

**MULTIRACIAL IDENTITY RECOGNITION – WHY NOT?
A COMPARISON BETWEEN MULTIRACIALISM IN THE UNITED
STATES AND BRAZIL**

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ABSTRACT

Scholars debate the importance of multiracial identity recognition as the increasing number of self-identified multiracial individuals challenges traditional racial categories. Two reasons justify the count of multiracial individuals on censuses. One is the right to self-identification, derived from personal autonomy. The other is social: the category allows governments to accurately assess affirmative action programs' results and society's acceptance of multiracialism. Critical Race Theory and Critical Mixed-Race Studies serve as basis for my analysis over multiracial identity formation and its recognition. Comparing multiracialism in America and Brazil, I verify that both countries are in different stages regarding categorization and social acceptance of multiracial identity. Neither uses multiracial data for social programs, though. I conclude that the growth of mixed-race individuals makes the identification of race-based social programs' beneficiaries difficult, which demands the use of diverse criteria. Moreover, official recognition can serve to improve the way society deals with race.

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LIST OF ABBREVIATIONS

ADPF	Arguição de Descumprimento de Preceito Fundamental [Allegation of Disobedience of Fundamental Precept] (Brazilian Constitutional Writ)
ACLU	American Civil Liberties Union
AMEA	Association of MultiEthnic Americans
APFU	A Place for Us
CLS	Critical Legal Studies
CRMS	Critical Mixed Race Studies
CRT	Critical Race Theory
DEM	Democratas (Party)
DF	Distrito Federal [Federal District – DC]
ENEM	Exame Nacional do Ensino Médio [High School National Exam] (Standardized test for all students in the end of High School)
IASA	Improving America’s Schools Act
IEPA	Interethnic Placement Act
IBGE	Instituto Brasileiro de Geografia e Estatística [Brazilian Institute of Geography and Statistics] (Brazilian census bureau)
JACL	Japanese American Citizens League
LatCrit Theory	Latina & Latino Critical Legal Theory
LDF	Legal Defense Fund
MEPA	Multi-Ethnic Placement Act
NAACP	National Association for the Advancement of Colored People
NABSW	National Association of Black Social Workers

OMB	Office of Management and Budget
PNAD	Pesquisa Nacional por Amostra de Domicílios (Brazilian National Household Survey)
Project RACE	Reclassify All Children Equally
STF	Supremo Tribunal Federal [Brazil Federal Supreme Court]
UNB	Universidade de Brasília
UNESCO	United Nations Educational, Scientific and Cultural Organization

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INTRODUCTION

While multiracial identity has gained more importance in academic debates in the United States, other countries such as Brazil have engaged with the issue for decades. Controversy over multiracialism arises mainly through the possibly negative social consequences that its recognition could cause to other minorities' civil rights achievements. However, the number of multiracial individuals continues to grow. Through comparing the United States and Brazil, this paper argues that multiracial individuals deserve official recognition through a specific category on censuses by reason of individual autonomy, and expanding our awareness of the true beneficiaries of affirmative action programs. In addition, this paper demonstrates how multiracialism can change a society's perception about race through bridging racial groups and stimulating tolerance and respect for racial differences.

Context

Race is a social construct. Due to its porosity and constant change of meaning within a society, its boundaries are hard to define.¹ Most scholars use the terms race, ethnicity and culture interchangeably, whereas Professors like Paul Gilroy distinguish race from the latter two. According to Gilroy, race does not signify a common origin or similarity of customs, language and beliefs, but a social construct based mainly on phenotype and ancestry.² Current research in sociology, psycholo-

¹ See Michael Omi & Howard Winant, *Racial formation in the United States: from the 1960s to the 1980s* (New York: Routledge, 1986), cited in José Pepels, *The myth of the positive crossed categorization effect* (Amsterdam: Thela Thesis, 1999) at 255.

² Paul Gilroy, *The black atlantic: modernity and double consciousness* (London: New Left Books, 1993), cited in Jonathan Friedman, "Global Crisis, the Struggle for Cultural Identity and Intellectual

gy, and political science further emphasize the constructionist view by defining race under psychological, environmental and familial factors. Sense of belonging to a racial group and desire to maintain racial heritages due to familial and social relationships are important in the way individuals see themselves regarding race.³ Therefore, using biology as a determining factor in categorizing individuals by race causes particular difficulties for multiracial people. Societies and governments tend to classify mixed-race individuals as the same race of the minority parent, even when multiracial people do not self-identify as such. In addition to phenotype and ancestry, social, educational and economic statuses have played important roles in defining the racial category of individuals.⁴

Thus, using official racial categories without acknowledging multiracialism can influence racial identity and restrict multiracial individuals' self-determination. The importance of official recognition of multiracialism is emphasized by the fact that race categories are fundamental for social programs aiming at promoting racial equality. One of the main concerns of governments and activists in acknowledging multiracial identity with a specific category relies on the possible confusion such change could cause to the implementation of social policies.

Porkbarrelling: Cosmopolitans versus Locals, Ethnics and Nationals in an Era of De-hegemonisation" in Pnina Werbner & Tariq Modood, eds, *Debating Cultural Hybridity: Multi-Cultural Identities and the Politics of Anti-Racism* (London: Zed Books, 1997) 70 at 76. Accord Anthony Appiah & Amy Gutmann, *Color conscious: the political morality of race* (Princeton: Princeton University Press, 1996) at 88-90.

³ See e.g. Kerry Ann Rockquemore & David L. Brunnsma, "Socially embedded identities: Theories, Typologies and Processes of Racial Identity among Black/White Biracials" (2002) 43:3 *Sociological Quarterly* 335.

⁴ See Paul R. Spickard, "The Illogic of American Racial Categories" in Maria P. P. Root, ed, *Racially Mixed People in America* (Newbury Park: Sage Publications, 1992) 12 at 17. See also Stanley A. Bailey, Mara Loveman & Jeronimo O Muniz, "Measures of 'Race' and the analysis of racial inequality in Brazil" (2013) 42:1 *Social Science Research* 106 at 108-109.

Scholars dedicated to Critical Race Theory tend to associate multiracial identity with colourblind discourse, disregarding the increasing number of individuals who self-identify as multiracial, and the positive social effects of official multiracial identity recognition.⁵ Debates around colourblindness and colour consciousness have strongly influenced the government decision to acknowledge multiracial identity with a specific category in the United States. Professor Twila L. Perry's clarifications about the difference between colourblind individualism and colour and community consciousness point out that colourblind individualism represents the belief that the complete eradication of racism is possible – or already achieved. In addition, she argues that for colourblindness advocates, race should not be important in evaluating individuals; society should pursue colourblindness as a goal, and the individual is the centre of the analysis of rights and interests.⁶

By contrast, colour- and community-consciousness ideology acknowledges that race strongly influences the lives and choices of individuals. Perry explains that within a colour-consciousness ideology, society should value the importance of a multicultural society, respecting differences and preserving diversity. Also, rights and interests of the group with which the individual identifies should prevail over one's own rights and interests.⁷

⁵ See Kim M. Williams. *Mark one or more: civil rights in multiracial America* (Ann Arbor: University of Michigan Press, 2006) at 30-34, 106-126 [Williams, *Mark one or more*].

⁶ Twila L. Perry, "The Transracial Adoption Controversy: An Analysis of Discourse and Subordination", in Kevin R. Johnson, ed, *Mixed-Race America and the Law: A Reader* (New York: New York University Press, 2003) 364 at 364-367 [Perry, "Transracial Adoption Controversy"]. Professor Perry uses the concepts of colour consciousness and community consciousness interchangeably. Community consciousness, however, signifies the individual's understanding that he/she belongs to a certain group with common interests, beliefs, values and experiences. Its definition is broader than the colour consciousness one, and can be founded in culture, ethnicity and any other social identity.

⁷ *Ibid.*

Multiracial identity recognition does not follow colourblindness or colour-consciousness ideologies in their entirety. Instead, it relies on principles that belong to both. For instance, multiracial identity advocates hold that the official recognition of mixed-race individuals can help to reduce or eradicate racism. They point out that mixed-race individuals might serve as bridges between different racial groups and a colourblindness ideal should be a social goal.⁸ Multiracial advocates also acknowledge that race still influences individuals' lives and choices and cite this as the fundamental reason why governments should allow mixed-race individuals to self-identify as such. Moreover, they hold that society is not yet colourblind. Tolerance, as well as respect, for differences should be the rule in pluralistic and multiracial communities.⁹

In order to demonstrate how differently societies, governmental institutions, and legal systems have dealt with multiracial identity recognition, this paper will introduce and compare multiracialism in the United States and Brazil. Even though one could explore many other countries' legal systems researching the topic, this paper focuses solely on the American and Brazilian systems due to their particular differences. For instance, each American state has its own legal system, with specific statutes and court decisions. In Brazil, on the other hand, the Congress, federal

⁸ See Cynthia L. Nakashima, "Invisible Monster: The Creation and Denial of Mixed-Race People in America" in Maria P. P. Root, *supra* note 4, 162 at 173; Christine C. Iijima Hall, "Coloring Outside the Lines" in Maria P. P. Root, *supra* note 4, 326 at 328; Carla K. Bradshaw, "Beauty and the Beast: On Racial Ambiguity" in Maria P. P. Root, *supra* note 4, 77 at 79. Cf G. Reginald Daniel & Josef Manuel Castaneda-Liles, "Race, Multiracialism, and the Neoconservative Agenda" in David L. Brunson, ed, *Mixed Messages: Multiracial Identities in the "Color-Blind" Era* (London: Lynne Rienner, 2006) 125 at 143 (mixed-race people "will increasingly play a central role in reifying or deconstructing the racial status quo").

⁹ See Williams, *Mark one or more*, *supra* note 5 at 7-15 (groups involved in the American multiracial movement focus their claims on respect for racial differences).

government and Supreme Court are the core of legal norms construction, leaving to state legislatures and state courts little space for legal creation and transformation. In addition, jurisprudence still represents the most important source of law in the common law system of the United States, while in the Brazilian civil law system statutes are the foundation of law. Therefore, my focus in tackling multiracial identity recognition will rely on the American Supreme Court's decisions and occasionally on state courts', as well as Brazilian statutes and the Brazil Federal Supreme Court's jurisprudence.

The comparison between the two countries provides an interesting and useful juxtaposition of official multiracial identity recognition. In America, where the government has adopted affirmative action programs for decades, as multiracial individuals gradually self-identify as such, social policies tend to change. In Brazil, on the other hand, where the government has implemented affirmative action policies since 2002, the high rates of self-identified mixed-race people turn race-based social programs of doubtful effectiveness. Using the two countries as examples, this paper shows the importance of the official recognition of multiracialism in the social realm, no matter how differently America and Brazil deal with the topic.

Given the multiple subjects multiracial identity would influence, this paper will focus primarily on multiracial children and the impacts of multiracial identity recognition on race-based affirmative action programs. The paper will explain how racial identity is inherent to an individual's self-determination and that childhood is the critical period of its formation. Next, the paper will analyze court decisions in the United States and statutes in Brazil regarding child custody and adoption of mixed-race children. Also, the paper gives special attention to court decisions regarding affirma-

tive action programs in the two countries, especially in the American Supreme Court and the Brazilian Federal Supreme Court.

In addition to the individual perspective of multiracialism under personal autonomy, this paper demonstrates that multiracial identity has a social impact that goes beyond discussions about colourblindness and colour consciousness. Mixed-race individuals are gradually self-identifying outside the “monoracial” categories. Therefore, official institutions should be prepared to deal with deep changes in society’s makeup, especially in the United States. In Brazil, the high number of self-identified multiracial individuals reveals the difficulty in using race in affirmative action policies and thus suggests the use of other criteria in order to fight inequality. If American and Brazilian governments effectively manage multiracialism, social acceptance of racial differences and tolerance can improve racial relations, reducing or minimizing discrimination.

Theoretical framework and literature review

Scholars and activists have researched and debated multiracialism from different theoretical perspectives, aiming to explore multiracial individuals’ personal perceptions of race and the consequences of social and official recognition of multiracial identity.¹⁰ Considering the intertwined approaches of legal, political and social studies of race, Critical Race Theory serves as the theoretical framework of this research, particularly the subgroup of Critical Mixed Race Studies.¹¹

¹⁰ The main theories which study multiracial identity, sometimes related to culture and ethnicity, are Critical Race Theory, Hybridism and Creolization.

¹¹ Critical Mixed Race Studies, online: <criticalmixedracestudies.org>.

Critical Race Theory (“CRT”) emerged from Critical Legal Studies’ (“CLS”) criticism of liberalism, especially the rule of law, the neutrality principle and the idea that politics and law do not influence one another. Although CRT scholars agree that some of CLS’s ideas about civil rights are fundamental for the achievement of social justice, they questioned the lack of attention CLS gave to people of colour and their rights claims.¹²

Professors Derrick Bell and Kimberle Crenshaw are two of the first who criticized CLS, setting the basis for Critical Race Theory.¹³ Other scholars presented strong contributions to CRT, including Richard Delgado and Jean Stefancic.¹⁴ With the influence of other studies, CRT formed subgroups like Intersectionality Theory, LatCrit Theory and Critical Mixed Race Studies (“CMRS”).¹⁵ G. Reginald Daniel is one of the most engaged scholars in the study of multiracial identity in CMRS subgroup.¹⁶ Other important authors in CRT and CMRS will also serve as scholarly background to the present work.¹⁷

[CRT] is the transracial, transdisciplinary, and transnational critical analysis of the institutionalization of social, cultural, and political orders based on dominant conceptions of race. CMRS emphasizes the mutability of race and the porosity of racial boundaries in order to critique processes of racialization and social stratification based on race. CMRS addresses local and global systemic injustices rooted in systems of racialization.

¹² See e.g. Kimberle Crenshaw, “Twenty Years of Critical Race Theory: Looking Back To Move Forward” (2011) 43 *Connecticut Law Review* 1253 at 1309.

¹³ See Richard Delgado & Jean Stefancic, *Critical race theory: an introduction* (New York: New York University Press, 2012) at 6.

¹⁴ See e.g. Delgado & Stefancic, *supra* note 13.

¹⁵ *Ibid* at 57-62.

¹⁶ See e.g. G. Reginald Daniel, “Black and White Identity in the New Millennium: Unsevering the Ties That Bind” in Maria P. P. Root, ed, *The Multiracial Experience: Racial Borders as the New Frontier* (Thousand Oaks: Sage Publications, 1996) 121.

¹⁷ See e.g. Tanya Katerí Hernández. “The Value of Intersectional Comparative Analysis to the ‘Post-Racial’ Future of Critical Race Theory: A Brazil-U.S. Comparative Case Study” (2011) 43 *Connecticut Law Review* 1407.

Objective and methodology of research

Although CRT and CMRS have strongly contributed to the understanding of multiracialism and its individual and social repercussions, there are still gaps. Most debates about official multiracial identity recognition rely on arguments of colour-blindness and the heterogeneity of mixed-race individuals as a group. As the analysis over multiracialism and its strong impact on individuals' lives, social acceptance of interracial relations, and social policies is lacking, this paper researches multiracial identity in both its individual and social dimensions. It aims to offer a contribution to current discussions about multiracial identity by arguing that, due to changes in the social composition of American and Brazilian societies, recognition of multiracial identities is a necessity. Official acknowledgment of the growing number of mixed-race individuals in both the United States and Brazil can improve affirmative action programs and change individuals' mentality about race.

This paper will use mixed methods of research. It will explore the legal scholarship's discourse in CRT and CMRS. Other sciences' literature will contribute to discussions about race and multiracial identity.¹⁸ This paper will also compare the racial categorization systems in the United States and Brazil, making use of case studies and secondary analysis of official data and demographic statistics related to

¹⁸ This paper discusses theory, statutes and court decisions when comparing multiracial identity in America and Brazil. Therefore, the main method of this research is qualitative. Due to the chosen theoretical approach, the quantitative research method would not add significant value to the current body of work. Also, the cases under analysis in this paper are the ones scholars cite most about race and multiracial identity.

race from the Office of Management and Budget,¹⁹ the United States Census Bureau,²⁰ and Instituto Brasileiro de Geografia e Estatística (“IBGE”)²¹ websites.

Thesis plan

The work starts by describing and analyzing the concepts of race and racial boundaries. In Part 1, it will examine the evolution of law, especially in the United States, whose scholarship, legal system, and jurisprudence have strongly influenced the study of race in Western countries including Brazil. Next, it will explore racial and multiracial identity, racial identity formation, and the idea of multiple consciousness. In Part 1, the paper will then analyze the importance of demographic surveys on race and the official multiracial identity recognition, with the inclusion of a specific category on census or a “mark-all-that-apply” option. Although scholars and society debate the abolition of racial categorization, race still plays an undeniable role on individuals’ lives. Therefore, this paper will demonstrate that a mark-all-that-apply option or a specific multiracial category may be effective, depending on the social acceptance of multiracialism. In addition, it will argue that if a just society is one that is free from racial discrimination, all individuals should receive substantive equal treatment. Therefore, the recognition of mixed-race individuals as a singular group represents an individual right, and may serve as a solution to the improvement of interracial relations.²²

¹⁹ U.S. Office of Management and Budget. Online: <<https://www.whitehouse.gov/omb>>

²⁰ United States Census Bureau. Online: <www.census.gov>

²¹ BRA. Instituto Brasileiro de Geografia e Estatística (“IBGE”). Online: <www.ibge.gov.br>

²² See *supra* note 8. According to the authors, mixed-race individuals can negotiate their racial identities, interacting amongst different racial groups. Therefore, they can improve social relations and reduce racial polarization and conflict. See also José Pepels, *supra* note 1 at 3.

Part 1 will also argue that accurate racial data obtained in censuses considering the number of mixed-race individuals may indicate the need to review current social policies that rely on race. If affirmative action programs are not effective in improving the lives of the most disenfranchised racial groups in society, then governments, universities, and other institutions should adopt complementary policies or use additional criteria, such as class.

Part 2 describes the specifics of how the American and Brazilian legal systems relate to multiracial identity recognition. One section will cover the United States and a second section will cover Brazil. The first section will present how the United States has dealt with multiracial identity recognition and the adoption of an official multiracial category. It will explain the importance of scholarship and the multiracial movement in regards to the introduction of a “Mark-all-that-apply” option on the Office of Management and Budget’s demographic policy for the year-2000 census. Following this discussion, the paper will explore the slow evolution of jurisprudence in America related to multiracial children since *Palmore v. Sidoti*,²³ as well as the current courts’ perspective on affirmative action programs in the country, with the aim of considering how the Supreme Court might deal with multiracial identity in future cases.

The second section will explore the Brazilian social and legal systems in relation to multiracial identity. Multiracial categories have always been common and im-

²³ *Palmore v. Sidoti*, 466 U.S. 429 (1984) [*Palmore*]. The Supreme Court decision in *Palmore* sets the interpretation of the best interest of the child principle and its relation to race. In this case, the white father of the child claimed custody under the argument that the white mother remarried a black man. The Supreme Court granted child custody to the mother, concluding that the best interest principle in child custody cases is a substantial governmental interest for the purposes of Equal Protection Clause. Therefore, racial classification should not serve as reason to remove a child from custody of the natural mother.

portant in Brazil, especially today, when around 40% of the population self-identifies as mixed-race.²⁴ Although miscegenation²⁵ in Brazil has always been present, Brazilian government and courts' views have always been binary: whites and nonwhites (which comprises of blacks, indigenous and mixed-race people). Therefore, there is no court decision or statute specifically regarding multiracial individuals. Race-based affirmative action programs give the same treatment to multiracial individuals and African-Brazilians as a single minority group, while both categories combined reaches more than half of the self-identified population. Also, the government states that race-based affirmative action in the country has been successful in promoting racial equality, although most Brazilians are potential beneficiaries of these programs and many nonwhite individuals in poverty gain no assistance through these policies.

After looking at notions of race and racial boundaries, multiple consciousness, racial categorization, and then linking multiracialism to affirmative action programs, this paper will conclude by comparing the American and Brazilian systems in regards to multiracial identity. This structure will build the foundation for the main findings of the present research: American and Brazilian governments need to recognize multiracial identity as a distinct category. The reasons for such recognition go beyond helping a multiracial individual's self-esteem. The count of mixed-race indi-

²⁴ BRA. IBGE. Pesquisa Nacional por Amostra de Domicilios - PNAD (2008), Tabela 1.2, online: <www.ibge.gov.br/home/estatistica/populacao/trabalhoerendimento/pnad2008/brasilpnad2008.pdf>

²⁵ Oxford Dictionaries (2015), *sub verbo* "miscegenation", online: <http://www.oxforddictionaries.com/us/definition/american_english/miscegenation> ("The interbreeding of people considered to be of different racial types"). "Miscegenation", for the purpose of this research, means the mixing of different racial groups through marriage, sexual relations and procreation. "Racial groups", as further explained, are the ones that a certain society recognizes as such, in a given moment in time. Therefore, miscegenation is a constant and fluid social process, and depends on how society and official institutions (re)define racial boundaries and racial groups throughout history.

viduals helps official institutions monitor changes in the social makeup of the two countries. Consequently, United States and Brazil can better determine whether their respective race-based affirmative action policies are still effective. Moreover, they can implement social programs using multiracialism as a factor to change the way American and Brazilian societies deal with race.

