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**ARTICLE:** Fictions of Identity and Brazilian Affirmative Action\*

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**SUMMARY:**

... I defend the verification of identity to insure that higher echelon opportunities are provided to those previously excluded as well as to maximize the longer-term political viability and legitimacy of affirmative action. ... Third, critics argue that affirmative action imposes identity as a consequence of using photos to verify identity. ... Those "imposed-upon" presumably include those who do not wish to have an identity, those who are unsure of their identity, those who do not identify with census categories such as Morenos, Pardos in the north who might identify as Indio (census term for indigenous persons), or those who have never thought of themselves as pertaining to the Black race. ... First, if ancestry were used to define the beneficiary class, the beneficiary class would become over-inclusive since many Whites can claim African ancestry. ... Of the multiple claims for affirmative action beneficiaries, I consider the three most relevant for this paper : (1) race: all Afro Brazilians, (2) color: the darkest Afro Brazilians (who are "unmistakably" Afro Brazilian), and (3) class: public school students and/or the poor. ... The use of color narrows the beneficiary class to darker Afro Brazilians who are more likely to report discrimination and therefore constitute a worthy beneficiary class. ... Indeed, four universities that verify identity have rejected the identity claims of between 5% and 35% of the applicants. ... From the comparative arena, colleges verifying identity could employ some of the following methods to verify a candidate's identity:

(1) official documents that testify to a candidate's identity; (2) visual examination of the candidate; (3) interviews with candidates about their self-perception, their behavior, their treatment by others, or their prior discriminatory experiences; and (4) the testimony of others, including a candidate's family, neighbors, co-workers, or members of various reference groups about the individual's self-perception, reputation in the community, self-presentation and behavior, discriminatory experiences, and physical appearance. ... Although the opposition has overstated the consequences of the complexities of identity, important questions about identity and public policy warrant further consideration. ... In that view, Brazilians would continue to treat state identity as something to be declared in specific contexts, such as university admissions, and claim societal identity, such as Moreno, on a daily basis.

## HIGHLIGHT:

*To order what cannot be ordered or to forbid what cannot be prevented is nonsensical, crazy, and illogical.*

- Judge Raquel Soares Chiarelli, 2007 n1

## TEXT:

[\*1] Racial orders constitute social structures with no clear exit. The axis of domination and the technology of domination can neither be readily ignored, as "colorblind" conservatives in the United States insist, nor axiomatically redeployed to undo racial domination. For example, contemporary South Africa would not use apartheid's technology of domination (pencil tests, et al.) to assign racial identity, and it remains unclear how South Africans define their identity under post-apartheid nonracialism and how they deploy their identities for the purpose of equal opportunity policies. n2 India outlawed the use of castes in its Constitution even as it also created educational, economic and political opportunity [\*2] policies based upon caste membership. n3 In the United States, a movement for a multiracial census category critiqued the rigidity of U.S. categories without fully acknowledging its positionality in the existing racial order n4 as if a new paradigm could simply be declared. I contend that an exit from a racial order cannot simply be declared, and explore the current implementation of affirmative action in Brazil as a case study of the general problem of exiting a racial order.

Each racial order produces a fiction that contains obstacles to remedying the inequalities it produces. The Brazilian fiction of identity as appearance has constructed an atomized and ambivalent n5 *Afro Brazilian* identity that complicates the use of categories to develop equal opportunity policies. In Brazil, *Black (Preta)* and *Brown (Parda)* have historically represented distinct color identities, and most of the Black movement's intended constituency has identified as *Brown*. n6 The Black movement encountered significant difficulties in 1991 in getting Brazilians to identify according to race and not color, a paradigm change. n7 Despite small but [\*3] significant inroads n8, the vast majority of the Black Movement's constituency still identifies according to color and not race. Thus, although identity is subjective, existing structures shape reconstructions of identity. The Brazilian fiction of identity allows multiple interpretations of certain markers that complicate the distinguishing of those on the border of whiteness and brownness, the relevant divide for Brazilian affirmative action. In those instances that universities have verified individual identity claims for the purposes of affirmative action, the evaluators have rejected as many as 1/3 of the applicants, n9 a phenomenon also reflected in Brazilians surveys. n10 In Brazil, unlike the U.S., mixedness has not been contained within blackness n11 but has been its own container for many identities, including a path to whiteness. Thus, the Brazilian fiction of mixedness and the system of physical differentiation have complicated the identification and verification of affirmative action beneficiaries.

In her opinion quoted in the epigraph, Judge Chiarelli viewed the Brazilian fiction of mixedness as expressing fundamental axioms about Brazilian humanity. Accordingly, in a country that blended individuals from distinct backgrounds, human beings inherently "cannot be ordered" and therefore cannot be distinguished for the purposes of affirmative action. Judge Chiarelli held that the differential treatment of two siblings was "absurd" and summarily dismissed the Federal University of Brasilia's (UNB) affirmative action admissions procedures. n12 This holding rests upon [\*4] an expectation that siblings be perceived and treated identically, which ignores Brazilian social reality. n13

The popular interpretation of the Brazilian construction of identity as primarily a matter of appearance n14 recreates a false dichotomy between self-identity and the perception of others. Self-identity and appearance to others are distinct entities that have also been mutually constituted. The flexibility that some Brazilians enjoy in their identity choices is delimited by their appearance. And their subjective identities influence how others see them. Thus, identity is fully contextual and relational, and research suggests that Brazilian self-presentation responds to perceptions of how an identity claim will be received in a specific context. n15

Colleges that verify identity have generally relied upon applicant appearance to others in making their initial determination of identity and applicant's self-identity upon appeal. In its initial determination, UNB found both siblings, Fernando and Fernanda, ineligible for affirmative action based upon their appearance to a UNB commission, which Judge Chiarelli upheld because "simple observation of their photos . . . verified that neither the plaintiff nor her brother is phenotypically black." n16 Thus, at first blush, the judge and the university agreed on the siblings' appearances. In appealing that classification, Fernando declared himself *Black* in appearance and ancestry and produced official docu-

mentation of being *Parda*. In her appeal, Fernanda also showed documentation of being *Parda* but admitted to consider herself *White*. n17 UNB found Fernanda's admission of considering herself *White* to undermine the veracity of her application and to violate her admissions requirements. n18 In holding this differentiation to be nonsensical and demonstrative of the "incongruence" of the university's criteria, Judge Chiarelli relied on her visual impressions and ignored the candidates' subjective claims. In the name of defending their [\*5] individuality and humanity, the judge actually ignored their subjective claims.

Thus, identity claims contain and express multiple aspirations with contradictory indications that reflect the ambiguity of Brazilian identity and the strategic calculations of multiple actors to identify themselves and others. Consider that Fernando, viewed as *White* by the UNB committee and the judge, showed official documentation of being *Brown* and insisted that he viewed himself as **Black**. Consider that Fernanda, also viewed as *White* by the UNB committee and the judge, also showed official documentation of being *Brown* and revealed her identity as *White*. Thus, self-identity contradicted official documentation (in Fernanda's case) and visual inspection (in Fernando's case); and visual inspection contradicted documentation (in both cases). A judge might have remanded the case to UNB's appeals' commission to sift through the contradictory evidence. However, the university had arguably erred in admitting the brother rather than in denying the sister during the appeal process to their admission. Under the politically charged environment, UNB admitted the sister as well.

The separation of appearance and subjective identity as sequential steps in the admissions process indicates the conceptual trouble in the current deployment of identity for the purpose of affirmative action. The dichotomization of subjectivity and appearance effectively denied applicants a voice in their process prior to the appeal n19 and gave ammunition to the opposition to affirmative action.

The opposition to affirmative action seized upon the case of Fernando and Fernanda and another case in which UNB classified identical twins differently n20 to demonstrate the impossibility of deploying categorical identities in Brazil for the purposes of public policy. The genuine complexity of adopting affirmative action in a country with a flexible but hierarchical identity structure has been sensationalized by a tripartite oppositional coalition of the media, rejected affirmative action candidates, and "anti-essentialist" anthropologists. Opposition from the media, dominated by Brazilian elites, is not surprising since elites view affirmative action as a threat to their children's access to public universities, which provides free education of the highest caliber. Rejected candidates for affirmative action seats assert their strategic interests in their legal [\*6] challenges to the universities. These individuals differ from Alan Bakke n21 in that many claim to have *Black* ancestry and to be part of the subject class. The oppositional anthropologists include prominent intellectuals who have contributed to the study of race in Brazil. n22 These anthropologists argue that race conscious policies force Brazilians to identify in divisive racial categories and that race, since it cannot be based on science, cannot provide a sound basis for government policy. n23 The alliance of anthropologists and rejected candidates lends an unusual edge to the opposition because of their combined proximity to the beneficiary class, progressive university professors, and important segments of the Black Movement.

Opponents claim that Brazil fused Portuguese, African and indigenous persons into a nation of 'blended' Brazilians, and thereby constructed mixedness as quasi-national. n24 However, in contrast to these fusionist claims to have produced a 'new people' by blending persons and cultures, an 'absorptionist' state produces its 'new people' by absorbing persons and cultures into the dominant group, who sets the terms for the 'blending'. n25 Opponents claim that the Brazilian nation will be divided through affirmative action. n26 However, if Brazil were truly fusionist, why would articulations of Blackness threaten this national 'mixedness'? Why couldn't a Brazilian be Black and Mixed? I argue that Brazil is a color [\*7] hierarchy with both fusionist and absorptionist tendencies and that the ambiguous space between fusionist and absorptionist discourses provides the political room for the opposition to affirmative action.

Affirmative action proponents hold the unusual position of being on the defensive in the debate but winning in the real policy arena with an ever-increasing number of Brazilian universities implementing affirmative action. n27 To the claim that it is impossible to identify *Afro Brazilian*, proponents retort that the police n28 have no such difficulty. n29 Although the discretionary behavior of Brazilian police hardly represents a credible model for state discretionary policy, the moral suasion of this response suggests the hyperbole of the opposition to affirmative action. If numerous public and private actors n30 can routinely make discretionary determinations for discriminatory purposes, how could it be impossible to make determinations for the purpose of anti-discriminatory policies?

The resulting debate represents an "intellectual cul-de-sac" n31 that largely does not address the identity questions posed by adopting affirmative action in Brazil. Who should be the beneficiaries of affirmative action? n32 If a candidate chose an identity simply for the purpose of [\*8] university admissions, do the principles of social constructedness

require that that she be accepted without scrutiny? What manifestations of *Black* or *Brown* identity would a candidate need to show, especially in a country that historically drew distinctions based upon appearance, and how should colleges incorporate appearance and subjective identity? Can colleges verify the identity of beneficiaries without falling into the trap of policing "fraud" n33 and violating the principles of social constructedness and the primacy of subjective identity? I argue that the view that subjective identity cannot be verified represents a dogmatic understanding of social constructedness and subjective identity. Identity claims are contextual, relational, and negotiable, especially in Brazil.

In this paper, I propose three policy goals to review Brazilian affirmative action: (1) to maximize the provision of opportunities to those previously excluded, (2) to maximize the political viability and political legitimacy of the program, and (3) to dismantle or at least counter the absorptionist aspects of *racial democracy*. n34 I argue that both race-based and class-based affirmative action are needed in Brazil and argue for the inclusion of three groups: *Afro Brazilian* public school students, *White* public school students, and *Afro Brazilian* private school students as best addressing those goals. The inclusion of *Afro Brazilian* private school students, especially necessary to democratize participation in the upper echelon schools, raises additional issues. Private school *Whites* seeking admission to competitive programs have reportedly identified as *Brown* for [\*9] the purposes of affirmative action. n35 In a country where at least 38% n36 of *Whites* possess African ancestry, such claims are not unfounded even if they are primarily strategic. I defend the verification of identity to insure that higher echelon opportunities are provided to those previously excluded as well as to maximize the longer-term political viability and legitimacy of affirmative action. In subsequent sections of this paper, I sketch the possibilities and limits of the contemporary affirmative action initiatives to transform the Brazilian social structure by examining: (1) the influence of the structure of identity upon categorical policy as claimed by opponents, (2) the Brazilian structure of identity, and (3) the influence of the structure of identity upon categorical policy of Brazilian colleges.

### **Part I: Brazilian Identity and Affirmative Action, According to Affirmative Action Opponents**

An unusual tripartite oppositional coalition of the media, rejected affirmative action candidates, and "anti-essentialist" anthropologists has emerged to sensationalize any problems in affirmative action policy and render the complexity of identity as impassable. Accordingly, if universities cannot show via science (such as DNA tests) n37 or positivist precision who is *Pardo*, then universities may not require applicants to be *Pardo* or *Preto*. n38 This anti-essentialism obscures the reality of subjective identity in Brazil. n39 In addition, *White* and light *Brown* Brazilians, claiming to be part of the subject class, have advanced the most prominent challenges to the affirmative action program at UNB, which has been subjected to intense scrutiny for its use of photos in the verification of candidates. The media [\*10] and the opposition have constructed each of these challenges as an indictment of affirmative action and the impossibility of verifying identity.

Of opposition claims n40, I examine those pertaining to identity and the delineation of the subject class. The first claim is the 'anthropological' objection that the use of photos to verify an applicant's identity clashes with the principle of subjective identity. UNB, used one commission to evaluate photos, the so-called 'racial tribunal' n41 and a second commission to consider appeals by rejected candidates, the so-called 'racial psychology' commission. n42 Important proponents of affirmative action have conceded this criticism about the use of photos but argued for the policies of the vast majority of universities that do not verify identity. n43

A second claim is that the full logic of affirmative action must lead to the use of photos, even if only a few universities do so today. n44 In this account, affirmative action seeks to remedy discrimination, and the best proxy for discrimination is how someone appears to others. n45 Therefore, affirmative action programs must rely on the view of others to viably identify affirmative action beneficiaries. Supporters have also argued that beneficiaries should appear *Brown* or *Black* to others n46 to insure that opportunities are being allocated to deserving beneficiaries. n47 This argument assumes that affirmative action should target current victims of discrimination. If affirmative action seeks to remedy past discrimination, the determination of who appears *Brown* would not be pertinent. Consider that a verification commission could reject Black movement activists on the [\*11] basis of their photos alone. Further, the logic of the census campaign of 1991 included all who subjectively identified as *Brown* or *Black*, choosing subjectivity over appearance. Certainly, affirmative action imposes a different logic, yet both supporters and opponents are flattening the complexity of identity and the considerations of how to mediate subjective and 'objective' identity. Finally, I argue that the verification of identity is linked to particular conceptions of the beneficiary class and particular policy objectives rather than to affirmative action policy in general.

Third, critics argue that affirmative action imposes identity as a consequence of using photos to verify identity. Some argue that affirmative action inevitably imposes census identity n48 upon those who would 'freely' identify oth-

erwise. n49 Those "imposed-upon" presumably include those who do not wish to have an identity, those who are unsure of their identity, those who do not identify with census categories such as *Morenos*, *Pardos* in the north who might identify as *Indio* (census term for indigenous persons), or those who have never thought of themselves as pertaining to the **Black** race. Two leading opponents of affirmative action, Maio and Venura, suggest that this imposition emanates from the tendency of law to require clear categories. n50 However, this entire 'imposition' argument turns on a claim that has not been articulated. What tangible harm is caused to "*Morenos*" or those uncertain or unwilling to declare their identity by the existence of seats for *Afro Brazilians*? Does the existence of indigenous seats at the university "impose" indigenous identity on such persons? Since candidates do not have to declare an identity for the universal seats, the existence of *Afro Brazilian* and indigenous seats does not seem to place an onerous burden **on** these students. n51

[\*12] Fourth, critics argue that it is impossible to say who is really *Black*. In addition to the long established social scientific understanding that race is not genetic, critics emphasize recent studies that have confirmed the lack of a biological link to physical appearance. n52 This argument insists that the only real evidence for racial identity could be genetic and that failing that threshold, racial identity cannot exist. That notion leaves out the understanding of race as a social construction! n53 Anti-essentialist anthropologists who seemingly defend social constructedness cannot fathom the independence of social construction from biological determinism. I concede the complication of racial identity as do others n54 but argue the imprecision of socially constructed identity does not render it intractable.

