used to connect blacks with delinquency and inferiority.⁴⁵ This is best exemplified by the popular phrases “it had to be a negro”⁴⁶ and “there is no such thing as a good black or a sweet tamarind.”⁴⁷ In Ecuador, an often-repeated joke is that “a black person running is a thief, a white person running is an athlete.”⁴⁸ This helps to account for the 2009 survey findings in Ecuador, demonstrating that five out of seven Ecuadorians harbor racial prejudice against blacks.⁴⁹ In Mexico, Afro-Mexicans respond to the stereotypes that they are “ugly” and “dark” with the focus on marrying lighter-skinned partners in the Latin American hope to lighten and thus “improv[e] the race” of

⁴¹ HÉDIO SILVA JR., DISCRIMINAÇÃO RACIAL NAS ESCOLAS: ENTRE A LEI E AS PRÁTICAS SOCIAIS [RACIAL DISCRIMINATION IN THE SCHOOLS: BETWEEN THE LAW AND SOCIAL PRACTICES] 34–38 (2002).

⁴² Hernando Salazar, *Colombia Contra el Racismo*, BBC MUNDO (May 23, 2008, 8:16 PM (GMT)) http://news.bbc.co.uk/hi/spanish/latin_america/newsid_7415000/7415897.stm (mentioning racial discrimination through the mass media and commentaries on the internet in Colombia).

⁴³ Marjorie Jiménez Castro, *Las Mascaras del Chiste Racista*, 2 INTERSEDES: REVISTA DE LAS SEDES REGIONALES 43, 43 (2001) (discussing the use of stereotypes and racial humor, even by employers, at the expense of the Afro-Latino community in Costa Rica).

⁴⁴ Fernando Ravensberg, *Advierten Sobre Racismo en Cuba*, BBC MUNDO (Feb. 13, 2003, 11:54 PM), http://news.bbc.co.uk/hi/spanish/latin_america/newsid_2759000/2759775.stm.

⁴⁵ See *id.* (discussing the negative social and economic associations used to describe black Cubans and noting that “[d]ozens of Cuban sayings link blacks with delinquency and crime”).

⁴⁶ See T. Avellaneda, *Manifestaciones del Racismo en Cuba: Varias Caras de Un Viejo Mal*, REVISTA DIGITAL CONSENSO, http://www.desdecuba.com/02/articulos/11_01.shtml (last visited March 2, 2011) (describing manifestations of racism in Cuba, including its presence in speech).

⁴⁷ Rafael Duharte Jiménez & Elsa Santos García, “No Hay Negro Bueno Ni Tamarindo Dulce,” *Cuba, 118 Años Después de la Abolición de la Esclavitud*, MATICES, <http://www.matices.de/18/18pcuba.htm> (last visited March 2, 2011).

⁴⁸ See José Alfredo Andaluz Prado, *Prácticas Racistas y Discriminatorias Es Castigada Con Prisión*, DIARIO CORREO (July 6, 2009), <http://www.diariocorreo.com.ec/archivo/2009/07/06/practicas-racistas-y-discriminatorias-es-castigada-con-prision>.

⁴⁹ *Id.*

their progeny.⁵⁰ In Nicaragua, the phrase “100 negroes for one horse”⁵¹ ties to how blacks are viewed as drug addicts and drunks.⁵² In Peru, the common statements about blacks are that they are criminals, can only work in low-level positions, that they only think until midday, that they are delinquents and live badly, that they are a leisurely race, and that black women are prostitutes.⁵³ A study of Peruvian newspapers from 2008, found a total of 159 different racist adjectives for describing Afro-descendants.⁵⁴ In Venezuela, despite the national pride in being a mixed-race “café con leche” (coffee with milk) society, the plethora of racist sayings commonly iterated includes the phrase “kill a negro and live a Pepsi [enchanted] day.”⁵⁵ The widely circulated racial stereotypes about Afro-Venezuelans include:

[B]lack people are dangerous, they're thieves, they smell bad, they have bad habits, they discredit a company's image . . . it's not their fault if they're like that . . . black people when they don't do it [make a mess] on the way in they do it on the way out.⁵⁶

⁵⁰ See Alicia Castellanos Guerrero et al., *Racist Discourse in Mexico*, in *RACISM AND DISCOURSE IN LATIN AMERICA* 217, 233 (Teun A. van Dijk ed., Elisa Barquin & Alexandra Hibbett trans., 2009).

⁵¹ See K.W. Stephenson, *Michael Campbell: El Racismo Está Enraizado en la Sociedad Nicaragüense*, LA BRÚJULA DIGITAL (Feb. 25, 2011 5:28 PM) <http://www.labrujula.com.ni/noticia/159>.

⁵² See Carlos Salinas Maldonado, *Alta Hooker Rectora de la Uracacan “El Chamán es Sólo la Punta del Iceberg”*, DIARIO DE LA PRENSA (Feb. 22, 2009), <http://archivo.laprensa.com.ni/archivo/2009/febrero/22/suplementos/domingo/313375.shtml> (describing racism in Nicaragua from the perspective of a Caribbean black woman).

⁵³ See VAN DIJK, *supra* note 9, at 159–60.

⁵⁴ See CENTRO DE ESTUDIOS Y PROMOCIÓN AFROPERUANOS LUNDU, INFORME 2008: PRESENCIA DE AFRODESCENDIENTES EN LOS MEDIOS IMPRESOS EN EL AÑO 2008 (2008), available at <http://lundu.org.pe/web2/informe%20anual%20web/informe%202008.pdf> (“In general information print media: “Peru 21,” “Trome,” and “Eye,” 131 articles were found to contain racist adjectives referring to male and female news actors of African descent. Added, these adjectives are a total of 159.”).

⁵⁵ See Jesús Chucho García, *El Racismo Nuestro de Cada Día*, GELEDÉS INSTITUTO DA MULHER NEGRA (Mar. 21, 2010 2:00 PM), <http://www.geledes.org.br/venezuela/el-racismo-nuestro-de-cada-dia-21/03/2010.html>.

⁵⁶ See Adriana Bolívar et al., *Discourse and Racism in Venezuela: a “Café Con Leche” Country*, in *RACISM AND DISCOURSE IN LATIN AMERICA* 291, 292–93 (Teun A. van Dijk ed., Elisa Barquin & Alexandra Hibbett trans., 2009).

Such racialized stereotypes also get repeatedly circulated through Venezuelan popular music with lyrics such as:

Black woman! . . . if you were white and had straight hair /
My mother told me in distress not to marry a black woman,
because when she's asleep, she looks like a coiled snake / A
black woman with a big nose doesn't cook for me, because
she hides the mouthfuls in her nostrils.⁵⁷

Within Latin America there is also the use of racialized language as terms of endearment, which unconsciously invokes the paternalism of slavery's past. For instance, affection is expressed by stating "that's my black person," or calling someone "my little black person."⁵⁸ Even compliments directed towards those who are black are reserved for those presumed to "supersede" their blackness by having other "superior" traits.⁵⁹ Such racialized compliments include: "he is black, but has the soul/heart of a white"; "she is black, but good looking"; "he is black, but well groomed and scented."⁶⁰ While such statements are not meant to carry racial malice, they still activate racial stereotypes about the inferiority of blacks. As such, the racialized endearments and comments are within the spectrum of racially problematic speech, but they are not included in the hate speech regulations discussed herein because they would be difficult to characterize as "inciting racial hatred" or as an intended act of discrimination. Nor does this Article suggest that such terms be made actionable. Nonetheless, it is important to note that even the non-actionable race-based endearments and compliments energize stereotypical conceptions of Afro-descendants.

⁵⁷ See *id.* at 293.

⁵⁸ See THOMAS M. STEPHENS, *DICTIONARY OF LATIN AMERICAN RACIAL AND ETHNIC TERMINOLOGY* 373 (2d ed. 1999) (listing "negrito" as a Latin American racial term for "my little black guy; small black person").

