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Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense

Tanya Katerí Hernández*

For the great enemy of truth is very often not the lie—deliberate, contrived and dishonest—but the myth, persistent, persuasive and unrealistic.¹

With the growing racial and ethnic diversity of the U.S. population and workforce,² scholars have begun to address the ways in which coalition building across groups not only will continue to be necessary but also will become even more complex.³ Recent scholarship has focused on analyz-

* Professor of Law & Justice Frederick Hall Scholar, Rutgers University School of Law-Newark. A heartfelt thanks to all the following colleagues who read earlier versions of this Article: Richard Banks, Taunya Lovell Banks, Dorothy Brown, Devon Carbedo, Anani Dzidzienyo, Angelo Falcon, Carlos Gonzalez, Mitu Gulati, Cheryl Harris, Alan Hyde, Jerry Kang, Emma Coleman Jordan, Kevin Johnson, Beverly Moran, Rachel F. Moran, Suzanne Oboler, James Pope, Miriam Jimenez Roman, Terry Smith, John Valery White, and Adrien Wing. I was also greatly benefited by being able to present this research as a work-in-progress at Fordham Law School, George Washington Law School, Pennsylvania State University Law School, University of Minnesota Law School, Stanford Law School, University of Western Cape Rulci/Lat Crit Colloquium, and the Latin American Studies Association 2006 Annual Congress. I also thank my research assistants Toan Tran and Mark Jaffe for truly superb research work. Most importantly, I dedicate this Article to my mother, Norma Cecilia Rolón, for her courage as a truth teller about racial bias and discrimination wherever she sees it. Any shortcomings are my own.

¹ President John F. Kennedy, Commencement Address at Yale University (June 11, 1962), available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03Yale06111962.htm>.

² See Mitra Toosi, *A Century of Change: The Labor Force, 1950–2050*, MONTHLY LAB. REV., May 2002, at 15, 15–16, available at <http://www.bls.gov/opub/mlr/2002/05/art2full.pdf> (reporting U.S. Department of Labor projections that almost half of the workforce of 2050 will be non-White and non-Anglo, with 24% Latino, 14% African American, and 11% Asian or Pacific Islander).

³ See, e.g., Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 ASIAN L.J. 7 (1998); Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759 (2003); Rogelio A. Lasso, *Some Potential Casualties of Moving Beyond the Black/White Paradigm To Build Racial Coalitions*, 12 WASH. & LEE J. C.R. & SOC. JUST. 81 (2005); Robyn K. Mallett, Stacey Sinclair & Jeffrey R. Huntsinger, *What Intergroup Relations Research Can Tell Us About Coalition Building*, 12 WASH. & LEE J. C.R. & SOC. JUST. 5 (2005); George A. Martinez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 UCLA CHICANO-LATINO L. REV. 213 (1998); Mary Romero, *Afterword: Historicizing and Symbolizing a Racial Ethnic Identity: Lessons for Coalition Building with a Social Justice Agenda*, 33 U.C. DAVIS L. REV. 1599 (2000); Victor C. Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship, and Anti-Subordination*, 50 VILL. L. REV. 823 (2005); Susan Taing, *Lost in the Shuffle: The Failure of the Pan-Asian Coalition*

ing how best to promote effective coalition building.⁴ Thus far, scholars have not examined what that growing racial and ethnic diversity will mean in the context of individual racial and ethnic discrimination claims. What will antidiscrimination litigation look like when all the parties involved are non-White⁵ but nonetheless plaintiffs allege that a racial hierarchy exists and they are not necessarily interested in the group-politics agenda of coalition building?⁶ This Article focuses on the implications of increased diversity for the operation of employment discrimination law.

For instance, in a pro se petition alleging employment discrimination,⁷ Mr. Olumuyiwa, a Nigerian security guard, asserted that he and African American security guards were hired at a lower wage (\$7.00 per hour) than Latino and Yugoslavian employees (\$14.00 per hour) and received fewer hours than did other guards at the discretion of the Hispanic supervisor, who said he did not like the plaintiff because he was Nigerian. The supervisor also made overtly discriminatory remarks, such as “Why is your black-ass sleeping here?! I am going to deduct two hours pay from your black-ass paycheck!” and “We Hispanics run this office!” Because the rest of the management personnel were also Latino, the plaintiff felt that they condoned the supervisor’s poor conduct. In that context, a plaintiff like Mr. Olumuyiwa is likely to be most concerned with having any harms he has experienced at the hands of a workplace racial hierarchy addressed before considering the importance of political coalitions with the ethnic

To Advance the Interests of Southeast Asian Americans, 16 LA RAZA L.J. 23 (2005); Reynaldo A. Valencia, *What If You Were First and No One Cared: The Appointment of Alberto Gonzales and Coalition Building Between Latinos and Communities of Color*, 12 WASH. & LEE J. C.R. & SOC. JUST. 21 (2005); Adrien Katherine Wing, *Civil Rights in the Post 9/11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717 (2003); Note, *The Ties That Bind: Coalitions and Governance Under Section 2 Of The Voting Rights Act*, 117 HARV. L. REV. 2621 (2004).

⁴ See, e.g., Kevin R. Johnson, *African American and Latina/o Cooperation in Challenging Racial Profiling*, in NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AND AFRO-LATINOS 247, 258 (Anani Dzidzienyo & Suzanne Oboler eds., 2005) [hereinafter NEITHER ENEMIES NOR FRIENDS] (“Because African Americans and Latinas/os suffer common harms from racial profiling in law enforcement, they would seem natural allies in seeking to eliminate the practice. However, cooperation between the African American and Latina/o communities in the United States faces formidable barriers.”).

⁵ Whiteness is treated in this Article as a social construct with which a society bestows favored status and class privilege upon the individuals referred to as White in varying contexts. See David Roediger, *Whiteness and Ethnicity in the History of “White Ethnics” in the United States*, in TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY 181, 181–98 (David Roediger ed., 1994) (describing whiteness as a context-based category whose assignment is influenced by class and citizenship). Because whiteness is not considered a biological fact in this analysis, the Article’s discussion of inter-ethnic discrimination also includes cases in which non-Anglo immigrants with fair skin are treated as non-White because they are viewed with less favor than White-Anglo citizens.

⁶ José E. Cruz, *Interminority Relations in Legislative Settings: The Case of African Americans and Latinos*, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 229, 230 (describing instances of disinterest in the formation of coalitions).

⁷ *Olumuyiwa v. Harvard Prot. Corp.*, 1999 WL 529553 (E.D.N.Y. July 21, 1999).

group members who are comparatively advantaged by that hierarchy. Unfortunately, neither the literature about coalition building nor the employment discrimination jurisprudence is presently capable of addressing the problems of inter-ethnic discrimination plaintiffs whose claims are not as extreme in their manifestation of overt Latino anti-Black sentiment.⁸

As this Article will explicate, non-White racial hierarchies appear opaque to decisionmakers and other legal actors, who find it difficult to recognize the indicators of discrimination. Agents of discrimination are perceived as uniformly White-Anglos⁹ and all incidents are envisioned as having a White-versus-non-White dynamic.¹⁰ For instance, the Equal Em-

⁸ *Id.* at *6 (granting plaintiff's motion to amend complaint).

⁹ The term "White-Anglo" is used in this Article to distinguish those viewed as White in the United States from the many Latinos who also appear Caucasian. In analyzing the interplay of race and ethnicity in employment discrimination cases, it is important to be specific about the background of the parties. For that same reason the term "African American" is used to distinguish those viewed as Black in the United States from the many Latinos who are also of African descent living in the United States. It is useful to be ethnically specific in referring to populations of African descent in order to provide a more nuanced account of Latino racism that does not conflate identifiable Afro-Latinos with Latinos of more prominent European ancestry.

¹⁰ There is a growing body of literature that discusses the various ways in which the legal system manifests a view of racism as solely involving African Americans and White-Anglos. The focus of that literature has been upon illustrating how the Black/White binary obfuscates the operation of White racism against many other racial groups. This Article instead focuses upon how the binary obfuscates the racial attitudes of racial group members themselves. See, e.g., Juan Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 CAL. L. REV. 1213, 1257 (1997) (discussing how the Black/White binary focus upon White racism against Blacks does not fully explain White racism against other racial groups); see also Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding The Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 10 LA RAZA L.J. 261, 261, 268 (1998) (defining "racial dualism" as "the tendency of courts to view civil rights discourse in terms of Blacks and Whites to the exclusion of Browns and other people of color" which thereby "makes Latinos and their problems in the workplace invisible"); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1267 (1993) ("To focus on the black-white racial paradigm is to misunderstand the complicated racial situation in the United States."); Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 696 (1996) ("An historical assessment of the relationship of other groups of color to a black/white paradigm reveals the paradigm as not only un-descriptive and inaccurate, but debilitating for legal analysis, as well as civil rights oriented organizing."); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 775 & n.169 (1994) ("Race-crits' understanding of 'race' and 'racism' might also benefit from looking beyond the struggle between black and white. African American theorists have, until now, dominated CRT, and African American experiences have been taken as a paradigm for the experiences of all people of color."); Elizabeth Martinez, *Beyond Black/White: The Racisms of Our Time*, 20 SOC. JUST. 22 (1993); Rachel F. Moran, *Foreword: Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 4 (1995); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 957-59 (1995); William R. Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 7-9 (1995); Frank Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 225, 248 (1995) ("The time has come to consider groups that are neither black nor white in the ju-

ployment Opportunity Commission (“EEOC”) fails to collect any data about the race of those individuals who are agents of discrimination and racial harassment in the workplace. While this is presumably because the EEOC targets discrimination by employers, not individuals, the absence of racial data about the employers’ representatives implicitly furthers the narrative that racism in the United States is solely a White/non-White problem. One EEOC attorney has even stated that there has been a “reluctance to bring cases against other minorities.”¹¹ This reluctance exists even though the EEOC is beginning to see more cases in which different racial/ethnic groups are set against each other in the allocation of job opportunities.¹² Indeed, employers generally demonstrate a preference for particular racial or ethnic groups in the labor market beyond a mere economic preference for low-wage immigrant workers.¹³ For instance, among immigrant workers, employers prefer those with lighter skin tone.¹⁴

risprudence of race Race is conceptualized as breaking down into two all-encompassing and mutually exclusive categories, black and white.”); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1196 (1997) (book review).

¹¹ Miriam Jordan, *Blacks vs. Latinos at Work: More African Americans Claim They Are Passed Over for Hispanics in Hiring*, WALL ST. J., Jan. 24, 2006, at B1 (quoting EEOC regional attorney Anna Park).

