

## ARTICLES

# *MESTIZAJE AND THE MEXICAN MESTIZO SELF: NO HAY SANGRE NEGRA, SO THERE IS NO BLACKNESS*

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“It is precisely this black-white experience which may prove of indispensable value to us in the world we face today. The world is white no longer, and it will never be white again.”<sup>1</sup>

### I. INTRODUCTION: DOES “RACE”<sup>2</sup> FOR LATINA/OS DEPEND ON GEOGRAPHY?

“Race” in the United States appears to be constructed differently from race-like constructions in Latin American and Caribbean countries, especially for persons with known African ancestry. Throughout the twentieth century in the United States a person with *any* known African

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<sup>1</sup> James Baldwin, *Stranger in the Village*, in NOTES OF A NATIVE SON 175 (Beacon Press 1984) (1955).

<sup>2</sup> As I have written elsewhere, I use the term “race” in quotation marks, much like anthropologist Ashley Montagu to remind the reader that race is not only socially constructed, but laden with such heavy baggage that it should never be used except in quotation marks. See, e.g., ASHLEY MONTAGU, MAN’S MOST DANGEROUS MYTH: THE FALLACY OF RACE (5th ed. 1974); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1707 n.9 (2000). The use of the term race is especially problematic when discussing the categorization of individuals prior to the late nineteenth century. Ian Haney Lopez writes that:

[R]ace must be understood as a sui generis social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics . . . Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.

Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (defining race as groupings of people based loosely on historical, social, ancestral, and physical components).

ancestry is *raced*<sup>3</sup> black.<sup>4</sup> Application of this principle, characterized as the one-drop or hypo-descent rule,<sup>5</sup> is counter to how race is constructed in Latin American and Caribbean countries.<sup>6</sup> Although some scholars argue that the denial of racial significance is an essential component of the Latin American racial model,<sup>7</sup> others disagree arguing instead that *mestizaje* is recognized and celebrated.

According to English professor Suzanne Bost, the words *mestiza* and *mestizaje* are unstable terms whose definition varies depending on the context.<sup>8</sup> Bost writes that the invocation of *mestizaje* by contemporary scholars “as a universal emblem for new frontiers of Americanness . . . potentially undermines universalist identity categories” because the term cannot escape the historical baggage that accompanied this mixture of races.<sup>9</sup> Carole Boyce Davies, another English professor, is more explicit about the internal contradictions of these terms. She argues that often *mestizo* or *mestiza* is used as a term of separation to distance individuals from people who identify or are identified “as ‘African,’ ‘Afro-’ or ‘Black.’”<sup>10</sup> Bost is more explicit on this point saying that the embrace by American academics of *mestizaje* is suspect because it tends to privilege lighter-skinned people while ignoring “the continued oppression of darker-

<sup>3</sup> As I have written elsewhere, I use “raced” as a verb throughout this essay to remind readers that race in the United States (and the Americas) is often imposed on some groups of people. See Taunya Lovell Banks, *What is a Community? Group Rights and the Constitution: The Special Case of African Americans*, 1 MARGINS 51, 55 n.26 (2001).

<sup>4</sup> See F. JAMES DAVIS, WHO IS BLACK?: ONE NATION’S DEFINITION 4-6 (1991). “The nation’s answer to the question: ‘Who is black?’ has long been that a black is any person with *any* known African black ancestry.” *Id.* at 5 (citing GUNNAR MYRDAL, AN AMERICAN DILEMMA 113-18 (1944); BREWTON BERRY & HENRY L. TISCHLER, RACE AND ETHNIC RELATIONS 97-98 (4th ed. 1978); JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES 1-2 (1980)). I consciously use the term “black” throughout this article even when referring to black Americans rather than the more current “African American.” As I have written elsewhere, the latter term was not consciously chosen by persons of African descent, but was the result of powerful media influences upon American society, including black America. See Banks, *supra* note 2, at 1708 n.12.

<sup>5</sup> See DAVIS, *supra* note 4, at 5. Davis writes that only the United States applies the hypo-descent rule to persons with any African ancestry. See *id.* at 13. Application of the hypo-descent rule in the United States starts after the Civil War in the late nineteenth century. See Ariela J. Gross, *Litigating Whiteness: Trial of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 114-19 (1998).

<sup>6</sup> See DAVIS, *supra* note 4, at 99-109.

<sup>7</sup> See Banks, *supra* note 2, at 1712 n.26 (citing CARL N. DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES 98-112, 226 (1971) (questioning claims that class, not race, keeps blacks in Brazil at the bottom of the socio-economic ladder); Florestan Fernandes, *The Negro Problem in a Class Society, 1951-1960*, in 2 BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN: SOCIAL DYNAMICS AND CULTURAL TRANSFORMATIONS 102 (Arlene Torres & Norman E. Whitten, Jr. eds., 1998) [hereinafter BLACKNESS IN LATIN AMERICA]; Arlene Torres, *La Gran Familia Puertorriqueña “Ej Prieta De Beldá”: The Great Puerto Rican Family Is Really Really Black*, in BLACKNESS IN LATIN AMERICA, *supra*, at 285).

<sup>8</sup> See SUZANNE BOST, MULATTAS AND MESTIZAS: REPRESENTING MIXED IDENTITIES IN THE AMERICAS, 1850-2000 8 (2003). As an example Bost mentions the invocation of the term by Jean-Luc Nancy whom she identifies as a “white Frenchman” who claims to be a *mestizo* because “[h]e problematically assumes the authority to redefine *mestizaje* as ‘nothing to do with mixed blood or mixed cultures,’ removing the term from its political/material foundations and its specific American differences.” *Id.* at 23 (citing Jean-Luc Nancy, *Cut Throat Sun*, in AN OTHER TONGUE: NATION AND ETHNICITY IN THE LINGUISTIC BORDERLANDS 123 (Alfred Arteaga ed., Lydie Moudileno trans., 1994)).

<sup>9</sup> BOST, *supra* note 8, at 13.

<sup>10</sup> *Id.* at 8 (citing CAROLE BOYCE DAVIES, BLACK WOMEN, WRITING AND IDENTITY: MIGRATIONS OF THE SUBJECT 16 (1994)).

skinned peoples as the dominant culture seeks out the familiar (the whiteness) within the other.”<sup>11</sup>

Law professor and Latina/o Critical Theory (LatCrit) scholar Angel R. Oquendo has a slightly different view of how *mestizaje* operates in contemporary America. He writes that *mestizaje* or “racial interfusion” makes race more fluid in Latin America.<sup>12</sup> Thus skin tone, often a marker of race, “is an individual variable—not a group marker—so that within the same family one sibling might be considered white and another black.”<sup>13</sup> Oquendo argues that “the fluid Latin-American concept of race differs from the rigid U.S. idea of biologically determined and highly distinct human divisions.”<sup>14</sup> But Latino/as avoid openly acknowledging African ancestry because the consequences in the United States are so severe—one is labeled *black*, a historically non-mobile category.<sup>15</sup> Because “possessing valid title to Whiteness requires being free from any encumbrances of Blackness,”<sup>16</sup> Latino/as with lighter skin tones, “probably motivated by the desire to distance themselves unequivocally from Black Latino/as, . . . [and i]n their zeal to adopt racial dualism . . . begin to think only in terms of Black or White.”<sup>17</sup> As result, Oquendo argues, Latino/as “neglect the fact that the majority of [them] are Mexicans, whose European blood is strongly diluted not by African but by Aztec blood.”<sup>18</sup> But even Oquendo in his recognition of Mexican *mestizaje* trivializes Mexico’s third root—African.

Oquendo’s analysis raises an interesting question whether Mexicans and Mexican Americans in particular distance themselves from blackness. Two recent incidents give this question particular relevance. In May 2005 President Vicente Fox in pushing for liberalizing immigration from Mexico

<sup>11</sup> *Id.* at 24.

<sup>12</sup> Angel R. Oquendo, *Re-imagining the Latino/a Race*, 12 HARV. BLACKLETTER L.J. 93, 101 (1995). Quoting Eugenio Fernandez Mendez, Oquendo writes, “the Spaniards did not have excessive racial scruples. This is why in their Spanish colonies, the process of *mestizaje* unfolded with considerable intensity. Only the peninsular aristocracy kept its distance from this process, thus forming a privileged state against Creoles, mestizos, and mulattos.” *Id.* at 101-02.

<sup>13</sup> *Id.* at 102 (quoting Lawrence Wright, *One Drop of Blood*, THE NEW YORKER, July 25, 1994, at 46, 52).

<sup>14</sup> *Id.* (quoting Lawrence Wright, *supra* note 13, at 52). See generally, NO LONGER INVISIBLE: AFRO-LATIN AMERICANS TODAY (Minority Rights Group ed., 1995).

<sup>15</sup> There are serious social and economic implications to being labeled as black. Melvin Oliver and Thomas Shapiro write that even “[i]f white and black households shared all the wealth-associated characteristics we examined, blacks would still confront a \$43,000 net worth handicap!” MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY 174 (1995). In addition to this empirically determined race-based inequality, whites as a group perceive that there is a disadvantage to being raced as black. White students, when asked how much it would cost for them to give up their whiteness in exchange for blackness responded a million dollars a year. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, AND UNEQUAL 32 (1992).

<sup>16</sup> Oquendo, *supra* note 12, at 102.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The footnote that accompanies this sentence reads:

The self-professed ‘Euro-Latinos’ have undoubtedly brought over some racism from their lands of origin. But this original racism is reinforced and transformed in the United States. It thus comes closer and closer to U.S. dualistic racism, . . . By manifesting racist inclinations, these individuals acquire a sense of belonging in U.S. society. In this way, they resemble many European immigrants.

*Id.* at 102 n.29 (citing CORNEL WEST, RACE MATTERS 25 (1993)).

stated that Mexicans workers are needed to fill jobs in the United States that “not even blacks want.”<sup>19</sup> He subsequently apologized conceding that his remark was insensitive.<sup>20</sup> But a month later Mexico released a series of postage stamps featuring the cartoon character Memín Pingüín or “little devil,” a dark-skinned black boy with “exaggerated lips, large eyes and somewhat simian body language.”<sup>21</sup> Anthropologists and civil rights advocates characterize the once popular cartoon character created in the 1940s as a “well intentioned but hapless [boy whose] . . . mannerisms and speech reinforce 1940s stereotypes of blacks as lazy, mischievous and uneducated.”<sup>22</sup>

Some U.S. government and political figures criticized the stamps as “insensitive toward black Americans.”<sup>23</sup> In response to this criticism, a spokesperson for Mexico’s President Fox replied, “I find it odd not to understand this celebration of popular Mexican culture and this tribute that the Mexican post office is making to Mexican cartoonists.”<sup>24</sup> His sentiments were reflected in the reported comments of some Mexicans and Mexican Americans. A street vendor of the comics in a southern Mexico city said that the Memín Pingüín character is not a racist depiction, but “just a naughty boy who is always getting into trouble.”<sup>25</sup> Mexican Americans in Houston had more mixed reactions. One man dismissed the criticism saying that Memín Pingüín is “part of our history.”<sup>26</sup> A woman said that the cartoon was “not racist . . . just a joke” but conceded it was inappropriate if offensive to blacks.<sup>27</sup> But other Mexican Americans and Latino/as were vocal in opposing the stamps.<sup>28</sup> Historian Pat Carroll points out, “In Mexico, racism t[akes] the form of denial.”<sup>29</sup>

Unlike Oquendo, I conclude that the American hypodescent rule is not the sole reason why Mexicans and Mexican Americans seem to erase the African presence in Mexico and Mexico’s history. The reasons for the erasure or invisibility of Mexico’s African roots are complex. The subordination of African slaves and their descendants was a component of

<sup>19</sup> *Fox Pas; Mexican President Vicente Fox Prompted an Uproar with his Ill-chosen Comment*, HOUSTON CHRON., May 23, 2005, at B6. See James C. McKinley, Jr., *New Racial Gaffe in Mexico: This Time It’s a Tasteless Stamp Set*, N.Y. TIMES, June 30, 2005, at A3.

<sup>20</sup> Jesse Jackson, Editorial, *From Ignorance Comes Growth*, CHI. SUN-TIMES, May 24, 2005, at 41.

<sup>21</sup> Dudley Althaus & Edward Hegstrom, *Mexicans Taken Aback by Racial Stir Over Stamps*, HOUS. CHRON., July 1, 2005, at A1.

<sup>22</sup> McKinley, *supra* note 19. “At the unveiling of the stamps . . . the publisher of the Memín Pingüín comics said the 62-year-old character had helped untold numbers of Mexican children and adults learn to read in the 1950s and 60s.” James C. McKinley, Jr., *Mexican Stamp Sets off a New Racial Fracas*, INT’L HERALD TRIB., July 1, 2005, at 2.

<sup>23</sup> Chris Kraul & Reed Johnson, *Mexican Postage Stamp Pushes Racial Envelope*, L.A. TIMES, June 30, 2005, at A1; Darryl Fears, *White House Denounces Art on Mexican Stamps*, WASH. POST, July 1, 2005, at A18.

<sup>24</sup> Fears, *supra* note 23.

<sup>25</sup> Althaus & Hegstrom, *supra* note 21.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See Fears, *supra* note 23. “Houston immigrant-rights activist and dual citizen Maria Jimenez . . . said race is one issue for which the country of her birth can be criticized. . . . ‘Mexico is just in denial on race issues.’” Althaus & Hegstrom, *supra* note 21.

<sup>29</sup> Althaus & Hegstrom, *supra* note 21.

Spanish colonialism.<sup>30</sup> Contemporary anti-black bias in Latin American countries like Mexico is a vestige of Spanish colonialism and nationalism that must be acknowledged, but is often lost in the uncritical celebration of Latina/o *mestizaje*.

Many legal scholars who write about Mexican *mestizaje* omit references to Afromexicans, Mexico's African roots, and anti-black sentiments in the Mexican and Mexican American communities.<sup>31</sup> At the end of the twentieth century the LatCrit movement advanced *mestizaje* as a unifying principle that moves beyond the conventional binary (black-white) discussions of race.<sup>32</sup> This uncritical and ahistorical invocation of *mestizaje* has serious implications for race relations in the United States given the growing presence and political power of Mexican Americans<sup>33</sup> because substituting *mestizaje* for racial binarism when discussing race in the

<sup>30</sup> It may be that the roots of anti-African sentiment predate Spanish colonial rule in the Americas and date back to the occupation of Spain by the Moors, and Spain's persecution of its Jewish population during the Spanish Inquisition. Both events resulted in Spain's obsession with racial purity. See Stafford Poole, *The Politics of Limpieza de Sangre: Juan de Ovando and His Circle in the Reign of Philip II*, 55 THE AMERICAS 359 (1999). Thus, manifestations of Spanish colonial subordination of Africans in America involved not simply slavery, but a racing process that applied to all persons with African ancestry, whether enslaved or free.

<sup>31</sup> See, e.g., Tanya Katerí Hernández, *Afro-Mexicans and the Chicano Movement: The Unknown Story*, 92 CAL. L. REV. 1537 (2004) (reviewing IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003), and criticizing Haney for failing to mention contemporary Afromexicans in his discussion of the Chicano movement).

<sup>32</sup> According to Francisco Valdés, one of the leaders in the movement, "the 'LatCrit' denomination arose from a meeting of several Latina/o law professors during a Colloquium held in Puerto Rico on Latinas/os and Critical Race Theory as part of the Hispanic National Bar Association's annual meeting." Francisco Valdés, *Foreword: Under Construction - LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1090 n.5 (1997). Valdés continues, "In my view, LatCrit theory is the emerging field of legal scholarship that examines critically the social and legal positioning of Latinas/os, especially Latinas/os within the United States, to help rectify the shortcomings of existing social and legal conditions. *Id.* at 1089 n.2.