Finally, the anthropologists argue that making racial distinctions represents a slippery slope which leads Brazil, not only to make the invidious distinctions of North American Jim Crow but also the deadly determinations enacted in Nazi Germany and genocidal Rwanda. n55 This slippery slope argument fails to distinguish between classifications made for remedial rather than discriminatory practices and fails to weigh the real consequences of governmental actions. Certainly being rejected for university admissions cannot be compared to being sent to a concentration camp -- yet the slippery slope argument claims that the former will somehow result in the latter. Nor does the slippery slope argument contend with causality: did Nazi distinctions grow because of the existence of the distinctions or because of the concomitant growth in Nazi power and regime capacity to enforce and expand the significance of the distinctions? n56 The [\*13] idea that racialization would have the same impact in every social context seems as ludicrous as the idea that rain would have the same impact on every natural environment. Arguably, racialization has a positive value in an absorptionist country in which many subordinated persons have been reluctant to articulate identity.

Opponents have questioned every aspect of the so-called "racial tribunals": their composition, their mandate, and their actual practices. Maio and Santos question whether "persons connected to the Black movement constitute 'effective' representatives of society" n57 and whether they could "mimic societal perceptions about race and discrimination" n58, the stated purposes for the UNB Commission. Do their questions suggest that no one could perform such a function or only that *Black* activists cannot? Either question seems ludicrous: who would know better than *Afro Brazilians* how society views Brazilians? As Dubois noted more than a century ago, *Blacks* know most directly how they are seen by *Whites* as well as how they see themselves, n59 and as Fanon added, the perception of *Whites* can overwhelm and become self-image. n60 Both insights are highly relevant in Brazil. n61

Many affirmative action opponents prefer **class-based** admissions policies n62 arguing that such policies can reach *Afro Brazilians* without making racial distinctions. Ironically, many of their critiques could also be leveled at class-based preferences, which can result in income or school attendance stipulations also difficult to verify. n63 Most significantly, the law that the anthropologists oppose n64 creates opportunities for public school students and stipulates that a proportionate share of these public school students be *Afro Brazilian*. Restated, these anthropologists oppose class-based affirmative action with a wrinkle: that *Afro Brazilians* be proportionately included in the beneficiary class. Without this "wrinkle," would *Afro Brazilians* really be proportionately represented by class-based affirmative action? I see no reason to assume that class-based affirmative action is either the most viable or appropriate policy to reach *Afro* [\*14] *Brazilians*. Researchers have founded persistent racial disadvantages from birth (surviving childbirth and childhood n65) onward (remaining in school n66) that are reproduced through major life passages. Consequently, *Afro Brazilians* enter the labor market much earlier and with much less education than *Whites*. n67 These racial differences are mediated through social class but also are manifest among persons of the same social class, so that social class cannot fully explain racial inequality. For example, *White* children enjoy greater educational success than their darker siblings. n68 *Afro Brazilians* who attain higher levels of education are much less likely than *Whites* with equivalent education to secure economic return for their education. n69 Finally, those *Afro Brazilians* who attain socioeconomic mobility are much less likely than *Whites* to be able to transmit those gains to their children. n70 Thus, racial difference cannot be simply understood as consequential to processes of social class formation.

Most Brazilians perceive these vast racial differences and tend to understand these differences in terms of social class or the legacy of slavery, rather than the actual reproduction of racial inequality. n71 However, not only do racial differences emerge among persons similarly situated but racial inequality also accumulates across life experiences. Racial differences in the accumulation of wealth are even greater than differences in income. For example, home value for the poorest *Whites* is twice as great as for Browns and three times as great as for *Blacks*. n72 Racial inequality in Brazil lies closer to South Africa than to the US in several important dimensions, such as participation in higher education n73 and overall economic position. n74 Class-based affirmative action is too narrow and does not include middle [\*15] class *Afro Brazilians* who also suffer racial discrimination n75 and whose participation is necessary to credibly diversify the more competitive public universities.

According to the opposition, affirmative action law forces the round peg, Brazilian flexible identity, into the square hole: the categories needed for affirmative action. In that view, affirmative action supporters and higher education officials seek to racialize Brazilian hybridity, and the oppositional anthropologists seek to protect that hybridity from the dangers of racialization. In so arguing, the opposition reads experience without deeper structural considerations and especially fails to address societal racialization that already shapes Brazilian experience. This opposition has fully polarized the debate, and proponents have been unwilling to discuss the real complications because every complication becomes an indictment of affirmative action. The next section explores some of the complexities of Brazilian identity that are relevant for the implementation of categorical policies by Brazilian colleges.

## Part II: The Brazilian Structure of Identity

Although Brazilian identity is complex n76, it provides a basis for policy distinctions. Brazilians often differ labeling themselves and each other in consistent categories. n77 Nonetheless, they use a commonly understood framework n78 of physical characteristics to characterize themselves and each other on a hierarchical color ladder. Thus, they can more surely rank themselves and each other from lighter to darker. This section examines key characteristics of the Brazilian identity structure that interact with affirmative action: (1) the number and nature of categories, (2) the difference between self-identity and assessment by others, (3) disagreements in the assessments of others, and (4) the relationship of ancestry and identity.

[\*16] Historically, Brazilian identity has been officially constructed in terms of "color" and not "race," an emphasis of appearance over descent. By "official," I refer both to the production of "social scientific knowledge" about race through the census, which asked Brazilians for their "color" usually from a selection of five categories or "closed" identity, and researchers who have asked Brazilians for their color sometimes without reference to census categories, or "open-ended" identity. As has been widely noted, Brazilians have claimed more than 100 identities on at least three occasions: 136 in the 1976 Census Household Survey (PNAD), 143 in the 1998 National Employment and Manufacturing Survey (PME), and 492 in a 1970 study by Marvin Harris. n79 Harris argued that a country with 492 identities could not effectively discriminate. I argue that the sheer number of categories is not an obstacle to discriminatory behavior nor to affirmative action as evidenced by the case of India and its several thousand castes. n80 Instead of the number of categories being determinative, I argue that the nature of categories matters more. Categories are not mutually exclusive groups that clearly perceive and maintain the boundaries between them and others. n81

In Brazil, there are a handful of salient categories with many derivatives. n82 Seven categories (*Branca, Moreno, Moreno Claro, Parda, Preta, Negra* and *Clara*) account for 95% of the overall population, as shown by Table 1. n83 Most of the other categories, cited by only a few respondents n84, pertain to *Brown* Brazilians articulating their positionality within mixedness n85, their aspirations to whiten, n86 and their distinctiveness from blackness on the hierarchical ladder. [\*17]

Table 1: Open-Ended and Closed Identity, Zumbi Survey, 1995

	Open-ended	Closed: (Census)	N
Branca	38.5%	49.7%	1926
Clara	1.6%		80
Moreno Claro	7.3%		367
Outras	2.3%	9.7%	114
Moreno	34.7%		1735
Parda	6.0%	28.6%	299
Mulato	0.8%		39

Table 1: Open-Ended and Closed Identity, Zumbi Survey, 1995

	Open-ended	Closed: (Census)	N
Moreno Escuro	0.5%		27
Escuro	0.7%		35
Preta	4.3%	11.9%	217
Negro	2.7%		134
			5003

Datafolha, Instituto de Pesquisa, *300 Anos de Zumbi, Os Brasileiros e o Preconceito de Cor*, Report, 1995.

**Much** fewer Brazilians claim the census identities *Pardo* and *Preto* in the open-ended question than in a closed-ended question. I distinguish "societal" identities, those used on the street and volunteered in open-ended survey questions, from "state" or "census" identities. n87 Table 2 shows that the most popular identity claimed by *Pardos* and *Preto*s in 1995 was *Moreno*, a "societal" identity. Variations of *Moreno*, such as *Moreno Claro*, represent a smaller but still significant identity. The popularity of *Moreno* supported the claim that the census bureau "imposes" identity on Brazilians [\*18] with its choice of categories, especially for those identifying as *Moreno*. n88 More recent data has shown a sizeable shift toward *Pardo*, *Preto*, and *Negro* and away from *Moreno*. n89

Table 2: Most Popular Societal Identities

According to Census Identities, Zumbi Survey, 1995

	For Brancas	For Pardas	For Pretas
Brancas	73.5%	Moreno 60.5%	Moreno 38.1%
Moreno	13.3%	Parda 18.5%	Preta 29.4%
Moreno Claro	7.8%	Moreno Claro 7.4%	Negro 18.1%
Clara	2.2%	Branca 3.4%	Escuro 3.8%
		Preta 2.0%	Moreno Claro 2.5%
		Mulato 2.0%	Parda 2.3%
		Negro 1.6%	Moreno Escuro 1.8%

Datafolha, Instituto de Pesquisa, *300 Anos de Zumbi, Os Brasileiros e o Preconceito de Cor*, Report, 1995.

Although many *Afro Brazilians* have preferred "societal" to "state" categories, surveys have shown that Brazilians can identify in a "census" category. For example, 99.4% of the respondents in the 1998 PME, a national survey, claimed a state identity. n90 The few Brazilians unable to locate themselves in a census category generally have attained so little schooling to not be close to university admission. n91 Thus, these data does [\*19] not support the opposition's argument that affirmative action causes tangible harm to Brazilians unable to place themselves in an affirmative action category.

Second, Brazilian self-identity often differs from the perception of another, which significantly impacts affirmative action: especially those who self-identify darker than someone else's perception. In the 1995 *Zumbi* survey, interviewers viewed 19% of self-identified *Pardos* and 2% of self-identified *Pretos* as *White*. n92 This impacts the definition and verification of beneficiaries. Should beneficiaries be defined according to self-identity, consistent with the primacy of self-identity, or the view of another? If affirmative action represents a response to current discrimination, the view of others would be the best proxy for who was most likely to encounter discrimination. However, how might the discrepancy between self and other be addressed in the process of verification?

Third, a further complication for the discrepancy between self and other is that Brazilians do not consistently identify others. In his studies of the Brazilian northeast, Harris found that Brazilians disagreed about the meaning of racial labels and the application of those labels to concrete persons, especially for those viewed to be in-between *White* and *Black*. n93 Two questions in the 2002 PESB survey illuminate this phenomenon. First, respondents evaluated 8 photos according to census categories. They reached an overwhelming consensus (95%) on 3 photos, which they viewed as *White* or *Black* and a strong consensus on 4 photos, which they predominantly viewed (85%) as *White* or *Brown*. They

were sharply divided on one photo: viewed as *Brown* by a large majority (72%) and *White* by a significant minority (25%). Based upon UNB procedures from 2004-5, a verification commission would be likely to disagree on 2 or more of these 8. n94 Another PESB question asked respondents to assess the identity of their interviewers. Respondents disagreed about the identity of 23 of 157 interviewers (14.6%). Respondents viewed one interviewer as *White* (9), *Black* (5), and *Brown* (1): *Whites* viewed her as *Black* and *Blacks* viewed [\*20] her as *White*: virtually all respondents differentiated her from themselves. n95 These data suggest that commissions evaluating candidates would often disagree with candidate self-assessment and among themselves. n96

Finally, how might ancestry intervene in these uncertainties about identity? A majority of all Brazilians report mixed ancestry, which poses several problems for affirmative action. n97 First, if ancestry were used to define the beneficiary class, the beneficiary class would become over-inclusive since many *Whites* can claim African ancestry. n98 If ancestry were used to verify identity claims only in cases of doubt, there would still be the same problem of over inclusiveness. Finally, siblings from the same parents can identify or be viewed distinctly, n99 and their common ancestry can obscure their distinctive identity, as in the opening case of the paper.

Thus, the complexity of Brazilian identity, including differences in self-identity and the view of others and differences among others about someone's identity, complicate the field for affirmative action. The constitution of appearance and descent make the designation, *Afro Brazilian*, problematic, which paradoxically leaves identity in the realm of appearance and subjective identity. The Brazilian structure of identity contains significant ambiguities, complicating the definition and verification of beneficiaries. Given these data and the dearth of opportunity in Brazil, I hypothesize that identity would be strategically deployed for the purposes of affirmative action. Despite this nuanced societal identity, Brazilians are able to place themselves in census categories, which is consistent with the thesis that context influences the presentation of identity. [\*21] The next section examines the influence of identity upon the categorical policies of Brazilian universities.

#### A. The Influence of the Structure of Identity Upon Categorical Policy of Brazilian Colleges

Brazilian racial identity has developed within a complex identity structure that melds race, color, and class as overlapping components of identity. The predominant claim for affirmative action has been to treat *Pardas* and *Pretas* as a unified beneficiary class, supported by empirical data that has shown a negligible difference in the life outcomes for *Pardas* and *Pretas*. n100 The other predominant claim has been to create opportunities on the basis of class: targeting either public school students and/or the poor. Class-based affirmative action has represented either a pragmatic construction of the beneficiary class n101 or an alternative conception of the truly needy. Third, some have advocated affirmative action for darker *Afro Brazilians*: a claim for a beneficiary class based upon color. n102 Studies show that *Pretas* are more than twice as likely as *Pardas* to report discriminatory experiences. n103 That data, combined with the hiring preference for lighter over darker *Browns*, could justify a greater preference for *Pretas*, particularly if affirmative action is viewed as compensatory for present discrimination.

How have Brazilian universities mediated between the competing claims for affirmative action on the basis of race, color and class? The early claim that affirmative action could not be implemented because no one would be willing to identify as *Black* has proven false. The other early [\*22] claim that everyone would wish to be *Black* for the purposes of affirmative action has proven closer to the mark. How have colleges responded to the new subjectivity of higher education candidates? In a country in which at least 38 percent n104 of *Whites* also have Black African ancestry, some *Whites* have declared themselves *Brown* for the purpose of university admission. Must verification of candidates violate the principles of social constructedness and the primacy of subjective identity, as some claim? This article argues that such a view represents a dogmatic understanding of social constructedness, and that the cost to program legitimacy in not verifying outweighs the cost of verification. This article claims that verification does not have to violate the principles of social constructedness and that it can be conducted in a way that maximizes program legitimacy.

Whereas the national debate has demonstrated the political cost of verifying beneficiary identity, I argue that there is also a cost to not verifying identity. Verification curbs the potential awarding of seats to those not intended and provides needed signals to candidates about their identity claims. The legitimacy of the program could be undermined without some verification process.

In this paper, I propose three principles to animate Brazilian affirmative action policy: (1) to maximize the provision of opportunities to those previously excluded, (2) to maximize the political viability and political legitimacy of the program, and (3) to counter the absorptionist aspects of *racial democracy*. I argue that maximizing opportunities to those previously excluded is morally just in a country with rampant inequality, socially advisable to further Brazilian



economic development, n105 and politically beneficial to increase political support for affirmative action. The broadest conception of the beneficiary class includes three constituencies: (1) *Afro Brazilian* public school students, (2) *White* public school students, and (3) *Afro Brazilian* private school students. The inclusion of *Afro Brazilian* public school students is relatively non-controversial since they would meet the criterion of race and class. The inclusion of *White* public school students is justifiable on several grounds. First, *White* public school students also deserve opportunities in a highly egalitarian country and their inclusion also increases the political viability of affirmative action. Second, the poor are most likely to self-lighten n106 so that some self-identified poorer [\*23] *Whites* might be socially viewed as *Brown*. Third, the inclusion of this group minimizes the need for verification of racial identity because an "error" would result in a *White* public school student gaining a university seat. Finally, *Afro Brazilian* private school students, having faced persistent discrimination, deserve inclusion. Their inclusion, opposed by some prominent *Afro Brazilian* educators and activists n107, provides the strongest demand to viably diversify the higher echelon universities.