⁵⁹ See *id.* at 379, 388–92 (listing Latin American racial terms for superseding blackness such as "negro blanco/white black," "negro distinguido/distinguished or well-to-do black," and "negro mundengue/black who has become whitened in political or social views").

⁶⁰ See *id.* at 383 (listing "preto de alma branca [black with a white soul]" as a Latin American racial term); Carlos Pozzi, *Race, Ethnicity, and Color Among Latinos in the United States*, in *THIS SIDE OF HEAVEN: RACE, ETHNICITY, AND CHRISTIAN FAITH* 47, 53 (Robert J. Priest & Alvaro L. Nieves eds., 2007) (describing the Latino use of the Latin American proverb "negro pero lindo/ black but cute" to express the idea that blackness and beauty are mutually exclusive and only rarely appear together).

In fact, these perspectives about Afro-descendants are so embedded in the social fiber of Latin American societies, that Afro-descendants' subordinated status in society is viewed as natural and logical. Furthermore, the historical notion that "racism does not exist" in Latin America disinclines those unaffected by hate speech to acknowledge the harms it causes marginalized groups.⁶¹ Nevertheless, with the growing mobilization of black social justice organizations, the voices of the traditionally excluded are being heard.⁶² As a result, more nations in Latin America are considering hate speech laws as a complement to other legal measures for addressing the racism that facilitates the socioeconomic exclusion of Afro-descendants.⁶³ The lobbying for hate speech regulation reverberates with the work of social norms theorists who have argued that law can and does influence social norms generally and race discrimination in particular.⁶⁴ The historical example of the U.S. shift from Jim Crow state mandated segregation to a legal landscape of antidiscrimination laws undermining the justifications for white supremacy is a powerful beacon for those concerned with hate speech in Latin America.⁶⁵ But to be clear, social justice activists in Latin America are seeking more than just a legal symbol of anti-racist sentiment. They instead wish to deploy the expressive function of law to substantively challenge the

⁶¹ See Ariel E. Dulitzky, *A Region in Denial: Racial Discrimination and Racism in Latin America*, in *NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AFRO-LATINOS* 39, 42-50 (Anani Dzidzienyo & Suzanne Oboler eds., 2005) (describing how denial of racism in Latin America takes on different forms).

⁶² See generally MINORITY RIGHTS GROUP, *NO LONGER INVISIBLE: AFRO-LATIN AMERICANS TODAY* (1995) (detailing the history and experience of the Afro-Latin people from the time of slavery to their modern political and social struggles).

⁶³ The International Law Department of the Organization of American States organized a workshop to address the legal needs of Afro-descendants in Latin America on January 22, 2010, and devoted a session to the concern with hate speech in the region. See *Project for the Incorporation of the Afro-descendent Theme in the Policies and Programs of the Organization of American States* (OAS), INT'L LAW DEP'T, ORG. OF AM. STATES, <http://www.oas.org/dil/afrodescendants.htm>.

⁶⁴ See, e.g., Richard H. McAdams, *Cooperation and Conflict: the Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1026, 1064 & 1081 (1995) (applying social norms theory to the context of racial discrimination); see also *id.* at 1081 ("[T]he law can change behavior merely by signaling on what grounds the majority will henceforth give and withhold esteem.").

⁶⁵ See *id.* at 1081 ("When Jim Crow laws mandated certain forms of segregation, whites confidently spoke of segregation as the natural order of things; when the laws forbade segregation, discriminatory whites had a greater difficulty believing their own ideology.").

justifications for racial exclusion in Latin America and the language that is used to do so.⁶⁶ This is because while there are a significant number of persons of African descent in Latin America, they have a highly limited presence in politics and government.⁶⁷

Throughout the region, African descendants are disproportionately living in poverty and illiteracy, with limited access to education and employment opportunities, all resulting in shorter life expectancies.⁶⁸ "Most Afro-descendants live in rural areas . . . [and] suffer a lack of infrastructure and utilities, with no health services, few schools, high unemployment and low income."⁶⁹ In fact, scholars attribute the slow economic growth of Latin American and Caribbean countries to their discriminatory exclusion of Afro-descendants, who make up a large part of the populations of many of the countries but are a small proportion of

⁶⁶ See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 964 (1996).

Many laws have an expressive function. They 'make a statement' about how much, and how, a good or bad should be valued. They are an effort to constitute and to affect social meanings, social norms, and social roles. Most simply, they are designed to change existing norms and to influence behavior in that fashion.

Id.

⁶⁷ See MARGARITA SÁNCHEZ & MAURICE BRYAN, MINORITY RIGHTS GROUP INT'L: AFRO-DESCENDANTS, DISCRIMINATION AND ECONOMIC EXCLUSION IN LATIN AMERICA, 3-4, tbl.1 (2003), available at <http://www.minorityrights.org/933/macro-studies/afrodescendants-discrimination-and-economic-exclusion-in-latin-america.html> (estimating that in 2003 there were approximately 150 million persons of African descent in Latin America representing at least one-third of the total population, residing mostly in Brazil, Central America, and the northern coast of South America and the Caribbean, but noting that Afro-descendants are also present in smaller numbers throughout the region). These are considered conservative demographic figures given the histories of undercounting the number of Afro-descendants on Latin American national censuses, and often completely omitting a racial/ethnic origin census question. See Juliet Hooker, *Afro-descendant Struggles for Collective Rights in Latin America: Between Race and Culture*, 10 SOULS 279, 281 (2008) (explaining that several nations in the region omit questions regarding race and ethnicity when conducting the national census, while a few nations have just begun to include such a question).

⁶⁸ See Bryce Pardo, *Members of Congress Discuss Challenges Facing Afro-Descendants in Latin America*, INTER-AMERICAN DIALOGUE NEWSLETTER, Apr. 9, 2008, <http://www.thedialogue.org/page.cfm?pageID=32&pubID=1298> (explaining that racial discrimination is a primary cause for many of the ills facing Afro-descendants in Latin America).

⁶⁹ SANCHEZ & BRYAN, *supra* note 67, at 3.

the traditional labor market.⁷⁰ In addition, they attribute Latin America's lower economic standing, as compared to East Asia and Eastern Europe, to its exclusion of the rural poor—many of whom are Afro-descendants—from social protections and services.⁷¹ Despite the variation in demographic density and political histories, studies of the region show a remarkable similarity in the marginalization of Afro-descendants and the racial discrimination they encounter.⁷²

In much of the region, Afro-descendants are considered to be the "poorest of the poor." "When poverty rates are estimated by race, Afro-descendants constitute 30 percent of Latin America's population but represent 40 percent of the region's poor."⁷³ The picture for Afro-descendants is particularly bleak when one considers that Latin America and the Caribbean are regions with some of the most unequal income distributions in the world. Furthermore, the social exclusion of Afro-descendants remains consistent even when income level is controlled for in statistical analyses.⁷⁴

In Brazil specifically, socio-economic indicators show considerable inequalities between black and white Brazilians, despite the fact that Afro-Brazilians were reported as 49.4 percent of the population in the census [IBGE] department's 2008 Synthesis of Social Indicators. The rate of illiteracy continues to be double for Afro-Brazilians as compared to white Brazilians. In addition,

⁷⁰ See Jonas Zoninsein, *The Economic Case for Combating Racial and Ethnic Exclusion in Latin America and the Caribbean Countries*, in SOCIAL INCLUSION AND ECONOMIC DEVELOPMENT 41, 43 (Mayra Buvinic et al. eds., 2001) ("[L]abor market discrimination and a segmented economy along racial and ethnic lines diminish aggregate production and income and slow productivity growth and economic development").