"LatCrit is a group of progressive law professors engaged in theorizing about the ways in which the Law and its structures, processes and discourses affect people of color, especially the Latina/o communities." In many ways, LatCrit is helping us delve deeper into the impact of the law on Latina/o lives, dispelling popular stereotypes without essentializing or bracketing the Latina/o experience. But the LatCrit project has broader ambitions; it seeks to further (1) "The Production of Knowledge"; (2) "The Advancement of Transformation"; (3) "The Expansion and Connection of Struggle(s)"; and (4) "The Cultivation of Community and Coalition."

Kevin R. Johnson, *Foreword: Celebrating LatCrit Theory: What Do We Do When the Music Stops?*, 33 U.C. DAVIS L. REV. 753, 754-55 (2000) (citations omitted).

<sup>33</sup> According to the 1990 U.S. Census, Hispanics of any race comprised 9% of the population compared to 12.1% for blacks. CAMPBELL GIBSON & KAY JUNG, U.S. CENSUS BUREAU, WORKING PAPER NO. 56, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1970 TO 1990, FOR THE UNITED STATES, REGIONS, DIVISION, AND STATES 19 tbl. 1 (2002), available at <http://www.census.gov/population/documentation/twps0056/twps0056.pdf>. By the 2000 census the percentage of the population who identified as Hispanic jumped to 12.5% while the percentage of blacks increased slightly to 12.3%. U.S. CENSUS BUREAU, TABLE 1: POPULATION BY RACE AND HISPANIC OF LATINO ORIGIN, FOR ALL AGES AND FOR 18 YEARS AND OVER, FOR THE UNITED STATES: 2000, available at <http://www.census.gov/population/cen2000/phc-t1/tab01.pdf>. When breaking down the Hispanic category down into ethnic groups, Mexican Americans constituted the largest percentage within that category at 58.5%. BETSY GUZMÁN, U.S. CENSUS BUREAU, THE HISPANIC POPULATION: CENSUS 2000 BRIEF 2 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf>. These figures do not include numbers for Puerto Rico's population, which the Census Bureau tabulates separately. *Id.* at 1 n.2.

United States reinforces, rather than diminishes, notions of white racial superiority and dominance.

In this Article, I argue that LatCrit scholars should replace their uncritical celebration of *mestizaje* with a focus on colonialism and capitalism, the twin *isms* that influenced ideological theories and racial formation from the late fifteenth through the twentieth century in the Americas. In the first part of this article, I look at the evolution of the concept of *mestizaje* in colonial Mexico. I argue that Spanish colonialists, disturbed by a growing population composed of offspring from relations between Spaniards, Africans and Indigenous people in colonial Mexico, developed a complex set of rules creating a race-like caste system with a distinct anti-black bias reinforced through art. Even after the end of colonial rule and the abolition of slavery and caste-based laws, this anti-African bias remained. I conclude that post-colonial officials and theorists in shaping Mexico's national image were influenced not only by the Spanish colonial legacy, but also by the negative image of Mexico and Mexicans articulated in the United States during the early nineteenth century. Thus, being Mexican becomes being *mestiza/o*, defined as European and Indian, with an emphasis on the European roots.

In the second part of this article, I look at how Mexicans were constructed in both Mexico and the United States from the mid-nineteenth through the twentieth century. I conclude that in the United States, Mexican nationals and Mexican Americans often were classified as white for political purposes. Nevertheless, many prominent members of the dominant American society considered persons of Mexican ancestry non-white, and in the nineteenth century some politicians saw some Mexicans as possessing African ancestry and thus theoretically akin to black Americans.

The third section of the article briefly argues that LatCrit scholars are reluctant to admit or address evidence of anti-black bias in contemporary Mexico and within the Mexican American and larger Latina/o communities in the United States. The uncritical use of *mestizaje* or *mestiza/o* by LatCrit and other scholars as a substitute for the traditional black-white binary racial analytical framework reinforces the denial of anti-black bias. This unexamined use of *mestizaje* ignores or trivializes the colonial baggage that accompanies the term. *Mestizaje*, unexamined and unreconstructed, also essentializes the African component of the racializing process in Latin America and the Caribbean, reinforcing conscious and unconscious notions of white superiority. Thus I call on LatCrit scholars to engage in scholarly conversations about whether *mestizaje*, defined or undefined, can ever be an all-purpose substitute for the black-white binary racial analytical framework in the United States, the Caribbean, or Latin America.

## II. THE EVOLUTION OF *MESTIZAJE* IN COLONIAL MEXICO

Black Africans and their descendants were brought to New Spain, the formal name for the Spanish colony that later became Mexico, in the early

sixteenth century.<sup>34</sup> Initially, the Spanish Crown encouraged intermarriage between Spanish “explorers” and indigenous people “as a tool to promote peaceful cultural interaction in the Caribbean.”<sup>35</sup> In contrast, early in the colonial period the Crown discouraged, but did not forbid, intermarriage between Spaniards and Africans.<sup>36</sup> According to Mexican anthropologist Gonzalo Aguirre Beltrán, initially African women slaves were more numerous than male slaves, serving as concubines for the Spaniards. He writes that during “the first year of the conquest . . . [,] 99% of the individuals of white stock were males, as were 6% of those of Negro stock.”<sup>37</sup>

According to some historians by the mid-eighteenth century mulattoes, the last of the African-descent slaves in Mexico, *disappear* or become assimilated into Mexican society.<sup>38</sup> This assimilation came about so quickly, they argue, because the Afromexican population was so small, never exceeding two percent of the total population during the colonial period.<sup>39</sup> But the size of the Afromexican population vis-à-vis Spanish colonialists is still a subject of dispute.<sup>40</sup> Thus, the alleged disappearance or assimilation of Afromexicans warrants closer examination.

During the colonial period the Spanish colonists seemed very concerned with drawing distinctions between the products of miscegenation.<sup>41</sup> They divided offspring of mixed couples into three

<sup>34</sup> Juan Garrido, an African freeman who lived in Spain, arrived in Mexico, perhaps with Cortes, around 1510. Peter Gerhard, *A Black Conquistador in Mexico*, in *SLAVERY AND BEYOND: THE AFRICAN IMPACT ON LATIN AMERICA AND THE CARIBBEAN* 2-3 (Darién J. Davis ed., 1995). Colonial records suggest that most slaves of African ancestry in Mexico City after the sixteenth century were American-born, and by the eighteenth century mulattoes constituted the majority of slaves. Dennis N. Valdés, *The Decline of Slavery in Mexico*, 44 *THE AMERICAS* 167, 177 (1987).

<sup>35</sup> Susan Kellogg, *Depicting Mestizaje: Gendered Images of Ethnorace in Colonial Mexican Texts*, 12 *J. WOMEN'S HIST.* 69, 73 (2000).

<sup>36</sup> See *id.*

<sup>37</sup> Gonzalo Aguirre Beltrán, *Races in 17<sup>th</sup> Century Mexico*, 6 *PHYLON* 212 (1945).

<sup>38</sup> Valdés, *supra* note 34. Valdés notes that even if most mulattoes were free persons in colonial Mexico, by the eighteenth century they were also the vast majority of the remaining slaves. See *id.* “Mulatto slaves did not necessarily increase in numbers while the others fell, but rather, they were the last of the African-descent slaves to disappear.” *Id.*

<sup>39</sup> COLIN A. PALMER, *SLAVES OF THE WHITE GOD: BLACKS IN MEXICO, 1570-1650* 39 (1976).

<sup>40</sup> Some contemporary scholars argue that more than 300,000 Africans were brought to colonial Mexico between 1500 and 1829 when slavery ended. See MARCO POLO HERNÁNDEZ CUEVAS, *AFRICAN MEXICANS AND THE DISCOURSE ON MODERN NATION* xiv, 5-9 (2004). According to Hernández these Africans produced more than 200,000-600,000 offspring. See *id.* at 28 n.24. He also claims that more than half of contemporary Mexicans have some African ancestry. See *id.* at 7. The estimates of other historians are lower. Historian Joseph Inikori cites to census figures from the clergy in 1796 stating that there were 679,842 people of African descent in Mexico, which represented 10.5% of the population. Joseph E. Inikori, *Slavery and Atlantic Commerce, 1650-1800*, 82 *AM. ECON. REV.* 151, 154 (1992). See also John K. Chance, *On the Mexican Mestizo*, 14 *LATIN AM. RES. REV.* 153, 155-56 (1979) (giving estimates of the Mexican mulatto population in 1742 as 187,900, or 7.11%, and in 1810 as 495,321, or 8.09%, compared to Spaniards, who comprised 11.94% and 17.93%, respectively, of the total population). Mexican anthropologist Gonzalo Aguirre Beltrán calculates that by 1742 the Euro-*mestizo* population was around 390,000, the Afro-*mestizo* and Indo-*mestizo* population was around 515,000, in addition to “unmixed” populations of 10,000 Europeans, 20,131 Africans, and 1,540,000 Indigenous people. GONZALO AGUIRRE BELTRÁN, *LA POBLACIÓN NEGRA DE MÉXICO* 222 (3rd ed. 1989). More recently historian Herman Bennett estimates that “by 1810 [the free black population] numbered approximately 624,000, or 10% of the total population.” HERMAN L. BENNETT, *AFRICANS IN COLONIAL MEXICO: ABSOLUTISM, CHRISTIANITY, AND AFRO-CREOLE CONSCIOUSNESS, 1570-1640* 1 (2003) (citing BELTRÁN, *supra*, at 232, 234).

<sup>41</sup> The Spanish colonials developed a social hierarchy based on skin color:

general groups: *mestizo* (Spanish-Indian), *mulatto* (Spanish-Black), and *zambo* or *zambaigo* (Black-Indian).<sup>42</sup> But even the Spaniards realized that these categories might overlap. For example, there were black mestizos and subdivisions within this category.<sup>43</sup> Hue often was used to distinguish between the types of mulattos<sup>44</sup> and *mestizos*.<sup>45</sup> These offspring of miscegenation unions, often illegitimate as well, were called *las castas*.<sup>46</sup>

A legal classification system based on hue or phenotype was bound to cause confusion and misidentification between groups, especially for persons with African and Indian ancestry.<sup>47</sup> According to Beltrán, darker-hued Afro-*mestizos* consistently tried to conceal their African ancestry because under colonial rule, Indians had a higher socio-economic status than *castas*.<sup>48</sup> To prevent Afro-*mestizos* slaves *passing* as Indians, masters often used hot irons to brand “the insignia of servitude” on slaves’ faces, or other places readily apparent to the observer.<sup>49</sup>

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Although this classification was founded essentially on differences of tegumentary hue, certain other anatomical characteristics . . . were not overlooked. Among these are the form and color of the hair of the head and beard, thinness, thickness, and prominence of the lips; form of the nose; color of the iris; and, on occasion, bodily morphology and facial breadth.

Beltrán, *supra* note 37, at 213. Initially, the Spanish Crown encouraged intermarriage between Spanish “explorers” and indigenous people “as a tool to promote peaceful cultural interaction in the Caribbean,” but early in the colonial period the Crown discouraged, but did not forbid, intermarriage between Spaniards and Africans. Kellogg, *supra* note 35, at 73.

<sup>42</sup> See ILONA KATZEW, *NEW WORLD ORDERS: CASTA PAINTING AND COLONIAL LATIN AMERICA* 43, 44 (1996). Offspring of a Negro and Indian were also called by some “lobo” or “sambayo.” SR. DON PEDRO ALONSO O’CROULEY, *A DESCRIPTION OF THE KINGDOM OF NEW SPAIN* 19 (Seán Galvin ed. & trans., John Howell Books 1972) (1774).

<sup>43</sup> See Beltrán, *supra* note 37, at 218. There was the black mestizo (*mestizo prieto*) the offspring of a Mestizo and Negro, whose Negroid features were apparent. There was the Dark Mestizo (*mestizo prieto*), the offspring of a Mestizo and Dark Mulatto. Both the White and Dark Mestizo were called *coyote*. “The coyote was, in reality, confused with different classes of mulatto, in the same way as was the ‘black mestizo.’” *Id.* at 212. See also MARÍA CONCEPCIÓN GARCÍA SÁIZ, *THE CASTES: A GENRE OF MEXICAN PAINTING* 24-26 (1989) (reporting in tabular form at least nineteen names for various combinations of classes).

<sup>44</sup> See *id.* at 214. There were “White Mulattos” or “Fair Mulattos,” “Moorish Mulattos” or *Moriscos*, the offspring of a white and white mulatto. See *id.* The offspring of Negroes and dark mulattos were called “Black Mulattos” (*mulatos prietos*). Black Mulattoes were described as having “black skin; short, thick, and kinky hair; and everted lips.” *Id.* at 215.

<sup>45</sup> The offspring of whites and Indians were called *mestizo*. See *id.* at 217. As with mulattoes, there were categories of mestizo. There was the “White Mestizo” the offspring of a Spaniard and Indian with almost white skin color, black straight hair and scant facial hair. See *id.* There was the *castizo mestizo* (Castillian Mestizo), the offspring of a Mestizo and Spaniard. See *id.* There also was the Black Mestizo (*mestizo prieto*) the offspring of a Mestizo and Negro, whose Negroid features were apparent. See *id.* at 218. There was the Dark Mestizo (*mestizo prieto*), the offspring of a Mestizo and Dark Mulatto. Both the White and Dark Mestizo were called *coyote*. “The coyote was, in reality, confused with different classes of mulatto, in the same way as was the ‘black mestizo.’” See *id.* at 217.

<sup>46</sup> See Edgar F. Love, *Marriage Patterns of Persons of African Descent in a Colonial Mexican City*, 51 *HISP. AM. HIST. REV.* 79, 80, 91 (1971); ILONA KATZEW, *CASTA PAINTING: IMAGES OF RACE IN EIGHTEENTH CENTURY MEXICO* 40 (2004).

<sup>47</sup> See KATZEW, *supra* note 46, at 45. “Children of *Negros* and Indians were many times considered ‘black mulattoes,’ when the Negro color happened to predominate.” Beltrán, *supra* note 37, at 215.

<sup>48</sup> See Beltrán, *supra* note 37, at 217 (referring to the wolf-like Indian (*indio alobado*), the offspring of a dark mulatto and Indian).

<sup>49</sup> *Id.* at 215. In 1784 a Spanish royal decree prohibited the practice of branding slaves. William Dusenberry, *Discriminatory Aspects of Legislation in Colonial Mexico*, 33 *J. NEGRO HIST.* 284, 287-88 (1948) (citing 2 *RECOPILACIÓN SUMARIA DE TODOS LOS AUTOS ACORDADOS DE LA REAL AUDIENCIA Y SALA DEL CRIMEN DE ESTA NUEVA ESPAÑA, Y PROVIDENCIAS DE SU SUPERIOR GOBIERNO : DE VARIAS REALES CÉDULAS Y ÓRDENES QUE DESPUES DE PUBLICADA LA RECOPILACIÓN DE INDIAS HAN PODIDO RECOGERSE ASI DE LAS DIRIGIDAS Á LA MISMA AUDIENCIA Ó GOBIERNO, COMO DE ALGUNAS OTRAS*

Even free Afro-*mestizos* had an interest in hiding their African ancestry since by law *mulattoes*, but not *mestizos*, were subject to paying tribute in the form of head-taxes.<sup>50</sup> In the words of art historian Ilona Katzew, the extensive racial classification system represented by the *sociedad de castas* suggests that “Spanish or white blood is redeemable . . . [and] inextricably linked to the idea of ‘civilization.’ Black blood, bear[s] the stigma of slavery, [and] connote[s] atavism and degeneracy.”<sup>51</sup> Some colonial public and private art reinforced this idea.