Maximizing the political legitimacy of affirmative action entails strategic considerations, such as maximizing potential supporters, minimizing potential opposition, and increasing the likelihood that others will view affirmative action as fair. Providing opportunities for the broadest constituency as discussed above will maximize supporters and opposition and make affirmative action more politically charged. The expansion of real opportunity, part of the federal government's current plan, will maximize supporters and minimize opposition. Rejected university candidates, who provide ammunition for the tripartite opposition and constitute its most crucial sector, would be diminished by the expansion of real opportunities. University verification of identity can also be conducted in ways to maximize the legitimacy of the program in the eyes of the broader public.

Affirmative action on the basis of race directly counters the absorptionist aspects of *racial democracy* by providing the first material incentive to identify as **Black** or *Brown*. In so doing, affirmative action communicates that racial identity can positively affect life chances. Affirmative action students need self-esteem to fully engage in a university historically catering to the elite. I argue that this ideological aspect of affirmative action is critical in Arendt's sense that the right to have rights n108 precedes the actual use of any right. The succeeding sections examine university practices in designating and verifying the beneficiaries of affirmative action.

## B. Designation of Beneficiaries

The adoption of affirmative action by Brazilian universities has had an historic impact in a country that had denied having racial discrimination until 1996. n109 During the ensuing decade, racial discrimination became part [\*24] of the public discourse, and 51 public universities adopted affirmative action by January 2008. n110 Most of these universities (61%) n111 constructed beneficiary classes with multiple constituencies. The few universities that targeted a sole constituency were most likely to designate public school students (9) and indigenous students (5). None of the universities with only one beneficiary group targets *Afro Brazilian* students! n112 That data surely indicates the relative political weight of the different beneficiary groups.

Of the multiple claims for affirmative action beneficiaries, I consider the three most relevant for this paper n113: (1) race: all *Afro Brazilians*, (2) color: the darkest *Afro Brazilians* (who are "unmistakably" *Afro Brazilian*), and (3) class: public school students and/or the poor. The criterion of color has the dubious virtue of being the politically least viable criterion but potentially offering the greatest challenge to the absorptionist aspect of *racial democracy*. The use of color narrows the beneficiary class to darker *Afro Brazilians* who are more likely to report discrimination and therefore constitute a worthy beneficiary class. Of the three criterion described above, the color criterion offers the most effective corrective to the whitening bias of the labor market. However, the use of color as a criterion for beneficiaries has encountered the most vehement political objections. Prominent Black movement activists were highly critical of the phenotypical criterion used at the State University of Mato Grosso do Sul (UEMS) as counter to subjective identity. n114

The criterion of race, the designation of *Blacks* and *Browns* as a unitary beneficiary class, enjoys greater political support than the criterion of color. The criterion of race creates real opportunities for *Afro Brazilians* but does not create opportunities for poor *Whites* nor differentiate among *Afro Brazilians*. It would challenge *racial democracy* by providing the first material incentive for someone to identify as *Afro Brazilian*, but not offer a corrective to the hiring preferences, such as *boa aparência*. n115 Second, these opportunities would be more accessible to *Afro Brazilians* of greater means.

The criterion of class enjoys the greatest political support in Brazil [\*25] and provides opportunities to those excluded in the past. However, it does not necessary offer a proportionate share of seats to *Afro Brazilian* public school

students. Empirical research has suggested that class-based policies cannot remedy Brazilian inequality. n116 Second, it does not provide opportunities for *Afro Brazilian* private school students nor challenge *racial democracy*.

The conception of the beneficiary class is strengthened by the use of multiple criteria, the practice of most universities. Race and class have been combined within the beneficiary class in at least four different approaches in Brazil. The first three approaches use separate lists while the fourth approach awards specific points for racial and/or class identity, akin to the Harvard plan, within a unitary process. n117 In Brazil, university admission is generally based upon entrance examinations. Students take a qualifying examination that establishes their overall skill attainment. Those that pass take a second examination that ranks students according to specified skills for their major. Students are admitted to specific departments based upon these examinations. Under the provision of affirmative action, separate lists have generally been utilized for beneficiary classes, and candidates decide whether to seek admission through the universal system or the affirmative action program. Each the four approaches treat the three target constituencies, *Afro Brazilian* public school students, *White* public school students, and *Afro Brazilian* private school students distinctly:

. **Race and class:** This approach, used by 6 colleges n118, combines race and class to provide opportunities to *Afro Brazilian* public [\*26] school students. This approach does not offer opportunities to *Afro Brazilian* private school students or *White* public school students. This approach represents the narrowest conception of the beneficiary class and provides the fewest opportunities. It would probably not generate much longer-term political support and would generate the least political opposition. It has the virtue of identifying a beneficiary class that could be viewed "double worthy" and thereby reducing the need to verify beneficiaries.

. **Race inside of class:** The current federal proposal for affirmative action sets aside half of the seats in the federal universities for public school students. Within the seats for public school students, colleges make proportionate shares available to *Afro Brazilian* and indigenous students, reflecting the census demographic data for each state. n119 This approach, the most widely used (15 colleges) n120, includes *White* public school students and represents class-based affirmative action that also offers proportionate representation for *Afro Brazilians*. The approach is probably the most political efficacious because it provides opportunities to *White* public school students while reducing the imperative to verify beneficiary racial identity. However, this approach omits *Afro Brazilian* private school students.

[\*27] . **Race or class:** This approach, used by 7 colleges n121, creates opportunities for candidates on the basis of their racial or class identity. This approach represents the broadest conception of the beneficiary class, admitting *Afro Brazilian* private school students and *White* public school students. Depending of the design of the program, *Afro Brazilian* public school students might need to decide whether to apply on the basis of race or class or might be able to apply simultaneously on multiple lists. However, this approach has not prioritized opportunities among beneficiaries and arguably, *Afro Brazilian* public school students deserve priority over other public school students and *Afro Brazilian* private school students. Further, this approach generates the most political support and the most virulent political opposition.

Figure 1: Constructing the Beneficiary Class

. **Race and class as "bonus points":** Finally, race and class can be [\*28] treated as supplementary factors. Three Brazilian universities n122 use a "Harvard like" system that awards points for race and class that are added to the examination score. The early data from one of these universities, UNICAMP, which awards 10 points for race and 30 points for class, indicates that the program has increased *Afro Brazilian* and public school presence but not at a rate that has kept up with the increase in demand. n123 This approach could theoretically provide the most sophisticated approach to the construction of the beneficiary class, by including all three constituencies and by prioritizing *Afro Brazilian* public school students over other public school students and over *Afro Brazilian* private school students.

Notwithstanding the public rancor over race-based affirmative action, class-based affirmative action has been widely implemented by single beneficiary n124 and multiple beneficiary programs. This surely reflects the historical salience of social class in Brazil, the tremendous need of the poor, as well as the current political balance of forces, in-

cluding the vociferous opposition to race-based affirmative action. Although regionalized approaches have emerged in the implementation of affirmative action, n125 this paper suggests that the regional effect is primarily a result of [\*29] the learning processes among universities (developing their programs based upon learning from the experiences of other universities) n126 within each region.

The construction of the beneficiary class has implications for the imperative to verify identity. The first two approaches combine race and class simultaneously and reduce the imperative to verify identity. Indeed, only one of 23 universities (4%) using these approaches verifies identity. n127 The last two approaches treat race and class separately, which could engender a greater need to verify identity. Indeed, five of the seven universities (71%) that use the broader race or class approach verify identity. n128

The use of multiple factors strengthens the conception of the beneficiary class but also asks how to prioritize among multiple groups. The bonus point system may have the ranking right: by prioritizing *Afro Brazilian* public school students, then *White* public school students and finally *Afro Brazilian* private school students. Both UNICAMP and FATEC grant three times more points for public school attendance than for racial identity. As noted above, the demand for the *Afro Brazilian* seats has increased more quickly than admissions, suggesting that the weighting system be evaluated. The next section considers the verification of beneficiaries by selected universities.

### C. Verifying Beneficiaries

Verification of racial identity has generated the greatest controversy for affirmative action. n129 There are social and political costs for verifying, [\*30] and also for not verifying, identity.

The need for verification is more pronounced at the more competitive universities where strategic candidates consider whether or not to apply for affirmative action seats to improve their chances for admission. This strategic use of identity was highly evident in the first year of affirmative action at the State University of the State of Rio de Janeiro (UERJ). Apparently, more than a quarter of UERJ applicants changed their identity during the two entrances examinations. Some candidates darkened themselves, changing from *White* to *Brown* or *Black*, and some lightened themselves, changing from *Brown* or *Black* to *White*. n130 Those who darkened themselves presumably sought to increase their chances to gain admission to the university. Those who lightened themselves may have decided that they did not wish to, did not need to, or could not justify claiming to be *Black* or *Brown* for the purposes of university admission. n131 For example, one applicant for medical school, Gabriella Francescutti, considered darkening herself for the purpose of admission but did not:

*I have friends who are whiter than me and didn't study or do well on the exam, but they wrote down they were [Black] on their application and they got in. My grandmother is Black. I could have written down that I am Black, but I didn't feel right about that. In a country like Brazil, everyone's blood is mixed together. n132*

Such calculations have also been evident at UNB. Karinny, a blond candidate for nutrition, decided to seek an affirmative action seat reasoning differently than Gabriela that "if others are benefiting, why shouldn't I?" n133 I suggest that the heart of the matter is not simply Gabriella and Karinny's [\*31] decisions but the overall legitimacy of affirmative action because candidates are keenly aware of their competitors' decisions.

The perceived fairness of Brazil affirmative action is not simply how affirmative action affects the overall provision of opportunities but also whether affirmative action can be administered fairly. Apparently, many of the admitted affirmative action students were *Whites* who had been counseled by university professors to darken themselves for the purpose of admission. n134 The perception that others are using identity opportunity to gain university admittance destabilizes and de-legitimizes affirmative action. With the knowledge that other candidates are darkening themselves, other *Whites* will also be tempted to darken themselves. Thus, I speculate that a highly competitive admissions process without verification processes will increase uncertainty and serve to delegitimize affirmative action.

Does social constructedness require the automatic acceptance of subjective identity? If a candidate chose a 'subjective identity' simply for the purpose of university admissions, do the principles of social constructedness require that that be accepted without scrutiny? I argue that such a view represents a dogmatic understanding of social constructedness n135 and does not acknowledge the strategic use of identity nor contemporary understandings of the complexity of

identity. Although I defend the importance of verification, I recognize that verification of racial identity is a delicate process that need be conducted based upon the principles of social constructedness and in a way to maximize program legitimacy in the eyes of ordinary Brazilians.

Any method of verification can yield an assessment that differs from subjective claims. As shown in **section (2)**, survey data suggests that the verification will differ from the individual's self-identity in approximately 15% to 20% of the cases. University candidates have more incentive than survey respondents to shape their identity for the purposes of university admission, which predicts higher rates. Indeed, four universities that verify identity have rejected the identity claims of between 5% and 35% of the applicants. n136 This divergence poses the challenge that the process and the actual assessment can withstand review.

From the comparative arena, colleges verifying identity could employ [\*32] some of the following methods to verify a candidate's identity:

- (1) official documents that testify to a candidate's identity; n137
- (2) visual examination of the candidate; n138
- (3) interviews with candidates about their self-perception, n139 their behavior, n140 their treatment by others n141, or their prior discriminatory experiences; n142 and
- (4) the testimony of others, including a candidate's family, neighbors, co-workers, or members of various reference groups n143 about the individual's self-perception, n144 reputation in the community, n145 self-presentation and behavior, discriminatory experiences, n146 and physical appearance.

In practice, Brazilian colleges have employed a combination of the first three methods, including the evaluation of candidate photos, interviews with the candidates, and the presentation of official documentation. At least two colleges permitted internal appeals of these determinations in which rejected candidates generally prevailed. In making their initial determinations, the colleges have emphasized the physical appearance of candidates. In the appeals, colleges have also considered the experiences and perceptions of candidates, their racial consciousness, their ancestry, and other considerations.

Only six of the fifty-one Brazilian colleges with affirmative action [\*33] programs n147 verify candidate identity. Currently, four colleges primarily use interviews, one primarily uses photos, and one primarily uses official documents to verify identity. n148 Most colleges have adopted other measures to "tighten" identity in lieu of actual verification n149, and require other criteria that can be more readily verified (such as public school attendance or family income). This section briefly surveys five of the Brazilian colleges n150 that have verified identity.

### *Photos*

Of the three universities that have used photos to verify identity, only one still does: the State University of Mato Grosso do Sul (UEMS). [\*34] The other two, the Federal Universities of Brasilia (UNB) and Maranhao (UFMA), both have shifted to use interviews to verify identity. In Mato Grosso do Sul in 2003, political leaders, university officials, and Black movement activists sought to avoid the trouble with self-identification that had occurred at UERJ. State Representative Pedro Kemp (PT) sponsored the new affirmative action law n151 and argued that the process of implementing affirmative action would be "fragile and susceptible to fraud" if applicants declared their own identity, n152 and Black movement activists advocated for "social control." n153 Subsequently, the University Vice-Chancellor, Leocadia Petry Leme, announced that *Pardos* would not be considered *Negros* under this law and would not be eligible for the affirmative action openings. She also announced the formation of a commission composed of *Afro Brazilian* students and professors, and Black movement activists to verify applicant identity. n154 Although the Commission considered holding interviews with candidates n155, it decided instead to require candidates to present a photo. n156 As shown in Table 3, the Commission rejected 76 (14%) of 530 applicants in its first year who did not possess the necessary "phenotype." n157 According to a member of the Commission who was also the President of the State Council for the Defense of *Negro* Rights (CEDINE), Naercio Ferreira Fernandes de Souza, the 76 lacked the necessary facial characteristics of a *Negro*: "thick lips, flat nose, and frizzy hair." n158 The Commission eliminated some lighter "Afro descendent" applicants, which she defended because "society discriminates against the color of the *Negro*. It is not a matter of genes or blood, but physical traces." n159 Dr. Edna Roland, Coordinator of the UNESCO program in Brazil against Racial Discrimination, sharply criticized the Mato Grosso [\*35] do Sul approach for (1) differentiating between *Negros* and Afrodescendents, (2) presuming that all *Negros* had particular physical traces, and (3) excluding lighter Afrodescen-

dents. n160 In subsequent years, the UEMS Commission rejected considerably more candidates: 191 (18.1%) in 2004 and 319 (35.1%) in 2005. n161

Table 3: Evaluation of Candidates by Four Commissions

		Candidates		Candidates Rejected	
		evaluated			
UEMS 1	2003	520	76	14.3%	
	2004	1,053	191	18.1%	
	2005	908	319	35.1%	
UNB 2	2004	4,385	212	4.8%	
UFPR 3	2004	573	27	22.3%	
UFMA 4	2008	1,987	343	17.3%	

1 Maria Jose de Jesus Alves Cordeiro, Tres anos de efetiva presenca de negros e indigenas cotistas nas salas de aula da UEMS: primeiras analises, in ANDRE AUGUSTO BRANDAO (org.) COTAS RACIAIS NO BRASIL: A PRIMEIRA AVALIACAO, (Colecao Politicas da Cor 2007).

2 Para a UnB, 21 rejeitados agora sao negros, FOLHA DE SAO PAULO ONLINE, June 23, 2004, available at, [http://www.universiabrasil.net/portada/actualidad/noticia\\_actualidad.jsp?noticia=70782](http://www.universiabrasil.net/portada/actualidad/noticia_actualidad.jsp?noticia=70782).