1 RACE, MULTIRACIALISM AND (MULTI) RACIAL IDENTITY

This part will explore racial boundaries, racial identity and racial categories using personal autonomy, or self-determination, as a starting point. That said, there will not be a deep and comprehensive examination of personal autonomy and its complexities. The brief analysis of personal autonomy in this work aims exclusively at situating the topic and introducing the study of multiracial identity in its individual and relational perspectives. In addition, please note that both American and Brazilian categorization systems are used as examples in the theoretical analysis presented in this part.²⁶

1.1 RIGHTS TO SELF-DETERMINATION AND SELF-IDENTIFICATION

Individual rights and freedoms are fundamental to all democratic states. Although not all philosophers agree that autonomy is an individual right, there is no doubt that it represents an irrefutable value and important foundation to all current constitutional systems.²⁷ As John Christman points out, autonomy is “the locus of interpersonal respect and reciprocity that principles of justice for pluralistic democracies are built upon”.²⁸

²⁶ The main comparison between multiracialism in the United States and Brazil takes place in Part 2.

²⁷ See John Christman, “Autonomy in Moral and Political Philosophy” in *The Standard Encyclopedia of Philosophy*, Spring 2011, ed by Edward N. Zalta, online: <plato.stanford.edu/archives/spr2011/entries/autonomy-moral/>, s 1 [Christman, “Autonomy in Moral and Political Philosophy”]. See also Jeremy Waldron, “The Works of Joseph Raz: Autonomy and Perfectionism in Raz’s *Morality Of Freedom*” (1989) 62 *South California Law Review* 1097 at 1123-1125; Nicole Hassoun, “Raz on the Right to Autonomy” (2014) 22:1 *European Journal of Philosophy* 96 at 96-105.

²⁸ John Philip Christman, *The Politics of Persons: Individual Autonomy and Socio-historical Selves* (Cambridge: Cambridge University Press, 2009) at 15 [Christman, *The Politics of Persons*].

In a broader sense, personal autonomy is the capacity of persons to make choices, free from coercion or manipulation, in accordance with their personal beliefs and values. Autonomy involves self-governing, self-determination, rationality, responsibility, self-respect and self-esteem.²⁹ Joseph Raz clarifies that “[a]utonomy is valuable only if exercised in pursuit of the good... [or] morally accepted options”.³⁰

Autonomy and freedom have always been associated with each other, since it is basic to any political system that the autonomous individual is free to make choices.³¹ Although autonomy and freedom are intimately connected, they are not synonyms. Freedom can be generally defined as the power to decide whether or not to practice individual acts, while autonomy is a broader notion regarding the statuses of a person.³² Even though the concepts of individual autonomy and freedom are different, only political systems that give room for choice allow effective individual autonomy.

The traditional autonomy model is deeply individualistic and does not consider interpersonal, social, cultural and historical factors that connect individuals within a society. Joseph Raz, however, clarifies that individual autonomy has a relational aspect, which corresponds to an internal/psychological factor and a social relational component.³³ Thus, self-trust and self-esteem are aspects of relational autonomy, as much as interpersonal relations and social environments. All these factors influence an individual’s desires, aspirations, personality, sense of self, and much

²⁹ Christman, “Autonomy in Moral and Political Philosophy”, *supra* note 27, s 3.3.

³⁰ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988) at 381.

³¹ See Alberto Melucci, “Identity and Difference in a Globalized World” in Werbner & Modood, *supra* note 2, 58 at 63 (“even a non-choice constitutes a choice because it means rejecting an opportunity”).

³² See Christman, “Autonomy in Moral and Political Philosophy”, *supra* note 27, s 1.1.

³³ Raz, *supra* note 30 at 400.

more.³⁴ Also, they reflect social identities that might influence life choices people make on a psychological or social level. Therefore, social identities tie individuals together and provide them with a sense of value, of self-respect, and of belonging.³⁵

Generally, social identities operate under categories. Social categories are social constructs and, therefore, are continuously in flux. Categories are a way in which social institutions express recognition for identities, mainly to minority and oppressed groups. Without institutional recognition and its acknowledgement by others, individuals cannot fully express one or more of their identities and autonomy.³⁶

Amongst the multiple identities individuals may develop, racial identity is a crucial one. Official racial categories have played a fundamental role in law and in the way governments and society deal with races. In the past, race has served as a foundation for slavery, social segregation, and oppression. Today, aiming to put an end to historical white domination and remaining segregation, American and Brazilian governments implement public policies that rely on racial categorizations.³⁷ However, current racial categories have been the object of strong criticism and controversy. Scholars and activists debate the need to put an end to, or to review official racial classifications. Different reasons inform this opposition, such as increasing immigration and intermarriage rates that affect societies' racial composition.³⁸

³⁴ *Ibid.*

³⁵ See Christman, *The Politics of Persons* *supra* note 28 at 164-172; Christman, "Autonomy in Moral and Political Philosophy," *supra* note 27, s 3.

³⁶ See Christman, *The Politics of Persons*, *supra* note 28 at 44-45 and 183. *Cf* Amy Gutmann, *Identity in democracy* (Princeton: Princeton University Press, 2003) at 8 ("[l]iving your life as you see fit" presupposes that groups do not impose identities against individuals' will").

³⁷ I will explain the relation between social policies and racial categorizations in Part II.

³⁸ See Williams, *Mark one or more*, *supra* note 5 at 15. See also Carrie Lynn H. Okizaki, "What Are You?' Hapa-Girl and Multiracial Identity" (2000) 71:2 *University of Colorado Law Review* 463 at 480-481.

In American and Brazilian societies, where race is still relevant in shaping individuals' lives, official institutions should not abandon racial categories. If individuals find support in racial groups with which they identify, states should provide protection to these groups. Moreover, considering the racial dynamics of America and Brazil, official institutions should use the most accurate demographic instruments possible to understand social changes regarding race and mixing.

1.2 RACE AND RACIAL BOUNDARIES

Scholars dedicated to Critical Race Theory hold that race is mainly a social construct. They argue that there are no significant biologic differences among individuals that would make a precise classification into different racial groups possible.³⁹ However, this argument has not always been part of public discourse.

During the Colonialism era in Western countries, differences among racial groups relied on biology and religion. These were used to justify that the race of one's ancestors, mainly the non-white ones, determined the race of the individual. From the establishment of colonies until the Twentieth century, legal norms and court decisions, especially in the United States, found support in the studies of eugenicists and other so-called race experts. American society and American courts saw miscegenation as unnatural, since they believed God created races with different characteristics. Therefore, according to them, the offspring of multiracial unions would only inherit the weaknesses of both races.⁴⁰

³⁹ See Omi & Winant, *supra* note 1 at 255. See also R. L'Heureux Lewis & Kanika Bell, "Negotiating Racial Identity in Social Interactions" in Brunnsma, *supra* note 8, 249 at 249-266.

⁴⁰ See also Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford: Oxford University Press, 2009) at 7-8, 69-80.

When categorizing mixed-race individuals became difficult due to the vagueness of laws in determining who was non-white, phenotype helped build the definition of race, especially in American courts. Anthropologists and other culturalist experts put forward the idea that it was impossible to define a person's race only by appearance, while biologists defended that ancestry and phenotype were valid criteria. Judges saw biologic definitions more precise and concrete than the ones offered by culturalists. Therefore, ancestry and physical characteristics were elements American courts often used to differentiate races.⁴¹

The importance of courts' and legislatures' respective efforts in setting legal racial boundaries relied on the preservation of the dominant societal position of whites over other races. As whites belonged to the only "pure" racial group, the laws at that time fully protected their rights. On the other hand, American statutes and court decisions contributed to the loss of property and inheritances of non-whites, as well as their segregation in housing and education.⁴²

Despite the objections whites made to interracial unions and their resistance to accepting multiracial individuals, miscegenation has taken place in the United States since colonization. The country's immigration patterns were very important in the fluidity of racial boundaries as well. Both mixed-race individuals and immigrants had to fit into one of the racial categories that existed.⁴³

⁴¹ *Ibid* at 119-130.

⁴² *Ibid* at 3-162.

⁴³ See Delgado & Stefancic, *supra* note 13 at 8 (racial boundaries have tended to be flexible according to country, context and time). See also George Yancey, "Racial Justice in a Black/Nonblack Society" in Brunnsma, *supra* note 8, 49 at 49-50; Williams, *Mark one or more*, *supra* note 5 at 30.

Undoubtedly, although immigration has been an important factor to the fluidity of racial boundaries in the United States and Brazil, the increasing interracial marriage rates, especially in America, have challenged legal systems which were built around differentiating races.⁴⁴ The offspring of interracial marriages evince that racial borders cannot be precise and that efforts to racially categorize individuals by physical appearance and/or ancestry tend to fail.

The “one-drop,” or “ancestry,” rule was an important tool to guarantee white supremacy and resist miscegenation in American history. The rule puts forth that an individual who has any racial ancestry other than white – even a remote one – belongs to that racial group.⁴⁵ Although the one-drop rule in the United States applied principally to African-Americans, segregation in American society existed in relation to all races, discrimination reached Mexicans, Chinese, Filipino and others with no “pure white blood”.⁴⁶

In the Nineteenth and Twentieth centuries, struggles for civil rights recognition and equality among different racial groups in the United States became stronger, mainly for African-Americans. Segregation and discrimination of African-Americans were the result of long years of slavery and Jim Crow laws.⁴⁷ Still, inequality has persisted among diverse racial groups in the United States through the end of the

⁴⁴ See Joshua R. Goldstein & Ann J. Morning, “Back In The Box: The Dilemma Of Using Multiple-Race Data For Single-Race Laws” in Joel Perlmann & Mary C. Waters, eds, *The New Race Question: How the Census Counts Multiracial Individuals* (New York: Russel Sage Foundation, 2005) 119 at 119-121.

⁴⁵ See Delgado & Stefancic, *supra* note 13 at 47.

⁴⁶ See Pascoe, *supra* note 40 at 116-119, 200-205. *Contra* F. James Davis, “Defining Race: Comparative Perspectives” in Brunsma, *supra* note 8, 15 at 15-16 (the one-drop rule applied exclusively to African-Americans).

⁴⁷ See Pascoe, *supra* note 40 at 200-205.

Twentieth century and into the Twenty-first century.⁴⁸ (There will be a further analysis about American history of racial segregation and discrimination in Part 2).

Brazil presents a different case. There were no expressive impediments to interracial sex and interracial unions. Also, racial boundaries have relied essentially on phenotype and not on the one-drop rule.⁴⁹ Phenotype, in short, indicates the physical traits that characterize a person.⁵⁰ Although individuals inherit physical characteristics from parents, phenotype and ancestry are not synonyms; the latter refers more so to lineage or descent. Professors Richard Delgado and Jean Stefancic highlight that

[p]eople with common origins share certain physical traits, of course, such as skin color, physique and hair texture. But these constitute only an extremely small portion of their genetic endowment, are dwarfed by that which we have in common and have little or nothing to do with distinctly human, higher-order traits, such as personality, intelligence, and moral behavior.⁵¹

Today still, while in the United States appearance matters less than lineage for racial self-categorization, phenotype is determinative in classifying individuals by race in Brazil.⁵² Aiming to fight racial inequality, both countries have changed laws and implemented race-based affirmative action programs, which rely on racial categories. American and Brazilian categorization systems come from the one-drop rule

⁴⁸ See Davis, *supra* note 46 at 20. See also Lewis & Bell, *supra* note 39 at 257.

⁴⁹ See Hernández, *supra* note 17 at 1412-1420. See also G. Reginald Daniel. "Beyond Black and White: The New Multiracial Consciousness" in Maria P. P. Root, *supra* note 4, 333 at 338.

⁵⁰ Oxford World Encyclopedia (2014), *sub verbo* "phenotype", online: <www.oxfordreference.com/view/10.1093/acref/9780199546091.001.0001/acref-9780199546091-e-8969?rskey=O11QTL&result=6> ("[p]henotype means the physical characteristics of an organism resulting from heredity").

⁵¹ Delgado & Stefancic, *supra* note 13 at 7-8.

⁵² It is important to explain that phenotype matters in the United States for racial classification of others and, in Brazil, the ancestry rule serves as support for the implementation of affirmative action programs. The following sections and Part II will present examples which will better illustrate this.

and/or phenotype, respectively – both of which very controversial and imprecise. Thus, in order to consider the flexibility of racial boundaries and the important role played by racial categories in social programs, we must analyze the theories on which (multi) racial identities rely.

1.3 MULTIRACIAL IDENTITY

1.3.1 Race as a social construct

Although immigration and interracial marriage have become common in the United States and Brazil, blurring the colour lines, official institutions and academia do not unanimously accept multiracial identity. Scholars who oppose official multiracial identity recognition present at least four arguments in this regard, even though they recognize race as a social construct.

The first argument relies on the idea that miscegenation has always happened and that most individuals, especially in American and Brazilian societies, are of mixed-race. According to these critics, the appeal to the newness of multiracialism as reason for the creation of a special category in official forms does not make sense at the present.⁵³

Although the first part of this critique is true (that miscegenation has always happened), following *Loving v. Virginia*⁵⁴ more interracial couples across America began to openly acknowledge their relationships. In other words, since race is a social construct, couples formed by individuals who belong to different official tradition-

⁵³ See Rainier Spencer, “New Racial Identities, Old Arguments: Continuing Biological Reification” in Brunsma, *supra* note 8, 83 at 84.

⁵⁴ *Loving v. Virginia*, 388 U.S. 1 (1967) [*Loving*] (in *Loving*, the United States Supreme Court overturned anti miscegenation laws).

al categories have crossed racial lines to marry each other, forming families and having children.⁵⁵ Thus, even though multiracial people are not new in American and Brazilian societies, mixed-race individuals have been increasingly self-identifying as such, reflecting the limitation of official racial categories.

The second argument is that the creation of a multiracial category would imply that all multiracial individuals have the same life experiences. Scholars who oppose multiracial identity recognition charge multiracial identity advocates with essentializing mixed-race individuals' existence – that multiracial people's experiences are uniform. Of course, mixed-race individuals do have heterogeneous backgrounds; but this argument becomes problematic when the same critics do not explain how the maintenance of current official racial categories for other groups is acceptable.⁵⁶ Members of these categories – like Hispanics, Asians and blacks – do not share the same life experiences, either.

This contradiction relies on the fact that the essentialist view does not take into consideration that racial boundaries have always been flexible and that race is a social construct. For instance, African-born blacks who have immigrated to the United States in recent years do not have the same experiences of the average African-American, although they are both included in the same African-American category.⁵⁷

Paul Spickard and Jeffrey Moniz explain that

multiculturalists and multicultural educators, in their struggle against white male supremacist hegemony, often assert their diverse perspectives in

⁵⁵ See Maria P. P. Root, "Within, Between and Beyond Race" in Maria P. P. Root, *supra* note 4, 3 at 3-4. *Contra* Spencer, *supra* note 53 at 84.

⁵⁶ See Okizaki, *supra* note 38 at 470-472 (essentialism creates a "further problem of false universalization and identity splitting").

⁵⁷ See especially Gilroy, *supra* note 2 at 75-76.

essentialized, monolithic terms. Their racial discourses actually reinscribe the very kind of power relations that they seek to challenge. When multiculturalists assert their respective agendas as members of groups who define themselves in monolithic, essentialized, and categorical terms, they in turn actually ignore or marginalize those of mixed ancestry. Thus, they have replicated the same kind of inequitable power relations that they had sought to challenge.⁵⁸

In a third argument, most scholars opposing official multiracial identity recognition insist on exploring race issues based exclusively on a binary view. These critics argue that other groups do not experience the alienation of blacks and their struggle for racial justice.⁵⁹ However, these scholars fail to acknowledge that the creation and maintenance of racial categories do not focus solely on black people, and that other groups have also fought for equality. Often, one single category groups different races, ethnicities and cultures, like Hispanics in the United States. Hispanics represent an extremely heterogeneous group, formed by whites, blacks, and indigenous people, all gathered into a single category due to origin. According to the United States Census Bureau, “[o]rigin can be viewed as heritage, nationality group, lineage, or country of birth of the person or the person’s ancestors before their arrival in the United States. People who identify their origin as Hispanic, Latino, or Spanish may be of any race.”⁶⁰

The fourth criticism made against the multiracial identity recognition relies on the argument that minority groups should keep authenticity and resist assimilation, in

⁵⁸ Jeffrey Moniz & Paul Spickard. “Carving Out a Middle Ground: The Case of Hawai’i” in Brunzma, *supra* note 8, 63 at 80-81.

⁵⁹ See Juan F. Perea, “The Black-White Binary Paradigm of Race” in Richard Delgado & Jean Stefancic, eds, *Critical race theory: the cutting edge* (Philadelphia: Temple University Press, 2013) 457 at 457-460. See also Roy L. Brooks & Kristen Widner, “In Defense of the Black-White Binary: Reclaiming a Tradition of Civil Rights Scholarship” in Delgado & Stefancic, *supra*, 449 at 449-510; Yancey, *supra* note 43 at 52-54.

⁶⁰ United States Census Bureau, online: <www.census.gov/population/hispanic/>

regards to the dominant group. This criticism is mainly directed at individuals who belong to racial minority groups and marry whites, suggesting these individuals aim at moving upward in the social ladder, whether consciously or not.⁶¹ The critics' argument has two flaws, though. First, race and culture are not synonyms. For instance, as mentioned above, Professor Paul Gilroy differentiates race, culture and ethnicity. According to him, race does not determine a commonality of language, customs and beliefs. Also, members of racial groups do not have necessarily the same origin.⁶² Thus, interracial relations such as intermarriage and friendships do not correspond to assimilation of cultures. Furthermore, the notion of authenticity and resistance to "assimilation" only reinforces racial boundaries and social segregation of racial minority groups – the very boundaries against which societies have fought in the quest for racial equality.⁶³

None of the listed arguments effectively justifies the prevention of the official multiracial identity recognition. Although racial boundaries have strongly depended on phenotype and ancestry criteria, appearance is only one of the aspects that influence racial identity. Social relationships, environment and family also determine how individuals classify themselves regarding race.

⁶¹ See Charles A. Gallagher, "Color Blindness: An Obstacle to Racial Justice?" in Brunnsma, *supra* note 8, 103 at 111. See also Yancey, *supra* note 43 at 54.

⁶² Gilroy, *supra* note 2 at 76 (interaction among ethnicities and cultures results in their constant transformation, including identity). According Appiah & Gutmann, *supra* note 2 at 88-90. See also Hans-Rudolf Wicker, "From Complex Culture to Cultural Complexity" in Werbner & Modood, *supra* note 2, 29 at 36 ("cultures and ethnic groups as actual, autonomous totalities do not exist - or, at least, no longer exist").

⁶³ See Jim Chen, "Unloving" in Johnson, *supra* note 6, 471 at 471-477. See also Randall Kennedy, "How Are We Doing with Loving?" in Johnson, *supra* note 6, 64 at 64-67 [Kennedy, "How Are We Doing with Loving?"].

Although scholars recognize race is a social construct, academic debates still rely heavily on the relationship between race and biology. This reliance leads to at least two different controversies. First, there is the notion that if biology cannot explain any significant differences among races, and if society seeks equality among individuals, governments should abolish racial categories.⁶⁴ However, the problem with this perspective is that even though races do not signify much from a purely genetic perspective, individuals and societies are not yet colourblind.⁶⁵ Therefore, public policies that aim at equality should not be colourblind either. Second, reliance on phenotype or ancestry in order to create and maintain racial categories annihilates the idea of constructivism itself. If race is a social construct, how can phenotype and ancestry still group individuals? Indeed, factors other than appearance and descent are important in setting racial categories like environment, family and social relations – mostly to mixed-race individuals.⁶⁶

1.3.2 (Multi) racial identity formation and multiple consciousness

As social scientists explain, racial identity formation follows a process, which occurs mainly between pre-school age and university. During these years, children

⁶⁴ See Williams, *Mark one or more*, *supra* note 5 at 120-121 (“disparities among races” justifies collecting racial data.)

⁶⁵ *Above*, the Introduction shows that colourblindness presupposes the idea that race does not matter anymore. However, race still plays an important role in social relations, especially regarding discrimination and segregation. Racial stereotypes foment bias and violence, mainly in the United States. For instance, in the years of 2014 and 2015 three big incidents happened in America. In Ferguson, Missouri, police officers killed an 18-year-old unarmed African-American man, called Michael Brown. In the following year, in Baltimore, Maryland, the African-American Freddie Gray died in police custody. In June, 2015, the 21-year-old white man Dylann Roof opened fire in the Emanuel African Methodist Episcopal Church, killing 9 African-American people, in Charleston, South Carolina. The three cases gained notoriety in the media and caused protests.