#### A. LAS CASTAS PAINTINGS: REINFORCING SOCIAL RACE-LIKE SUBORDINATION THROUGH ART

Art not only reflects a country’s culture, but often shapes that culture as well. This is especially true in Mexico where art has occupied a central position from the sixteenth century, when the church directed art production, through the seventeenth century, when arts guilds controlled art production.<sup>52</sup> Moreover, the current academy of art, established in the late eighteenth century, was under the control of both the imperial and colonial governments.<sup>53</sup> When Mexico became an independent country in 1821, the new government, recognizing that art was an effective way to educate its citizens, made the Academy one of its “foremost educational institutions.”<sup>54</sup> Thus, art in Mexico has a consciously propagandistic purpose.

In the eighteenth century, colonial elites in the Spanish territories, including Mexico, commissioned paintings that depicted life in the colonies.<sup>55</sup> Some paintings were exported to Europe while other paintings were commissioned for local use and often placed in churches and other public settings.<sup>56</sup> This colonial public and private art reinforced the hierarchy of the *sociedad de castas*, undoubtedly influencing the thinking of Mexico’s predominantly illiterate population.

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QUE POR SUS NOTABLES DECISIONES CONVENDRÁ NO IGNORAR 265-66 (Eusebio Bentura Beleña ed., 1787)). The Dark Mulatto (*mulato pardo*), the offspring of a Negro and Indian, was the most numerous single racially mixed group in colonial Mexico. *See id.* at 216. Dark Mulattoes were described as having hair that was “more straight than kinky.” *Id.* at 212. Variances in skin color among dark mulattoes resulted in a varied series of adjectives, some of which varied by region. In Michoacán they were called *Cochos*; “*Cambujos*” in Oaxaca, ‘*Chinos*’ in Puebla, ‘*Jarochos*’ in Veracruz, ‘*Loros*’ in Chiapas, and ‘*Zambos*’ in Guerrero.” *Id.* Two other categories of Negro-Indian offspring were the “Wolf Mulatto” (*mulato lobo*), the offspring of a dark mulatto and Indian, and the “Wolf-like Indian” (*indio alobado*) was the offspring of a wolf mulatto and Indian. *Id.* at 216-17.

<sup>50</sup> *See id.* at 218.

<sup>51</sup> KATZEW, *supra* note 42, at 10.

<sup>52</sup> *See* STACIE G. WIDDIFIELD, THE EMBODIMENT OF THE NATIONAL IN LATE NINETEENTH-CENTURY MEXICAN PAINTING 15 (1996).

<sup>53</sup> *See id.* at 14-15. “In the nineteenth century, academies were set up all over the Americas under the patronage of the governments.” Elizabeth Wilder Weismann, *Introduction to JEAN CHARLOT, MEXICAN ART AND THE ACADEMY OF SAN CARLOS, 1785-1915* 10 (1962) (documenting the struggle within the Academia de San Carlos in Mexico between 1785 and 1915 over the classical European tradition of art versus a new art that was Mexican).

<sup>54</sup> WIDDIFIELD, *supra* note 52, at 16. Widdifield writes, by 1833 “The Academy was thus understood to be part of the state’s bureaucracy and effective in educating its citizens.” WIDDIFIELD, *supra* note 52, at 17.

<sup>55</sup> *See* KATZEW, *supra* note 46, at 1.

<sup>56</sup> *See* Miguel Angel Fernández, *Introduction to* MARÍA CONCEPCIÓN GARCÍA SÁIZ, *THE CASTES: A GENRE OF MEXICAN PAINTING* 20 (1989).

The production of *Las Castas* paintings spans the entire eighteenth century, but their format and content remain essentially the same. The paintings portray the complex process of *mestizaje* or race mixing among the three major racialized groups that inhabited the colonies: Spaniard, Indian, and African.<sup>57</sup> The central focus of these paintings is the family. Each painting usually consists of sixteen panels, four tiers with four paintings on each tier. The same scene repeats in each panel: a man and woman, each with a *casta* designation, along with one or two of their offspring, also with a *casta* designation. “In every family represented, each member belonged to a different ethnoracial grouping, subsuming individual identity into the family grouping.”<sup>58</sup>

The pictures on the first tier generally portray men and women whose ancestry is designated as Spanish, Indian, African, Mestizo, or Mulatto and their offspring.<sup>59</sup> One significant message conveyed by the *casta* paintings is that non-white women who have children with Spanish men improve their socio-economic status, and perhaps more importantly, the socio-economic status of their offspring. But there also are subtle differences between the way Indian and black women are portrayed in these paintings. Unlike Indian women, black women “never reach the [social] level of Indian women in the same circumstances,”<sup>60</sup> and often are painted acting physically aggressive toward their spouses.<sup>61</sup> A possible message conveyed to the viewer by these paintings is that black or Afromexican women are less attractive marriage partners than Spanish, Indian, and *mestizo* women who are portrayed as passive or submissive. Implicitly, the portrayal of only black and Afromexican women as aggressive or violent stigmatizes all women with any African ancestry as marriage partners.

The gendered aspect of these paintings applies to non-white males as well. Unlike Indian and black women, Indian and black men almost never appear on the first tier.<sup>62</sup> Further, non-white men in these paintings, unlike non-white women, never appear to improve their social position through marriage.<sup>63</sup>

The first picture on the first tier most often portrays a family grouping with a man labeled *español*, a woman who is Indian, African, or mixed, and their offspring.<sup>64</sup> The three other scenes on the first tier portray the

<sup>57</sup> KATZEW, *supra* note 42, at 8-9.

<sup>58</sup> Kellogg, *supra* note 35, at 75.

<sup>59</sup> Occasionally there was some variation from the pattern. For example, a *Casta* painting by an unknown artist from the first half of the eighteenth century in the collection of Ezio Cusi, Mexico City, has a *mulata* and a *morisco* couple with a *torna atrás* child in the first panel of the first tier. An Indian woman and Spanish man with a *mestizo* child appear in the second panel. A Spanish man and a Negro woman appear with a *mulatto* child in the fourth panel. The third panel is unreadable, but both parents are light-skinned as is their child. KATZEW, *supra* note 42, at Plate 7.

<sup>60</sup> GARCÍA SÁIZ, *supra* note 43, at 38.

<sup>61</sup> Kellogg, *supra* note 35, at 76.

<sup>62</sup> For discussion of an exception, see Katzew, *supra* note 42.

<sup>63</sup> GARCÍA SÁIZ, *supra* note 43, at 38. Similarly, black men are depicted in lower occupations, usually appearing as coachmen, a trade they dominated in Mexico City by the mid eighteenth century. *See id.*

<sup>64</sup> *See id.*; Rachel Vanessa Pooley, *The Casta Paintings of Colonial Mexico: The Politics of Constructing Social Order Through Art* 102 (1996) (unpublished M.A. thesis, University of Texas) (on file with author) (noting that the “*Casta* genre . . . diagrams . . . measure[ed] degrees of forbidden marriages.”).

consequences of miscegenation between the offspring of the first panel and pairings with Indians, Africans, or *mestizos* (offspring of *español* and Indian).<sup>65</sup> The focus, after the first tier, however, is on the offspring of unions between persons of African (*mulata*) and Indian (*mestizo*) descent.<sup>66</sup> The dress, family setting or surroundings, and accompanying symbols indicate the social status of each family group.<sup>67</sup> As the family groups become more mixed (Indian and African), their social standing diminishes. These families usually occupy the lower tiers of the painting.<sup>68</sup>

The overriding message of the *casta* paintings is of Spanish or European male dominance.<sup>69</sup> Thus, *mestizaje* as depicted in these paintings represents an embodiment of colonization and conquest.<sup>70</sup> The *casta* paintings convey to the viewer not only the superiority of the *español*, but also the inferiority of racially mixed groups, especially anyone with African ancestry.

Contemporary art historians agree that the *casta* paintings depict a taxonomic progression, but disagree about the purpose of the paintings. Some scholars, like Susan Kellogg, argue that the paintings represent an idealized racial hierarchy, not the “racial reality in colonial Mexico,” because the caste system was not rigidly enforced throughout the eighteenth century.<sup>71</sup> Rachel Pooley argues that the *criollos*, Mexican-born Spaniards, painted the pictures to blur the distinction between them and *peninsulares*, people of Spanish ancestry born in Spain.<sup>72</sup> Thus, according

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The offspring depicted in the paintings are “overwhelmingly represented as male.” GARCÍA SÁIZ, *supra* note 43, at 64.

<sup>65</sup> Pooley, *supra* note 64, at 63 (arguing that the series “construct a chain of lineage”). See also KATZEW, *supra* note 46, at 49 (describing the “typical” *casta* series as: “the first cluster of paintings . . . focus[es] on the Spanish-Indian union . . . the second group on Spanish-Black unions . . . and the third on Black-Indian combinations.”). According to Beltrán, African women slaves were more numerous than male slaves, serving as concubines for the Spanish. He writes that during “the first year of the conquest . . . 99 percent of the individuals of white stock were males as were 6 percent of those of Negro stock.” Beltrán, *supra* note 37, at 212.

<sup>66</sup> For example, the second tier portrays the offspring of sexual unions between the children of the first tier. Likewise, the third tier portrays the offspring of sexual unions between children of the second tier. The fourth tier continues focusing on miscegenation between children of the third tier.

<sup>67</sup> Patricia Seed, *Social Dimensions of Race: Mexico City, 1753*, 62 HISP. AM. HIST. REV. 569, 574 (1982).

<sup>68</sup> See Pooley, *supra* note 64, at 55 (“Examination of the entire genre reveals that the outcome of this racial mixing displays the construction of racial ideology which constructs whiteness as the norm, and measures all other races by their distance from whiteness.”).

<sup>69</sup> See KATZEW, *supra* note 46, at 106.

<sup>70</sup> See BOST, *supra* note 8, at 9. Bost writes:

*Mestizaje* embodies a historical narrative of the production of mixture, the often coercive intermingling of bloods – on the national level as well as the individual level – through the rape of indigenous and African women by men of European descent. These rapes continue as a dominant theme in the work of mestiza writers. . . . *Mestizaje*, for Moraga [a writer she quotes] and for others, reflects a simultaneously racial, sexual, and national memory, an embodiment of colonization and conquest.

*Id.*

<sup>71</sup> Susan Kellogg also concludes that “the lived meaning” of the colonial racialized categories, “at least as group markers, was in decline” by the end of the colonial period, “especially in urban areas.” Kellogg, *supra* note 35, at 82.

<sup>72</sup> See Pooley, *supra* note 64, at 132. Pooley points out that during the seventeenth century, proof of bloodline “purity,” *limpieza de sangre*, was required to become *maestro* [master], the only class of painter allowed to own his shop and employ others, in the Painter’s Guild, meaning that only the upper echelons of Mexican colonial society could reach this position. See *id.* at 139-40. Generally, the

to Pooley, in the *casta* paintings all persons of unmixed Spanish ancestry are characterized as *españoles*.<sup>73</sup> Yet, if consolidation of the top of the *casta* system was the sole purpose, one wonders why all paintings include four generations of racially mixed offspring, most of whom are Afro- and Indio-*mestizos*.

Another reading of the *casta* paintings is that they illustrate how the Spanish colonists brought “their own social schema” with them to the “New World.”<sup>74</sup> Beltrán, writes:

Most of the European conquerors came from the Spanish provinces of New Castille, Old Castille, and Extremadura, from areas . . . which had been under Moorish domination during part of the Middle Ages and which . . . had received in the Renaissance period additional injections of Negro blood from the slave ports of Seville and Lisbon. In spite of this . . . we find it convenient to catalog them within the Mediterranean race of the white stock.<sup>75</sup>

Suzanne Bost is even more explicit, writing, “Even the ‘pure’ Spanish colonizers were the mixed descendants of Latins, Moors, Visigoths and Jews.”<sup>76</sup>

While the “purity” of Spanish blood was inextricably linked to colonialist ideas of ‘civilization,’ in these paintings, African ancestry carried a greater stigma. This sentiment was explicitly stated in 1763 by a Spanish merchant, Joaquín Antonio de Bafarás, in an illustrated manuscript entitled *Origen, costumbres, y estado presente de mexicanos y philipinos* (Origin, customs, and current status of Mexicans and Filipinos).<sup>77</sup> Bafarás wrote that so long as Spaniards are mixed only with Indians, their blood

apprentice positions also were limited to Spaniards, although exceptions appear to have been made for Indians, but not blacks, when the need arose. *See id.* at 140. Other guild regulations during the period also contained racial limitations. *See id.* at 141. For example, a 1681 ordinance limited blacks and mulattoes who worked in pottery to official or worker categories, never maestro. *See id.* (citing the following ordinance quoted from MANUEL CARRERA STAMPA, LOS GREMIOS MEXICANOS: LA ORGANIZACIÓN GREMIAL EN NUEVA ESPAÑA, 1521-1861 240 (1954): “*Que para exercer dicho oficio se ha de examinar, y a de ser Español, ó mestizo, y no negro, ni mulatto, y ha de haver aprendido con maestro examinado, con lo qual puedan los negros y mulattos exercer el oficio Solo como oficiales . . .*”). Carrera Stampa argues that the term *español* used in the regulation referred to both *peninsulares* and *criollos*. STAMPA, *supra*, at 224. By the eighteenth century, *criollos* controlled access to the Painter’s Guild, and they were concerned about threat of art produced clandestinely by artists excluded from the guild because of racial restrictions. Pooley, *supra* note 64, at 143-44.

<sup>73</sup> See Pooley, *supra* note 64, at 132.

<sup>74</sup> Iona Katzew writes:

The subordination of state to church and the ideology of *limpieza de sangre* (purity of blood) —where the absence of Jewish or Muslim blood defined an honorable “Old Christian”—were factors in Spain’s hierarchically organized society . . . which the Spaniards brought with them when they colonized the New World. . . . Spaniards [or whites] became the aristocracy of Mexico regardless of their origins or occupations.

KATZEW, *supra* note 46, at 39. Writing in the early nineteenth century, naturalist and explorer Alexander von Humboldt “treated people of African descent, especially women, more harshly than those of indigenous descent, remarking that *mestizos* were ‘of a much more mild character than the *mulattoes* descended from whites and negresses, who are distinguished for the violence of their passions and a singular volubility of tongue.’” Kellogg, *supra* note 35, at 77 (citing 1 ALEXANDER VON HUMBOLDT, POLITICAL ESSAY ON THE KINGDOM OF NEW SPAIN 244 (John Black trans., AMS Press 1966) (1811)).

<sup>75</sup> Beltrán, *supra* note 37, at 212.

<sup>76</sup> BOST, *supra* note 8, at 28.

<sup>77</sup> See Kellogg, *supra* note 35, at 76-77.

can be purified.<sup>78</sup> But the mixture of Spanish or Indian with blacks, according to Bafarás, can never again be “purified” back to Spanish or Indian.<sup>79</sup>

Still other art scholars like Patricia Seed see the *casta* paintings as reflecting a social rather than scientific understanding of race in colonial Mexico.<sup>80</sup> But social understandings often translate into legal reality for those people at the lower levels of the social strata. Seed’s description sounds very much like the way race in Latin America is described today.

Whether the paintings represent reality or an idealized society, their message is clear, Spanish or white ancestry is preferable, and African ancestry is least preferred.<sup>81</sup> “Throughout the colonial period, Spanish civil and ecclesiastical authorities emphasized racial differences” to control a population where Spaniards were in the minority.<sup>82</sup> These officials were very concerned because “blurring of social boundaries that resulted from race mixing, [however], precluded a de facto categorization of the population . . . .”<sup>83</sup> Thus art curator Ilona Katzew argues that the *casta*

<sup>78</sup> See *id.* at 77. “These are, among the vast types of peoples of New Spain, the main castas or generations that it contains originated from the introduction of Blacks. . . . If this Kingdom had freed itself from the mixture with that nation, it would by now be purely Spanish without any corruption. Since Indians belong to a pure nation, upon mixing with Spaniards they become perfectly Spanish on the third step.” *Id.*

<sup>79</sup> See *id.*; KATZEW, *supra* note 46, at 10-11.