3 Cimea Barbato Bevilaqua, A implantacao do "Plano de Metas de Inclusao Racial e Social" na Universidade Federal do Parana, Curitiba, Dezembro de 2005.

4 Coluna Bastidores, O IMPARCIAL, February 1, 2008.

[\*36] UNB was the second college that decided to verify the identity of its affirmative action applicants. Two anthropology professors, Jose Jorge de Carvalho and Rita Laura Segato, proposed that the university adopt affirmative action in response to the discriminatory treatment of Arivaldo Lima Alves, the first Black doctoral student in the anthropology department in 1999. n162 Influenced by the UERJ experience and allegations of fraud for admission to an affirmative action program for the diplomat corps n163, [\*37] officials at UNB worried about the problem of fraud. Although UNB considered conducting candidate interviews, the implementation commission decided in favor of photos because of concerns for the efficient handling of student applications. n164 This concern with fraud led UNB to diverge from the Carvalho/Segato proposal that had proposed that "social consequentialism" could properly constrain candidates. n165 Reflecting the concern with fraud, UNB decided to modify the UEMS system by requiring that UNB take candidate photos (against standardized backgrounds) to prevent the altering of photos. n166

UNB set a very high standard for rejecting candidates and a very low standard for admitting candidates. If any of the six members of the UNB Commission thought a candidate was *Brown* or *Black*, that candidate was admitted. In other words, the UNB commission had to reach unanimity to not admit a candidate. This high standard for rejecting candidates had several consequences. First, this probably contributed to the very low rejection rate at UNB, compared to other colleges. (See Table 3). Second, the Commission effectively set the admission bar very close to whiteness, and apparently *Whites* reportedly gained admissions to UNB. n167 Third, UNB claimed that the actual impact of the photo requirement significantly exceeded the 4.8% rejection rate by deterring others from applying. n168 Finally, the media closely scrutinized every rejection. The UNB Commission classified at least two sets of twins differently, and at least two additional brother-sister combinations differently, each of which became cause celebres for the media and the opposition to affirmative action. [\*38]

Table 4: Appeals by Rejected Candidates at Two Universities

Candidates Rejected	Appeals	As % of	Successful appeals	As % of
		rejected applicants		appeals

Table 4: Appeals by Rejected Candidates at Two Universities

		Candidates Rejected	Appeals	As % of rejected applicants	Successful appeals	As % of appeals
UNB 1	2004	212	34	16.0%	21	61.8%
UFPR 2	2004	127	103	81.1%	70	68.0%

1 Para a UnB, 21 rejeitados agora sao negros, FOLHA DE SAO PAULO ONLINE, June 23, 2004, available at [http://www.universiabrasil.net/portada/actualidad/noticia\\_actualidad.jsp?noticia=70782](http://www.universiabrasil.net/portada/actualidad/noticia_actualidad.jsp?noticia=70782).

2 Cimea Barbato Bevilaqua, A implantacao do "Plano de Metas de Inclusao Racial e Social" na Universidade Federal do Parana, Curitiba, Dezembro de 2005.

UNB permitted rejected candidates to appeal the college's assessment. As indicated by Table 4, few (16%) candidates appealed their rejections. These much lower rejection and appeal rates conform to the view that the low bar for admission resulted in the admission of *Whites*, and that many of the rejected candidates perceived themselves as *White*.

UFMA was the third university to adopt the use of photos to verify candidate identity, although it would do so for only one year. In 2007, its first year of implementing affirmative action, UFMA established a Validation Commission of three members to review photos. The Commission reviewed the photos of all candidates, and invited candidates about whom it had doubts for interviews. In all, the Commission validated the identity of about 80% of the 925 applicants. According to Fernanda Pinheiro, a member of the commission, the rejected candidates did not show "any trace [of blackness] or any circumstances of disadvantage," n169 which could represent a standard closer to UNB.

#### *Official Documentation*

One university, the State University of Goias (UEG), verifies candidate identity by presentation of official documents. The affirmative action program at UEG, initiated in 2004, included seats for *Afro Brazilians*, public school students, and indigenous or disabled students, and permitted candidates to apply for one of the quota systems and the universal [\*39] system simultaneously. All quota candidates are required to provide official documentation: indigenous students must provide a letter from the federal agency for indigenous affairs, the National Foundation of the Indian (FUNAI), public school students need to prove their matriculation through middle school, and *Afro Brazilians* need to show "an official public document that confirms the candidate's black identity, such as a birth or marriage certificate." n170 Lacking that, candidates for the *Afro Brazilian* seats can submit a declaration of blackness officially registered by a public notary, which apparently cost approximately \$ 75 in 2006. n171 This last method of documentation appears the most expensive and the least rigorous. n172

#### *Interviews*

Three universities use interviews to verify candidate identity. The first, the Federal University of Parana (UFPR), strongly influenced by the UNB plan, developed its affirmative action program in 2004. However, instead of requiring that candidates be photographed, the university conducted a short interview as candidates submitted their applications. n173 To gain admissions through affirmative action, candidates had to be unanimously approved by the Commission, a much higher standard than at UNB. n174 Consequently, the UFPR Commission rejected the identity claims of 22% of the affirmative action candidates. Of the 127 rejected candidates, 81% appealed, and most prevailed. Those who appealed tended to view themselves as *Pardo*, alleged to have a black parent and in some instance a black grandparent, and showed an official identity document or a photo of their family. n175

[\*40] In its first year of affirmative action, UFPR enjoyed a significant growth in *Afro Brazilian* candidates and students. In subsequent years, the demand for *Afro Brazilian* candidates declined but remained above the pre-affirmative action level. Marcilene Garcia de Souza, a member of the Commission, and the President of UFPR, Carlos Moreira Junior, both thought that this decline in demand was a response to the Commission's rigorous verification process. n176 Thus, the differences in methods, requiring unanimity to admit rather than to reject, and the actual standards moved the line for candidates further toward *Pardo* at UFPR than at UNB. The higher rejection and higher appeals rates also suggest that the standard at UFPR was further toward *Pardo*

In 2008, UFMA modified its affirmative action admissions process to call all quota candidates, and not just those in doubt, for an interview. Of 3,041 eligible candidates, approximately one thousand did not appear for the interview. n177 Of the 1987 interviewed, the 25-person Commission of Validation did not accept 343 (17.3%), who subsequently competed in the universal system. n178 The 1644 approved candidates represented just over half (54.1%) of the qualified candidates. n179 The Validation Commission had made its determinations based upon a short interview, which sought, according to the director of the commission, Professor Carlos Benedito Rodrigues da Silva, to evaluate the candidate's perception of her blackness in daily life, n180 including how she views herself socially and how she presents herself to her family, as well her reasons for choosing the quota option. n181

Following UNB's footsteps, UFMA also classified twins distinctly. The rejected twin, Ana Caroline, claimed her interview had lasted less than five minutes and consisted of three questions: "(1) why do you want to study Communication? (2) did you study in public school? and (3) do you [\*41] understand the [purpose of the] quota system?" n182 During the several month controversy, the university never managed to locate its records from her interview. n183 Fully reminiscent of Marx's warning about the repetition of history, UFMA also admitted Ana Caroline after significant political pressure.

UNB revised its affirmative action admission policy to verify candidate identity based upon interviews as of January 2008 in response to the ongoing controversies. n184 Candidates viewed the new system as more fair and more difficult to scam. However, even under the new system, some candidates reported a "grand mixture of color" among their competitors. Apparently, one candidate was "so *White* that everyone laughed" when he entered the waiting room, and this candidate was reputedly accepted by the Commission. n185 The interviews at UNB were also short and also consisted of three questions: (1) what is **your** name? (2) why do you consider yourself Black? and (3) why are you seeking a quota seat? n186

### *Discussion*

The verification of applicant identity constitutes a sensitive process that presents particular challenges in a country that has prided itself for rendering identity ambiguous and indeterminate. To maximize political and social legitimacy in Brazil, the verification method needs to recognize both the primacy of subjective identity and the social contexts of identity, which entails mediating between self-perception and the perception of others. Thus, candidates must be able to "speak" during the process of verification, which the use of photos or documents fails to grant. Until 2008, UNB candidates could not "speak" until their appeal, which recognized neither their due process rights nor the primacy of self-identity. A primary reliance on documents does not recognize the reality of Brazilian identity and past practice in which official documents have been issued without regard for the potential consequences for scarce public goods. n187 Documents and photos best constitute supporting and not primary evidence. I claim that the [\*42] interview represents the verification method best suited to maximize the political and societal legitimacy of affirmative action.

On what underlying assumptions about identity might interviews draw? Should interviewers seek to 'uncover' the identity of applicants, on the theory that identity is 'waiting' to be 'found', or to seek to explore the identity of applicants in a more open-ended fashion? n188 If the latter, might interviews simulate 'travel' in the sense that new experiences, at a university or another country, enabled some *Afro Brazilians* to see their Brazilian experiences through new eyes? Might interviews take stock of the significance of assimilation in Brazil and explore candidate identity in a way that contests Brazilian assimilation, as the 1991 census campaign sought to do? Further, should interviews be structured in a way that acknowledges the role of positionality in socializing all discourse about identity? A candidate's perceived relationship to her audience, in this instance her interviewers, could influence her identity claim, and thus the composition of interviewers would matter. n189 Thus, committees might be composed to reflect the identity of the applicant pool. Regarding the scope of the interview, committees might develop a "short mode" that would suffice in the vast majority of cases and a "dialogic" mode n190 available for the more complicated cases. n191

What base-line subjectivity might colleges seek from affirmative action candidates in these interviews? For the "short mode" interview, suitable for the vast majority of candidates, I propose a plural approach that emphasizes subjective "color" identity, the recognition of societal position, and the perception of others without any element functioning as the litmus test n192 for identity. If someone presented herself as *Parda* in her daily life or [\*43] was clearly perceived as *Parda* by others, I claim that would be sufficient. I question an expectation that someone had already come to identify with the Black movement n193 or possessed Black consciousness, either of which would certainly constitute evidence of her identity, but lacking either should not constitute grounds for elimination. n194 Scholars have proposed tests of "suffering," n195 "functional" experience, n196 or "consequentialism" n197 that emphasize different conceptions of subaltern societal position. Piper's "suffering" test was a litmus test of whether she was "Black enough", experi-

ences that lighter Brazilian *Pardos* also face. Yang's functional test, an effort to move away from a conception of policing fraud, emphasizes the recognition of discrimination. Requiring such recognition in Brazil would represent a narrow construction of the beneficiary class since the majority of Afro Brazilians do not report discriminatory experiences. n198 Tanya Hernandez proposes a consequentialist approach that asks an individual to recognize how her appearance and self-presentation affects her treatment: "When first interacting with others, in what ways does your appearance affect the interaction?" n199 Hernandez's consequentialism overlaps Piper's suffering test in a more open-ended fashion and elicits a broader recognition of racialized experiences than those generally conceived as discriminatory. While all three notions are relevant for Brazil, I suggest that Hernandez's consequentialism would be most pertinent in a country with coded [\*44] behaviors most aptly described as racial and color etiquette. n200 I argue that this consequentialism would need to be incorporated in an exploratory rather than accusatory style to grant primacy to the candidate's subjective identity.

Several questions could elicit subjective "color" identity and recognition of subaltern positionality. First, how does the candidate identify on a daily basis? Presumably, she would offer or be asked to provide concrete instances, such as friends, associates, or community members who could validate her identity. UNB has asked several questions that resonate with Hernandez's concern with the mutual constitution of identity and experience: (1) why do you consider yourself *Black*? n201 and (2) how is it being *Black*? n202 Second, a committee might explore how others view and treat the candidate on a daily basis and might ask "whether anyone outside of your family treat you as *Pardo*?" In these instances, either the candidate would offer, or be asked for, concrete instances. These questions bring community perception and daily experience into the assessment. Although ancestry is not determinative, I claim that having a *Black* or *Brown* parent matters in Brazil and propose that committees also elicit parental identity. n203

Consider how those three questions: daily self-presentation, community perception and parental racial identity, would play out for the toughest case: *Novos Pardos*, "first time *Browns*," stimulated by the benefit of access to higher education to identify for the first time as *Brown*. How might a university distinguish between *Novos Pardos* who deployed identity simply to maximize their life chances and those who had actually come to rethink their identity because of the opportunity? n204 The three proposed questions would not seem helpful to make this determination. *Novos Pardos* could not viably claim to have presented themselves or to have been perceived as *Brown*. Nor would parental ancestry necessarily differentiate a light *Brown* from a *White*, although having a *Black* parent has been sufficient in practice to gain admission. Thus, a broader, dialogic approach [\*45] to identity that draws upon Hernandez's notion of consequentialism seems especially relevant for such cases.

What might this broader dialogic approach to the identity of *Novo Pardo* entail? A committee would presumably focus on two elements: (1) the nature of the change in identity: to explore the candidate's considerations triggered by the new opportunity, and (2) the candidates deeper recognition of the consequences of her appearance in daily life. UNB asks candidates, "Before signing up for the UNB entrance examination, had you ever thought of yourself as *Negro*?" n205 That question would not establish whether someone whose new identity was triggered by the possibility of affirmative action had come to genuinely rethink her identity, which I argue is the central question. Interviewers might ask whether she had previously wondered about her identity, and if so, to talk about that in an open-ended fashion. Interviewers would seek to elicit the elements of that "wondering": her multiple personal and social influences. She might have a sibling who identified as *White*, another who identified as *Brown*, a darker parent, a lighter parent, and distinct relations with the extended families of both parents, while most likely privileging the extended family of the *White* parent. She undoubtedly had the experience of being treated *White* sometimes and *Brown* sometimes in social settings, and may have learned to avoid the settings in which she would be treated *Brown*. Interviewers would seek to draw out her recognition and experience of these diverse influences, opportunities and treatment by others. Hernandez's consequentialism would be extremely relevant to inquire about her recognition of how her "appearance affected the interaction?" n206 The intent would be to locate the substance of her claim to be *Brown* and her recognition of the consequences of her Brownness, rather than simply authenticating her Afro Brazilianness. In addition to eliciting innermost thought, interviewers would explore whether she communicated those thoughts to others. Admittedly, this broader dialogic "verification" would tread on soft ground, but I argue that to be a necessary space for individual *Novo Pardos* and to understand the nature of the identity shift from affirmative action, necessary for a new paradigm of identity.

[\*46] Because of the complexity of individual verification, colleges also seek to impact the macro-level, the larger market of applicants. Thus, one college with a lower rate of rejecting candidates (UNB) n207 claimed to have deterred other applicants from applying and to have had a greater impact on the macro-level. At UFMA, the number of candidates who failed to show for interviews tripled the actual rejection rate, suggesting that no-show candidates feared the interviews. The higher initial rejection rate at UFPR, compared to UEMS or UNB, was thought to lower applications in



subsequent years, n208 also suggesting a relationship between verification and macro-level demand. This data suggests that colleges need to be aware that too much deterrence could yield a drop in demand and perhaps create a backlash among rejected candidates.

The nature of the interview process will impact the ability of the verification commissions to make determinations in the difficult cases. Currently, the interviews conducted at UFPR, UNB and UFMA are short and governed by considerations of efficiency, a prominent consideration given the large demand for public universities. At UEG, a notary public can issue an official statement of identity for a sizeable fee. Perhaps the process of confirming identity is best conducted outside of the university admissions office to not overburden the various universities, provided that the outside entity designated is appropriate for the task. Designated Black Movement NGOs and/or an official agency could confirm candidate identity, similar to the certification of candidate eligibility for indigenous affirmative action seats in Brazil. A longer interview conducted separately from the moment of the university entrance examination could allow for a calm, probing interview that could maximize the legitimacy and stability of the process. Based upon the UNB experience, I suggest that the fuller interviews would be necessary for no more than 10% of the applicants. These interviews could illuminate a rethinking of *Afro Brazilian* identity in Brazil and contribute toward a new racial paradigm. That, as I explore in the closing, seems to be the heart of the controversy: how will Brazil be translated and transformed toward a new racial paradigm?

