Nao Valel a Pena (Not Worth the Trouble?) Afro-Brazilian Workers and Brazilian Anti-Discrimination Law

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I. Introduction

In September 2005, Brazilian public prosecutors filed a series of lawsuits that would have been nearly unimaginable in the country even a few years before. The suits, brought in Brasilia as civil complaints in the federal labor courts, charged five of the country’s leading banks with violating the Brazilian constitution by discriminating against Afro-Brazilian employees and job applicants in hiring, promotion and compensation.¹ The allegations were based on statistical evidence indicating significant disparities in occupational status and compensation of Afro-Brazilian employees relative to their white colleagues at the banks.² The suits also asserted that the banks discriminated in hiring, based on under-representation of Afro-Brazilians in the banks’ workforce when compared to their share of the local labor market.³ In the first of these cases to be heard in court, the judge observed that these statistics provided “vehement
indications of discrimination in the employment policies practiced by the defendant bank."

Public prosecutors announced that they would be bringing similar litigation in five other states, as part of a broader initiative to tackle discrimination in the banking industry.

In almost every significant aspect, these lawsuits represented a dramatic break with the traditional treatment of racial discrimination claims in Brazilian courts. Up until the mid-1990s public prosecutors considered protection of minority rights at the bottom of their list of law enforcement priorities. Brazil’s statutory anti-discrimination law was comprised of a single provision of the penal code prohibiting acts “motivated by racial prejudice.” Brazilian courts held that liability for racial discrimination could only be established through direct evidence of a defendant’s prejudicial motive. Instances of Afro-Brazilian workers successfully challenging racial discrimination through the court system were so rare that a 1997 documentary film chronicling a case where a plaintiff actually prevailed was entitled “The Exception and the Rule.”

The recent employment discrimination suits brought against the banks on behalf of Afro-Brazilian workers also reflect a broader shift in the country’s treatment of racial inequality. For most of the last century the Brazilian state claimed that it was a ‘racial democracy’ whose colorblind society stood in contrast to the segregationist practices of other nations, a claim that was accepted by numerous scholars, Brazilian and foreign. By the century’s end, however, both scholars and state officials increasingly recognized that despite longstanding traditions of formal legal equality and widespread interracial mixing, Brazilian racial relations were characterized by deep and persistent inequalities between the white and non-white

7. Lei No. 7.716, de 5 de janeiro de 1989 D.O. (Brazil) (translation by author) [hereinafter Lei 7.716/89].
In place of the claim that Brazil was a racial democracy came a realization that in areas such as formal employment and higher education, the exclusion of persons of African descent — a group that is generally understood to include more than 40 percent of the country’s population — rivaled that of countries such as South Africa and the United States, that have only recently emerged from decades of legally-enforced apartheid. Over the past 10 years the country’s government, under pressure from Afro-Brazilian activists, has introduced a wave of affirmative action programs in higher education and public sector employment. However, until the filing of last summer’s lawsuits, the issue of widespread discrimination against Afro-Brazilians in the country’s private labor market remained largely untouched by these developments, and in particular, by any challenge brought through the country’s courts. This paper considers why, despite the recent success of Afro-Brazilians in mobilizing the state to address the issue of racial inequality, there has been — until now — remarkably little use of the legal system to combat racial discrimination in the workplace.

The seeming absence of legal action against racial discrimination is all the more notable given that “the practice of racism” was made a crime in Brazil in 1951, and the Constitution explicitly prohibits differentiation based on color in hiring, salary and job functions. This paper discusses the interaction and influence of three key factors which impede use of the law challenging employment discrimination against Afro-Brazilians: (1) Brazil’s distinctive ideologies of race relations; (2) its statutes and constitutional law dealing with discrimination; and (3) the treatment of these issues by its legal institutions. I assess the impact of these factors on the attractiveness and effectiveness of legal action as a strategy for combating racial discrimination in the country’s labor markets. I conclude by considering recent developments and potential reforms that may make the law a more effective tool to be used on behalf of Afro-Brazilian workers.

Section II summarizes the impact of racial discrimination on the Brazilian labor market. This is important when discussing Brazilian
anti-discrimination law because the ideologies of race relations that have shaped the law explicitly reject either the existence of significant discrimination against Afro-Brazilians, or its salience for redressing social inequality. These ideologies have influenced the Brazilian judiciary and other legal institutions and thus have affected how the anti-discrimination laws are applied. In this section, I draw on economic and sociological research showing that Afro-Brazilians experience a degree of inequality in relation to whites which cannot be explained without recognition of widespread racial discrimination in Brazil's labor market. I also illustrate, through the observations of legal practitioners and scholars, the impact of racial discrimination on the working lives of Afro-Brazilians. I conclude that racial discrimination is pervasive in the country's labor market and affects Afro-Brazilian workers at each stage of employment.

Next, I consider two ideologies of race relations that have influenced the development of Brazilian anti-discrimination law. First, I analyze the historically dominant notion that Brazil is an egalitarian “racial democracy.” Second, I explore the currently more prevalent view that racial inequality exists in Brazil, but is a symptom of class divisions — not prejudice — and is best addressed through redistributionist social policies. I show how these two ideologies have shaped the development of the country's anti-discrimination law and conclude that their combined impact has been quite significant. The first ideology, racial democracy, has both disadvantaged Afro-Brazilians' attempts to challenge discrimination in the courts and handicapped their collective efforts to develop a broad-based social movement for racial equality. The second ideology, which I term the "class-over-race" thesis further hobbles Afro-Brazilians' efforts to eliminate racial discrimination by encouraging the subordination of race-conscious initiatives within class-based politics focusing on economic development and wealth redistribution.

In Section III, I consider the direct impact of Brazilian anti-discrimination law on the ability of Afro-Brazilians to challenge racial inequality through the courts. In particular, I examine the interplay between the ideology of racial democracy and the Brazilian legal system's conception of racial discrimination as a criminal offense manifested in open acts of prejudice. The adoption of a penal approach to the issue of racism has resulted in an anti-discrimination law that is remarkably "thin," and fails to address all but the most blatant offenses. I examine the ways in which this basic formulation of what racial discrimination is, and how it should be remedied, has
influenced the development of the country's anti-discrimination law. I conclude that it has produced a legal regime that is of little value for countering discrimination against Afro-Brazilian workers.

In Section IV, I consider what has been, until the last decade, a path not taken by Afro-Brazilians — the route of challenging racial discrimination in the workplace through civil lawsuits rather than criminal prosecution. I discuss three related aspects of Brazil's civil litigation system that may provide significant advantages over reliance on the anti-discrimination provisions of the penal code. I look at the viability of bringing suit based directly on constitutional guarantees of equal treatment in the workplace. I also examine the option of bringing racial discrimination claims under the country's labor code, an area of Brazilian law that is far more developed than the anti-discrimination statutes.\textsuperscript{15} Lastly, I consider the potential for bringing such claims as class actions, a procedural device which Brazil has already adopted.\textsuperscript{16} In each area there are significant obstacles to effective use of the law, however, civil litigation offers a far more promising path than continued reliance on criminal law.

In Section V, I compare the response of Brazil's judiciary, public prosecutors, police forces and private bar to the issue of racial discrimination with that of political actors in the executive and legislative branches. Despite some signs of change, Brazilian judges and attorneys, compared to members of the executive and legislature, may be more wedded to the ideology of racial democracy and less responsive to the problem of discrimination against Afro-Brazilians.\textsuperscript{17} Similarly, while some attempts at reform are underway, the police, through whom citizens must channel criminal complaints under the anti-discrimination laws, are often perceived as being hostile and prejudicial towards Afro-Brazilians.\textsuperscript{18} Likewise, until recently, Brazilian prosecutors responsible for litigating criminal cases and the vast majority of class actions, gave little attention to the issue of racial discrimination.

\textsuperscript{15} John D. French, \textit{Drowning in Laws: Labor Law and Brazilian Political Culture} 1, 40 (U.N.C. Press 2004) [hereinafter \textit{DROWNING IN LAWS}].

\textsuperscript{16} Antonio Gidi, \textit{Class Actions in Brazil – A Model for Civil Law Countries}, 51 \textit{Am. J. Comp. L.} 311 (2003).

\textsuperscript{17} Antonio Guimarães, \textit{The Misadventures of Nonracialism in Brazil, in Beyond Racism: Race and Equality in Brazil, South Africa, and the United States} 174 (Charles Hamilton et al. eds., 2001) [hereinafter \textit{BEYOND RACISM}].

discrimination." However, in the past several years, public prosecutors, particularly those assigned to the country's labor courts, have begun to place greater emphasis on enforcing the anti-discrimination laws.

Finally, in Section VI, I examine another factor cited by both Brazilian and foreign observers to explain the legal system's failure to address effectively racial discrimination has been the inadequate performance in this area of its key institutional actors, including judges, public prosecutors, police and the private bar.

Since Brazil's return to democracy in the 1980s, however, other political institutions have undergone a much more rapid and dramatic shift in their treatment of racial issues. Through both "enrist" strategies of gaining influence within the country's political parties, and external critiques of the government brought before various international fora, Afro-Brazilian activists have achieved impressive success in pushing the country's executive and legislature to adopt meaningful measures to address racial inequality. Thus it is not surprising that Brazil's Movimento Negro has chosen to advance its claims before these institutions rather than on the less friendly terrain of the courts. I suggest that this strategy, while quite successful in prodding these branches to address the issue of racial inequality, may have further delayed the development of effective legal tools against racial discrimination in the workplace.

While this paper takes a highly critical view of the Brazilian legal system's past treatment of the problem of discrimination against Afro-Brazilian workers, it concludes by recognizing that recent developments suggest that real change may be afoot in this area of


21. Literally, "Black Movement." I use this term in its current Brazilian meaning as referring collectively to the activists and organizations that make up the Afro-Brazilian civil rights movement. It is derived from the name of the umbrella organization, Movimento Negro Unificado, (Unified Black Movement) whose founding in 1978 marked the emergence of Afro-Brazilian political mobilization during the country's period of democratic transition. See Lélia Gonzales, The Unified Black Movement: A New Stage in Black Political Mobilization in RACE, CLASS AND POWER IN BRAZIL 124 (Pierre-Michel Fontaine ed., 1985).
law. The myth of racial democracy has been steadily discredited in Brazil over the past two decades, opening the door for lawmakers, legal scholars and practitioners to reconceptualize how discrimination is defined under the law and redressed through the courts. Legal advocates for racial equality have already begun to shift their approach from reliance on criminal prosecution to the more promising route of civil litigation, and recent amendments to the labor law and civil code further have made this alternative even more attractive. Though grounds for optimism are still sparsest in the jurisprudence of the courts themselves, recent decisions in favor of Afro-Brazilian plaintiffs in the country’s labor courts, and the increasing energy and creativity shown by public prosecutors in bringing litigation there suggest that this new strategy may be opening a new chapter in the story of Brazilian anti-discrimination law. I conclude by identifying a few areas where the existing law, particularly class action procedure, may be amended to further facilitate such efforts.

II. The Impact of Employment Discrimination on Afro-Brazilian Workers

A. Race and Inequality

In the area of employment, one cites numbers that would embarrass the normal North American citizen, but that in Brazil do not cause the least impact. We have for example, nearly 800 federal judges. Of these, blacks hardly make up a dozen. The Federal Public Ministry has nearly 550 prosecutors among whom only six are black; the Diplomatic Corps, the most racist of Brazilian institutions, does not count more than two blacks in a group of nearly one thousand diplomats; in the Brazilian public universities, above all in their most prestigious programs, not more than 3 percent of the students are black, an absurdity in a country in the black population is more than 40 percent of the total. So observed Joaquim Barbosa Gomes, who in 2003 became the first Afro-Brazilian named to the Federal Supreme Court. As

22. Id. at 10; Buckley, supra note 18, at A12.
23. Joaquim Barbosa Gomes, O Uso da Lei no Combate ao Racismo: Direitos Difusos e as Acões Civis Públicas, in TIRANDO A MASCARA: ENSAIOS SOBRE O RACISMO NO BRASIL 408 n.15 (Antonio S.A. Guimarães and Lynn Huntley eds., 2000) (translation by author) [hereinafter TIRANDO A MASCARA].
Gomes suggests, among the most striking aspects of racial inequality in Brazil are both the near absence of Afro-Brazilians in the upper reaches of professional life, and the fact that this occurs in a country with 100 million persons of African descent, more than live any other nation in the world except Nigeria. When asked to indicate their skin color on an open scale, roughly 53 percent of Brazilians use a term designating some shade of black or brown compared to 42 percent who refer to themselves as white. Using U.S. terms of racial classification, Brazil is a majority black nation.

Even though Brazil was the last country in the Americas to abolish slavery, until recently, leading Brazilian legal scholars, like much of the country’s elite, maintained that due to the mixed identity of much of the population, significant racial discrimination simply did not exist in Brazilian society. Writing in 1989, constitutional law scholars Celso Ribeiro Bastos and Ives Gandra Martins asserted that while “[t]he black population... presents an economic and social underclass when compared with the average of the Brazilian population,” racial discrimination could not be the cause because “the majority of the Brazilian population is mixed, and the foundation of racism depends necessarily on the existence of races that oppose and distinguish each other.”

In regard to racial bias in the labor market, they commented, “discriminatory practices on the part of the employer, notably in reference to the hiring of the employee... by color is fortunately not significant in our country.”

In Brazil, racial inequality is felt both in the absence of Afro-Brazilians in the upper echelons of society and in the much higher incidence of poverty in the non-white population. However, economic and sociological research indicates that racial discrimination in the labor market is a key factor in maintaining this inequality. In this section I briefly sketch the dimensions of racial

25. Id. at 7, 110; Ricardo Rochetti, Not as Easy as Black and White: The Implications of the University of Rio de Janeiro’s Quota-Based Admissions Policy on Affirmative Action Law in Brazil, 37 VAND. J. TRANSNAT’L L. 1423, 1425 (2004).
27. Id. at 43; Guimarães, supra note 17, at 174.
29. Id. at 496.
30. Telles, supra note 10, at 16, 141; Nelson do Valle Silva, Updating the Cost of Not Being White, in RACE, CLASS AND POWER IN BRAZIL 54 (Pierre-Michel Fontaine, ed., 1985); Edna Maria Santos Roland, The Economics of Racism: People of African Descent in Brazil, Paper Delivered at the Seminar on the Economics of Racism,
inequality in Brazil and its relationship to labor market discrimination against Afro-Brazilian workers. I also will discuss the other source of Justice Gomes’ frustration — the failure of the Brazilian legal system to respond to this deep and debilitating divide.

Despite being the world’s ninth largest national economy, Brazil has the most unequal distribution of wealth of any country outside sub-Saharan Africa. Income inequality in Brazil has grown in the last four decades, with the share of wealth distributed to the poorer half of the population falling from 18 percent to 11 percent, and that accruing to the richest 20 percent rising from 54 percent to 64 percent. While Brazil has a sizeable poor white population, wealth and poverty are strongly correlated with skin color: “poverty in Brazil unquestionably has a racial identity. It is mainly non-white.” A 1989 study showed that non-white Brazilians are 3.5 times more likely than whites to be poor, while white Brazilians are five times more likely than non-whites to belong in the top income brackets. Average annual family incomes of black and brown Brazilians are respectively, 40 percent and 45 percent those of white families. Ninety percent of all black and brown Brazilians live beneath the poverty line, though so do nearly 50 percent of all whites. To speak of poverty in Brazil without regard to race ignores the reality that while “a part of the white population is poor; all of the black population is poor.”

B. Race and Labor Market Discrimination

This unequal distribution of income reflects a wide disparity in wages between non-white and white workers. In 1996, the Brazilian government estimated that black women earned a mere 25 percent of the average wage of white male workers and black men earned only...
Surveys of unemployment in major cities in 1999 found jobless rates of blacks to be anywhere from 17 percent to 45 percent higher than those of white workers in the same metropolitan areas. These differences in earning power reflect stratification in occupational status and differences in social mobility that divide the fortunes of non-whites and whites. Black and brown Brazilians are much more likely than whites to perform manual labor rather than work in professional occupations. Whites are fifteen times more likely than blacks, and three times more likely than brown Brazilians, to work in the highest occupational categories.

This racial divide is passed on and reinforced across generations. Even accounting for parental income and education, rates of intergenerational upward mobility for whites are higher than for blacks at all points on the occupational ladder. Moreover, for higher-status blacks downward mobility in the next generation is much more common than for similarly situated whites.

Brazilian elites traditionally have advanced a series of explanations for these disparities that avoid the issue of racial discrimination. Among these are the widespread poverty associated with Brazil’s status as a developing country, extreme differences in rates of education between whites and non-whites, and class prejudice that operate against the poor regardless of their race. While these factors can explain some, and in the case of access to education perhaps most, of these differences, statistical evidence indicates that racial discrimination in the labor market has a powerful impact on Afro-Brazilian workers.

Brazilian scholars have estimated that while anywhere from two-thirds to four-fifths of the disparities in occupational status and earnings between whites and non-whites are due to differences in education levels, the remaining portion of the disparity is attributable

38. REBECCA REICHMANN, RACE IN CONTEMPORARY BRAZIL: FROM INDIFFERENCE TO INEQUALITY 5, Introduction (Rebecca Reichmann, ed. 1999) [hereinafter RACE IN CONTEMPORARY BRAZIL].
40. Telles, supra note 10, at 131.
41. Id.
42. Carlos Hasenbalg, Race and Socioeconomic Inequalities in Brazil, in RACE, CLASS AND POWER IN BRAZIL, supra note 30, at 32-6.
43. Id.
44. Antonio Guimarães, CLASSES, RAÇAS E DEMOCRACIA 63, 206 (2002); Antonio Guimarães, RACISMO E ANTI-RACISMO NO BRASIL 206 (2002).
to discrimination in the labor market. Even at the same occupational levels, black and brown Brazilians earn considerably less than their white counterparts. Studies that control for education, work experience and regional differences find that white workers earn roughly a third more than their Afro-Brazilian counterparts — a level of disparity three times greater than that between white and black workers in the United States. While research indicates differences in earnings for Afro-Brazilian men are “mainly due to differences in human capital,” such workers “also suffer heavy wage and insertion [i.e., hiring] discrimination.”

Afro-Brazilian women experience even greater wage discrimination, and suffer an additional degree of discrimination in hiring.