<sup>80</sup> See Seed, *supra* note 67, at 574. “[T]he social race of an individual was related to the combination of physical appearance, economic status, occupation, and family connections, in other words, to his overall socioeconomic position as well as to physical features.” Kellogg, *supra* note 35, at 574. The *Casta* paintings depict each familial group “in a social setting that included the dress, furnishings, home, and occupation thought to be associated with each racial category.” *Id.* at 574.

<sup>81</sup> See Holland Cotter, *Faces From a Fictional Melting Pot*, N.Y. TIMES, Oct. 4, 1996, at C25. As a *New York Times* reviewer of a recent exhibit of *Casta* paintings points out, the pictures quickly devolved into a “tool for social engineering . . . [because the images] both reflected and confirmed a social hierarchy based on bloodlines.” The Spanish colonizers were on the top and blacks were on the bottom and the population between was defined “on a sliding scale of minutely calibrated genetic percentages jostled for advantageous position.” *Id.*

<sup>82</sup> KATZEW, *supra* note 46, at 39. See Edgar F. Love, *Legal Restrictions on Afro-Indian Relations in Colonial Mexico*, 55 J. NEGRO HIST. 131, 131-32 (1970). See also CHARLOT, *supra* note 53, at 53 (for an example of an attempt to enforce race-like admission requirements for artists):

The readiness of individuals to codify racial prejudice had come clearly to the fore when statutes were drafted in 1753 for the private academy painter Miguel Cabrera. This short-lived venture that was based on racial discrimination failed also to receive official backing. Only with it might such harsh rulings as this one have been enforced: “None may receive students of mixed blood . . . . To abide by this ruling, the pedagogue must find out whether the child brought before him is a Spaniard and of good conduct . . . he will send him to the house of the Secretary . . . who will ascertain from the baptismal papers which the child brings with him whether he is of the quality he says . . . .”

*Id.* This statute illustrates the importance of baptismal records in determining socio-economic status. In discussing whether the Mexican-born artist *Pedro Patiño Ixtolinque* was eligible to teach at the Academy, Charlot notes that his published baptismal record said he was “born June 5, 1774 . . . of a Spanish father and a *Mestiza* (mixed blood) mother.” *Id.* at 55 (citing ABELARDO CARILLO Y GABRIEL, DATOS SOBRE LA ACADEMIA DE SAN CARLOS DE NUEVA ESPAÑA: EL ARTE EN MÉXICO DE 1781 A 1863 77-78 (1939)). Charlot notes that a child of these parents would be classified as white, “especially as he is not referred to as *de color quebrado* (of mixed pigmentation).” *Id.* at 55 n.37. The author also notes that *Patiño*’s contemporaries thought him a full-blood Indian. *Id.*

<sup>83</sup> KATZEW, *supra* note 46, at 39.

painting genre reflects colonialist “anxiety over loss of control” during the eighteenth century.<sup>84</sup>

#### B. LEGAL AND SOCIAL REALITIES IN MID AND LATE EIGHTEENTH CENTURY COLONIAL MEXICO

In the mid eighteenth century the *casta* system began to erode, but the gulf between *españole/ creoles* and *mulatto* persisted. During this period the boundary between *castizos* (offspring of *españole* and *mestizo*) and *españoles* disintegrated, resulting in an expansion of the *españoles* or white category.<sup>85</sup> In contrast, *moriscos* (light-skinned offspring of *españoles* and white *mulattoes*), were reclassified (by Census takers) downward as *mulattos*, not *españoles*.<sup>86</sup>

Patricia Seed concludes that the distinctions between *creoles* and *mulattoes* remained unchanged because of urban slavery.<sup>87</sup> Anthropologist John Chance in his study of colonial Oaxaca writes: “mulatto status continued to carry socially inferior meaning” even though *mulattoes* were not always on the lowest socioeconomic level.<sup>88</sup> Chance’s interpretation suggests a specific anti-black social stigma.

Yet as mentioned previously, some scholars argue that persons with African ancestry were assimilated into Mexican society by the late eighteenth century because the designation Black (*negra*) disappears from the records after the 1753 census.<sup>89</sup> Chance suggests that late eighteenth century census records may be unreliable indicators of Mexico’s racial realities because *casta* designations had socioeconomic implications and were used more precisely in marriage records.<sup>90</sup>

Despite the existence of rigid racial boundaries throughout the colonial period,<sup>91</sup> racial passing was possible for persons with mixed racial ancestry. Beltrán reports incidences of obvious tampering with parish baptismal records where erasures show that *españole* was substituted for *mulatto*.<sup>92</sup> There were other ways that persons with African ancestry could improve their social status. A few *mulattoes* entered the upper castes by joining the

<sup>84</sup> KATZEW, *supra* note 42, at 8.

<sup>85</sup> See Seed, *supra* note 67, at 599.

<sup>86</sup> See *id.* Racially mixed populations of Indian origin were less distinguishable from Spaniards than populations of Black or mulatto origin. See *id.* at 600.

<sup>87</sup> See *id.* at 601.

<sup>88</sup> JOHN K. CHANCE, RACE AND CLASS IN COLONIAL OAXACA 168 (1978).

<sup>89</sup> See Seed, *supra* note 67, at 576-77.

<sup>90</sup> See CHANCE, *supra* note 88, at 155. Sometimes census records were under inclusive. For example, the 1792 census excluded Indians and slaves because they were not eligible for military service. The recorded census compiled in 1793 did contain a count of Indians. See *id.*

A comparison of the classifications employed in the 1792 census with those found in the marriage records for 1793-97 illustrate the ambiguity and irregularity inherent in the *sistema de castas* as a terminological and cognitive system . . . In the marriage records, socioracial terms were used in a more precise manner than in the census[.]

*Id.* at 157 (emphasis added).

<sup>91</sup> See *id.*

<sup>92</sup> GONZALO AGUIRRE BELTRÁN, LA POBLACIÓN NEGRA DE MÉXICO 270 (2d ed. 1972). Chance found similar attempts to pass in Oaxaca. CHANCE, *supra* note 88, at 177-80.

military and serving in militias comprised of other *mulattoes*.<sup>93</sup> During this period it also was possible to purchase a license (certificate of whiteness), which gave the licensee the rights and prerogatives of Spaniards.<sup>94</sup> “[S]ocial race” in eighteenth century Mexico was based on multiple factors including appearance and financial standing.<sup>95</sup> Nevertheless, most *mulattoes* still faced legal and social restrictions.

For example, the 1781 *Consulta del Consejo de Indias* (Consulta of the Council of Indians) urged Catholic priests to discourage Indians from marrying blacks, saying that honorable positions could only be held by “pure” Indians.<sup>96</sup> A college established during the 1770s in Oaxaca, an area with a large Afromexican population, excluded “Negroes, mulattoes, *lobos* (offspring of Indians and mulattoes), *coyotes* (offspring of mestizos and mulattoes) and people of other malignant mixtures.”<sup>97</sup>

Even the term *mulato* (someone with known African ancestry) was used among common people in a negative sense.<sup>98</sup> These recorded instances of anti-black bias call into question the assimilation theory.<sup>99</sup> For *mulattoes*, racial passing may have been the easiest way to escape the burdens imposed on persons with known African ancestry. This interpretation seems consistent with contemporary scholars’ studies of modern Afromexican communities.<sup>100</sup>

Evidence of anti-black bias continues into the nineteenth century. When the imperial Cortes opened in Cádiz on September 24, 1810 and started discussions that ultimately led to the Spanish Constitution of 1812,

<sup>93</sup> See CHANCE, *supra* note 88, at 174. See generally, Ben Vinson III & Matthew Restall, *Black Soldiers, Native Soldiers: Meanings of Military Service in the Spanish American Colonies*, in BEYOND BLACK AND RED: AFRICAN-NATIVE RELATIONS IN COLONIAL LATIN AMERICA 15-47 (Matthew Restall ed., 2005).

<sup>94</sup> Chance cites to MAGNUS MÖRNER, RACE MIXTURE 45 (1967), but admits finding no records of this practice in Oaxaca. See CHANCE, *supra* note 88, at 174.

<sup>95</sup> See BOST, *supra* note 8, at 29. The existence of social race in the Spanish colony dates back at least to the sixteenth century when Pope Clemente VII issued an edict suggesting that “race and legitimacy are determined by manners rather than fixed at birth.” *Id.* at 30. Appearance, language, religion, education, class and lifestyle determined who was white. See *id.* at 29. (citing MICHAEL L. CONNIFF & THOMAS J. DAVIS, AFRICANS IN THE AMERICAS: A HISTORY OF THE BLACK DIASPORA 312 (1994)). Bennett agrees, writing that “social appearance and behavior patterns” rather than “biological pedigree” often determined how one was classified. See BENNETT, *supra* note 40, at 28-29.

<sup>96</sup> See CHANCE, *supra* note 88, at 173-74 (citing Archivo Parroquial de Cuilapan (Oaxaca), *Libro de Providencias*, 1771-91); Love, *supra* note 82, at 136 (citing the August 1, 1781 *Consulta del Consejo de Indias*).

<sup>97</sup> CHANCE, *supra* note 88, at 180-81 (citing a 1776 letter from the bishop of Oaxaca to the Crown outlining plans for the college).

<sup>98</sup> In support of this statement, John Chance cites three instances during the latter part of the eighteenth century where mulatto status had a negative association:

[I]n 1754 a Spanish woman from Antequera, in charging a local man with cursing her, called his outburst ‘mulatto talk’; in 1789 the parents of Joaquín Camacho y Ybañez brought a civil suit against their son to keep him from marrying a mulatto woman, alleging ‘inequality of rank’; and in 1790 a man from Coyoacán (near Mexico City) assaulted a public official after telling him to ‘Go to hell!...I’m no mulatto who has to pay tribute.’

*Id.* at 168 (citing Archivo del Estado de Oaxaca, Juzgados, bundle for 1751-55 and 1887-90; Archivo General de la Nación, Criminal 137, 4).

<sup>99</sup> Interestingly, Chance, at one point, appears to use assimilation, absorption, and passing interchangeably. See *id.* at 175-76.

<sup>100</sup> See discussion *infra* notes 107-21 and accompanying text.

the *criollos* deputies campaigned to eliminate distinctions between *españoles* and *criollos*.<sup>101</sup> These representatives, while willing to concede nominal equality to Indians and *mestizos*, hotly debated whether *castas*, particularly Afro-*castas*, should be treated as equals and included when determining apportionment of representation for the colony.<sup>102</sup>

The initial equality decree issued October 15, 1810 excluded blacks and *mulattoes*, but the 1811 draft is more subtle, differentiating between the status of *Spaniards* and *citizens*.<sup>103</sup> Although Indians, *mestizos*, and Afro-*castas* were declared *Spaniards*, citizens, like *criollos*, were defined as: “Spaniards who on both sides trace their ancestry to the Spanish dominions of both hemispheres [Europe and America],” effectively excluding persons with any African ancestry.<sup>104</sup> The 1812 Spanish Constitution of Cadiz abolished the *casta* system and accompanying racial laws.<sup>105</sup> *Mestizo* ultimately becomes “a source of pride rather than a stigma” because much of the population was *mestizo*.<sup>106</sup> Yet, *mestizo* did not clearly include Afromexicans.

### III. ANTI-BLACK SENTIMENT IN POST-COLONIAL MEXICO

#### A. AS REFLECTED IN LAWS

Following independence from Spain in 1821, the Sovereign Constituent Congress ordered that official documents no longer classify persons by race.<sup>107</sup> Yet, African slavery, although declining, lingered on until 1829.<sup>108</sup> With the abolition of African slavery, scholars of Spanish America, until very recently seem to “lose all interest” in Afromexicans.<sup>109</sup>

<sup>101</sup> See TIMOTHY E. ANNA, FORGING MEXICO: 1821-1835 51 (1998).

<sup>102</sup> See *id.* at 51-52. One scholar argues that there were ulterior motives in pushing for equality for Indians, the desire to “eliminate the basis for the Indian way of life, communal property holding.” MARK WASSERMAN, EVERYDAY LIFE AND POLITICS IN NINETEENTH CENTURY MEXICO: MEN, WOMEN, AND WAR 105 (2000).

<sup>103</sup> See ANNA, *supra* note 101, at 52. “The decree . . . excluded from equality those persons not ‘derived’ from America or Europe . . . . It did, however, constitute the formal declaration of the equality of all white, Indian, and mestizo Americans with peninsular Spaniards and of the overseas territories with metropolitan Spain.” *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Repression in the United States*, 20 AM. ETHNOLOGIST 583, 586 (1993).

<sup>106</sup> *Id.*

<sup>107</sup> See Moisés González Navarro, *Mestizaje in Mexico During the National Period*, in RACE AND CLASS IN LATIN AMERICA 145, 146 (Magnus Mörner ed., 1965). On September 27, 1822, the Congress implemented the Plan de Iguala. See *id.* at 146 (citing Moisés González Navarro, *Instituciones indígenas en México Independiente*, in MÉTODOS Y RESULTADOS DE LA POLÍTICA INDIGENISTA EN MÉXICO 115-30, 143-65 (1954)).

<sup>108</sup> See Douglas Richmond, *The Legacy of African Slavery in Colonial Mexico*, J. POPULAR CULTURE, Fall 2001, at 1, 11 (noting also that the only exception to the end of African slavery was in Texas, where “Anglo settlers insisted that slaves be utilized.”). Indian slavery was abolished in 1517 due to the efforts of the bishop of Chiapas, Bartolomé de las Casas, although illegal Indian slavery continued. See *id.* at 2.

<sup>109</sup> Magnus Mörner, *Historical Research on Race Relations in Latin America During the National Period*, in RACE AND CLASS IN LATIN AMERICA 214-15. Today, a few historians and anthropologists are trying to piece together the history of Afro-*mestizos* in Mexico. See, e.g., BEYOND BLACK AND RED: AFRICAN-NATIVE RELATIONS IN COLONIAL LATIN AMERICA (Matthew Restall ed., 2005); BEN VINSON & BOBBY VAUGHN, AFROMÉXICO: EL PULSO DE LA POBLACIÓN NEGRA EN MÉXICO (2004); Alfredo Martínez Maranto, *The Afromestizo Population of Coyolillo*, 27 CALLALOO 142 (2004); BENNETT,

Nevertheless, Mexico's laws and customary practices continued to reflect bias against Afromexicans.<sup>110</sup>

In 1826, for example, the Senate of Jalisco, in defining who was Indian, permitted anyone with mixed ancestry, except Afro-*castas*, to be considered Indian.<sup>111</sup> Sometimes non-racial language was used for laws that disproportionately impacted Afro-mestizos and Indians. For example, the initial constitutions in all but two Mexican states restricted the civil rights of domestic servants and illiterates.<sup>112</sup> Afromexicans (and Indians) would be disproportionately represented as either servants or illiterates. Other laws specifically discriminated against Indians.<sup>113</sup>

Between 1895 and 1930, only the 1921 national census contained questions about race, although the 1940 census asked questions about cultural characteristics, which might be considered racial indicators.<sup>114</sup> But racial signifiers appear in marriage records until 1940.<sup>115</sup> Marriage records from 1930-1940 raise interesting questions about the assimilation of Afro-*castas*. During this period people continued to identify and be identified in these records as Afro-*mestizos*.<sup>116</sup> In 1930, for example, 91.3% of persons with acknowledged African ancestry married within their racialized group compared with 75% of whites and 94.6% of people labeled as "pure-blooded Indians."<sup>117</sup> By 1940, 50% of persons with acknowledged African ancestry married within their racialized group. Many Afro-*mestizos* married *mestizo* women.<sup>118</sup> Historian Patrick Carroll speculates that the marriage records show possible economic, but not social mobility for the Afro-*castas*.<sup>119</sup>

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*supra* note 40; LAURA LEWIS, HALL OF MIRRORS: POWER, WITCHCRAFT AND CASTE IN COLONIAL MEXICO (2003); PATRICK J. CARROLL, BLACKS IN COLONIAL VERACRUZ: RACE, ETHNICITY, AND REGIONAL DEVELOPMENT (2d ed. 2001); BEN VINCENT, BEARING ARMS FOR HIS MAJESTY: THE FREE-COLORED MILITIA IN COLONIAL MEXICO (2001); Ted Vincent, *The Blacks Who Freed Mexico*, 79 J. NEGRO HIST. 257 (1994).