⁷¹ See generally STEPHAN HAGGARD & ROBERT R. KAUFMAN, DEVELOPMENT, DEMOCRACY AND WELFARE STATES: LATIN AMERICA, EAST ASIA AND EASTERN EUROPE (2008) (showing how exclusionary welfare systems and economic crises in Latin America created incentives to adopt liberal social-policy reforms, and how, in East Asia, high growth and permissive fiscal conditions provided opportunities to broaden social entitlements in the new democracies).

⁷² See generally MARGARITA SANCHEZ & MICHAEL J. FRANKLIN, COMMUNITIES OF AFRICAN ANCESTRY IN COSTA RICA, HONDURAS, NICARAGUA, ARGENTINA, COLOMBIA, ECUADOR, PERU, URUGUAY, VENEZUELA (1996) (analyzing the marginalization of Black Latin American communities and encouraging governments to devise policies that empower and promote minority development).

⁷³ GUSTAVO MARQUEZ ET AL., 2008 REPORT: OUTSIDERS? THE CHANGING PATTERNS OF EXCLUSION IN LATIN AMERICA AND THE CARIBBEAN 17 (2007).

⁷⁴ *Id.* at 18.

there is a consistent pattern of Afro-Brazilian investments in education providing less of an improvement in labor market opportunities as compared to white Brazilians.⁷⁵ When Afro-Brazilians and white Brazilians have the same years of schooling, whites earn 40% more. Wage inequality exists even amongst Afro-Brazilians with the highest level of education, and the disparity is more accentuated in the higher income brackets.⁷⁶ In fact, a Brazilian census department report specifically states “education cannot be characterized as a sufficient factor for overcoming racial inequalities in income in Brazil.”⁷⁷

Clearly, the unsatisfactory life circumstances of Afro-Brazilians cannot be attributed solely to an issue of class status.⁷⁸ Indeed, the Organization of American States has stated that the pervasive existence of racial discrimination in Brazil will hinder its ability to meet the United Nations Millennium Development Goals for 2015, which Brazil committed to as a precise and measurable manner of diminishing social exclusion in the nation.⁷⁹ This has motivated Brazilian and Latin American interests in using the law to address racial inequality more effectively and to combat the pervasive

⁷⁵ See Samuel Kilsztajn et al., *Concentração e Distribuição do Rendimento por Raça No Brasil* [Concentration and Distribution of Income by Race in Brazil], 9 REV. ECON. CONTEMP. 367, 380 (May/Aug. 2005) (stating that non-black Brazilians earn more than black Brazilians with the same amount of education and that income is concentrated among non-blacks).

⁷⁶ See ELISA LARKIN NASCIMENTO, *THE SORCERY OF COLOR: IDENTITY, RACE, AND GENDER IN BRAZIL* 46 (2007) (“Approximately 26 percent of blacks, as opposed to 16 percent of whites, earn less than minimum wage, while 1 percent of blacks, as opposed to 4 percent of whites earn more than ten times that value.”).

⁷⁷ IBGE, *SÍNTESE DE INDICADORES SOCIAIS* 2006, at tbl. 9.7 (2006).

⁷⁸ The only small exception to the stark labor market inequality is the Federal District of Brasilia, where as the nation’s capitol the federal government has begun to implement racially equitable hiring practices resulting in an equivalent rate of unemployment by race, but only for those with higher education. See Gilson Santos Silva, *Negros Com Renda Média No Bairro da Pituba* [Blacks with Middle-Class Incomes in the Neighborhood of Pituba] (2007) (unpublished M.A. thesis, Universidade Salvador-UNIFACS) at 86, available at http://tede.unifacs.br/tde_busca/arquivo.php?codArquivo=203.

⁷⁹ See Roberta Lopes, *Discriminação Racial Pode Fazer Com Que Brasil Não Cumpra Metas do Milênio* [Racial Discrimination May Mean That Brazil Will Not Meet the Millennium Goals], *AGÊNCIA BRASIL*, Nov. 23, 2006, <http://www.agenciabrasil.gov.br/noticias/2006/11/23/materia.2006-11-23.6429391562/view>; see also Edward E. Telles, *Race and Ethnicity and Latin America’s United Nations Millennium Development Goals*, 2 *LAT. AM. & CARIBBEAN ETHNIC STUD.* 185, 195 (2007) (discussing Brazil’s quantitative data demonstrating racial disparities on each of the U.N. millennium development goals indicators).

presumption that racism does not exist in Latin America despite the ubiquitous social and economic exclusion of blacks.

II. INTERNATIONAL LAW NORMS OPPOSING HATE SPEECH

The widespread objection to hate speech is reflected in the international law landscape. The United States is thought to stand as the extreme exception with an absolutist vision of free speech where much of hate speech is tolerated despite the fact that actual First Amendment doctrine does permit speech regulation in other contexts.⁸⁰ Yet it should be noted that like the United States,

⁸⁰ See Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT'L L.J. 277, 372 (2008) (comparing the unparalleled protection of freedom of expression provided by the "American Exceptionalism" of the United States to the majority of jurisdictions like Germany that restrict free speech to promote the protection of human dignity); see also Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571, 588 (1996-1997) (discussing the United States' reservations towards regulating hate speech as embodied in Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination). Yet, it is an overstatement to characterize the U.S. free speech doctrine as absolutist, as the doctrine contains many exceptions for the regulation of speech, and the protections that exist have been abrogated during periods of extreme and populist based repression. See David Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 165 (David Kairys ed., 1982) [hereinafter *Freedom of Speech II*] (discussing the traditional free speech exceptions that government may legitimately restrict under certain circumstances such as speech that incites illegal activity, subversive speech, fighting words, obscenity, pornography, commercial speech and symbolic expression). The exceptions to free speech protection have grown over time to include speech in venues where people of limited means might speak, like malls and public transit hubs, in addition to limiting public access to the media. See Kairys, *Freedom of Speech I*, *supra* note 21, at 203-04 ("The Court has narrowed and restricted the free-speech rights available to people of ordinary means . . . and erected a free-speech barrier to public access to the media. . . . The Court has recently limited the range and scope of speech activities in public places. . . ."). However, the absolutist position regarding free speech in the United States was not articulated until after the 1940's. See Kairys, *Freedom of Speech II*, at 141:

Despite the persistent but nonspecific references to 'our traditions' in legal and popular literature, no right of free speech, either in law or practice, existed until a basic transformation of the law governing speech in the period from about 1919 to 1940. Before that time, one spoke publicly only at the discretion of local, and sometimes federal, authorities, who often prohibited what they, the local business establishment, or other powerful segments of the community did not want to hear.

Hungary uses a “clear and present danger” test for assessing concerns with racial hate speech albeit in its criminal code.⁸¹

International law specifically directs states to prohibit hate speech. As early as 1963, the United Nations General Assembly adopted the Declaration on the Elimination of All Forms of Racial Discrimination, which punished all incitement to violence on account of color or ethnic origin. The Declaration was viewed as a necessary response to the increase in swastikas as a symbol of hatred globally.⁸² Thereafter, in recognition of the importance of the civil rights movement, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) in 1965.⁸³ CERD explicitly opposes the manifestation of racist hate speech. Article 4 of CERD provides that states shall condemn the dissemination of all ideas based on racial superiority or hatred.⁸⁴ In addition, states must prohibit all organizations that “promote and incite racial discrimination, and shall recognize participation in such organizations or activities an offence punishable by law.”⁸⁵

The Committee on the Elimination of Racial Discrimination has stated that when CERD was adopted, Article 4 was seen as “central to the struggle against racial discrimination.”⁸⁶ It was hoped that

⁸¹ See Gabor Halmai, *Free Speech in the New Hungarian Constitutional Practice*, 26 INT’L J. SOC. 66, 74 (1996-97) (stating that the Hungarian Constitutional Court’s decision on racial hate speech applied the clear and present danger test of Oliver Wendell Holmes); see also Peter Molnar, *Towards Improved Law and Policy on “Hate Speech” – The “Clear and Present Danger” Test in Hungary*, in EXTREME SPEECH AND DEMOCRACY 237, 240 (Ivan Hare & James Weinstein eds., 2009) (discussing the historical roots, which include Hungarian struggles for freedom in the nineteenth and twentieth centuries, of the Hungarian “Clear and Present Danger” test and advocating that nations should independently choose their hate speech policies).