¹² See, e.g., *EEOC v. Clougherty Packing Co.*, No. 2:04-cv-08051-GAF-PLA (C.D. Cal. Oct. 19, 2005), available at <http://www.morelaw.com/verdicts> (settling discrimination claim for \$110,000 where Black applicants alleged they were denied employment so that pork packing employer could hire Latino applicants instead); *EEOC v. Raytheon Technical Servs.*, No. CV 02-00735 (D. Haw. Nov. 5, 2004), available at <http://www.eeoc.gov/litigation/settlements/index.html> (settling discrimination claim for \$165,000 where Black paint contractor allegedly was denied employment in favor of Asian/Pacific Islander paint contractors); *EEOC v. Pac. Micr. Corp.* No. 02-0015 (D. N. Mar. 1, Mar. 3 2004), available at <http://www.eeoc.gov/litigation/settlements/index.html> (settling discrimination claim for \$400,000 where more than forty employees of Filipino origin had been replaced by employees from countries other than the Philippines); see also Jordan, *supra* note 11, at B1 (describing \$180,000 EEOC settlement with Zenith National Insurance Corp., based upon the allegation that ten Black applicants were denied a position in the mailroom in favor of a Latino applicant with no mailroom experience); W. Matt Meyer, *Here Is a Twist—Firm Is Fined for Hiring Too Many Hispanics and Not Enough Black and White Workers, Pictsweet To Amend for Prejudicial Hiring*, *HIS. VISTA*, July 14, 2003, at 1 (describing a settlement agreement between United Foods Inc. and the U.S. Department of Labor’s Office of Federal Contract Compliance Programs for discrimination in systematically excluding African American and White job applicants in favor of hiring Latinos). The preference for Latino workers over African Americans may also contribute to the disparate unemployment rates that each group suffers. The Bureau of Labor Statistics indicates that the unemployment rate among African Americans is rising twice as fast as that of Whites. In contrast, overall Latino unemployment is in line with that of the nation as a whole and Latinos have fared better with an expansion in manufacturing jobs. Louis Uchitelle, *Blacks Lose Better Jobs Faster as Middle-Class Work Drops*, *N.Y. TIMES*, July 12, 2003, at A1.

¹³ PHILIP MOSS & CHRIS TILLY, *STORIES EMPLOYERS TELL: RACE, SKILL, AND HIRING IN AMERICA* 116–17 (2001). The authors report racial distinctions made by employers regarding the desirability of different racial/ethnic group employees in the Russell Sage Foundation Multi-City Study of Urban Inequality, as demonstrated by respondents identifying Latinos six times more frequently than African Americans as preferred workers. This attitude is reflected in one respondent’s statement that “Spanish people are more willing to work. They are willing to work longer hours. I think the ones that I’ve known are very dedicated

Similarly, despite the fact that a significant level of overtly anti-Black Latino gang violence occurs in the state of California; Chicago, Illinois; and most recently in Perth Amboy, New Jersey,¹⁵ the FBI's statistical collection of hate-crime incidents fails to provide a mechanism for assessing the number of Latino offenders. Instead, the FBI tabulates suspected offenders as White, Black, American Indian/Alaskan Native, Asian/Pacific Islander, Multi-Racial, and Unknown.¹⁶ Thus, the existence of Latino hate crime perpetrators is statistically invisible despite news reports of its occurrence.¹⁷ In turn, the notion that hate crime is solely a White/non-White phenomenon is maintained.¹⁸

to their jobs." See also John J. Betancur, *Framing the Discussion of African American-Latino Relations: A Review and Analysis*, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 159, 160 (summarizing the literature detailing employer preferences for one racial group over another with a racial ordering of segmented employment roles by status and wage).

¹⁴ Joni Hersch, *Profiling the New Immigrant Worker: The Effects of Skin Color and Height* (Vanderbilt Law & Econ., Research Paper No. 07-02, 2007), available at <http://ssrn.com/abstract=927038> (noting that a 2003 study of 8600 recent immigrants found that light-skinned immigrants in the United States make more money on average than those with darker complexions, even when controlling for race and nationality).

¹⁵ See, e.g., Jeffrey Gettleman, *Effort To Re-Integrate Jail Sparks New Disturbance*, L.A. TIMES, May 10, 2000, at B4 (reporting three days of rioting after Latino inmates, acting on orders from the Mexican Mafia prison gang, began attacking African American inmates, prompting prison officials to segregate the inmates by race, after which the Latino inmates refused to be re-integrated with African American inmates); Suzanne C. Russell, *Perth Amboy Gang Tensions Worry Parents*, HOME NEWS TRIB., Apr. 7, 2004 (reporting harassment of African American athletes by a Dominican gang of students known as the "D Block").

¹⁶ See FBI, UNIFORM CRIME REPORTS OF HATE CRIME (1995), <http://www.fbi.gov/ucr/hatecm.htm>.

¹⁷ See, e.g., Nicholas Confessore & Kareem Fahim, *Racial Slur Preceded Slashing of 3 in Manhattan*, *Police Say*, N.Y. TIMES, Mar. 5, 2006, at Metro 37 (reporting attack on three Asian men by three Hispanic men wielding a box cutter and yelling a derogatory term for Chinese people); Robert Siegel & Melissa Block, *All Things Considered: California Prisons on Alert After Weekend Violence* (National Public Radio broadcast Feb. 6, 2006) (reporting two weekend race riots between Latino and African American inmates, which culminated in prison officials segregating the inmates by race and Latino inmates sending prison officials a letter that stated, "No disrespect . . . but if blacks come in the dorms we will fight."); News Brief, Center for the Study of Hate and Extremism, *Los Angeles Hate Crime Leads to Hijacked Bus*, May 3, 2001, available at http://hatemonitor.csusb.edu/NewsHeadlines/may01_news_briefs.html#LA%20Hate%20Crime (reporting shooting of African American by Latino who stated he did not like African American men associating with Latina women); see also JAMES E. JOHNSON & BILL LANN LEE, U.S. DEP'T OF TREASURY ET AL., NATIONAL CHURCH ARSON TASK FORCE (1998), available at http://www.usdoj.gov/crt/church_arson/arson98.html (reporting arrest of Hispanic suspect for burning an African American house of worship). In addition, some municipal arrest records reflect the existence of Latino hate crime perpetrators. See Brian Levin, *A Dream Deferred*, 20 J. INTER-GROUP REL. 3, 22 (1993) (indicating that 42% of those arrested for racial hate crimes in Los Angeles in 1992 were Latino, and 9% of those arrested for racial hate crimes in Boston in 1991 were Latino).

¹⁸ See Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 970 (1995) (describing the ways in which the relative lack of positive public identity and legitimacy of Latinos creates an image of racial conflict as existing solely between African Americans and White-Anglos).

As Eric Yamamoto notes, the traditional civil rights approach focuses on conflicts with Whites and not with other communities of color.¹⁹ He also observes that the focus on White-Anglos underappreciates the extent to which inter-ethnic conflicts can quickly escalate into intergroup controversies because of the deep and often unacknowledged racial grievances.²⁰ Yamamoto recommends that in order to build more effective coalitions, civil rights attorneys should envision racial justice practice as something more than the enforcement of civil rights laws. They should instead deploy interracial justice inquiries in the venue of grassroots organizing in order to acknowledge how racial groups harm one another. Yamamoto's work, however, does not examine the focus of this Article: the development of a conceptual framework for effectively presenting and understanding inter-ethnic discrimination claims with the goal of disrupting the judiciary's singular focus on White/non-White discrimination.

This Article treats "inter-ethnic discrimination" as discrimination among non-White racial and ethnic groups. The concept is defined broadly to include discrimination among members of different ethnic subgroups, such as discrimination by Puerto Ricans against Dominicans or by White Latinos against Afro-Latinos. Inter-ethnic discrimination is viewed expansively in order to depict the many ways non-White ethnic groups and subgroups are complicit in maintaining racial hierarchy in the workplace. Thus, the classic disparate treatment employment discrimination cases, in which White employers exclude or differentially treat particular racial/ethnic groups, are not part of this examination of inter-ethnic discrimination.²¹ Furthermore, the dearth of reported cases involving systemic disparate treatment and disparate impact in the inter-ethnic context precludes the

¹⁹ ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 38 (1999).

²⁰ See Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 379, 386 (Francisco Valdes et al. eds., 2002).

²¹ See *supra* note 12 (detailing cases in which the EEOC has successfully settled allegations of White employers awarding job opportunities to one racial/ethnic group at the expense of another). While the EEOC often is able to settle classic disparate treatment cases involving White employers, plaintiffs have met with judicial resistance when they allege disparate treatment by White employers who rely on word-of-mouth hiring methods that disproportionately exclude African Americans while overwhelmingly including other racial/ethnic groups. *But see* EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 298–99 (7th Cir. 1991) (observing that exclusionary word-of-mouth hiring methods can support a finding of discrimination when an employer is actively involved in soliciting employees for word-of-mouth applicant recommendations). The Seventh Circuit later upheld a judgment of discrimination by a Polish employer who used word-of-mouth recruitment practices that benefited Polish and Latino employees while completely excluding African American applicants. EEOC v. O&G Spring & Wire Forms Specialty Co., 38 F.3d 872 (7th Cir. 1994). This result accords with the general understanding that word-of-mouth recruitment policies creating a predominantly White workforce or job category can establish a discrimination violation. See, e.g., Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980); Barnett v. W. T. Grant Co., 518 F.2d 543 (4th Cir. 1975).

specific examination of those forms of discrimination in this Article's analysis of inter-ethnic discrimination.²²

The majority of inter-ethnic employment discrimination claims appear to be those in which Latinos are involved in turn as victims and as agents of individual disparate treatment in the workplace.²³ Latinos and individual disparate treatment cases are thus the focus of this exploration of inter-ethnic discrimination.²⁴ This focus is warranted by demographic projections that one in four job seekers by the year 2020 will be the child of a Latino immigrant and that Latino workers will increase their representation in the workforce from the current rate of 12% to 25% by the year 2050.²⁵ Latino-owned businesses have also increased 232% between 1987 and 1997.²⁶ In 1997 alone, Latino-owned businesses employed 1,492,773 people.²⁷ Furthermore, as the fastest-growing²⁸ ethnic/racial minority²⁹ in the United States, Latinos have been celebrated in the public discourse as a multiracial people incapable of racial discrimination.³⁰ Examining La-

²² In one noteworthy systemic disparate treatment inter-ethnic discrimination case, the Seventh Circuit held that the passive use of word-of-mouth recruitment by the Korean owner of a janitorial and cleaning services company could not in and of itself give rise to an inference of intentional discrimination in the absence of evidence that the owner was biased in favor of Koreans or prejudiced against any group underrepresented in its work force. *EEOC v. Consol. Serv. Sys.*, 989 F.2d 233 (7th Cir. 1993). Although this case has been assailed for underestimating the discriminatory effects of intra-ethnic group preferences in the workplace, it should be noted that unlike the disposition of the emerging individual disparate treatment inter-ethnic cases analyzed in this Article, *Consolidated Service* does not foreclose the possibility that racial discriminatory intent might exist simply because the company owner is Korean. Indeed, the court took pains to note that the assessment of the case would have been different if evidence of racial animus had been presented or if the owner had been actively engaged in deploying the word-of-mouth hiring method rather than passively benefiting from his employees' self-initiated use of the method. *Id.* at 236.