<sup>110</sup> See Navarro, *supra* note 107, at 146. "The 1836 'centralista' constitution imposed similar handicaps. Although no such restrictions appeared in the 'federalista' constitution of 1857, in practice little progress was made because despite a decrease in illiteracy the rapid development of peonage impeded the greater part of the indigenous population from actively participating in national life." *Id.* at 146.

<sup>111</sup> See *id.* at 146.

<sup>112</sup> See *id.* The imposition of restrictions for illiterates was delayed for ten to twenty-five years. See *id.* The states of Puebla and San Luis Potosí did not have similar restrictions. See *id.*

<sup>113</sup> Although the use of racial terminology in official documents was legally ended on September 27, 1822, the practice continued in remote or heavily Indian areas until 1832. In other states racial terms appear periodically, especially in records throughout the nineteenth century. See *id.* at 155. In Chiapas, Indians were required to pay a special tribute until 1824. See *id.* Some churches imposed different fees on Indians than on non-Indians. Navarro writes: "cultural distinctions (that is, language, food habits, dress, housing) are currently the best criteria for analyzing Mexican society. It is, however, also possible that some people might belong to one race by some standards and to a different one by others." *Id.*

<sup>114</sup> See *id.* at 150. Navarro admits that "an occasional official source continues to classify population by racial origin." *Id.* at 151.

<sup>115</sup> See *id.* at 150.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.* at 150-51.

<sup>118</sup> See *id.* at 151 (citing *Anuario Estadístico de los Estados Unidos Mexicanos 1939* 122-23 (1941); *Anuario Estadístico de los Estados Unidos Mexicanos 1939* 156 (1943)).

<sup>119</sup> See PATRICK J. CARROLL, BLACKS IN COLONIAL VERACRUZ: RACE, ETHNICITY, AND REGIONAL DEVELOPMENT 120-24 (1st ed. 1991).

Although there is some evidence of anti-black bias in Mexico in the 1930s and 1940s, other anecdotal evidence suggests that any bias was more social than legal.<sup>120</sup> Black baseball players, relegated in the U.S. to segregated teams, could play freely in Mexico during this period. The players reported that they enjoyed freedom of movement and experienced a social standing and well-being they did not have in the United States.<sup>121</sup>

#### IV. WHAT IS A MEXICAN IN THE UNITED STATES 19TH – 20TH CENTURY?

The racial status of Mexicans and Mexican Americans in the United States has been contested throughout the nineteenth and twentieth centuries. This section examines the racing of Mexicans and Mexican Americans, looking first at congressional and public debates in the nineteenth century and court decisions in the late nineteenth century and early twentieth century. Next, I look at how Mexico, in fashioning a national image, responded to its negative image abroad. I end with a brief discussion of the continuing debate over the classification of mixed-race individuals with Mexican ancestry by looking at how they are treated in the U.S. Census.

##### A. CONGRESSIONAL AND PUBLIC DEBATES IN THE NINETEENTH CENTURY

Historian Reginald Horsman argues that the Texas Revolution and the Mexican-American War in the 1840s were catalysts for the “overt adoption of a racial Anglo-Saxonism” in the United States.<sup>122</sup> Thus, it is unsurprising that in public debate during the 1830s and 1840s, the citizens of Mexico were compared unfavorably with white Americans.<sup>123</sup> Influenced by pseudo-scientific racialists and ethnologists, some U.S. politicians blamed the instability in Mexico during this period on its inhabitants, which were characterized as “a mixed inferior race with considerable Indian and some *black blood*.”<sup>124</sup> As the Mexican-American War (1846-1848) drew to a close, congressional debates shifted to whether inhabitants of the territory

<sup>120</sup> See Omar Farouk, *Los Beisbolistas AfroAmericanos En Las Ligas Mexicanas, 1930-1940: Un Refugio Desde La Sociedad “Jim Crow” De Estados Unidos* [AfroAmerican Baseball Players in the Mexican Leagues, 1930-1940: A Refuge from the “Jim Crow” Society of the United States], in EL ROSTRO COLECTIVO DE LA NACIÓN MEXICANA 330 (María Guadalupe Chávez Carbajal ed., 1997).

<sup>121</sup> *Id.*

<sup>122</sup> REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 208 (1981). Mónica Russel y Rodríguez argues that a close examination of the writings by race scientists and ethnologists of the mid-1800s discloses that they were “commenting on the politics and policies regarding Mexico.” Mónica Russel y Rodríguez, *Mexicanas and Mongrels: Policies of Hybridity, Gender and Nation in the US-Mexican War*, 11 LATINO STUDIES J. 49, 55 (2000). “[T]here are clear textual references to science, ethnologies, and travel accounts within the Congressional records.” *Id.* at 59.

<sup>123</sup> See HORSMAN, *supra* note 122, at 109-120.

<sup>124</sup> *Id.* at 210 (emphasis added). “These racial postulates were imposed on Mexicans as mongrels—part-Indian, part-Black, and part-European. The racial terms used to describe Mexicans a century and a half ago were extreme, horrifically negative, virulent, but oddly repetitive. The words ‘degraded,’ ‘mongrel,’ ‘half-breed’ were used endlessly, seemingly absentmindedly to explain and locate the supposed racial inferiority of Mexicans.” Russel y Rodríguez, *supra* note 122, at 60.

taken from Mexico would become U.S. citizens.<sup>125</sup> During the winter of 1847-1848, the Whigs in Congress strongly opposed making the Mexican population U.S. citizens.<sup>126</sup> Race, for some legislators, was a factor mediating against conferring citizenship.<sup>127</sup>

Florida Representative Edward C. Cabell, for example, argued that annexing the Mexican territory meant annexing a population of “*black, white, red, [and] mongrel*.”<sup>128</sup> Representative James Pollock from Pennsylvania opposed taking more Mexican territory because its population was degraded and “every possible shade and variety of color and complexion, from the deep black of the negro, to the shallow white of the Mexican Indian.”<sup>129</sup> Similarly, Representative Columbus Delano, an anti-slavery Whig from Ohio, argued that Mexicans were a “slothful, indolent, ignorant race of beings” because they were “a combination of Spanish, English, Indian and Negro blood.”<sup>130</sup> Still others, like South Carolina Senator John C. Calhoun, characterized Mexicans as “a ‘dead body’—a mixed people who, in time, would create their own demise.”<sup>131</sup>

Proponents of incorporating portions of Mexico and its citizens tended to characterize Mexicans as primarily Indians, linking them to American Indians and to the Indian-removal policies applied to Indians in the United States.<sup>132</sup> Arkansas Senator Ambrose H. Sevier, who twice chaired the Committee on Indian Affairs (26<sup>th</sup> and 29<sup>th</sup> Congresses), “reminded Senator [John Bell of Tennessee] of his own system for the removal of the Indians to the West . . . [Thus,] He did not see any greater difficulty in civilizing and governing the mass of Mexicans.”<sup>133</sup> Initially, it appeared that these arguments prevailed.

The original 1848 Treaty of Guadalupe Hidalgo signed by the President accorded Mexicans the status of “free white person(s)” and granted them citizenship “as soon as possible.”<sup>134</sup> In confirming the treaty following the

<sup>125</sup> Three options were debated in Congress: (1) take over all of Mexico and treat its citizens as colonial subjects; (2) withdraw from Mexico rather than “pollute” the U.S. with the racially mixed Mexican population; and (3) take some land belonging to Mexico, but minimize the number of Mexican citizens to be incorporated as U.S. citizens. Russel y Rodríguez, *supra* note 122, at 61.

<sup>126</sup> “Militarism, the extension of slavery, and the forcible addition of a mongrel race dominated the arguments of Whig orators in Congress.” HORSMAN, *supra* note 122, at 239.

<sup>127</sup> Thus, it is unsurprising that 1848 is “commonly characterized as the year of the ‘war of the races.’” ROBERT J.C. YOUNG, *COLONIAL DESIRE* 120 (1995) (discussing the connection between race, gender, sexuality, and nation).

<sup>128</sup> HORSMAN, *supra* note 122, at 242 (emphasis added).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 240.

<sup>131</sup> Russel y Rodríguez, *supra* note 122, at 62. On January 4, 1848, Senator Calhoun, in a well-known speech, argued against including Mexicans as U.S. citizens, characterizing Mexico’s population as a mixed colored race of largely Indian ancestry. CONG. GLOBE, 30th Cong., 1st Sess. 96-98 (1848) (“Are we to associate with ourselves as equals, companions, and fellow-citizens, the Indians and mixed race of Mexico?”).

<sup>132</sup> Russel y Rodríguez, *supra* note 122, at 65.

<sup>133</sup> CONG. GLOBE, 30th Cong., 1st Sess. 299 (1848). Sevier was not worried about conferring the franchise on Mexicans incorporated into the United States, saying that: “he did not know that the Mexicans would gain it from the Constitution. The Indians had not gone up to vote that he knew of.” Russel y Rodríguez, *supra* note 122, at 65.

<sup>134</sup> Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., Feb. 2, 1848, 9 Bevans 791 n.11 (giving the original text of Art. IX).

debates, Congress changed the language on conferral of citizenship to “at the proper time” as determined by Congress.<sup>135</sup> The extent to which the former citizens of Mexico were treated as white “was deferred to each state’s constitution and pervasive social practices of racialization.”<sup>136</sup>

#### B. FORMATION OF NATIONAL IDENTITY AND MEXICO’S CONCERN ABOUT ITS IMAGE ABROAD

The Mexican leadership was very aware of its image abroad. In 1867, Benito Juárez, upon returning to power, referred to Mexico as “a state protected by the law of people . . . not ‘a voluntary association of thieves and pirates’ organized for its own particular good. Thus, Mexico can distinguish itself perfectly from ‘wandering savage hordes’ because it constitutes a resolute civil society. . . .”<sup>137</sup> In 1869 Ignacio Altamirano, editor of the publication *El Renacimiento*, proposed the use of the arts to counter Mexico’s negative image abroad.<sup>138</sup> Art historian Stacie Widdifield concludes: “Picturing national history required negotiating between an assertive posture on the one hand and a defensive posture on the other.”<sup>139</sup> A call to use the arts to change foreign impressions of Mexico is repeated once again in a lengthy editorial published by *El Siglo XIX* in May 1874. The editorial entitled *Exposición americana de 1876, su importancia para México* [*The American Exposition of 1876: Its Importance for Mexico*], acknowledges that foreign countries view Mexico and its citizens as “ignorant, vicious, and brutish.”<sup>140</sup> The editorial writer argues that Mexico’s presence at the Philadelphia Exposition would be “an ideal place to re-establish Mexico’s honor in the international arena.”<sup>141</sup>

In crafting its national image, Mexico “actively calculated blacks’ disappearance from the nation while centering mestizos and Indians in it.”<sup>142</sup> The symbolic elevation of Mexico’s indigenous people accompanied

<sup>135</sup> Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922, 930 (providing amended text).

<sup>136</sup> Russel y Rodríguez, *supra* note 122, at 54. For a more detailed discussion of this point see *The Treaty of Guadalupe Hidalgo (1848)*, in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 260-75 (Juan F. Perea et al. eds., 2000).

<sup>137</sup> WIDDIFIELD, *supra* note 52, at 32.

<sup>138</sup> *Id.* at 41. “[T]he cultivation of the arts could effectively dispel the cruel image created by foreigners (especially by French writers) of Mexico as backward and uncivilized.” *Id.* “The enemy had become the image that foreigners had created of Mexico . . . All Mexicans, no matter what their political position, were encouraged to join together in this virtuous and civilized pursuit of culture to ward off the enemy.” *Id.* Altamirano continues:

[I]t was the enemy’s image of Mexico that was also at issue. . . . “[T]he defense of the noble Mexican people, despicably outraged, indignantly described as uncivilized in their vengeance, unrecognized in their sacrifices, condemned before humanity.” It was a gesture aimed at correcting the biased views of Europeans, whose knowledge of the events of the past two decades conjured up images of Mexicans as consummately inhumane.

*Id.* at 42.

<sup>139</sup> *Id.* at 45-46.

<sup>140</sup> *Id.* at 67.

<sup>141</sup> *Id.*

<sup>142</sup> Laura A. Lewis, *Blacks, Black Indians, Afromexicans: The Dynamics of Race, Nation, and Identity in a Mexican Moreno Community (Guerrero)*, 27 AM. ETHNOLOGIST 898, 903 (2000) (citing JACQUES LAFAYE, QUETZALCOATL AND GUADALUPE: THE FORMATION OF MEXICAN CONSCIOUSNESS (1976)). “In the late-18th century exiled Jesuit Francisco Javier Clavijero’s defense of Indians from European

by the simultaneous rejection of Mexico's African roots is apparent in an early twentieth century book, *La Raza Cómica (The Cosmic Race)*, a classic written by revolutionary essayist José Vasconcelos. In his book, Vasconcelos, while promoting the idea of "constructive miscegenation"—*mestizaje*—defined as the mixing of whites and Indians, also promotes "the idea that the 'Negro race' would vanish from the Mexican social body."<sup>143</sup>

To accomplish these twin goals, Mexico's ruling elite, like their neighbors to the north and south, sought to *whiten* its population during the nineteenth century by encouraging European immigration and prohibiting immigration by Asians and blacks.<sup>144</sup> At the same time, the Aztec became an important national symbol of rehabilitating the image of indigenous people. In 1896, Antonio Martínez de Castro, Minister of Justice in the Juárez administration, fostered a nationalist narrative that incorporated Mexico's pre-colonial, colonial and post-colonial culture,<sup>145</sup> using Indianism as a component of Mexican nationalism. As a result, Moisés González Navarro writes:

The Revolution rehabilitated the image of the Indian, to a degree sometimes approaching demagogy . . . . the exact opposite of Dr. Mora's mid-nineteenth century plan for the population of the country by white foreigners who should be given preference over the "colored" races in everything that did not constitute a "clear violation of justice."<sup>146</sup>

Arguably, the rehabilitation of the indigenous population in Mexico is not necessarily inconsistent with that country's encouragement of European migration; both are components of a Latin American type of nationalism. Nationalism, "the identity of the majority of people within a nation-state with the republic, nation, or national society as the primary reference group,"<sup>147</sup> often uses a variety of symbols to achieve unity. Mexico's acknowledgment of its Indian roots was an essential step in the development of an internal oneness that could accommodate the vast race-like differences developed and encouraged by colonial rule. *Mestizaje* with the African roots erased becomes the vehicle to accommodate these differences.<sup>148</sup>

As Arlene Torres and Norman Whitten write, Indianism or *Indigenismo* is a component of *mestizaje*, "the ideology of racial intermingling."<sup>149</sup>

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racism or his rejection of the 'vile Black slave and his descendants' from his image of the Mexican nation." *Id.*

<sup>143</sup> *Id.* at 903 (citing NANCY LEYS STEPAN, 'THE HOUR OF EUGENICS': RACE, GENDER AND NATION IN LATIN AMERICA 150 (1991); JOSÉ VASCONCELOS, LA RAZA CÓSMICA: MISIÓN DE LA RAZA IBEROAMERICANA 30 (1925)).