Studies over the last thirty years have shown that advancement in education appears to widen the divide between Afro-Brazilian workers and their white colleagues, since the latter receive greater income gains from the same levels of schooling. A 1999 survey in São Paulo, Brazil’s leading city of private industry and finance, found that while Afro-Brazilians with a primary school education earned 84 percent of the wages of similarly educated white workers, those with university degrees earned only 63.8 percent of the salaries of their white colleagues. A separate study in 2000 concluded “[t]he better positioned in the distribution of wealth, the more a black man is discriminated against.”

C. Labor Market Discrimination in Everyday Life

The effects of racial discrimination in the labor market are highly visible, though its actual workings are more covert. One commonly cited example is the virtual absence of non-whites in retail sales and other customer service positions. As Justice Marco Aurelio Mello, President of the Brazilian Supreme Federal Court has noted:

Visits to shopping malls reveal to us in everyday life that in the
stores that sell sophisticated products blacks are rarely placed as sales clerks, not to speak of managers. In restaurants, services that involve direct contact with the customer generally are not done by blacks. Moreover, where blacks are commonly present, they work as manual laborers, bouncers, etc.4

Similarly, Sergio da Silva Martina writes that “[j]obs which involve contact with the public or with clients — even if they do not require special qualifications — are prohibited to the Black population,” and therefore that “Blacks are considered disqualified to exercise positions such as secretaries, sales attendants in shopping malls, [or] waiters in elegant restaurants . . .,”5 in the state of Bahia, where over two-thirds of the population is of African descent, a study of private petrochemical firms found that 83 percent of black female employees worked as cleaners, while over 50 percent of white females at these companies were employed as office staff.6

This segregation only increases further up the occupational ladder, where Afro-Brazilians typically are denied positions that involve interaction with top company officials or key clients.7 A recent survey of over a hundred of the country’s largest enterprises found that Afro-Brazilian employees made up only 2 percent of middle and upper management — again, a striking statistic when one realizes that they comprise nearly half the population.8

Other studies confirm that compared to Afro-Brazilians with the same education and work experience; whites are hired into higher-level positions and promoted faster within the corporate hierarchy.9 Afro-Brazilians who are placed in managerial positions often report that white colleagues and subordinates consider them “arrogant, aggressive invaders” and attempt to undermine them and provoke

54. Marco Aúrélio Mendes de Farias Mello, Ótica Constitucional – A Igualdade e as Ações Afirmativas in DISCRIMINAÇÃO E SISTEMA LEGAL BRASILEIRO, 25 (Tribunal Superior do Trabalho, pubs. 2003) (translation by author) [hereinafter DISCRIMINAÇÃO E SISTEMA LEGAL].
57. Id.
conflicts. This results in a further reluctance of firms to employ Afro-Brazilians in positions of authority.

Though racial discrimination in the workplace appears to be heavily underreported by Afro-Brazilian workers, complaints are sufficiently widespread to make clear the need for legal deterrence and redress. Discrimination in the labor market is the form of racial bias most widely reported by black and brown Brazilians. A 1995 survey found that 13 percent of black men and 19 percent of black women say they have personally faced some form of employment discrimination, with 7 percent of brown males and 5 percent of brown women stating the same. Though these figures seem quite low, even if they accurately reflect reality, this would still mean that millions of black and brown Brazilians claim to have personally suffered some form of labor market discrimination.

Beyond the statistical evidence of income inequality and occupational segregation, there is reason to believe that discrimination is far more prevalent than these surveys suggest. In a separate study, up to two-thirds of “black” Brazilians reported experiencing some form of discrimination, with the percentage reporting experiencing racial bias in hiring or promotion increasing along with the occupational status of the worker. Moreover, a 2000 public opinion survey in Rio de Janeiro found that over 80 percent of respondents agreed with the statement that, "discrimination keeps blacks from getting good jobs and improving their lives." In other words, when they are not asked to identify themselves as victims or perpetrators of racial prejudice, Brazilians are quite open about the existence of discrimination in the labor market.

Discrimination in hiring is the form of employment-related racial bias most often complained of by Afro-Brazilians. Studies in São Paulo show that when hiring decisions are made on criteria other than
education and job experience, private firms often employ racial stereotypes. Where hiring is done through advertisements in newspapers, discrimination often occurs through listings requiring “boa aparência” (literally “good appearance”), which is commonly understood to exclude black candidates. Similarly, it appears that employment agencies receive, and seek to satisfy, racial requirements of their clients, by screening through identifying factors such as place of residence.

**D. The Failure of Brazilian Anti-discrimination Law**

Initially, we searched in the police stations and courts in Rio de Janeiro — Nada! We went to the eminences of jurisprudence — Nada! It was unbelievable that given so much fuss in the press [about incidents of racial discrimination in Rio de Janeiro] there were not even reports in the police stations — Nada!

So Jorge da Silva described his 1994 survey of prosecutions under Brazil’s anti-discrimination laws. Searching in the Rio de Janeiro courts for cases brought under Brazil’s statutes prohibiting racial discrimination, the 1951 *Lei Afonso Arinos* and its successor legislation, the 1989 *Lei Cãâ€šo,* Silva found only four prosecutions, all unsuccessful and none involving complaints against employers or co-workers. While more recent studies have had more success finding jurisprudence on this topic, they have sounded similar notes of frustration regarding the laws’ effectiveness. Civil rights lawyer Hédio Silva has noted that during the first twenty-five years after the enactment of the *Lei Afonso Arinos,* the courts in the states of Bahia,

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68. Telles, supra note 10, at 160.
70. Racusen, supra note 8, at 191.
72. As discussed infra, Brazil’s core anti-discrimination law is a criminal statute, which requires victims to file complaints with the police in order to initiate investigation and prosecution.
73. Lei No. 1.390, de 3 de julho de 1951. This law is commonly referred to by the name of its congressional sponsor, Afonso Arinos de Mello Franco, as the “Lei Afonso Arinos.”
74. Lei No. 7.716, de 5 de janeiro de 1989. Like its predecessor, the *Lei Afonso Arinos,* this statute is referred to by the name of its congressional sponsor, in this case, Deputy Carlos Alberto Cã³o, as the “Lei Cã³o.”
75. Id. at 160.
Rio Grande, Rio de Janeiro, and São Paulo recorded only nine convictions under the law.\textsuperscript{76} Similarly, Sérgio Martins found only two convictions in all of Brazil under the Lei Caó from 1989 to 1999.\textsuperscript{77}

Seth Racusen, who has conducted what appears to be the most comprehensive survey in this area, identified 142 cases dealing with racial bias that were brought to trial in Brazilian courts between 1989 and 2001.\textsuperscript{78} While judges held defendants liable in thirty-five of these cases, only six of them were convictions under the Lei Caó, with the rest involving violations of other statutes or constitutional provisions.\textsuperscript{79} None of the cases where defendants were found liable involved hiring and only two involved termination of employment.\textsuperscript{80} Thus, writes Carlos Medeiros, the courts have sent Afro-Brazilians an "easily decipherable message: ... it is simply not worth the trouble for blacks to pursue justice in cases of racial discrimination."\textsuperscript{81}

The near-total failure of the Brazilian legal system in this area leads one to the basic question posed by António Guimardes: "Why does racial discrimination still go widely unpunished in spite of [the country]... already having passed specific anti-discrimination laws?"\textsuperscript{82} As discussed herein, this is a question with multiple, interrelated answers. It requires explanation of why the anti-discrimination laws are so rarely used, and why they are used to such little effect. This paper considers the various factors that may help answer this question, including Brazilian ideologies of race relations, the relative weakness of its anti-discrimination statutes, and the treatment of racial issues by the judiciary and other legal institutions. More optimistically, I also discuss nascent attempts to combat racial discrimination through Brazil’s civil litigation system, and evaluate whether this is a more promising approach to securing justice for Afro-Brazilians workers.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{76} Hédio Silva, \textit{Do Racismo Legal ao Principio da Ação Afirmativa}, in \textit{TIRANDO A MASCARA}, \textit{supra} note 23, at 379.
\item \textsuperscript{77} Martins, \textit{supra} note 55, at 429.
\item \textsuperscript{78} Racusen, \textit{supra} note 8, at 247.
\item \textsuperscript{79} Id. at 282.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} CARLOS ALBERTO MEDEIROS, \textit{NA LEI E NA RAÇA: LEGISLAÇÃO E RELAÇÕES RACIAIS, BRASIL – ESTADOS UNIDOS} 115 (2004) (translation by author).
\item \textsuperscript{82} Antonio Sérgio Alfredo Guimarães, \textit{Measures to Combat Discrimination and Racial Inequality in Brazil}, in \textit{RACE IN CONTEMPORARY BRAZIL, supra} note 38, at 139.
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III. From Racial Democracy to ‘Class-over-race:’ Ideology and Anti-discrimination Law

As Afro-Brazilian activist and law professor Antonio Carlos Arruda has noted, Brazil was “the last country in the world to do away with slavery and the first to declare itself a ‘racial democracy.’”83 Works by North American scholars often have pointed to Brazil’s distinctive ideologies of race relations as factors that have impeded resistance to racism and inhibited the development of effective anti-discrimination laws.84 In this section, I discuss two ideologies for understanding race relations which were dominant in Brazil during the twentieth century — one which largely denied the existence of racial prejudice in the country, and another which, while admitting the presence of racial discrimination, characterizes it mostly as a symptom of class-based inequality. While U.S. scholars typically have focused on the influence of the former, I suggest that in recent years the latter tendency has been equally influential, since it favors colorblind policies aimed at redressing economic inequality and undermines support for state action targeting racial discrimination.

A. Racial Democracy

The first of these two ideologies to emerge historically is commonly known as the “racial democracy” thesis, and was most prominently articulated by Brazilian anthropologist Gilberto Freyre in the 1930s. Put simply, racial democracy posits that Brazilian society is relatively free of racial discrimination because extensive interracial parentage has created a large, mixed race population incapable of prejudice against each other.85 According to this thesis, the phenomenon of interracial parentage was originally the product of both the gender imbalance and the lack of miscegenation taboos among the country’s original Portuguese colonizers, but has been maintained by the desire of Afro-Brazilians themselves to gain upward social mobility through a processing of “whitening.”86 This
mixture allegedly has produced “a new meta-race” who “live in greater harmony than other people” and “cannot discriminate against each other.”

By presenting the country’s mixed race population as a strength that enabled Brazil to avoid interracial conflict, “racial democracy” originally served as a rejoinder to white supremacist claims that miscegenation would retard national development. It quickly was adopted by the regime of Getúlio Vargas, whose regime deployed its egalitarian rhetoric for a different purpose — to co-opt a fledgling Afro-Brazilian movement for civil rights that arose in the 1940s.

In the 1950s, the racial democracy thesis was embraced internationally as Brazilian society became emblematic of successful racial integration, and a counter-example to South African apartheid and U.S. Jim Crow laws. E. Franklin Frazier observed that in Brazil, “[c]olor distinctions and prejudices against blacks are seemingly absent . . . . One drop of negro blood does not make a person a Negro and condemn him to become a member of a lower caste.” “The Brazilian Negro . . . is first of all a Brazilian,” he added, “[he] has faith in the justice of the courts, and is convinced that his abilities and achievements will be recognized.” As Brazil fell under military rule in the 1960s and 1970s, its generals deployed the image of racial democracy abroad as a source of legitimacy. At home, however, the regime repressed any discussion of racial inequality, driving scholars who challenged the racial democracy thesis — including sociologist and future president Fernando Henrique Cardoso — into exile abroad.

While widespread recognition of the prevalence of discrimination against Afro-Brazilians indicates that the Brazilian public no longer accepts racial democracy as an accurate depiction of reality, the ideology still possesses significant influence in Brazilian political culture. Carlos Hasenbalg suggests that racial democracy has retained legitimacy because it reflects certain distinctive features of

87. Racusen, supra note 8, at 19.
88. Telles, supra note 10, at 39.
89. Id.
91. Reichmann, supra note 38, at 3.
92. Telles, supra note 10, at 41.
93. Thomas E. Skidmore, Race and Class in Brazil: Historical Perspectives, in RACE, CLASS AND POWER IN BRAZIL, supra note 30, at 16.
Brazilian race relations, among them the absence of legal segregation and racial conflict during the post-abolition period, the presence of some non-whites among elites, and the prevalence of interracial marriage and social mingling. Racial democracy may draw continued support from whites and non-whites for different reasons. While it benefits whites by masking discrimination and defusing conflict, for blacks, racial democracy “provides the moral high ground” in dealings with whites by “remind[ing] their oppressor how s/he should behave as a good Brazilian.”

1. Racial Democracy and Anti-Racism

A number of scholars have analyzed the ways in which racial democracy has impeded Afro-Brazilian resistance to racial discrimination. Most fundamentally, by casting any attempt to draw attention to race as “un-Brazilian,” racial democracy tends to suppress the very discussion of problems related to race relations. It presents racial discrimination as a subject foreign to Brazilian society rather than as a problem requiring internal reform. While racial democracy asserts itself as an expression of a unique Brazilian character, Tanya Hernandez notes that the claims that “racism is solely a phenomenon of aberrant racist individuals” and “discussing race is ... itself racist because it disrupts the harmony of race neutrality,” are prevalent in most Latin American societies with significant mixed race populations. In Latin America, Hernandez suggests, “rejection of race as a social or formal concept sustains rather than diminishes white privilege.”

By promoting a strategy of upward social mobility through whitening, racial democracy also impedes the development of broad based solidarity among Afro-Brazilians. Indeed, the lower their income levels the more likely it is that “brown” Brazilians will self-identify as “white” and that “black” Brazilians will describe themselves as “brown.” As a result, Afro-Brazilian activists have

94. Carneiro, supra note 33, at 180.
95. Peter Fry, Color and the Rule of Law in Brazil, in The (Un)Rule of Law and the Underprivileged in Latin America 186, 199 (Juan E. Méndez et al. eds. 1999).
96. E.g., Skidmore, supra note 90, at 381-4.
97. Telles, supra note 10, at 232.
98. Hernandez, supra note 84, at 1098.
99. Id. at 1100.
100. Id. at 96-99.
had to devote an inordinate portion of their energies to “convincing
the black to accept his blackness.”

While racial segregation in the United States produced wholly
African-American religious, educational and economic institutions
that provided a base of support for the civil rights movement,
comparable Afro-Brazilian institutions are much less common, much
smaller, and more likely to have a more cultural and less politicized
focus. The effect of racial democracy has been to require the Black
Movement to focus on what might otherwise be considered quite
limited goals. As Anthony Marx observed, “[t]he greatest task and
achievement of the Movimento Negro has been to establish the fact of
racism. Consumed by this task, the movement has been largely
unable to move beyond it to actually organizing much in the way of
mass action.”

2. Racial Democracy and Anti-discrimination Law

As both Brazilian and North American scholars have pointed
out, the influence of the racial democracy thesis also helps explain the
inadequacies of Brazil’s anti-discrimination laws. Denying the
significance of racial discrimination as a problem in Brazilian society
has reinforced the notion that this is an area “where the law did not
have a role to assume.” More subtly, racial democracy has led
the Brazilian legal system to define racial discrimination in terms of the
former segregationist practices of other countries rather than the
forms of discrimination that actually exist in Brazil. This has
produced laws of a largely symbolic nature, which only address a
narrow range of racial discrimination’s effects on the lives of Afro-
Brazilians.

In the courts, racial democracy has disadvantaged the victims of
discrimination and shielded its perpetrators from liability. By casting
victims’ allegations as contrary to the national character, or “racist”
themselves, it de-legitimizes claims of racial discrimination.
Moreover, it assists defendants in such cases by obscuring the
prejudicial nature of their practices and providing an automatic

102. Burdick, supra note 65, at 150.
103. Skidmore, supra note 90, at 383-4.
105. E.g., Hernandez, supra note 69, at 6.
106. Medeiros, supra note 81, at 99.
107. Racusen, supra note 8, at 33.
defense based on their "Brazilianess" or mixed race status.\textsuperscript{108}

The racial democracy thesis has hindered the development of Brazilian anti-discrimination law by promoting an image of a country where racial discrimination hardly exists and therefore statutory protections for the rights of Afro-Brazilians are unnecessary. In its initial report to the U.N. Committee on the Elimination of Racial Discrimination in 1970, Brazil's Foreign Ministry asserted that, "[s]ince racial discrimination does not exist in Brazil, the Brazilian Government has no necessity to take... legislative, judicial or administrative measures to assure equality of the races."\textsuperscript{109} While suppression of racial issues reached its peak during military rule, successive Brazilian governments maintained basically the same official position until the mid-1990s. Brazilian historian Carlos Albertos Medeiros observed that, "a fundamental aspect of comparison between North American and Brazilian legislation, from the point of view of racial relations, is that in Brazil the question of race has been treated as a non-question [since]... racial problems are minimal."\textsuperscript{110} Similarly, U.S. scholars have noted that the Brazilian legal system "sees issues of racism as unimportant," and have pointed to the "myth of the absence of racism" to explain why the country's anti-discrimination laws remain "woefully inadequate."\textsuperscript{111}

This general attitude on the part of the Brazilian state has been mirrored by a striking lack of attention to this subject in legal scholarship. Public prosecutor Dora Lúcia de Lima Bertulio charges that "discrimination in employment is not a question presented for discussion in the system of law and labor protection in Brazil... Judges, lawyers and scholars have not discussed this question either in theory or in practice."\textsuperscript{112} While the country's leading sociologists, and more recently, its major economic think tanks, have produced considerable research on the impact of racial discrimination, Brazilian legal scholarship has lacked a comparable body of work. With the exception of a number of recent texts on affirmative action, few


\textsuperscript{109} Racusen, \textit{supra} note 8, at 50, (citing Brazil, Consideration of Reports Submitted by State Parties to the Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/R-3/Add.11 (1970)).

\textsuperscript{110} Medeiros, \textit{supra} note 81, at 99.

\textsuperscript{111} Hernandez, \textit{supra} note 69, at 6; Telles, \textit{supra} note 10, at 240.