[\*47] *If Gilberto Freyre were alive today, he would roll over and die again.*

- Edson Cardoso, April, 2007 n209

## Conclusion

When Brazil's former President Cardoso initially opened the public discussion about affirmative action in 1996, he conceded the existence of racial discrimination, a statement of historical significance, while also insisting that Brazilians would need to find "Brazilian" solutions to racial discrimination. n210 During the ensuing decade, a growing debate emerged about those "Brazilian" solutions in which opponents continually asserted the impossibility of implementing affirmative action in Brazil because of the nature of Brazilian identity. Initially, they argued that no one would wish to claim to be *Black*, given deep-seated historical stigma, even to gain an opportunity. That argument has proven wrong and many *Whites* have been willing to claim to be *Black* or *Brown* for the purposes of gaining university admission. The other prominent argument about the impossibility of affirmative action was the converse: that everyone would want an affirmative action seat and that it would be impossible to determine who was really *Black*. Although that argument has also proven not to be true, that argument landed closer to the mark.

The first five years of affirmative action have shown that the considerable ambiguities of the Brazilian structure of identity have provided sufficient opportunities for strategic action and that Brazilians have deployed their identity strategically. Although the opposition has overstated the consequences of the complexities of identity, important questions about identity and public policy warrant further consideration. The Black movement's initial effort through the 1991 census campaign to encourage Brazilians to identify on the basis of race and not color has developed a following. However, I argue against requiring such racial consciousness on the part of candidates for the university and that *Black* or *Brown* color identity should be sufficient.

Affirmative action surely represents a paradigm shift in Brazil. Affirmative action represents the first material incentive in Brazil to identify as *Black* or *Brown*, an important counterweight to *racial democracy*. Affirmative action is increasing the educational opportunities for *Blacks*, *Browns* and the poor, which also will create identity shifts. University educated *Afro Brazilians* are more likely to identify as *Black* or [\*48] *Brown* and as *Afro Brazilian*. Further, the nature of the identity shift by *Novos Pardos*, another consequence of affirmative action, will signal the nature of the paradigm shift. Has the strategic opportunity of entering universities led *Novos Pardos* to reconsider their identity or to seek personal gain?

I contend that the current moment can only be understood as a collision between past and present identity structures and the discursive ambiguity between fusionist and absorptionist fictions. The provision of targeted opportunities for the historically oppressed, those who were to be absorbed, represents a historically significant counterweight to the societal pressure to be absorbed. These opportunity policies also provide an incentive for anyone in the country to identify within the dominated group. Consequently, others also seek benefits intended for dominated persons, which contributes to the collision between past and present identity structures. Winant characterizes this dynamic, the exhaustion of an old paradigm prior to the development of a new paradigm of identity, as a world-wide phenomena. n211

How might affirmative action affect Brazil and its structure of identity? One possibility, raised by the opposition and Thomas Sowell n212, is that state identity will trump societal identity and that Brazil will become bipolar. In a sense, that fear parallels the Black movement hope that affirmative action will yield a new paradigm for identity based upon an overarching African ancestry. n213 Certainly identities change over time, but I argue that such change occurs through societal mobilization rather than a single declaration for a public benefit. State identity would have to matter beyond university admissions for such a change to be plausible. A second possibility would be that societal identity would be able to adapt to the new circumstance. In that view, Brazilians would continue to treat state identity as something to be declared in specific contexts, such as university admissions, and claim societal identity, such as *Moreno*, on a daily basis. That latter view underestimates the nature of the change. I hypothesize instead that a new synthesis of state and societal identities will emerge over time.

New knowledge and methodologies about racial identity will be [\*49] needed to perceive this new synthesis of identity. The understanding of race in Brazil that the opposition has defended so staunchly was developed through an "orientalist" paradigm that has presumed US race relations as the norm. n214 Seminal studies showed that Brazil did not have US style racial dynamics, which said little analytically about Brazilian dynamics. n215 Perhaps the much-maligned "racial commissions" may contribute to a new understanding about identity n216 and to the production of a new subjectivity: [\*50] new ways of moving beyond the color paradigm. Thus far, the majority of the Black movement recoils from the category, *Moreno*, because of its association to whitening. The battle in the 20th century centered over the construction of the middle of the color spectrum, declared *Moreno* by Freyre. Might the Black Movement find a new way to contest that construction by inventing a new category connoting mixedness and blackness? Could an absorptionist dynamic be transformed into a dynamic that was genuinely fusionist based upon the power of renaming?

Finally, one policy goal I initially posited was whether affirmative action policy could counter the absorptionist aspects of *racial democracy*. Consider that the historical preference for whiter or lighter employees can be expected to continue for the foreseeable future. Thus, employers hiring through affirmative action would be expected to hire the lightest *Brown* Brazilian available. Ultimately, does opportunity policy in a color hierarchy need to offer "layered" benefits: privileging those "at the bottom" over those "at the middle" over those "at the top"? Would employers need to be expected to hire the darkest of the equally qualified candidates? Those questions, not yet considered, may become pertinent if Brazil seeks to fully exit its racial order.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Antitrust & Trade Law Industry Regulation Professional Associations & Higher Education General Overview Civil Procedure Judicial Officers Judges General Overview Evidence Demonstrative Evidence Photographs

### FOOTNOTES:

n1 Processo N. 2004.34.00.022174-8, Fernanda Souza Lopes De Oliveira V. Fundacao Universidade De Brasilia, 21<a> Vara Federal do Distrito Federal, *Revista Consultor Juridico*, May 31, 2007, <http://coniur.estadao.com.br/>.

n2 See especially Deborah Posel, "What's in a name? Racial categorizations under apartheid and their afterlife," 47 *Transformation* 50 (2001).

n3 India carefully prescribed the circumstances under which the government might use "forbidden criteria." See especially MARC GALANTER, *COMPETING EQUALITIES, LAW AND THE BACKWARD CLASSES IN INDIA* 215 (Oxford University Press 1984).

n4 Tanya Kateri Hernandez, *Multiracial' Discourse: Racial Classification in an Era of Color-Blind Jurisprudence*, 57 *MD. L. REV.* 97, 110 (1998).

n5 See Edward E. Telles, *Racial ambiguity among the Brazilian population*, 25 *ETHNIC AND RACIAL STUDIES* 3, 415 (2002).

n6 In Brazil, a term equivalent to African-American has not developed widespread acceptance. The Black movement (*Movimento Negro*) has advanced *Afro Brasileiro* (*Afro-Brazilian*) and *Negro* (*Black*), terms connoting race, as preferable to *Preta* and *Parda*, the terms used by the census bureau that connote color: *Black* and *Brown* (or tan, more precisely), respectively. In daily life, darker Brazilians have tended to identify as *Moreno* or one of its many variants rather than as *Parda*, *Preta* or *Negra*. To the census bureau, most Afro Brazilians identify as *Parda* (Brown) rather than *Preta* (Black). *Parda* (Brown) is an identity of different meanings in different parts of the country, that suggest mixedness. Further, at least three different vocabularies of identity are deployed: movement, state, and traditional. In this article, I refer to both *Pretas* and *Pardas* as *Afro-Brazilians* for clarity and support the Black Movement's aspirations but without asserting that the majority of *Pardas* and *Pretas* actually embrace the term.

n7 Brazil's Black movement has grown significantly since 1991. The movement is expressed through many non-governmental organizations (NGOs) which address concrete employment, health, legal, and other issues as well as underlying social and cultural concerns. On the Black movement, see Monica Trevino, *Opportunities and Challenges for the Afro-Brazilian Movement* and Sales Augusto dos Santos, *Black NGOs and Consciousness Rap: New Agents of the Antiracism Struggle in Brazil* in Bernd Reiter and Gladys Mitchell, *BRAZIL'S NEW RACIAL POLITICS* (Lynne Rienner, 2009). On the census campaign of 1991, see especially Melissa Nobles, *SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS* 15-17 (Stanford University Press, 2000) (discussing the role of the census bureaus in the definition of categories).

n8 After a century of declining *Parda* and *Preta* identity, small but significant increases in *Parda* and *Preta* identity and the emergence of *Negra* identity have developed in the past decade. See Seth Racusen, *Making the "Impossible" Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 *CONN. L. REV.* 787, 797 (Spring, 2004).

n9 Six universities currently verify the identity of applicants: the Federal University of Brasilia (UNB), the State University of Mato Grosso do Sul (UEMS), the Federal University of Parana (UFPR), the Federal University of Maranhao (UFMA), the State University of Goias (UEG), and the State University of Ponta Grossa (UEPG).

n10 In Brazilian surveys, there is a much higher discordance between respondent and interviewer attributed identity than in the US. On Brazil, see EDWARD E. TELLES, *RACE IN ANOTHER AMERICA* 89 (Princeton University Press, 2004). On the US, see Tom W. Smith, *Measuring Race by Observation and Self-Identification* National Opinion Research Center, University of Chicago. GSS Methodological Report No. 89, Feb. 1997.

n11 The notion of mixedness contains a tension by implying a prior moment of "pure" or "non-mixed" individuals. By "mixedness", the article refers to the social construction of mixed persons in relationship to societal constructs of Whites and Blacks, which produces the meaning of mixedness. *See* Naomi Pabst, *Blackness/Mixedness: Contestations over Crossing Signs*, 54 CULTURAL CRITIQUE 178 (2003).

n12 Processo N. 2004.34.00.022174-8, Fernanda Souza Lopes De Oliveira V. Fundacao Universidade De Brasilia, 21<a> Vara Federal do Distrito Federal, *Revista Consultor Juridico*, May 31, 2007, <http://conjur.estadao.com.br/>.

n13 *See* TELLES 2004, *supra* note 10, at 148-150.

n14 *See* Oracy Nogueira, TANTO PRETO QUANTA BRANCO: ESTUDOS DE RELACOES RACIAIS (Sao Paulo: T.A. Queiroz, 1985).

n15 *See* Merida Blanco, "Race and Face among the Poor: The Language of Color in a Brazilian Bairro." (Dissertation: Stanford University, 1978).

n16 "Irmaos tem mesmo direito de concorrem as cotas para Negros, diz Justica," May 31, 2007, Website of the Ultima Instancia, <http://ultimainstancia.uol.com.br>.

n17 Acao Declaratoria com Pedido de Antecipacao de Tutela, Fernanda Souza Lopes de Oliveira, v. Fundacao Universidade de Brasilia, Vara de Direito da Circunscricao Especial Judicaria de Brasilia, July 2004.

n18 Although the judge raised questions about the admissions criterion, the admissions requirements clearly stipulated that candidates declare their identity in either the census category of Brown or Black, declare their belonging to the black race, and have a picture taken that will be evaluated by a UNB commission. In this instance, Fernanda's application was rejected on the second criteria.

n19 UNB's recent revision of its admissions procedures to use interviews instead of photos will likely increase the role of subjectivity in the process. Erica Montegenro, *Cota Racial -- aprovadas mudancas na UNB*, CORREIO BRAZILENSE, *Jornal Irohin* Clipping, Oct. 2, 2007.

n20 Lucila Soares, *Retrato em Preto e Branco: Cotas para negros na UnB poe fogo na discussao sobre o acesso ao ensino superior*, 37 VEJA 75 (No. 16, 2004).

n21 Alan Bakke was the white candidate to the Medical School of the University of California at Davis who challenged the university's affirmative action program as discriminatory. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)

n22 See especially DIVISOES PERIGOSAS: POLITICAS RACIAIS NO BRASIL (Peter Fry, Yvonne Maggie, Marcos Chor Maio, Simone Monteiro, Ricardo Ventura Santos) (Civilizacao Brasileira, 2007). See also a special issue of the anthropological journal, Horizontes Antropologicos, Marcos Chor Maio and Ricardo Ventura Santos, HORIZONTES ANTROPOLOGICOS, Year 11, N. 23, (Jan/Jun 2005).

n23 See especially Marcos Chor Maio and Ricardo Ventura Santos, *Políticas de cotas Raciais, Os 'Olhos da Sociedade' e os Usos da Antopologia: O Caso do Vestibular da Universidade de Brasilia (UNB)*, Year. 11, N. 23 HORIZONTES ANTROPOLOGICOS 181-214, (Jan/Jun 2005).

n24 See Fry et al. 2007, *supra* note 22, at 21; and Yvonne Maggie, Does Mario De Andrade Live On?, Debating The Brazilian Modernist Ideological Repertory, 2006 Unpublished Paper, available at [http://www.observa.ifcs.ufjf.br/bibliografia/artigos\\_periodicos/MaggieYvonne\\_macunaima\\_eng.pdf](http://www.observa.ifcs.ufjf.br/bibliografia/artigos_periodicos/MaggieYvonne_macunaima_eng.pdf), 22.

n25 On state strategies to 'manage' political 'minorities,' see DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (University of California Press, 1985); CRAWFORD YOUNG, *ETHNIC DIVERSITY AND PUBLIC POLICY: AN OVERVIEW* (Geneva, United Nations Research Institute for Social Development, 1994); and PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (Oxford [England], Clarendon Press, New York: Oxford University Press, 1991).

n26 See especially Fry et al. 2007, *supra* note 22, at *Politica Social de Alto Risco*.

n27 As of January, 2008, 51 Brazilian universities had adopted affirmative action admissions policies, according to the monitoring project at the Laboratory of Public Policies (LPP) at the State University of Rio De Janeiro (UERJ). See Antonio Gois, *51% das universidades estaduais adotam acoes afirmativas*, FOLHA DE SAO PAULO, Jan. 8, 2008, available at <http://www1.folha.uol.com.br/folha/educacao/ult305u361070.shtml>. For the most detailed report, see Elielma Machado, *Acompanhamento e Monitoramento das Políticas de Acao Afirmativa nas Universidades Brasileiras*, 1 DESIGULDADE E DIVERSIDADE 139 (2007), available at [http://publique.rdc.pucrio.br/desigualdadediversidade/media/Nirema\\_desdiv\\_nlanol.pdf](http://publique.rdc.pucrio.br/desigualdadediversidade/media/Nirema_desdiv_nlanol.pdf).

n28 See IGNACIO CANO, *THE USE OF LETHAL FORCE BY POLICE IN RIO DE JANEIRO*, BOLETIM DO ISER, RIO DE JANEIRO (1998); and Dijaci David de Oliveira, SALES AUGUSTO DOS SANTOS, VALERIA GETULIO DE BRITO E SILVA, ORGANIZADORES, *VIOLENCIA POLICIAL: TOLERANCIA ZERO?* GOIANIA, GOIBAS, BRASIL : EDITORA UFG, (2001).

n29 Frei David Raimundo, among others, has offered this response. See Viviane Barreto, *Vaga de Pardos Vira Polemica*, O DIA, May 16, 2003, at 3 (quoting David Santos), available at <http://www2.urej.br/clipping> (last visited Mar. 16, 2004). See also Sales Augusto dos Santo, *Who is Black in Brazil? A Timely or a False Question in Brazilian Race Relations in the Era of Affirmative Action*, 33 LATIN AMERICAN PERSPECTIVES 7-8 (2006).

n30 Consider here also the actions of countless building doormen, employment recruiters, realtors and others. See Lilia Moritz Schwarcz, *Not black, not white: just the opposite, Culture, race and national identity in Brazil*, 44 (Working Paper, CBS-47-03, University of Oxford, Centre for Brazilian Studies, 2003).

n31 Christopher A. Bracey, *The Cul de Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231 (2006).