⁶⁶ See Delgado & Stefancic, *supra* note 13 at 8. (races are “not objective, inherent, or fixed”, neither correspond to a biological or genetic reality).

perceive colour, learn about racial differences, place themselves in social settings, and analyze others in this regard. Admiration, denial, pride, acceptance and other feelings shape the racial identity formation process and contribute to racial consciousness within the individual.⁶⁷

Many factors influence the racial identity formation process, such as friendships, neighbourhoods, schools, family and mainly parents. Researching the topic in the United States, Kerry Ann Rockquemore and others conclude that parents are the most important element in the identity formation of individuals. Most parents who belong to racial minority groups prepare their children for discrimination they may face during their lives. If both parents belong to the same racial category group, the child's racial identity formation will not follow a process as intricate as the one for mixed-race children.⁶⁸

Multiracial individuals go through a complex racial identity formation process due to the diversified information and guidance they receive regarding racism from family and friends. The way society responds to the multiple ancestries of an individual and/or their singular phenotype may also affect this process. Thus, multiracial individuals may develop one out of five different racial identities: the one of the

⁶⁷ See e.g. Rockquemore & Brunnsma, *supra* note 3 at 335-336.

⁶⁸ Kerry Ann Rockquemore, Tracey Laszloffy & Julia Noveske, "It All Starts at Home: Racial Socialization in Multiracial Families" in Brunnsma, *supra* note 8, 203 at 204-215 (structural racial patterns influence "the most intimate of individual activities, such as parenting."). See also Erica Chito Childs, "Black and White: Family Opposition to Becoming Multiracial" in Brunnsma, *supra* note 8, 233 at 233-244 (the central role of family...is to maintain or challenge the racial framework that exists in societies).

mother; the one of the father; a protean identity; a biracial/multiracial identity; or a transcendent identity.⁶⁹

The development of the racial identity of one of the parents generally follows one of two paths. Parents may deliberately decide to raise the child under the influence of the parent's minority race (and then, the multiracial child will most likely identify him/herself with that specific racial group). The main concern of parents in this situation is to prepare their children, just like "monoracial" minority parents, for possible future discrimination.⁷⁰ Or, mere affinity of the child with one of the parents, often the mother, deeply affects the racial identity formation of the child. In this case, the parent does not automatically provide a thoughtful influence on the child's racial identity formation. Therefore, "colourblind parenting" is not necessarily intentional.⁷¹

Multiracial individuals may develop a protean identity as well, which means mixed-race persons sometimes adopt one race or another according to particular circumstances.⁷² Protean identity is generally confused with "passing", although they are not synonyms. A multiracial individual who develops a protean identity may intentionally "pass" as a member of one racial group and sometimes as a member of another racial group, depending on the context. However, "passing" may as well

⁶⁹ See Rockquemore & Brunisma, *supra* note 3 at 336-339. The authors mention only four identities for mixed-race individuals. The inclusion of a fifth possibility, in this case, is due to the possible different racial categories of parents.

⁷⁰ See Rockquemore, Laszloffy & Noveske, *supra* note 68 at 205-215.

⁷¹ *Ibid* at 206-215 ("most multiracial children do not have a parent with whom they can...identify as a multiracial person").

⁷² See Rockquemore & Brunisma, *supra* note 3 at 338.

happen involuntarily, according to other people's perspectives on the individual's physical appearance.⁷³

Another form of racial identity is the border or biracial/multiracial identity. In this case, individuals have affinities with the race of both parents and do not reject any of their heritages. Since mixed-race people do not identify with one race in particular, but with both/all races of parents, individuals who self-classify as biracial/multiracial can serve as bridges among diverse racial groups.⁷⁴

Finally, multiracial individuals may develop a transcendent identity. In this case, the individual does not accept the idea of belonging to any specific race. Conversely, he or she transcends race as if racial identity does not signify much in his or her life.⁷⁵ These individuals tend to adopt colourblindness in their private lives and social relations.⁷⁶

In 2015, American media released news about the leader activist from NAACP in Washington Rachel Dolezal, who self-identifies as an African-American woman, although being white. The fact became public after her biologic white parents announced that, despite changing some of her physical characteristics, she has no African-American ancestry. After resigning from NAACP, Rachel Dolezal maintains that she feels black and continues to self-identify as such. Dolezal's identifica-

⁷³ See Randall Kennedy, "Racial Passing" in Johnson, *supra* note 6, 157 at 157-158. ("[a] passer is distinguishable from the person who is merely mistaken" by another race) [Kennedy, "Racial Passing"]. See also Kerry Ann Rockquemore, "Forced to pass and other sins against authenticity" (2005) 15:1 *Women & Performance: a journal of feminist theory* 17; Julie Pelletier, "'So what are you...?': Life as a Mixed-Blood in Academia" (2003) 27:1 *The American Indian Quarterly* 369 (narratives about "passing" and racialization).

⁷⁴ See Rockquemore & Brunnsma, *supra* note 3 at 337-338. See also *supra* note 8.

⁷⁵ See Rockquemore & Brunnsma, *supra* note 3, at 338-339.

⁷⁶ See Gilroy, *supra* note 2 at 75-76 (cosmopolitanism is similar to transcendent identity: race is no longer meaningful for self-categorization).

tion with the black race may relate to her life experiences: she has African-American adoptive siblings, an African-American ex-husband, multiracial children and worked for NAACP.⁷⁷

Although there are not enough clarifications about Dolezal's racial identity choice, her story may indicate she developed a transracial identity.⁷⁸ The topic is very interesting and would benefit from greater research to better understand how the issue affects individuals and current American society. Notwithstanding the intentions or the veracity of Rachel Dolezal's racial choice, her story confirms that factors other than appearance and ancestry do influence the way individuals self-identify.

The official recognition of multiracial identity, as any other social classification, allows multiracial individuals to fully express their racial background and to exercise their right to self-determination. Delgado and Stefancic explain the importance of framing categories and subgroups, not only as a matter of theoretical interest and individualism. They highlight the need to determine "who has power, voice and representation and who does not."⁷⁹ They evoke the notion of "multiple consciousness," which constitutes a powerful argument in favour of the multiracial identity recognition in societies marked by diversity. Both authors explain that "[m]ost of us experience

⁷⁷ National and International media highlighted Dolezal's case. See e.g. Ben Brumfield and Greg Botelho, "Race of Rachel Dolezal, head of Spokane NAACP, comes under question", CNN (15 June 2015), online: <edition.cnn.com/2015/06/12/us/washington-spokane-naacp-rachel-dolezal-identity/index.html>

⁷⁸ Transracial identity is not broadly accepted amongst scholars. However, it may have some similarities to transsexuality: in both cases, individuals change phenotype in order to gain social acceptance of their identities – or the way they feel about themselves regarding race or gender. Cf Ashley Fantz, Ray Sanchez, Faith Karimi & Dana Ford "NAACP leader resigns; accused of lying about race", CNN (16 June 2015), online: <edition.cnn.com/2015/06/15/us/washington-rachel-dolezal-naacp/index.html>.

⁷⁹ Delgado & Stefancic. *supra* note 13 at 61.

the world in different ways on different occasions, because of who we are. The hope is that if we pay attention to the multiplicity of social life, perhaps our institutions and arrangements will better address the problems that plague us.”⁸⁰

Under this light, categorization is important since it speaks to the multiplicity of individual’s identities; it facilitates the analysis of social changes and power relations; it also permits official institutions to better solve social problems. Thus, if multi-racialism increases in society, traditional racial categories may not be reliable for the construction of social programs and for protecting the civil rights of racial minority groups. Official institutions should search for demographic alternatives, like the creation of a special category for multiracial individuals, or allowing a mark-all-that-apply option on censuses, in order to achieve the desired social goals. Brazil and America have already made these choices on demographic surveys, which will now be discussed.

1.4 OFFICIAL MULTIRACIAL IDENTITY RECOGNITION

1.4.1 Multiracial category and the mark-all-that-apply option

This subsection intends to explain how official institutions count multiracial people in societies, using the mark-all-that-apply option or a specific multiracial category on censuses. Both methods of data collection are valid and effective, depending on the categorization system in which they apply.

United States and Brazil have structured racial categorization systems according to their particular histories. Traditional racial categories have resisted major

⁸⁰ *Ibid* at 61-62.

social changes in American society such as increased intermarriage and immigration. In the United States, constant social vigilance toward racial boundaries has contributed to the maintenance of racial categories and the confusing psychological perception of race by mixed-race individuals and society.⁸¹ In Brazil, the country's racial categorization system has long considered multiracialism as part of the social makeup.

Interracial marriages were controversial in the United States. In colonial times, anti-miscegenation laws forbade them until the decision in *Loving v. Virginia*.⁸² Although the prohibition ended, the offspring of interracial unions continue facing particular challenges due to the embedded racism in American society. For instance, multiracial individuals are the only group in the United States that cannot yet identify their multiple races on census forms with a specific category. Moreover, they have to deal with the lack of identification with parents, and, in most cases, the absence of a group with whom they can share similar experiences during their racial identity formation process.⁸³

Scholars and multiracial activists argue that official institutions should not interfere with how individuals classify themselves. According to them, demographic surveys should rely solely on self-identification and not on classification by official

⁸¹ See Abby L. Ferber, "White Supremacists in the Color-Blind Era: Redefining Multiracial and White Identities" in Brunnsma, *supra* note 8, 147 at 148. ("[t]he denial in recognizing racial identities perpetuates the one-drop rule").

⁸² *Loving*, *supra* note 54.

⁸³ See Rockquemore, Laszloffy & Noveske, *supra* note 68 at 204-209. See also Erica Chito Childs, *supra* note 68 at 242-245; Kwane Owusu-Bempah, "Confronting Racism in the Therapist's Office" in Brunnsma, *supra* note 8, 313 at 319.

agents, who might complement a census form's data with personal interviews.⁸⁴ In the American context, Professor Peter Skerry explains the reasons why censuses have only followed the self-identification method:

There are many methodological and practical reasons for relying on self-identification, but in the American context, self-identification of race and ethnicity is sustained by more than convenience to bureaucrats or social scientists. It accords with strongly held beliefs in individual choice and liberty. Most Americans feel uneasy when a person is assigned to a racial or ethnic category by the government. To the extent that we regard such categories as legitimate, we tend to think that the individual should decide where he or she belongs. ... One reason Americans dislike the idea of a government agency assigning individuals to racial or ethnic categories is the nation's past failures to apply its individualistic values to various racial minorities. Slavery, Jim Crow laws, the mistreatment of Indians, and the wartime internment of Japanese civilians are just the first examples that come to mind.⁸⁵

In Brazil, racial self-identification and classification by interviewers have concomitantly served as tools for demographic surveys.⁸⁶ Even though categories have changed on censuses – mainly the ones regarding mixed-race individuals – in contrast to Americans, Brazilians have long self-identified as multiracial. The results of data collected in racial classification by interviewers and in individuals' self-declaration demonstrate the connection between race and class. They show that, the more educated and wealthier the individual, the lighter his/her skin becomes.⁸⁷

Although race self-identification may lead to imperfect results, it continues to be the best methodological way of collecting demographic data for two reasons. First, it allows respondents to express how they feel about their own race – an as-

⁸⁴ See Roderick J. Harrison, "Inadequacies of Multiple-Response Race Data in the Federal Statistical System" in Perlmann & Waters, *supra* note 44, 137 at 157.

⁸⁵ Peter Skerry, "Multiracialism and the Administrative State" in Perlmann & Waters, *supra* note 44, 327 at 334 [footnotes omitted].

⁸⁶ See Bailey, Loveman & Muniz, *supra* note 4 at 109-110.

⁸⁷ See Hernández, *supra* note 17 at 1415-1416. See *below* subsection 2.2.3

pect of individual autonomy. Second, self-identification enables official institutions to verify how social factors have influenced the way individuals see themselves regarding race. Moreover, if demographic analysts can examine both self-classification data and interviewers' data on race, official institutions may have clearer results about how biased society might still be.⁸⁸

As Brazilian society did in the past, the American society's composition has gone through deep changes with the increase of immigration and interracial marriages, making the count of mixed-race Americans on demographic surveys a necessity. Therefore, the United States' Office of Management and Budget ("OMB") chose to count multiracial persons in the 2000 Census with a "mark-all-that-apply option," which allowed respondents on the survey to check all the racial categories within which they identify. In order not to threaten civil and voting rights of minority groups, the government allocates multiracial data on the category other than white that mixed-race individuals mark on census.⁸⁹

Despite the careful measures American federal authorities adopted in allocating multiracial data, opponents of multiracial identity recognition are critical of the complexity of demographic information regarding multiracial individuals and the way federal agencies might address political, social and civil rights policies with the census changes.⁹⁰ Furthermore, these opponents hold that a mark-all-that-apply option may lead to the creation of a specific multiracial category, which could inadvertently foment division among racial groups, and thus, do more harm than good. However,

⁸⁸ See Bailey, Loveman & Muniz, *supra* note 4 at 115-117.

⁸⁹ See Joel Perlmann. "Census Bureau Long-Term Racial Projections: Interpreting their Results and Seeking Their Rationale" in Perlmann & Waters, *supra* note 44, 215 at 215-216.

⁹⁰ See Harrison, *supra* note 84 at 137-156.

critics do not provide a better solution on how the government and American society should deal with the increasing number of individuals who do not fit in any of the traditional racial categories. Indeed, racial identity and racial pride are relevant; but they are not socially valuable if they stimulate intolerance and unhealthy interracial relationships.⁹¹

Multiracial advocates' perspective on solidarity also relies on the idea that the more individuals identify with a single (or multiple) multiracial categories, the more society will admit racial mixture as ordinary and accept racial differences. Therefore, although the mark-all-that-apply option and the allocation of multiracial data make current OMB's measures seem ineffective, they are an adequate reflection of the way American society presently deals with race. As Americans' ideas about race and racial mixture change, the government can adopt new ways of collecting and allocating data in parallel.⁹²

In Brazil, the specific multiracial category that exists on censuses, and the strong self-identification of mixed-race Brazilians with it, show that race's salience in the country is not as strong as in the United States. Although inequality in housing and education has historical connections to race, today social disparities have stronger ties with class.⁹³ Also, the country does not face the same challenges with voting rights and redistricting as the United States.

⁹¹ See Williams, *Mark one or more*, *supra* note 5 at 120.

⁹² *Ibid* at 18, 111, 121. (with time, disparities among races will reduce and there will be no need to collect more data on race). Cf Patrick F. Linehan, "Thinking Outside the Box: The Multiracial Category and its Implications for Race Identity Development" (2000) 44:1 *Howard Law Journal* at 43 at 70-72 (a specific multiracial category does not mean a new race but an "opt-out option from the system")

⁹³ See Carlos A. Fernández, "La Raza and the Melting Pot: A Comparative Look at Multiethnicity" in Maria P. P. Root, *supra* note 4, 126 at 132 (poverty is persistent, inherited and more perverse than race in Brazil).

Even though self-identified mixed-race Brazilians correspond to over 40% of the population on census, the Brazilian government, Congress and the courts still use a binary perspective of white/nonwhite.⁹⁴ So far, there has been no use of the specific multiracial data in the elaboration of affirmative action and other social programs. Thus, the multiracial category in Brazil has not served social purposes other than the mere demographic count of mixed-race individuals. Part 2 will provide further examination of multiracialism in Brazil.

In sum, regardless of the adoption of a specific category or a mark-all-that-apply option, the count of multiracial individuals is important for demographic projections and in guaranteeing the recognition of multiracial identity to mixed-race people with all their racial background. The choice between a category and multiple-box-checking depends on the social acceptance of different races (race seen as a social construct) and the multiple consciousness of race in multiracial individuals. While in Brazil, society easily accepts multiracial individuals and the multiracial category, in the United States the specific category may not be the best solution to monitor social changes regarding race today. The mark-all-that-apply option, although not ideal, still allows authorities to document changes in the American racial makeup and manage multiracial data without offending civil, political and social rights of racial minority groups. The main question regarding multiracial recognition, though, relies on the interpretation of multiracial data and its use in social programs.

⁹⁴ See Bailey, Loveman & Muniz, *supra* note 4 at 107 and 112-113.

1.4.2 Multiracial identity recognition and affirmative action policies

Racial classifications are foundational to several political and social issues, such as scientific research on medical conditions and the monitoring of racism.⁹⁵ In the past, society considered racial categories an oppressive tool against minorities. Today, racial categories are fundamental to colour conscious policies. Thus, in the United States and Brazil, the main concern of minorities and governments regarding racial categories relies on civil rights and social programs.

Affirmative action policies aim to remedy past discrimination (corrective or compensatory justice), to provide equal opportunities for individuals in terms of education, employment and income (distributive justice) and, therefore, present a solution to underrepresentation of minority and disenfranchised groups in important sectors of society. Racial categorization has been the main base for affirmative action policies and for minority groups' achievements in civil rights.⁹⁶ Hence, the topic is sensitive in the discussion of official multiracial identity recognition and principally, the creation of a specific multiracial category.

In Brazil, since a multiracial category has been common on censuses and since around 40% of Brazilians self-identify with it, scholars debate the effectiveness of race-based affirmative action programs in the country. The Movimento Pardo-Mestiço Brasileiro, a Brazilian multiracial activist group, also holds that class – not race – is the main factor for inequality in Brazil.⁹⁷

⁹⁵ See Pascoe, *supra* note 40 at 298.

⁹⁶ See Paul Brest & Miranda Oshige, "Affirmative Action for Whom?" (1995) 47 *Stanford Law Review* 855 at 856. See also Linehan, *supra* note 92 at 71.

⁹⁷ See *Arguicao de Descumprimento de Preceito Fundamental - ADPF 186/DF* [Allegation of Disobedience of Fundamental Precept] (26 April 2012), [20 October 2014] DJE, STF Brazil, online:

In the United States, debates around multiracial identity and affirmative action are more complex. American society and politicians have different opinions about the continuance of colour conscious policies today. The Republican Party and more conservative sectors of the American society strongly support the idea of colour-blindness and that colour conscious policies and/or racial categories should end. The Democratic Party and activists, on the other hand, favour the continued use of colour conscious policies and racial categories. According to them, American society is not yet ready for changing the traditional categorization system.⁹⁸

Opponents of multiracial identity recognition in the United States criticize the inclusion of a multiracial category on demographic surveys, arguing it focuses exclusively on one's individuality and not on macro, political and structural inequalities remaining in society – which should be the primary aim of colour conscious policies. These critics say the creation of a multiracial category does not provide any solution to racial inequality. Instead of contributing to the end of discrimination, the multiracial category might reduce the number of members of other minority groups who fight for equality in America; and create confusion when the government implements race-based programs and reinforce civil rights.⁹⁹

While the main inspiration for recognizing multiracial identity relies on self-esteem and individual autonomy, the social factor of official multiracial recognition is evident in the continuous transformation of the American social makeup. In this re-

<www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2691269> [ADPF 186/DF].

See also, Movimento Pardo-Mestiço Brasileiro, online: <www.nacaomestica.org>.

⁹⁸ See Williams, *Mark one or more*, *supra* note 5 at 5, 16-22. According Pascoe, *supra* note 40 at 301-303.

⁹⁹ See Spencer, *supra* note 53 at 83-102.

gard, critics do not explain how official institutions should maintain traditional race-based social programs and simultaneously ignore the increasing number of self-identified multiracial individuals in social policies. Moreover, critics do not consider that multiracial individuals might play a significant role in combating social inequalities, bridging racially-segregated groups.

Therefore, instead of limiting the discussions over multiracial identity recognition within colourblindness and colour conscious arguments, debates should consider the growing number of individuals who do not fit or do not identify with any of the traditional racial categories. Should society continue adopting old American practices of the one-drop rule to categorize multiracial individuals? Should governments renounce self-declaration on censuses and impose racial categories on citizens? Should the government ignore multiracial data, even if the number of self-identified mixed-race individuals increases, in order to maintain traditional affirmative action policies? Will the government guarantee protection and equality to racial minority groups with social policies that rely on inaccurate/insufficient racial data? This paper shows that the answers to all these questions are negative. Undoubtedly, though, the points these questions raise demonstrate that multiracialism demands from governments the creation of new policies to deal with racial categorizations and the adequacy of social programs to the dynamic composition of societies.