\textsuperscript{112} Dora Lúcia de Lima Bertulio, \textit{Considerações Sobre o Racismo e o Direito – Gênero e Raça nas Relações de Trabalho}, in \textit{DISCRIMINAÇÃO E SISTEMA LEGAL BRASILEIRO}, \textit{supra} note 54, at 95.
books have been published on anti-discrimination law, and many of these have been doctoral dissertations rather than works by more established scholars. In a civil law system where the work of legal scholars — as opposed to prior judicial decisions — heavily influences the application of the laws, this absence is particularly significant.

a. Racial Democracy and Statutory Law

Unlike in the U.S. where civil rights laws were enacted in recognition of the need to counteract domestic systems of racial subordination, in Brazil the influence of the racial democracy thesis meant that the purpose articulated for the anti-discrimination laws was to protect Brazilian society from the importation of racism from abroad. The 1951 Lei Afonso Arinos — "the first piece of legislation to confront the problem of discrimination in Brazil [and] . . . for nearly forty years the only one"113 — was adopted in response to an incident where prominent African-American dancer Katherine Dunham was denied admittance to a São Paulo hotel.114 However, instead of addressing existing discrimination in Brazilian society, the law was promoted as necessary to prevent the introduction of American-style segregation. Speaking in support of the legislation, anthropologist-turned-senator Gilberto Freyre observed that "[i]t is not surprising that this [incident] occurred in São Paulo, because . . . all the 'isms' which are inseparable from . . . industrial America operate in São Paulo with a vengeance."115 The law's sponsor, Senator Afonso Arinos explained that "the agents of [racial] injustice are almost always gringos who are . . . insensitive to our old customs of racial fraternity."116

The Lei Afonso Arinos established "acts resulting from race or color prejudice" as a criminal misdemeanor, including denial of employment, service, lodging or admittance.117 Thus, until the late 1980s Brazil's main anti-discrimination law was one "which prohibit[ed] social practices of the North American segrega[tionist] past," but failed to address the covert forms of discrimination far

113. Medeiros, supra note 81, at 108.
114. Racusen, supra note 8, at 122.
115. Id.
117. Lei 1.390/51 (translation by author).
more common in Brazilian society. Within the rubric of racial democracy, however, these less explicit forms of exclusion were not covered because they did not fit a conception of discrimination based on the U.S. model of Jim Crow laws. This "narrow construction of racial discrimination," has severely limited its usefulness to the persons it purports to protect.

The logic behind making discrimination merely a misdemeanor offense was that the law's purpose was not to uproot an already entrenched social problem, but to prevent the emergence of one that did not currently exist. As one Brazilian author notes, "the legislator of the penal code considered the practice of racism . . . like the illegal carrying of arms, or vandalism, etc. These acts are punished because they can cause future prejudice or danger to the security of society." This focus on deterring the introduction of racist practices, typically of foreign origin, into society, is a persistent preoccupation in Brazilian anti-discrimination law. In a text on employment discrimination law, Francisco Gerson Marques de Lima cites, as his chief example of racial discrimination in Brazil, incidents of prejudice towards mixed race Brazilians by "groups of 'Aryans'" among the country's large German immigrant population. "This is the result," charges de Lima, "of discrimination against Brazilians in our own land by foreigners!"

The ideology of racial democracy has shaped not only the policy of Brazilian anti-discrimination law, but also perceptions of its effectiveness. In a 1985 case involving a Sao Paulo nightclub that refused to admit Afro-Brazilians on the grounds that its clientele would not accept their presence, the judge concluded, "This was not racial segregation. In Brazil, this practically does not exist. Blacks are loved as idols in sports, music, film . . . This is so much so that prosecutions under the Lei Afonso Arinos are very rare, even when the judges are people of color."

Similarly, in 1986, Jose Neri de Silveira, then-President of the Brazilian Supreme Federal Court, asserted "that the Arinos Act had
been an effective deterrent as evidenced by its lack of use.”¹²⁴ However doubtful this may seem, when viewed through the lens of racial democracy, such a claim has its own internal logic. If racial discrimination is defined as manifested only in explicit acts of apartheid, then, since such practices did not emerge in Brazil after the law’s passage, the law has been a success.

Even after the emergence of the Black Movement in the late 1970s, the racial democracy thesis continued to influence the strategies by which Afro-Brazilians sought to strengthen the anti-discrimination laws. Such efforts focused primarily on enacting measures that symbolized the state’s opposition to racism rather than creating laws that provide individual plaintiffs with workable means to combat discrimination. Afro-Brazilian activists sought to “counter trivialization of racial discrimination” by “argu[ing] that racial prejudice constitutes a crime against the nation and should therefore become a felony.”¹²⁵

The result was Article 5 ¶ 42 of the 1988 Constitution, which establishes that the “practice of racism constitutes an unbailable crime, subject to the punishment of imprisonment.”¹²⁶ This provision was made judicially enforceable by the 1989 Lei Caó, which replaced the Lei Afonso Arinos. The Lei Caó specifies that “crimes resulting from prejudice or discrimination of race, color, ethnicity, religion or national origin,” including “to deny or obstruct employment in a private enterprise,” are offenses punishable by two to five years imprisonment.¹²⁷

As an expression of a stated commitment to racial equality the law “represents... a grand conquest of the black movement,” however, in practical effect the Lei Caó “does not offer much protection to black workers.”¹²⁸ The only successful prosecutions have been in cases where the defendants were charged with the “dissemination of a message with racist content” — conduct which meets racial democracy’s narrow conception of discrimination as an explicit display of racial prejudice.¹²⁹ Thus, the influence of the racial

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¹²⁴. Racusen, supra note 8, at 128.
¹²⁵. Id. at 116.
¹²⁶. C.F. art. 5 ¶ 42 (translation by author).
¹²⁷. Lei 7.716/89, supra note 7, at arts. 1, 4.
¹²⁹. Martins, supra note 55, at 429. (translation by author); While complaints
democracy thesis has required Afro-Brazilian activists to focus their legislative efforts on securing a symbolic expression of opposition to racism, rather than the creation of effective legal tools to counter its effects.

b. Racial Democracy and Anti-discrimination Litigation

1. Effects on Plaintiffs and Their Claims

The influence of the racial democracy thesis has also discouraged Afro-Brazilians from bringing discrimination complaints in the courts. Because it defines Brazil as a society lacking racial distinctions and characterized by relaxed interracial relations, to raise an allegation of racial discrimination has been to open oneself to charges of being “un-Brazilian” and even “racist” oneself. In a country where “whitening” is seen as a means of social advancement, asserting that one is being discriminated against for one’s blackness has meant eschewing this strategy and choosing a lower rung on the social ladder. Because racial democracy defines racial discrimination narrowly as a marginal phenomenon manifested in explicit acts of prejudice, it has restricted the types of claims that Afro-Brazilians raise in court.

Because racial democracy assumes that Brazilian social relations are colorblind, those who seek to resist racial discrimination have had to confront the notion that “to recognize the idea of race and to promote any anti-racist action based on this idea, even if the actor is black, is... racism.” As an appellate court judge wrote in a 1993 opinion, “[i]n a country like ours... to attempt to inject racial conflict involving racial insults often constitute the strongest claims under Brazilian anti-discrimination law, as Robert Cottrol has noted, in the United States imposition of criminal penalties in such cases would “run up against severe First Amendment problems.” Robert Cottrol, The Long Lingering Shadow: Law, Liberalism and Cultures of Racial Hierarchy and Identity in the Americas, 76 Tul. L. Rev. 11, 68 (2001). For example, the most well known conviction under the Lei Ca6 is the case of Siegfried Ellwanger, a neo-Nazi, who was sentenced to a year and nine months imprisonment for the sale of anti-Semitic publications in 2004. Pena substituada: Editor nazista é condenado a quase dois anos de reclusão, CONSULTOR JURÍDICO (Sept. 10, 2004), http://conjur.estadao.com.br/, discussing 8a Vara Criminal, Processo-Crime No. 1397026988-08720 (Aug. 26, 2004).

130. Racusen, supra note 8, at 20; Racusen, supra note 116, at 2.
131. Hernandez, supra note 84, at 1132; Telles, supra note 10, at 96-9.
132. Racusen, supra note 8, at 18.
is a gesture of pure ignorance, rooted in a lack of understanding of our history and development."¹³⁴ Similarly, in a 1997 decision denying relief to a Afro-Brazilian customer subjected to racist abuse by a shopkeeper, a judge urged that “[t]he racial question and racism should be ignored in favor peaceful relations among the races.”¹³⁵

As a result, the victim of discrimination may have to prove she is not the one being racist by bringing her accusation. Unless the defendant “after practicing discrimination based on racial prejudice, states . . . that this is the cause of his act,” observes Jorge da Silva, then “at the end of the day, the victim, himself, would be charged as the racist.”¹³⁶

The ideology of racial democracy has encouraged Afro-Brazilians to identify as members of a single mixed race nationality, rather than to resist discrimination as members of a separate racial subgroup. Unlike in countries with more rigid racial classifications, in Brazil identifying oneself as a victim of racial discrimination means voluntarily assuming a lower status in the social hierarchy. Such a step runs directly counter to the strategy pursued by many Afro-Brazilians of identifying themselves as brown rather than black, or white rather than brown, in order to claim a higher social status. On the 2000 census, where respondents were limited to describing themselves as black, pardo (brown), white, yellow (i.e. Asian) or indigenous, only 6.1 percent of the population identified itself as black, and 38.9 percent as pardo.¹³⁷ Because “[p]rotesting racial discrimination . . . represents an admission of ‘being the type of person who might be discriminated against,’” bringing such an allegation in court requires plaintiffs to forgo this path to advancement.¹³⁸

Finally, because the racial democracy thesis defines discriminatory conduct as manifesting itself in explicit displays of prejudice, it influences the type of complaints that Afro-Brazilians bring under the anti-discrimination laws. In opinion surveys Afro-Brazilians “consistently report problems securing work as the principal discriminatory problem they face.”¹³⁹ However, since employers rarely generally state such prejudices explicitly, such

¹³⁴. Racusen, supra note 8, at 23.
¹³⁵. Telles, supra note 10, at 242.
¹³⁶. da Silva, supra note 70, at 136 (translation by author).
¹³⁷. Telles, supra note 10, at 79.
¹³⁹. Racusen, supra note 8, at 18.
claims make up less than 5 percent of complaints brought under the anti-discrimination law.\textsuperscript{140} Instead, "Brazilians disproportionately bring allegations against insults and other ... verbalized prejudice," which more clearly fit the commonly accepted definitions of discrimination.\textsuperscript{141}

Indeed, until the filing of the recent lawsuits against Brazilian banks based on statistical evidence alone, an open act of racism appeared to be a prerequisite for claims of workplace discrimination. Racusen's study of criminal complaints brought under the Lei Caô found that incidents involving verbal statements of racial prejudice made up 96 percent of cases concerning discrimination in the workplace.\textsuperscript{142} But until recently, more covert employment discrimination, particularly in the area of hiring, has gone almost unchallenged in the courts.

2. Effects on Defendants
When discrimination cases do reach the courts, the influence of the racial democracy thesis not only handicaps the victims, but also provides a ready shield for defendants. Most powerfully, it allows the accused to refute the allegation that their conduct had a racially prejudicial motive simply by virtue of their own "Brazilianess" and thus their presumed inability to discriminate.\textsuperscript{143} Defendants have been able to assert their lack of culpability by claiming that because of their own mixed race background, or their marriage to a non-white spouse, or their friendships with blacks, or even their spiritual devotion to a black saint, they could not possibly be prejudiced.\textsuperscript{144}

According to Racusen, this "Brazilian defense" is with few exceptions, generally accepted by judges, prosecutors and police when asserted in cases involving allegations of discrimination.\textsuperscript{145} Moreover, since many "white" Brazilians claim some African ancestry or are married to someone of mixed race, it is widely available.\textsuperscript{146} For example, in a 2003 prosecution for hiring discrimination, the judge found that simply by virtue of being a

\textsuperscript{140} Id. at 202.
\textsuperscript{141} Id. at 18.
\textsuperscript{142} Id. at 209.
\textsuperscript{143} Racusen, supra note 116, at 2.
\textsuperscript{144} Martins, supra note 55, at 423; Racusen, supra note 108, at 805.
\textsuperscript{145} Racusen, supra note 108, at 805.
\textsuperscript{146} Telles, supra note 10, at 79.
mulato, the defendant was “inherently unprejudiced.” Likewise, in a 1995 case where the defendant was quoted as saying that “the place of the Negro is in the senzala [slave quarters]” the police officer who investigated the case recommending dropping charges, since the accused “had a person of color in his family and could not be prejudiced.” And in a 1994 case brought against an employee who called a co-worker, “monkey, preto [the color “black” used pejoratively], son of an incompetent whore,” the defendant asserted that he since he was of mixed race “just like the victim,” he was incapable of discriminating against someone with the “same Negra origin.”

Racial democracy also imposes a double standard for how references to race are treated by the courts. While those who bring allegations of discriminatory conduct are seen as having inappropriately interjected the issue, use of racially demeaning language is often considered insufficient to establish a prejudicial motive. Defendants who use racial slurs often “claim that the pejorative expressions are recurrent in everyday practice as jokes.”

Likewise, terms that would appear to indicate prejudice are explained away as indications of informality and intimacy. In a 1993 case the defendant, a bank manager, ordered a cleaning contractor to reassign its black employee, threatening to cancel its contract if “that neguinha [literally “blackie”] even entered the bank again.” Prosecutors, however, accepted the defendant’s claim that he used the term affectionately, and recommended that the complaint be dropped.

B. Class-over-race

A second ideology that has affected the development of the anti-discrimination law admits that racial discrimination exists in Brazil, but asserts that it is merely a symptom of class inequality and therefore of lesser salience as a focal point for social reform. In part, because it is compatible with recognition that discrimination exists,

147. Racusen, supra note 108, at 806.
148. Id. at 807.
149. Pretola means the color “black” and almost always is used pejoratively when referring to a person. Negro/a signifies belonging to the “black race,” and is used positively by Afro-Brazilians. Id. at 806.
151. Racusen, supra note 8, at 298.
152. Id.
this thesis has begun to supplant racial democracy as more descriptively accurate, though racial democracy still retains influence as a normative ideal. Like racial democracy, this ideology — which I refer to as the “class-over-race” thesis — is compelling because it accurately explains some aspects of the country’s social relations, and thus resonates with both political and intellectual elites and ordinary Brazilians as well.

Like racial democracy, the class-over-race thesis has hindered the development of Brazilian anti-discrimination law. First, because this ideology makes it difficult for Afro-Brazilians to distinguish racial discrimination from class prejudice, it discourages recourse to anti-discrimination law by potential complainants.153 Second, because the use of class distinction as a basis for differential treatment has long been accepted within the Brazilian legal system, the legitimacy of class prejudice provides a cover for perpetrators of racial discrimination. Finally, the dominance of class over race as a basis for political mobilization has weakened the ability of Afro-Brazilians to press for policies specifically aimed at addressing racial discrimination. Instead, either as a result of cooption or as a strategic choice, Afro-Brazilian activists have tended to ally themselves with class-based political parties that, until recently, have pursued race-blind redistributionist programs rather than confronting racial discrimination head-on.

Class-over-race theories of Brazilian racial relations first gained prominence with postwar research led by sociologist Florestan Fernandes, and sponsored by UNESCO as part of an effort to draw lessons from the country’s successful multiracial society.154 These studies, however, documented a deep socioeconomic divide between white and non-white Brazilians. The UNESCO researchers concluded, however, that “race was a subordinate variable in determining social stratification,” and that “underdevelopment” was the dominant factor that “held back non-white Brazilians.”155

Nevertheless continued research over the next three decades demonstrated that this inequality could not be explained solely by underdevelopment alone, but instead reflected pervasive and persistent discrimination against Afro-Brazilians. Moreover, research showing that “brown” Brazilians occupied a socioeconomic status

154. Skidmore, supra note 90, at 375.
155. Id.
hardly superior to blacks but far below that of whites revealed that racial democracy's promise of social mobility through interracial marriage was largely a myth. In addition, economic data showed that the income gap between whites and non-whites actually increased during Brazil's "miracle" period of rapid growth during the 1960s and 1970s.

While this research did much to discredit the racial democracy thesis, it not lead to a policy consensus in support of measures aimed at countering discrimination, even after Brazil's return to democracy in the 1980s. As Thomas Skidmore observed in 1985, the Brazilian left identified "[s]ocial class [a]s the most fundamental variable . . . for studying society and for changing it," and "dismiss[ed] race as a false issue." Throughout the 1990s political elites continued to "reduce the race issue to one of class conflict that would be solved by the building of socialism or the implementing of universal race-neutral income distribution policies." Thus, even after the problem of racial discrimination has emerged from behind the façade of racial democracy, the influence of the class-over-race thesis has meant that efforts to confront the issue have faced considerable resistance—even from the most committed supporters of social change.

1. Class Prejudice and Racial Discrimination

Just as the influence of racial democracy has been sustained by the fact that Brazilian society is indeed characterized by widespread interracial mingling, the persuasiveness of the class-over-race thesis reflects the reality that the country also is pervaded by extreme inequalities of wealth. Because "Brazil['s] culture was more comfortable with status and hierarchy," its traditional elites had less need than their counterparts in the U.S. south to adopt explicit legal measures to maintain racial subordination during the post-abolition period. The result has been a strong tradition of recognizing class instead of race as a legitimate basis for differential treatment in the courts.

156. do Valle Silva, supra note 30, at 54-5.
157. Telles, supra note 10, at 126.
158. Skidmore, supra note 90, at 17.
160. Cottrol, supra note 129, at 54.
161. Keith S. Rosenn, Brazil's Legal Culture: The Jeito Revisited, 1 FLA. J. INT'L
Antonio Guimarães observes that “[c]lasses in Brazil, to the contrary of . . . the United States, are considered legitimate bases for inequality of treatment and opportunity . . . .” Brazilians who recognize the existence of racial discrimination in the country, nevertheless, often describe it as less virulent than that of the bias of rich against poor. Darcy Ribeiro accuses the descendants of Brazil’s slave-owning elite of “still hold[ing] the same attitude of vile contempt where the black is concerned,” but later notes that “more than a prejudice of color, Brazilians have a deep-seated class prejudice.”