<sup>144</sup> See Navarro, *supra* note 107, at 158; see generally MINORITY RIGHTS GROUP, NO LONGER INVISIBLE, AFRO LATIN AMERICANS TODAY 170 (1995).

<sup>145</sup> See WIDDIFIELD, *supra* note 52, at 39.

<sup>146</sup> Navarro, *supra* note 107, at 154.

<sup>147</sup> Arlene Torres & Norman E. Whitten, Jr., *General Introduction: To Forge the Future in the Fires of the Past: An Interpretive Essay on Racism, Domination, Resistance, and Liberation*, in 2 BLACKNESS IN LATIN AMERICA, *supra* note 7, at 7.

<sup>148</sup> "Nationalist ideologies develop [among other things,] . . . symbols of internal 'oneness' based on concepts of 'racial classification' . . ." *Id.*

<sup>149</sup> The concept of Indianism has two conflicting aspects:

*Mestizaje* and *blanqueamiento*<sup>150</sup> are two “complementary . . . nationalist ideolog[ies] of racial culture.”<sup>151</sup> Thus, Mexico’s policy of ennobling its indigenous population while simultaneously encouraging European migration is not inconsistent with the creation of a single national identity. One can see the impact of this quite clearly in *In re Rodriguez*,<sup>152</sup> a U.S. naturalization case.

In 1896 Ricardo Rodriguez appeared before a Texas federal district court considering his petition for naturalization.<sup>153</sup> Two lawyers, A. J. Evans and T. J. McMinn, also appeared in court to challenge Rodriguez’s application, arguing that since Rodriguez was neither white nor black (African or of African descent), he was ineligible for United States citizenship.<sup>154</sup> Naturalization was restricted to whites until 1870,<sup>155</sup> when the statute was broadened to include persons of “African nativity, and to persons of African descent.”<sup>156</sup>

In trying to determine whether Rodriguez met the racial criteria for naturalization, counsel asked him a series of questions:

Q. Do you not believe that you belong to the original Aztec race in Mexico?

A. No, sir.

Q. Do you belong to the aborigines or original races of Mexico?

A. No, sir.

Q. Where did your race come from? Spain?

A. No, sir.

Q. Where did your race come from?

A. I do not know where they came from.<sup>157</sup>

Rodriguez testified that he was born in Ojueles, Mexico of Mexican parents who told him he was Mexican. He stated that he was a “*pure-blooded Mexican*, having neither Spanish nor African blood in him.”<sup>158</sup> His challengers, Evans and McMinn, describe the population of Mexico as:

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[O]n the one hand, a search for the creative dimensions of nationalism through the symbolism of an indigenous past and, on the other hand, [it is] a social-political-literary symbol that conveys the mood of remorse over the living conditions of contemporary ‘acculturated Indians. . . . Indeed, *indigenismo* may be thought of as a key support for the exclusion of contemporary native peoples from nation-state affairs.

Torres & Whitten, *supra* note 147, at 7 (citations omitted). Further discussion of this point is beyond the scope of this article.

<sup>150</sup> *Blanqueamiento* means whitening. See Torres & Whitten, *supra* note 147, at 7.

<sup>151</sup> Torres & Whitten, *supra* note 147, at 7.

<sup>152</sup> *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897).

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

<sup>155</sup> See Naturalization Act of 1790, 1 Stat. 103 (1790).

<sup>156</sup> *In re Rodriguez*, 81 F. at 348.

<sup>157</sup> *Id.* at 338.

<sup>158</sup> Amicus Curiae Brief of Floyd McGown, *In re Rodriguez*, 81 F. at 345 (emphasis added).

compris[ing] about six million Indians of unmixed blood, nearly one-half of whom are nomadic savage tribes of the mountain districts of the north; about five million whites or creoles, chiefly descended from the early Spanish colonists; perhaps *twenty-five thousand Africans or hybrids, possessing some negro blood*, whether mixed with the European or the Indian element; and the Mestizos, or half-breeds, derived from the union of the whites and Indians.<sup>159</sup>

Since naturalization was racially restricted to whites,<sup>160</sup> a socially constructed category, the court had to determine whether a self-described Mexican national who was neither Spanish nor African was eligible for U.S. citizenship.<sup>161</sup> Noting that Rodriguez “has dark eyes, straight, black hair, chocolate brown skin, and high cheek bones,”<sup>162</sup> the court concluded that he was an Indian and thus, if “the strict scientific classification of the ethnologist should be adopted, he would probably not be classed as white.”<sup>163</sup> Martha Menchaca argues that Paschal’s questioning of Rodriguez was designed to demonstrate to the court that “he no longer identified himself as Indian.”<sup>164</sup> A Mexican national has only a national identity because race or caste designations have no meaning under Mexican law.

In defense of Rodriguez’s naturalization petition, T.M. Paschal argued that the federal government, by treaty,<sup>165</sup> had agreed that Mexicans remaining in the ceded territory could become U.S. citizens.<sup>166</sup> Thus, someone like Rodriguez of apparent Indian ancestry should be considered white for naturalization purposes since federal law restricted naturalization to white persons.<sup>167</sup> The court accepted Paschal’s reasoning.<sup>168</sup> Rodriguez’s

<sup>159</sup> Amicus Curiae Brief of A. J. Evans, *In re Rodriguez*, 81 F. at 346-47 (emphasis added) (quoting AMERICAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE (Charles A. Dana & George Ripley eds., 1881(1876)).

<sup>160</sup> For a discussion of the white-only naturalization policy and its legacy, see Enid Trucios-Haynes, *Latino/as in the Mix: Applying Gotanda’s Models of Racial Classification and Racial Stratification*, 4 ASIAN L.J. 39 (1997); Enid Trucios-Haynes, “Family Values” 1990s Style: U.S. Immigration Reform Proposals and the Abandonment of the Family, 36 BRANDEIS J. FAM. L. 241 (1997); Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369 (1997); Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185 (1998).

<sup>161</sup> For discussions of U.S. immigration policy toward Mexicans, see AT THE CROSSROADS: MEXICAN MIGRATION AND U.S. POLICY (Frank D. Bean et al. eds., 1997); Luis Herrera-Lasso, *The Impact of U.S. Immigration Policy on U.S.-Mexico Relations*, 3 UCLA J. INT’L L. & FOREIGN AFF. 357 (1999); Gilberto Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66 (1975); Gabriele A. Gallegos, Comment, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 CAL. L. REV. 1729 (2004).

<sup>162</sup> See Amicus Curiae Brief of Floyd McGown, *supra* note 158, at 345.

<sup>163</sup> Amicus Curiae Brief of Floyd McGown, *supra* note 158, at 349. In all probability, Ricardo Rodriguez was *mestizo*—of mixed racial ancestry.

<sup>164</sup> Menchaca, *supra* note 105, at 595-96. The U.S. government did not formally extend naturalization to all Mexicans until 1940 with the Passage of the Nationality Act of 1940, Pub. L. No. 76-853, § 303, 54 Stat. 1137, 1140 (1940). See also Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 281 (1996).

<sup>165</sup> At that time, the Treaty of Guadalupe Hidalgo had been “rescinded, under notice by Mexico.” Amicus Curiae Brief of T.M. Paschal, *In re Rodriguez*, 81 F. 337, 339 (W.D. Tex. 1897).

<sup>166</sup> See *id.*

<sup>167</sup> See *id.* at 342 (arguing against the court adopting a “hairsplitting, technical, and meaningless consideration of who are meant by ‘white people’”).

<sup>168</sup> See *In re Rodriguez*, 81 F. at 349 (Maxey, J.) (stating that it is not “deemed material to inquire what race ethnological writers would assign [Rodriguez]” as long as “he falls within the meaning and intent

refusal to be classified as white, black or Indian reflects the ambivalence of Mexicans generally to define themselves in racial terms.<sup>169</sup>

### C. MEXICANOS AND THE U.S. CENSUS

Prior to 1930 the United States Census, reflecting, no doubt, the reasoning of the judge in the *Rodriguez* case, classified persons of Mexican ancestry as white for census purposes.<sup>170</sup> Nevertheless, “Mexicans, due [to] the presence of indigenous blood, were widely considered a distinct race, both within and outside the United States.”<sup>171</sup> In 1930, the U.S. Census introduced a “Mexican” category.<sup>172</sup> The census enumerator's instructions for that census read:

Mexicans—practically all Mexican laborers are of a racial mixture difficult to classify, though usually well recognized in the localities where they are found. In order to obtain separate figures for this racial group, it has been decided that all persons born in Mexico, or having parents born in Mexico, who are definitely not white, Negro, Indian, Chinese, or Japanese, should be returned as Mexican (“Mex”).<sup>173</sup>

A press release in 1931 said that the Mexican category was added to the census classifications “in response to massive Mexican immigration in the 1920s.”<sup>174</sup>

Prior to the Mexican Revolution in 1889, the small number of Mexicans who migrated to the United States were “presumed to be of Spanish descent, and thus white.”<sup>175</sup> One scholar argues that nativism, combined with “racialized thinking,” triggered “anxiety over

of the law, his application should be granted, notwithstanding the letter of the statute may be against him”).

<sup>169</sup> See Felipe H. Lopez, *Race, Gender, and Sexuality: The Construction of Mexican Identity*, 54 RUTGERS L. REV. 989, 997 (2002) (citing Richard Rodriguez, *The Strong Man is Unmasked as Everyman*, L.A. TIMES, Feb. 19, 1995, at M1). Lopez cites to a contemporary work by anthropologist Barbara Margolies, who reports that some Mexicans in a community she studied “do not see themselves as more indigenous, but rather as more white. One of her informants states, ‘We Mexicans are more like the white race than any other race, but we are all Mestizos.’” *Id.* at 994 (citing BARBARA LUISE MARGOLIES, PRINCES OF THE EARTH: SUBCULTURAL DIVERSITY IN A MEXICAN MUNICIPALITY 140-141 (1975)).

<sup>170</sup> See MELISSA NOBLES, SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS 72 (2000) (citing U.S. BUREAU OF THE CENSUS, *Instructions to Enumerators RG 29*, in 2 SCRAPBOOKS 26 (National Archives, Washington, D.C. 1930)).

<sup>171</sup> James Henson, *The Color of Money: Race, Ideology, and Foreign Enterprise in Post-Revolutionary Mexico*, SINCRONÍA (Summer 1999), available at <http://fuentes.csh.udg.mx/CUCSH/Sincronia/henson.htm> (citing FREDERICK B. PIKE, THE UNITED STATES AND LATIN AMERICA: MYTHS AND STEREOTYPES OF CIVILIZATION AND NATURE 221-24 (1992)).

<sup>172</sup> See NOBLES, *supra* note 170, at 73.

<sup>173</sup> *Id.* at 72.

<sup>174</sup> *Id.* at 73 (citing U.S. BUREAU OF THE CENSUS, POPULATION OF THE UNITED STATES BY COLOR OR RACE RG-29, Form 15-1927 (National Archives, Washington, D.C. 1931)).

<sup>175</sup> *Id.* Officials in both the United States and Mexico estimate that “nearly 500,000 Mexicans legally entered” the country between 1889 and 1928. *Id.* (citing FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S 7 (1995)). Demographer Melissa Nobles speculates that the government created the Mexican census category because of the large number of migrants “with the intent of counting them separately, [because] larger numbers of them were necessarily defined as ‘racially mixed,’” and did not fit neatly within the traditional “white/non-white, pure/impure dichotomy.” *Id.* (citing Peggy Pascoe, *Miscegenation Law, Court Cases, and the Ideologies of “Race” in Twentieth-Century America*, 83 J. AM. HIST. 44, 51 (1996)).

immigration.”<sup>176</sup> This anxiety is reflected in a May 1922 editorial in the *Chicago Daily Tribune* characterizing Mexicans as physically inferior, illiterate, having a low standard of living and possessing “an inherent . . . tendency to political ‘turmoil.’”<sup>177</sup> Invoking race more directly, the editorial continues: “America finds herself today in the strange position of excluding white Europeans and admitting brown men from Mexico. . . . Unless the bars are put up, every American City, within a few years, will have its Mexican slum.”<sup>178</sup> Perhaps the view of Mexicans as racially distinctive, coupled with white Americans’ unease with the increased migration of Mexicans into the United States, explains the separate census category.

The separate Mexican category was dropped after the 1930 census “because of political complications resulting from what might be termed an accidental circumstance” which Leon Truesdell, the chief statistician for population and drafter of the advisory committee’s memorandum for the 1940 census, did not specify in the memorandum.<sup>179</sup> These “political complications” probably refer to the lobbying efforts of both the Mexican government and Mexican Americans “against the continuance of the ‘Mexican’ category.”<sup>180</sup> The introduction of the Mexican category on the census also coincided with the “forced repatriation of nearly 400,000 Mexicans and Mexican Americans from the Southwest in the 1930s.”<sup>181</sup> Whether related or not, the change in the census policy suggests some invidious intent.<sup>182</sup>

Clearly, the message conveyed by the special census category was that Mexicans, while not black, were not white. From 1940 until 1970, the census classified Mexicans as white.<sup>183</sup> Today, the U.S. Census classifies

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<sup>176</sup> Henson, *supra* note 171.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> NOBLES, *supra* note 170, at 73-74 (quoting U.S. BUREAU OF THE CENSUS, GENERAL MEMORANDUM ON CHANGES UNDER CONSIDERATION FOR THE 1940 CENSUS OF POPULATION (National Archives, Washington, D.C., n.d.)).

<sup>180</sup> *Id.* at 74 (citing Harvey M. Choldin, *Statistics and Politics: ‘The Hispanic Issue’ in the 1980 Census*, 23 DEMOGRAPHY 403, 408 (1986)).

<sup>181</sup> *Id.*

<sup>182</sup> *See id.*

<sup>183</sup> *See id.* at 74 n.136 (stating that the Hispanic question is separate from the race question on the Census, but this claim is questionable). According to the Office of Management and Budget, the operational definition of “Hispanic” is: “A person of Cuban, Mexican, Puerto Rican, Cuban, South or Central American or other Spanish culture or origin, regardless of race.” *Id.* (quoting Office of Mgmt. & Budget, Statistical Directive No. 15, 43 Fed. Reg. 19,269-70 (May 12, 1977), available at <http://www.whitehouse.gov/omb/fedreg/ombdir15.html>). This change from white to Hispanic has been criticized. Some critics argue that the Hispanic category is misleading or imprecise because it “combines colonized natives and their offspring, foreigners and political refugees under one ethnic umbrella.” Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as’ Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 103 (1998). Gloria Sandrino-Glasser writes: “The [Hispanic] label deprives all Latin Americans of their national identities, which, though they have been used to develop racist stereotypes, are less likely to create the presumption of racial distinction. In my view, the fact that the heterogeneity of the Hispanic population is generally not taken into account, contributes to its assuming a racelike character in social, scientific and everyday discourse that strengthens the development of racist stereotypes.” *Id.* at 103 (citing Martha E. Gimenez, *U.S. Ethnic Politics: Implications for Latin Americans*, 19 LATIN AM. PERSP. 7, 15 (1992)).

Mexican Americans as “Hispanic,” an ethnic group.<sup>184</sup> Individuals checking this category also have six racial options: “American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, White, or some other race.”<sup>185</sup>

Steven Bender, another LatCrit scholar, writes about the racial implications of the Hispanic category even without the racial options. According to Bender, the “Hispanic” designation is controversial because it reflects a “return to [the] philosophy of Mexican positivists at the turn of [the twentieth] century who wanted to purge indigenous Mexicans and convert Mexico into [a] European Spanish nation.”<sup>186</sup> Bender’s claim bears closer examination because it has direct implications on the alleged erasure of Afro-*mestizos* in Mexico and contemporary scholars’ invocation of Mexican *mestizaje*.