²³ See *infra* note 125 and accompanying text (detailing the inter-ethnic employment discrimination cases in LexisNexis and Westlaw).

²⁴ See *infra* notes 125–131 and accompanying text (describing the nature of an individual disparate treatment case and its importance to the emerging inter-ethnic discrimination cases).

²⁵ *Employment: Second-Generation Latinos To Exert Major Workforce Influence*, *Pew Report Says*, Daily Lab. Rep. (BNA) No. 199, at A-7 (Oct. 15, 2003); see also RAKESH KOCHAR, PEW HISPANIC CTR., LATINO LABOR REPORT 2006: STRONG GAINS IN EMPLOYMENT (2006), available at <http://pewhispanic.org/files/reports/70.pdf>.

²⁶ U.S. SMALL BUS. ADMIN., MINORITIES IN BUSINESS 1 (1999), available at <http://www.sba.gov/advo/stats/min.pdf>.

²⁷ *Id.* at 23.

²⁸ U.S. CENSUS BUREAU, THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 2002, at 20-545 (2003), available at <http://www.census.gov/prod/2003pubs/p20-545.pdf> (reporting that the nation's Hispanic population grew much faster than the population as a whole, increasing from 35.3 million in 2000 to 38.8 million in 2002, and constituted 12.5% of the 2000 census population, excluding the 3.8 million residents of Puerto Rico). The Latino population is projected to constitute one-quarter of the U.S. population by 2050. Dick Kirschten, *Hispanics: Beyond the Myths*, NAT'L J., Aug. 14, 1999, at 2350, 2351.

²⁹ See Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997) (describing how Latinos can be positioned to be both an ethnic group and a racial group).

³⁰ See Silvio Torres-Saillant, *Inventing the Race: Latinos and the Ethnoracial Pentagon*, 1 LATINO STUD. J. 123 (2003) (describing how Latinos take pride in being enlightened about race relations because they are a "racially mixed" people); Silvio Torres-Saillant,

tino bias may tell us much about the ability of legal actors to recognize and articulate the harm of inter-ethnic discrimination in a legal system steeped in an understanding of discrimination as solely a White/non-White phenomenon.

In the emerging body of inter-ethnic discrimination cases, Latinos figure prominently in allegations of employment discrimination in ways that contradict the image in public discourse of a multiracial people who do not racially discriminate. In these cases, judges seem unable to appreciate Latino manifestations of bias for two reasons. First, judges appear to be unfamiliar with Latin American racial ideology and how Latinos in the United States express racial bias. Second, they impute to diverse workplaces a shield against discriminatory treatment claims. This is best exemplified by one judge's explicit claim that "[d]iversity in an employer's staff undercuts an inference of discriminatory intent."³¹ Such a presumption both contravenes established employment discrimination doctrine and impairs a thorough inquiry into inter-ethnic employment discrimination claims. Indeed, it effectively operates as a defense to discrimination in individual disparate treatment cases when an accusation of inter-ethnic discrimination is at issue.

This Article uses the term "diversity defense" to describe the way in which legal actors view a racially "diverse" workplace as the equivalent of a racially harmonious workplace, thereby failing to recognize incidents of discrimination and the relevant caselaw. Viewing all people of color as the same and overlooking the particular histories of racial animus within and across different ethnic groups can cause a perceived equivalence of workplace diversity and racial harmony. The lack of judicial knowledge about non-White racial hierarchies generally, and Latino ethnic/racial differences and attitudes specifically, facilitates the inclination to construct a diversity defense. Then, in a circular fashion, the diversity defense hinders judicial awareness of Latino heterogeneity and inter-ethnic strife. In response, this Article proposes a "Multiracial Racism Litigation Approach" ("MRLA") to enable decisionmakers to identify and address discrimination in inter-ethnic contexts.

Part I of this Article will present the social science literature illuminating the complexity of racial attitudes among Latinos, which judges gen-

Epilogue: Problematic Paradigms: Racial Diversity and Corporate Identity in the Latino Community, in *LATINOS: REMAKING AMERICA* 435 (M.M. Suarez-Orozco & M.M. Paez eds., 2002) [hereinafter Torres-Saillant, *Problematic Paradigms*] (discussing the dangers of "current assertions of a harmonious panethnic Latino identity"); see also JOHN FRANCIS BURKE, *MESTIZO DEMOCRACY: THE POLITICS OF CROSSING BORDERS* (2002) (arguing that the Latino "mestizaje" mixed race experience offers an ideal model for fostering unity); Lynette Cleetson, *Hispanic Population Is Rising Swiftly, Census Bureau Says*, N.Y. TIMES, June 19, 2003, at A22 ("[Latinos] just don't see the world divided into such stark boxes, and that has to be a real engine for change." (quoting Roberto Suro, Director of the Pew Hispanic Institute)).

³¹ *Arrocha v. CUNY*, 2004 WL 594981 (E.D.N.Y. Feb. 9, 2004).

erally do not appreciate. Part II will analyze the emerging Latino inter-ethnic employment discrimination cases. These cases demonstrate that judicial inability to recognize racial discrimination when it occurs in an inter-ethnic context leads judges to deploy an inappropriate diversity defense to discrimination claims. Part III therefore proposes that legal actors address the particular litigation needs of inter-ethnic claims through a multiracial racism lens. The proposed MRLA focuses on how an ethnic/racial group is advantaged or disadvantaged depending on the context. As such, it is better able to elucidate and address the harms of inter-ethnic employment discrimination, without imputing magical powers to the existence of workplace diversity.

I. LATINO RACIAL ATTITUDES

Before presenting the emerging Latino inter-ethnic discrimination cases, it is important to explore the social science data about Latino racial attitudes that judges have overlooked. With a foundation in the social science literature, one can more clearly appreciate the missteps of the cases.

A. *The Origins of Latino Racism*

The manifestation of Latino racism in the United States is the result of a complex interaction of Latin American/Caribbean racial attitudes and self-esteem-boosting responses to being racialized as Latinos in the United States. Most relevant for this analysis of inter-ethnic employment discrimination is the interplay of Latino anti-Black racial attitudes.³² They are most relevant because the emerging inter-ethnic Latino cases discussed herein involve workplace settings in which Latinos are identified as agents of anti-Black bias and discrimination against African Americans and Afro-Latinos. Presented with these cases, judges are often unable to recognize

³² Latino anti-Asian bias is an under-studied area that warrants empirical research. Just a few scholars have begun to address the issue of Asian ethnicity in Latin America. See JEFFREY LESSER, *NEGOTIATING NATIONAL IDENTITY: IMMIGRANTS, MINORITIES AND THE STRUGGLE FOR ETHNICITY IN BRAZIL* (1999); Evelyn Hu Dehart, *Chinese Coolie Labour in Cuba in the Nineteenth Century: Free Labour or Neo-Slavery?*, in *THE WAGES OF SLAVERY* 67, 68–70 (Michelle Twaddle ed., 1993); Mieko Nishida, *Japanese Brazilian Women and Their Ambiguous Identities: Gender, Ethnicity and Class in Sao Paulo* (Latin Am. Stud. Ctr., Univ. of Md., College Park, Working Paper No. 5, 2000). In contrast, prejudice against those of indigenous ancestry in Latin America is well documented in social science literature. See, e.g., *STRUGGLES FOR SOCIAL RIGHTS IN LATIN AMERICA* (Susan Eva Eckstein & Timothy P. Wickham-Crowley eds., 2002) (detailing the indigenous peoples' struggle against discrimination in Latin America). However, neither anti-Asian nor anti-indigenous bias has been implicated in the emerging Latino inter-ethnic employment discrimination cases reported thus far.

the details of Latino anti-Black racial discrimination, despite their willingness to entertain claims of anti-Latino bias made by African Americans.³³

It is useful to first summarize Latin American and Caribbean perspectives about Afro-Latinos, that is, their own Afro-descendants, before discussing how those perspectives inform Latino attitudes toward African Americans in the United States. The presentation of Latin American race ideology is not at all meant to suggest that all Latinos are racist or harbor these racialized perspectives. Admittedly, group-focused discussions always run the risk of suggesting an essentialized view of a group.³⁴ This data about Latino racial perspectives is provided to demonstrate the nature of Latino racial stereotypes of which legal actors in the United States may otherwise be ignorant and which they must understand in order to recognize the discriminatory conduct of Latinos who act upon such stereotypes.³⁵ It is not intended to insinuate that all Latinos think a particular way.

Racism, in particular anti-Black racism, is a pervasive and historically entrenched fact of life in Latin America and the Caribbean. Over 90% of the approximately ten million enslaved Africans brought to the Americas were taken to Latin America and the Caribbean, whereas only 4.6% were brought to the United States.³⁶ As such, the historical legacy of slavery is pervasive in Latin America and the Caribbean. In Latin America and the Caribbean, as in the United States, lighter skin and European features increase one's chances for socioeconomic advancement, while darker skin and African or indigenous features severely limit such opportunity and social

³³ It may well be that the apparent judicial predisposition to consider the culpability of Black defendants in anti-Latino bias employment claims is part and parcel of the general proclivity for more readily accepting the possible culpability of Black defendants in contrast to other racial groups. See, e.g., Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721 (2004). Therefore, while inter-ethnic cases of anti-Latino bias do exist, they have not thus far led to judicial confusion in the inquiry into discrimination and are therefore not the subject of this Article. See, e.g., *Limes-Miller v. City of Chicago*, 773 F. Supp. 1130 (N.D. Ill. 1991) (dismissing claim of Latina plaintiff who failed to show that her employer's stated reason for layoffs was a pretext for national-origin discrimination in an inter-ethnic workplace in which plaintiff failed to prove that Blacks were promoted at higher rates than others).

³⁴ An essentialized approach to understanding groups is marked by the notion that human identity categories are fixed and exist trans-historically and transculturally. See Cheshire Calhoun, *Denaturalizing and Desexualizing Lesbian and Gay Identity*, 79 VA. L. REV. 1859, 1863 (1993).

³⁵ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (concluding that an employer's expressions of stereotypical views about a protected group such as women could be admitted as evidence that an adverse employment decision was impermissibly motivated); see also Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 95 (1994) (proposing the use of essentialized notions of culture in criminal law cases for the limited purpose of explaining an individual's state of mind and cultural influences).