Scholars discuss the benefits and flaws of race-based affirmative action policies in different aspects, such as stigmatization, encouragement of divisive identity

politics, lack of attention to the merit principle, and “passing”.¹⁰⁰ The use of race as a basis for social policies can improve racial minority individuals’ lives; but it can also cause more segregation and decline in solidarity among groups.¹⁰¹

Advocates of affirmative action policies emphasize the multiplier effect and role modeling as positive consequences of race-based programs to minority groups, which would justify their adoption. The multiplier effect refers to a phenomenon where the amelioration of one member’s status corresponds to the benefit of all members of a certain group, since the model of success may reduce outsiders’ prejudice. Role modeling has an intragroup perspective, signifying that a professionally successful individual of a minority group may inspire other members of this group.¹⁰²

Regarding the issue, Paul Brest and Miranda Oshige explain that

role modeling is more effective for the children of stable working- and middle-class families than for children from severely economically disadvantaged families. The sense of hopelessness of youth from very disadvantaged families makes them less likely than working or middle-class youth to contemplate or plan for these futures. ...[T]he putative benefits of role modeling may be offset by the feelings of inferiority that affirmative action can engender by implying that minority group members cannot succeed on their own “merits”.¹⁰³

Brest and Oshige’s conclusions show that the multiplier effect and role modeling might be utopian as arguments to justify race-based affirmative action policies, and help put an end to the remaining disparities of income and status among racial category groups. Moreover, members of minority groups do not have the same ex-

¹⁰⁰ See Thomas Sowell, *Affirmative Action Around the World: An Empirical Study* (New Haven: Yale University Press, 2004) at 1-13. See also Delgado & Stefancic, *supra* note 13 at 111.

¹⁰¹ See Brest & Oshige, *supra* note 96 at 869.

¹⁰² There is another positive aspect about affirmative action: the commitment of successful members of racial minority groups in collaborating with the entire group. For instance, successful African-American lawyers may actively engage in civil rights causes aiming to defend the interests of African-Americans in the United States, and consequently improve the entire group’s status.

¹⁰³ Brest & Oshige, *supra* note 96 at 870 [footnotes omitted].

periences with racism, or the same obstacles in climbing the social hierarchy.¹⁰⁴ Scholars who research colorism, for instance, point out that light-skin individuals can succeed more easily than dark-skin ones.¹⁰⁵ In addition, scholars argue that recent immigrants have different experiences with prejudice – many times harder than the ones traditional minority group members face, even if they have a similar phenotype.¹⁰⁶ Therefore, the fair implementation of compensatory policies related to race is indeed difficult, since there is no equality (in ethnicity/nationality, education, income or status) among members of the same racial group.¹⁰⁷

American and Brazilian governments hold that affirmative action policies have presented good results so far in regards to racial justice and the improvement of minority members' status.¹⁰⁸ There has been no official statement about mixed-race individuals in these policies, perhaps because they benefit from affirmative action as members of traditional racial minority groups. However, the more self-identified multiracial individuals become a significant group in societies, the more difficult it will be to point out who might be the beneficiaries of race-based social programs.¹⁰⁹

¹⁰⁴ See Okizaki, *supra* note 38 at 470.

¹⁰⁵ Colorism is a CRT subgroup which studies the connection of wealth and social status with skin colour. According to scholars dedicated to colorism, ancestry, phenotype, social meaning assigned to racial groups are less relevant than skin colour alone. Thus, light-skin individuals would have the highest social status, while black-skin individuals would be at the bottom of the social hierarchy ("pigmentocracy").

¹⁰⁶ In the United States, see e.g. Kevin R. Johnson, "Immigration and Latino Identity" in Johnson, *supra* note 6, 290 at 290-293. In Brazil, see Bailey, Loveman & Muniz, *supra* note 4 at 106-119.

¹⁰⁷ See Brest & Oshige, *supra* note 96 at 874. See also Manning Marable, "Beyond Racial Identity Politics: Toward a Liberation Theory for Multicultural Democracy" in Delgado & Stefancic *supra* note 59, 586 at 591; Bailey, Loveman & Muniz, *supra* note 4 at 106-119.

¹⁰⁸ See Kimberle Crenshaw, "Playing race cards: constructing a proactive defense of affirmative action" (1998) 16:2 *National Black Law Journal* 196 at 296-214. See also *ADPF 186/DF*, *supra* note 97.

¹⁰⁹ See Kenneth Prewitt, "Racial Classification in America: Where Do We Go from Here?" in Delgado & Stefancic *supra* note 59, 511 at 511-516 (difficult classification of immigrants since the system was created for a different demographic and political moment).

The analysis of multiracial identity recognition as an important factor for the effectiveness of social programs and the need for gradual changes in affirmative action policies, defeats the argument that multiracialism relies exclusively on self-esteem. There is a real social aspect that official institutions should not disregard. If the number of people self-identifying as multiracial increases, then social dynamics will change as much as the claims for equality in education, employment, income and status.

In Brazil, as almost half of the population self-identified on the 2008 census as mixed-race, the implementation of race-based affirmative action is a challenge. How can the government reach disenfranchised Brazilians who need more opportunities in education and employment when it considers the majority of the population (i.e., nonwhites) as being marginalized? Are affirmative action programs going to reach their fundamental objectives if they continue relying exclusively on race? Attempts to implement race-based affirmative action policies do not reach Brazilians who live below the poverty line, no matter which race. High rates of miscegenation in Brazilian society are the main reason for the short-comings of these social programs. As almost all Brazilians have nonwhite ancestry, these potential beneficiaries of affirmative action policies – low-income or not, light-skinned or not – can easily prove their multiple racial heritages with pictures and documents.¹¹⁰

¹¹⁰ In Brazil, see e.g. Pamela Oliveira & Daniel Haidar, “Fraudes na UERJ evidenciam falhas do sistema de cotas” [Fraud at UERJ shows the quota system failures], *Veja* (22 March 2014) online: <veja.abril.com.br/noticia/educacao/uerj-nada-faz-para-deter-as-fraudes-a-lei-das-cotas>. In the United States, see Sowell, *supra* note 100, at 137; Luther Wright Jr. “Who’s Black, Who’s White, and Who Cares: Reconceptualizing the United States’ Definition of Race and Racial Classifications” in Johnson, *supra* note 6, 181 at 183; Kennedy, “Racial Passing,” *supra* note 73 at 167.

If the Brazilian government effectively considered the multiracial population information from demographic surveys in elaborating social programs and abandoned the binary perspective, then race would not be the most important factor, or it would not be the only one to consider. Since most Brazilians have black or indigenous ancestry, African-Brazilians, indigenous, or mixed-race individuals who need social policies most are the ones in the lowest class level and, for reasons other than race, are also the ones who have fewest chances to benefit from race-based affirmative action programs. For instance, a low-income African-Brazilian who studied in a public school, which is poorly structured, will compete equally for a seat in a public university with a high-class African-Brazilian, who studied in a private school, under the traditional race-based affirmative action admission program.

Scholars might argue the inclusion of multiracial individuals as a separate group in social policies or integrating new criteria to affirmative action programs tends to privilege distributive justice over compensatory justice. Indeed, the idea of compensating disenfranchised racial groups for past discrimination seems hard to implement today, with the increasing number of self-identified multiracial individuals. Could governments create effective social policies aiming at compensating racial minorities for past discrimination, although miscegenation and immigration have been so intense in the United States and Brazil? Is there a reasonable way to efficiently compensate minority groups using exclusively race as basis for social policies, separating who is a recent immigrant or who has succeeded in education and income, from the ones who carry the weight of long-term discrimination? Is it possible to blame exclusively race or ethnicity for the lower status and income of individuals? The answer to these questions is negative. If the number of self-identified multi-

racial individuals and immigrants becomes high, the effectiveness of compensatory policies is questionable. Moreover, factors other than race contribute to racial members' status and income, including personal effort and chance. Therefore, speaking of multiracialism is a necessity when discussing the potential beneficiaries of race-based affirmative action programs and the flaws in such policies.

Undoubtedly, race does not lose its importance in social inequality policies solely with the creation of the multiracial category or the adoption of a mark-all-that-apply option. Nevertheless, the principal social reason why governments should adopt other or complementary criteria for affirmative action policies is simply the evident and increasing difficulty in verifying the true beneficiaries of such programs, especially if miscegenation intensifies.

Notwithstanding current academic debates over multiracialism and affirmative action, law will play a fundamental role in the way multiracial identity recognition will affect major social issues and rights.¹¹¹ Next, this paper will compare American and Brazilian legal systems and the way both societies, governments and courts treat multiracial identity.

¹¹¹ See Nathaniel Persily, "The Legal Implications of a Multiracial Census" in Perlmann & Waters *supra* note 44, 161 at 161-162.

2 MULTIRACIAL IDENTITY RECOGNITION IN THE AMERICAN AND BRAZILIAN SYSTEMS

This Part explores multiracial identity recognition and the implementation of a multiracial category in the United States and in Brazil. The two countries have different histories, different social makeups and their laws have served in different ways to deal with race issues. According to the social development of the United States and Brazil, governments and official institutions have acknowledged multiracial identity with or without social resistance, though neither country effectively considers multiracialism in its public policies. The comparison between the United States and Brazil will provide useful conclusions about multiracial identity and the future acceptance of racial diversity in the American and Brazilian societies.

Multiracialism in the United States and Brazil will be explored separately, first reviewing the most important historical facts. Next, this part will analyze demographic surveys regarding multiracial individuals. Finally, it will overview the most relevant recent court decisions and/or statutes related to multiracial identity in the United States and Brazil, respectively.

2.1 UNITED STATES

2.1.1 Brief history of American racial context

The American legal system's relationship with race and affirmative action programs is an important touchstone in Western countries.¹¹² Concerning race and

¹¹² See Fernández, *supra* note 93 at 139-140.

racial boundaries, the United States has a singular history of segregation, which scholars have often used in comparative research, especially with Brazil.¹¹³

Since American colonialism, European settlers used law to fix racial boundaries, mainly for African-Americans, in order to maintain the purity of whiteness and privilege.¹¹⁴ Following Reconstruction (1865-1877), states enacted Jim Crow laws, promoting racial segregation in public facilities, workplaces, housing and education. Restrictions to civil rights and civil liberties of African-Americans, including their right to vote, contributed to white supremacy, deepening inequality and disenfranchising nonwhites. The Supreme Court guaranteed the “separate but equal” doctrine, nullifying acts that attempted to put an end to Jim Crow laws.¹¹⁵

After World War II, African-Americans struggle for equality and civil rights became stronger. The National Association for the Advancement of Colored People (“NAACP”) has been one of the most active groups in the defense of civil rights for African-Americans. In the late Twentieth century and in the early years of the Twenty-first century, NAACP concentrated efforts in pursuing equality in housing, education, and opposing overt discrimination.¹¹⁶ For instance, NAACP Legal Defense Committee (“LDF”) carried out efforts in overturning *Plessy v. Ferguson*,¹¹⁷ which occurred with the Supreme Court decision in *Brown v. Board of Education*.¹¹⁸ Although interracial marriage gained only secondary attention from NAACP at first, the

¹¹³ See e.g. Thomas E. Skidmore, “Race and Class in Brazil: Historical Perspectives” in Pierre-Michel Fontaine, ed, *Race, Class and Power in Brazil* (Los Angeles: University of California Publication, 1985) 11.

¹¹⁴ See e.g. A. Leon Higginbotham Jr. and Barbara K. Kopytoff. “Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia” in Johnson, *supra* note 6, 13 at 13-25.

¹¹⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896) [*Plessy*].

¹¹⁶ See Pascoe, *supra* note 40 at 233-238.

¹¹⁷ *Plessy*, *supra* note 115.

¹¹⁸ *Brown v. Board of Education*, 347 U.S. 483 (1954) [*Brown*].

Association's campaign in overturning anti-miscegenation laws in the 1960s was fundamental to invalidating or repealing such rules for minorities.¹¹⁹

Other racial minority groups had different struggles from African-Americans' regarding equality. For instance, American white society considered Mexicans white for the purposes of anti-miscegenation laws, although stereotypes against them remained strong.¹²⁰ Ambivalent treatment of Mexicans dates from the American conquest, when treaties guaranteed privileges of white citizenship to the ones who remained in the occupied territories. The Supreme Court sustained the white status attributed to Mexicans, while Americans continued to racialize Mexicans who lived in the United States.¹²¹

When Mexicans and other Latino groups formed a single Hispanic category as separate from European whites, stereotypes of laziness, lack of initiative and unproductiveness still did not end, and persist in American society even today.¹²² Associations like The National Council of La Raza have fought for equality for Latino communities, joining forces with other important associations like the NAACP for racial justice.¹²³

¹¹⁹ See Pascoe, *supra* note 40 at 169-254 (ACLU and JACL also dedicated efforts in combating anti-miscegenation laws in American states).

¹²⁰ See Ariela J. Gross, "The 'Caucasian Cloak': Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest" in Delgado & Stefancic, *supra* note 59, 154 at 154-166.

¹²¹ See *Perez v. Sharp* 32 Cal. 2d 711, 198 P2d 17 (1948) [*Perez*]. See also Pascoe, *supra* note 40 at 121-122. (American citizenship to Mexicans represented a protection from Jim Crow laws) Regarding the definition of racialization, see Oxford Dictionary of Sociology (2009), *sub verbo* "racialization", online: <<http://www.oxfordreference.com/view/10.1093/acref/9780199533008.001.0001/acref-9780199533008-e-1861>> (racialization is "[t]he social processes by which a population group is categorized as a race").

¹²² See Brest & Oshige, *supra* note 96 at 888-889.

¹²³ See Prewitt, *supra* note 109 at 514.

Regarding Native Americans, settlers used marriage to gain rights to indigenous lands, offering them American citizenship.¹²⁴ However, in different states, anti-miscegenation laws reduced Native Americans, considering them a single race, and forbade their marriage to whites.¹²⁵ Undoubtedly, the prohibition meant the denial of white privilege to the group.

Anti-miscegenation laws restricted Chinese and Japanese rights in the United States and contributed to denial of American citizenship to both groups. Chinese and Japanese immigrants suffered with stereotypes, like ideas of effeminate men, prostitution of women and illegal commerce.¹²⁶ Most of these stereotypes ended, especially with the efforts associations like the Japanese American Citizens League made in defending the interests of their members.¹²⁷

Today, though Asians generally figure as the model minority group in the American society, this view disregards the persistent inequality of Asians other than Japanese and Chinese descendants and immigrants.¹²⁸ Concerning “the model minority stereotype”, Brest and Oshige clarify that

[m]any whites and other non-Asians do not distinguish among Asian groups, which helps perpetuate what is sometimes called the “model minority” stereotype. According to this stereotype, which has both positive and negative elements, Asian Americans have a good work ethic and a strong commitment to education, leading to great educational and economic success. ...[E]ducational achievement has not necessarily translated into individual salaries commensurate with those of whites with the same level of education – a phenomenon that may evidence wage dis-

¹²⁴ See Bethany Ruth Berger, “After Pocahontas: Indian Women and the Law: 1830-1934” in Johnson, *supra* note 6, 71 at 72-79. See also Karen M. Woods “A ‘Wicked and Mischievous Connection’: The Origins of Indian-White Miscegenation Law” in Johnson, *supra* note 6, 81 at 81-85.

¹²⁵ *Ibid.*

¹²⁶ See Pascoe, *supra* note 40 at 80-119.

¹²⁷ The Japanese American Citizens League - JACL has been important and very active in the fight for equality for Japanese in the country, including the overturn of anti-miscegenation laws in the past.

¹²⁸ See Brest & Oshige, *supra* note 96 at 893-894 [footnotes omitted].

crimination. ...The negative aspects of the stereotype – which portray Asians as having poor leadership and interpersonal skills – may have contributed to a “glass ceiling” phenomenon: For all of the educational attainments of Asian Americans, they occupy disproportionately few executive and top management positions in American businesses.¹²⁹

Therefore, the fight for equality in America remains for Asians as well. Overall, each minority group in American history has dealt with discrimination and segregation in particular ways while pursuing civil rights recognition.

2.1.2 The struggle against anti-miscegenation laws

In the United States, nonwhites have long fought for equality, including the choice of spouse disregarding race. The struggle against the prohibition on interracial sex and interracial marriage in America started in the American Conquest and ended with the Supreme Court decision in *Loving v. Virginia*.¹³⁰

Before the United States Supreme Court decided *Loving*, activist groups considered the number of interracial marriages too low to justify taking the attention away from the fight against segregation. In addition, Black Nationalist groups did not stand up for interracial marriages; and neither did whites – some of whom were financially supporting the LDF. Therefore, most disputes over interracial marriage in American courts were individual. Lawyers tried to defend their clients by founding arguments on the denial of race or ancestry, in order to keep the validity of marriage.¹³¹ In *Knight v. State*, for instance, Davis Knight, who had a mixed-race mother

¹²⁹ *Ibid* at 893-894.

¹³⁰ *Loving*, *supra* note 54.

¹³¹ See *Pescoe*, *supra* note 40 at 201-204, 224-228, 250-252. As the controversy over anti miscegenation laws gained strength, most lawyers avoided the NAACP, ACLU and other activists' support; while civil rights groups did not want to risk trying to overturn anti-miscegenation laws and sacrifice achievements in school desegregation.

and married a white woman, was convicted for violating Mississippi anti-miscegenation law. The Mississippi Supreme Court, however, overturned Knight's conviction, under the argument of miscategorization, as he had less than one-eighth black blood.¹³²

However, in *Perez v. Sharp*,¹³³ the California Supreme Court acknowledged that anti-miscegenation laws violated the Fourteenth Amendment. California was the first state to end prohibitions on interracial marriages. Later on, after World War II, Japanese women who married white American soldiers (the "war brides") gained attention from lawyers, who saw a new opportunity to restart the battle against anti-miscegenation laws since *Perez*. However, most of these interracial marriages took place in military bases, where couples did not have to go through a marriage license officer's analysis.¹³⁴

Only *McLaughlin v. State*¹³⁵ provided enough basis to take opposition to anti-miscegenation laws to the Supreme Court. In this case, Connie Hoffman and Dewey McLaughlin lived together in an interracial union in the state of Florida, and both ended up arrested. NAACP and LDF defended the couple and raised an open campaign against anti-miscegenation laws. The main rationales used in the defence of Hoffman and McLaughlin's union still relied on the definition of race, and the uncertainty and vagueness of state anti-miscegenation laws. However, the Supreme Court decision in *McLaughlin* opened enough space for arguments later used in *Loving*.

¹³² *Knight v. State*, 207 Miss. at 568-69 (1949)

¹³³ *Perez*, *supra* note 121.

¹³⁴ See Pascoe, *supra* note 40 at 233-238.

¹³⁵ *McLaughlin v. State*, 172 So 2d 460, 461 (1965).

*Loving v. Virginia*¹³⁶ was a groundbreaking case for the United States. Richard Loving, a white man, wanted to marry Mildred Jeter, an African-American woman. As the state of Virginia would not give them a marriage license, they traveled to Washington, D.C. to obtain the permission and returned to their hometown with a marriage certificate. After a short time living together, they were both arrested for violating Virginia's anti-miscegenation law. Virginia's statute aimed at keeping the purity of citizens, and therefore sought to limit the number of mixed-race individuals among the state's population.

The Supreme Court declared anti-miscegenation laws unconstitutional in *Loving*. Chief Justice Warren delivered the opinion of the Court holding, among other arguments that, although marriage depends on state regulation, a state's power is limited and must follow the Fourteenth Amendment. Therefore, Virginia's anti-miscegenation law had to adequately justify its foundation on race. In Chief Justice Warren's words,

[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.¹³⁷

Under the arguments of personal freedom, the fundamental right to marriage and the equality principle, the Supreme Court overturned Virginia's anti-miscegenation law. Since then, *Loving* has inspired other important movements like

¹³⁶ *Loving*, *supra* note 54.

¹³⁷ *Ibid* at 12-13.

the multiracial movement in America, which has fought for official multiracial identity recognition in the country.¹³⁸

2.1.3 Multiracial Movement in the United States and its claim for the official multiracial identity recognition

After the decision in *Loving*, biracial couples began questioning American racial categorization, due to the multiple heritages of their offspring. In the 1980s, scholars dedicated to Critical Mixed Race Studies and the Multiracial Movement in the United States gained strength.¹³⁹ Different issues such as multiracial identity formation,¹⁴⁰ colorism,¹⁴¹ colour conscious and colourblind policies¹⁴² became the focus of study and debate amongst scholars and official institutions.¹⁴³

The American multiracial movement demanded from the OMB and the Census Bureau, the recognition of a multiracial identity for mixed-race individuals. Groups joining the multiracial movement in the United States had diverse propositions and were not in perfect harmony.¹⁴⁴ For instance, while Project Reclassify all

¹³⁸ Williams, *Mark one or more*, *supra* note 5 at 37. See also Pascoe, *supra* note 40 at 297-300.

¹³⁹ Maria P.P. Root, Reginald Daniel and Paul Spickard are amongst the scholars who have studied multiracial identity in depth. See online: <criticalmixedracestudies.org>. In addition, the multiracial movement in the United States gathered different multiracial associations. The first founded was Interracial Intercultural Pride - I-Pride, followed by the Association of MultiEthnic Americans - AMEA, Eurasia Nation, Hapa Issues Forum, Project RACE (Reclassify All Children Equally), APFU (A Place For All of Us), amongst others.