## V. CONTEMPORARY ANTI-BLACK BIAS

### A. IN MEXICO

Almost thirty-five years ago historian Leslie Rout, Jr. wrote:

[T]here probably are many persons of Afro-Indian blood in Mexico, but because it is better to be Indian than Negroid, the latter is ignored. . . . the Indian remains the officially recognized sufferer from oppression, and there is no desire either to add another group to this category, or delve into the issue of African cultural contributions.<sup>187</sup>

More recently another historian, Colin A. Palmer, conceded that a racial hierarchy exists in contemporary Mexico based on skin color, “with white the higher value[,] as opposed to those who are brown[,] and those, God forbid, who are black.”<sup>188</sup>

The noted Mexican anthropologist Gonzalo Aguirre Beltrán began to document the existence of Afromexicans in the 1940s.<sup>189</sup> He writes that despite a general consensus that Afromexicans have become integrated into Mexican society so completely that it is difficult for the layperson to

<sup>184</sup> See Office of Mgmt. & Budget, Directive No. 15, 62 Fed. Reg. 58,782 (Oct. 30, 1997), available at <http://www.whitehouse.gov/omb/fedreg/ombdir15.html> (noting that the new standard will be used by the Census Bureau in the 2000 decennial census).

<sup>185</sup> *Id.* The Census Bureau also gave respondents the option to check a box labeled “some other race.” See ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS 2000 BRIEF 10 tbl.10 (2001) (giving the percentages of self-described Hispanics/Latinos who define themselves racially as white (47.9%), black (2.0%), “some other race” (42.2%), and “two or more races” (6.3%). The Census Bureau categorized persons who wrote in “Mexican” (or any other nationality) in their race category as “[s]ome other race.” *Id.* at 2.

<sup>186</sup> Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1027 n.6 (1996) (citing RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS ix-xii (3d ed. 1988)).

<sup>187</sup> LESLIE B. ROUT, JR., THE AFRICAN EXPERIENCE IN SPANISH AMERICA: 1502 TO THE PRESENT DAY 282 (1976).

<sup>188</sup> Anthony DePalma, *Racism? Mexico’s in Denial*, N.Y. TIMES, June 11, 1995, §4, at 4.

<sup>189</sup> See, e.g., Beltrán, *supra* note 37; Gonzalo Aguirre Beltrán, *The Integration of the Negro into the National Society of Mexico*, in RACE AND CLASS IN LATIN AMERICA 11 (Magnus Mörner ed., 1970) [hereinafter Beltrán, *Integration*].

recognize them, distinct Afromexican communities exist and their inhabitants are racially distinctive.<sup>190</sup> Despite Mexico's nationally constructed identity as raceless and casteless, Beltrán writes, "Afromexicans in these communities have not integrated themselves into the national society."<sup>191</sup>

Recent scholarship in this area partially supports Beltrán's claim. For example, today some Afromexicans who call themselves *morenos*, signifying a mixture of African and Indian ancestry, occupy the middle socioeconomic stratum in Mexico's Costa Chica region.<sup>192</sup> Although *morenos* acknowledge their African roots, they strongly identify as Indians (*indio*) whom they view as the "authentic Mexicans."<sup>193</sup>

Ethnographer Laura Lewis, however, discounts Beltrán's earlier conclusion that some *morenos* have remained culturally distinct, never "blending" into the national identity as "Mexicans."<sup>194</sup> Lewis argues that because *morenos* closely identify as "'Indians' in order to nationalize themselves" and since Indians are important Mexican national icons, whereas blacks and blackness are not, *moreno* distinctiveness does not stem from their Africanness.<sup>195</sup> But this reasoning seems to undercut her conclusion. Further, Lewis concedes that Afromexicans are not a monolithic group "in terms of experience and identity."<sup>196</sup>

She concludes, however, that *morenos* in what scholars classify as "the seat of Afromexican culture" do not think that heightened black consciousness is useful to them.<sup>197</sup> *Morenos* reason that "[o]ne cannot ... be black and also be Mexican. Since whites reject blackness, alliances with Indians achieved through consciousness and understandings of historical experience remain the only viable option."<sup>198</sup> Her explanation is consistent with critiques of *mestizaje* as erasing, marginalizing, or essentializing blacks in a country with a history of African slavery. It does not necessarily follow that *morenos* who acknowledge their African roots are not distinctive from other Mexicans as a result.

In fact their reluctance to identify with their African roots reflects the continued anti-black sentiment in this area. Comments about *morenos* by Indigenous and *mestizo* people in that area reflect the messages from the

<sup>190</sup> See BELTRÁN, *supra* note 40, at 277-78; Beltrán, *Integration*, *supra* note 189, at 12. See also Joaquin Roncal, *The Negro Race in Mexico*, 24 HISP. AM. HIST. REV. 530 (1944).

<sup>191</sup> See Beltrán, *Integration*, *supra* note 189, at 14.

<sup>192</sup> See Lewis, *supra* note 142, at 899-903. The Costa Chica region starts in an area southeast of Acapulco and runs down the coast of Oaxaca. The area runs inward from the Pacific Coast to the Sierra Madre del Sur mountain range. The other racialized groups living in this area are "socially classified" as *mestizo*, who occupy the uppermost stratum, and indigenous people, primarily Mixtec and Amuzgo speakers, who occupy the lowest socio-economic stratum. See *id.* at 903.

<sup>193</sup> See *id.* at 899. Lewis writes: "When asked what *moreno* means, *morenos* respond that they have 'mixed blood' (*sangre mezclada*) with Indians. Sometimes they even explicitly distinguish themselves from blacks by referring to themselves as 'black Indians' (*indios negros*) or 'Indian blacks' (*negros indios*). *Id.* at 909-10.

<sup>194</sup> See *id.* at 901-02.

<sup>195</sup> *Id.* at 899.

<sup>196</sup> *Id.* at 917.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

*castas* paintings. *Morenos*, most often called negro by Indigenous and *mestizo* people are characterized as “intrinsically violent and impulsive,” “bad people,” “unable to handle money,” and “unwilling to work or study hard.”<sup>199</sup> Lewis notes the irony of these remarks given the middle socio-economic status of *morenos* in the region.<sup>200</sup>

As mentioned at the beginning of this article, contemporary stories suggest that anti-black bias remains deeply embedded in Mexican society. The statements of President Fox and the Memín Pingüín stamps are not abhorrent. While anti-black racism is more subtle in Mexico than in the United States, a stigma continues to attach to blackness. In 1995, the *New York Times* ran a story about racism in contemporary Mexico.<sup>201</sup> The story stated that although the Mexican Constitution guarantees all citizens equality under the law,<sup>202</sup> like the United States, Mexico remains divided along racialized lines.<sup>203</sup> The story continues that discrimination is more apparent for Indigenous peoples and other Mexicans with Indian features and dark skin.<sup>204</sup> This quasi-racial discrimination also extends to persons with African ancestry. The *New York Times* article reports: “A recent commercial on national television featured a dark-skinned man in a white tuxedo telling viewers that at Comex, a Mexican paint company, ‘they’re working like n\*\*\*\*\* to offer you a white sale.’”<sup>205</sup>

During the hotly contested 2001 election for governorship of the Michoacán State, opponents of Senator Lázaro Cárdenas (Batel), the son and grandson of two “beloved” Mexican leaders, focused on the fact that Cárdenas’s wife, Mayra Coffigny, is an Afro-Cuban, once they sensed that they were losing.<sup>206</sup> Michoacán has a largely indigenous population, but according to one voter, “It is one thing to be brown. The black race is something different.”<sup>207</sup> Mexican scholar José Antonio Crespo admits that there is open prejudice toward Mexicans with obvious African features.<sup>208</sup> Nevertheless, most Mexicans continue to deny that there is a race

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<sup>199</sup> *Id.* at 905.

<sup>200</sup> *See id.*

<sup>201</sup> *See DePalma, supra* note 188.

<sup>202</sup> *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, tit. 1, art. 1, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). The first full guarantee of equality did not appear until the Republic’s 1857 Constitution which contained a bill of rights guaranteeing individual liberties. WIDDIFIELD, *supra* note 52, at 19. The first constitution of the Republic in 1824 was less inclusive. *See supra* notes 101-06 and accompanying text.

<sup>203</sup> *See DePalma, supra* note 188.

<sup>204</sup> *See id.* In Mexico today, “it is the degree of Indianness, or darkness of brown skin, that determines status. Many Mexicans living in the cities rely on hair dyes, skin lighteners and blue or green contact lenses to appear more white or European and less Indian.” *Id.* The reporter claims that some of the most exclusive restaurants in Mexico City routinely refuse service to Mexicans with Indian features under the guise of prohibiting the entry of servants and drivers. *See id.*

<sup>205</sup> *Id.* The article continues: “Such ‘expressions’ pop up in a commercial for packaged toast that features a black baker boasting that his skin color gives him the expertise to recognize the right shade of toast. Aunt Jemima pancake mix goes by the brand name ‘La Negrita’ here.” *Id.*

<sup>206</sup> *See* Ginger Thompson, *Race Strains a Mexican Campaign*, N.Y. TIMES, Nov. 11, 2001, §1A, at 10.

<sup>207</sup> *Id.*

<sup>208</sup> *See id.* *See also* S. Lynne Walker, *Cardenas Victory at the Polls Energizes Leftist PRD*, SAN DIEGO UNION-TRIB., Nov. 13, 2001, at A12. Despite the racist attack, Senator Lázaro Cárdenas Batel was elected governor. *See id.* *See also* Ricardo Sandoval, *Mexico’s PRI Struggles to Find a New Identity*, DALLAS MORNING NEWS, Nov. 16, 2001, at 12A.

problem.<sup>209</sup> Unfortunately, some Mexicans bring this anti-black bias with them when they immigrate to the United States.

## B. MEXICAN AMERICANS

Whether the anti-black sentiment from Mexico combined with the anti-black sentiment in the United States impacts Mexican Americans' attitudes towards Black Americans is unclear. In the United States today, a little less than one-fifth of Latino/as marry non-Latina/os, and most of these non-Latina/os are white.<sup>210</sup> Barbara Renaud González writes:

Less than 3 percent of Latinos dare to marry into black families. Think of the *escándalo* [scandal] and what the neighbors will say. Young Latinas [are] absolutely – *vale más que no* – prohibited from dating black men. If you date one, you might as well announce to the world that you are a you-know-what. And no decent Latino will ever want you again.<sup>211</sup>

In 1997 Rachel Moran wrote about the debate over the positionality of Latina/os in the United States.<sup>212</sup> One question is whether Latina/os will serve as a buffer group between whites and blacks, a mediator in race relations, or whether they will ally themselves with whites, contributing to the further racial isolation and alienation of blacks.<sup>213</sup> Recent events suggest Latina/os, and Mexican Americans in particular, are choosing the latter approach despite the fact that some scholars estimate that almost “a quarter of a million [Afro-Mexicans] live here.”<sup>214</sup> Anecdotal evidence suggests that Afro-Mexicans who are more phenotypically “black” are alienated from other Mexican Americans.<sup>215</sup>

Further, coalitions between blacks and Mexican Americans are difficult to create. Black political activist Jesse Jackson's op-ed piece in the *Chicago Sun Times* states:

[R]acial tension between Hispanics and African Americans can be easily sparked. We are disproportionately poor. We struggle for low-paying jobs and scarce low-income housing. Our children must survive mean streets often divided by gangs organized along lines of race. Our leaders compete for political office and political power. Division is easy to sow; unity is hard to build.<sup>216</sup>

<sup>209</sup> See Thompson, *supra* note 206.

<sup>210</sup> See U.S. CENSUS BUREAU, CENSUS 2000, TABLE PHC-T-19, HISPANIC ORIGIN AND RACE OF COUPLED HOUSEHOLDS (2003), available at <http://www.census.gov/population/cen2000/phc-t19/tab01.pdf> (detailing married couples' racial and ethnic breakdown). Hispanic women of all races married non-Hispanic men 17.7% of the time; Hispanic men of all races married non-Hispanic women 15.3% of the time. See *id.* See also Barbara Renaud González, Opinion, *Blowing the Lid on Dark Secret in Mexico's Past: How Many Mexicans Qualified for the Million Man March?*, KANSAS CITY STAR (Mo.), Oct. 20, 1995, at C5. “For many families, [marrying a white person] is the ultimate. This is almost as good as getting a college degree. ‘Ay, que bonitos niños vas a tener.’ (What beautiful children you are going to have).” *Id.*

<sup>211</sup> González, *supra* note 210.

<sup>212</sup> See Rachel F. Moran, *Neither Black nor White*, 2 HARV. LATINO L. REV. 61, 76 (1997).

<sup>213</sup> See *id.*

<sup>214</sup> Hernández, *supra* note 31, at 1544-45.

<sup>215</sup> See *id.* at 1546-47.

<sup>216</sup> Jesse Jackson, *Racist Humor No Laughing Matter*, CHICAGO SUN TIMES, July 12, 2005, at 41 (commenting on the Memín Pingüín stamps issued by the Mexican government).

## VI. REFLECTIONS AND RECOMMENDATIONS

LatCrit theory distinguishes itself from Chicana/o Studies and critical legal movements by focusing on the commonalities of persons who trace their ancestry to Latin America.<sup>217</sup> Formulating a different approach was necessary, according to Francisco Valdés, because the earlier movements were “analytically incomplete due to excessive focus on one or another construct -- gender, race, sexuality -- and a lack of attention to their legal and social interplay.” The weakness in each resided in an essentializing failure to elucidate the sometimes covert, always complex, but nonetheless fundamental interdependence of sexism, racism, and homophobia in the construction and practice of social and legal subordination by, within, and between various identity categories.”<sup>218</sup>

However, focusing on common experiences of Latina/os carries with it the potential to overlook or marginalize the subordinating experience of minority groups, such as Afromexicans, or powerless majorities, such as the indigenous people in Mexico.<sup>219</sup> This unintended consequence is apparent in the writings of some LatCrits. For example, Guadalupe Luna writes that the U.S. government’s classifying people of Mexican descent as white presents analytical differences, especially since “the mestizo ancestry of . . . Mexicans placed them in ambiguous social and legal positions.”<sup>220</sup> She illustrates this point by looking at the jurisprudence involving Mexican Americans defending their property interests following the conquest by the United States of the former Mexican provinces in 1848. Professor Luna touches briefly on the fact that Mexicans or Mexican Americans and Latino/as are raced as indigenous people, but does not mention that some Latino/as (and Mexican Americans) are raced as black.

Similarly, George Martinez explains the white legal classification conferred on Mexican Americans as an example of how racialized groups United States become legally white by the political process.<sup>221</sup> He posits that whiteness, when conferred on Mexican Americans, usually imposes a burden rather than a benefit.<sup>222</sup> As a result, many Mexican Americans experience discrimination similar to that of Black Americans, and thus do not receive the full benefits of whiteness.<sup>223</sup> Further, although legal

<sup>217</sup> See Francisco Valdés, *Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience – RaceCrits, QueerCrits, and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999).

<sup>218</sup> Francisco Valdés, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1, 5 (1997).

<sup>219</sup> See *id.* at 8. Torres and Whitten write that in the formation of Latin American ethnic blocs there are “three master symbols of ideology” in the formation of any Latin American ethnic bloc: “phenotypical, cultural, or ethnic lightening (or whitening); black liberation; and indigenous autodetermination. Torres & Whitten, *supra* note 147, at 8-9. They define *autodeterminación indígena* as “the assertion that indigenous people who were deposed and disfranchised by the European conquest of the Americas must speak to New World nation-states in modern, indigenous ways which they themselves will determine.” *Id.* at 9-10.