⁸² See Nathan Courtney, Note, *British and United States Hate Speech Legislation: A Comparison*, 19 BROOK. J. INT’L L. 727, 733 (1993) (noting that the convention agreed to “declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred. . . .”)

⁸³ See Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT’L L. 57, 86 (1992-1993) (noting the connections between the U.S. civil rights movement and the adoption of CERD in 1965).

⁸⁴ International Convention on the Elimination of All Forms of Racial Discrimination, art. 4, Jan. 4, 1969, 660 U.N.T.S. 195.

⁸⁵ *Id.* art. 4(b).

⁸⁶ See General Recommendation XV on Article 4 of the Convention, ¶ 1, 3, U.N. Doc. A/48/18 (1993), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 207, U.N. Doc. HRI/GEN/1/Rev. 7 (May 12, 2004).

the prohibition of racist expression before an overt act of racial discrimination occurred would help in the struggle against racism.⁸⁷ The concern with the role of racist speech in the rise of the Nazi regime informed the drafting of CERD.⁸⁸

Similarly, Article 20 of the International Covenant on Civil and Political Rights ("ICCPR") provides that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."⁸⁹ Thereafter in 1969, the United States exerted its influence to narrow the scope of Article 13 of the American Convention on Human Rights, to solely a concern with the advocacy of hatred constituting incitement to lawless violence or illegal action punishable by law.⁹⁰ More recently, the Council of Europe has issued a protocol criminalizing racist and xenophobic acts committed through the operation of a computer.⁹¹ Furthermore, there has also been the development of a customary international law against hate speech.⁹²

⁸⁷ See Michael A.G. Korengold, Note, *Lessons in Confronting Racist Speech: Good Intentions, Bad Results, and Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination*, 77 MINN. L. REV. 719, 719 (1993) ("In their efforts to silence hate speech, governmental bodies throughout the world continually explore new legislative approaches to combat it.").

⁸⁸ See *id.* at 721 ("International desire to prohibit incitement to racial hatred and discrimination gained momentum after the genocide in Nazi Germany was revealed.").

⁸⁹ The International Covenant on Civil and Political Rights was signed by the U.N. General Assembly in 1966 and made effective in 1976. International Covenant on Civil and Political Rights, art. 20, Dec. 16, 1966, 999 U.N.T.S. 171.

⁹⁰ See Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1, 81 (1996) ("[Article 13] must not only be directed to inciting lawless action or be likely to incite such action, but it must actually constitute incitement to lawless action of a violent nature before the State is required to prohibit it"); see generally Eduardo Bertoni, *Hate Speech Under the American Convention on Human Rights*, 12 ILSA J. OF INT'L & COMP. L. 569, 570 (2006) ("Article 13's broad mantle of freedom of expression is not absolute. . . . [T]he American convention declares hate speech to be outside the protections of Article 13 and it requires States parties to outlaw this form of expression.").

⁹¹ Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, Council of Europe, Jan. 28, 2003, C.E.T.S. No. 189, available at <http://conventions.coe.int/Treaty/en/Treaties/html/189.htm> (recognizing the need to provide adequate legal responses to racist and xenophobic propaganda committed through computer systems).

⁹² See generally Mariana Mello, Comment, *Hagan v. Australia: A Sign of the Emerging Notion of Hate Speech in Customary International Law*, 28 LOY. L.A. INT'L &

III. LATIN AMERICAN HATE SPEECH LAWS

Latin American hate speech laws generally range from the criminal prohibition of the dissemination of ideas based on racial superiority to the criminal prohibition against inciting racial hatred.⁹³ While the language of the statutes does vary across the region, the provisions are quite similar in their central focus on prohibiting the dissemination of messages of racial subordination and hatred without regard to whether violence is incited by the message. Given this central commonality in the statutes and the pervasive anti-black sentiment that exists in Latin America, there is a value in discussing the issue of hate speech legislation in the region as a whole despite the differences in statutory language and national histories.

Latin American hate speech laws do not encompass defamation laws which are typically focused on harms to an individual rather than to a group and thus do not address public group-based hate speech.⁹⁴ Two examples of literal legislative compliance with the international law norms against hate speech can be found in Cuban and Ecuadorian domestic laws. Article 295.2 of the Cuban Penal Code criminalizes those who “disseminate ideas based on racial superiority or racial hatred.”⁹⁵ Article 212.4 of the Ecuadorian Penal Code criminalizes those who through whatever medium, diffuse ideas based on racial superiority or racial hatred.⁹⁶ In both Cuba and Ecuador the sanction for a hate speech infraction is the same as that for an act of racial discrimination. In Cuba, that is six months to two years of imprisonment or a fine, or both; in Ecuador, that is six months to three years imprisonment.

COMP. L. REV. 365 (2006) (discussing the topic of customary international law regarding hate speech and the current state of such laws in influential nations).

⁹³ See *supra* note 2 (providing examples of statutory prohibitions on hate speech in various Latin American Countries).

⁹⁴ See, e.g., Sallie Hughes & Chappell Lawson, *The Barriers to Media Opening in Latin America*, 22 POL. COMM. 9, 11 (2005) (discussing how the majority of countries in Latin America have criminal defamation laws as protection for the reputation of an individual and not a group). Related to the laws of defamation are “descato” (insult) laws that penalize disrespect toward public officials. See generally Ruth Walden, *Insult Laws*, in *THE RIGHT TO TELL: THE ROLE OF MASS MEDIA IN ECONOMIC DEVELOPMENT* 207 (2002) (discussing the existence of “descato” laws in Latin America).

⁹⁵ CÓDIGO PENAL [Criminal Code] art. 295.2 (Cuba).

⁹⁶ CÓDIGO PENAL [Criminal Code] art. 212.4 (Ecuador).

In contrast, Brazil departs from the international law model focus upon the dissemination of racist ideas. Instead, Brazil's hate speech restriction is part of the general law prohibiting acts of racism. Specifically, the Brazilian crime of racism prohibits "acts of discrimination and prejudice carried out by means of communication or publication of any nature."⁹⁷ The penal code makes such acts punishable by one to three years imprisonment and a fine.⁹⁸ In 2003, the Federal Supreme Court enforced the prohibition against hate speech in the criminal prosecution of Siegfried Ellwanger, for practicing racism when he published books that were anti-Semitic and falsely denied the existence of the Holocaust.⁹⁹ The Court noted that free speech is not absolute, and that publishing books with discriminatory ideologies is racism that free speech will not tolerate.¹⁰⁰ Ellwanger was sentenced to two years imprisonment for the publication of the book "Holocaust: Jewish or German? The Creators of the Lie of the Century," in addition to his active distribution of the following books that blamed Jewish people for the ills of the world: "The Conquerors of the World—The True Criminals of the War," "Hitler: Guilty or

⁹⁷ Lei No. 7.716, art. 20, § 2, de 5 Janeiro de 1989, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 6.1.1989 (Braz.); see Alex Lobato Potiguar, *Igualdade e Liberdade: A Luta Pelo Reconhecimento da Igualdade Como Direito À Diferença no Discurso do Ódio* [Equality and Liberty: The Fight for Recognition of Equality as a Right to Difference in Hate Speech] (2009) (unpublished L.L.M. Thesis, Universidade de Brasília, Faculdade de Direito Programa de Pós-Graduação em Direito), available at <http://hdl.handle.net/10482/5328> (on file with author) (analyzing the principles of equality and freedom as complementary and demonstrating that the expression of hate speech is an abuse of rights).