Defendants in racial discrimination cases often use the acceptability of class prejudice in order to disguise their motives and thereby avoid liability. Recasting racial discrimination as class prejudice has been a longstanding strategy for placing such conduct beyond the ambit of the law. In a 1979 case brought under the Lei Afonso Arinos, the court accepted the excuse of a doorman who denied an Afro-Brazilian lawyer access to a building’s elevator that “he had taken the victim for a servant.” Similarly, in a 1989 case, a salon owner in an apartment complex justified refusing an appointment to an Afro-Brazilian housekeeper by claiming that his establishment “could not serve domestics.” Courts appear to routinely accept such excuses because, as one judge observed, while “much more segregation is social and economic than racial . . . [the former] does not represent a crime like the latter.” The ability of defendants to explain away acts of illegal racial discrimination as permissible expressions of class prejudice is therefore a further factor in persuading Afro-Brazilians of the futility of legal action.

The fact that “a poor ‘black’ or ‘brown’ may not know whether particular mistreatment is based on race or class” also narrows the situations where Afro-Brazilians are likely to bring complaints in the courts. Cases alleging racial discrimination in the workplace nearly always involve use of racial insults, since the verbal offense constitutes “the only available evidence, for the complainant, that the

162. Guimarães, supra note 44, at 206.
164. Prudente, supra note 121, at 239.
165. da Silva, supra note 70, at 162.
166. Prudente, supra note 121, at 242.
discrimination suffered... was, really, of a racial nature and not merely of class.\textsuperscript{168}

By contrast, asserting a legal claim based on class — one’s status as a worker — is a far more straightforward proposition. Brazil’s labor code confers on employees a vast array of legal rights, and creates a dedicated system of labor courts for their enforcement.\textsuperscript{169} Because of this, Brazilian workers long have been described as having “a juridical consciousness of class.”\textsuperscript{170} Racial discrimination, particularly in its less explicit forms, creates injuries that are more difficult for victims to define as violations of the law, where the legal system provides less obvious and accessible avenues for redress.

2. Class Politics and the Black Movement

Like racial democracy, the class-over-race thesis has hindered Afro-Brazilian efforts to garner the political support necessary to enact laws aimed at remedying racial inequality and discrimination. Because efforts at political mobilization on the basis of race have been relatively unsuccessful compared to those based on class, Afro-Brazilian movements have faced cooption by class-based party politics, and submersion of their agendas under broader populist programs. Even where they have maintained a distinct presence and agenda within political parties, Afro-Brazilian activists often have been treated as representing a “special interest” rather than a constituency numbering nearly half the population. Afro-Brazilians typically have gained leadership in class-based parties by representing other, more influential constituencies such as trade unions or organizations of \textit{favela} residents. Rarely have they come to prominence as leaders of the Black Movement itself.

“In Brazil,” writes Guimarães, “class mobilization has been the most successful form of mobilization.”\textsuperscript{171} Afro-Brazilian organizations have had considerable difficulty mobilizing black Brazilians, so much so that “a good part of the black population feels more attracted by the trade unions and left political parties, than by black institutions.”\textsuperscript{172} Brazil’s labor parties in particular have been able to attract strong support from Afro-Brazilians, but mostly through their support for class-based redistribution programs, not opposition to

\textsuperscript{168} Guimarães, \textit{supra} note 44, at 169.
\textsuperscript{169} See \textit{infra} pp. 55-56.
\textsuperscript{170} French, \textit{DROWNING IN LAWS}, \textit{supra} note 15, at 111.
\textsuperscript{171} Guimarães, \textit{supra} note 128, at 213.
\textsuperscript{172} Id.
racial discrimination.

Anthony Marx observes of Brazilian electoral contests that, "the general lack of any explicit use of racial politics . . . in a setting of tremendous inequality remains striking." In contrast to the United States, where racial politics often have been employed to head-off class-based political challenges, the opposite dynamic has held sway in Brazil. In the 1930s Getúlio Vargas' Brazilian Workers Party ("PTB") secured the support of Black workers by passing laws requiring employers to give preference to native Brazilians (which included nearly all Afro-Brazilians) over immigrants (who were predominantly European and Asian). The contemporary successor to the PTB, the Workers Democratic Party ("PDT") still tends to attract strong Afro-Brazilian support and the participation of prominent black leaders, including pioneering civil rights activist Abdias do Nascimento.

Afro-Brazilian activists have tended to work within larger class-based organizations rather than establishing an independent political agenda. While many involved in the Black Movement in 1970s and 1980s also joined the newly founded Workers Party ("PT"), these activists formed only one element in an "uneasy mix" of social movements that "gravitated toward the PT in its capacity as an alternative political proposal." Because the Black Movement's presence within the PT lacked the influence of a core constituency like the trade unions, it was not until 1987 that the party first gave serious attention to the issue of racial discrimination.

Like the PDT, the PT has had amongst its leaders prominent Afro-Brazilians, including Benedita da Silva, originally a community activist in the favelas of Rio de Janeiro, and Vincente Paulo da Silva, former president of the CUT, one of the country's leading trade union federations. However, such leaders have typically seen their roles within the PT as representatives of these organizations rather than of the Black Movement. As Benedita da Silva explains,

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173. Marx, supra note 104, at 259.
175. E.g., Reichmann, supra note 38, at 15, 21.
178. Marx, supra note 104, at 259.
Those of us in the PT face many difficulties in dealing with what is traditionally meant by a black movement in order to meet black expectations. As a black woman, I am not there to represent the militant wing of the black movement, but rather underpaid blacks who live in the slums . . . .

Thus, the influence of the class-over-race thesis has meant that anti-racist politics often are marginalized within the left parties, even if Afro-Brazilians themselves are not.

3. Class-Over-Race and Social Policy

The Brazilian left often has deployed the Black Movement’s critique of racial inequality to support its redistributionist agendas, but only rarely to promote initiatives to combat discrimination. Because Afro-Brazilians make up an overwhelming majority of the poor, and because the leading factor in racial inequality is lack of access to public goods such as education, it has made sense for the Black Movement to support this agenda. Moreover, in the employment arena, colorblind policies have provided some shelter to Afro-Brazilians from workplace discrimination. However, a failure to adopt legislation that would enable Afro-Brazilians to effectively challenge discrimination in the labor market may mean that Afro-Brazilians workers will face continued difficulties in extracting full benefits from such reforms.

As Guimardes observes, “to say that the poor are poor because they are black, and not because the country is poor, is a creative strategy for holding responsible the elite of the country, who, until today, hide their . . . interests behind theories like racial democracy or underdevelopment.” For the left, the Black Movement’s charges of systemic racial discrimination have represented a powerful counter-argument to claims that poverty can only be alleviated gradually through economic growth. As the left has deployed this critique in support of redistributionist programs to benefit the poor, Afro-Brazilian activists have, until recently, supported its agenda and deferred demands for more race-specific policies. This is in part because the Afro-Brazilian poor will be the primary beneficiaries of such programs, and because the alternative, a “minority politics”

180. Guimardes, supra note 44, at 63.
181. Guimarães, supra note 17, at 177.
based on race, "runs the risk of losing legitimacy."\(^\text{182}\)

Moreover since redistributionist programs represent a significant advance for Afro-Brazilians over the patronage-based politics of traditional elites, it is not surprising that Afro-Brazilians would lend them support rather than be marginalized politically through a race-focused approach. For example, even absent affirmative action programs, Afro-Brazilian workers appear to face less discrimination within the public sector, where the government has imposed standardized hiring and compensation practices, than they do in private sector firms where informal systems of social connections prevail. A study comparing petrochemical companies in the state of Bahia found significantly higher employment of black and brown workers, at higher occupational levels, in state-owned companies than in private firms.\(^\text{183}\) A broader study in 1989 of labor markets in Brasilia, the seat of Brazil’s federal bureaucracy, and São Paulo, its center of private industry and finance, found the levels of disparity between black and white unemployment rates and salary levels to be several times higher in the latter.\(^\text{184}\)

Clearly, Afro-Brazilians do benefit from redistributionist policies that do not specifically target racial inequality. Yet, for many Afro-Brazilian workers, the promise of a class-over-race agenda to ameliorate inequality through broad-based improvements in education and other social welfare programs may prove a frustrating mirage. Without effective means to challenge discriminatory practices in private sector employment, Afro-Brazilians may have difficulty converting enhanced human capital into greater racial equality.

**IV. Prejudice and Punishment: Brazil’s ‘Thin’ Anti-discrimination Law**

In this section, I examine Brazil’s anti-discrimination statutes, to consider the extent to which the laws themselves, as well as their interpretation by Brazilian courts and law enforcement agencies, are responsible for the legal system’s failure to effectively address racial discrimination in the labor market. First I consider two factors which a number of scholars have identified as responsible for the law’s

\(^{182}\) Guimarães, *supra* note 44, at 63.
\(^{184}\) Roland, *supra* note 30, at 5.
ineffectiveness: its counter-productive emphasis on penal sanctions and its narrow conception of discrimination as conduct manifesting overt displays of racial prejudice. I also look at another consequence of the anti-discrimination law's penal focus, the central role this gives to police and public prosecutors in its enforcement. Next I show how the basic doctrines of Brazilian anti-discrimination law have continued to shape efforts at its reform. I conclude that, despite attempts to improve their efficacy, reliance on these statutes has proved a dead end street for those seeking to challenge racial discrimination.

A. A Punitive Approach to Anti-discrimination Law

Both U.S. and Brazilian scholars have recognized the counterproductive impact of the punitive approach employed by the country's core anti-discrimination statutes, the Lei Afonso Arinos and its successor, the Lei Caô, which impose criminal sanctions for acts of racial prejudice. Robert Cottrol has observed that in Brazil, "criminalization may have actually hindered the development of a body of robust civil rights law." The most direct effect of the penal approach has been that courts require a high burden of proof, "the criminal standard of evidence 'beyond a doubt,'" to establish defendants' liability for discriminatory conduct.

The enactment of the Lei Caô, which establishes racism as an "unbailable crime" punishable by one to five years imprisonment, has made judges even more reluctant to convict defendants, since it means imposing a relatively harsh penalty for what may appear to be a minor offense. This has led judges to further raise the bar for establishing liability, in particular, for satisfying the requirement of proving the defendant's prejudicial motive. An Afro-Brazilian civil rights organization's study of prosecutions under the Lei Caô identified its harsh penalties as one of the chief "impediments to its utility."

B. A Narrow Focus on Prejudice

By criminalizing acts "resulting from race or color prejudice," Brazilian anti-discrimination law adopted the racial democracy thesis'
narrow conception of discrimination as manifested in overt displays of prejudice.\textsuperscript{190} The result, in the words of Supreme Court President Marco Aurelio Mello is a “jurisprudence under which the victim need[s] proof of the specific motive of the opposing party.”\textsuperscript{191} Brazilian courts have interpreted the standard for conviction under the Lei Caô to require proof by direct evidence of (1) the discriminatory act; (2) the defendant’s prejudice towards the victim; and (3) a causal relationship between the two.\textsuperscript{192} As Jorge da Silva points out, for a finding of guilt “it is necessary that someone, after practicing discrimination because of racial prejudice, state . . . that this was the cause of the act.”\textsuperscript{193}

Because racial discrimination is often covert, many harms to Afro-Brazilian workers fall beyond the reach of the laws. For example, in a 1995 case where a complaint was brought against an employer who admitted requiring “boa aparência” — in other words, whiteness — in a job posting, the Public Ministry refused to bring charges.\textsuperscript{194} The prosecutor explained that “although one repudiates this odious behavior,” it was not possible to bring charges because “the practice unfortunately is veiled.”\textsuperscript{195}

\textbf{C. Unavailability of Burden Shifting}

The requirement of direct evidence of prejudicial motive means that the Lei Caô does not permit the burden shifting methods used to establish liability under U.S. anti-discrimination law. Because, until now, the Brazilian judiciary “has not . . . allow[ed] racial disparities in employment to serve as evidence of discrimination,”\textsuperscript{196} it has had no equivalent in its jurisprudence to the theory of discrimination based on the disparate impact of facially neutral practices adopted by the U.S. Supreme Court in \textit{Griggs v. Duke Power}.	extsuperscript{197} Similarly, until recently, the Brazilian legal system had not produced a theory of liability based on statistical evidence showing discriminatory pattern and practice of the type the U.S. Court upheld in \textit{International

\begin{footnotesize}
\begin{enumerate}
\item Lei 7.716/89, \textit{supra} note 7.
\item Mello, \textit{supra} note 54, at 22.
\item Racusen, \textit{supra} note 8, at 93.
\item da Silva, \textit{supra} note 70, at 136.
\item Racusen, \textit{supra} note 8, at 25-7.
\item \textit{Id.}
\item \textit{Id.} at 88-9.
\end{enumerate}
\end{footnotesize}
Brotherhood of Teamsters. The bank employee litigation, which is the first Brazilian case to assert liability based solely on statistical evidence, was brought as a constitutional claim and not under the Lei Caô.

The Brazilian Code of Civil Procedure does allow burden shifting in civil lawsuits when "production of evidence by the...[plaintiff] is impossible or extremely difficult." Brazilian courts also apply burden shifting in cases where workers bring constitutional claims alleging age or sex discrimination as a result of such employment criteria as mandatory retirement limits or minimum height requirements. In such situations, Brazilian courts require defendants to demonstrate the "reasonableness" of the disputed practices based on: (1) their relationship to the employer’s purported purpose; (2) their consistency with the Brazilian Constitution; (3) the existence of an alternative practice less burdensome on the plaintiff; and (4) the proportionality between the burden on the plaintiff and the benefits of the policy for the employer. By contrast, in cases involving claims of racial discrimination judges have not applied this method and "placed no evidentiary burden on employers to demonstrate their rationale."

D. Misconstruing Claims

Another way in which the law’s penal approach influences the treatment of discrimination claims is by placing police and public prosecutors in the role of gatekeepers to the courts. As a result these institutions strongly affect the way in which complaints of racial discrimination are legally construed and enter the courts. Here again, the law’s emphasis on criminal penalties and its requirement of prejudicial motive combine to the detriment of those it is supposed to protect.

Attempts to bring racial discrimination claims typically begin with the filing of a complaint with the police. This is due not only to

201. Racusen, supra note 8, at 98-9.
202. Id.
203. Id. at 297.
204. Id. at 20.
the classification of racial discrimination as a criminal offense under the *Lei Ca6*, but also most victims' lack of resources. Civil litigation can be a risky proposition for plaintiffs since Brazilian law generally operates according to a "loser pays" system and attorneys generally require some form of up front fee. Moreover, a criminal conviction constitutes a civil judgment for which the victim may seek damages and victims may participate in the prosecution by proposing means of proof and participating in collection of evidence. Therefore, there are significant advantages to bringing complaints to the public authorities rather than immediately pursuing a private lawsuit.

Despite the potential advantages for victims, channeling such complaints through the police appears to actually reduce the number of discrimination claims that make it to the courts. Although over 95 percent of incidents of discrimination reported to police involve verbal statements of prejudice, the *Lei Ca6* did not specify that use of racial epithets represented a violation of the law. As a result, most complainants, and in particular those who bring allegations of discrimination in the workplace, were told by police that the conduct they reported did not violate the anti-discrimination law.

Of the 213 complaints of racial bias filed from 1993 to 1995 with the São Paulo state police’s Department of Social Communications, which was tasked with investigating violations of the *Lei Ca6*, Seth Racusen found that over 75 percent were classified as *injúria* — a private offense, similar to defamation, which must be litigated by the victim herself — and not as grounds for prosecution under the *Lei Ca6*. In cases where the victim alleged discrimination related to employment, the largest single category of complaints, police deemed less than a handful to constitute violations of the anti-discrimination law.

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210. *Id.* at 205.
Racusen suggests that police classified complaints as *injúria* because they view verbal statements of racial prejudice in isolation from other non-facially discriminatory acts, even when the latter caused more concrete harm to the victim. Since a verbal statement alone may not have appeared serious enough to merit the arrest without bail that the *Lei Caá* commands, police apparently were reluctant to treat them as violations of the statute. Once the police classified complaints of racial discrimination as *injúria*, victims were much less prone to pursue their claims. Complaints classified as *injúria* were nine times less likely to result in judicial proceedings than those police treated as violations of the *Lei Caá*.

Thus the *de facto* result of police involvement has been to further heighten the law’s already rigorous standard of proof. In investigating complaints involving employment discrimination, police found violations of the *Lei Caá* only when defendants made verbal statements of prejudice at the same time they took adverse action towards the victim which was explicitly covered by the statute — i.e., “obstructing or denying employment.” However, in situations where the employer’s prejudicial statement occurred before or after the adverse action, police classified the complaint as *injúria*. Thus unless victims had evidence of (1) conduct explicitly covered under the statute; (2) defendant’s overt expression of a prejudicial motive; and (3) these elements being present at the same time, even police tasked with investigating racial crimes were likely to reject the complaint.

**E. Punishment, Prejudice and Legislative Reform**

Despite the scarcity of successful prosecutions under the *Lei Afonso Arinos* and *Lei Caá*, those who sought reform of Brazilian anti-discrimination law remained wedded to the same punitive approach. Throughout the mid-1990s leading Black Movement NGOs, while criticizing the deficiencies of the existing laws, focused their legislative efforts on expanding the anti-discrimination provisions of the criminal code. One result was the 1997 *Lei*

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211. *Id.* at 255.
213. *Id.* at 205, 255.
214. *Id.* at 255.
Paim,\textsuperscript{216} sponsored by Afro-Brazilian Senator Paulo Paím of the PT, which amends the penal code to permit "injúria [to] be punished with the same rigor as racial crimes [under the Lei Caô]."\textsuperscript{217}

Carlos Medeiros claims that, "independent of the ultimate sentence," this amendment "has shown itself more agile and efficacious than the Leis Afonso Arinos and Caô" since "the accused have gained highly negative visibility in addition to sometimes spending time in jail."\textsuperscript{218} But while this amendment closes the "injúria loophole,"\textsuperscript{219} it further cements the notion that the law only addresses explicitly discriminatory practices. And though constitutional impediments to the imposition of criminal sanctions for racist speech are weaker in Brazil than in the United States,\textsuperscript{220} it seems likely that courts will remain hesitant to impose prison sentences solely for verbal insults.