³⁶ Miriam Jimenez Román, *Un Hombre (Negro) del Pueblo: José Celso Barbosa and the Puerto Rican "Race" Toward Whiteness*, 8 CENTRO 8, 12 (1996).

mobility.³⁷ The poorest socioeconomic class is populated primarily by Afro-Latinos, while the most privileged class is populated primarily by Whites; an elastic intermediary socioeconomic standing exists for some light-skinned (mixed-race) “Mulattos” and “Mestizos.”³⁸ For instance, until the Cuban revolution in 1959, certain occupations used explicit color preferences to hire Mulattos to the complete exclusion of dark-skinned Afro-Cubans, based on the premise that Mulattos were superior to dark-skinned Afro-Cubans, though not of the same status as Whites.³⁹

White supremacy is deeply ingrained and continues into the present. For example, in research conducted in Puerto Rico during the 1997–1998 academic year, the overwhelming majority of the 187 college students interviewed described “Puerto Ricans who are ‘dumb’ as having ‘dark skin.’”⁴⁰ Conversely, the same students correlated light skin color with a description of “Puerto Ricans who are physically strong.” Such negative perspectives about African ancestry are not limited to college students. In 1988, when the presiding governor of Puerto Rico publicly stated, “The contribution of the black race to Puerto Rican culture is irrelevant, it is mere rhetoric,” it was in keeping with what social scientists describe as the standard paradox in Puerto Rico: Puerto Ricans take great pride in the claim of being the whitest people of the Caribbean islands, while simultaneously asserting they are not racist. The pride of being a presumably White population is a direct reaction to the Puerto Rican understanding that “black people are perceived to be culturally unrefined and lack ambition.”⁴¹ The Puerto Rican example is emblematic of the racial attitudes throughout the Caribbean and Latin America.⁴²

As in the United States, the disparagement of Black identity is not limited to Mulattos, Mestizos and Whites, but also extends to darker-skinned Afro-Latinos who can harbor internalized racist norms. The internalization manifests itself in a widespread concern among Afro-Latinos with the degree of pigmentation, width of nose, thickness of lips, and nature of one’s hair—with straight, European hair denominated literally as “good” hair.

³⁷ Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States—Latin America Comparison*, 87 CORNELL L. REV. 1093, 1121–22 (2002) [hereinafter Hernández, *Multiracial Matrix*].

³⁸ *Id.* at 1121–25.

³⁹ Tanya K. Hernández, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 22 U.C. DAVIS L. REV. 1135 (2000).

⁴⁰ Ronald E. Hall, *A Descriptive Analysis of Skin Color Bias in Puerto Rico: Ecological Applications to Practice*, 27 J. SOC’Y. & SOC. WELFARE 171, 177–78 (2000).

⁴¹ Arlene Torres, *La Gran Familia Puertorriqueña “Ej Prieta De Beldá” (The Great Puerto Rican Family is Really Really Black)*, in BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN: SOCIAL DYNAMICS AND CULTURAL TRANSFORMATION, VOL. II, EASTERN SOUTH AMERICA AND THE CARIBBEAN 285, 297 (Arlene Torres & Norman E. Whitten, Jr. eds., 1998).

⁴² Ariel E. Dulitzky, *A Region in Denial: Racial Discrimination and Racism in Latin America*, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 41–42 (describing the anti-Black racism that exists throughout Latin America).

This concern with European skin and features also influences Afro-Latinos' assessments of preferred marriage partners. Marrying someone lighter is called "adelantando la raza" (improving the race) under the theory of "blanqueamiento" (whitening), which prizes the mixture of races precisely to help diminish the existence of Afro-Latinos. Even in the midst of Latin American nationalistic emphasis on having individuals identify solely by their country of origin rather than by racial ancestry, discursive distinctions are made about the diminished value of Blacks and blackness. Indeed, it is even common within Latin America and the Caribbean to rank order the prestige of countries based on a color spectrum in which each country is racially identified.⁴³ In this way "nationality is a proxy for race" that embodies White supremacy.⁴⁴ As a result, countries with a large percentage of Whites are valued while those with a large percentage of Blacks are discounted as "less cultured."⁴⁵ The attribution of a racial identity to countries, with nationality serving as a proxy for race, also permits a schizophrenic ability to cast racial aspersions about a person's background without ever openly discussing race. These proxies for race are deeply ingrained in Latin American/Caribbean culture.⁴⁶

It should not be surprising, then, that migrants from Latin America and the Caribbean travel to the United States with their culture of anti-Black racism well intact.⁴⁷ In turn, this facet of Latino culture is transmitted to some degree to younger generations.⁴⁸ For instance, in one ethnographic

⁴³ Telephone Interview with Ana Y. Ramos Zayas, Professor of Latino & Hispanic Caribbean Studies, Rutgers Univ. (Mar. 1, 2007); see also Francisco Valdes, *Race, Ethnicity, and Hispanismo in a Triangular Perspective: The "Essential Latino/a" and LatCrit Theory*, 48 UCLA L. REV. 305, 326 (2000) (describing the racialization of Latin America and "the supremacy of whiteness and Eurocentricity in Latina/o racial and ethnic hierarchies — both in Latin American societies and in Latina/o communities throughout the United States"). One scholar refers to racial identification of countries as "primacism." See Benjamin G. Davis, *International Commercial Online and Offline Dispute Resolution: Addressing Primacism and Universalism*, 4 J. AM. ARB. 79, 81 (2005) ("The word primacism is my manner of describing the situation where race, culture, and nationality are intertwined in such a manner that while one speaks in terms of nationality, in fact, one is describing race (or some other primary group).").

⁴⁴ Davis, *supra* note 43, at 81.

⁴⁵ Hernández, *Multiracial Matrix*, *supra* note 37, at 1160 ("[T]he examination of the Latin American context has shown how existing racial disparities and hierarchy are explained as the result of the 'bad culture' that racial minorities manifest."); see also Paulo de Carvalho-Neto, *Folklore of the Black Struggle in Latin America*, 5 LATIN AM. PERSP. 53, 58–62, 71 (1978) (detailing the ways in which Latin American folklore publicly depicts Blacks in Latin America as ill-mannered and stupid). "To the prejudiced white man, the black man has no artistic or literary education." *Id.* at 62.

⁴⁶ Telephone Interview with Ana Y. Ramos Zayas, *supra* note 43.

⁴⁷ Paula D. McClain et al., *Racial Distancing in a Southern City: Latino Immigrants' Views of Black Americans*, 68 J. POL. 571 (2006) (documenting how Latino immigrants bring negative attitudes towards Blacks with them from their countries of origin rather than develop them in the United States after immigrating); Torres-Saillant, *Problematic Paradigms*, *supra* note 30, at 435–55.

⁴⁸ See Valdes, *supra* note 43, at 307 (observing the "internal reproduction of white supremacy within and among Latinas/os").

study of Dominican racial identity within the United States, all of the Dominican preoccupations with skin color and European phenotype honed in the Dominican Republic were readily apparent among the Dominican Diaspora in the United States.⁴⁹ Furthermore, interviews of Dominican clients at a hair salon in Washington Heights, New York, demonstrated the pervasive Latin American/Caribbean racialized denigration of curly African hair as “bad” and straight European hair as “good,” along with the distaste for dark skin.⁵⁰

The inability to perceive Latino racism in the United States stems from an acceptance in U.S. public discourse of the Latin American myth that racism does not exist in Latin America⁵¹ and that racism is thus not part of the Latino migrant legacy across generations.⁵² In turn, Latinos and the scholars who describe their racial attitudes tend to accept the notion that any anti-Black sentiment expressed by Latinos in the United States is a consequence of learning the cultural norms of the United States and its racial paradigm.⁵³ However, a growing social science literature discredits the premise that Latino racism is a set of behaviors and attitudes only learned on the United States mainland.⁵⁴

B. The Extent of Latino Social Distance from African Americans

The sociological concept of “social distance” measures the social unease that an ethnic or racial group has in interactions with another ethnic or racial group.⁵⁵ Social science studies of Latino racial attitudes often indicate a preference for maintaining social distance from African Americans. And while the social distance level is largest for recent Latin American immigrants, more established communities of Latinos in the United States are also characterized by their social distance from African Americans. For instance, in a 2002 survey of 600 Latinos (two-thirds of whom were Mexican, the remainder Salvadoran and Colombian) and 600 African Americans in Houston, Texas, the African Americans had more positive views of Lati-

⁴⁹ See Ginetta E. B. Candelario, *Situating Ambiguity: Dominican Identity Formations* 339 (2000) (unpublished Ph.D. dissertation, City University of New York) (on file with author).

⁵⁰ *Id.* at 360–81.

⁵¹ Dulitzky, *supra* note 42, at 39.

⁵² See *supra* text accompanying note 30.

⁵³ See, e.g., TATCHO MINDIOLA, JR. ET AL., *BLACK-BROWN RELATIONS AND STEREOTYPES* 20–29, 37–38 (2002).

⁵⁴ See Valdes, *supra* note 43, at 328 (“Latina/o tendencies to valorize whiteness are not simply a matter of acculturation, or even reacculturation, to the Anglocentric white supremacist rule imposed by the United States.”); see also Tanya Katerí Hernández, *To Be Brown in Brazil: Education and Segregation Latin American Style*, 29 N.Y.U. REV. L. & SOC. CHANGE 683 (2005) (describing the literature documenting the existence of residential and educational racial segregation in Latin America).

⁵⁵ GEORGE YANCEY, *WHO IS WHITE? LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE* 65 (2003).

nos than vice versa.⁵⁶ While a slim majority of U.S.-born Latinos did use positive identifiers when describing African Americans, only a minority of foreign-born Latinos did so. One typical foreign-born Latino respondent stated “I just don’t trust them The men, especially, all use drugs and they all carry guns”⁵⁷ It is thus not surprising that this same study found that, although Latino immigrants live in residential neighborhoods with African Americans in the same proportion as U.S.-born Latinos, 46% of Latino immigrants report almost no interaction with African Americans whatsoever.⁵⁸ Similarly, the Los Angeles Survey of Urban Inequality found that recent and intermediate-term Latino immigrants held the most negative stereotypes of African Americans.⁵⁹

Furthermore, the social distance of Latinos from African Americans is consistently reflected in Latino responses to other survey questions.⁶⁰ In a 2003 survey of five hundred residents of Durham, North Carolina (equally divided among Latinos, African Americans, and White-Anglos), researchers found that Latinos’ negative stereotypes of African Americans exceed those held by White-Anglos.⁶¹ A 2000 study of residential segregation found that Latinos reject African Americans as neighbors more readily than members of other racial groups do.⁶² In addition, the 1999–2000 Lilly Survey of American Attitudes and Friendships indicated that African Americans were the least desirable marriage partners for Latinos, whereas African Americans are more accepting of intermarriage with Latinos.⁶³

Similarly, in a 1993 study of intergroup relations, Latinos overwhelmingly responded that they had most in common with Whites and least in

⁵⁶ MINDIOLA, JR., *supra* note 53, at 35.

⁵⁷ *Id.* at 35.

⁵⁸ *Id.* at 44–45.

⁵⁹ CAMILLE ZUBRINSKY CHARLES, WON’T YOU BE MY NEIGHBOR? RACE, CLASS, AND RESIDENCE IN LOS ANGELES 161 (2006) (describing the results from the 1992–1994 Los Angeles Survey of Urban Inequality).

⁶⁰ *Id.* at 46.