⁹⁸ This racial crime law is distinct from Brazil's "Injúria Racial/Racial Insult" which is a crime against honor like that of defamation, in which the dignity of a specific individual is targeted and harmed. CÓDIGO PENAL [Penal Code] art. 140, § 3 (Braz.). In contrast, the crime of racism targets an undetermined number of persons in its exclusion of an entire race or color. For that reason, unlike the individualized crime of Racial Insult, the group-based crime of racism is not subject to a prescription period and is a non-bailable offense. With Racial Insult, a judge has discretion to suspend the one to three year jail sentence, and the claim is subject to an eight year prescription period. See SAMANTHA RIBEIRO MEYER-PFLUG, *LIBERDADE DE EXPRESSÃO E DISCURSO DO ÓDIO* [FREEDOM OF EXPRESSION AND HATE SPEECH] 102-03 (2009) (describing differences between hate speech and racial insult).

⁹⁹ S.T.F. Hab. Corp. No. 82424, Relator: Min. Maurício Corrêa. 17.09.2003, S.T.F.J. (Braz.), available at <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28HC%24%2ESCLA%2E+E+82424%2ENUM%2E%29+OU+%28HC%2EACMS%2E+ADJ2+82424%2EACMS%2E%29&base=baseAcordaos>.

¹⁰⁰ *Id.*

Innocent," and "The International Jew" amongst other publications.

With the 2003 Ellwanger case as a guidepost, Brazil's hate speech proscription has been extended to the venue of the internet as well. In 2006, Google was ordered to provide government prosecutors data that could help them identify users of Orkut (its social networking site) who are "accused of taking part in online communities that encourage racism, pedophilia and homophobia."¹⁰¹ Google went on to agree to remove Orkut member submissions from the Internet that the Brazilian prosecutors classified as illegal racist content.

IV. RACIAL EQUALITY FOCUSED LEGISLATION MODELS: CIVIL VS. CRIMINAL PROVISIONS

Because of its great symbolic power, a ban on hate speech can easily become a symbol that is an end in of itself rather than part and parcel of an overarching policy against racism. It is thus centrally important to enact hate speech legislation that focuses on its anti-discrimination role rather than viewing it as an anti-defamation inspired law or simply as a dignitary harm. Incorporating civil as well as criminal code provisions would also enhance the anti-discrimination role of hate speech legislation.

Restricting hate speech legislation to the criminal code context, as is done in many jurisdictions, may limit its efficacy for a number of reasons. Entrusting the enforcement of the criminal law to public authorities risks having the law undermined by the complacent inaction of public officials who may harbor the same racial bias as the agents of hate speech. This is a particular danger in Latin America, where police officers are consistently found to discourage Afro-descendants from filing racial discrimination complaints, and are often the perpetrators of discrimination and violence themselves.¹⁰² Furthermore, even well-meaning

¹⁰¹ Ellen Nakashima, *Google to Give Data to Brazilian Court*, WASH. POST, Sept. 2, 2006, at D3.

¹⁰² See, e.g., DANIEL M. BRINKS, *THE JUDICIAL RESPONSE TO POLICE KILLINGS IN LATIN AMERICA: INEQUALITY AND THE RULE OF LAW* 49-54 (2008) (describing how marginalization prevents effective discourse between citizens and the legal systems, how politics influences prosecutorial and judicial decision making, and how institutional change is often quashed by contextual factors). See generally Michael J. Mitchell & Charles H. Wood, *Ironies of Citizenship: Skin Color, Police Brutality, and the Challenge to Democracy in Brazil*, 77 SOC. FORCES 1001 (1999) (discussing racism in the Brazilian criminal justice system).

government officials may be reluctant to impose criminal sanctions out of concern that hate speech is a social problem that should otherwise be addressed outside of the harsh penalties of the criminal law. This may help to explain why so few hate speech cases are actually brought despite the many jurisdictions that have hate speech criminal laws.¹⁰³ In addition, the criminal law's focus on racial discrimination as a dynamic of isolated incidents caused by individual bad actors distracts needed attention away from systemic racism. While public opinion may support the imposition of prison terms on those whose racist speech incited others to acts of violence, prison terms may otherwise appear too excessive for injuries that do not threaten bodily harm. Accordingly, it may be useful to incorporate civil remedies to address the vast majority of hate speech incidents that are divorced from the narrow incitement to violence context.

The contrast between the civil and criminal contexts is best exemplified by the Brazilian case of *Tiririca*, in which the same fact pattern of hate speech yielded a success for the plaintiffs in the civil court but not in the criminal court. Francisco Everado Oliveira Silva, whose stage name is Tiririca, is a Brazilian entertainer who released a song with the Sony Music company entitled "Veja os Cabelos Dela" ("Look at Her Hair") in 1996. The song was in essence a long tirade against the inherent distasteful animal smell of black women and the ugliness of their natural hair.¹⁰⁴ The lyrics stated in significant part,

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

¹⁰³ See Eric Heinze, *Wild-West Cowboys Versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* 182, 183 (Ivan Hare & James Weinstein eds., 2009) (noting the limited enforcement of hate speech bans across Europe).

¹⁰⁴ See EDWARD E. TELLES, *RACE IN ANOTHER AMERICA: THE SIGNIFICANCE OF SKIN COLOR IN BRAZIL* 154-155 ("[T]he song reflects the naturalness with which black people are derided to the point that explicit racism is so openly, but perhaps innocently, broadcast to children.").

(Black woman) . . . Stinking animal that smells worse than a skunk.¹⁰⁵

The black feminist NGO Criola, in conjunction with the NGO CEAP: Centro de Articulação de Populações Marginalizadas, and a number of other social justice organizations, filed lawsuits against the singer and Sony Music company in both criminal and civil courts. In the criminal court action, the plaintiffs filed a complaint of racism. The plaintiff lost because the judge found that there was no criminal intent to offend black women.¹⁰⁶ As a result, the song was allowed to remain in circulation for commercial sale.

In contrast, the civil court action was successful. The civil public action was filed pursuant to Article 3 of the Constitution, which states the national objective is “to promote the well-being of all without prejudice as to origin, race, sex, color, age, and any other form of discrimination.”¹⁰⁷ The case sought to protect the diffuse and collective rights of black women to be free of discrimination.¹⁰⁸ Free of the criminal context, which requires a finding of intent to discriminate, the civil court held that the defendant’s authorship of the lyrics was discriminatory itself because the words inherently provoke feelings of humiliation in black women.¹⁰⁹ The court took note that because the singer Tiririca was also a popular entertainer for children (who was often nationally televised in a clown costume), the insulting and injurious content of the song was also prejudicial to the formation of black youth. As compensation for the moral damages of collective emotional harm to dignity, in 2008, the court ordered

¹⁰⁵ See Caldwell, *supra* note 1, at 19 (translating Portuguese lyrics).

¹⁰⁶ Juiz Carlos Flores da Cunha, 23 Vara Criminal do Rio de Janeiro, 18/02/1998 (Brazil), available at <http://estudoodireito.spaceblog.com.br/58156/QUESTOES-DE-DIREITO-CONSTITUCIONAL>.

¹⁰⁷ Constituição Federal [C.F.] [Constitution], art. 3, para. IV. Authorization to litigate a public civil action is obtained pursuant to Lei No. 7.347, de 24 de Julho de 1985 (Braz.).

¹⁰⁸ Diffuse rights are a category of legal rights that provide guarantees to a group of individuals who have common legal interests despite being dispersed within the political community. The public civil action for the protection of diffuse and collective rights was created by Law No. 7.347 of July 24, 1985, D.O.U. of 25.07.1985, as amended by Law Nos. 8.078 of September 11, 1990; 8.884 of June 11, 1994; 9.494 of September 10, 1997; and Provisional Measure No. 2.102-28 of February 23, 2001.