n32 Fry and Maggie argue that affirmative action represents the death of *Pardos*, *Cabloclos*, and *Morenos*. Peter Fry and Yvonne Maggie, "Politica Social de Alto Risco" in Fry et al, 2007, supra note 22, p. 279-80. Nancy Leong argues that the use of discrete categories constrains multi-racial identity, Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 UCLA ASIAN PAC. AM L. J. 1, 17 (Fall 2006/Spring 2007).

n33 Laura Jenkins and Tseming Yang both warn about fraud doctrine. Laura Dudley Jenkins, *Race, Caste, and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States*, 36 CONN. L. REV. 747, 761 (2004) Tseming Yang, *Choice and Fraud in Racial Identification: the Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 MICH. J. RACE & L., 367 (2006).

n34 The term *racial democracy* refers to a society in which opportunities are not structured by racial identity. Although some scholars contest the origins of the concept, most credit Gilberto Freyre with its development. Frere tributed the "democratization of human relationships" and Brazil's "marching onward toward social democracy" in his English preface to his classic, the *Masters and the Slaves*. For the skeptics, see David Lehman and Levy Cruz, who criticize Freyre's critics for not reading him closely enough but fail to acknowledge that Freyre's the precision of his concepts was not Freyre's strength. He uses 'ethnic democracy', 'racial democracy', and 'social democracy' interchangeably. See GILBERTO FREYRE, *THE MASTERS AND THE SLAVES* xiv (University of California Press, 1986). See David Lehman, *Gilberto Freyre: the Reassessment Continues*, 43 LATIN AMERICAN RESEARCH REVIEW 208 (2008). See Levy Cruz, *Deocracia racial: uma hipotese*, TRABALHOS PARA DISCUSSAO, N. 128 (Recife: Fundacao Joaquim Nabuco, 2002), available at <http://www.fundaj.gov.br/tpd/128.html>.

n35 See section 3 -- B.

n36 TELLES 2004, supra note 10, at 92-3. The work of Pena and Bortolini suggest a much higher figure, in excess of 50%, and in excess of 75% for 3 of Brazil's regions. See Sergio D. J. Pena and Maria Catira Bortolini, *Pode a genetica definir quem deve se beneficiar das cotas universitarias e demais acoes afirmativas?*, 18 ESTUDOS AVANCADOS 43 (2004).

n37 Sergio D. J. Pena and Maria Catira Bortolini, *supra* note 36.

n38 See Judge Chiarelli's decision in Processo N. 2004.34.00.022174-8, Fernanda Souza Lopes De Oliveira V. Fundacao Universidade De Brasilia, 21<a> Vara Federal do Distrito Federal, *Revista Consultor Juridico*, May 31, 2007, available at <http://conjur.estadao.com.br/>.

n39 Anti-essentialism argues that human beings cannot be reduced to a biological essence. Thus, the significance of being a woman in society is socially and politically constructed in each society, rather than simply arising automatically from the "biological" difference of men and women. The anti-essentialism of Brazilian affirmative action opponents turns anti-essentialism on its head by not acknowledging the social construction of identity in the case of race in Brazil.

n40 Opponents raise other, non-identity based claims, such as considerations of merit. See especially the special issue of HORIZONTES ANTROPOLOGICOS, *supra* note 22; and Fry, et al, 2007, *supra* note 22 at Introduction.

n41 Maio and Santos, *supra* note 23, at 181.

n42 Maio and Santos, *supra* note 23, at 181.

n43 Antonio Sergio Alfredo Guimaraes, *Entre o Medo de Fraudes e o Fantasma das Racas*, 11 HORIZONTES ANTROPOLOGICOS 215 (2005). Jose Jorge de Carvalho, *Usos e Abusos da Antropologia em Contexto de Tensao Racial: O caso das cotas para negros na UNB*, 11 HORIZONTES ANTROPOLOGICOS 237 (2005). Rita Laura Segato, *Em Memoria de Tempos Melhores: Os Antropologos e A Luta Pelo Direito*, 11 HORIZONTES ANTROPOLOGICOS 273 (2005).

n44 *Pode-se criar uma cisao racial* in Fry et al, 2007, *supra* note 22, at 340.

n45 *Pode-se criar uma cisao racial* in Fry et al, 2007, *supra* note 22, at 340.

n46 Telles and Lim argued that the interviewer's racial assessment of a respondent was a stronger proxy for racial discrimination because it was dependent on the views of others. Edward E. Telles and Nelson Lim, *Does It Matter Who Answers the Race Question? Racial Classification and Income Inequality in Brazil*, 35 DEMOGRAPHY 465 (1998).

n47 Paulo Vinicius Baptista da Silva, Evando C. Piza Durate and Dora Lucia Bertulio, "Políticas afirmativas na Universidade Federal do Parana," in Andre Augusto Brandao (org.) *Cotas Raciais no Brasil: a primeira avaliacao*, Colecao Politcas da Cor, 2007.

n48 See Simone Schwartzman, *Das estatísticas de cor ao Estatuto da Raca* in Fry et al, 2007, *supra* note 22, at 108, and Jose Murilho de Carvalho, *Genocidio racial estatístico*, in Fry et al, 2007, *supra* note 22, at 113. See also Celia Maria Marinho de Azevedo, *Cota Racial e Estado: Abolicão do Racismo ou Direitos de Raca*, 34 CADERNOS DE PESQUISA 223 (2004).

n49 Marvin Harris, Josildeth Gomes Consorte, Joseph Lang and Bryan Byrne, *Who Are the Whites?: Imposed Census Categories and the Racial Demography of Brazil*, 72 SOCIAL FORCES 451, 459 (1993).

n50 Maio and Santos argue that UNB uses the social scientists on its commission as "classifier/taxonomists," performing "techno-bureaucratic" activity that misuses anthropology. Maio and Santos, *supra* note 23, at 201.

n51 Consider that most Brazilians are able to comply with the census. Less than 1% of Brazilians do not claim a census identity. (Simon Schwartzman, *Fora de foco: diversidade e identidades étnicas no Brasil*, 55 NOVO ESTUDOS CEBRAP 83 (1999). This group would arguably have a difficult time applying for affirmative action. Yet it would hardly seem justifiable to throw out a needed program for a large sector of Brazilians based upon this small segment who could seemingly be accommodated. Telles has argued persuasively that the possibility of real opportunities available through affirmative action should trump the right to an ambiguous identity. Edward E. Telles, *Who Are the Morenas?* 73 SOCIAL FORCES 1609 (1995). Indeed, as long as Brazil increases the pool of openings, the uncertain or ambiguous Brazilian can apply without loss through the universal system.

n52 See Sergio D. J. Pena and Maria Catira Bortolini, *supra* note 36, at 31.

n53 See Nagel who discusses that social constructiveness recognizes the durability of race and ethnic identity. Joane Nagel, *Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture*, 41 SOCIAL PROBLEMS 168 (1994).

n54 *A difícil tarefa de definir quem é Negro no Brasil: Entrevista de Kabengele Munanga*, 18 ESTUDOS AVANÇADOS, 51 (2004).

n55 See Rosana Zakabi and Leoleli Camargo, "Eles são gêmeos identificáveis, mas, Segundo a UNB, este é branco e este é Negro," *Veja*, June 6, 2007, p. 82 (arguing that racial classification leads to disastrous consequences, cit-



ing Nazi Germany and apartheid South Africa). *See also* Fry, et al, 2007, *supra* note 22 at 21 (arguing that racial classifications polarize a society and lead to "conquest, civil wars and genocide").

n56 Tanya Hernandez argued that "Racial categories themselves do not confer stigma upon non-White classifications, but rather racism informs and stigmatizes the categories." *See* Hernandez, *supra* note 4, at 160.

n57 Maio and Santos, *supra* note 23, at 196.

n58 Maio and Santos, *supra* note 41, at 197.

n59 W. E. B. Du BOIS, *THE SOULS OF BLACK FOLK* (New York: Bantam Books 1989).

n60 *See* FRANZ FANON, *BLACK SKIN, WHITE MASKS* (New York: Grove Press 1967). On the relevance of Fanon to Brazil, *see* HOWARD WINANT, *H. RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS*. (Minneapolis, University of Minnesota Press 1994)

n61 *See* N. S. Souza, N. S. *Tornar-se negro, ou, As vicissitudes da identidade do negro brasileiro em ascensao social*, Rio de Janeiro, RJ, Brasil, Graal, 1983.

n62 *Pode-se criar uma cisao racial* in Fry et al, 2007, *supra* note 22, at 340.

n63 Most pointedly, how could income be verified in an economy with a large informal sector and with widely variable household structure?

n64 Their recent book is dedicated to opposing the law. *See* Bila Soraj, Jos Carlos Miranda and Yvonne Maggie, *Preambulo*, in Fry, et al, 2007, *supra* note 22, at 14.

n65 Rosana Heringer, 1997, *A Cor da Cidadania*, available at <http://r.heringer.sites.uol.com.br/> (last visited: Dec. 1, 2001).

n66 Paulo Singer, 1997, *Social Exclusion in Brazil*, International Institute for Labour Studies, Discussion Paper 94, Website of the International Labour Organisation: <http://www.ilo.org/public/english/bureau/inst/papers/1997/dp94/index.htm> (Last visited: Dec. 1, 2001).

n67 Singer, *supra* note 66.

n68 Telles 2004, *supra* note 10.

n69 See Nelson do Valle Silva and Carlos Hasenbalg, *Race and Educational Opportunity in Brazil*, in RACE IN CONTEMPORARY BRAZIL 76, (Rebecca Reichman, ed., Pennsylvania State University Press, 1999).

n70 See Nelson do Valle Silva, *Updating the Cost of Not Being White in Brazil*, in FONTAINE (1985).

n71 TURRA AND VENTURI, ET AL, RACISMO CORDIAL: A MAIS COMPLETA ANALISE SOBRE O PRECONCEITO DE COR NO BRASIL (Sao Paulo, SP, Editora Atica, 1995).

n72 Telles 2004, *supra* note 10, at 118.

n73 Do Valle Silva and Hasenbalg 1999, *supra* note 69, at 57.

n74 Telles 2004, *supra* note 10, at 137.

n75 See Telles 2004, *supra* note 10, at 253.

n76 I concede the Brazilian structure of identity to be complex but not so complex so as to make affirmative action impossible. Even if identity appeared intractable because subaltern identity was occluded, I would argue against the claim of the impossibility of affirmative action. A country that produced a widely inegalitarian society on the grounds of race would have a moral obligation to provide opportunities to those excluded even if they failed to perceive the grounds of their disadvantaged position. In that instance, it would be justifiable to explore policy alternatives that would reach Afro Brazilians without explicitly naming them.

n77 See Blanco, *supra* note 15, at 78-85.

n78 Blanco, *supra* note 15, at 96.

n79 The 1976 PNAD has been extensively discussed by Nelson do Valle Silva and Clovis Moura, among others. Clovis Moura. *Sociologia do Negro Brasileiro*, Sao Paulo: Atica, 1988. The 1998 PME Study is discussed by Simon Schwartzman, 1999, *supra* note 51. For Harris, see *Referential Ambiguity in the Calculus of Brazilian Racial Identity*, 26 SOUTHWESTERN JOURNAL OF ANTHROPOLOGY 2 (1970). Harris identified 246 racial terms, which he doubled because of distinct linguistic meaning for each gender in Portuguese.

n80 Galanter reported between 2,000 and 3,000 castes. See GALANTER, *supra* note 3, at 8.

n81 See Michele Lamont and Virag Molnar, *The Study of Boundaries in the Social Sciences*, 28 ANNUAL REVIEW OF SOCIOLOGY 167 (2002).

n82 Harris 1970, *supra* note 79, at 4.

n83 Telles 2004, *supra* note 10, at 82.

n84 Petruccelli notes that 77 of the 143 categories of the PME had only one claimant. See Jose Luis Petruccelli, *Classificacao etnico-racial brasileira: onde estamos e aonde vamos*, REAA TEXTOS PARA DISCUSSAO, NUMERO 1, REDE DE ESTUDOS DE ACAA AFIRMATIVA 6 (2006).

n85 See Naomi Pabst, *supra* note 11.

n86 Schwarcz, *supra* note 30.

n87 Scholars have identified numerous "systems" of deploying identity within Brazil. Sheriff distinguishes three 'discourses' or 'registers' of identity: (1) a "descriptive discourse" used to describe rather than classify others, (2) a "pragmatic discourse" used to "treat" others in daily life, and (3) a bipolar "discourse on race" that distinguishes white and black and anchors the three discourses. (ROBIN E. SHERIFF, DREAMING EQUALITY, COLOR, RACE AND RACISM IN URBAN BRAZIL (Rutgers University Press 2001)). Although Sheriff acknowledges the role of relationality and positionality within the labeling processes, her account does not theorize how relationality and positionality inform the use of the 3 "registers." Telles distinguishes three systems: the popular system, the IBGE, and the "black movement" system. (Telles 2004, *supra* note 10).

n88 Harris 1993, *supra* note 49.

n89 Racusen 2004, *supra* note 8, at 799.

n90 Simon Schwartzman, *supra* note 51, at 5.

n91 Studies have consistently shown that ability or willingness to self-identify in a census category is strongly correlated with education. See Telles 2004, *supra* note 10. My secondary analysis of a national survey, the Brazilian Social Study (PESB) of 2002, showed that 98% of the 52 respondents who could not place themselves in a census category possessed less than high school education. The PESB of 2002, (N=2365) was conducted by DataUFF, a research center at the Federal University of Fluminense (UFF). Race was one of its four major themes, along with the Brazilian "jeitinho" or personalist culture, violence and criminality, and sexuality and reproductive health. See *O Que e o PESB*, DATAUFF, UFF, available at [http://www.uff.br/datauff/Crdssr/pesb\\_mod\\_sexualidade.htm](http://www.uff.br/datauff/Crdssr/pesb_mod_sexualidade.htm), (last visited: Aug. 31, 2005); and *Brazil Sample Design*, Stigma in Global Context: Mental Health Study Website, Indiana University, available at [http://ww.indiana.edu/\\_sgcmhs/study%20design/brazil.htm](http://ww.indiana.edu/_sgcmhs/study%20design/brazil.htm) (last visited: Aug. 31, 2005). Nelson do Valle Silva kindly shared the dataset.

n92 Datafolha Instituto de Pesquisa, 300 Anos de Zumbi, Os Brasileiros e o Preconceito de Cor, Report (1995), 164.

n93 See Harris 1970, *supra* note 79; Marvin Harris, *Racial Identity in Brazil*, 1 LUSO-BRAZILIAN REVIEW 1 (1964).

n94 At UNB in 2004-5, caution prevailed. An affirmative action candidate was admitted if one evaluator of the group of 3 viewed the person as *Brown* or *Black*. All 3 evaluators had to view the person as *White* for that person to not be admitted. All candidates not admitted were then viewed *em banc* by all 6 evaluators. Any candidate viewed as *Black* or *Brown* by one of the six evaluators was also admitted. The rejected candidates were those still unanimously viewed as *White*. Author's interview with Timothy Mulholhand, Brasilia (Aug. 17, 2004).

n95 Secondary analysis of the PESB 2002 conducted by the author.

n96 The Commissions have generally sought to reproduce the "eyes of society" rather than the perspective of trained "experts." This survey data about respondent views about reflects the "eyes of society." There is an important distinction between respondent views of the interviewer (second person assessment) and of photos (third person assessment of someone not present).

n97 A majority of Whites (52%) claim African or indigenous descent. Much larger majorities of *Blacks* (75%) and *Browns* (80%) claim European or indigenous descent. Telles 2004, *supra* note 10, at 93.