⁶¹ See McClain, *supra* note 47 (observing that a majority of Latino immigrants in the study—58.9%—said that few or almost no African Americans are hardworking, 57% said few if any African Americans could be trusted, and nearly one-third said few if any African Americans are easy to get along with; for White-Anglos, 9.3% said few African Americans work hard, 9.6% said African Americans could not be trusted, and 8.4% said African Americans were difficult to get along with).

⁶² Camille Zubrinsky Charles, *Neighborhood Racial-Composition Preferences: Evidence from a Multiethnic Metropolis*, 47 SOC. PROBS. 379 (2000).

⁶³ YANCEY, *supra* note 55, at 70–71 (describing the study of group-based racial attitudes but not delineating which ethnic groups made up the composite of “Latinos” in the study respondents); see also Roger Lindo, *Miembros de las Diversas Razas Prefieren a los Suyos: Así lo Afirma una Investigación de la Universidad de California de Los Angeles*, LA OPINION, Nov. 20, 1992, at 1C (describing UCLA study indicating Latino social distance from African Americans); Cynthia Orosco, *Aprender a Convivir: Negros e Hispanos*, LA OPINION, Apr. 14, 2001, at 9A (describing a study by Hispanic Link regarding Latino relations with African Americans in North Carolina, South Carolina, Arkansas, Alabama, and Tennessee).

common with African Americans.⁶⁴ In contrast, African Americans responded that they felt they had more in common with Latinos and least in common with Whites and Asian Americans. It is somewhat ironic that African Americans, who are publicly depicted as being averse to coalition building with Latinos, provide survey responses that are actually more in accord with all the socioeconomic data that demonstrates the commonality of African American and Latino communities.⁶⁵ Meanwhile, Latinos in contradistinction provide survey responses that fly in the face of all the socioeconomic data demonstrating African American and Latino parallels.⁶⁶

Although some commentators might equate the Latino preference for White-Anglos over African Americans with the competition they perceive from African Americans in the labor market, a 1996 sociological study of racial group competition indicates otherwise.⁶⁷ In the study of 477 Latinos from the 1992 Los Angeles County Social Survey, Bobo and Hutchings found that prejudice contributes to perceptions of group threat and economic competition. They also found that the greater the social distance Latinos prefer to maintain from African Americans, the more likely they are to see African Americans as competitors.⁶⁸ In other words, the anti-Black animosity facilitates the perception of African Americans as an economic threat. Yet despite media reports to the contrary, the Bobo and Hutchings study indicated a lower rate of African American perception of economic competition from Latinos, as compared with the rate of Latino perception of economic threat from African Americans.⁶⁹ Similarly, Latinos attribute disorder to predominantly African American neighborhoods much more readily than do other racial/ethnic groups. A study published in 2004

⁶⁴ NAT'L CONFERENCE FOR CMTY. AND JUSTICE, TAKING AMERICA'S PULSE: THE FULL REPORT OF THE NATIONAL CONFERENCE SURVEY ON INTER-GROUP RELATIONS 10 (1994).

⁶⁵ See Tanya Katerí Hernández, "Too Black to be Latino/a: Blackness and Blacks as Foreigners in Latino Studies," 1 *LATINO STUD.* 152, 154 (2003) ("Current discussions about the demographic explosion of Latinos/as and their desire to assume greater political clout has focused upon the presumed obstructionism and discontent of Anglo-Blacks who must 'relinquish' their power to accommodate Latinos/as."); see also Alex Prud'homme, *Race Relations Browns vs. Blacks*, *TIME*, July 29, 1991, at 14-16 (identifying the source of Black-Latino hostilities as African Americans' beliefs that "Latinos are benefiting from civil rights victories won by blacks with little help from Hispanics," "fear that Hispanic immigrants, who are often willing to work less than the legal minimum wage, are supplanting them in even the lowliest positions," and resistance to "any attempts to increase Latino employment" and being "unwilling to treat [Latinos] as equals in the fight for equal rights"). A recent book about Black-Latino hostilities has been criticized for being one-sided in its blame of African Americans: "The villains invariably turn out to be African-Americans, who are threatened by demographic changes and shut Latinos out of political office, while refusing to acknowledge that anyone's suffering could ever be as great as theirs." Ed Morales, *Brown Like Me?*, *NATION*, Mar. 8, 2004, at 24.

⁶⁶ BILL PIATT, *BLACK AND BROWN IN AMERICA: THE CASE FOR COOPERATION* 52-57 (1997) (detailing the socioeconomic factors that align Latino and African American interests).

⁶⁷ Lawrence Bobo & Vincent L. Hutchings, *Perceptions of Racial Group Competition: Extending Blumer's Theory of Group Position to a Multiracial Social Context*, 61 *AM. SOC. REV.* 951 (1996).

⁶⁸ *Id.* at 963.

⁶⁹ *Id.* at 964.

demonstrated that neighborhood racial context in Chicago shapes perceptions of disorder more powerfully than actual observations of disorder.⁷⁰

The Latino affinity for White-Anglos over African Americans is part and parcel of the Latino identification with whiteness. Indeed, in contrast to the many reports of a Latino preference for mixed-race census racial categories, there is a strong Latino preference for the White racial category and some Latino groups like Cubans disproportionately select the White racial category.⁷¹ Moreover, the Latino National Political Survey, a study of Latino racial preferences across generations in the United States from 1989 to 1990, found that a substantial majority of Latino respondents chose to self-identify as White.⁷² It is important to note that the Latino National Political Survey study was able to examine the preference for whiteness divorced from any ancillary effects that variation in census racial category structures can include.⁷³ The study indicated that the White racial category is particularly preferred by recent immigrants of all skin color shades.⁷⁴ And when later generations do move away from the White racial category, they do so in favor of collective national ethnic labels like “Latino” or “Hispanic.”⁷⁵ Furthermore, the Latino imagination consistently identifies a White face as the quintessential Latino.⁷⁶ Even for those Latinos who do acknowledge their African ancestry, there is a cultural pressure to emphasize their Latino ethnicity publicly as a mechanism for distancing themselves from

⁷⁰ Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCH. Q. 319, 332–33, 336 (2004) (summarizing findings of study of five hundred block groups in Chicago).

⁷¹ William Darity, Jr., Darrick Hamilton & Jason Dietrich, *Passing on Blackness: Latinos, Race and Earnings in the USA*, 9 APPLIED ECON. LETTERS 847 (2002).

⁷² William Darity, Jr. & Tanya Golash Boza, *Choosing Race: Evidence from the Latino National Political Survey* 4–5 (2004), available at <http://paa2004.princeton.edu/download.asp?submissionid=41644> (discussing findings from study of Mexican American, Cuban, and Puerto Rican respondents in the United States); see also William A. Darity, Jr. et al., *Bleach in the Rainbow: Latino Ethnicity and Preference for Whiteness*, 13 TRANSFORMING ANTHROPOLOGY 103 (2005).

⁷³ A Hispanic-origin ethnicity category was not added to the list of racial categories on the census until 1980. See Transfer of Responsibility for Certain Statistical Standards from OMB to Dep’t of Commerce, Directives for the Conduct of Federal Statistical Activities, Directive 15, 43 Fed. Reg. 19,260, 19,269 (May 4, 1978). This permitted Latinos to self-identify both as of Hispanic origin and as belonging to a racial category (Black, White, Asian, Indian, or Other). With the 1980 census Latino respondents could self-select their racial and ethnic designation rather than have one designated by a census enumerator. Prior to the 1980 census, enumerators were instructed to observe and then classify Hispanics who “were definitely not Negro” as White. See Sharon M. Lee, *Racial Classifications in the U.S. Census: 1890–1990*, 16 ETHNIC & RACIAL STUD. 75, 78 (1993). Mexicans were exempted from this White versus Negro visual inspection when “Mexican” was briefly included as its own racial category on the 1930 census. *Id.* From 1940 to 1970, Mexicans were officially included in the White category. *Id.*; see also CLARA E. RODRIGUEZ, *CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES* (2000).

⁷⁴ Darity & Boza, *supra* note 72, at 13.

⁷⁵ *Id.*

⁷⁶ Denise DiFulco, *Can You Tell a Mexican from a Puerto Rican?*, LATINA, Aug. 2003, at 86, 86.

public association with the denigrated societal class of African Americans.⁷⁷ This truism is highlighted by the popular refrain “the darker the skin, the louder the Spanish.”⁷⁸

While commentators in the United States are seemingly oblivious to the pre-existing anti-Black racism of Latinos, journalists from abroad have observed a number of disturbing examples. For instance, a 2001 British Broadcasting Company news item entitled “Hate in Action” noted that Latino gangs in Los Angeles have a clear mission of anti-Black ethnic cleansing in their neighborhoods and that Latinos are increasingly perpetrators of anti-Black hate crimes in the United States.⁷⁹ In fact, four Latino gang members were recently convicted in Los Angeles for engaging in a six-year conspiracy to assault and murder African Americans in the city’s Highland Park neighborhood.⁸⁰ During the trial, federal prosecutors demonstrated that African American residents were terrorized in an effort to force them out of a neighborhood perceived as Latino.⁸¹ Notably, the victims of the violence were not themselves members of gangs. One African American resident was murdered as he looked for a parking space.⁸² As a consequence of the incendiary facts, the trial garnered some media attention and is thus an exception to the general public silence about Latino expressions of anti-Black bias in the United States.⁸³

The one area in which Latino anti-Black racism has begun to be discussed in the United States is with respect to the apparent racial caste system of Spanish-language television that presents Latinos as almost exclusively White.⁸⁴ In fact, because of the scarce but derogatory images of Afro-Latinos in the media, activists have been lobbying the Puerto Rican Legal Defense and Education Fund to consider a lawsuit against the two major Spanish-language networks to challenge their depiction of Afro-

⁷⁷ PATRICIA R. PESSAR, *A VISA FOR A DREAM: DOMINICANS IN THE UNITED STATES* 44 (1995).

⁷⁸ DAVID HOWARD, *COLORING THE NATION: RACE AND ETHNICITY IN THE DOMINICAN REPUBLIC* 114–15 (2001).

⁷⁹ Pilar Marrero, *El Odio en Acción*, BBCMUNDO.COM, Aug. 29, 2001, http://news.bbc.co.uk/hi/spanish/specials/newsid_1513000/1513820.stm.

⁸⁰ Press Release, U.S. Dep’t of Justice, *Gang Members Convicted of Federal Hate Crimes for Murders and Assaults of African-Americans* (Aug. 1, 2006), available at http://www.usdoj.gov/opa/pr/2006/August/06_crt_481.html.

⁸¹ See John Spano, *Blacks Were Targeted, Witness Insists: A Highland Park Gang Member Testifies in a Civil Rights Conspiracy Trial That a 1999 Murder Was Part of a Racial Cleansing Campaign*, L.A. TIMES, July 6, 2006, at B4.

⁸² See Andrew Murr, *A Gang War with a Twist: Gangbangers in L.A. on Trial for Deadly Hate Crimes*, NEWSWEEK, July 17, 2006, at 29.