¹⁰⁹ See T.J.R.J., Embargos Infringentes No. 2005.005.00060, CEAP v. Sony Music Entertainment Brasil, 11 Câmara Cível do Tribunal de Justiça do Estado do Rio De Janeiro, Acórdão 14.12.2005 (Brazil).

payment of 300,000 reais [approximately US \$162,000] in addition to attorney's fees and costs.¹¹⁰ The monetary payment for the damage to the collective equality interest of black women was directed towards the Federal Ministry of Justice's Fund for the Defense of Diffuse Rights, for the creation of educational anti-racism youth programs disseminated through radio, television, film, and printed materials for elementary schools in the state.

Brazilian commentators attempted to trivialize the criminal prosecution of Tiririca, as innocent joking that the Black Movement exaggerated as a racial harm. In addition, there was the concern that the Black Movement's focus on racist speech was frivolous in comparison to the significance of black poverty and underemployment. Yet such critiques overlook the particular significance of racist speech litigation in a context where racial justice movements are still struggling to educate the general public about the existence of racism in a long mythologized "racial democracy" that characterizes Brazilian race relations as harmonious because of the existence of racial mixture.¹¹¹

The longstanding myth that Latin America is a racial utopia that stands in marked contrast to the United States (where "real" racism exists), facilitates the normalization of hate speech and in turn makes hate speech an even greater danger for racialized groups than elsewhere in the Americas.¹¹² This is because racist

¹¹⁰ See 10 Year Currency Converter, BANK OF CANADA, <http://www.bankofcanada.ca/en/rates/exchform.html> (indicating a 0.54 U.S. dollar exchange rate for the Brazilian real on September 28, 2008 [the date of the Tiririca civil damages award judgment]). In civil law systems, moral damages are non-pecuniary damages that compensate for the injury of emotional distress from harm to one's honor or reputation. Often, moral damages are not available for every sort of tort action, but only for those that create dignitary harm. See Saul Litvinoff, *Moral Damages*, 38 LA. L. REV. 1 (1977) (moral damage is injury to non-patrimonial assets and interests although it may affect patrimonial assets as well, especially where damages are concerned); see also Jorge A. Vargas, *Moral Damages Under the Civil Law of Mexico: Are These Damages Equivalent to U.S. Punitive Damages?*, 35 U. MIAMI INTER-AM L. REV. 183, 208-11 (2004) (listing the necessary prerequisites for awarding moral reparations).

¹¹¹ See George Reid Andrews, *Brazilian Racial Democracy, 1900-90: An American Counterpoint*, 31 J. CONTEMPORARY HIST. 483, 488-89 (1996) (discussing some of the shortcomings of the racial democracy ideology).

¹¹² See Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Anti-Discrimination Laws, a United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1098-100 (2002) (citing Cuba and Puerto Rico as Latin American countries with different political structures that nevertheless share an under-enforcement of civil rights despite pervasive racial

speech is labeled “humorous” and “cultural” and thus not indicative of a racialized society. For instance, a study of Brazilian attitudes indicated that while ninety-seven percent of Brazilians believe they are not racially prejudiced, ninety-eight percent profess to knowing others who do discriminate.¹¹³ Addressing hate speech head on may help the many who so easily perceive discrimination in others, to begin to see it in themselves as well.

While hate speech cases may not take up a large portion of the Black Movement’s litigation dockets, even a few high profile cases have the potential for large scale “consciousness raising.” In jurisdictions such as Brazil and elsewhere in Latin America—where it is commonplace for virulent derogatory racial stereotypes to coexist with the notion that racism is not present in the society—there is a tremendous value in having a public articulation of the ways in which black humanity is questioned, black citizens are excluded, and racism is manifested. In this way, hate speech litigation serves as a much-needed disruption of the Latin American myth of racial democracy and the implicit biases that inform the maintenance of racial hierarchies in education, employment, and politics. Moreover, the hate speech laws discussed in this Article are but one part of a larger web of legal anti-discrimination remedies being considered and slowly implemented in Latin America.¹¹⁴ For instance, in Brazil, the hate crime legislation coexists with: 1) the crime of racism,¹¹⁵ 2) the Statute of Racial Equality,¹¹⁶ 3) the legal obligation to provide

discrimination and thereby serve as examples of the problematic Latin American legal context for Afro-descendants).

¹¹³ See LILIA MORITZ SCHWARCZ, *RACISMO NO BRASIL: PERCEPÇÕES DA DISCRIMINAÇÃO E DO PRECONCEITO RACIAL NO SÉCULO XXI* [RACISM IN BRAZIL: PERCEPTIONS OF DISCRIMINATION AND RACIAL PREJUDICE IN THE 21ST CENTURY] (2005).

¹¹⁴ See generally TALLER DE EXPERTAS/OS DE LA TEMÁTICA AFRODESCENDIENTE EN LAS AMÉRICAS (2011) (addressing issues such as affirmative action, civil liability for racial discrimination, and hate speech).

¹¹⁵ Lei No. 7.716, art. 20, as amended by Lei No. 8081, de 21 de Setembro de 1990 (Braz.).

¹¹⁶ The recently enacted Statute of Racial Equality issues a federal government mandate to administer programs and articulate specific measures for reducing racial inequality. Law No. 12.288, de 20 de Julho de 2010, available at <http://www.portaldaignaldade.gov.br/arquivos/Estatuto%20em%20ingles.pdf>. Article 1 states that it is the goal of the statute “to assure to the Afro-Brazilian population the achievement of equal opportunities, the support of individual collective and diffuse ethnic rights and the struggle against discrimination and other forms of ethnic intolerance.” Yet the statute has been criticized by Afro-

national school instruction regarding Afro-Brazilian History and Culture,¹¹⁷ and 4) the constitutional right of reply to messages and images in print media, radio and television that are damaging.¹¹⁸

In short, the criminal context with its threat of imprisonment can inhibit judicial willingness to make racist expressions legally actionable because they are a predominant feature of the culture. The singular Brazilian case of *Ellwanger* was a successful criminal prosecution of hate speech because of the view that the blatant anti-Semitic Holocaust denial at the center of the case was rare in Brazil. In contrast, the more pervasive anti-black racist speech is viewed as too commonplace to be worthy of criminal prosecution. Like the *Tiririca* criminal case, other criminal prosecutions of hate speech have been unsuccessful in Brazil.¹¹⁹ Furthermore, the punitive focus of criminal law can create a backlash against the targets of hate speech. Unfortunately, the public resents victims in criminal prosecutions because they are perceived as causing the incarceration of the speaker. Such public resentment would

Brazilian activists for being purely aspirational and failing to provide concrete rights to enforce equality such as affirmative action policies. See, e.g., Jaime Alves, *Ouro de Tolos: O Estatuto da Igualdade e a Submissão Política Negra II* [Fools Gold: The Statute of Racial Equality and Submissive Black Politics II], ÍROHIN, June 21, 2010, <http://www.irohin.org.br/onl/new.php?sec=news&id=8090> ("[T]he Statute represents a generic letter of intent that says little or nothing about the struggle of black people. . . .") (author's translation).

¹¹⁷ See Lei no. 10.639, de 9 Janeiro de 2003, amending Lei no. 9.394, de 20 de Dezembro de 1996 (Braz.) (laying down the guidelines for national education, including themes of history and Afro-Brazilian culture).

¹¹⁸ CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 5 § 5 (Braz.); see also J.F. 5 Vara São Paulo, n. 2004.61.00.034549-6, Relator Juíza Marisa Cláudia Gonçalves Cucio, 12.05.2005, CONSULTOR JURÍDICO, 14.05.2005 (Braz.) (ordering that television stations that discriminatorily portrayed Afro-Brazilian religion provide thirty consecutive days of daily response programming for the duration of two hours during the hours of 9 PM–11 PM).