¹⁴⁰ See subsection 1.3.3 *above*.

¹⁴¹ See Leonard M. Baynes, "If it's not just Black and White anymore, why does darkness cast a longer discriminatory shadow than lightness? An investigation and analysis of the color hierarchy" in Johnson, *supra* note 6, 263 at 263-266 ("a dark-skinned person of color is likely to encounter more discrimination than his/her light-skinned counterpart"). See also Trina Jones, "Shades of Brown" in Johnson, *supra* note 6, 268 at 269-275; Taunya Lovell Banks, "Colorism: a Darker Shade of Pale" in Johnson, *supra* note 6, 276 at 276-281.

¹⁴² See more about the topic in the Introduction and in Section 1.4, *above*.

¹⁴³ See e.g. Daniel, *supra* note 49, at 336.

¹⁴⁴ See Williams, *Mark one or more*, *supra* note 5 at 9 and 43-48. Multiracial groups' different propositions rely on the need to report multiple races; the combination of questions about race and Hispanic

Children Equally (“Project RACE”) struggled for a multiracial category on census, the Association of MultiEthnic Americans (“AMEA”) was favourable to a mark-all-that-apply option in which multiracial individuals could express themselves entirely, and encouraged any measure to improve interracial relations.¹⁴⁵

Opponents of the multiracial category point out that American multiracial groups lack legitimacy, since white mothers of multiracial children in general have taken the lead (e.g. Susan Graham, from Project RACE).¹⁴⁶ Despite this critique, mixed-race individuals with different backgrounds have joined the movement, claiming for official multiracial identity recognition.¹⁴⁷

Opponents also argue that mixed-race individuals have always existed in American history. Thus, they affirm, the creation of the multiracial category now would serve solely to set colourblind policies. In addition, they argue that the multiracial movement is excessively individualistic, focusing on the self-esteem of mixed-race people, and disregarding social inequality that endures in American society. According to critics of the multiracial movement, their claims for a multiracial category do not offer any solution to racial discrimination and to racial hierarchy in the United States.¹⁴⁸

origin; the mixture of concepts about race, ethnicity and ancestry; the use of terminology; and a new multiracial category.

¹⁴⁵ *Ibid* at 7-15; Kim M. Williams, “Multiracialism & The Civil Rights Future” (2005) 134:1 *Daedalus* at 53-58 [Williams, “Multiracialism”] (APFU - A Place for Us defended the idea of the abolition of racial categories).

¹⁴⁶ See Reginald Leamon Robinson, “The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez” in Johnson, *supra* note 6, 212 at 214. See also Williams, *Mark one or more*, *supra* note 5 at 12.

¹⁴⁷ See Susan R. Graham. “The Real World” in Johnson, *supra* note 6, 200 at 203. See also Aaron Gullickson and Ann Morning. “Choosing race: Multiracial ancestry and identification” (2011) 40:2 *Social Science Research* 498 at 499.

¹⁴⁸ But see Daniel & Castañeda-Liles, *supra* note 8 at 125-146.

The notion that the American multiracial movement follows a conservative or colourblind agenda has no solid basis. The movement does not attack colour conscious policies. Perhaps conservative groups who urge for colourblind rules may take advantage of some of the movement's ideas, but the movement itself does not necessarily support colourblindness. Multiracial identity advocates hold that mixed-race individuals aim at social rights and respect for their multiple racial identities.¹⁴⁹

Moreover, the American multiracial movement's focus on self-esteem does not contribute to discrimination and/or segregation. On the contrary, scholars argue that mixed-race people may help society in bridging racial groups, reinforcing social tolerance, and fighting racial bias.¹⁵⁰ In America, minority groups pursue equality, amelioration of their status and income, and ending discrimination. So, multiracial individuals, knowing both sides of their heritages, may help balance interests and improve racial relations.¹⁵¹

Self-esteem, as much as self-respect and pride, constitutes part of an autonomous person. As pointed out in Part 1, individuals can only assert being autonomous if they are allowed to fully express their social identities. Thus, multiracial individuals and multiracial-group advocates have the right and interest in pursuing multiracial identity recognition. Furthermore, from a social perspective, self-esteem is important in building a positive racial identity and in giving cohesion to racial groups. Given that, as Kim M. Williams adds, self-esteem was the main rationale in the deci-

¹⁴⁹ See Pascoe, *supra* note 40 at 301-303 (the overturn of anti-miscegenation laws did not put an end to racism in America, as once thought). See also Graham, *supra* note 147 at 200-204.

¹⁵⁰ See Williams, *Mark one or more*, *supra* note 5 at 120-131. See also Daniel & Castaneda-Liles, *supra* note 8 at 125-146.

¹⁵¹ See *supra* note 8.

sion of the Supreme Court in *Brown v. Board of Education*. Therefore, official institutions should not disregard its importance in the recognition of the multiracial identity.¹⁵²

Opponents to the multiracial category affirm multiracial movements' claims are unimportant because the number of people who would self-identify outside the formal categories is low. However, collected data on the 1990, the 2000, and the 2010 censuses show that the number of individuals self-identifying as multiracial has increased significantly.¹⁵³

Despite being disorganized and heterogeneous in its propositions, the American multiracial movement had its first institutional victory when OMB included a mark-all-that-apply option on official forms in the 2000 census. For the first time, the Bureau allowed respondents to check all racial boxes on census forms with which they self-identified, opening to federal agencies the possibility to use such demographic data in social programs.

The mark-all-that-apply option allowed the Census Bureau to put an end, at least temporarily, to debates over the creation of the multiracial category, or multiple racial categories (according to the different combination of racial backgrounds). Although the mark-all-that-apply option did not correspond to Project RACE's goals or to other multiracial associations' ideologies, it satisfied AMEA and did not confront

¹⁵² Williams, *Mark one or more*, *supra* note 5 at 103.

¹⁵³ See United States Census Bureau, online: <<https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>>. See also Linehan, *supra* note 92 at 43-44.

the interests of other civil rights' groups. NAACP and The National Council of La Raza, for instance, have openly opposed the creation of the multiracial category.¹⁵⁴

The greatest demographic challenge of OMB today is to adapt a complex and growing multiracial society to the same racial categories created to “unequivocally distinguish between those who are members of [certain] minority groups and those who are not”.¹⁵⁵ Actually, scholars and institutions debate if racial classifications are still necessary, efficient and accurate. Surely, although current categories are imperfect, American society is not ready to eliminate them.

The abolition of racial categories in demographic surveys today would cause great impacts on the monitoring of racism in American society. The pursuit of equality and/or the colourblindness ideal still demands from the American government the analysis over disparities in income, education and status of racial minority groups. Moreover, the overcoming of racism depends on stronger and persistent efforts from official institutions and society in dealing with intolerance. Major incidents from 2014 and 2015 show the fight against racial discrimination is far from ending. In Ferguson, Missouri, 2014, police officers killed an 18-year-old unarmed African-American man named Michael Brown.¹⁵⁶ The following year, in Baltimore, Maryland, the African-American Freddie Gray died in police custody.¹⁵⁷ In June 2015 in Charleston, South

¹⁵⁴ See Williams, *Mark one or more*, *supra* note 5 at 12 and 48-50.

¹⁵⁵ See Goldstein & Morning, *supra* note 44 at 119.

¹⁵⁶ See Elliott C. McLaughlin, “What we know about Michael Brown’s shooting”, *CNN* (15 August 2014) online: <edition.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know>.

¹⁵⁷ See “Freddie Gray”, *The Guardian* (July 2015) online: <www.theguardian.com/us-news/freddie-gray>. Compare John Blake, “Inside the mind of a black Baltimore cop”, *CNN* (9 May 2015) online: <edition.cnn.com/2015/05/08/us/black-baltimore-cops/index.html>; Jason Nichols, “Can black police be pro-black and pro-blue at the same time”, *The Guardian* (28 May 2015) online: <www.theguardian.com/commentisfree/2015/may/28/can-black-police-be-pro-community-and-pro-police>.

Carolina, a 21-year-old white man named Dylann Roof opened fire in the Emanuel African Methodist Episcopal Church, killing nine African-Americans.¹⁵⁸ The three cases gained notoriety in the media, generated violent protests, and highlighted the remaining discrimination against African-Americans in the country. Undoubtedly, racial prejudice has still been a problem that American society could not yet overcome.

Therefore, even if official racial categories are not the ideal strategy to combat discrimination, the abolition of such categories would create more harm than benefit to minorities today. The creation of a specific category for multiracial people, as desired by multiracial activists, would enable mixed-race individuals to fully express their diverse racial background, as autonomous individuals. Also, it would not affect civil rights achievements for racial minority groups. Lastly, the multiracial category would allow official institutions to monitor the racial composition of American society and, consequently, to implement more accurate affirmative action programs - which the following sections will further explore.

¹⁵⁸ See Ralph Ellis, Ed Payne, Evan Perez & Dana Ford. "Shooting suspect in custody after Charleston church massacre", *CNN* (19 June 2015) online: <www.cnn.com/2015/06/18/us/charleston-south-carolina-shooting/index.html>.

2.1.4 Multiracial individuals and the 1990, 2000 and 2010 Censuses¹⁵⁹

The Multiracial Movement tried to influence OMB's policies related to the 1990 Census with no success. Multiracial groups had no unified propositions regarding multiracial identity recognition and Associations like NAACP and The National Council of La Raza raised diverse arguments against multiracial identity recognition.¹⁶⁰

In the following decade, the movement gained more support from scholars, politicians and significant recognition among mixed-race individuals. With the adoption of a mark-all-that-apply option on the 2000 census, the OMB made a short but important step towards official multiracial identity recognition.¹⁶¹ The mark-all-that-apply option on the 2000 census represented an important victory for multiracial people, especially due to the small group of activists involved in the multiracial movement.¹⁶² Also, for the first time, official institutions could keep track of changes in the racial composition of American society and the efficiency of social programs by considering multiracial individuals as a factor.

The monitoring of the multiracial population in American society has shown that mixed-race individuals have gradually self-identified as such since 2000. In fact,

¹⁵⁹ U.S. Office of Management and Budget. Race and Ethnic Standards for Federal Statistics and Administrative Reporting. Directive no. 15 (12 May, 1977), online: <https://www.whitehouse.gov/omb/fedreg_directive_15>. According to Directive 15, to which U.S. Census Bureau adhered, there are five racial/ethnic categories in the United States official forms: white, black or African-American, American Indian or Alaskan Native, Asian, Native Hawaiian or Other Pacific Islander. The US Census Bureau has included the option "Some other race" - which represented 19% of Americans in the 2010 Census. See United States Census Bureau, online: <<https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>>.

¹⁶⁰ See Prewitt, *supra* note 109 at 514-515. See also Williams, "Multiracialism", *supra* note 145 at 53.

¹⁶¹ See Williams, *Mark one or more*, *supra* note 5 at 9 and 43-48.

¹⁶² See Williams, "Multiracialism", *supra* note 145 at 53.

on the 1990 Census, when respondents could not check all boxes that represented their race, half a million marked two or more races on forms.¹⁶³

In 2000, nearly 7 million Americans self-identified as multiracial on the census, or 2.4% of the American population. In 2010, self-identified multiracial individuals rose to 9 million Americans – an increase of 32% from the previous census. Considering the growth of the total American population in the same decade was 9.7%, a 32% growth in self-identified multiracial individuals is quite significant.¹⁶⁴

With the implementation of the mark-all-that-apply option on censuses, individuals with more than one racial or ethnic heritage could indicate them on forms, checking all boxes that represent their racial background.¹⁶⁵ However, instead of gathering the information about mixed-race individuals altogether, the allocation of multiple-box-checking data follows OMB specific guidelines, known as Bulletin 00-02.¹⁶⁶ Professors Goldstein and Morning clarify that

[OMB guidelines] are limited in scope to ‘data on race for use in civil rights monitoring and enforcement’ and do not, for example, apply directly to the reporting of the many social, economic and demographic indicators involving racial statistics. Nor are they meant to preclude the development of alternative allocation methods for preserving the continuity of time-series data collected under the old and new systems (that is, ‘bridging’ methods). Nevertheless, they are the first explicit guidelines covering the use of multiple-race data, and as such they have set a precedent for the systematic reallocation of multiple responses back to single-race categories... The need for allocation rules results from the disconnection between statistical policy governing the collection of racial data and the laws

¹⁶³ See Nancy Leong, “Multiracial Identity and Affirmative Action” (2006) 12:1 *UCLA Asian American Pacific American Journal* 1 at 4-5.

¹⁶⁴ United States Census Bureau, online: <<https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>>.

¹⁶⁵ Kenneth E. Payson, “Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed Race People” in Johnson, *supra* note 6, 191 at 191-196.

¹⁶⁶ U.S. Office of Management and Budget. Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement. OMB Bulletin #00-02 (9 March 2000), online: <https://www.whitehouse.gov/omb/bulletins_b00-02/>.

and precedents for using racial data... The OMB (2000,2) guidelines read in part as follows: ‘Federal agencies will use the following rules to allocate multiple race responses for use in civil rights monitoring and enforcement:

- . Responses in the five single race categories are not allocated.
- . Responses that combine one minority race and white are allocated to the minority race.
- . Responses that include two or more minority races are allocated as follows.
 - if the enforcement action is in response to a complaint, allocate to the race that the complainant alleges the discrimination was based on.
 - if the enforcement action requires assessing disparate impact or discriminatory patterns, analyze the patterns based on alternative allocations to each of the minority groups.¹⁶⁷

The OMB has mandated that Federal agencies are not to consider the box marked “White” in tabulating data when the respondent checked also a minority race box.¹⁶⁸ The reason why OMB protocol disregards only the white category and not other racial category boxes is due to the 2000 census results, which found that most multiracial individuals pointed out white ancestry. A negligible percentage of respondents registered that they had multiple racial background other than white.¹⁶⁹

Multiracial activists have questioned the OMB guidelines for allocating data, since they result in external categorization of individuals and, therefore, would disrespect one’s self-identity and autonomy. However, the OMB’s Bulletin 00-02 aims at simplifying demographic results that Federal agencies would use to implement programs which still rely on traditional racial categories – civil rights, voting rights, and affirmative action programs.¹⁷⁰

¹⁶⁷ Goldstein & Morning, *supra* note 44 at 119-121 [footnotes omitted].

¹⁶⁸ See Prewitt, *supra* note 109 at 511-520. See also Daniel & Castaneda-Liles, *supra* note 8 at 133.

¹⁶⁹ See Goldstein & Morning, *supra* note 44 at 126-131

¹⁷⁰ See Persily, *supra* note 111 at 163-165.

In sum, if the American society is not yet colourblind, the American government should not abandon colour conscious policies completely. Affirmative action programs, however, still depend on traditional racial categories that tend to change gradually. Thus, although today's race-based programs provide significant opportunities for minority groups in America regarding civil, social and voting rights, it may be necessary to rethink future social programs, if mixed-race individuals continue to self-identify outside the traditional racial categories. The use of race as the sole criterion may not be enough to promote diversity and equality to all American citizens if racial boundaries become deeply blurred.

Moreover, while the OMB and American Federal agencies struggle with multi-racial identity recognition and the adaptation of the system to the changes in the decennial census, American courts have slowly examined cases related to multiracial identity. Although courts have not analyzed the changes on the Census and the possible creation of a multiracial category, there are no doubts that they will play a fundamental role in the near future, reconciling multiracial identity with civil, political, and social rights.

2.1.5 Current American court decisions and multiracial identity

Historically, courts in the United States have been central to the construction and deconstruction of race and racial boundaries. Their upholding of anti-miscegenation laws, and then their subsequent striking down of them via *Loving v. Virginia*,¹⁷¹ are the main examples of the use of law as a tool of oppression and

¹⁷¹ *Loving*, *supra* note 54.

freedom regarding race. For a long time in American history, judges carried the responsibility for assuring, or denying, rights based on the one-drop rule, using the law according to the socially dominant group's interests.¹⁷²

As explained in previous subsections, the United States went through deep changes regarding its perspective about race, though American society still has a long way to go. Courts have played a fundamental role in giving legitimacy to colour conscious policies and anti-segregation efforts in housing and education, mainly through *Brown v. Board of Education*.¹⁷³ However, scholars like Kimberle Crenshaw argue that the United States Supreme Court has adopted a more conservative position regarding race in recent years, which might threaten civil rights achievements for minority groups, especially affirmative action programs.¹⁷⁴ Even if American courts have effectively become conservative in this arena, it is necessary to differentiate colourblind judicial rationale and the position judges might take about mixed-race individuals. American courts have not yet constructed a solid jurisprudence about multiracial individuals. Most racial debates in American courts draw solely on a colourblindness/colour consciousness antagonism.

Today, decisions regarding jury formation or racial discrimination involving mixed-race persons may be difficult to quantify, since most of the American court decisions related to race do not establish a precise difference between multiracial

¹⁷² For instance, see *Pace v. Alabama*, 106 U.S. 583 (1883) [*Pace*]. In this case, the African-American Tony Pace and the white woman Mary Cox were arrested for violating Alabama's anti miscegenation law. The United States Supreme Court affirmed that the legal prohibition over interracial sex did not violate the Equal Protection Clause, and thus, was constitutional.

¹⁷³ *Brown*, *supra* note 118.

¹⁷⁴ Kimberle Crenshaw. "The Court's Denial of Racial Societal Debt" (2013) 40:1 *Human Rights, Winter* 12, at 12-16. But see Williams, *Mark one or more*, *supra* note 5 at 6, 120-131. See also Daniel & Castañeda-Liles, *supra* note 8 at 140-143.

individuals and the ones who self-identify as “monoracial”.¹⁷⁵ Redistricting cases might involve scholarly discussions about multiracialism. According to academics who oppose multiracial identity recognition, the creation of a specific category for mixed-race people could, understandably, reduce the number of minority groups’ members, splitting or diluting minority voters in multiple districts.¹⁷⁶ Two arguments demonstrate that the mark-all-that-apply option on census does not affect redistricting and voting rights in the United States today. First, the OMB guidelines direct federal agencies to allocate multiracial data on the census to the racial minority group marked. Thus, there are no significant changes in the current situation of minority groups regarding electoral districts and voting rights.¹⁷⁷ Second, the core of current judicial debates related to redistricting is colourblindness.

One of the most important decisions (if not *the* most important) regarding redistricting is *Shaw v. Reno*,¹⁷⁸ in which the Supreme Court decided race could not prevail or would not be the most important factor in defining electoral districts. Professors Joshua Goldstein and Ann J. Morning explain the difficulty in implementing redistricting plans:

redistricting plans are subject to competing, and potentially contradictory, criteria. On the one hand, the voting rights statutes forbid the dilution of the minority voting power, and statistics on racial composition are employed in judging compliance with those statutes. On the other hand, the Supreme Court’s recent rulings appear to forbid the drawing of district lines on the basis of race alone. Thus, race must be taken into considera-

¹⁷⁵ See Persily, *supra* note 111 at 165-168.

¹⁷⁶ See Williams, “Multiracialism,” *supra* note 145 at 53-54. See also Payson, *supra* note 165 at 191-196; Nathaniel Persily. “Color by Numbers: Race, Redistricting, and the 2000 Census” in Johnson, *supra* note 6, 216 at 216-217.

¹⁷⁷ See Persily, *supra* note 111 at 171-175.

¹⁷⁸ *Shaw v. Reno*, 509 U.S. 630 (1993) [*Shaw*].

tion to assure the protection of voting rights, but not so much that the redistricting plan is likely to be rejected in court.¹⁷⁹

In *Shaw v. Reno*, the Supreme Court examined the North Carolina redistricting plan after the U.S. Attorney General rejected the first one, which created only one minority-majority district based on the 1990 census. White voters appealed to the Supreme Court claiming the gerrymandered new district was unnaturally shaped, using interstate highways to connect areas with high concentration of minority groups. The plan ended up separating districts and crossing municipalities in an unreasonable way. The drawing of the new district, Plaintiffs argued, was racially discriminatory. The Supreme Court held the efforts to satisfy the *Voting Rights Act* with redistricting plans should rely on strict scrutiny standards (or be of compelling government interest). Justice Sandra O'Connor, writing for the Court, held that

[r]acial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters – a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. [509 U.S 630,26]. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.¹⁸⁰

The Supreme Court has used similar arguments in recent decisions regarding affirmative action cases. Since *Brown v. Board of Education*,¹⁸¹ when the Supreme Court overturned state laws that had established segregation in public schools, universities implemented programs aiming for the greater inclusion of minorities. In

¹⁷⁹ Goldstein & Morning, *supra* note 44 at 123.

¹⁸⁰ *Shaw*, *supra* note 178 at s V.

¹⁸¹ *Brown*, *supra* note 118.