⁸³ See Tanya K. Hernández, Op-Ed., *Roots of Latino/Black Anger: Longtime Prejudices, Not Economic Rivalry, Fuel Tensions*, L.A. TIMES, Jan. 7, 2007, at M1 (discussing the growing pattern of Latino gangs targeting peaceful, non-gang-affiliated Black residents in Los Angeles, culminating in the murder of fourteen-year-old Cheryl Green on December 15, 2006).

⁸⁴ Michael A. Fletcher, *The Blond, Blue-Eyed Face of Spanish TV*, WASH. POST, Aug. 3, 2000, at A01.

Latinos.⁸⁵ Some Latino activists see a direct parallel between the whiteness of Spanish-language television and Latino politics. One such activist states:

Latino leaders and organizations do not want to acknowledge that racism exists among our people, so they have ignored the issue by subscribing to a national origin strategy. This strategy identifies Latinos as a group comprising different nationalities, thereby creating the false impression that Latinos live in a color-blind society.⁸⁶

Many concrete examples demonstrate that Latinos are not colorblind. To begin with, Afro-Latinos in the United States experience color discrimination at the hands of other Latinos. In fact, the 2002 National Survey of Latinos indicated that Latinos with more pronounced African ancestry, such as Dominicans, more readily cite color discrimination as an explanation for the bias they experience from other Latinos.⁸⁷ Furthermore, despite variations across regions and ethnic groups, the commonality of social distance in relations with African Americans remains constant. What follows is a preliminary review of the social science literature that demonstrates the consistency of anti-Black sentiment in Latino communities across the United States.

C. Racial Attitudes Among Latinos Across Ethnic Groups and Regions

Of all the Latino ethnic subgroups, Mexican Americans have the largest demographic presence within the United States.⁸⁸ The development of Mexican American racial identity in the United States has been subject to a variety of influences. Prior to the Chicano movement, Mexican American leaders claimed that Mexicans were Caucasian and therefore deserving of the same social status as White-Anglos.⁸⁹ “The Mexican American generation saw

⁸⁵ Carlos Flores, *Race Discrimination Within the Latino Community*, DIÁLOGO, Winter/Spring 2001, at 30–31, available at http://condor.depaul.edu/~dialogo/back_issues/issue_5/race_discrimination.htm.

⁸⁶ *Id.*

⁸⁷ PEW HISPANIC CTR. & THE KAISER FAMILY FOUND., NATIONAL SURVEY OF LATINOS 74 (2002), available at <http://pewhispanic.org/files/reports/15.pdf>.

⁸⁸ The 2000 census reported that of the 35.3 million Latinos in the United States, 58% were of Mexican or Mexican American origin. See Press Release, U.S. Census Bureau, Census 2000 Paints Statistical Portrait of the Nation's Hispanic Population (May 10, 2001), available at <http://www.census.gov/Press-Release/www/2001/cb01-81.html>. This large demographic presence represents not only contemporary immigration flows from Mexico, but also the generations of Mexican Americans who trace their roots to the incorporation of Mexican lands into the United States after the 1848 Treaty of Guadalupe Hidalgo, which ended the Mexican American War. See RICHARD GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT* (1990); THE MEXICAN WAR: A CRISIS FOR AMERICAN DEMOCRACY (Archie P. McDonald ed., 1969).

⁸⁹ Ruben Salazar, the *Los Angeles Times* journalist who most faithfully reported the developments of the Chicano movement, observed that “many [Mexican Americans] still

themselves as a White group,” writes Professor Ian Haney Lopez. “This self-conception both drew upon and led to prejudice against African Americans, which in turn hindered direct relations between those two groups.”⁹⁰ Only after widespread police brutality and judicial mistreatment of Mexicans in the wake of the Black civil rights movement did a Chicano movement that stressed a non-White Chicano identity emerge.⁹¹ Yet this non-White identity focused upon Chicanos’ indigenous ancestry and completely submerged their African ancestry.⁹²

Even with their construction of a non-White racial identification, Chicanos in California and the Southwest in the 1960s and 1970s expressed feelings of cultural superiority with respect to African Americans that adversely affected intergroup interactions.⁹³ At the time, one Chicano college student summed up this sentiment when he wrote:

We’re not like the Negroes. They want to be white men because they have no history to be proud of. My ancestors come from one of the most civilized nations in the world.⁹⁴

Such sentiments in turn fed Chicano resentment about the allocation of government funds in Los Angeles after the 1965 Watts urban uprising, and the allocation of government funds to service agencies catering to what were described to be as “less needy” African Americans.⁹⁵ Such perspectives have not greatly changed in the new millennium. In Los Angeles, where a predominant number of Latinos are Chicano, it has been observed:

Many Latinos fail to understand the complexity and severity of the black experience. They frequently bash blacks for their poverty and goad them to pull themselves up like other immigrants

cling to the idea that Mexican Americans are Caucasians, thus white, thus ‘one of the boys.’” Ruben Salazar, *Chicanos Would Find Identity Before Coalition With Blacks*, L.A. TIMES, Feb. 27, 1979, reprinted in BORDER CORRESPONDENT: SELECTED WRITINGS, 1955–1970, at 239, 241 (Mario T. Garcia ed., 1995). In addition, Salazar observed that “several of the more conservative Mexican-American leaders strongly oppose any ‘mixing’ of Mexican-American and Negro grievances.” Ruben Salazar, *Negro Drive Worries Mexican-Americans*, L.A. TIMES, July 14, 1963, reprinted in BORDER CORRESPONDENT: SELECTED WRITINGS, 1955–1970, at 113, 113 (Mario T. Garcia ed., 1995).

⁹⁰ Ian Haney Lopez, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205, 216 (2001).

⁹¹ *Id.*

⁹² Tanya Katerí Hernández, *Afro-Mexicans and the Chicano Movement: The Unknown Story*, 92 CAL. L. REV. 1537 (2004) (reviewing IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003)).

⁹³ FRED BARBARO, *Ethnic Resentment*, in BLACK/BROWN/WHITE RELATIONS: RACE RELATIONS IN THE 1970S 77, 89–91 (Charles V. Willie ed., 1977).

⁹⁴ *Id.* at 91.

⁹⁵ *Id.* at 90.

have done. Worse, some even repeat the same vicious anti-black epithets used by racist whites.⁹⁶

For instance, in the 2000 *New York Times* series entitled “How Race is Lived in America,” an investigation into the North Carolina pork industry revealed a rigidly planned hierarchy in job tasks assigned by race that usually had White-Anglos employed as supervisors over both African Americans and Latinos.⁹⁷ Yet rather than focusing on the injustice of all-White management ranks, Mexican worker Mrs. Fernandez is quoted as saying, “Blacks don’t want to work. They’re lazy.”⁹⁸ Her husband is quoted as saying, “I hate the Blacks.”⁹⁹ Even Mexican Americans with greater exposure to the U.S. history of racism express cultural superiority over African Americans. One prominent Mexican American business executive and commentator in Los Angeles, Fernando Oaxaca, accounts for the difference in Latino and African American economic conditions with the explanation, “[W]e have a work ethic.”¹⁰⁰

Even younger generations are not immune to anti-Black sentiment. In recent years the Los Angeles town of Inglewood has experienced violence almost every time Black History Month is celebrated.¹⁰¹ The source of the violence is Latino teens’ resentment at the month-long celebration of Black culture. In February 1999, the principal of Inglewood High School cancelled the Black History Month celebration in order to avoid the violence.¹⁰²

Los Angeles Latinos have even proposed having block association meetings that exclude the African American residents of the block, prompting one African American resident to state, “[I]t seems like the Latinos don’t even want to try to forge neighborhood unity.”¹⁰³ This social distance is paralleled even in church congregations in which Latino and African American parishioners who share the same church attend separate services, serve on separate parish councils, and never meet.¹⁰⁴ It is interesting to note that even when African American congregations in other areas of the United States have actively made it part of their ministry to reach out to their Latino neighbors, the social distance of Latinos remains.¹⁰⁵ Eth-

⁹⁶ Earl Ofari Hutchinson, *Urban Tension: Latinos’ New Clout Threatening to Blacks*, L.A. DAILY NEWS, Jan. 26, 2003, at V3.

⁹⁷ Charlie LeDuff, *At a Slaughterhouse, Some Things Never Die: Who Kills, Who Cuts, Who Bosses Can Depend on Race*, N.Y. TIMES, June 16, 2000, at A1.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Gary Lee & Robert Suro, *Latino-Black Rivalry Grows: Los Angeles Reflects Tensions Between Minorities*, WASH. POST, Oct. 13, 1993, at A01.

¹⁰¹ Martin Kasindorf & Maria Puente, *Hispanics and Blacks Find Their Futures Entangled*, USA TODAY, Sept. 10, 1999, at 21A.

¹⁰² *Id.*

¹⁰³ Lee & Suro, *supra* note 100, at A01.

¹⁰⁴ *Id.*

¹⁰⁵ Francis W. Guidry, *Reaching The People Across the Street: An African American Church Reaches Out To Its Hispanic Neighbors* (1997) (unpublished Ph.D. Dissertation,

nographic studies of Mexican Americans in Chicago and the southern states uncover the same disdain for African Americans and attributions of blackness in Latino subgroups.¹⁰⁶ For example, one Latino student at a Chicago high school said: "It's crazy. But a lot of the Hispanic kids here just don't want to be friends with the blacks."¹⁰⁷

The general racial relations of Cubans with African Americans in Florida are not much better. In fact, Miami, Florida (a city in which Cubans and other Latinos predominate and hold political power), has the distinction of being the only city that was the locus of four separate race riots in the 1980s.¹⁰⁸ The immediate causes of all four riots were police shootings of African Americans.¹⁰⁹ Although police brutality against African Americans is endemic throughout the United States, Miami is a city with many Latino police officers and, more alarmingly, a Latino population seemingly indifferent to anti-Black police brutality. For instance, when a Colombian immigrant police officer was found guilty of manslaughter for killing an African American motorcyclist, the Latino community came out in protest.¹¹⁰ Furthermore, Latinos publicly denounced the urban uprisings that marked each affront to the humanity of African Americans as the work of the "criminal element."¹¹¹ Indeed, sociologists in Miami have noted that the Latino discourse about African Americans evinces the association of African Americans with crime and "an invidious comparison between Hispanic economic advancement—attributed to hard work, family values, and self-reliance—and black dependency on welfare and other social programs."¹¹²

In contrast, studies of Puerto Rican relations with African Americans in the northeastern United States have traditionally noted the smaller degree of social distance that exists between the groups.¹¹³ However, even

Drew University Theological School) (on file with author).

¹⁰⁶ See NICHOLAS DE GENOVA & ANA Y. RAMOS-ZAYAS, *LATINO CROSSINGS: MEXICANS, PUERTO RICANS, AND THE POLITICS OF RACE AND CITIZENSHIP 187–89* (2003) (discussing ethnographic study of Latino racial attitudes in Chicago); McClain et al., *supra* note 47 (discussing study of Latino immigrant views of Blacks in the U.S. South); see also Rachel L. Swarns, *Bridging a Racial Rift That Isn't Black and White*, N.Y. TIMES, Oct. 3, 2006, at A1 (describing derogatory racial attitudes of Mexican workers in the U.S. South toward African Americans).