¹¹⁹ See Superior Tribunal de Justiça do Ceará, Sexta Turma, Processo RESP 273067, Sept. 14, 2001 (affirming innocence of newspaper journalist Claudio Cabral who published a commentary in which he stated that "feijoada [black bean stew] is the food of Bahian musicians, black and indian – obviously inferior races" because there had been no evidence of a criminal intent to commit the crime of racism with the motive to racially offend, and because there had been no evidence of a belief in racial segregation, which is what racial prejudice is); see also Cezario Correa Filho, *Humor, Racismo e Julgamento: Ou Sobre Como Se Processa A Ideia de Racismo no Judiciário Brasileiro*, 6 REVISTA DA ESCOLA SUPERIOR DA MAGISTRATURA DO ESTADO DO CEARÁ 275 (2008).

undermine the goal of enforcing hate speech regulations to further racial equality.¹²⁰

This backlash may help explain how Tiririca was elected into the Brazilian Chamber of Deputies (the lower house of Brazil's Congress) on October 3, 2010. With a criminal trial that martyred him and then later acquitted him of the crime of racial discrimination, Tiririca was well positioned to continue attracting public attention. Building upon his public notoriety, the obscure PR (Partido da República) political party provided generous financing to mount a campaign designed to catch the attention of voters disillusioned with mainstream politics following numerous corruption scandals.¹²¹ Tiririca's principal slogan was "It can't get any worse," which he followed with: "What does a congressman do? The truth is I don't know, but vote for me and I'll tell you."¹²² Because voting is compulsory in Brazil there is a tradition of voting for preposterous candidates as a mechanism of protest (including voting for a São Paulo zoo rhinoceros back in 1959).¹²³ Such protest votes advantage the sponsoring political party which can then take any votes cast in excess of those needed to win for the protest candidate and have those excess votes reallocated to other candidates in the party's coalition. Because the Chamber of Deputies is formed by a proportional representation system that allocates seats to parties according to the total number of votes their candidates win, it makes it easier for celebrity candidates to leverage their popularity to benefit their political party.

Tiririca's criminal trial vindicated him and at the same time enhanced his notoriety and thereby made him strategically attractive to his political party. Because the individual perpetrator emphasis of the criminal context ends up focusing on the messenger (as an alleged racist) rather than the message of racist

¹²⁰ See C. EDWIN BAKER, *Autonomy and Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* 139, 148 (Ivan Hare & James Weinstein eds., 2009) (suggesting that hate speech regulations "may create a backlash against the enforcers and sympathy for the 'suppressed' racists").

¹²¹ See *No Joke! Illiterate Clown Triumphs in Election*, MSNBC.COM (Oct. 4, 2010, 9:01 AM (PDT)), <http://bltwy.msnbc.msn.com/politics/no-joke-illiterate-clown-triumphs-in-election-1664748.story> (asserting that the other candidates in Tiririca's coalition would benefit from the substantial excess votes he received).

¹²² *Id.*

¹²³ See Lilia M. Schwarcz, *Politically Incorrect: Brazil's Clown-Elect*, THE NEW YORK REVIEW OF BOOKS BLOG (Oct. 14, 2010, 8:04 AM), <http://www.nybooks.com/blogs/nyrblog/2010/oct/14/politically-incorrect-brazils-clown-elect/> (discussing the use of protest votes in Brazilian elections).

speech, it undermines the potential of hate speech regulations to promote equality. In contrast, the *Tiririca* civil trial more adeptly worked towards undermining Tiririca's message of racial inferiority and thus did not form part of his campaign platform. That itself is a significant contribution of the civil litigation.

In the civil context, the absence of the imprisonment feature has enabled judges to consider modern perspectives about racial equality when deciding whether the discrimination that has been historically prevalent in Latin America but invisible as "culture" should be actionable. A civil framework can provide broader theories of discrimination and less burdensome evidentiary standards.¹²⁴ In addition, the civil context carries less risk of selective enforcement whereby vulnerable populations are disproportionately targeted for hate speech prosecution. This is because, unlike criminal prosecutions, the state need not be the primary enforcer of the legislation. With non-profit organizations representing vulnerable populations in civil actions, the actual victims of hate speech rather than the state could lead the way in defining the contours of problematic hate speech.

In fact, legal scholar Richard Delgado proposes a tort action for racial insults that allows victims to sue directly.¹²⁵ Delgado suggests that while a racial insult is itself certainly an act of racial discrimination, many courts might be hesitant to impose the sanctions of racial discrimination laws. The option of a tort suit permits the victim to circumvent the potential bias of government enforcers in the criminal context and the reticence of judges to apply the sanctions of criminal law. Nevertheless, the focus of this Article is not on individual racial insult cases, but rather the group-based discrimination of hate speech more generally.¹²⁶

¹²⁴ See Seth Racusen, "A Mulato Cannot Be Prejudiced": The Legal Construction of Racial Discrimination in Contemporary Brazil 87-88 (June 2002) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with Massachusetts Institute of Technology Libraries), available at <http://dspace.mit.edu/handle/1721.1/31104> (contrasting the requirement of evidence that proves criminal guilt "beyond a doubt" with the lesser requirement of evidence that "more likely than not" supports a finding of civil liability).

¹²⁵ See Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 151-59 (1982) (describing the varied success that the theory of intentional infliction of emotional distress has had in lawsuits concerning racial slurs and the reasons for the failure of lawsuits based on defamation claims).

¹²⁶ To be sure, as a procedural matter, a jurisdiction can extend standing to bring group-based claims to individuals.

Treating hate speech solely through the vein of individual racial insult cases runs the risk of reducing the issue to the presumed over-sensitivity of the plaintiff and the “non-racial” ways an individual plaintiff was otherwise disliked, rather than addressing the racial subordination harms to entire racial groups and society as a whole when hate speech is disseminated without an effective mechanism for an adequate response.¹²⁷ In contrast, group-based civil hate speech litigation actually permits an opportunity for responsive speech that levels the playing field in ways that the abstract “marketplace of ideas” does not permit.¹²⁸ Specifically, while civil litigation may infrequently result in the outright censoring of hate speech, the civil remedies of compensation for public education can enable those who are victimized by hate speech to more effectively respond with public education remedies. The influence of education remedies extends beyond tort compensation to individual plaintiffs or criminal fines paid to the state treasury.

Indeed, a principal critique of the ACLU’s “more speech” as the best response to hate speech line of thought has been the well-founded concern that few individuals have the access to public forums that can effectively counter the discriminatory effects of hate speech.¹²⁹ As a result, hate speech silences any further speech

¹²⁷ See Seth Racusen, *The Ideology of the Brazilian Nation and the Brazilian Legal Theory of Racial Discrimination*, 10 SOC. IDENTITIES 775, 789–90 (2004) (describing how, before the enactment of the hate speech provisions of the antidiscrimination law in Brazil, most incidents of racism were treated as “injúria,” an injury to one’s honor parallel to racial insult, which officials tended to dismiss as personal problems rather than enforcing the law).

¹²⁸ See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 53, 77–78 (Mari J. Matsuda et al. eds., 1993) (describing the “marketplace of ideas” as untenable because “the idea of racial inferiority of nonwhites infects, skews, and disables the operation of the market”); see also STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH . . . AND IT’S A GOOD THING, TOO 118 (1994) (“[t]he marketplace of ideas—the protected forum of public discourse—will be structured by the same political considerations it was designed to hold at bay: and therefore, the workings of the marketplace will not be free in the sense required”); OWEN M. FISS, THE IRONY OF FREE SPEECH 16 (1996) (noting “the fear is that the [hate] speech will make it impossible for these disadvantaged groups even to participate in the discussion. In this context, the classic remedy of more speech rings hollow. Those who are supposed to respond cannot.”); SUNSTEIN, *supra* note 19, at 178 (“[R]ules that are content-neutral can, in light of an unequal status quo, have severe harmful effects on some forms of speech”).