Paim continued to pursue the same approach in a bill he introduced in the senate in 2000 entitled the "Statute of Racial Equality."\textsuperscript{221} The proposed legislation contains ambitious measures for affirmative action, land rights for Quilombo communities of descendants of escaped slaves, and consideration of reparations for slavery.\textsuperscript{222} However, in its anti-discrimination provisions, Paim's bill does not alter the Lei Caô's approach, but merely proposes expanding its reach to punish employers who "hinder the promotion or receipt of any other job-related benefit," "fail to provide necessary equipment," or "provide . . . differential treatment in work environment, especially in salary" on the basis of race or skin color.\textsuperscript{223} Indeed, aside from prohibiting firms that are hiring new employees from using the term "boa aparência" in job listings or requesting photographs on job applications (which would indicate race), the proposed amendments fail completely to address the problem of covert discrimination.\textsuperscript{224} Racusen concludes that because Paim's proposal "defer[s] to the 1989 law [the Lei Caô]" and "does not

\begin{footnotesize}
\begin{enumerate}
\item Lei 9.459 de 13 de Maio de 1997
\item Guimarães, \textit{supra} note 44, at 169.
\item Medeiros, \textit{supra} note 81, at 122.
\item Racusen, \textit{supra} note 8, at 155.
\item See Cottrol, \textit{supra} note 129.
\item \textit{Id.}
\item \textit{Id.} at 175.
\item \textit{Id.} at 176.
\end{enumerate}
\end{footnotesize}
modify... [its] theory of racial discrimination” it is unlikely “to provide a stronger basis for future litigation.”

Even statutory reforms aimed specifically at the issue of employment discrimination, while more innovative in certain respects, suffer from some of the same limitations as of the Lei Ca6. Law 9.029 of 1995 amended the Civil Code to offer victims of discriminatory termination a choice between reinstatement with back pay or damages equal to twice their lost wages. While the law also contains a general “prohibition on the adoption of any discriminatory practice and limitation which affects access to employment, or its maintenance,” this ban is limited to discrimination “for motive of sex, origin, race, color, marital status, family situation or age.” Thus, it appears that plaintiffs still must prove the defendant’s prejudicial intent in order to establish liability.

Marques de Lima, pointing to Law 9.029’s failure to prohibit a broader range of discriminatory practices, criticizes its sponsors for having “let slip through [their]... fingers an opportunity bring into more notable effect equality of treatment in employment relations.” He also observes that the provision of reinstatement for discriminatory termination is undermined by the lack of protection for plaintiffs from subsequent employer retaliation, a flaw that “makes the exercise of the right unviable.” Because Brazilian law provides relatively strong protections from employer retaliation for individuals exercising other workplace rights, such as union stewards, health and safety representatives and workers taking parental leave, the lack of similar provision for workers bringing discrimination claims is particularly notable.

While Marques de Lima claims that the 1995 law expands the coverage of Brazilian anti-discrimination law to encompass the same type of indirect harms that the U.S. Court dealt with in Griggs v. Duke Power, it is unclear whether this is really an accurate comparison. As an example of the practices prohibited by the statute, Lima states that the law forbids employers from imposing “higher requirements for blacks... to be hired,” or to deny employment

225. Racusen, supra note 116, at 18.
226. Lei No. 9.029, de 13 de abril de 1995, art. 4 [hereinafter Lei 9.029/95].
227. Id. at art. 1 (emphasis added).
228. Marques de Lima, supra note 122, at 19.
229. Id. at 197.
“through greater rigor in tests [or] interviews.” Such policies constitute discrimination through *disparate impact*, and thus are distinguishable from those at issue in *Griggs*, where the defendant had adopted an employment test that, while applied neutrally, had a *disparate impact* on black employees.

Marques de Lima raises further doubts that the 1995 statute permits disparate impact analysis when he emphasizes that, “intent is indispensable to the configuration of the crime, which in cases of work relations, *must be specific*, that is to say, whose desire is to impede or obstruct access of someone qualified to a position or job.” The power of disparate impact analysis, of course, is that its burden-shifting process allows plaintiffs to establish liability without proving any intent on the part of the employer to discriminate. Thus, even as legislators have sought to provide broader legal protections for Afro-Brazilian workers, the notion that racial discrimination manifests itself solely in intentional acts of prejudice continues to constrain the reach of the law.

**V. Civil Litigation: A Path Worth Taking?**

Perhaps the most compelling critique of the Brazilian legal system’s punitive approach to racial discrimination is that of civil rights attorney Hédio Silva, who charges that this model not only has been a dead end for Afro-Brazilian workers, but also has impeded exploration of more promising routes of legal action. In an article written in 2000, Silva outlined the model’s “tragic effects:”

(a) the quick and convenient invocation of the criminal law, repressive methods and criminal sanctions; (b) consequently a depressing, structural incapacity to explore other responses to the violation of the right to equality that are available in the [legal] order, for example, objective civil responsibility as envisioned in Article 1 of [ILO] Convention 111 and Article 6 of the [International] Convention Against All Forms of Racial Discrimination; and (c) non-perception of a formidable

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232. Id. at 95.
combination of methods of confronting the problem...  

In the last decade, Brazilian public prosecutors and civil rights attorneys, recognizing the limitations of the criminal anti-discrimination statutes and sensing opportunities under the country’s new Constitution, have begun to explore whether civil litigation presents more viable options for challenging racial discrimination in the workplace.

Legal practitioners and scholars have identified three elements of the Brazil's civil litigation system that offer advantages for employment discrimination claims brought by Afro-Brazilian workers. First, a few individuals have already achieved notable success by bringing suits under the Brazilian Constitution's equality and anti-discrimination provisions. Such constitutional claims are being further tested in the current bank employee litigation. Moreover, these constitutional claims demonstrate that Brazil's incorporation of international conventions on employment discrimination into its new constitutional order provides grounds for courts to take a broader view of employers’ liability for non-facially discriminatory practices.

Second, discrimination claims can be brought within the country's well-developed labor law system, which may be a more favorable mechanism for Afro-Brazilian workers than criminal prosecution of employers under the Lei Caô. Finally, Brazilian class action law confers standing on public prosecutors and non-governmental organizations to bring lawsuits on behalf of large groups of workers, though use of this provision is a novel concept. This section will briefly evaluate the potential advantages and limitations of civil litigation strategies as alternative methods for combating discrimination against Afro-Brazilians in the labor market.

Attorneys associated with the Black Movement have pointed to several important advantages that civil litigation of discrimination claims may offer Afro-Brazilian plaintiffs and civil rights organizations. First, and most obviously, the burden of proof and evidentiary requirements for establishing liability are greatly reduced. A related advantage is that under the civil litigation regimes mentioned above — constitutional equality claims, labor law, and class action procedure — Brazilian courts already employ this type of

235. Silva, supra note 76, at 382.
236. Martins, et. al., supra note 159, at 800.
237. Telles, supra note 10, at 245.
burden-shifting analysis needed to challenge covert acts of discrimination. In addition, civil litigation may offer economic incentives for plaintiffs and counsel to pursue discrimination claims more aggressively than police and prosecutors have done in the past. Moreover, fee awards generated by successful civil litigation may provide resources to support expanded legal services and advocacy by Black Movement organizations. Although there is, as yet, limited jurisprudence or scholarship on the application of Brazil's constitutional, labor and class action laws to claims of racial discrimination, that which does exist suggests that civil litigation will be a more effective tool for advancing the rights of Afro-Brazilians than continued reliance on the anti-discrimination provisions of the penal code.

A. Constitutional Claims

Brazil's 1988 Constitution contains extensive provisions protecting equality and prohibiting discrimination. Article 5 of the Constitution begins by stating that "[a]ll are equal before the law, without distinction of any nature, guaranteeing to Brazilians and foreigners resident in the country the inviolability of the right to life, liberty, equality, security and property... in the following terms..." Paragraph forty-one of Article 5 goes to adds that "the law will punish any discrimination which would offend rights and fundamental liberties," while ¶ XLII states that the "practice of racism constitutes an unbailable crime, subject to the punishment of imprisonment, under the terms of the law." Brazilian courts have held that the general equality protections of Article 5 are self-executing, even though the specific anti-discrimination provisions of ¶ XLI and XLII appear to require implementation through criminal statutes. Supreme Court President, Marco Aurélio Mello, has observed that "in relation to rights and individual guarantees, the Constitution of 1988 became, from when promulgated, self-executing." However, constitutional scholars Celso Ribeiro Bastos and Ives Gandra Martins describe ¶ XLI's anti-discrimination provisions as "unequivocally not self-

238. C.F. art. 5 (translation by author).
239. Id. art 5 ¶¶ XLI, XLII.
240. E-mail from Marcos Paulo Veríssimo, Professor, Escola de Direito de São Paulo da Fundação Getúlio Vargas, to author (July 22, 2005 12:58:16 -0300) (on file with author).
executing... [being] among those that demand implementation.” However, unlike ¶ XLII, whose criminal provisions were brought into effect by the Lei Caó, ¶ XLI appears to lack, as of yet, any such implementing legislation.

Additionally, Article 7 ¶ XXX of the Constitution, which addresses economic rights, prohibits “difference of salary, exercise of functions, and criteria of admission for motive of sex, age, color or civil status.” While Law 9.029 of 1995 provides for at least partial implementation of ¶ XXX, it clearly does not exhaust the potential reach of the prohibition. However, in cases addressing age bias the Supreme Federal Court has treated ¶ XXX as self-executing, lending support to those who assert that direct racial discrimination claims can be made as well.

Bringing litigation under the Constitution’s equality provisions may make available the kind of burden shifting analysis that can reach a broader range of discriminatory practices than the Lei Caó. In considering constitutional claims by employees alleging age and gender bias, courts have considered the “reasonableness” of the challenged practices by using a test that considers their consistency with the Constitution's equality provisions. Since the same constitutional provisions also address, discrimination on the basis of race and color, it would seem appropriate for the courts to apply this test more widely than they have to date.

Moreover Hédio Silva argues that in adopting ILO Convention 111, Brazil accepted a definition of racial discrimination that encompasses facially neutral practices that have a disparate impact on racial minorities. According to Silva, Convention 111 is enforceable by Brazil's domestic courts by virtue of Article 5 of the Constitution which states that “the rights and guarantees expressed in this Constitution do not exclude others flowing... from international treaties to which the Federal Republic of Brazil is party.” Because Convention 111 defines discrimination as “any distinction, exclusion or preference made on the basis of race, colour,... which has the effect of nullifying or impairing equality of opportunity or treatment

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243. C.F. art. 7 ¶ XXX.
245. Racusen, supra note 8, at 98.
246. Silva, supra note 76, at 388; C.F. art. 5 §2.
in employment or occupation," Silva claims it has "introduced into the [legal] order the modality of objective civil responsibility for racial discrimination." Correct application of Convention 111, says Silva, means that "the discriminated person ... is relieved of proving that intangible, cunning and concealed subjective element, the intent to discriminate." According to this argument, under Convention 111 Brazilian law already permits disparate impact analysis.

While the courts have yet to adopt this particular approach, there are already some indications that bringing civil suits based on constitutional claims is a viable route for Afro-Brazilians to assert employment discrimination claims. In two well-publicized cases in 1995 and 2001, Afro-Brazilian public employees won rulings in Brazilian labor courts that racially discriminatory terminations had violated their constitutional rights. In both cases, the plaintiffs' claims initially had been rejected for failure to show the prejudicial motives of their employers. However, on appeal, the courts relaxed the evidentiary requirements and held that discrimination had been established despite lack of direct proof of specific intent. Similarly, in two more recent cases, Afro-Brazilian workers in the private sector brought successful constitutional claims against their employers for racial harassment in the workplace.

In Eletrosul, the 1995 case that was the subject of the film, "The Rule and the Exception," the plaintiff was an Afro-Brazilian engineer who was laid-off from a public utility company shortly after his supervisor said, "let's clean up the department and fire that crioulo [Creole]." While the engineer initially sought to bring a criminal complaint under the Lei Caô, public prosecutors refused to file charges, accepting the company's claim that the layoff was not racially motivated. The engineer subsequently filed a civil suit in the labor courts claiming that the termination was unconstitutional. While the claim was rejected by the court of first instance, on appeal, the regional labor court held that it was unnecessary to show "the motivation of the dismissal to be definitely racist" and instead

247. ILO No. 111, art. 1 §1(a) (emphasis added).
248. Silva, supra note 76, at 379.
249. Id.
250. However, the more recent ruling was subsequently reversed. See infra at 312.
251. Racusen, supra note 8, at 306.
252. Id. (discussing Inquerito Policial No. 596/92, 3d Vara Criminal, Estado de Santa Catarina).
“scrutinized the firm’s dismissal process to ask if this was an unjustified dismissal.”

Concluding that this process was “discretionary with likely racial motivations,” the appellate court ordered the plaintiff’s reinstatement, a ruling that was subsequently upheld by the country’s highest labor court, the *Tribunal Superior do Trabalho* (TST).

Similarly, in the 2001 case of *de Souza v. SENAI*, the TST awarded reinstatement and damages to a teacher in a government apprenticeship program whose supervisor had harassed him and called him a “worthless Black” who should return to the *tronco* (slave quarters). The lower court rejected the plaintiff’s claim, accepting the defendant’s argument that the supervisor’s statement only reflected his personal animosity towards the plaintiff and not a racially discriminatory motive for the plaintiff’s termination. However, the TST accepted the plaintiff’s appeal and ruled in his favor, holding that the supervisor’s “numerous documented acts demonstrated... [his] prejudicial motive” and that this was “responsible for [the plaintiff’s]... reassignment and dismissal.”

In its decision in favor of the plaintiff, the TST cited both constitutional provisions prohibiting discrimination and Brazil’s adoption of ILO Conventions 111 and 117. The court appeared to recognize that some form of burden shifting was appropriate. The TST held that, because of “the social aspects involved” in the case, the defendant employer had “objective responsibility” for the discriminatory acts of its supervisor, even if at the time of the plaintiff’s termination the employer was not aware of those discriminatory acts. However, on rehearing by a specialized panel of the court, the TST reversed itself and reinstated the lower court’s ruling, finding that since “the acts considered discriminatory did not
extend beyond the personal relationship of the employee with his immediate supervisor, they cannot be attributed to the employer who lacked knowledge of them.” Notably, Justice Carlos Alberto Reis de Paula, the first Afro-Brazilian to serve on the TST, dissented from the majority’s decision to reverse.

Under Brazilian law, employment discrimination claims based on the constitutional guarantee of “equality before the law” are not restricted to public sector workers, but may also be brought by employees of private firms. In the 2001 case of Mylene Pereira Ramos v. McDonald’s, an Afro-Brazilian food service worker in São Paulo successfully brought suit after her supervisor called her a “smelly black woman” and told her that her skin color made her a poor employee. Although by U.S. standards, the supervisor’s conduct might not have been sufficient to create liability, the Brazilian court awarded “moral damages” based on a violation of constitutional equality guarantees.

Similarly, a 2005 ruling by the TST affirmed a lower court decision awarding damages to an Afro-Brazilian electrician who was subjected to repeated racial insults by his supervisor. In his opinion, which also cited both the Constitution and ILO Convention 111, João Oreste Dalazen of the TST wrote that, “in a context where one notes a global concern with eradicating discrimination, there remains no room to tolerate the vexatious exposition to which the employee was subjected because of his race.” Rejecting the company’s claim that remedial measures reduced its liability, the court observed that “the Brazilian legal order and international norms... prohibit to an employer or any other persons the adoption of any practice that implies prejudice or discrimination by virtue of race.”

The bank employee lawsuits, which also were brought as constitutional claims, have sought to break new ground in both the

262. Id.
263. Hernandez, supra note 69, at 9, discussing São Paulo Labor Court District 31, Case No. 562/02 (2002).
264. Id. at 10.
266. Id.
267. Id.
theories of discrimination that courts entertain and the kind of burden-shifting procedure they apply in such cases. The litigation marks the first time in Brazil that a discrimination claim has been brought solely on statistical evidence. In the first of these suits to reach hearing, a labor court judge appeared to accept the argument that liability could be established based on this theory. He concluded that the evidence gave “vehement indications of discrimination in the employment policy of the defendant banks.”

Moreover, the language of the judge in this case suggests a willingness to consider a broader range of theories of discrimination than are typically applied by Brazilian courts. The court indicated that the Constitution’s equality provisions require shifting the burden of proof to defendants. The judge observed that “in the fundamental principal of equality, expressed in various constitutional and international dispositions... we find ourselves facing an objective situation of inversion of the burden of proof.” The judge then held that “the defendant is responsible for proving completely that, despite the evidence put forward by the plaintiff, it did not commit any violation of the fundamental principal of equality, in its various species.” This approach is striking in comparison to jurisprudence under the Lei Caé, in both in the court’s openness to holding an employer liable without evidence of prejudicial intent, and its resulting willingness to shift the burden of proof.

While these cases demonstrate some of the advantages of bringing employment discrimination suits as constitutional claims, significant obstacles to such litigation still exist. Plaintiffs will have to secure their own resources for investigation and litigation in lieu of the assistance provided to crime victims by police and public prosecutors. Moreover, unsuccessful plaintiffs may have to pay the opposing side’s legal fees. Finally, would-be plaintiffs may have few places to turn to for assistance; few of the organizations affiliated with the Black Movement specialize in litigation and those that do tend to focus on highly visible cases, particularly those addressing racial bias in the media.

270. Id.
271. Id. (emphasis added).
272. Bermudes, supra note 205.
Also, as Racusen observes, Brazilian courts have, until recently, resisted using burden shifting when the plaintiff's allegations deal with racial discrimination. However, even if courts ultimately do not adopt the theory of discrimination based on statistical evidence that has been asserted in the bank employee litigation, the more limited burden-shifting employed in the *Eletrosul* and *SENAI* cases seems likely to produce a more favorable jurisprudence than has developed under the *Lei Caá*.

**B. Labor Law**

Another disadvantage of treating racial discrimination as a criminal offense is that it hinders Afro-Brazilian workers from bringing such claims through the country's highly accessible and relatively plaintiff-friendly labor law system. While Brazil's anti-discrimination law appears relatively underdeveloped compared to its U.S. counterpart, its labor law is far “thicker,” appearing almost hypertrophied in its breadth and specificity. While Brazilian law incorporates a rather narrow understanding of racial discrimination, its labor law reflects a broad conception of legal rights related to class. Although adjudication of racial discrimination cases in the criminal courts poses significant obstacles for Afro-Brazilian employees, the country's system of labor tribunals provides a highly accessible forum for redress of workplace problems.