n98 It is important to note that this complexity in distinguishing *Browns* from Whites does not seemingly apply to distinguishing indigenous persons from Whites. 29% of Whites and much larger proportions of *Browns* (48%) and *Blacks* (44%) claim indigenous ancestry. (Telles 2004, *supra* note 10, at 93) Distinguishing indigenous from non-indigenous Brazilians could be analogous to distinguishing White from *Brown*. However, indigenous identity is authoritatively established by a document issued by the Federal Agency of Indigenous Affairs (FUNAI) based upon a letter from a tribe. The lack of controversy over this process contrasts markedly to the heated rancor over the so-called 'racial tribunals'

n99 Harris 196, *supra* note 93; Harris 1970, *supra* note 79; Telles 2004, *supra* note 10

n100 Nelson do Valle Silva and Carlos A. Hasenbalg, *Relacoes raciais no Brasil contemporaneo*, Rio de Janeiro, RJ, Rio Fundo Editora, 1992; Carlos Hasenbalg and Nelson do Valle Silva, *Estrutura social, mobilidade e relacoes racias*, Vertice, 1998.

n101 Helio Santos and Antonio Carlos Arruda da Silva, important Brazilian activists, advanced a proposal in the early 1990's for affirmative action for public school students as the most viable and pragmatic way of reaching *Afro Brazilians*. Peter Eccles also suggested this approach in his unpublished article, Peter Eccles, Blacks, the Law, and Human Rights in Brazil 53 (Cambridge, Harvard Law School, 1985). *See also* Ricardo Rochetti, *Not as Easy as Black and White: The implications of the University of Rio de Janeiro's Quota-Based Admissions Policy on Affirmative Action Law in Brazil*, 37 *VAND. J. TRANSNAT'L L.* 1423 (2004).

n102 This preference has been expressed in several instances: at UEMS and for public sector hiring in the Ministry of Agriculture. *See* Solano Nascimento & Beatriz Velloso, *A Semana*, EPOCA, Dec. 16, 2001.

n103 The author has conducted unpublished secondary analysis of the 1995 Datafolha Zumbi survey that demonstrates this effect. *See* TURRA AND VENTURI 1995, *supra* note 71; Telles 2004, *supra* note 10.

n104 Telles 2004, *supra* note 10 at 92-3.

n105 The significance of addressing racial discrimination for economic development has been recognized by the millennium goals of the UNDP. UN Millennium Project 2005. *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals. Overview*. United Nations Development Programme (New York: 2005).

n106 Telles 2004, *supra* note 10 at 96-7.

n107 For example, the dynamic President of the State University of Bahia (UNEB), Ivete Nascimento, felt that her children, who attended private schools, did not need affirmative action. Author's interview with Ivete Nascimento, Salvador (Aug. 10, 2004).

n108 HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 295-96 (Andre Deutsch 1986).

n109 See Maio and Santos, *supra* note 23.

n110 See Gois, *supra* note 51.

n111 Machado, *supra* note 27.

n112 Machado, *supra* note 27.

n113 Claims have also been advanced for indigenous Brazilians and those physically different.

n114 See letter from Edna Roland, Folha De Sao Paulo, (Dec. 24, 2003).

n115 The employment screen, *boa aparencia*, which literally means good appearance but possesses racial and class overtones, was apparently devised for occupations with considerable customer contact in anticipation that certain customers would be offended if served by an *Afro-Brazilian*. See Abdia Nascimento, *O Negro revoltado*. RIO DE JANEIRO, Editora Nova Fronteira, 1982.

n116 See Omar G. Arias, Yamada, and L. Tejerina, *Education, Family Background, and Racial Earnings Inequality in Brazil*, 25 INTERNATIONAL JOURNAL OF MANPOWER 355 (2004). See also Roberto Martins, *Desigualdades raciais e politicas de inclusao racial: um sumario da experiencia brasileira recente*. CEPAL, 2003.

n117 The *Bakke* Court recognized the Harvard admission process for taking race into account as one of many factors that might contribute to the diversity of the student body. Under this approach, various diversity factors, including race, can boost an applicant's overall standing within a unitary pool of candidates for admission. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978).

n118 As of January 2008, six colleges use the joint criterion of race and class. For the Universidade do Estado da Bahia (UNEB), the Universidade Federal de Alagoas (UFAL), the Universidade do Estado de Mato Grosso (UNEMAT), and the Universidade Federal de Sao Paulo (UNIFESP), *see* Renato Ferreira, Universidade do Estado do Rio de Janeiro, Laboratorio de Politicas Publicas, Programa Politicas da Cor na Educacao Brasileira Mapa das Acoes Afirmativas no Ensino Superior, *available at* <http://152.92.152.60/web/CDREUNIAO/SerieDadosDebate/index.htm>. For the Universidade Federal da Bahia (UFBA), and the Universidade Federal do Recôncavo da Bahia (UFRB), *see* Manual do Candidato, *available at* [http://www.vestibular.ufba.br/manual/Inform\\_Gerais2008.htm](http://www.vestibular.ufba.br/manual/Inform_Gerais2008.htm).

n119 *See* article 2 of the Projeto de Lei 3.627/2004, Website of the Brazilian Congress, *available at* <http://www2.camara.gov.br/proposicoes>.

n120 As of January, 2008, fifteen colleges place the criterion of race within the criterion of class. For the Universidade Estadual de Feira de Santana (UEFS), the Universidade Federal do ABC (UFABC), the Universidade Federal de Juiz de Fora (UFJF), the Universidade Federal do Para (UFPA), and the Universidade Estadual de Londrina (UEFL), *see* Elielma Ayres Machado, Acompanhamento e Monitoramento das Politicas de Acao Afirmativa nas Universidades Brasileira, Desigualdade e Diversidade, Ano 1, (2007), 139-160. For the Universidade do Norte-Fluminense (UENF), the Universidade do Estado do Rio de Janeiro (UERJ), the Fundacao de Apoio a Escola Tecnica do Rio de Janeiro (FAETEC-RJ), the Universidade Estadual de Minas Gerais (UEMG), the Universidade Estadual de Montes Claros (UNIMONTES), the Universidade Federal de Santa Catarina (UFSC), and the Universidade Federal de Sao Carlos (UFSCar), *see* Renato Ferreira, Universidade do Estado do Rio de Janeiro, Laboratorio de Politicas Publicas, Programa Politicas da Cor na Educacao Brasileira Mapa das Acoes Afirmativas no Ensino Superior, *available at* <http://152.92.152.60/web/CDREUNIAO/SerieDadosDebate/index.htm>. *See also* Centro Federal de Educacao Tecnologica da Bahia (CEFET-BA), Edital De Abertura De Inscricao, <http://sistemas.cefetba.br/scripts/selecao/2008.2/edital.pdf>; Universidade Estadual de Ponta Grossa (UEPG), Comissao Permanente de Selecao Processo Seletivo Seriado 2007, <http://www.uepg.br/cps/>; and Universidade Federal Do Rio Grande Do Sul (UFRGS), Manual do Candidato, Vestibular 2008, [http://www.vestibular.ufrgs.br/cv2008/manual\\_cv2008.pdf](http://www.vestibular.ufrgs.br/cv2008/manual_cv2008.pdf).

n121 As of January, 2008, seven colleges use the criterion of race or class: Universidade Estadual de Mato Grosso do Sul (UEMS), Universidade Federal Do Maranhao (UFMA), Universidade Federal do Parana (UFPR), Universidade de Brasilia (UNB), Universidade Federal de Santa Maria (UFSM), Centro Universitario de Franca (FACEF), Universidade Estadual de Goias (UEG). Renato Ferreira, Universidade do Estado do Rio de Janeiro, Laboratorio de Politicas Publicas, Programa Politicas da Cor na Educacao Brasileira Mapa das Acoes Afirmativas no Ensino Superior, *available at* <http://152.92.152.60/web/CDREUNIAO/SerieDadosDebate/index.htm>,

n122 Three colleges augment a candidate's score with points or a percentage: the Universidade Estadual de Campinas (UNICAMP), the Faculdade de Medicina S.J. do Rio Preto (FAMERP), and the Faculdade de Tecnologia - Sao Paulo (FATEC-SP). Renato Ferreira, Universidade do Estado do Rio de Janeiro, Laboratorio de Politicas Publicas, Programa Politicas da Cor na Educacao Brasileira Mapa das Acoes Afirmativas no Ensino Superior, <http://152.92.152.60/web/CDREUNIAO/SerieDadosDebate/index.htm>,

n123 Kleinke shows that Afro Brazilian and public school admits increased during the first two years of affirmative action. Mauricio U. Kleinke, "O Vestibular Unicamp e a Inclusao Social: Experiencias e Perspectivas," Working paper, <http://www.convest.unicamp.br/paaais/artigo6.pdf>, 10. However, university data reveals that the increased demand by Afro Brazilians and public school student exceeded this increased admissions and that the ratio of candidates to admits became higher for Afro Brazilians than any other group after affirmative action was implemented. See *Perfil Socioeconomico dos Candidatos e Ingressantes Vestibular Unicamp for the years 2003-7*, <http://www.convest.unicamp.br/estatisticas/perfil/>.

n124 Machado, *supra* note 27, at 148.

n125 Race and class, which provides seats for *Afro Brazilian* public school students, has primarily been used in the Northeast: the poorest and darkest region that uses affirmative action. The class-based approach, race-in-class that provides opportunities to all Public School students, has been used in south and southeast, the lightest regions. The race or class approach, that includes Public school students and Black private school students, has been used primarily in the South and the Central regions (Brasilia), areas with more affluent candidates. Finally, a few elite universities in the southeast use the "bonus points" approach. Do these regional differences in approach reflect regional demographic differences, the balance of political power, or other considerations? The deployment of the narrowest conception of the beneficiary class, Afro-Brazilian public school students, in the poorest region, the northeast, might be more a reflection of politics, since it is also the most traditional region politically. It would be difficult to argue that *White* public school students do not need opportunity only in the northeast.

n126 See DANIEL MAZMANIAN AND PAUL SABATIER, *IMPLEMENTATION AND PUBLIC POLICY* (University Press of America 1989).

n127 The State University of Ponta Grossa (UEPG) verifies the identity of its candidates for the Afro Brazilian public school student seats.

n128 Five universities currently verify applicant identity for seats under the broad "race or class" approach: the Federal University of Brasilia (UNB), the State University of Mato Grosso do Sul (UEMS), the Federal University of Parana (UFPR), the Federal University of Maranhao (UFMA), and the State University of Goias (UEG).

n129 This controversy has not been about verification per se but verification of racial identity. Neither the verification of public school participation, income nor indigenous status has produced controversy about verification, even though there are equivalent problems. Verification of household income in an economy with a sizeable informal labor force is virtually impossible. To my knowledge, no one has argued that because of the impossibility of verifying income in Brazil affirmative action cannot be implemented on the grounds of social class. Nor has anyone denounced indigenous tribes as "racial tribunals" for their procedures in deterring whether or not to issue a letter.



n130 *Mais pobres ficam com meno vagas das cotas*; O GLOBO, Aug. 15, 2003, at 27, available at [http://www2.uerj.br/clipping/cotas/cotas\\_pagina/cotas\\_pagina\\_mais\\_pobres\\_oglobo.htm](http://www2.uerj.br/clipping/cotas/cotas_pagina/cotas_pagina_mais_pobres_oglobo.htm).

n131 The 'strategic' use of identity undoubtedly emerged in the first round as well. Thus, some candidates who "darkened" themselves for the second round may have "lightened" themselves initially. Further research would be needed to understand the strategic use of identity in Brazil.

n132 See Jon Jeter, *Affirmative Action Debate Forces Brazil To Take Look In The Mirror*, WASHINGTON POST, June 16, 2003.

n133 BRAZIL IN BLACK AND WHITE, (PBS Wide Angle. available at [http://www-tc.pbs.org/wnet/wideangle/previous\\_seasons/shows/brazil2/Brazil\\_Transcript.pdf](http://www-tc.pbs.org/wnet/wideangle/previous_seasons/shows/brazil2/Brazil_Transcript.pdf). P. 4).

n134 A prominent activist, Frei David Raimundo dos Santos, charged that 35% of the admitted *Blacks* and *Browns* were actually Whites who had darkened themselves for the purpose of admission, many so counseled by university professors. *Sistema de cotas apresenta mudancas em relacao a 2003*, FOLHA DIRIGIDA, Oct. 14, 2003, available at <http://www2.uerj.br/clipping/cotas> (last visited Jan. 31, 2004)

n135 Nagel argues that social constructedness must recognize the endurance of identity. See Nagel, *supra* note 53, at 168.

n136 See Table 3 below.

n137 This criterion has been discussed as one of the three Jasani factors used in India. See GALANTER, *supra* note 3, at 290.

n138 Ford discussed this as one of the three tests used to evaluate the claim of the Malone brothers. See Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1233 (1994).

n139 Ford, *supra* note 138, at 1233.

n140 See Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 266 (1995).

n141 Tanya Hernandez proposes a consequentialist approach that would ask someone to reflect on how her appearance impacted her treatment and if she shared her ancestry, how that information would affect her treatment. See *Hernandez*, *supra* note 4, at 168-9.

n142 See comments of David Santos in Barreto, *supra* note 29. See also Adrian Piper's, *Suffering Test*, in Adrian Piper, *Passing for White, Passing for Black*, 58 *TRANSITION* 1, 6-7 (1992).

n143 The Jasani factors in India strongly emphasize the views of the former and new reference groups. See GALANTER, *supra* note 3, at 290-97.

n144 Ford, *supra* note 138, at 1233.

n145 See Karst, *supra* note 140 at 272; see also GALANTER, *supra* note 3, at 291-92.

n146 See question of David Santos in Barreto, *supra* note 29.

n147 See Antonio Gois, *51% das universidades estaduais adotam acoes afirmativas*, FOLHA DE SAO PAULO, (Jan. 8, 2008), available at <http://www1.folha.uol.com.br/folha/educacao/ult305u361070.shtml>.

n148 The four colleges primarily relying on interviews to verify racial identity include Universidade Federal do Parana (UFPR), Universidade Federal Do Maranhao (UFMA), Universidade de Brasilia (UNB), and Universidade Estadual de Ponta Grossa (UEPG). To verify the racial identity of candidates, Universidade Estadual de Mato Grosso do Sul (UEMS) and Universidade Estadual de Goias (UEG) rely primarily on photos and documents, respectively.

n149 Universities worry about ambiguity of the *Pardo* category (Larissa, Meira, "Rejeitados por unanimidade," (Author's Interview with Mauro Rabelo, *Correio Braziliense* (June 1, 2004)) and include questions to strengthen the likelihood that a *Pardo* applicant belongs to the intended beneficiary class. For example, many universities ask candidates whether they pertain to something larger than a census category. UFSM asks whether applicants identify as Afro Brazilian (*Afro Brasileiro*), with the explanation that that refers to the IBGE identities of *Pardo* or *Preto*. (Universidade Federal de Santa Maria (UFSM), *Manual do Candidato, Vestibular 2008*, 63, available at [http://w3.ufsm.br/coperves/edital.php?id\\_edital=29](http://w3.ufsm.br/coperves/edital.php?id_edital=29)) UNEMAT asks candidates whether they consider themselves *Negro* (of the Black race) also linked to IBGE categories and whether they have suffered discrimination for being Black. (Universidade Estadual de Mato Grosso, *Manual do Candidato, Vestibular 008/2*, 40, available at <http://www.unemat.br/vestibular>.) UFPR asks whether candidates possess "phenotypical traces characterized in society as pertaining to the black (*Negro*) racial group." (UFPR -- Universidade Federal do Parana, *Processo Seletivo 2007/2008, Guia Do Candidato*, 20, available at

[http://www.nc.ufpr.br/concursos\\_institucionais/ufpr/ps2007/center\\_2007.htm](http://www.nc.ufpr.br/concursos_institucionais/ufpr/ps2007/center_2007.htm)) Finally, some universities warn candidates to be prepared to prove their identity legally (UFMS) or to be aware of the legal consequences of fraud (UNEMAT).