¹²⁹ See WALKER, HATE SPEECH, *supra* note 33, at 45 (describing the ACLU position that the best response to bad speech is more speech).

rather than promoting a fuller discourse.¹³⁰ Group-based civil actions that provide remedies and resources for public education enable an effective platform for the public response to hate speech that an individual speaker alone cannot have. Commentator Katharine Gelber describes the provision of educational, material and institutional support to victims of hate speech, as a “capabilities-oriented” hate speech policy that enables hate speech victims to “speak back.”¹³¹

By way of further comparison, Australia’s network of state and federal laws prohibit hate speech in both the criminal and civil context. But, the most widely enforced are those that are civil complaints-based laws.¹³² Yet, the Australian context also cautions against relying upon the use of a civil context without a public education campaign focus, inasmuch as the preponderance of out-of-court settlements and confidential conciliation proceedings limit the educative impact of the cases on the public.

Furthermore, civil action approaches to hate speech run the risk of unfairly forcing already vulnerable populations to bear the burden of enforcing hate speech laws that will benefit the entire society. Particularly, in jurisdictions that lack contingent fee arrangements that provide incentives for lawyers to take on the legal cases of the low to moderate-income clients, there is the concern that victims may lack the material means to enforce the law effectively. In such contexts, civil legislation should be considered in conjunction with an administrative apparatus that provides a locus for filing hate speech civil complaints and having those complaints investigated and prosecuted by government representatives (as employment discrimination complaints are handled by the Equal Employment and Opportunity Commission in the United States). Such a hybrid government

¹³⁰ See FISS, *supra* note 128, at 17 (justifying the regulation of hate speech as “a conception of democracy which requires that the speech of the powerful not drown out or impair the speech of the less powerful”).

¹³¹ KATHARINE GELBER, *SPEAKING BACK: THE FREE SPEECH VERSUS HATE SPEECH DEBATE* 117 (2002); see also Coliver, *supra* note 22, at 374 (concluding that civil and administrative remedies are preferable to criminal hate speech remedies because they “are far more effective in granting relief to injured parties and promoting education than jail sentences”).

¹³² See Judith Bannister, *It’s Not What You Say But the Way That You Say It: Australian Hate Speech Laws and the Exemption of “Reasonable” Expression*, 36 FLA. ST. U. L. REV. 23, 27–28 (2008) (describing the extensive and overlapping federal and state enforcement mechanisms available to support the Australian Federal Racial Hatred Bill).

enforcement/private litigation civil model should provide the benefits of: 1) empowering hate speech victims with the direct right to sue; 2) diminishing the risks of selective enforcement by preventing government agency enforcers from being the exclusive litigators; and 3) enabling the government to use the expressive function of the law to publicly articulate the state opposition to hate speech without all the disadvantages which the criminal law context brings.

Criminal law is often viewed as the ideal space in which the state expresses the social norms it seeks to promote and conveys that the norms are public values and not merely private grievances.¹³³ Yet, the civil context can also be crafted as a venue for the state to use the expressive function of the law. Indeed, political theorist Corey Brettschneider suggests that there are many other ways in which the state can use its expressive power to promote the value of equality to undermine the message of hate speech.¹³⁴ In jurisdictions in which the criminal law is the sole venue for hate speech enforcement, adding civil sanctions in addition to better training law enforcement officials may be preferable to completely eliminating the criminal provisions and inadvertently communicating the public message that hate speech is no longer of significant concern to the state.

V. CONCLUSION

In short, civil remedies should be incorporated into the Latin American struggle against hate speech, because civil as opposed to criminal law sanctions are better equipped to address the deleterious effects of hate speech on racial equality that are much more pervasive than criminal law's primary concern with speech that incites physical violence. Furthermore, this exploration of the Latin American experience with hate speech may also serve as a useful contribution to the scholarly conversation about hate speech

¹³³ See Julie C. Suk, *Denying Experience: Holocaust Denial and the Free Speech Theory of the State*, in *THE CONTENT AND CONTEXT OF "HATE SPEECH": RETHINKING REGULATION AND REMEDIES* (Michael Eric Herz & Peter Molnar eds., forthcoming 2011) (discussing how the French criminalization of Holocaust denial enhances the state's legitimacy).

¹³⁴ See Brettschneider, *supra* note 21, at 1009-13 (discussing the different ways the state can use its expressive power to promote equality—such as Senate confirmation hearings, establishing monuments and public holidays, mandating state standards for teaching civil rights history, and finally, through the state spending power).

globally. The issue of racist speech and racial discrimination in Latin America as it affects Afro-descendants in particular is rarely discussed when comparative analyses of hate speech laws are presented. It is typically the comparison between the United States as a presumably free speech absolutist jurisdiction that is oft-compared to European jurisdictions that restrict hate speech in varying ways.

The longstanding comparisons between the United States and Europe often get stymied in the competition between prioritizing free speech or human dignity as democratic values.¹³⁵ When the binary comparisons are made it is presumed that the U.S. experience is entrenched in its concern with avoiding the First Amendment abuses of the McCarthy era's persecution of Communists and suspected-Communists, while Europe is entrenched in its concern with avoiding the abuses of the Holocaust, and thus typically criminalizes hate speech.¹³⁶ Although it is certainly true that each nation's free speech doctrines pertain to very specific historical developments, the exclusion of Latin America in the hate speech comparative literature misses the opportunity to consider the experiences of a region that has both endured historical censorship of voices of dissent, while racial minorities have been stigmatized and exposed to racial violence most typically at the hands of law enforcement officials. Examining the Latin American context provides the opportunity to reconsider the entrenched positions of the traditional hate speech comparative law binary.

Specifically, the Latin American context demonstrates the enhanced value that hate speech regulations with civil remedies have in the new world order where racism is globally rejected and explicit racial segregation laws are absent, but racist discourse sustains racial hierarchy nonetheless. Broadening the hate speech

¹³⁵ THE CONTENT AND CONTEXT OF "HATE SPEECH": RETHINKING REGULATION AND REMEDIES, *supra* note 133.

¹³⁶ See MACKINNON, *supra* note 6.

The official history of speech in the United States is not a history of inequality – unlike in Europe, where the role of hate propaganda in the Holocaust has not been forgotten. In America, the examples that provide the life resonance for the expressive freedom, the backdrop of atrocities for the ringing declarations, derive mostly from attempts to restrict the political speech of communists during the McCarthy era.

Id. at 74.

debate beyond the U.S.-Europe binary, with the consideration of Latin America, more clearly demonstrates the connection between hate speech and furthering equality that Critical Race Theory scholars have long emphasized as essential.¹³⁷ Perhaps with the concrete example of hate speech harms in Latin America, the transnational conversation about hate speech regulations can be enriched and entrenched positions on racist speech reconsidered.¹³⁸ “[S]peech always matters, is always doing work; because everything we say impinges on the world in ways indistinguishable from the effects of physical action, we must take responsibility for our verbal performances — *all* of them.”¹³⁹

¹³⁷ See Charles R. Lawrence III et al., *Introduction* to WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT, *supra* note 8, at 6 (Mari J. Matsuda et al. eds., 1993) (discussing the importance of hate speech restrictions in fostering racial inequality); see also Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 797 & 803-04 (1992) (describing how an anti-subordination theory of free speech recognizes the injury done to hate speech victims whose own speech is suppressed along with the historical reality that hate speech systematically silences the less powerful to maintain their inferior group status and treatment).

¹³⁸ For instance, U.S. commentators do find that there is some traction within U.S. law for addressing the concerns with hate speech harms. See, e.g., Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 886 (1993) (discussing pragmatic methods for addressing hate speech harms through the use of tort-based or other civil remedies).

¹³⁹ FISH, *supra* note 128, at 114.

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