The underdevelopment of Brazil's anti-discrimination law in contrast to its labor law may be another reflection of class over race in Brazilian legal and political culture. Brazil's labor code, the *Consolidação das Leis Trabalhistas* ("CLT"), has been described as the "world's most advanced labor legislation." It is a "highly structured minutely regulated" code that "provides guidance on almost all important aspects of the world of work" as well as

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275. This disparity is apparent in Brazilian legal scholarship as well. While there appear to be only a handful of published works that discuss the law's treatment of racial discrimination in employment, scholarly literature concerning the labor code reportedly makes up the majority of all published Brazilian legal texts. French, *DROWNING IN LAWS, supra* note 15, at 2.
276. *Id.* at 40-1.
278. French, *DROWNING IN LAWS, supra* note 15, at 1, citing KENNETH ERICKSON, CORPORATISM AND LABOR IN DEVELOPMENT IN CONTEMPORARY BRAZIL: ISSUES IN ECONOMIC AND POLITICAL DEVELOPMENT, 146 (Rosenbaum and Tyler, eds. 1972).
addressing "hundreds of secondary questions large and small."\(^{279}\) Unlike the anti-discrimination law, which exempts the most prevalent forms of discrimination, Brazil's labor laws heavily "judicialize" the workplace, making nearly every aspect of the employment relationship the source of an actionable legal right. Moreover, the labor law permits plaintiffs to seek compensation for "moral injury" as well as economic losses, with the result that racial insult — the most frequent source of workplace discrimination claims — can, by itself, provide the basis for liability.\(^{280}\)

Under the CLT, Brazil has established a nationwide system of labor courts that are "characterized by ease of access, informality, speed and low cost."\(^{281}\) These courts are widely perceived to be more sympathetic to ordinary citizens than the regular civil and criminal courts.\(^{282}\) While individual employees may bring claims \textit{pro se}, professional representation is readily available to plaintiffs as a benefit of union membership.\(^{283}\) Significantly, the labor law allows judges to shift the burden of proof from employee to employer when evidence is difficult for workers to obtain.\(^{284}\) Moreover, because the law establishes a presumption of continuity of employment, burden shifting is mandatory in unfair discharge cases, which make up the largest category of claims.\(^{285}\)

Brazilian employees are well accustomed to defending their interests in court. The emergence since the late 1970s of vigorous independent trade unions that mobilize and assist workers in asserting their rights has led to a dramatic increase in claims.\(^{286}\) Over the past half century, the docket of the labor courts has continued to expand nearly exponentially, from 37,530 filings in 1954 to 157,628 in 1974, and to the point where in 1997 the number of cases reaching

\begin{footnotesize}
\begin{itemize}
\item \(^{279}\) French, \textit{DROWNING IN LAWS}, supra note 15, at 1, 40.
\item \(^{281}\) Fragale, supra note 230, at 292.
\item \(^{282}\) Racusen, supra note 8, at 303.
\item \(^{283}\) Brazilian labor law establishes a system of mandatory union representation financed by a payroll tax remitted by the government to labor organizations, though access to legal services is usually limited only to those workers who pay an additional voluntary membership fee. Fragale, supra note 230, at 292-3.
\item \(^{284}\) \textit{Id.}
\item \(^{285}\) \textit{Id.}
\item \(^{286}\) French, \textit{DROWNING IN LAWS}, supra note 15, at 102.
\end{itemize}
\end{footnotesize}
final adjudication reached 2.4 million.\footnote{287. Id. Fragale, supra note 230, at 282.}

The greater availability of compensation through the labor law system, particularly in cases of discriminatory discharge, is another factor that explains the relative lack of recourse to anti-discrimination law by Afro-Brazilian workers. Under the CLT, terminated employees are entitled to severance payment in an amount that depends on their length of service and whether or not the employer can establish just cause.\footnote{288. Fragale, supra note 230, at 288-294.} When the difficulty of establishing liability under the anti-discrimination statutes is compared to the presumption of employer liability and the assurance of some compensation under the labor laws, it is not surprising that workers choose the latter even if it means allowing employers to escape sanctions.

However, until recently, this otherwise all-encompassing legal regime failed to include specific remedies for discrimination in the workplace. It was only in 1999 that the CLT was amended to prohibit the forms of employment discrimination already addressed by the Constitution and Law 9.029.\footnote{289. Racusen, supra note 8, at 158 (discussing Lei No. 9.799, de 26 de Maio de 1999 [hereinafter Lei 9.799/99]).} In its current form, however, the Labor Code now provides, on paper at least, extensive protections against racial discrimination. The 1999 amendments make it a violation of the CLT for employers to consider sex, age, color or marital status as: (1) a qualification for hiring; (2) a reason for termination or denying promotion; (3) a variable for determining compensation, qualifications or opportunities for advancement; or (4) a criteria for taking or passing job-related examinations.\footnote{290. Lei 9.799/99 at art 1.}

In sum, bringing discrimination lawsuits in the labor courts appears to offer three main advantages over pursuing prosecution in the criminal courts under the Lei Caô. First, the burden-shifting analysis typically applied by the labor courts may relieve employees of having to prove their employer’s discriminatory intent. Second, to the extent that the Constitution’s own equality and anti-discrimination provisions are self-executing, the labor courts provide a fairly accessible venue for workers to bring such claims. Third, recourse to the labor courts may offer Afro-Brazilian workers greater ability to control of their claims, avoiding the risk that their complaints will be misconstrued by police or dropped by skeptical prosecutors. Because the labor law system provides workers with
relatively easy access to counsel, this advantage may more than compensate for the lack of assistance to complainants by public authorities.291

However, despite these advantages, it is likely that the labor law will be used to address racial discrimination in a fairly restricted range of circumstances with limited deterrent effect on employers. First, most Afro-Brazilians workers are employed in the informal economy, and therefore, are not covered by the labor laws292 — though, the 1999 amendments should permit these workers to challenge discriminatory hiring practices that bar access to formal sector jobs.

Second, workers typically use the labor law as a means of gaining monetary compensation after they have been terminated from a job, not as a tool to challenge unfair treatment in their current workplace. Because the standard remedy under the CLT is to provide unjustly terminated employees with severance pay, not reinstatement, “workers tend not to complain about unlawful practices during the employment period . . . but are very active in the Labor Court after they are fired . . . .”293 This tendency is exacerbated by the labor law’s rather weak protections against employer retaliation, and the risk of blacklisting by future employers.294 In this sense, race discrimination claims are likely to be used as a form of unemployment insurance for fired workers, but not as a way to change discriminatory workplace practices.

Finally, existing jurisprudence under the Lei Caó may affect the courts’ treatment of discrimination claims brought under the CLT. Racusen observes that when considering cases alleging racial discrimination the labor courts have tended to require proof of prejudicial motive and have not used the burden-shifting analysis they otherwise apply.295 The successful constitutional claims discussed earlier were initially lost in the lower labor courts, which ruled that the plaintiffs had failed to establish liability. While the appellate judges in these cases allowed discrimination to be shown by inference

291. In addition, public prosecutors in the labor courts may be more sympathetic to racial discrimination claims than those in the general civil and criminal courts. See infra at 167.
292. Amaury de Souza, Dilemma of Industrial Relations Reform: Learning from Brazil’s Interest Representation Experience, in COMPARING BRAZIL AND SOUTH AFRICA, supra note 33, at 108.
293. French, DROWNING IN LAWS, supra note 15, at 104.
295. Racusen, supra note 8, at 93, 99, 114.
instead of direct evidence, they did not apply the "reasonableness" standard that the labor courts often use in age and gender bias suits.\textsuperscript{296}

Several other recent cases suggest the advantages of this kind of litigation, as well as its limitations. In three decisions reported from São Paulo labor courts in the last two years, judges have awarded moral damages to Afro-Brazilian employees who had been subjected to racial insult in the workplace.\textsuperscript{297} When compared to the bleak record of attempts to hold employers liable under the Lei Afonso Arinos and Lei Caó, these cases further confirm that civil litigation under the labor laws represents a viable strategy for challenging racial discrimination. However, these cases suggest that such litigation only will enable Afro-Brazilian workers to challenge the same explicit forms of prejudice that the Lei Caó was intended to deter, but is unlikely to address the more covert forms of discrimination that perpetuate racial inequality.

\textbf{C. Class Action}

The \textit{ação civil pública}, brought by NGO's and the Public Ministry, would be an excellent instrument of combating this [discriminatory] system... not only in education, but also in employment relations and many others fields in which Brazil distinguishes itself by insupportable injustice. It remains to be seen, however, if this formidable instrument of juridical combat will come to be utilized adequately.\textsuperscript{298}

\begin{quote}
–Joaquim Barbosa Gomes
\end{quote}

As Afro-Brazilian legal advocates and activists have shifted from reliance on criminal prosecution to exploration of civil litigation for challenging racial discrimination, they have increasingly considered the possibility of using the country's distinctive forms of class action...
law, the ação civil pública (civil public action) and ação coletiva (collective action). Brazil is unusual among civil law countries in having adopted class actions over two decades ago, and such suits already have been used extensively in the fields of consumer and environmental protection.299

While class actions appear to present unique advantages for plaintiffs, until recently there have been no attempts to use them to challenge racial discrimination against Afro-Brazilian workers. The bank employee litigation discussed previously represents a major test of this strategy. This section will consider the possible advantages and risks of bringing employment discrimination claims as class actions, and what factors explain the historical absence of such litigation.

1. Brazilian Class Action Procedure

Brazilian class action law developed in the 1980s during the country's democratic transition as a means to promote greater accountability of government institutions and private corporations to public interests.300 The statutes that establish the two forms of Brazilian class action, Law 7.347 of 1985 and Law 8.078 of 1990, "amount, in effect to a code of class action procedure."301 These two forms of class action protect different types of interests: the civil public action is concerned with "diffuse and collective rights" and the collective action defends "homogenous individual rights."302 The former is implicated where a defendant's actions affect a group as a whole and damages cannot be apportioned among class members, the latter when these actions produce distinct and measurable harms of the same type to each class member.303

Unlike environmental or consumer rights, the interests of persons of a common ethnic background or employees in a common industry are not mentioned specifically in the statute establishing the civil public action. However, the law creates a right of action for damages to "any other diffuse or collective interest."304 Similarly,

299. Gidi, supra note 16, at 326, 332; Sadek and Cavalcanti, supra note 19, at 5 n.7.
301. Id. at 328; Lei No. 7.347, de 24 de Julho de 1985 [hereinafter Lei 7.347/85]; Lei No. 8.078, de 11 de Setembro de 1990 [hereinafter Lei 8.078/90].
302. Id.
303. Id. at 350-60.
304. Lei 7.347/85 art. 1.
even though the 1990 statute creating the collective action is entitled the "Consumer Defense Code," it states that "the defense of the interests and rights of consumers and victims will be able to exercised in court . . . by collective title." This indicates that claims can be brought on behalf of any group of persons who have suffered collective harms. Thus, under Brazilian law, "class action rules are available to solve controversies in environmental, antitrust, torts, tax, and any other branch of the law," including employment claims. For example, the lawsuits against the banks were brought as civil public actions asserting injury to the interests of Afro-Brazilian, female, and older employees from discrimination in hiring, promotion and compensation.

The different interests protected by the civil public action and the collective action gives rise to different statutory remedies. Because the civil public action seeks to defend interests where it may not be possible to identify a determinate class or else to apportion damages among its members, the courts' preferred remedy in such cases is injunctive relief. If the defendants have caused harms that cannot be remedied by injunction, the court may order them to pay damages, not to the class members directly, but to a fund supporting remedial projects related to the harmed interests. The bank employee class actions seek $14.3 million from each defendant financial institution to be used to remedy the "collective moral damages" caused to Afro-Brazilian, female and older workers by the banks' discriminatory practices.

In a collective action plaintiffs may seek either injunctive relief or compensatory damages in the estimated sum of the harm to the members of the class. If the suit is successful, the court enters a declaratory judgment, but class members must then bring suit individually to establish causality for the claims they personally

305. Lei 8.078/90 art. 81 (emphasis added).
306. Id.
310. Id. at 339-340.
311. Press Release, supra note 308.
assert. If in one year from the date of the judgment individual class members have not claimed the full amount of the award, the court may require the defendant to deposit the remainder in an account of the same type mandated in the civil public action.

One distinct difference between Brazilian class action law and its U.S. counterpart is that in Brazil standing is granted not to representative members of the class, but to state and private institutions authorized to defend the particular interests at stake. The statute establishes the standing of the Public Ministry to bring by itself, or intervene in, class actions to defend any type of interest protected by the law. While individuals cannot bring class actions, they do have the right to petition the Public Ministry to begin an investigation that may lead to a class action by supplying facts constituting the grounds for the action.

Moreover, when public prosecutors or other government authorities do participate in class actions, the law authorizes them to resolve the suits through out of court settlements known as Termos de Ajustamento de Conduta, ("TAC"). Class actions help avoid protracted litigation because Public Prosecutors can secure settlements before a suit is filed by using their statutory investigative powers. For example, in the bank employee lawsuits, public prosecutors publicly proposed that the defendants settle the litigation by negotiating specific deadlines and numerical targets for hiring, promotion and salary adjustment of Afro-Brazilian, female and older employees.

The law also extends standing to private associations that have been in existence for more than a year to bring class actions to protect interests that are among their institutional objectives. Even where the association has not been existence for a year prior to the filing of the action, the court may relax this requirement for reasons of public interest in the issues involved. Moreover, an association can assert

313. Id.; Gidi, supra note 16, at 359.
315. Lei 7.347/85 art. 5.
316. Id. art. 6.
317. Id. art. 5 §6.
320. Lei 7347/85 art. 5.
321. Id. art. 5 §4.
standing even if the class members on whose behalf the suit is brought are not actually affiliated with it.\textsuperscript{322}

Thus, a group of Afro-Brazilian workers seeking to challenge racial discrimination by an employer could either petition the Public Ministry to bring such a case, or enlist the support of an organization that has among its institutional purposes protecting the collective interest affected. Brazil’s Constitution authorizes trade unions to bring litigation to protect the collective interests of groups of workers in their respective industries.\textsuperscript{323} Moreover, if a particular union does not have the will or capacity to take legal action against racial discrimination in its industry, workers could seek the help of a NGO whose institutional objectives include protecting the interests of Afro-Brazilian workers.\textsuperscript{324}

2. Advantages of Class Actions for Afro-Brazilian Workers

Brazilian class action law grants parties bringing such suits, especially Public Prosecutors, significant advantages in establishing the defendant’s liability for the harms asserted. As previously mentioned, Brazilian judges already are accustomed to employing burden shifting in class actions.\textsuperscript{325} In the first of the bank employee lawsuits to be heard, the judge, finding “an objective situation of inversion of burden of proof,” ordered the defendant bank to prove that “despite the indicia [of discrimination] shown by the plaintiff, it did not commit any violation of the fundamental principle of equality . . . .”\textsuperscript{326}

Second, parties bringing class actions have a greater ability to request production of evidence than other plaintiffs, a notable benefit in a civil law system where pre-trial discovery is extremely limited. The statute establishes that in order to prepare their complaints, plaintiffs can “request to competent authorities certifications and information that they judge necessary, to be furnished in a period of fifteen days.”\textsuperscript{327} Public prosecutors have even greater investigatory powers, since the statute authorizes them to initiate a “civil investigation” in which they can request from “any public or private organization,” “certification, information, or examination,” to be

\begin{itemize}
    \item \textsuperscript{322} Gidi, \textit{supra} note 16, at 374-375.
    \item \textsuperscript{323} Mazzilli, \textit{supra} note 312, at 110.
    \item \textsuperscript{324} Nery, \textit{supra} note 307, at 617.
    \item \textsuperscript{325} Racusen, \textit{supra} note 116, at 8, 12.
    \item \textsuperscript{326} Press Release, Ministério Público do Trabalho, \textit{supra} note 4.
    \item \textsuperscript{327} Lei 7.347/85 art. 8 (translation by author).
\end{itemize}
In preparation for bringing the bank employee class actions, prosecutors used their investigatory authority to secure demographic, salary and occupational data from the targeted financial institutions and equivalent data on local labor markets from the government research institute, IBGE. These statistics, which they analyzed with assistance from another state statistical agency, IPEA, provided the basis for its suits against the banks.

Brazilian class action procedure also has important features that may enable plaintiffs to avoid some of the risks associated with bringing discrimination claims on an individual basis. One is that the statute creates an exception to the usual rule of "loser pays" by exempting unsuccessful plaintiffs in civil public actions or collective actions from having to reimburse the legal fees of the defendants unless the court finds the action was brought in bad faith. Another is that if a class action is dismissed on grounds of insufficient evidence, it can be re-filed if new evidence is produced. Additionally, class actions only have res judicata effect for members of the class to the extent that the judgment benefits their interests. Therefore, even if the action is unsuccessful, class members still can bring individual lawsuits asserting the same claim.

Brazil's class action law may compensate for aspects of its labor law that discourage the filing, and limit the impact, of discrimination claims brought by individual workers. For example, the law confers standing on institutional actors to bring employment discrimination claims on behalf of workers who, as individual plaintiffs, would be left vulnerable by the labor law's weak anti-retaliation provisions. In the bank employee lawsuit, for instance, it would serve no purpose for defendants to retaliate against Afro-Brazilian employees since the litigation is being brought not by these workers but by public prosecutors.

Similarly, the availability of injunctive relief may allow such suits to be brought in direct response to discriminatory conduct, rather than as post facto claims for severance benefits. And the remedies

328. Id. at § 1.
331. Lei 7.347/85 art. 18.
333. Id. at 388-389.
334. Id. at 390.
achieved can benefit both current personnel instead of simply compensating former employees.

Plaintiffs bringing class actions can seek a court order or a settlement agreement requiring employers to reform their practices. Such suits are more likely to have a broader and more lasting impact on a particular firm or industry. Indeed, Gomes argues that TAC settlements may be “more effective than judgments” in producing institutional change since they allow the crafting of more sophisticated remedies than a lower court judge is likely to impose.\(^335\) Finally, the imposition of a damage award for the full amount of the harm done to the entire plaintiff class, rather than that inflicted on one individual employee, is more likely to convince a firm to reform its practices.