¹⁰⁷ Jacquelyn Heard, *Racial Strife Runs Deep at High School: Black and Hispanic Staff, Students Clash at Farragut*, CHI. TRIB., Nov. 17, 1992, at 1C.

¹⁰⁸ Marvin Dunn & Alex Stepick III, *Blacks in Miami*, in *MIAMI NOW! IMMIGRATION, ETHNICITY, AND SOCIAL CHANGE* 41 (Guillermo J. Grenier & Alex Stepick III eds., 1992).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 45.

¹¹¹ John F. Stack & Christopher L. Warren, *The Reform Tradition and Ethnic Politics: Metropolitan Miami Confronts the 1990s*, in *MIAMI NOW! IMMIGRATION, ETHNICITY, AND SOCIAL CHANGE* 174 (Guillermo J. Grenier & Alex Stepick III eds., 1992).

¹¹² Guillermo J. Grenier & Max Castro, *Blacks and Cubans in Miami: The Negative Consequences of the Cuban Enclave on Ethnic Relations*, in *GOVERNING AMERICAN CITIES: INTERETHNIC COALITIONS, COMPETITION, AND CONFLICT*, 137, 151 (Michael Jones-Correa ed., 2001).

¹¹³ See Nelson Peery, *Witnessing History: An Octogenarian Reflects on Fifty Years of*

the Puerto Rican subgroup expresses anti-Black racism. Angela Jorge noted early on that Latinos such as Puerto Ricans are taught within their family circles to dislike African Americans.¹¹⁴ One observer of the civil rights coalitions of Puerto Ricans and African Americans even stated that the coalition “was more of a strategic device than a factual description of the true nature of the relationship between the groups. Puerto Rican participation in civil rights organizations and on picket lines was lower than for whites.”¹¹⁵ Another commentator noted that Puerto Ricans, because of the anti-Black prejudice they harbored, were not eager to be identified with African Americans.¹¹⁶ In fact, the residential segregation between the two groups is high.¹¹⁷ Even though Puerto Rican youth organizations in the 1960s and 1970s modeled themselves after the Black Panthers, the groups never had much contact with Black Power organizations.¹¹⁸

In fact, although relations between Puerto Ricans and African Americans in New York City are typically depicted as unusually harmonious, electoral politics studies have shown the two groups at odds with one another.¹¹⁹ Similarly, in Chicago, racial tensions between Puerto Ricans and African Americans have arisen over the competition for housing rehabilitation, in which Puerto Ricans have depicted African Americans as presumed gang members, criminals, and generally the cause of the tightening housing market.¹²⁰

The concern with a racialized competition between Latinos and African Americans does not dissipate when one examines Dominicans, who are frequently viewed as Black themselves.¹²¹ Despite often sharing the more visible facial imprint of African ancestry, Dominicans and African Americans have a high level of residential segregation,¹²² and Dominicans resent

African American-Latino Relations, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 305, 306–08.

¹¹⁴ Angela Jorge, *The Black Puerto Rican Woman in Contemporary American Society*, in THE PUERTO RICAN WOMAN 134, 139 (Edna Acosta-Belén ed., 1979).

¹¹⁵ BARBARO, *supra* note 93, at 83.

¹¹⁶ José E. Cruz, *Interminority Relations in Urban Settings: Lessons from the Black-Puerto Rican Experience*, in BLACK AND MULTIRACIAL POLITICS IN AMERICA 84, 90 (Yvette M. Alex-Assensoh & Lawrence J. Hanks eds., 2000).

¹¹⁷ *Id.* at 91.

¹¹⁸ *Id.* at 92; see also MIGUEL “MICKEY” MELENDEZ, WE TOOK THE STREETS: FIGHTING FOR LATINO RIGHTS WITH THE YOUNG LORDS (2003).

¹¹⁹ Angelo Falcón, *Black and Latino Politics in New York City: Race and Ethnicity in a Changing Urban Context*, in LATINOS AND THE POLITICAL SYSTEM 171 (F. Chris Garcia ed., 1988); Silvio Torres-Saillant, *Racism in the Americas and the Latino Scholar*, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 281, 299.

¹²⁰ See ANA Y. RAMOS-ZAYAS, NATIONAL PERFORMANCES: THE POLITICS OF CLASS, RACE, AND SPACE IN PUERTO RICAN CHICAGO 228–30 (2003).

¹²¹ Jose Itzigsohn et al., *Immigrant Incorporation and Racial Identity: Racial Self-Identification Among Dominican Immigrants*, 28 ETHNIC & RACIAL STUD. 50, 69 (2005) (describing high levels of Black external racialization of Dominicans in New York and their high level of Black self-identification).

¹²² Lance Freeman, *A Note on the Influence of African Heritage on Segregation: The Case of Dominicans*, 35 URB. AFF. 137, 141 (1999).

job competition from African Americans.¹²³ Recent reports of high-school violence show Dominican youth and African American youth involved in violent clashes as well.¹²⁴ Yet despite the troublesome incidents demonstrating discord between Latinos and African Americans and the complexity of Latino racial attitudes, the emerging Latino inter-ethnic employment discrimination cases often treat Latinos as incapable of racial or ethnic discrimination.

II. THE EMERGING LATINO INTER-ETHNIC DISCRIMINATION CASES

The majority of the emerging cases of Latino inter-ethnic discrimination are disparate treatment claims filed pursuant to Title VII of the Civil Rights Act of 1964.¹²⁵ This accords with the majority of employment dis-

¹²³ Jose Itzigsohn & Carlos Dore-Cabral, *Competing Identities? Race, Ethnicity and Panethnicity Among Dominicans in the United States*, 15 Soc. F. 225, 240 (2000).

¹²⁴ See Russell, *supra* note 15 (reporting the harassment of African American athletes by a Dominican gang of students known as the "D Block" in Perth Amboy, N.J.).

¹²⁵ 42 U.S.C. § 2000e (2000). A list of the relevant cases presently available in Lexis Nexis and Westlaw follows. *Ajayi v. Aramark Bus. Servs.*, 336 F.3d 520 (7th Cir. 2003) (African American plaintiff alleging that Hispanic supervisor treated Hispanic employees better and gave her more onerous responsibilities); *Osei-Buckle v. Laidlaw Transit, Inc.*, No. CV-96-00753-DDP, 1998 WL 552126, at *1 (9th Cir. Aug. 27, 1998) (African American plaintiff alleging Hispanic supervisor discriminated against her and expressed preference for Hispanic employees in allocating work assignments); *Patino v. Rucker*, No. 96-7531, 1997 WL 416949, at *1 (2d Cir. July 25, 1997) (Puerto Rican porter for Columbia University alleging that he was discharged by his Hispanic supervisor and replaced with another Latino porter, in violation of Title VII of the Civil Rights Act); *Arrocha v. City Univ. of N.Y.*, No. CV021868, 2004 WL 594981, at *1 (E.D.N.Y. Feb. 9, 2004) (Afro-Panamanian college instructor alleging illegal termination in preference for non-Black Hispanic employees); *Isaac v. School Bd. of Miami-Dade County*, No. 00-0890-CIV, 2002 WL 31086118, at *1 (S.D. Fla. Sept. 3, 2002) (African American plaintiff alleging discrimination by Hispanic supervisor); *Allen v. Bake-Line Prods., Inc.*, No. 98 C 1119, 2001 WL 1249054, at *1 (N.D. Ill. Oct. 17, 2001) (analyzing allegation by fifteen African American plaintiffs that Hispanic management preferred Hispanic employees and failed to promote African American employees to position of supervisor as an individual disparate treatment case because the statistical data presented by plaintiff was insufficient to mount a systemic case); *Rai v. Dynagear, Inc.*, No.98 C 6053, 2000 WL 875401, at *1 (N.D. Ill. June 26, 2000) (Southeast Asian Indian plaintiff alleging discriminatory termination by Hispanic supervisor and other Hispanic managers who preferred to work with Mexicans and not Indians); *Olumuyiwa v. Harvard Prot. Corp.*, No. 98-CV-5110, 1999 WL 529553, at *1 (E.D.N.Y. July 21, 1999) (Nigerian plaintiff alleging that Hispanic and Yugoslavian employees were hired at a higher wage and received greater number of work hours than Black employees); *Rodriguez v. Torres*, 60 F. Supp. 2d 334 (D.N.J. 1999) (Hispanic plaintiff alleging that Hispanic supervisor denied him a promotion and subjected him to a hostile work environment because of his involvement in Hispanic community activism); *Russell v. Am. Eagle Airlines*, 46 F. Supp. 2d 1330 (S.D. Fla. 1999) (African American aircraft mechanic alleging that employees and supervisors who were either White or Hispanic racially harassed him); *Thompson v. Chicago School Reform Bd. of Trustees*, No. 97 C 1172, 1999 WL 258488, at *1 (N.D. Ill. Apr. 13, 1999) (African American plaintiff alleging discriminatory termination and replacement by Hispanic candidate along with preferential treatment for Hispanic employees); *Harper v. Hunter Coll.*, No. 95 CIV. 10388, 1999 WL 147698, at *1 (S.D.N.Y. Mar. 15, 1999) (West Indian assistant principal custodial supervisor alleging that his Hispanic immediate supervisor and Black American director of housekeeping subjected him to harassment, retaliation, and termination); *Sprott v. Franco*, No. 94 Civ. 3818, 1998 WL 472061, at *1 (S.D.N.Y.

crimination claims that are filed by individual plaintiffs asserting disparate treatment rather than class claims of systemic disparate treatment or disparate impact.¹²⁶ Accordingly, this Article's examination of Latino inter-ethnic employment discrimination focuses on individual disparate treatment claims.

Aug. 7, 1998) (African American who worked as Deputy Director of New York City Housing Authority Office of Equal Opportunity alleged that her Hispanic supervisor harassed her and denied her salary increases because of her race in violation of 42 U.S.C. § 1981); *Vincent v. Wells Fargo Guard Servs., Inc. of Fla.*, 3 F. Supp. 2d 1405 (S.D. Fla. 1998) (Black, Haitian-born security guard alleged that Black and Haitian guards were assigned undesirable posts while Whites and Hispanics were given desirable posts with rest rooms); *Webb v. R&B Holding Co.*, 992 F. Supp. 1382 (S.D. Fla. 1998) (African American title clerk alleging discrimination in a predominantly Caucasian-Hispanic car dealership); *Bernard v. N.Y. City Health & Hosps. Corp.*, No. 93 CIV.8593, 1996 WL 457284 (S.D.N.Y. Aug. 14, 1996) (pro se application by a self-described dark-skinned Black woman born in Trinidad, West Indies alleging that she had been terminated from her position as Administrative Assistant because of her race, color, and national origin, all in violation of Title VII, because of negative interactions with her Puerto Rican manager and other Latina co-workers); *Mathura v. Council for Human Servs. Home Care Servs., Inc.*, No. 95CIV.4191, 1996 WL 157496 (S.D.N.Y. Apr. 2, 1996) (Black Belizean plaintiff alleging that Hispanic supervisor harassed and verbally abused him and treated him differently from the Hispanic employees); *Roberts v. CBS Broadcasting Inc.*, No. BC 227280, 2003 WL 1194102, at *1 (Cal. Ct. App. Mar. 17, 2003) (African American camera technician alleging Hispanic supervisor relegated him to temporary job positions and routinely passed him over in favor of non-African Americans with less seniority, experience or expertise who were often preselected when openings were not posted).