<sup>220</sup> Guadalupe T. Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sanford*, 53 U. MIAMI L. REV. 691, 701 (1999) (quoting Menchaca, *supra* note 105, at 584).

<sup>221</sup> See George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997).

<sup>222</sup> See *id.* at 324.

<sup>223</sup> See *id.* at 336-39.

whiteness is superficially appealing, according to Professor Martinez, it may actually facilitate the continued subordination of Mexican Americans by creating barriers to coalitions with other non-white groups.<sup>224</sup>

Martinez uses *In re Rodriguez* as one of the cases to illustrate his point about the problems with legal whiteness. Immediately prior to his discussion of *Rodriguez*, Martinez discusses another case, *Inland Steel Co. v. Barcena*, a workers compensation action.<sup>225</sup> In *Barcena*, Ruby Barcena, the common-law wife of the decedent, Estanislao Barcena, was awarded widow's benefits by the Industrial Board of Indiana.<sup>226</sup> *Inland Steel* appealed, arguing that Ruby, a black woman, could not legally be the common-law wife of Estanislao, a Mexican American, citing the state's anti-miscegenation statute, which prohibited marriages between whites and persons with one-eighth or more "negro blood."<sup>227</sup>

The court disagreed with the employer, stating that the word "Mexican" should [not] necessarily be construed to be a white person from that country.<sup>228</sup> Citing the eleventh edition of the *Encyclopaedia Britannica*, the court said: "approximately one-fifth of the inhabitants of Mexico are white, approximately two-fifths Indians, and the balance made up of mixed bloods, Negroes, Japanese, and Chinese."<sup>229</sup> The court continues that since Mexico's 1824 constitution abolishes all racial distinctions unless specifically established, a Mexican is not presumptively white.<sup>230</sup>

Martinez only quotes the court's language from the *Encyclopaedia Britannica* without mentioning the context of the case. Then he positions *Barcena* in contrast to *Rodriguez* to illustrate his point that legal whiteness for Mexican Americans varied in the courts. Rather than cite similar language about the composition of Mexico's population offered the court in *Rodriguez*, Professor Martinez says only that "the court stated that Mexicans would probably be considered non-white from an anthropological perspective," and explains the court's reliance on treaties which expressly allowed Mexicans to become U.S. citizens.<sup>231</sup>

Martinez's treatment of these two cases would not be troubling except for the statement he makes in the paragraph following his discussion of *Rodriguez*. He writes: "it appears that Mexicans – a mixture of Spanish and Indian – should not have [been] counted as white."<sup>232</sup> The courts in both *Barcena* and *Rodriguez* clearly define Mexicans as being more than merely a mixture of Spanish and Indian, yet Martinez falls back on the conventional image of Mexicans as *mestizo*. Mexico's constructed notion

<sup>224</sup> See *id.* at 334.

<sup>225</sup> See *id.* at 326 (analyzing *Inland Steel Co. v. Barcena*, 39 N.E.2d 800 (Ind. Ct. App. 1942)).

<sup>226</sup> See *Barcena*, 39 N.E.2d at 800.

<sup>227</sup> See *id.*

<sup>228</sup> *Id.* at 801. The Indiana Appellate court notes that there was no evidence presented that Estanislao was white, only that he was "whiter" than Ruby. See *id.* at 801.

<sup>229</sup> *Id.* at 801.

<sup>230</sup> See *id.*

<sup>231</sup> Martinez, *supra* note 221, at 326.

<sup>232</sup> *Id.* at 327 (emphasis added).

of what is a Mexican is deeply imbedded in the minds of Mexican Americans. *Afro-mestizos* have no place and Indigenous people exist only as the producers of *mestizos*. Similarly, Felipe Lopez, in describing the construction of Mexican identity, never acknowledges the existence of *any* African root.<sup>233</sup>

Siegfried Wiessner points out that a recent annotated bibliography of LatCrit articles<sup>234</sup> “painstakingly describe[s] seventeen distinct ‘themes,’” but fails to include “the indigenous condition.”<sup>235</sup> Wiessner argues that indigenous people in the Americas are a key ingredient of the *mestizaje* Latina/o identity touted by LatCrit scholars.<sup>236</sup> A closer examination of Wiessner’s concerns discloses an argument for indigenous auto-determination, an ideological theme that is consistent with Indianism, but inconsistent with Indian self-determination. Thus it is unsurprising that a LatCrit theory grounded in *mestizaje* creates no space for indigenous self-determination.

Likewise, conventional indigenous self-determination creates no space for blackness. Even Wiessner overlooks *Afro-mestizos* when describing the population of Mexico as *mestizo*.<sup>237</sup> In discussing Latina/o *mestizaje*, Kevin Johnson, another LatCrit scholar, readily acknowledges its African component, *except* when discussing Mexicans and Mexican Americans.<sup>238</sup> Similarly, as Tanya Hernández points out, Ian Haney Lopez acknowledges in his well documented book, *Racism on Trial: The Chicano Fight for Justice*,<sup>239</sup> “that Chicanos stressed their indigenous ties, in part to distance themselves from associations with Blacks in the United States, . . . [but denies] the existence of Afro-Mexicans among them.”<sup>240</sup> As these examples suggest, some LatCrit scholars ignore the positionality of *Afro-mestiza/os* in the Americas and the important role Africans played in the colonialization of the Americas.

It is doubtful that *mestizaje*, as invoked by LatCrit scholars, can be used as an inclusive concept that encompasses the multiple cultural, racial, and national elements that meet within peoples of the Americas and highlight the mixtures, negotiations, and frictions that define American

<sup>233</sup> See generally Lopez, *supra* note 169. Yet he acknowledges that in some Mexican communities “Children are first indoctrinated in concepts of *mestizaje* with the story of the castes, followed by the postscript of the ‘mixing’ [sic] of the castes.” *Id.* at 994 (quoting Barbara Luise Margolies, *Princes of the Earth: Subcultural Diversity in a Mexican Municipality* 140 (1975)).

<sup>234</sup> See Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography*, 85 CAL. L. REV. 1509 (1997).

<sup>235</sup> Siegfried Wiessner, *¡Esa India!: LatCrit Theory and the Place of Indigenous Peoples Within the Latina/o Communities*, 53 U. MIAMI L. REV. 831, 838 (1999).

<sup>236</sup> See *id.*

<sup>237</sup> See *id.* at 850-51.

<sup>238</sup> See Kevin R. Johnson, *How Did You Get to Be Mexican? A White/Brown Man’s Search for Identity* 158 (1999). In his book, Johnson discusses how differences in skin with the Latina/o communities often enable some light skinned Latina/os to pass for white whereas “[s]ociety treats those with dark skin as ‘black’ regardless of how they see themselves.” Therefore, he concludes that American society treats any persons with dark skin as *black*. *Id.*

<sup>239</sup> Hernández, *supra* note 31, at 1538 (reviewing Ian F. Haney Lopez, *Racism on Trial: The Chicano Fight for Justice* (Harvard Univ. Press, 2003)).

<sup>240</sup> *Id.*

history.<sup>241</sup> George Martinez's discussion of Mexican *mestizaje* is a good example of the problems with this concept. He writes, citing José Vasconcelos, that "Anglo colonizers took a very negative view of the mixed-race Mexican-American . . . [but] Mexican thinkers developed a much more positive view of racial mixture."<sup>242</sup>

There are several problems with Martinez's invocation of *mestizaje*. First, as mentioned previously, Vasconcelos' notion of *mestizaje* explicitly excludes Afro-*mestizos* and denies indigenous people autonomy. Second, Martinez focuses only on Anglo colonizers and not on how Spanish colonizers used *mestizaje* to advance their imperialistic goals. Thus it is doubtful that the term, as he uses it, can be rehabilitated.

Implicit in a concept of racial hybridity that develops in highly racialized societies is the notion that hybridity overcomes some stigmatizing or disabling condition. But in the case of Mexican Americans who invoke Mexican *mestizaje*, hybridity moves some Mexicans further away from Indianness and/or blackness, stigmatizing those ancestries. More importantly, *mestizaje* represents a movement toward whiteness. LatCrit scholars might be better able to appreciate these aspects of *mestizaje* by not totally abandoning the black-white racial paradigm as a theoretical lens for analyzing race-like subordination in the Americas.

Anthony Farley criticizes LatCrits for their unexamined dismissal of the black-white paradigm.<sup>243</sup> He argues that abandonment of the paradigm allows "white power . . . to divert their eyes and attention away from the people they hate most to the other whom they hate less."<sup>244</sup> LatCrits, in abandoning the black-white racial paradigm, ignore not only the black side of the paradigm, but the rich and sophisticated body of intellectual work by blacks discussing other non-whites and whites.<sup>245</sup> He concludes: "[T]hose who use this term – 'black-white paradigm' [disparagingly] – seem not to have carefully read works written by blacks."<sup>246</sup> According to Farley, LatCrits in their wholesale abandonment of the paradigm have conflated black and white writing, leading to a "reactionary" use of white writing to represent both sides of the paradigm.<sup>247</sup> John Hayakawa Torok characterized the black-white paradigm as the "mother tongue" of American race discourse, displacing what he calls the "colonizing settler-over-native" language.<sup>248</sup>

<sup>241</sup> See Bost, *supra* note 8, at 8 ("Mestizaje . . . highlights the mixture of identities in the Americas and the friction that occurs between them. . . . [M]estizaje can serve as a model for the fusions, negotiations, frictions, and border crossings between races in the Americas.").

<sup>242</sup> Martinez, *supra* note 221, at 343 n.128. He continues: "Vasconcelos concluded that the germ of the *raza cosmica* of the future is to be found in the hybrid peoples of Latin America." *Id.*

<sup>243</sup> See Anthony Paul Farley, *All Flesh Shall See It Together*, 19 CHICANO-LATINO L. REV. 163, 174 (1998).

<sup>244</sup> *Id.* at 171.

<sup>245</sup> See *id.* at 171-72.

<sup>246</sup> *Id.* at 172.

<sup>247</sup> See *id.* at 174.

<sup>248</sup> See John Hayakawa Torok, *Finding the Me in LatCrit Theory: Thoughts on Language Acquisition and Loss*, 53 U. MIAMI L. REV. 1019, 1028-29 (1999) (discussing the relevance of the black-white paradigm for LatCrits). See also Stephanie L. Phillips, *The Convergence of the Critical Race Theory*

Kevin Johnson, in the introduction to the writings from the fourth annual LatCrit conference, acknowledges that this issue has been debated among LatCrit scholars.<sup>249</sup> He writes:

Nobody seems to disagree with the need for a multiracial understanding of civil rights in the United States. . . . However, objections to the sustained LatCrit criticism of the 'Black-White paradigm,' as it has been denominated, have emerged. Sensitivity in this area is especially necessary. Like all communities, *anti-African American* sentiment exists in some quarters of the Latina/o community. All interested in civil rights must take great care not to exacerbate, tap into, or capitalize upon such sentiment in advocating for Latina/o civil rights.<sup>250</sup>

Johnson, while acknowledging the existence of anti-black bias in the Latina/o community, limits this bias to African Americans, and overlooks bias within the Latina/o community toward Afro-Latina/os, including Afro-Mexicans.

## VII. CONCLUSION

In this article, I join with those scholars who argue against the unexamined use of the *mestizaje* paradigm to replace U.S. binary racial analysis because of the uncritical use of *mestizos* or *mestizaje* papers over the role of the Atlantic slave trade in shaping and perpetuating racialized color-caste neo-colonial hierarchies in the United States and the post-colonial hierarchies in other parts of the Americas. This essay starts from the position that discussions of the racing process, whether in the United States, Caribbean, or other Americas, benefit from a colonial analysis that is grounded in the Atlantic slave trade. As I point out, LatCrit scholars' wholesale condemnation of the black-white racial binary analysis, prominent in U.S. race jurisprudence, tends to overlook how that binary analysis impacts other racialized groups, especially mixed-raced ethnic groups from Latin America and the Caribbean. Thus, an anti-African bias found in many Latin American and Caribbean nations goes unexamined.

The failure to acknowledge and examine this bias means that race issues among Latino/as get papered over in the celebration of Latino/a *mestizaje*. In discussing the concept of *mestizaje* in Latin American and U.S. society, it is essential to determine not only what *mestizaje* moves toward, but more importantly from what *mestizaje* moves away. In 1993, Peter Skerry argued that the movement among Mexican Americans to identify themselves as an ethnic group and minority would impede their political assimilation, identify them more closely with the black minority, and distance them from earlier European-American ethnic populations.<sup>251</sup>

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*Workshop with LatCrit Theory: A History*, 53 U. MIAMI L. REV. 1247, 1251-54 (1999) (countering LatCrit claims that Critical Race Theory ignored issues of importance to Latina/os).

<sup>249</sup> See Johnson, *supra* note 32, at 758.

<sup>250</sup> *Id.* (emphasis added).

<sup>251</sup> See Patrick J. McDonnell, *Mexican-Americans: Minority or Mainstream?*, L.A. TIMES, Oct. 31, 1993, Book Review Desk, at 8 (discussing Peter Skerry's book, *MEXICAN-AMERICANS: THE AMBIVALENT MINORITY* (1993)).

Sociologist Orlando Patterson might argue that many Latina/os have chosen the assimilation route.

Writing in the *New York Times*, Patterson disagrees with those commentators who assert that with the increasing Latina/o population the United States is becoming a non-white country.<sup>252</sup> He argues that these commentators “fail[] to take account of the fact that nearly half of the Hispanic population is white in every social sense of the term; 48 percent . . . classified themselves as solely white . . . to the census taker.”<sup>253</sup> Patterson also argues that second-generation “Hispanic whites” are intermarrying and assimilating American language and culture faster than earlier second-generation European migrants.<sup>254</sup> But Miriam Jiménez Román and Gina Pérez write in response, “That Latinos are not considered ‘true whites’ is evident by their classification as Hispanic whites, a conditional whiteness bestowed on (or claimed by) only some (and not all, as Mr. Patterson suggests).”<sup>255</sup>

Patterson’s comments evidence the real fear among blacks that Latina/os, a growing political power within the United States, prefer to occupy a middle racial position, a buffer between whites and blacks, who will side most often with whites against the interests of blacks. Román and Pérez’s response reminds *New York Times* readers that Latina/os, whether classified as conditional whites or not and notwithstanding any economic and political power, will continue to retain their non-white status.<sup>256</sup> So even though they seem at cross purposes, as my prior discussion suggests, Patterson, Román and Pérez are correct in their analysis of Latina/os’ situation in the United States as not fully assimilated.

Thus, by not adopting a more global analytical perspective when discussing race, ethnicity, gender, and perhaps sexuality, U.S. legal scholars have started at least a century too late. When discussing race, ethnic, and gender subordination in the Americas, scholars must acknowledge the lingering effects of war, colonialism, capitalism, and slavery, as well as the way in which different imperial powers, like Spain, England, and more recently, the United States, have dominated the Americas during different eras over the past five centuries.

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<sup>252</sup> See Orlando Patterson, *Race by the Numbers*, N.Y. TIMES, May 8, 2001, at A27.

<sup>253</sup> *Id.*

<sup>254</sup> See *id.* Patterson also charges that Latinos seem to want to be both white and beneficiaries of affirmative action, writing: “Latino coalition strategies, by vastly increasing the number of people entitled to affirmative action, have been a major factor in the loss of political support for it.” *Id.*

<sup>255</sup> Miriam Jiménez Román & Gina Pérez, Letter to the Editor, *A Category, Not a Race*, N.Y. TIMES, May 15, 2001, at A26.

<sup>256</sup> See *id.*