1978, in *Regents of the University of California v. Bakke*,¹⁸² the Supreme Court upheld the constitutionality of the use of race as one of the factors in college admissions policies, under the argument that diversity in classrooms was of compelling state interest. However, the court clarified that specific quotas for racial minority groups were not allowed.

In 2003, with *Grutter v. Bollinger*,¹⁸³ the Supreme Court maintained that race conscious policies in university admissions were permissible, but race could not serve as the only factor in the evaluation of applicants. The court emphasized the unconstitutionality of the quota system since *Bakke*. Justice Sandra O'Connor clarified affirmative action policies should be temporary and, with the use of sunset clauses, suggested that states move in the future towards the implementation of colourblind policies.

Finally, in 2012, in *Fisher v. University of Texas at Austin*,¹⁸⁴ the Supreme Court of the United States again examined strict scrutiny standards for colour conscious policies in university's admissions. Abigail Fisher, a white student, sued the University of Texas at Austin alleging injuries due to the university's race-based admission program for Fall/2008. Before explaining this decision, it is necessary to clarify that, after the decision in *Hopwood v. Texas*,¹⁸⁵ colour conscious admission processes at the University of Texas had ended. In its place, the state legislature adopted the "Top Ten Percent Plan" (in short, the top ten percent of students in

¹⁸² *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

¹⁸³ *Grutter v. Bollinger*, 539 U.S. 306 (2003) [*Grutter*].

¹⁸⁴ *Fisher v. University of Texas*, 570 U.S. ____ (2013) [*Fisher*].

¹⁸⁵ *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). In this decision, four white plaintiffs sued the University of Texas at Austin's School of Law, arguing it rejected their admission due to race-based policies. The decision of the U.S. Court of Appeals for the 5th Circuit was abrogated by the decision in *Grutter*, *supra* note 183.

Texas high schools would gain admission with priority over other applicants). In 2008, the program was responsible for filling up approximately 81% of the seats in the University of Texas at Austin. Consequently, the Top Ten Percent Plan ended up reaching racial minority students, due to the unfortunate and persistent de facto segregation at schools. For the remaining seats for in-state applicants, the university considered different criteria and factors through a holistic review based in standardized test scores and high school class rank, leadership abilities, work experience, extracurricular activities, race, socioeconomic and family status. The main goal of the holistic review was to increase diversity in the university with talented students whom the Top Ten Percent Plan did not reach.

Fisher argued that the University of Texas's race-conscious policy violated the Fourteenth Amendment. She also argued before the District Court that using race as a factor in the holistic review did not follow the strict scrutiny standard used in *Grutter*. In 2009, the District Court upheld the legality of the university's admission program, which the 5th Circuit reaffirmed upon Fisher's appeal.

In 2012, the Supreme Court heard arguments from the parties as well as amici, and remanded the case back to the 5th Circuit, under the argument that the lower court did not apply a strict scrutiny review. In 2013, the 5th Circuit ruled in favour of the University of Texas, holding that the university might use race as part of a holistic admissions program where it cannot otherwise achieve diversity. In the following year, the 5th Circuit declined Fisher's request to rehear the case. Fisher filed a petition for certiorari to the Supreme Court. The court granted certiorari, but has not yet heard the case.

The Supreme Court's decision in *Fisher* may signify an important change in the court's reasoning in relation to race in university admissions. Colour consciousness advocates fear that the Supreme Court might eliminate the use of race, or limit the scope of color conscious policies in university admissions. However, even if the decision in *Fisher* goes the way of absolute racial neutrality, race can still serve as basis in holistic reviews, not with box-checking, but with other personal information, like surname and address.¹⁸⁶

Although the core debate in *Fisher* is the examination of race under the strict scrutiny standard, note how the Top Ten Percent Plan and the holistic review process combined can address social equality, improving the lives of disenfranchised individuals with diversified criteria in social programs.¹⁸⁷ This positive aspect of the use of multiple standards for affirmative action programs is to the mutual satisfaction of colourblindness and colour conscious policies advocates' claims – it continues supporting racial minority groups without offending the Equal Protection Clause. Moreover, multiple criteria in affirmative action programs promote diversity in universities, reaching biracial/multiracial individuals without imposing on them the choice of one of the traditional racial categories.

It is important to highlight, though, that the United States Supreme Court never specifically analyzed the impacts of multiracial data on census and social policies,

¹⁸⁶ See e.g. Vinay Harpalani, "Fisher's Fishing Expedition", online: (2012) 15 *U. Pa. J. Const. L. Height Scrutiny* <ssrn.com/abstract=2185453>.

¹⁸⁷ Lei 12.711/2012 (30 August 2012), Presidency of the Republic, <www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/l12711.htm> [Law 12.711/2012]. The statute implemented a similar program to the Top Ten Percent Plan, but with the use of quotas. In Brazil, the need for objective criteria and the respect for the constitutional principle of impersonality (of administrative acts) demand public policies to be very strict with their rules and in determining who the beneficiaries should be.

or the role multiracial individuals play in redistricting and affirmative action cases. Judicial debates over race-based policies still rely on the grounds of a compelling need to remedy prior discrimination or the promotion of diversity.

The most noteworthy decisions in relation to multiracial individuals have involved child custody and transracial adoption.¹⁸⁸ According to scholars, courts in the United States have recognized that the race of parents may serve as an indicator of life experiences and therefore, may influence the child's identity formation. However, the race of parents is not the only or the most important factor regarding child custody and transracial adoption.

The first major change in American jurisprudence regarding child custody and race came in *Palmore v. Sidoti*.¹⁸⁹ The Supreme Court decision in *Palmore* influenced the current interpretation of the best interest of the child principle and its connection with race. In *Palmore*, the Caucasian father, Anthony J. Sidoti sought custody of his child, which lower courts had granted to the Caucasian mother Linda Sidoti Palmore, when they divorced. Sidoti founded his claim on different arguments, including that the mother married an African-American man, Clarence Palmer Jr. He argued that, in having an African-American stepfather, his child might face discrimination and other challenges that she would not face if raised in an all white family. The Supreme Court determined that the natural mother had rightful custody of the child, concluding that

¹⁸⁸ See *Palmore*, *supra* note 23; *Davis v. Davis* 240 A.D.2d 928, 658 N.Y.S.2d 548 N.Y.A.D. 3 Dept., 1997 (child custody cases in which courts examined the connection between the best interest principle and race). Also see *Reisman by Reisman v. State of Tenn. Dept. of Human Services* 843 F.Supp. 356 W.D.Tenn., 1993 [*Reisman*]; *DeWees v. Stevenson* 779 F.Supp. 25 E.D.Pa., 1991 [*DeWees*] (transracial adoption cases in which courts analyzed the best interest and race regarding biracial children).

¹⁸⁹ *Palmore*, *supra* note 23.

[t]he State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved. Fla. Stat. § 61.13(2)(b)(1) (1983). The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause. ...The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.¹⁹⁰

With the decision in *Palmore*, the Supreme Court clarified that under the best interest of the child, an infant's placement should be evaluated primarily on the consideration of which parent can provide love and nurturing. In addition, the parent seeking custody should be able to prepare the child for the complex challenges he/she might face in life. Race or private prejudice could not serve as a reason for divesting a parent from child custody.

Palmore v. Sidoti has strongly influenced child custody cases of mixed-race infants and transracial adoption. If parents can provide a biracial child with protection, respect, and at the same time be sensitive to her multiple racial and ethnic backgrounds, then the race and ethnicity of parents and future parents become secondary criteria.¹⁹¹ Professor Twila L. Perry, raising doubts about the consequences

¹⁹⁰ *Palmore*, *supra* note 23, at 2.

¹⁹¹ See Gayle Pollack. "The Role of Race in Child Custody Decisions between Natural Parents over Biracial Children" in Johnson, *supra* note 6, 338 at 338-341. The author clarifies that:

[s]ome could also argue that considering race in custody disputes is a form of biological predeterminism, forcing biracial people to be bicultural. However, a consideration of race that looked at a parent's ability to teach a biracial child about both of her racial heritages just ensures that biracial children have ample information with which to continually define themselves, and that their parents play an encouraging role in helping them explore all facts of their identities. The state is not stepping in and deciding levels of race consciousness or racial identity for children, but is simply saying that children ought not to be limited by parental preconceptions.

of *Palmore* for multiracial child custody, presents some extra concerns, which would not show up in regular custody modification cases:

[regarding multiracial children], in addition to the potential for ostracism as a result of the racial prejudices of others, there is the issue of the child's own sense of identity, his feelings about being a mixture of two races in a society in which racial labels are important. ...The problem is that in the vast majority of cases that do not involve unfitness of one of the parties, the judge often has little rational basis upon which to prefer one parent to the other. If race can be considered as a factor, the party who feels that he or she has or should have the advantage on this issue (usually the Black parent) is likely to attempt to make it the focus of the case in an attempt to convince the court that there is some distinction to be drawn between the parties. This can result in the unhappy scene of parents trading allegations about racism, impaired racial identity, [etc.]... Clearly, such a process could be damaging to the child. It focuses attention at a very stressful time on the very issue that the child will have to work out over many years: her racial identity.¹⁹²

Therefore, biracial/multiracial children have the right to develop a healthy racial identity, to preserve social and familial relationships, as well as to the comfort of a stable home. This basic rationale serves both child custody and transracial adoption policies. In regards to adoption, with the absence of a multiracial category on census, agencies in charge of adoptions (in the past, public and private agencies; today only non-profitable institutions)¹⁹³ have treated multiracial children as "monoracial" in most cases, privileging their placement with racial minority families. The great debate around child placement for adoption and race has rested on the divided opin-

¹⁹² Twila L. Perry, "Race and Child Placement: The Best Interests Test and the Cost of Discretion" in Johnson, *supra* note 6, 343 at 346-347 [Perry, "Race and Child Placement"] ("[i]n disputes between natural parents, race should not be considered").

¹⁹³ In the United States, there are three ways of domestically adopting a child. First is the independent one: prospective parents, with the support of a lawyer, adopt the child after an agreement with the biological mother. The independent process is the most common in America. The second one is through non-profitable organizations, while the third is through public agencies. After 1996, with the Interethnic Placement Act, agencies who receive public funds cannot delay or deny the placement of a child solely on the basis of race/ethnicity. The main goal is to avoid discrimination and disparities in regards to white and nonwhite children waiting for adoption.

ions about privileging the best interest of the child while disregarding race. Scholars see overlooking race as a colourblind solution and the placement of children with families compatible to their race as a colour conscious position.¹⁹⁴ In this second point of view, the best interest of the child should be in harmony with the rights and interests of the racial group with which the child might identify.¹⁹⁵ However, since biracial/multiracial children's racial identity is under formation, determining to which racial group a mixed-race child belongs is a difficult task.

The main problem with colour conscious policies regarding transracial adoption relies on the fact that there are more nonwhite children in need of a family and more white couples willing to adopt. Although there were no specific statutes regulating placement of adoptive children according to race until the Interethnic Adoption Provisions or Interethnic Placement Act (1996), adoption agencies tended to use this rationale in placing children within families.¹⁹⁶ Therefore, nonwhite children, especially African-Americans, ended up waiting longer for placement than white children, mainly in public agencies or other institutions which receive public funds. Moreover, in order to encourage nonwhite couples to adopt nonwhite children, official standards for nonwhite prospective parents became lower than the ones for white couples, especially regarding income and age.¹⁹⁷

¹⁹⁴ See Perry, "The Transracial Adoption Controversy", *supra* note 6 at 364-365.

¹⁹⁵ See Zanita E. Fenton. "In a World Not Their Own: The Adoption of Black Children" in Johnson, *supra* note 6, 368 at 368-374.

¹⁹⁶ See Twila L. Perry. "Race, color, and the adoption of biracial children (Modern Families: Changing Families and Changing Laws" (2014) 17:1 *Journal of Gender, Race and Justice* at 73-104. ["Race, color and the adoption of biracial children"]

¹⁹⁷ See Elizabeth Bartholet. "Where Do Black Children Belong? The Politics of Race Matching in Adoption" in Johnson, *supra* note 6, 353 at 353-361.

Professor Elizabeth Bartholet, who analyzed the difficulty in placing African-American children for adoption before the Interethnic Placement Act, explains that critics of transracial adoption believe that the preservation and reunification of black families justify the delays and denial in placement of minority children with white families.¹⁹⁸ The author refuted this idea, arguing that

the fact is that the resources devoted to the goal of preserving black biological families and to making in-racial adoption work have been limited and are likely to be limited in the foreseeable future... [T]he current racial matching regime, by barring and discouraging white parents from transracial adoptions ... denies adoptive homes to minority children. The racial matching policies also mean that black children who can be placed interracial go to families that are as a group significantly different in socioeconomic terms from typical white adoptive families and rate significantly lower according to traditional parental screening criteria.¹⁹⁹

Scholars like Professor Ruth Colker also criticize the role race has played in preventing the adoption of minority children by white parents. Colker points out the importance of the National Association of Black Social Workers (“NABSW”) in this regard, mainly its influence in the adoption and placement policies in America since the 1970’s. NABSW defends that race matching is fundamental for the preservation of blackness in adoption cases. Thus, for Colker, NABSW has contributed to the perpetuation of “stark black-white thinking about society” and the “one-drop” rule, especially for multiracial children. The author argues that

our goal should be to respect an individual’s full racial heritage... When courts or social agencies distort one aspect of that racial heritage, they help perpetuate our racist “one drop of blood” rule. ...Our policy of preferring black parents for a black child may be beneficial in terms of preserving racial heritage and even teaching a child how to deal with the racism of our society... [But] stretching that policy to include all multiracial children with a drop of African American blood reinforces racism rather than

¹⁹⁸ *Ibid* at 354.

¹⁹⁹ *Ibid* at 360 [footnotes omitted].

the best interests of the child. By taking that step, we are helping to construct a bipolar racial model that is disrespectful to the genuine mixed racial heritage of that child.²⁰⁰

Even though the NABSW and scholars like Twila L. Perry support colour conscious policies in adoption of nonwhite children, transracial adoption policies and rules should be in the realm of reasonability.²⁰¹ If the number of available white and nonwhite children for adoption was similar and the number of white and nonwhite prospective parents was the same, child placement with parents with common racial backgrounds would be a valid policy. In these cases, a parent's race could contribute to the child's racial identity formation. However, as the numbers have been extremely unfavourable to nonwhite children, restrictions for child placement based on race are unreasonable and do not attend to the best interest of the child. In this regard, the Interethnic Placement Act for public agencies (and for non-profitable institutions that receive public funds) has been an important step towards racial equality in adoption cases.²⁰²

For biracial/multiracial children, there is an additional argument that justifies ignoring race in adoption placement: mixed-race children do not necessarily identify with one or both of their biological parents' race. Therefore, a biracial/multiracial child's placement should be with a family – disregarding race – able to provide protection, nurturing, and necessary psychological resources to help the child develop a healthy racial identity.

²⁰⁰ Ruth Colker. "Bi: Race, Sexual Orientation, Gender and Disability" in Johnson, *supra* note 6, 375 at 377.

²⁰¹ *Contra* Perry, "The Transracial Adoption Controversy," *supra* note 6 at 364-367; Perry, "Race, color and the adoption of biracial children", *supra* note 196 at 104.

²⁰² It is necessary to highlight, though, that most domestic adoptions in the United States go through an independent process, between prospective parents and the biological mother of the child.

American courts have played an important role in defining how to consider race in placing multiracial children in transracial adoption cases. Before the Inter-ethnic Placement Act, American judges recognized that, although racism remains in American society, adoption agencies should not base adoption decisions exclusively on race – lest it “may retard efforts to achieve a colorblind society”.²⁰³ Courts permitted colour conscious policies in transracial adoption cases “only where it can be justified on the grounds of compelling necessity... [and] even ‘benign’ racial classifications are highly suspect and must be limited to narrowly defined situations”.²⁰⁴

Due to the complexity of today’s social relations, cases other than custody and transracial adoption will demand a deeper consideration of courts regarding mixed-race individuals. For instance, recently, in a very rare situation, a woman filed a complaint for wrongful birth and breach of warranty against the Midwest Sperm Bank, with the Circuit Court of Cook County, Illinois. The Plaintiff, who lives in common law with another woman, decided to use the sperm of an unknown donor to conceive a child. Although she specified the genetic characteristics she wanted in her child, the sperm bank made a mistake and used the material donated by an African-American man. The child was born mixed-race and the woman sued the clinic under the argument that the child does not have the characteristics she wanted, and now the family will face “fears, anxieties and uncertainty”. In addition, she alleged that she has extra concerns for her daughter’s future, and that they will probably

²⁰³ See Bartholet, *supra* note 197 at 361.

²⁰⁴ *Ibid.* See also *DeWees*, *supra* note 188 (in adoption decisions, “state agencies cannot ignore the realities of society for child’s placement”). See also *Reisman*, *supra* note 188 (assigning a black heritage to a bi-racial child for placement violates the Equal Protection Clause).

have to move out because she lives in a city where most of the population is white.²⁰⁵

This case is an example of future controversies regarding discrimination, and that civil rights enforcement may fall specifically over individuals who have at least part of the ancestry or physical characteristics of a group.²⁰⁶ The sperm bank case shows that America is not yet colourblind and that the one-drop rule still plays an important role in social and familial relations. In addition, the case demonstrates that racism does not involve only monoracial minority group members, but also mixed-race individuals. If multiracialism were broadly accepted in American society, perhaps there would be no law suit in this case. Hopefully, the Plaintiff, as a mother of a multiracial child, will see racism through her daughter's eyes, as much as the white mothers involved in the multiracial movement in the United States,²⁰⁷ and thus, will be more understanding, respectful and tolerant to the multiplicity of racial groups in the country.

So far, multiracial identity recognition has slowly reached courts, especially in child custody and transracial adoption cases. In Brazil, multiracialism has a different perspective.

²⁰⁵ See Matthew McKnight, "The Ohio sperm-bank controversy: a new case for reparations?", *The New Yorker* (14 October 2015) online: <www.newyorker.com/news/news-desk/ohio-sperm-bank-controversy-new-case-reparations>

²⁰⁶ See Persily, *supra* note 111 at 168.

²⁰⁷ Williams, *Mark one or more*, *supra* note 5 at 101-119.

2.2 BRAZIL

2.2.1. Brief history

In Brazil, colonization happened in a different context from the United States. As soon as Portuguese colonizers arrived in the country, miscegenation began.²⁰⁸ Portuguese colonizers arrived alone, with no families. The absence of white women meant intercourse with indigenous women was common. Thus, the first mixed-race individuals in Brazil were the offspring of such relations. This behaviour would continue later on with black women.²⁰⁹

As the exploration of Brazilian territory gained strength, Portugal organized the administration of the land and the sugar cane plantation system, which became very successful in the Sixteenth, Seventeenth, and Eighteenth centuries. In the beginning, colonizers enslaved the indigenous people to work on plantations. However, this labour force was not effective, since the indigenous people were not used to this kind of activity. Thus, colonizers introduced another group to work on agriculture: blacks, taken from Africa as part of the slave trade. In the following years, Africans replaced the local indigenous populations on sugar cane plantations, and later on in coffee farms.²¹⁰

When Brazil became independent from Portugal in 1822, mining and coffee gained more importance in the Brazilian economy. Whites occupied the top of racial hierarchy, as property owners and traders. Most nonwhite populations, on the other

²⁰⁸ See Miguel Vale de Almeida. "From Miscegenation to Creole Identity: Portuguese Colonialism, Brazil, Cape Verde" in Charles Stewart, ed, *Creolization: history, ethnography, theory* (Walnut Creek: Left Coast Press, 2007) 108 at 119.

²⁰⁹ See Skidmore, "Race and Class in Brazil," *supra* note 113 at 12.

²¹⁰ See Almeida, *supra* note 208 at 110.

hand, were enslaved people. In the Nineteenth Century, sex between people with different racial backgrounds was common and, therefore, mixed-race Brazilians represented a great number of individuals on plantations, in cities, and even in the military forces like the National Guard.²¹¹

The prohibition of the slave trade made African slaves more expensive to coffee farmers. Therefore, the government stimulated foreign workers immigration under the premise that Europeans, especially Italians, were more qualified labour workers than blacks.²¹² The abolition of slavery happened in 1888, when most slaves were already free, but still in poverty with very few professional opportunities.²¹³

Concomitantly with European immigration and the abolition of slavery (by the end of the Brazilian Empire and in the beginning of the Republic), European descendants and the elite idealized a “whitening” process in Brazilian society, associating it with progress.²¹⁴ However, in the 1930s, after the work of Gilberto Freyre “Casa-Grande & Senzala” (translated, “Masters and Slaves”), the idea of Brazil as a

²¹¹ *Ibid* at 112 (“miscegenation and ... mixed culture occurred mostly as side effects, not as the result of a policy”). See also Skidmore, “Race and Class in Brazil,” *supra* note 113 at 19.