n150 One other college apparently verifies identity: the State University of Ponta Grossa in Parana (UEPG). UEPG adopted the requirement that candidates would need to present the "physical traces characteristic of Blacks" to a special commission beginning in 2006. See Universidade Estadual De Ponta Grossa, Comissao Permanente De Selecao, *Processo Seletivo Seriado-Prova De Acompanhamento I -- 2006*, Edital No 15/2006-CPS, available at <Http://www.Uepg.Br/Pss/Documentos/2006/EDT-PSS-15-2006.Doc>.

n151 See *Projeto de Lei N. 2.605, de 6 de Janeiro de 2003*, available at <http://www.pedrokemp.com/br> (last visited Jan. 24, 2004).

n152 See *Regulamentacao de Cotas para Negros e Indios mobiliza UEMS*, MS NOTICIAS, May 12, 2003, available at <http://www.msnoticias.com.br>.

n153 See *UEMS recorrera a outro criterio para incluir negro em cota*, MS NOTICIAS, May 30, 2003, available at <http://www.msnoticias.com.br>.

n154 See *Cota de 20% para negros na UEMS exclui pardos, diz Leocadia*, MS NOTICIAS, June 2, 2003, available at <http://www.msnoticias.com.br>.

n155 See *Governo e UEMS definem as 13h criterios para regime de cotas*; MS NOTICIAS, Aug. 14, 2003, available at <http://www.msnoticias.com.br>.

n156 See *Inclusao: UEMS aprova criterios de cota para negros e indios*, MS NOTICIAS, Aug. 18, 2003, available at <http://www.msnoticias.com.br>.

n157 Hudson Correa, *Em MS, Foto diz quem Entra por Cotas para Negros*, FOLHA ONLINE, Dec. 15, 2003, available at <http://www1.folha.uol.com.br/folha/educacao/ult305u14591.shtml>.

n158 See Correa, *supra* note 157.

n159 See Correa, *supra* note 157.

n160 See letter from Edna Roland, Folha De Sao Paulo (Dec. 24, 2003).

n161 Maria Jose de Jesus Alves Cordeiro, *Tres anos de efetiva presenca de negros e indigenas cotistas nas salas de aula da UEMS: primeiras analises*, in ANDRE AUGUSTO BRANDAO (ORG,) COTAS RACIAIS NO BRASIL: A PRIMEIRA AVALIACAO, (Colecao Politcas da Cor, 2007).

n162 Jose Jorge de Carvalho, *supra* note 43, at 239-240.

n163 Gustavo Moura, a UNB student active in ENEGRESER and the affirmative action planning process, discussed the trouble at the Institute Rio Branco where allegedly 40% of the candidates for the affirmative action seats were white. See *Cotas por cor, nao por renda*, UNB Agencia, April 29, 2004; available at [www.unb.br/acs/acsweb/](http://www.unb.br/acs/acsweb/).

n164 Author's interview with Timothy Mulholhand, Brasilia (Aug. 17, 2004).

n165 See the interview with Professor Jose Jorge de Carvalho, PPCOR, Boletim N. 11, march, 2004, available at [www.politicasdacor.net](http://www.politicasdacor.net): "Neither I nor Profa. Rita Segato supported the utilization [of photos]... because we thought that there are other control mechanisms, less problematic from the standpoint of political repercussion, than this." He suggested that regular meetings of the quota students would exert a "severe moral constraint" upon opportunist candidates, which he thought would be more effective and less problematic politically.

n166 Author's interview with Timothy Mulholhand, Brasilia (Aug. 17, 2004).

n167 There are many reports of White admissions at UNB. In addition to the case discussed on page 1, see Erica Montenegro, *Cota Racial -- Aprovadas mudancas na UNB*, CORREIO BRAZILIENSE, JORNAL IROHIN CLIPPING, Feb 10, 2008.

n168 Author's interview with Mauro Rabelo, Brasilia, (Aug. 17, 2004).

n169 Mieko Wada, *UFMA: divulgada disputa por vagas*, O IMPARCIAL, Mar. 21, 2007, available at <http://oimparical.site.br.com/>.

n170 Of course, such identification, prepared by an official who often assigned someone's identity, can also violate the primacy of self-identity. See Rafael Guerreiro Osorio, *O Sistema Classificador de "Cor ou Raca" do IBGE*, TEXTO PARA DISCUSSAO N. 996 (November 2003), Brasilia. For the UEG requirement, see Universidade Estadual de Goias, Processo Seletivo 2008/2, 15, available at <http://www.vestibular.ueg.br/>

n171 Heber Regis, *Comunidades: Cotas sem afirmacao*, TRIBUNAL DO PLANALTO, July 22, 2006, available at <http://www.tribunadoplanalto.com.br/index.php>.

n172 Presumably, a notary would be certifying that a candidate declared herself to be Black or *Brown* in his presence. Although some notaries might require support beyond a verbal declaration, the high fee would serve as a strong incentive to certify a candidate's blackness.

n173 Cimea Barbato Bevilaqua, *A implantacao do "Plano de Metas de Inclusao Racial e Social" na Universidade Federal do Parana*, Curitiba, (Dec. 2005), at 17.

n174 Bevilaqua, *supra* note 173, at 18.

n175 Bevilaqua, *supra* note 157, at 17.

n176 On Marcilene Gacia de souza, see *Avaliacao rigida e procesos diminuem inscricao de negros*, GAZETA DE POVO, Sept. 20, 20005; available at [www.observa.ifcs.urgr.br](http://www.observa.ifcs.urgr.br). On the President, Carlos Moreira Junior, see *Cai o numero de candiatos cotistas no vestibular da Federal do Parana*, GAZETA DE Povo, Sept. 20, 20005, available at [www.observa.ifcs.urgr.br](http://www.observa.ifcs.urgr.br).

n177 The figure was cited differently in two newspaper articles. The figure of 999 was given by Suzana Beckman, *UFMA nao incluirea candidata em cotas*, O IMPARCIAL, Feb 14, 2008; while the figure of 1,054 was given by *Columna Bastidores*, O IMPARCIAL, Feb. 1, 2008.

n178 *Columna Bastidores*, *supra* note 177.

n179 Beckman, *supra* note 177.

n180 Beckman, *supra* note 177; see also *UFMA Commission admits the possibility of human error*, O IMPARCIAL, Feb. 12, 2008.

n181 *Inscritos na cota para negros sao entrevistados*, UFMA NOTICIAS, Jan. 23, 2008, available at <http://nea.ufma.br/noticias/noticia.php?id=3125>

n182 *Inscritos na cota para negros sao entrevistados*, *supra* note 181.

n183 Suzana Beckman, *A Familia vai a Justica, sem advogado*, O IMPARCIAL, Feb. 15, 2008; Carolina Nahuz and Adalberto Junior, *UFMA reconhece error em sistema de cotas*, O IMPARCIAL, Mar. 13, 2008.

n184 Rodrigo Vizeu, *Sistema de entrevistas para comprovar condicao de Negro para aprovacao no sistema de cotas da UnB estreia com criticas*, O GLOBO, Mar. 10, 2008.

n185 Vizeu, *supra* note 184.

n186 Vizeu, *supra* note 184.

n187 Ironically, there appears to have been no controversy in the media about this university verifying identity according to existing documents.

n188 See Paula Saukko, *Studying the self: from the subjective and the social to personal and political dialogues*, 2 QUALITATIVE RESEARCH 244.

n189 A Brazilian would arguably have a harder time claiming to the Brown if at least one of the interviewers had his complexion.

n190 For example, Saukko proposes "agonistic dialogues" that would seek to mediate between the constructions of the "self" presented by individuals, others, and their "social world". See Saukko, *supra* note 188, at 252-4.

n191 As a point of reference, the UNB verification committee was apparently stumped by approximately 10% of the applicants in its first year. Author's interview with Timothy Mulholland, Brasilia (Aug. 17, 2004).

n192 UNB included several other questions to elicit life experiences. The first was a question about discrimination: "Were you ever discriminated against?" (Acao Declaratoria com Pedido de Antecipacao de Tutela, Fernanda Souza Lopes de Oliveira, v. Fundacao Universidade de Brasilia, Vara de Direito da Circunscricao Especial Judicaria de Brasilia, July 2004.) That question would seem important to include as long as a positive answer is not required. The second was a question about romantic choices: "Did you ever have a *mulata* girlfriend?" (Darse Junior, *Concorrenca major*, CORREIO BRAZILIENSE, June 23, 2004.) This latter question seems questionable especially under the presumptions of *racial democracy*.

n193 UNB included several questions that consider the candidate's consciousness as a Black, not simply racial identity, but collective identity: "Do you have or have you ever had a connection to the black movement? Do you have connections with the values and with black culture?" and "Did you ever participate in the black movement?" Ney Hayashi da Cruz, *Alunos sao reavaliados pela UNB para ingresso no sistema de cotas*, FOLHA DE SAO PAULO, June 6, 2004, available at <http://www1.folha.uol.com.br>.

n194 Consider that many Brazilian Black activists developed their racially consciousness in college, which raises strategical and moral questions about expecting that consciousness prior to enrollment.

n195 Adrian Piper's lightness subjected her in the US to a "suffering test" generally conducted by other Blacks who presented their experiences of racism to test if she had really suffered enough. See Adrian Piper, *supra* note 142.

n196 Yang proposed a "functional test" that emphasizes one's "experience and relationship with racial discrimination" for affirmative action. See Yang, *supra* note 33, at 407-8.

n197 See Hernandez, *supra* note 4 at 168-9.

n198 Although there are good reasons to suspect this represents underreporting, approximately 22% of Afro Brazilians report discriminatory experiences. See Datafolha Report, 1995, *supra* note 92, at 38.

n199 See Hernandez, *supra* note 4, at 168-9.

n200 Anani Dzidzienyo first discussed the significance of Brazilian racial etiquette to maintain racial domination in 1971. See DZIDZIENYO, *THE POSITION OF BLACKS IN BRAZILIAN SOCIETY* (London, Minority Rights Group 1971). Blanco discusses color etiquette in Blanco, *supra* note 15.

n201 Vizeu, *supra* note 184.

n202 Acao Declaratoria com Pedido de Antecipacao de Tutela, Fernanda Souza Lopes de Oliveira, v. Fundacao Universidade de Brasilia, Vara de Direito da Circunscricao Especial Judicaria de Brasilia, July 2004

n203 Of course, some would argue that this question simply pushes the identity question back one generation -- also needing verification.

n204 This is Yang's concern in seeking a third way between acceptance of subjective identity and traditional fraud doctrine. *See* Yang, *supra* note 33.

n205 Ney Hayashi da Cruz, *supra* note 193.

n206 Committees might develop a listing of probes for discriminatory experiences to further the explorations, such as whether someone had ever been (1) followed in a store, (2) discouraged from shopping or entering a public place, (3) stopped by police while driving or passing through a middle class neighborhood, (4) rejected summarily prevented from applying for employment in occupations with white customers, etc. *See* Seth Racusen, "A *Mulato* Cannot be Prejudiced": The Legal Construction of Racial Discrimination in Contemporary Brazil" (Thesis, MIT Department of Political Science 2002), especially 174-195.

n207 Author's interview with Mauro Rabelo, Brasilia (Aug. 17, 2004).

n208 *See Avaliacao rigida e procesos diminuem inscricao de negros*, GAZETA DE Povo, Sept. 20, 2005, available at [www.observa.ifcs.urgr.br](http://www.observa.ifcs.urgr.br); *Cai o numero de candiatos cotistas no vestibular da Federal do Parana*, GAZETA DE Povo, Sept. 20, 2005; available at [www.observa.ifcs.urgr.br](http://www.observa.ifcs.urgr.br).

n209 Author's interview with Edson Cardoso, Sao Paulo, (Apr. 19, 2007).

n210 *See* Maio and Santos, *supra* note 23, at 86-7.

n211 Howard Winant, *Race and Racism, Towards a Global Future*, 29 ETHNIC AND RACIAL STUDIES 986, 987-98 (2006).

n212 SOWELL, THOMAS, *AFFIRMATIVE ACTION AROUND THE WORLD : AN EMPIRICAL STUDY* (New Haven, Yale University Press 2004).



n213 Jacques D'Alesky draws the same parallel in *A Ideologia da democracia Racial no Limiar do Anti-Racismo Universalista*, 5 SEMIOSFERA, available at [http://www.eco.ufrj.br/semiosfra/conteudo\\_nt\\_06Dadesky.htm](http://www.eco.ufrj.br/semiosfra/conteudo_nt_06Dadesky.htm). (last visited: Aug. 7, 2007).

n214 Peter Wade makes this point in his excellent treatment of the construction of race in Latin America: PETER WADE, *RACE AND ETHNICITY IN LATIN AMERICA*, (London; Chicago, Ill., Pluto Press 1984).

n215 For example, Gilberto Freyre showed that Brazil did not resemble the post World War I US that he observed. His work was rich descriptively but did not advance systemic claims about Brazilian practices. (See Thomas Skidmore, *Raizes de Gilberto Freyre*, 34 J. LAT. AMER. STUD., 1, 2002) Even if his claim were true that Brazil had the "most harmoniously constituted . . . race relations" in the Americas, what would that tell us about Brazil? (See GILBERTO FREYRE, *THE MASTERS AND THE SLAVES, A STUDY IN THE DEVELOPMENT OF BRAZILIAN CIVILIZATION* 83, (2nd English Language Version, University of California Press 1986). Donald Pierson and his mentor, Robert Park, highly influenced by Freyre's orientalist paradigm, discussed Brazil in "paradisiacal" terms (Robert Park, "Introduction" to Donald Pierson, *Negroes in Brazil: A Study of Race Contact at Bahia*, University of Chicago Press, 1942 at xix) because it did not possess US style dynamics. (Donald Pierson, *Negroes in Brazil: A Study of Race Contact at Bahia*, University of Chicago Press, 1942, especially at 344-350). Marvin Harris sought to unearth an underlying logic to Brazilian identity based upon his understanding of the mapping of identity in the US. Although Harris acknowledged Pierson's observation that that the usage of terms: "*varies with individuals* in keeping with varying personal relations" (Marvin Harris 1964, *supra* note 93, at 27.) and also that the 'noise' and 'ambiguity' of Brazilian identity could be functional to the maintenance of the social structure, (Marvin Harris, 1970, *supra* note 79 at 12) he did not theorize those insights, treating variation as noise, rather than information about the "relations" between persons. He concluded that there was so much 'noise' and 'ambiguity' about the classification of Brazilians that he could not find a 'general cognitive formula' for identity claims. (Harris, 1964, *supra* note 26 at 23.) Thus, he concluded that Brazil was not the US, "The larger significance of the confusion about racial identity in Bahia is that it clearly precludes systematic discrimination and segregation. In order to prevent the members of a certain group from voting, enrolling in a school, or joining a club, it is absolutely indispensable that there be a reliable means of establishing the identity of those who are to be segregated and discriminated against." (Harris 1970, *supra* note 79, at 28). Carl Degler viewed the "mulatto escape hatch" as the decisive difference between the US and Brazil which he viewed from a US perspective. Although he acknowledged ambiguities in the Brazil-US comparison, he marveled about the use of certain linguistic expressions based upon what their use might have represented in the US without fully analyzing what their use actually meant in Brazil. (CARL DEGLER, *NEITHER BLACK NOR WHITE, SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* (MacMillan Publishing 1971)).

n216 Merida Blanco uncovered the social and relational context that had eluded Marvin Harris. From Blanco, one could hypothesize that much Harris's "noise" from the logic of identity actually represented individual positioning, such as: "I am darker than you", or "He is lighter than me", rather than precise positions. The Verification Commissions face a greater challenge, in so far as Blanco was trying to simply uncover the existing structure of identity, and Brazilian identity is evolving beyond that moment. See Blanco, *supra* note 15.