Class actions also may alleviate the difficulty of establishing liability in employment discrimination suits. The greater ability of parties bringing class suits to require pre-trial production of information makes it more likely that documentary evidence can be obtained that may help show prejudicial intent. Also, asserting anti-discrimination claims as class actions offers opportunities to re-litigate should the initial suit be unable to establish liability. Especially in a system that allows limited pre-trial discovery, having multiple chances to litigate may increase the likelihood of securing a successful verdict by creating more opportunities to secure evidence and develop facts in court.

Class actions also remove some of the financial disincentives against bringing civil litigation under Brazilian law. Since individuals cannot bring class litigation on their own, the costs of bringing the suit are borne by the public or private entity that asserts standing and not the class members. Given the significant challenges involved in developing more favorable jurisprudence on racial discrimination, the exemption to the “loser pays” rule is vital for encouraging private organizations to litigate class suits.

### 3. Possible Limitations of Brazilian Class Actions

Considering the apparent advantages to using class action litigation to combat racial discrimination, it seems surprising that this procedural device has not been used more widely in this arena. However, one can identify certain features of Brazilian class action that may hinder its application to such claims. Moreover, even should

\(^{335}\) Gomes, supra note 23, at 400.
more class action litigation be brought on behalf of Afro-Brazilian workers, other factors still may undermine its effectiveness as a tool for achieving greater racial equality in the labor market.

It is important to recognize that discussion of the advantages of class actions for bringing anti-discrimination litigation in Brazilian courts is somewhat speculative. The current bank employee litigation appears to be the first in which class actions have been used to challenge employment discrimination against Afro-Brazilians. Writing in 2000, Justice Gomes expressed his frustration that “the record of [successful] civil public actions in general is so squalid that in the area of protection of minority rights there is nothing to analyze!” While Gomes blames institutional factors — mainly the conservatism of the judiciary and the lack of resources devoted by the Public Ministry to class action litigation — it seems likely that aspects of the class action statutes themselves are at least partially responsible.

Compared to the U.S. class action regime, Brazil’s system of collective legal representation heavily privileges institutional actors. This may reduce the incentive for individuals to take an active role in monitoring class litigation, even though they are its potential beneficiaries. Moreover, although the class action laws confer standing on private associations and entities, public prosecutors bring an estimated 98 percent of all civil public actions and collective actions. This statistic reflects the limited resources and legal expertise available to most NGOs and other potential plaintiffs who, rather than bring such actions themselves, typically petition the Public Ministry to file a class suit on their behalf. Reliance on public prosecutors also may reflect their superior powers to investigate, engage in discovery, and reach settlements with defendants.

Moreover, while Brazilian law explicitly authorizes public prosecutors to bring class actions to protect citizens from racial discrimination, it does not make a clear grant of standing to private institutions, like trade unions or NGOs. The organic law establishing the Public Ministry specifically confers the power to “bring civil public actions and civil investigations” for “the protection of...
However, while the class action law states that private associations may bring civil public actions to defend “any . . . diffuse or collective interest,” protection of minorities, unlike protection of the environment or consumers, is not listed specifically as a cause of action. Thus the use of the civil public action to defend the interests of Afro-Brazilians is authorized not under the class action law itself, but instead as a statutory function of the Public Ministry.

The lack of a clear statement authorizing private associations to bring such claims is of some concern, because some judges may be reluctant to recognize protection of Afro-Brazilians from racial discrimination as a legitimate collective interest. Justice Gomes has expressed worry that “[g]iven the overwhelming predominance of a conservative vision among Brazilian legal scholars, the eventual rise of a current of thought tending to disqualify ethno-racial factors as a legitimate element of standing for the civil public action would not be a surprise.” Such concerns are not without basis. In a 1993 civil public action brought by public prosecutors and Geledes, a Black Movement NGO, which asserted injuries to Afro-Brazilian consumers from racist advertising, one judge filed a dissenting opinion arguing that standing should be denied, because “in a country like ours,” “the theme of injury or affront to the black race must be seen . . . as speculation.”

Moreover, while the standing of trade unions to bring suit on behalf of their members is well established, the law places potential obstacles in the way of unions litigating discrimination claims on behalf of Afro-Brazilian workers. Because the law requires unions whose by-laws do not specifically authorize the organization to bring lawsuits on behalf of their members to gain approval from the rank-and-file before filing such actions, it is possible that employees benefiting from discriminatory practices might resist this type of initiatives. Brazilian trade unions tend to be relatively wealthy compared to NGOs since they benefit from a compulsory “trade union tax” on employees. Because of this, their leaders may be reluctant to devote political capital to pursuing litigation that is divisive for their membership. Rebecca Reichmann’s survey of

340. Id.
341. Racusen, supra note 116, at 23.
Brazilian trade unionists found that while over 55 percent of Afro-Brazilian labor activists she interviewed supported affirmative action programs, only 32 percent of their white counterparts felt similarly.\textsuperscript{343}

A related barrier to such suits may be that, unlike under the U.S. system, individual Afro-Brazilian workers cannot bring class actions on behalf of themselves and other similarly situated employees. Moreover, even if a collective action is successful, individual class members must bring suit for execution of the judgment in order to recover damages.\textsuperscript{344} These restrictions, combined with the relatively limited damage and fee awards issued by Brazilian courts, limit the incentives for private attorneys to litigate class actions.\textsuperscript{345} Along with the tendency of potential plaintiffs to defer to public prosecutors to bring such suits, these obstacles help explain the absence in Brazil of an entrepreneurial class action bar, an institution that has played an important role in the development of such litigation in the United States.

The relatively marginal role of both private attorneys and non-governmental institutions in Brazilian class actions may be hindering their development as an “instrument of juridical combat.” U.S. scholars have suggested that “the failure of the Brazilian legal system to develop strong incentives for private suits by victims of alleged discrimination in employment and other areas,” is, in part, responsible for the weakness of the country’s civil rights regime.\textsuperscript{346} Public Prosecutors’ near monopolization of Brazilian class action practice means that it is their priorities and preferences — not those of NGOs or private attorneys — that determine the types and strategies of class action pursued in the courts. Relying solely on prosecutors to bring class actions may be disadvantageous for the development of a more effective anti-discrimination law regime, since this process may require considerable experimentation and thus could benefit from the participation of a wider group of litigators.

Finally, Brazilian class action law contains relatively weak mechanisms to ensure that such suits actually will advance the interests of Afro-Brazilian workers. Aside from its restrictions on standing, the law does not require courts to determine whether parties bringing a civil public or collective action adequately

\textsuperscript{343} Reichmann, supra note 38, at 21.
\textsuperscript{344} Gidi, supra note 16, at 359.
\textsuperscript{345} Id. at 319-320.
\textsuperscript{346} Cottrol, supra note 129, at 75; Hernandez, supra note 84, at 1129.
represent the interests of the class. Moreover the only provision for class notice is requirement that an announcement of the suit be published in the official organ of the state. The result is that an individual on whose behalf an action is brought may have little ability to influence the remedies sought or whether to settle.

The justification for this absence of procedural safeguards is the lack of prejudicial res judicata effect of the class action on subsequent individual claims by class members. However, unless a class claim fails for lack of sufficient evidence, a contrary judgment does preclude successive attempts to bring it again on a class basis. Therefore litigation that fails to secure effective remedies may harm future efforts to address systemic problems.

Not surprisingly, Brazilian class action law seems vulnerable to some of the same criticisms leveled at the U.S. class action system. Those prosecuting class actions, whether Public Prosecutors, trade unions or NGOs, may, in pursuit of their own institutional aims, neglect the actual preferences of class members. On the other hand, by using the TAC settlements mechanism in order to avoid drawn-out litigation, Public Prosecutors may fail to fully vindicate the legal rights of Afro-Brazilian workers.

Even though Brazil has a civil law system, its Federal Supreme Court has adopted the practice of issuing in some cases the súmula vinculante, a precedential interpretation of the law that is binding on the lower courts. The court has issued at least one súmula interpreting the Constitution’s equality provisions as they apply to maximum age limits for taking civil service examinations. However, no such precedential ruling appears to have been issued on any question of discrimination in regard to race. To the extent that settlement of litigation forgoes the opportunity to establish such precedents, it may impede the development of anti-discrimination law as well.

348. Id. at 341-342.
349. Id. at 389.
350. Id.
352. Arantes, supra note 318, at 89.
354. Supremo Tribunal Federal, Súm. 683.
Public Prosecutors may reach inadequate settlements with defendants not because of financial self-interest, as has been charged against the private class action bar in the U.S., but because litigating such cases to judgment may not be a priority. In the bank employee class actions, this risk was mitigated because the workers' union has taken an active role in challenging racial discrimination and is likely to closely monitor the litigation. However, unions in other sectors may be less attentive or may even oppose litigation that threatens the privileges of their existing members.

VI. Legal Institutions and Anti-discrimination Law

It is saddening to see how such aggression to human dignity... touches the sensitivities of so few judges, prosecutors, lawyers and police.

– Jorge da Silva

Another factor cited by both Brazilian and foreign observers to explain the legal system's failure to address effectively racial discrimination has been the inadequate performance in this area of its key institutional actors, including judges, public prosecutors, police and the private bar. In 2004, the U.N. Committee on the Elimination of Racial Discrimination observed that "despite widespread occurrences of... discrimination, the relevant domestic legal provisions against racial crimes are rarely applied." The Committee recommended that the Brazilian government "improve awareness and training regarding the existence and treatment of racist crimes on the part of persons engaged in the administration of justice..." While the judiciary and police forces have been most criticized in this regard, given the central role played by the Public Prosecutors in both criminal cases and class actions, their unwillingness — until recently — to prioritize this issue bears attention as well.

Because treating racial discrimination as a criminal offense places law enforcement officers as “gatekeepers” for these claims,
police treatment of Afro-Brazilians in general, and discrimination complainants in particular, also has restricted recourse to the judicial system. Similarly, in evaluating the viability of civil discrimination litigation, the limited availability of private counsel who are willing and able to bring such claims may be another constraint on the law's effectiveness.

The striking lack of litigation by Afro-Brazilians challenging racial discrimination demonstrates in part a well-founded lack of confidence in the courts. The lingering resistance of judges and other legal actors to race discrimination claims is particularly noticeable because in the last decade there has been a remarkable transformation in the treatment of racial issues by other elements of the Brazilian state. Since the mid-1990s, the Black Movement has been successful in pressing the executive and legislative branches to recognize that racial inequality is an important social problem and to expand educational and employment opportunities for Afro-Brazilians. The comparative failure of the judiciary to make a similar break with the past may reflect its relative independence and insulation from the forms of pressure that the Black Movement has used to engage other state institutions. In this sense, the underdevelopment of Brazilian anti-discrimination law may also reflect Afro-Brazilian activists' conscious choice to focus their efforts away from the courts and towards state actors that have been more responsive to their claims.

A. The Judiciary

Some scholars have suggested that jurisprudence on discrimination against Afro-Brazilians reflects the continued influence of the racial democracy thesis over the Brazilian judiciary. Guimarães writes of a gap between current Brazilian "sociological thinking" on issues of race and the attitudes among the judiciary, which "still remain[s] attached to the intellectual consensus of [Gilberto] Freyre" — i.e., racial democracy.\(^3\)\(^6\)\(^1\) Similarly, Medeiros suggests that having been "raised in the culture of racial democracy," Brazilian judges are "prone to discounting racial discrimination as infrequent and unimportant," and therefore are unwilling to impose the anti-discrimination law's criminal penalties on defendants.\(^3\)\(^6\)\(^2\) Da Silva cites a case of a judge who, after dismissing a complaint brought

\(^3\)\(^6\)\(^1\) Guimarães, supra note 17, at 174.

\(^3\)\(^6\)\(^2\) Medeiros, supra note 81, at 121.
under the Lei Caé, went so far as to instruct the civil police instructing to “take precaution[s], that, [future cases with] facts like those of this accusation . . . be avoided.”

These attitudes also may explain judicial resistance in this area to procedural methods that are used to facilitate other rights-based claims. According to Racusen, judges have been less willing to apply burden shifting in constitutional claims alleging race discrimination than in those asserting age or gender bias. Similarly, Justice Gomes has expressed his fear that the “predominan[t] . . . conservative vision among Brazilian legal scholars” may lead Brazilian judges to “disqualify ethno-racial factors as a legitimate element of standing for the civil public action.”

The judiciary's treatment of discrimination claims brought by Afro-Brazilians is often attributed to a more traditional attitude towards race among some Brazilian legal scholars than that which currently prevails in other academic fields, such as sociology and economics. Brazilian judges are members of a career bureaucracy who typically join the bench shortly after law school and have little other academic or professional experience. Moreover, the social origins and career trajectories of Brazilian judges may make them predisposed towards continued acceptance of the racial democracy thesis.

The current Brazilian judiciary combines what researchers have described as “intense social mobility” in the class background of its members, along with occupational segregation in terms of race. A landmark 1997 survey of Brazilian judges found that 54 percent had fathers with only a primary education. It also showed that judges entering the profession during the 1990s were much more likely than their predecessors to have attended less prestigious private law schools and to have taken night classes, both indications of less-privileged backgrounds. Nevertheless, the Brazilian judiciary also remains

363. da Silva, supra note 70, at 167.
364. Racusen, supra note 8, at 99.
366. Elisa Larkin Nascimento, It's in the Blood: Notes on Race Attitudes in Brazil from a Different Perspective, in BEYOND RACISM, supra note 17, at 517.
367. Luiz Wernneck Vianna, Maria Alice Rezende de Carvalho, Manuel Palácios Cunha Melo e Marcelo Baumann Burgos, Corpo e Alma da Magistratura Brasileira 7 (1997).
368. Id. at 101.
369. Id. at 176.
overwhelmingly white. Reflecting the striking inattention to issues of race in Brazil legal academia, the 1997 survey — which recorded a wealth of demographic detail about Brazilian judges (grandfather’s occupation, etc.) — did not even query about their race. However, Gomes anecdotally suggests that Afro-Brazilians make up less than 2 percent of the federal judiciary.\textsuperscript{370}

These statistics begin to explain why racial democracy may have a particularly strong grasp on the Brazilian judiciary. As members of a meritocratic bureaucracy who have experienced considerable upward mobility, the idea that their advancement is due to their own abilities and not privilege accruing from race may hold particular appeal. The racial democracy thesis, which contends not only that racial discrimination is not a significant problem in Brazil, but also that they, personally, by virtue of being Brazilians, are incapable of racial prejudice towards plaintiffs and defendants, seems likely to validate Brazilian judges’ sense of themselves as fair and impartial.\textsuperscript{371}

\textbf{B. Public Prosecutors}

Upward social mobility combined with overwhelming racial homogeneity also describes Brazil’s public prosecutors. A 1996 survey of members of the Federal Public Ministry, which likewise did not ask their race, showed that a majority had parents without university degrees or links to the legal professions, and over 70 percent had achieved higher education and income levels than their parents.\textsuperscript{372} By contrast, Gomes reports anecdotally that barely 1 percent of federal prosecutors are Afro-Brazilians.\textsuperscript{373}

The Constitution of 1988 granted to the Public Ministry an extreme degree of autonomy, leading some scholars to speak of it as virtually a “fourth branch” of government.\textsuperscript{374} This autonomy is mirrored inside the institution by the large measure of functional

\textsuperscript{370} Gomes, \textit{supra} note 23, at 408, n. 15.
\textsuperscript{373} Gomes, \textit{supra} note 23, at 408, n. 15.
independence afforded to individual prosecutors.\textsuperscript{375} Decisions by ministry officials and individual prosecutors about where to focus their efforts are very significant factors in determining how aggressively cases are investigated and litigated.\textsuperscript{376}

However, perhaps because its top officers are still appointed by the executive branch, and because individual prosecutors have become increasingly politicized over the past two decades, the Public Ministry has shown a noticeable responsiveness to agenda setting by the executive and legislative branches.\textsuperscript{377} Public Prosecutors have developed a new profile as the country’s leading public interest litigators, and have come to see themselves as active allies of Brazilian civil society.\textsuperscript{378} As trade unions, human rights groups and other elements of civil society awake to the issue of racial discrimination, prosecutor’s attitudes appear to be shifting significantly as well.

Despite the fact that the Public Ministry is authorized by statute to bring class actions to “protect ethnic minorities,” until the late 1990s public prosecutors considered such cases a low priority.\textsuperscript{379} In a 1998 survey of federal prosecutors, only 8 percent of prosecutors reported that they had made protection of ethnic minorities a priority in the past two years and only 21 percent said that it would be a priority in the two years to come.\textsuperscript{380} This was the lowest rating given by prosecutors to any area of litigation or law enforcement — trailing behind even the protection of cultural and historic monuments.\textsuperscript{381} These attitudes appear to have affected prosecutors’ treatment of discrimination complaints, as evidenced by Racusen’s study from the mid-1990s, \textit{which} is replete with examples of prosecutors dropping charges in cases involving blatant displays of racial animus.\textsuperscript{382}

Such attitudes also reflect a general institutional reluctance to devote resources to cases involving racial discrimination. Following the introduction of class actions in 1985, the Public Ministry established dedicated divisions for bringing environmental, consumer, disability, and investor protection litigation. Until recently, though,

\textsuperscript{375} C.F. art. 128.
\textsuperscript{376} Sadek and Cavalcanti, \textit{supra} note 19, at 7.
\textsuperscript{377} \textit{Id.} at 7-8, 12.
\textsuperscript{378} Macedo, \textit{supra} note 374, at 256-8.
\textsuperscript{379} Gomes, \textit{supra} note 23, at 395.
\textsuperscript{380} IDESP, \textit{supra} note 6, at 15.
\textsuperscript{381} \textit{Id.}
\textsuperscript{382} Cf. Racusen, \textit{supra} note 8, at 27, 298, 299, 306.
offices devoted to racial discrimination cases remained the exception rather than the rule.\textsuperscript{383} However, such facilities have gradually expanded, and in 2001 a working group on racial discrimination was established within the Public Ministry at the federal level.

Reflecting the strategy adopted by both Brazilian prosecutors and NGOs of pursuing highly visible cases that have “pedagogical” value for the public,\textsuperscript{384} the Ministry appears to have put most of its emphasis on prosecuting racist communications in the public media, from advertising playing on ethnic stereotypes to the sale of neo-Nazi publications.\textsuperscript{385} While such prosecutions may be justified by their deterrent and consciousness-raising effects, they may also to reinforce the notion that discrimination predominately manifests itself in explicit forms.