²¹² See Sérgio Buarque de Holanda, *História Geral da Civilização Brasileira. Dispersão e Unidade* [General History of Brazilian Civilization. Dispersion and Unit] (São Paulo: Difusão Européia do Livro) at 177 e 280. According Caio Prado Júnior. *História e Desenvolvimento: a contribuição da historiografia para a teoria e prática do desenvolvimento brasileiro* [History and Development: the contribution of historiography to the theory and practice of Brazilian development]. (São Paulo: Brasiliense, 1999) at 101.

²¹³ See Roberta Kauffman, *Ações afirmativas à brasileira: necessidade ou mito? Uma análise histórico-jurídico-comparativa do negro nos Estados Unidos da América e no Brasil* [Brazilian affirmative actions: necessity or myth? a historical, legal and comparative analysis of blacks in the United States and Brazil] (Porto Alegre: Livraria do Advogado, 2007) at 36-38.

²¹⁴ See Thomas E. Skidmore, “Bi-Racial USA vs Multiracial Brazil – is The Contrast Still Valid?” (1993) 25:2 *Journal of Latin America Studies* 373 at 374 [Skidmore, “Bi-Racial USA v. Multiracial Brazil”]; Skidmore, “Race and Class in Brazil,” *supra* note 113 at 13. See also Almeida, *supra* note 208 at 115.

racial democracy became widespread and well accepted in society.²¹⁵ Scholars define racial democracy as the belief that racism and racial discrimination never existed in Brazil and that race has been an irrelevant factor regarding social mobility.²¹⁶

In 1950s, researchers sponsored by UNESCO investigated racial democracy in Brazil.²¹⁷ They concluded class, rather than race, was the reason why nonwhites were at the bottom of the social hierarchy, with fewer opportunities in education and jobs.²¹⁸ In the 1970s, scholars like Thomas Skidmore questioned the idea of racial democracy in the country. According to Skidmore, although in Brazil there was no lynching and segregation like in the United States, with respect to jobs and education, blacks had less opportunity than whites.²¹⁹ The government, on the other hand, defended Brazil as indeed a racial democracy.²²⁰ Important scholars who studied race and racial hierarchy in the country and who refuted the idea that Brazil was a colourblind society, exiled due to the repression of intellectuals by military dictatorship at that time. Therefore, research on race in academia did not develop in the country until the “Abertura Democrática,” or the end of the dictatorship, when scholars returned to Brazil.²²¹

²¹⁵ Gilberto Freyre. *The Master and the Slaves (Casa Grande & Senzala): a study in the development of Brazilian Civilization*, 2d ed. (New York: Knopf, 1956) (acknowledgment of the importance of Indians and African descendants in the Brazilian society).

²¹⁶ See Skidmore, “Bi-Racial USA vs Multiracial Brazil” *supra* note 214 at 374.

²¹⁷ UNESCO (1969), Four Statements on the Race Question, Com.69/II.27/A (Paris: UNESCO). A group of scholars prepared four statements in 1950, 1951, 1964 and 1962, as part of UNESCO’s program about race and the combat of racial prejudice.

²¹⁸ See Skidmore, “Bi-Racial USA vs Multiracial Brazil” *supra* note 214 at 375. See also Pierre-Michel Fontaine. “Introduction” in Fontaine, *supra* note 113, 1 at 1-2.

²¹⁹ Skidmore, “Bi-Racial USA vs Multiracial Brazil,” *supra* note 214 at 376-384.

²²⁰ Almeida, *supra* note 208 at 108.

²²¹ Cláudia Mitchell-Kernan. “Foreword” in Fontaine, *supra* note 113, ix at ix-x. See also Skidmore, “Race and Class in Brazil,” *supra* note 113 at 16-17; Fontaine, *supra* note 218 at 2.

With the end of the military government, the National Assembly promulgated Brazil's new Constitution in 1988,²²² listing several individual and social rights, as well as principles, which the states, institutions, and individuals should respect. Even with constitutional rights and guarantees, the Brazilian government took more than a decade to implement public policies aiming to achieve substantial racial equality. Only in 2002, with the Decree 4.228/2002 – The National Program of Affirmative Action Policies,²²³ and the Law 10.558/2002 – The Diversity in the University Program²²⁴ did Brazil have its first affirmative action policies.

2.2.2. Census in Brazil

Phenotype has been the core of Brazilian racial categorization.²²⁵ However, in the past, one of the ways to identify race was through its indication on birth certificates, which unequivocally found support in the ancestry rule. Since 1975, with the

²²² Constituição da República Federativa do Brasil de 1988 (05 October 1988), Presidency of the Republic, online: <www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm> [*Constitution of the Federative Republic of Brazil – 1988*] Art 3rd-7th. For instance, Article 3rd sets the fundamental objectives of the Federative Republic of Brazil. Amongst them, the Constitution states: the construction of a free, just and solidary society; the eradication of poverty and marginalization, as well as the reduction of social and regional inequalities. Also, the Constitution prohibits discrimination on the basis of origins, race, sex, color, age or any other. Article 4th enunciates the commitment of the Republic with human rights and the repudiation of racism. Article 5th establishes that everyone is equal before the law.

²²³ Decreto 4.228/2002 (14 May 2002), Presidency of the Republic, online: <www.planalto.gov.br/ccivil_03/decreto/2002/D4228.htm> [*Decree 4.228/2002*] This Decree traces guidelines for social public policies, mainly for African-Brazilians and indigenous peoples, women and people with disabilities. It is addressed both to public service and private sector. The statute establishes incentives to companies that adhere to the program.

²²⁴ Lei 10.558/2002 (14 November 2002), Presidency of the Republic, online: <www.planalto.gov.br/ccivil_03/leis/2002/L10558.htm> [*Law 10.558/2002*] This Law aims at turning Brazilian universities into pluralistic and multicultural environments. The Ministry of Education in Brazil has the responsibility to trace strategies in order to improve chances of minorities and/or marginalized groups in university admissions.

²²⁵ See Bailey, Loveman & Muniz, *supra* note 4 at 110-112. See also Almeida, *supra* note 208 at 110.

change in the Law 6.015/1973,²²⁶ which regulates public records in Brazil, there is no more registration of race in identity documents, opening space for the analysis of phenotype. Tania Katerí Hernandez points out the difficulty in adopting phenotype as a foundation for racial categorization in Brazil:

[t]oday, racial fluidity in Brazil is rhetorically based upon the premise that racial classifications are determined more closely by how one phenotypically appears rather than strictly by one's genetic history or ancestors... [I]ndividuals with identical racial heritage are often identified socially or informally by distinct racial designations based on their phenotype... [R]ace mixture has made racial identification a very indeterminate and unnecessary practice. In turn, racial mixture is rhetoric idealized and promoted as the national norm.²²⁷

Self-identification has been the main way to categorize Brazilians, although census bureaus have also used interviews for determining an individual's racial classification. The first time Brazilian census collected racial data was in the Nineteenth Century. Comparing the censuses of the years 1872, 1890, 1940, 1950, 1960, 1980, 1991 and 2000, the number of white Brazilians increased from 38% of the population in 1872, to 53.4% in 2000. African-Brazilian representation decreased from 20% in 1872, to 8.7% in 1960, and to 6.1% in 2000.²²⁸ This data shows the tendency of Brazilians to "whiten" themselves and reflects the deep miscegenation in the country between 1872 and 2000.

Fluid colour lines and categorization difficulties have been constant throughout Brazil's history, and thus a challenge to demographic analysts. Perhaps, the results of the 1976 Brazilian National Household Survey ("PNAD") are the most persuasive

²²⁶ Lei 6.015/1973 (30 October 1975), Presidency of the Republic, online: <www.planalto.gov.br/ccivil_03/leis/l6015compilada.htm> [Law 6.015/73]

²²⁷ Hernández, *supra* note 17 at 1415-1417 [footnotes omitted].

²²⁸ See Kauffman, *supra* note 213 at 248-252.

data on how imprecise racial categorization of Brazilians might be. In the census form, respondents had to answer two questions in which they should identify their race. On the first, respondents had to write down their race/colour. In the second, they should check a box with four different categories: white, black, mixed-race and Asian (“amarelo”). Results to the first question showed about 200 different colours existed in the country, although 93% of written responses corresponded to white (branco), “light-skinned” (claro), “light-brunette” (morena-clara), “brunette” (morena), mixed-race (pardo) and black (preto). Moreover, while 41.91% answered the first question writing “white” in the form, 53.94% checked the White box in the second question. According to Nelson do Valle Silva, the second question with the simple box-check response allowed Instituto Brasileiro de Geografia e Estatística (“IBGE”) to tabulate racial data.²²⁹

In 2008 PNAD, IBGE adopted the following categories: White, Black, Asian (“Amarelo”), Indian and Multiracial (“Pardo”). Among interviewed Brazilians, 48.4% self-identified as white; 43.8% as mixed-race, 7.1% as black, 0.5% as Asian and 0.2% Indian.²³⁰ Note that nonwhites represent the majority of Brazilian population today.

Demographic data on race serves different purposes, including the creation of social policies that aim to reduce racial inequalities. In Brazil, however, the imprecision of phenotype examination makes it difficult for official institutions to set effective

²²⁹ Nelson do Valle Silva. “Distância social e casamento inter-racial no Brasil” [Social distance and interracial marriage in Brazil] in Carlos Hasenbalg & Nelson do Valle Silva, eds, *Relações raciais no Brasil contemporâneo [Racial relations in contemporary Brazil]* (Rio de Janeiro: Rio Fundo Editora/IUPERJ, 1992) 17 at 17-52.

²³⁰ BRA. IBGE. Pesquisa Nacional por Amostra de Domicílios - PNAD (2008), Tabela 1.2, online: <www.ibge.gov.br/home/estatistica/populacao/trabalhoerendimento/pnad2008/brasilpnad2008.pdf>.

race-based affirmative action programs. Universities, for instance, find in the ancestry rule an additional criterion to phenotype analysis in admission processes. Therefore, universities have demanded documents like birth certificates and photos for applicants to prove their nonwhite ancestry and then claim one of the seats addressed to racial minority groups under affirmative action programs. The most expressive example of this controversy in Brazil is the debate amongst diverse racial groups and sectors of society about quotas in the University of Brasilia. This case was submitted to the Federal Supreme Court (“STF”), with the ADPF 186/DF²³¹ - which this paper will better explain in subsection 2.2.4.

Undoubtedly, data collected on race is extremely important to frame the racial composition of a society. However, in a multiracial country like Brazil, more important than collecting data is to interpret such information precisely. In this regard, the method of categorization and interpretation chosen by official institutions is central to the understanding of racial inequality. As Bailey, Loveman and Muniz point out,

[a]ccording to some schemes, Brazil is a predominantly nonwhite country; in others, it becomes majority white... [T]he magnitude of racial disparities in wages changes depending on how race is defined and according to location along the income distribution. Finally, comparisons of level of inequality across classification schemes provide clues to the underlying mechanisms fueling racial disparities. ... [W]e address a complicating factor in the interpretation of any findings of racial inequality in Brazil: the possibility that racial classification is not independent of social status in Brazilian society. ... Brazil's population oscillates between 40.7% and 70.4% White, between 0% and 40.1% brown, and between 10.8% and 59.3% black/nonwhite, depending on the means of classification. ... [M]any researchers, the state and social movement actors rely heavily on

²³¹ ADPF 186/DF, *supra* note 97.

descriptive statistics for much of their discussion of income inequality in Brazil.²³²

The method of data collection and interpretation is not the only reason why results on censuses in Brazil are imprecise. Education, wealth and status “whiten” individuals when they racially self-identify.²³³ The same happens when interviewers have to categorize interviewees: they tend to classify light-skinned respondents with high educational levels or status as “whites”. If these same individuals have lower educational levels and lower status, they become “pardos” (mixed-race). In addition, dark-skinned individuals with high educational levels or status may be classified as “pardos”.²³⁴ Hence, census data reflects the connection between status, income, education and race in Brazil, although there are contextual differences by regions in the country.²³⁵

2.2.3 Race or class?

Authors like Thomas Skidmore believe race is at the core of inequality in Brazilian society. Skidmore compares Brazilian racial inequality to the American variety and concludes that

[f]or the last forty years at least it is clear that Brazil has suffered from systematic racial inequality, which can no longer be dismissed as the result of a set of factors other than race itself. According to official Brazilian

²³² Bailey, Loveman, & Muniz, *supra* note 4 at 107 and 112-113 (racial composition shifts from majority white to majority black depending on the classification scheme) [footnotes omitted]

²³³ See Carlos A. Haselbalg. “Race and Socioeconomic Inequalities in Brazil” in Fontaine, *supra* note 113, 25 at 26. (occupation, education and status were more important than race regarding interpersonal relations).

²³⁴ See Hernández, *supra* note 17 at 1417

²³⁵ See Fontaine, *supra* note 218 at 4-5. According Haselbalg, *supra* note 233 at 27-29 (there is a disproportionate number of nonwhites in Northeast and whites in the South and Southeast). See also Bailey, Loveman & Muniz, *supra* note 4 at 109. (Interviewer classification increases the level of inequality of blacks relative to whites, but not so for browns).

census data, race has a significant independent effect on infant mortality, life expectancy, education, occupation, housing and income.²³⁶

In a similar view, Tania Katerí Hernández asserts that whitening and mixing in Brazil has served only to maintain white supremacy. For her, the ideological use of the “mulatto escape hatch” is nothing but a tool of racial subordination.²³⁷ The idea of a “mulatto escape hatch” in Brazil signifies that mixed-race individuals have easier mobility in Brazilian social hierarchy than blacks, since they can be treated as whites if they have education, income and status.²³⁸ F. James Davis, on the other hand, argues that the “whitening process” shows that class is the main factor for inequality

[i]n Brazil, it is class rather than racial discrimination that is pervasive, sharp, and persistent, even involving class-segregated public facilities and class-based master-servant etiquette. The expression “money whitens” indicates that class can have more weight than physical traits in determining racial classification. Census estimates of the number of people in different racial categories can be very misleading when compared with the estimates in the United States or other nations.²³⁹

Carlos Fernández, who analyzes the link between race and class in Brazil as well as in Latin America, acknowledges that statistics point out a disproportional number of darker people in lower classes and lighter people in upper classes. However, he argues that

[m]any sociologists have long noted that in the absence of effective countermeasures, poverty and wealth alike tend to be inherited... Add to this the blurring of racial lines on a large scale over hundreds of years, such that customary forms of discrimination based on actual ancestry have been rendered impotent... [The race] question in Latin America has by and large been transformed into a socioeconomic issue.²⁴⁰

²³⁶ Skidmore, “Bi-Racial USA vs Multiracial Brazil,” *supra* note 214 at 376 [footnotes omitted].

²³⁷ Hernández, *supra* note 17 at 1412-1414.

²³⁸ See Bailey, Loveman & Muniz, *supra* note 4 at 107-109.

²³⁹ Davis, *supra* note 46 at 24.

²⁴⁰ Fernández, *supra* note 93 at 132.

In recent decades, the government has tried to reduce inequality using race as the main criterion. The goal of race-based programs is to bring dark-skinned Brazilians to a higher level in income and education. In universities and in the public service, institutions have implemented affirmative action policies based on phenotype – which has caused many controversies. In 2012, the Federal Supreme Court decided that affirmative action policies are constitutional.²⁴¹

Despite the strong debates over whether race or class is the main factor for inequality in Brazil, Brazilian society is indisputably multiracial. Moreover, disparities in income and status among Brazilians are notoriously deep. Therefore, race has historically contributed to social inequality. Due to the long and intense miscegenation in the country, class still represents an important obstacle to the achievement of isonomy among Brazilians today.

2.2.4 Multiracial people in Brazilian statutes and courts

Brazil is a civil law country, although jurisprudence has gained importance since the promulgation of the Federal Constitution in 1988. The Federal Constitution prohibits any kind of discrimination; statutes reinforce this prohibition. Regarding race, the Congress and courts have adopted a binary system whites/nonwhites even though censuses show that mixed-race individuals represent a great number of self-identified Brazilians.²⁴²

²⁴¹ ADPF 186/DF, *supra* note 97.

²⁴² BRA. IBGE. Pesquisa Nacional por amostra de Domicílios – PNAD (2008), table 1.2, online: <www.ibge.gov.br/home/estatistica/populacao/trabalhoerendimento/pnad2009/pnad_sintese_2009.pdf>

The idea that Brazil is a non-racist society, which prevailed for decades, may have influenced the way the government, legislatures and courts have managed racial issues.²⁴³ Except for “Dia do Mestiço” (Mestizo Day, on June 27th in the states of Amazonas, Paraíba, and Rondônia) and the interracial adoption policies founded in the Law 8.069/90, there are no other expressive law or court decisions in Brazil which consider multiracialism in its rules or arguments. Actually, Brazilian official institutions consider multiracial identity exclusively under the personal autonomy perspective, with no impacts on social policies aiming at equality. In order to understand the reason why so many Brazilians self-identify as mixed-race and to assess the way official institutions deal with multiracialism, this section will focus on the way Brazilian law treats multiracial children and the way the government designs affirmative action programs with the contribution of the Federal Supreme Court.

Child custody in Brazil follows the rules of the Brazilian Civil Code – articles 1.583 to 1.590 of the Law 10.406/2002.²⁴⁴ However, none of these articles refers to colour or race. Concerning adoption, laws and public policies encourage the formation of interracial families. Thus, race is not a factor in the analysis of the best interest of the child principle in Brazil.

The Law n. 8.069/90²⁴⁵ establishes the Child and Adolescent Statute in the country, with general principles and rights, sanctions for penal transgressions committed by children and adolescents or against them, and mainly adoption proce-

²⁴³ See Skidmore, “Bi-Racial USA vs Multiracial Brazil,” *supra* note 214 at 374-377.

²⁴⁴ Lei 10.406/2002 (11 January 2002), Presidency of the Republic, online: <www.planalto.gov.br/ccivil_03/leis/2002/L10406.htm> [*Civil Code*]

²⁴⁵ Lei 8.069/90 (27 September 1990), Presidency of the Republic, online: <www.planalto.gov.br/ccivil_03/leis/l8069.htm> [*Law 8.069/90*]

dures. Note Article 84, VII of this law, which promotes interracial adoption as well as the adoption of older, disabled children, adolescents and groups of siblings.

Article 197-A of Law 8.069/90 reveals the importance of transracial adoption in Brazil, stating that prospective adoptive parents must participate in orientation programs, which aim to promote interracial adoption. Governmental programs for interracial adoption have been successful in Brazil according to the monthly magazine of the Brazilian Senate. The May 2013 publication reports that while 38.72% of the prospective adoptive parents say they are indifferent to colour, almost 100% adopt nonwhite children – perhaps because there are few white children available for adoption.²⁴⁶

Racial identity is an important aspect of an individual's personality. Its formation starts in childhood. By considering the best interest of the child over matters of racial identity, Brazil privileges the well-being of children and the affection and comfort they feel within a family.²⁴⁷ Indeed, the different legal treatment Brazilian laws and government give to race is due to the country's history and demographic makeup. In the United States, race's salience in society is more intense than in Bra-

²⁴⁶ "Adoção: opiniões, dados e ações" [Adoption: opinions, data and actions], *Em discussão! Revista de audiências públicas do Senado Federal*, ano 4, n. 15 (May 2013) online: <www.senado.gov.br/noticias/Jornal/emdiscussao/adocao/contexto-da-adocao-no-brasil/adocao-opinioes-dados-e-acoes.aspx>. But see Bárbara Paludeti, "Há 5,4 vezes mais pretendentes do que crianças aptas à adoção, aponta CNJ" [There are 5.4 times more prospective parents than children available to adoption, says CNJ] *UOL* (25 May 2013) online: <noticias.uol.com.br/cotidiano/ultimas-noticias/2013/05/25/ha-54-vezes-mais-pretendentes-do-que-criancas-aptas-a-adocao-aponta-cnj.htm> The National Registration of Adoption presents different information from the Senate magazine regarding adoption: although 66.33% of children who expect for adoption are black or mixed-race, 32.1% of prospective adoptive parents accept solely white children. In Brazil, there were 1.777 white, 1.024 black, 2.575 mixed-race children waiting for adoption in 2013, and 29.440 prospective parents waiting in line.

²⁴⁷ See Paludeti, *supra* note 246.

zil. Once American society becomes more tolerant and multiracial, race may lose importance in terms of child custody and transracial adoption.

Even though the Brazilian government gives little or no importance to race in child custody and adoption cases, race matters to affirmative action programs, particularly in education. The binary racial perspective founds social programs and prevails in the interpretation given by courts, mainly the STF to the implementation of quotas in university admissions. ADPF 186/DF²⁴⁸ has served as leading case regarding affirmative action programs in public universities. In this case, the STF decided that affirmative action policies are constitutional, and they must rely on the principle of human dignity.

Before explaining the controversy, please note that, in general, public universities in Brazil are the best in the country for quality of education. On the other hand, public schools are very poor in excellence and structure. Thus, public university students tend to come from private schools, while lower income students who depend on public education, no matter which race, have less opportunity to join the best universities in the country. Each public university in Brazil has autonomy to choose its admission process rules, including racial quotas, social quotas targeting low income students, and mixed criteria.²⁴⁹

The controversy in ADPF 186/DF relies on the University of Brasilia's ("UNB") racial quotas in the 2008 admission process. When the university first adopted racial quotas, UNB let applicants racially self-identify. After, aiming to prevent "passing" and fraud, the University began analyzing applicants' phenotype through pictures

²⁴⁸ ADPF 186/DF, *supra* note 97.

²⁴⁹ *Constitution of the Federative Republic of Brazil – 1988*, *supra* note 222 art 207.

taken on campus, as well as with interviews. According to the Plaintiff, Democratas Party (DEM), interviews during the application process had political and personal inquiries (like participation in black movements and love affairs with African-Brazilians), and followed the phenotype examination.²⁵⁰

Intense disputes over racial analysis in UNB's admission process arose. The main complaints about UNB's affirmative action program came from students who did not gain admission because of quotas. These students argued that they had higher scores in the university's standardized tests than students who gained admission under the quota system. The other argument against UNB's affirmative action policy was the difficulty in defining who is African-Brazilian and who is an indigenous person for the purposes of admission. The analysis of phenotype in Brazil principally by picture was so ambiguous, that UNB's "racial analysts" had even categorized identical twins differently. After the scandal, the University concluded interviews were less problematic than the analysis of phenotype with the additional support of the ancestry rule.²⁵¹

DEM took the case to STF, challenging UNB's racial quotas. For the first time the Federal Supreme Court examined the constitutionality of affirmative action programs in Brazil. DEM as the Plaintiff and UNB as the Defendant built their arguments over Articles 1st, III and 3rd, of the Federal Constitution – those related to human dignity and the prohibition of discrimination based on origins, race, sex, colour, age and any other. Both DEM and UNB targeted Human Rights and the promotion of equality in their arguments. In its petition, although DEM argued the party did not

²⁵⁰ ADPF 186/DF, *supra* note 97.

²⁵¹ *Ibid.*

oppose affirmative action programs, DEM strongly criticized the way UNB implemented race-based affirmative action policies in its admission process. The Plaintiff used different arguments in the appeal, mainly that class, not race, was the most important factor in the marginalization of Brazilians.

UNB, on the other hand, based its defence on demographic data from PNAD - IBGE, the census bureau in Brazil, as well as in studies of scholars regarding compensatory discrimination. The Court heard arguments from parties as well as amici – most of whom affirmed the importance and constitutionality of race-based affirmative action policies.²⁵²

Thus, in ADPF 186/DF, STF judges unanimously decided affirmative action policies in the country are constitutional. Justice Lewandowski delivered the opinion of the Court, whose main reasoning was based in substantive and formal equality, distributive justice, reasonable admission criteria in public universities, and race consciousness. In addition, he emphasized the inclusive role of universities, the temporary nature of affirmative action policies, and the proportionality of means aiming at implementing affirmative action programs. However, regarding the possible discriminatory admission procedure in examining phenotype, Justice Lewandowski did not offer a broad analysis of the topic. Instead, he founded his opinion mainly on

²⁵² *Ibid.* Most amici argued the constitutionality of quotas; the need to promote equality in Brazilian society; the end of any kind of discrimination in Brazil; the importance of pluralism in universities etc. The opinion against quotas relied on the possible offence to the San Salvador Protocol, of which Brazil is a party (the Protocol establishes that admissions in universities should be based on merit). Brazilian “Pardo-mestiço” Movement held that quotas should target poor students disregarding race as criterion, since students who do not have access to universities are the sons and daughters of poor workers. In addition, the movement argued that in UNB, quotas are not affirmative action, but a protection to individuals who self-declare African-Brazilians, although being white.

the Brazilian scholar Daniela Ikawa's lessons, which support the use of pictures and inquiries to verify applicants' race for affirmative action programs in Brazil.²⁵³

After Justice Lewandowski mentioned Ikawa's work, he concluded in a vague paragraph that quotas are constitutional as long as they do not offend the personal dignity of applicants. He did not point out which criteria, measures, or procedures might violate human dignity, leaving determinations broad and subjective. Unfortunately, the Federal Supreme Court left this important question unanswered.

Concomitantly with the trial in ADPF 186/DF, the Executive Branch of the Brazilian government sent a Bill to the Congress, aiming to rule on the use of quotas in federal public universities. The Law 12.711/2012²⁵⁴ passed months after the STF's final decision, and required all federal universities to reserve 50% of seats for students from public schools, with half of this percentage reserved for low-income applicants. Self-declared African-Brazilians, mixed-race, and indigenous students can compete for one of the seats in a defined percentage that corresponds to official data on race in the state where the university is located.

The Law 12.711/2012 fixed minimum rules for affirmative action policies in federal public universities. For the other 50% of seats Law 12.711/2012 does not cover, federal public universities may continue using colourblind criteria like merit, with traditional admission exams and the National Exam for High School Students ("ENEM").²⁵⁵ Hence, although the Law 12.711/2012 is not colourblind, it determined

²⁵³ Daniela Ikawa. *Ações Afirmativas em Universidades* (Rio de Janeiro: Lumen Juris, 2008), cited in ADPF 186/DF, *supra* note 97.

²⁵⁴ Law 12.711/2012, *supra* note 187.

²⁵⁵ Lei 11.096/2005 (14 January 2005), Presidency of the Republic, online: <www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/L11096.htm> [Law 11.096/2005]

a significant proportion of seats for poor students and students coming from public schools, regardless of their race.

According to the Law 12.711/2012, federal public universities must gradually implement quotas until 2016 (four years after the enactment of the Law 12.711/2012), which hinders any complete legal and social analysis of the program at this point in time. In addition, Article 7th determines the government will review the race-based policy prescribed in the referred law by 2022 (10 years after publishing the Law in the official press). Therefore, even though Brazilian society may not fully support race-based affirmative action policies and/or the Law 12.711/2012, it is not possible to affirm that quotas have been successful or not so far.²⁵⁶ It is only when federal public universities implement the program in its entirety (after 2016) that researchers will be able to clarify if the affirmative action program of the Law 12.711/2012 worked as expected. The federal government will do so by 2022.

Although the STF did not mention multiracial individuals in the ADPF 186/DF decision, and neither did the Law 12.711/2012, debates over university admissions remain valid concerning the difficulty in determining Brazilians' race for affirmative action programs. In any case, the Law 12.711/2012 has shown that the adoption of diversified criteria for university admissions is possible.²⁵⁷ Therefore, Brazilian rules regarding affirmative action policies in federal public university admissions provide

²⁵⁶ Affirmative actions in Brazil have always been controversial. See Antônio Gois. "Verbete: Ação Afirmativa, reação polêmica," [Entry: Affirmative Action, polemic reaction] *Folha de São Paulo* (27 May 2003) online: <www1.folha.uol.com.br/folha/sinapse/ult1063u434.shtml>.

²⁵⁷ *Law 12.711/2012*, *supra* note 187. The statute has some similarities with the Ten Percent Plan instituted by Texas University as an attempt to use criteria other than race in university admissions. See subsection 2.1.3, specifically in *Fisher*, *supra* note 184.

opportunity to marginalized groups, considering race, income, and merit in the achievement of equal opportunities for all.

2.3. MIXED-RACE INDIVIDUALS IN AMERICA AND IN BRAZIL: THE COMPARISON

The analysis of the way America and Brazil deal with multiracial identity recognition shows that no matter how large the differences in history, economy, politics and social contexts may be, neither of the legal systems accepts multiracialism in its entirety. Neither of the countries sees in mixed-race individuals the potential for social transformation, despite the possibility that multiracial people may bridge racial groups and improve racial relations.

The United States has a long history of racial discrimination and segregation, which activists, government and courts have struggled to change. In 2000, the country started counting multiracial individuals with a mark-all-that-apply option. However, the American Census Bureau still allocates multiracial data using traditional racial categories. The number of mixed-race Americans self-identifying as such has gradually increased, which soon might challenge reliance on official categories and the social programs based on them.

Brazil is one step ahead of America regarding multiracial identity recognition: there has always been a multiracial category on Brazilian censuses, with which almost half of the population self-identifies today. Miscegenation in Brazil makes the implementation of affirmative action programs difficult, since the government still adopts a binary view of race for social policies (whites/nonwhites). Due to the large number of self-identified multiracial individuals, defining who is African-Brazilian and

who is white is a challenge in almost all states in the country. In addition, most disenfranchised Brazilians, no matter which race, do not have access to the benefits of affirmative action programs in the country, mainly in education.

In the United States, race still plays an important role in individuals' lives. American society is still far from being colourblind, although courts in the United States look to colourblindness and the strict scrutiny standards when analyzing race in social policies and civil rights. None of them have ever examined the place of multiracial individuals in American society. Courts in the United States have acknowledged multiracial identity solely in child custody and transracial adoption cases, in which the analysis of the best interest of the child favours the maintenance of the child's entire racial background.

In Brazil, statutes and courts do not mention multiracial individuals or multiracial identity in their statements and reasoning, either. Only the Law 8.069/90, The Statute of the Child and Adolescent, refers to the formation of interracial families in adoption cases.

Therefore, the two systems, though in different stages, still regard multiracial identity in its individualistic perspective – or exclusively as part of personal autonomy. Both countries do not count mixed-race individuals as an independent group for public policies or in the law. Multiracial individuals have benefited from social programs as members of traditional minorities. However, as this paper explains, multiracial people should be counted as distinct in order to avoid a misperception of racial numbers based on traditional categories.

Official multiracial identity recognition is necessary for the construction and success of affirmative action programs. American and Brazilian governments would

do well to note that the more individuals self-identify as mixed-race, the more ineffective current affirmative actions will be, and the more common cases of fraud and “passing” will become. The need to redesign social policies aimed at racial equality is due to the progressive difficulty (and even future impossibility) of separating individuals accurately per race in order to point out who belongs to a disenfranchised racial group and who does not. Thus, other criteria should serve to complement current race-based affirmative action programs. Class, for instance, would improve the chances in employment and education for low-income members of racial minority groups – the ones who need affirmative action policies most.²⁵⁸

Brazilian and American governments do not consider multiracial identity as a social factor in bridging racial groups or assessing affirmative action programs’ results. Therefore mixed-race people become almost invisible, politically and legally speaking. This is the reason why American multiracial advocates argue that mixed-race individuals, especially children, are at the margins of official racial categories.²⁵⁹ Scholars who defend multiracial identity recognition point out the need to implement specific policies regarding multiracial families, as well as to improve the way schools deal with the issue.²⁶⁰ Indeed, schools contribute to the racial identity formation of mixed-race individuals, which occurs mainly during childhood. In addition, schools

²⁵⁸ See Gutmann, *supra* note 36 at 21 (in identity politics, the government should not neglect class and consider solely race for equality). See Law 12.711/2012, *supra* note 187; Fisher, *supra* note 184.

²⁵⁹ See Pascoe, *supra* note 40 at 298.

²⁶⁰ See Jane Ayers Chiong. “Racial Categorization of Multiracial Children in Schools” in Henry A. Giroux, ed, *Critical Studies in Education and Culture Series* (London: Bergin & Garvey, 1998). See also Angela Onwuachi-Willig and Jacob Willig-Onwuachi. “A House Divided: The Invisibility of the Multiracial Family” in Delgado & Stefancic, *supra* note 59, 416 at 416-425

bear a great responsibility in helping to improve the way society deals with race and multiracialism.²⁶¹

America and Brazil should acknowledge the important role of multiracial identity in changing society's ideas about interracial relationships and mixed-race people. An official multiracial category, even as a transitory solution, serves to reduce polarization, to affirm multiracial identity of mixed-race people and to improve social acceptance of the growing number of individuals who want to assume their multiple racial heritages. In this regard, Brazil serves as a good example to America and to other countries.²⁶²

Multiracial individuals can subvert and transform the current racial system that continues to lead to segregation and lack of solidarity among groups.²⁶³ Thereby, with an emphasis on tolerance, American and Brazilian governments, legislatures and courts can find alternative and promising ways to end, or at least reduce, racial discrimination and inequality, using multiracialism as a foundation to policies and law.

²⁶¹ In the United States, for instance, the Improving America's Schools Act (IASA) could have included special programs regarding multiracialism and ethnic studies in American education, as it did with bilingual education and Magnet Schools Assistance.

²⁶² Instead of seeing Brazil as a model that needs improvement according to American scholars' ideas, Brazil should be a model of multiracial country that still struggles with racism, but with less polarization and conflict than America. Brazil may overcome its racial problems when the country recognizes that race intertwines with class/income. Other countries, according to their own history, law and social context, could improve racial relations taking the present comparison as an example of what works and what does not work in regards to multiracialism, social policies and civil rights. For instance, aiming to find a solution for racial discrimination, other countries could not disregard that it is necessary to officially recognize multiracial identity and gradually implement social policies with responsibility, in order to fight racism (but avoiding polarization). Most importantly, decision-makers should be aware that there is no immediate solution for social inequalities. Any social change demands time.

²⁶³ See Daniel & Castañeda-Liles, *supra* note 8 at 143.

CONCLUSION

Law has always served as an instrument of power in the hands of the dominant social group. The fluidity of racial boundaries allowed constant changes in the racial classification of individuals according to political and social contexts of the time. If, in the past, the law fixed racial categories as a tool of oppression, then today the law works in the opposite way: racial categories have been the basis for affirmative action programs that aim at social equality.

Although most scholars consider race a social construct, debates over racial categories still involve biological factors, such as phenotype and ancestry; however, race as social identity is unequivocally comprised of elements other than appearance, related to personal autonomy or self-determination. Personal autonomy, or simply the capacity and freedom to make choices, is an important value and foundation of constitutional systems. Personal autonomy is relational, which means that interpersonal, social, cultural, historical factors among others reflect individuals' social identities and influence their choices. Social identities tie individuals together, providing self-esteem, respectfulness and sense of belonging. In general, social identities operate under official categories that also allow individuals to fully express themselves.

This paper explained that, besides individual autonomy, official multiracial identity recognition is necessary to address the inaccuracy of current racial categorization. In order to do so, it examined multiracial identity in the United States and Brazil – countries with legal systems that scholars constantly compare and whose multiracial populations have gradually increased.

The construction of the current American categorization system relies on various factors. Some of the factors analyzed in this work are: the end of American anti-miscegenation laws, the strong connection of American society to traditional racial categories and the preservation of the one-drop rule for racial classification in the country. Also, this paper looked at the multiracial movement's efforts for multiracial identity recognition and the adoption of a mark-all-that-apply option by the OMB for the first time on the 2000 census. Then, it highlighted that American Courts have not yet analyzed the role multiracial individuals play in social programs and civil rights, although courts have slowly recognized the importance of preserving multiracial children's diverse heritages in custody and transracial adoption decisions. This section concluded that debates about multiracial identity in America tend to grow with the increasing number of self-identified mixed-race people on demographic surveys.

In Brazil, on the other hand, miscegenation has always been a complex and constant process in society. In the country, there have never been anti-miscegenation laws or a social movement that aimed at the official multiracial identity recognition with a specific category. Indeed, multiracial categories have been on demographic surveys since the Nineteenth century and phenotype is the main element in defining an individual's race. With the country's diversity in skin colours and physical traits, the use of phenotype as a foundation for social policies tends to be misleading. Statutes and courts ignore the official multiracial categories and treat all nonwhite Brazilians as black and indigenous people. Undoubtedly, these classifications lead to affirmative action programs of questionable efficacy, making official institutions search for complementary criteria, in order to reach disenfranchised Brazilians.

This paper's comparison of the two countries has shown that the porosity of racial boundaries today is more evident than ever, due to historical immigration and intermarriage. With no prohibitions over interracial marriages and civil rights guarantees for minority groups and immigrants, multiracial individuals have multiplied in Brazilian and American societies, challenging traditional racial categories and race-based social policies.

Multiracial identity recognition with a specific category may be a way to foster a positive racial identity in mixed-race individuals, especially in American society, where the idea of separated racial groups remains. Actually, the development of a healthy and positive racial identity in mixed-race individuals will determine their group membership – if to a single race among the traditional ones, if to more than one (biracial), or if to none (transcendent identity). Also, the consciousness of their multiple racial identities make multiracial Americans and Brazilians able to serve as bridges among races, promoting solidarity and reducing polarization, stereotypes and bias.

If the American government allows and encourages its citizens to fully self-identify with all their racial backgrounds, mixed-race Americans will inevitably and slowly self-identify as such. Brazilians have done so for decades. Thus, society's resistance to see race outside traditional categories will diminish as the number of self-identified mixed-race individuals in America rises. With time, the ordinariness of multiracialism in society might change the tabulation of racial data on the American census. All these factors together may promote social harmony and reduce racial bias in the United States.

Unlike Americans, Brazilians already acknowledge inter-racial relationships as embedded in the culture and easily self-identify as multiracial. Although at first sight Brazilian society may seem to be a racial democracy, scholars point out that African-Brazilians and indigenous peoples have not been able to overcome the legacy of slavery. These groups remain at the bottom of the social ladder, with less income, less education and fewer job opportunities. Other scholars, however, view class as the fundamental and persistent problem in Brazil. As Brazilians higher up in the social pyramid, with education and income/status, they go through a “whitening” process within a demographic and social perspective. Even though researchers still debate the main cause of inequality in Brazil (if class or race), the government and courts disregard census data and adopt a binary view of race.

The Brazilian government has used race as the basis for affirmative action policies over the past two decades, even though Brazil is deeply multiracial. While the government and minority groups affirm that race-based programs in universities’ admissions have had good results so far, these policies may not be so effective in the country. Most Brazilians are nonwhite and, therefore, can claim one of the seats under the quota system. Affirmative action programs in Brazil will only provide good social results if the government considers multiracial demographic data in constructing its policies. The Law 12.711/2012 did so when it determined that federal public universities should reserve a percentage of quotas for African-Brazilians and indigenous people equivalent to racial data on census in the state where the university is located.

Race-based affirmative action programs in the United States are still necessary. The country is far from being colourblind. However, the increasing number of

multiracial individuals may call race-based social policies into question, especially if they reach a high percentage among the total population, like in Brazil. If so, the improvement of opportunities or correction of underrepresentation of minority groups with affirmative action policies may be inaccurate or even unfeasible. Like Brazil, it may become difficult to point out who belongs to a disenfranchised racial group and who does not.

Therefore, an increasing number of self-identified multiracial individuals without a census category may affect the success and effectiveness of affirmative action policies. Without putting it to use, the multiracial category may still end up demonstrating that race as the only or most important criterion in affirmative action programs is misguided and outdated. Complex societies cannot end or reduce social inequalities with racial categories that do not represent accurately their members. This is the main reason why multiracial Americans, as well as Brazilians, should become visible in demographic surveys and in public policies.

The current racism and inequality in American and Brazilian societies suggests that both countries should not abolish racial categories. The creation or continuance of the multiracial category does not signify that American and Brazilian societies have overcome racism and become colourblind. The count of multiracial individuals and the monitoring of social acceptance of multiracialism should represent a transitory but powerful instrument in regards to the analysis of diversity and tolerance.

Therefore, as Delgado and Stefancic affirm, any social transformation demands time, including the acceptance of multiracial identity by society.²⁶⁴ Multiracial identity recognition is a slow process that official institutions should carefully pursue. In order to preserve civil rights for minority groups, and before speaking of abolition of racial categorization, both countries need to implement an intermediary phase on censuses regarding race while racism and racial inequality remain in American and Brazilian societies. In this transition phase, societies and official institutions should acknowledge the porosity of racial boundaries. They should recognize multiracial identity, with a mark-all-that-apply option followed by a specific category, in the case of the United States; or simply with the maintenance of the specific multiracial category – aiming at improving affirmative action policies.

As society gradually moves towards acceptance and respect for racial identities, and as tolerance and solidarity increases, the importance of racial categories tend to rely solely on personal autonomy. The use of race in the construction of laws and social programs will, ideally, reduce until discrimination disappears and race-based affirmative action policies become unnecessary or simply impossible to implement. Considering the changes in the racial composition of the American and Brazilian societies, the count of mixed-race individuals on census has become necessary, as much as its consideration in social programs. Multiracial individuals, however, should not be counted in these policies as beneficiaries, since they are already included in current affirmative action programs as members of “monoracial”

²⁶⁴ Delgado & Stefancic, *supra* note 13 at 34-37.

minority groups. Instead, they should be counted as a factor to assess the success of race-based programs.

Therefore, the wide acceptance of multiracialism may positively affect social policies and alter social attitudes and beliefs regarding race – something difficult to achieve solely with law. This desired change in individuals' mentalities about the multifaceted, yet static, construction of race and the natural existence of multiracial people can undoubtedly serve as important tools to reduce discrimination against minorities in America, in Brazil and in other countries that face the same challenge.

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