Lending further support to the argument that use of labor law may offer a promising avenue for bringing racial discrimination claims, members of the Public Ministry’s labor branch, the Ministério Público do Trabalho (“MPT”), have been notably more aggressive than other public prosecutors. There may be several reasons why this is the case. Besides the fact that employment is where Afro-Brazilians feel the effects of discrimination most strongly, the MPT is explicitly mandated by statute to “remove any type of discrimination in relations between employers and workers.”\textsuperscript{386}

However, the MPT also appears to have among its ranks a greater proportion of prosecutors who are likely to be receptive to such claims. Reportedly, more than 10 percent of the candidates who pass the civil service examination to join the MPT are Afro-Brazilian, giving it a much more diverse profile than the Ministry’s other branches.\textsuperscript{387}

In 2002, the MPT established an internal network entitled the “National Coordination for the Promotion of Equality and Elimination of Discrimination at Work.”\textsuperscript{388} This network has a specific focus on racial discrimination.\textsuperscript{389} Early results have been well-

\begin{footnotesize}
\begin{enumerate}
\item Guimarães, supra note 17, at 174; Mazzilli, supra note 312, at 114.
\item Arantes, supra note 318, at 145; Carneiro, supra note 215, at 135.
\item Racusen, supra note 8, at 82.
\item Soares, supra note 53, at 81.
\item Vladiene Silva de Assis, Ações afirmativas para promoção da igualdade material in DISCRIMINAÇÃO E SISTEMA LEGAL, supra note 54, at 50.
\item Id.
\end{enumerate}
\end{footnotesize}
publicized investigations into racial discriminatory hiring by restaurants and shopping malls in Bahia and successful settlements with newspapers in Paraíba that had published job listings with racially discriminatory requirements.™ Moreover, in the last year the MPT has launched a “Program of Promotion of Equality and Opportunity for All” headed by its second highest-ranking prosecutor, one of whose pilot projects is the bank employee class action.™ The stated objective of this effort is to increase the representation, status and remuneration of Afro-Brazilians and women employed in key economic sectors to reflect their actual presence in the broader labor market.

C. Police

While the MPT’s growing attention to the issue of racial discrimination may facilitate recourse to the labor courts by Afro-Brazilians, the role of police as “gatekeepers” for complaints brought under the Lei Caô may be having the opposite effect on the use of the criminal courts to challenge racial prejudice. Even though many of their personnel are Afro-Brazilian, the police are commonly perceived as hostile and suspicious toward blacks and the poor.™️ Afro-Brazilians may fear that if they bring a complaint to the police, the allegation will be turned against them since, according to the logic of racial democracy, anyone who raises the issue of discrimination is being “racist” themselves.™️ For their part, police officers, who are accustomed to viewing Afro-Brazilians stereotypically as criminal suspects and dealing with business owners mostly as complainants, may find a reversal of roles difficult to accept.

Even when complaints of racial discrimination are filed by Afro-Brazilians, the results of police involvement often frustrate victims’ initiative. Racusen’s research from the mid-1990s indicates that even police specifically tasked with handling racial crimes tended to misconstrue such complaints as defamation claims.™️ Although greater attention to the issue of racial discrimination has resulted in more training for the police in this area, it is likely that the mistrust by

390. Id.
392. Id.
393. Fry, supra note 95, at 188-9; Buckley, supra note 18, at A12.
394. Racusen, supra note 8, at 20.
395. Id. at 205.
many Afro-Brazilians of the police will continue to discourage use of the law.  

**D. The Private Bar**

A final institutional factor discouraging recourse to the courts may be that the private bar does not offer a viable source of representation for plaintiffs with discrimination claims. While private counsel is readily available to plaintiffs in the labor courts, such attorneys typically handle claims for severance payments, and may not be equipped to attempt the more difficult litigation required to establish employer liability for discriminatory practices.

Moreover, NGOs associated with the Black Movement have generally petitioned the Public Ministry to bring class actions rather than litigate on their own behalf. Within the Brazilian consumer rights and environmental movements, legal advocacy-focused NGOs have been established that litigate civil public actions in their own right. However, Afro-Brazilian organizations pursuing similar strategies are only now beginning to emerge. In the last ten years, attorneys associated with the Black Movement have discussed the potential for civil litigation to generate financial, but the Brazilian legal system currently lacks the type of financial incentives to support the development of an entrepreneurial class action bar. Though networks of attorneys concerned with the rights of Afro-Brazilians have formed within state bar associations, pro bono practice by private attorneys has only recently begun to be introduced in Brazil. Despite these recent developments, the resources required to bring such litigation may continue to be in short supply.

**E. Black Movement Success through Non-Legal Strategies**

The relative lack of responsiveness to the issue of racial discrimination within the country’s legal system is particularly notable in contrast to recent reversals of attitude toward this subject by other institutions of the Brazilian state. Afro-Brazilian activists, through

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strategic alliances with other social movements and skillful engagement of the executive and legislature, have achieved remarkable success in securing government policies aimed at remediing racial inequality. This impressive progress suggests that the Black Movement has chosen, perhaps wisely, to pursue reform through policy channels, rather than through the courts.

However, these gains, though of significant value to the Afro-Brazilian population, do not remedy the lack of effective legal protection against racial discrimination in the private labor market. Moreover, while it is clear that the Black Movement’s successful engagement of other state institutions has begun to influence the legal system, its reform efforts have mixed implications for the further development of Brazilian anti-discrimination law.

One sign of increasing responsiveness to this issue by the Brazilian state has been the formation of government agencies specifically tasked with defending the rights of Afro-Brazilians. First established in the early 1990s in states with large Afro-Brazilian populations like Rio de Janeiro, such bodies have been formed in recent years at successively higher levels of the federal government, and as increasingly permanent institutions. After decades in which the federal government treated racial inequality as a non-issue, the Cardoso administration formed in 1996 an “Inter-ministerial Working Group for the Valorization of the Black Population,” and created regional “Nuclei of Combating Discrimination and Promoting Equal Opportunity” within the Ministry of Labor. Under the current Lula government, a separate federal agency, the Secretariat for Promoting Policies of Racial Inclusion (“SEPPIR”), has been created to coordinate governmental initiatives in this area. Headed by Afro-Brazilian activist Matilde Ribeiro, the secretariat possesses minimal budget and staff, but its creation was significant to the Black Movement as a symbol of the government’s commitment to addressing the issue of racial inequality.

Of more concrete value has been the adoption of over 100 affirmative action programs in both employment and higher education by a wide array of government institutions. Created by legislation and executive orders at the federal, state and municipal

402. Id. at 54; Soares, supra note 53, at 81.
403. Telles, supra note 10, at 73-4.
404. Id.
levels, these initiatives operate as straightforward quotas that reserve a set proportion of jobs or university admissions for Afro-Brazilians. In the area of employment, most of these programs cover only public sector workers, though some state agencies extended their coverage to staff of government contractors as well. Given the importance of the state as an employer and purchaser of services, these policies benefit Afro-Brazilian workers by expanding employment opportunities in the public sector and by setting an example for private firms. However, these measures provide little concrete help to the majority of Afro-Brazilian workers whose work is not connected to the state.

The most publicized of the affirmative action programs, and those upon which the Black Movement has concentrated most of its energy, address admissions to the country’s public universities. This is understandable since inequality in educational levels between white and non-white Brazilians has been identified as the factor responsible for the greatest share of racial disparities in income and employment. These programs address a widely recognized injustice: the subsidization of free higher education for students from wealthy families, who can afford the private preparatory schooling necessary to pass the university entrance examinations, by a much poorer taxpaying public whose children do not benefit from these public institutions. Standing alone, however, such programs will not ensure that Afro-Brazilians who gain access to higher education subsequently receive equal treatment in the job market. Indeed, given that recent surveys indicate that racial disparities in earning increase along with educational levels, such programs by themselves are unlikely to close the economic gap between non-white and white Brazilians.

F. Black Movement Strategies and the Anti-discrimination Law

The recent success of the Black Movement in prodding the Brazilian state to recognize and respond to the problem of racial inequality has been attributed to the adoption of two important

407. Id. at 59-61.
409. Telles, supra note 10, at 141.
410. Gomes, supra note 23, at 401.
411. Roland, supra note 30, at 5.
political strategies. Domestically, Black Movement organizations and individual Afro-Brazilian activists have pursued an “entrist” strategy within the political left, forming institutional alliances with, and assuming leadership in, key sectors of Brazilian civil society, such as the labor, human rights, housing and land reform movements. This has allowed the Black Movement to place the issue of racial discrimination on the political agenda, notwithstanding the continued preference on the left for class-based social policies.

Second, in extraordinarily skillful fashion, the Black Movement has deployed the “naming and shaming” strategy of the global human rights movement by bringing complaints against the government before various international bodies, including the ILO, Inter-American Commission on Human Rights and the UN World Congress Against Racism. By threatening Brazil’s reputation as an exemplar of racial harmony and tolerance, the Black Movement has challenged one of the country’s leading claims to moral authority in international relations. As a result, the Brazilian government has had to enter into direct dialogue with Afro-Brazilian activists specifically around the question of racial discrimination. By situating this conversation in an international setting, the Black Movement has been able to avoid having the issue subsumed in a broader discussion of social inequality as so often has occurred in the domestic context. Finally, by bringing the attention of international bodies to bear on the issue of racial inequality in Brazil, the Black Movement has allowed the state to frame the adoption of affirmative action and other race-specific programs as necessary to meet the country’s international human rights commitments, instead of as a response to domestic political pressure.

While successful in bringing the issue of racial inequality into the mainstream of Brazilian politics, these strategies have had a mixed impact on the development of the country’s anti-discrimination law. The Black Movement’s engagement of the executive and legislative branches has produced laws that, if enforced, might provide important statutory protections for the rights of the Afro-Brazilian population. As discussed already, the past two decades have seen the expansion of anti-discrimination protections in key fields of Brazilian law, from the Constitution itself to the civil, labor and penal codes.

412. Telles, supra note 10, at 47-51, 64, 76.
413. Id. at 63-71.
414. Id.
But while this legislation is of considerable symbolic value, it has limited practical usefulness in combating discrimination. Indeed, veteran Afro-Brazilian activist Abdias do Nascimento has argued that the importance of the anti-discrimination laws is not in their actual enforceability, but instead in their rhetorical value — as a tool for pushing the state to take seriously the policy commitments they embody.\textsuperscript{416} From this perspective, the Black Movement's focus on affirmative action can be understood as an attempt to push the state to give substantive content to the anti-discrimination legislation of the late 1990s. Such a strategy makes particular sense in the Brazilian context, where the autonomy of the Public Ministry means that the executive has rather limited ability to enforce laws on its own.

However, the use of anti-discrimination law as a symbolic tool may further delay the development of more effective methods of challenging racial discrimination through the courts themselves. As displaced white applicants challenge affirmative action programs — which has already occurred in the context of higher education — the legal resources of both the Public Ministry and the Black Movement may be devoted to protecting these gains.\textsuperscript{417} It seems likely that use of anti-discrimination law to protect the rights of Afro-Brazilians in the private sector necessarily will have to take a back seat to defending Brazil's nascent affirmative action programs against such challenges.

The lack of responsiveness of legal institutions to the problem of racial discrimination has contributed significantly to the underdevelopment of Brazil's anti-discrimination law. Whether from resistance, reluctance or lack of capacity, or because they are more insulated from the forms of influence the Black Movement brought to bear on other institutions, the Brazilian legal system does not appear to have experienced a similar shift in its treatment of racial discrimination. This inertia has persisted in spite of the enactment of significant new anti-discrimination measures and increasingly greater attention to these issues by both public prosecutors and the private bar. As a result, the Black Movement has chosen to use the law as an instrument of political advocacy outside of the courts, but may be delaying the development of an anti-discrimination law that will better serve the needs of Afro-Brazilian workers.

\textsuperscript{416} Id. at 139.
\textsuperscript{417} Telles, \textit{supra} note 10, at 74; Adami, \textit{supra} note 58.
VII. Conclusion

While the Brazilian legal system has not made the dramatic shift in its approach towards racial discrimination that the country’s other political institutions have undertaken in recent years, it would be premature to conclude that the law is unlikely become a viable route for Afro-Brazilians to achieve fair treatment in the workplace. On the contrary, when one considers each of the key factors that have influenced the development of Brazilian anti-discrimination law, one can see significant changes that may well pave the way for more effective use of the law in combating racial discrimination. At the same time, even if the Black Movement achieves broader success in opening educational and employment opportunities for Afro-Brazilians, the need for more effective legal protection against discrimination in the workplace will only become more pressing. Given the dramatic progress that the Black Movement has made recently on other fronts, it is hard to believe that success for Afro-Brazilian workers in the courts will remain an “exception to the rule.”

First, it is clear that the ideology of racial democracy holds declining sway in the country’s public life. Nearly 90 percent of the population now recognizes the existence of significant discrimination against Afro-Brazilians, particularly in the labor market and criminal justice system. Additionally, the Brazilian government has broken with its past and no longer denies that racial discrimination is a problem requiring remedial state action.

The end of racial democracy’s ideological hegemony creates an opening in Brazilian legal thought for the re-conceptualization of racial discrimination, its varied expressions and effects. Freed of a narrow formulation of racial discrimination as a foreign phenomenon that shows itself only in the most blatant forms of prejudice, legislators, litigators and judges can construct an anti-discrimination law that extends its reach to less visible forms of discrimination that nonetheless constrain the prospects of Afro-Brazilian workers. A trend towards such broader thinking can already be glimpsed in changes in the statutory law, litigation strategies pursued by plaintiffs and public prosecutors, and the recent jurisprudence of the courts.

One concrete and fundamental change is the strategic shift by Afro-Brazilians away from reliance on the criminal provisions of the anti-discrimination law toward civil litigation as a strategy to secure

418. Fry, supra note 95, at 188.
419. Telles, supra note 10, at 16.
justice in the courts. This has already produced a number of successful verdicts that are likely to further embolden legal advocates and potential plaintiffs. Moreover, in the field of legislative reform, one can recognize similar change in emphasis, away from attempts to strengthen criminal penalties for ‘racism’ and toward the enactment of stronger civil protections and remedies for Afro-Brazilian workers.

While some elements of the Brazilian judiciary continue to resist expanding the liability of employers for racial discriminatory acts, signs of change in its jurisprudence are increasingly apparent. In several recent cases judges in the labor courts have awarded damages to Afro-Brazilians employees for racially abusive treatment by co-workers and supervisors. The TST’s historic decisions regarding the right of Afro-Brazilian workers to redress in cases of discriminatory discharge also represent important signs of national progress in dealing with issues of race.420

Another marker of change may be the composition of the courts themselves. The last 10 years have seen the appointment of the first Afro-Brazilian members to both the Federal Supreme Court and the TST. In a judiciary of career civil servants, change may come more slowly to the lower courts. Nevertheless, it seems likely that, over time, affirmative action programs in higher education should lead to greater judicial diversity.

As the Black Movement continues to succeed in pressing the state to expand educational and employment opportunities for Afro-Brazilians, the need for more effective protections against racial discrimination in employment will only become greater. Afro-Brazilians who benefit from these reforms are likely to face discrimination by those who resist their entrance into non-traditional roles. Moreover, in a labor law regime where many statutory protections are enforced either not at all or only after an employee’s termination, action through the courts will be necessary to ensure that the recent amendments to the labor code actually “take hold” with Brazilian employers.421

In the Brazilian debate over affirmative action, its proponents are often charged with inappropriately implanting a North American policy in a context to which it is ill-suited due to Brazil’s more fluid

421. Rosenn, supra note 161, at 22.
Strengthening Brazilian anti-discrimination law, however, does not require the importation of new methods from abroad, but instead can take advantage of already available tools in the domestic legal order. As Hédio Silva has suggested, the incorporation of ILO Convention 111 into Brazilian constitutional law provides grounds for imposing "objective liability" based on the racially disparate impact of employer practices. Moreover, in age and gender bias cases Brazilian courts already employ a form of burden shifting analysis that readily could be applied in cases involving racial discrimination.

Similarly, amendments to existing provisions of the Labor Code might further facilitate the use of the labor courts to challenge racial discrimination. In order to reduce the risk to individual plaintiffs, the Labor Code’s anti-retaliation provisions, which currently extend only to workers exercising parental leave or holding positions as union stewards or health and safety officers, could be extended to employees with discrimination claims. Another option might be to add anti-retaliation protections to Law 9.029, which already offers reinstatement or liquidated damages for victims of discriminatory termination.

It seems unlikely that the Public Ministry alone can adequately enforce the new antidiscrimination provisions of the Labor Code without some assistance from private litigants. Some of the advantages Public Prosecutors enjoy in establishing standing and compelling discovery might in class actions be extended to trade unions and NGOs to better enable these groups to bring such suits themselves. Similarly, in the labor courts, where trade unions are otherwise well-positioned to bring class actions challenging discrimination, it seems reasonable that some of the existing barriers to their standing in such cases be relaxed. If a Black Movement NGO can file a suit without showing that a majority of Afro-Brazilian citizens in a particular community are in favor of it, why should a trade union have to seek approval of its general membership before bringing a class action on behalf of a sub-group of Afro-Brazilian workers?

The work of the Public Ministry also might be complemented by the institutional development of new non-governmental entities that specialize in litigating this type of case. Such organizations already

422. Rochetti, supra note 24, at 1458.
423. Silva, supra note 76, at 379.
exist in Brazil’s consumer and environmental fields. Additionally, assistance could be sought from the committees that recently have been formed to address racial issues within the Brazilian state bar associations. While organized pro bono practice is only beginning to be established in Brazil, cooperation in bringing discrimination claims may be a fruitful area of collaboration among prosecutors, NGOs and the private bar.

After nearly four decades of virtual stasis, Brazilian antidiscrimination law appears to be entering a period of significant change. Broader recognition of racial discrimination as a significant problem in Brazilian society means that the legal system increasingly will be held accountable for failing to offer a viable means of redress. At the same time, those seeking to combat racial discrimination, particularly in the field of employment, are likely to pursue the more promising path of civil litigation, rather than seeking criminal prosecution. Though obvious obstacles to effective deterrence and fair redress persist, it is equally clear that in Brazil racial discrimination can no longer be considered an area where “the law [does] not have a role to assume.”

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424. Medeiros, supra note 81, at 99.