The number of emerging cases has thus far been modest, in large measure because of the racially segmented nature of the employment market, which relegates different racial and ethnic groups to different employment sectors and job positions. See HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* 182–83, 254 (Univ. Wis. Press 1985) (providing statistical data regarding the racial segmentation of the labor market); DEIRDRE A. ROYSTER, *RACE AND THE INVISIBLE HAND: HOW WHITE NETWORKS EXCLUDE BLACK MEN FROM BLUE-COLLAR JOBS* 29–33 (2003) (explaining the dynamic of labor market racial segmentation and how the operation of ethnic networks facilitates racial hierarchy); Elizabeth Higginbotham, *Employment for Professional Black Women in the Twentieth Century*, in *INGREDIENTS FOR WOMEN'S EMPLOYMENT POLICY* 73–91 (Christine Bose & Glenna Spitze eds., 1987) (detailing how even when Blacks enter into traditionally segregated professions, they are relegated to racially segregated positions). It is the longstanding existence of racial segmentation that in turn can fuel racial hostilities when different racial and ethnic groups interact in the workplace. See, e.g., Roberto Lovato, *The Latinization of New Orleans*, *NEW AM. MEDIA*, Oct. 18, 2005, http://news.newamericamedia.org/news/view_article.html?article_id=fa92e2c88a63985418da75582292b5c7 (describing the influx of Latino workers as a “radical Latinization that is transforming [New Orleans and] other urban landscapes in the country” and that has “strained race relations by lowering wages and fostering competition between groups”).

¹²⁶ See THOMAS R. HAGGARD, *UNDERSTANDING EMPLOYMENT DISCRIMINATION* 83 (2001) (describing the different stages of proof in a class-based systemic disparate treatment case alleging that an employer's hiring or promotion practice results in the hiring or promotion of fewer members of a protected group in relation to the number of qualified group members in the local labor pool); GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 70–87 (2001) (describing the doctrinal features of an adverse impact case in which a business policy or practice affects a plaintiff's protected group as a class differently than it affects members of other groups); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 *STAN. L. REV.* 983, 1019–21 (1991) (detailing the numerical patterns in kinds of cases filed).

A. *Doctrinal Contours of Disparate Treatment*

In an individual disparate treatment case, an employer may not, with a rule, policy, or decision, treat an employee differently than she treats other employees on account of race or ethnicity.¹²⁷ The plaintiff must prove that the employer purposefully treated her differently compared to similarly situated individuals from other racial or ethnic groups. Yet absent direct evidence of discriminatory motive¹²⁸ (for example, outright statements of animus closely timed with an adverse employment decision), a plaintiff can rely upon circumstantial evidence. This is done with an elaborate burden-shifting process.¹²⁹

¹²⁷ See RUTHERGLEN, *supra* note 126, at 30–54 (describing the features of an individual disparate treatment case, which can also be based upon color, national origin, gender, or religion).

¹²⁸ In a situation where the employer is alleged to have both discriminatory and nondiscriminatory motives for the employment decision, known as a mixed-motive case, a plaintiff who can establish that discrimination played a “motivating factor” in the employer’s decision is entitled to judgment. Thereafter the defendant is allowed to prove that she would have made the same decision absent the discriminatory motive, and if the defendant is successful the plaintiff is not entitled to any compensatory relief on her claim; she can still collect attorney’s fees for prevailing on the merits, and can possibly obtain injunctive relief. See *Desert Palace v. Costa*, 539 U.S. 90 (2003).

¹²⁹ See, e.g., *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). A plaintiff can establish a prima facie inference of discrimination by showing that she is a member of a protected group (race, sex, etc.) and was rejected after applying for a job or promotion for which he or she was qualified, and that after rejecting the plaintiff the employer continued to seek applications from persons of plaintiff’s qualifications. The employer can rebut the prima facie showing of discrimination by proffering a nondiscriminatory reason for the employment decision. Thereafter the burden shifts back to the plaintiff to present either further evidence of discriminatory intent or evidence that the defendant’s proffered nondiscriminatory justification was actually a pretext for discrimination. The elements of the prima facie case may be modified to suit varying factual patterns beyond the hiring and promotion context. But it is not sufficient for a plaintiff merely to show that the employer’s proffer of a nondiscriminatory reason was “unbelievable.” See *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000); see also *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). Scholars have observed that over time, courts have transformed the burden-shifting process into one that is more burdensome on plaintiffs than originally intended by *McDonnell Douglas*. See, e.g., Symposium, *Employment Discrimination and the Problems of Proof*, 61 LA. L. REV. 487 (2001). It is also unclear whether the Supreme Court decision in *Desert Palace* has altered the *McDonnell Douglas* prima facie standard. See MARION G. CRAIN ET AL., *WORKLAW: CASES AND MATERIALS* 560 (2005) (“Although, on its face, the Supreme Court’s unanimous decision in *Desert Palace* was uncontroversial, it has sparked a lively debate in the lower courts (so far principally confined to district courts) regarding whether the case has altered the *McDonnell Douglas* proof structure.”); see also *id.* at 560 (“Traditionally, the mixed-motives structure was seen as an alternative proof structure But now that the Supreme Court has held that circumstantial evidence can be used to prove a mixed-motive case, there is a question whether the two structures have effectively been merged, given that circumstantial evidence is the means to prove pretext.”); Sheila A. Skojec, *Effect of Mixed or Dual Motives in Actions Under Title VII*, 83 A.L.R. FED. 268 (listing cases that apply *Desert Palace* differently). But see *Ash v. Tyson Foods*, 546 U.S. 454 (2006) (per curiam) (chastising the Eleventh Circuit for its inappropriate test once pretext is shown and thereby suggesting that the *McDonnell Douglas* prima facie test remains separate from the *Price Waterhouse* mixed-motive test).

In the absence of evidence of overt discriminatory treatment, the plaintiff may offer statistical data about the composition of the workforce in comparison to the number of racial minorities in the relevant labor market to allow the court to infer discrimination.¹³⁰ Ironically, this ability to infer discrimination from racial disparity in the workplace can lead factfinders in inter-ethnic discrimination cases to conclude that diverse workplaces are free of discrimination. The juridical belief in the inherent salutary powers of a diverse workplace exists despite established Supreme Court precedent to the contrary. In fact, the Supreme Court has rejected the notion that a workplace with a large number of employees from a plaintiff's protected group is de facto free of bias against the plaintiff.¹³¹ However, the emerging inter-ethnic discrimination cases suggest that judges are doctrinal amnesiacs when caught up in the romanticization of diversity.

B. *The Diversity Defense and Its Obfuscation*

The diversity defense describes the way in which legal actors immediately view a racially "diverse" workplace as the equivalent of a racially harmonious workplace.¹³² These legal actors view people of color as the same, overlooking the particular histories and present incidence of racial animus within and across different ethnic groups.¹³³ The judicial fashion-

¹³⁰ See *McDonnell Douglas*, 411 U.S. at 804–05 (noting that statistical evidence showing an employer's general policy or practice is relevant to whether an individual employment decision was discriminatory).

¹³¹ See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) (vacating summary judgment in a sex discrimination case in which the district court erroneously concluded that an over-representation of women in the workplace obviated the existence of bias against women by an employer that refused to accept job applications from women with preschool-age children).

¹³² It should be noted that more than a decade ago Juan Perea presciently suggested that employers would be able to defend themselves against a claim of national-origin discrimination by the presentation of workplace statistics indicating a large percentage of racial minorities. See Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 864–65 (1994) (describing the potential for an employer's "minority percentage points defense" to national origin discrimination claims). Yet the two cases available to Perea at that time did not explicitly deploy racial minority percentages data as the justification for denying relief to the plaintiffs, as is done in the Latino inter-ethnic discrimination cases discussed herein. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93 (1973) (finding no evidence of national-origin discrimination when there was no disparity in Latino hiring and the only direct evidence was employer's neutrally applied policy against hiring undocumented workers); *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (concluding that in the absence of both direct evidence of national origin discrimination and an indirect suggestion of discrimination from a workplace statistical imbalance in the hiring of Latinos, the neutral application of a workplace English-only rule was not national-origin discrimination).

¹³³ The colorblind approach of the diversity defense is not exclusive to judges of any particular race. Cf. Martin Kilson, *Anatomy of Black Conservatism*, 59 TRANSITION 4, 7 (1993) (describing the articulation of colorblind discourse amongst Black intellectuals). The one exception to the judicial use of the diversity defense that appears in the emerging inter-ethnic discrimination cases is in the context of White plaintiffs filing reverse-discrimination allegations in diverse non-White workplace settings. This is the only context where the

ing of a diversity defense to claims of employment discrimination appears to reflect the public romanticization of diversity as a panacea for racial conflict.¹³⁴ Diversity as a concept was first introduced into the legal discourse as a justification for race-conscious remedies to racial inequality, such as affirmative action.¹³⁵ Since that time, it has taken on a force of its own in the public imagination¹³⁶ through the operation of what sociologist Lauren Edelman aptly terms “diversity rhetoric.”¹³⁷ Research corroborates the public support for diversity and indicates that diverse workplaces help to facilitate creative problem solving, attract larger client bases, and effectively operate within a global marketplace.¹³⁸

diverse workplace does not mislead judges into automatically presuming the existence of a bias-free workplace. See *Bass v. Bd. of County Comm’rs*, 256 F.3d 1095 (11th Cir. 2001) (reversing summary judgment order for defendant where White plaintiff alleged discrimination in layoff decision from racially diverse workplace); *EEOC v. David Gomez & Assocs., Inc.*, 1997 WL 136285 (N.D. Ill. Mar. 17, 1997) (denying summary judgment where White plaintiff alleged discrimination because he was not referred for employment by agency that chose to refer Latino and African American candidates instead).

¹³⁴ See Tanya Katerí Hernández, “Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 102 (1998) (observing the growing societal belief that racial diversity will deconstruct and transcend race and racism); see also Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 106 (1999) (discussing the growing scholarship that equates increasing racial diversity with the reconstruction of racism and the Black-White paradigm of race).

¹³⁵ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J., concurring); see also *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding the use of racial preferences to enroll a critical mass of underrepresented students of color legally permissible to serve the compelling interests of achieving a diverse and robust exchange of ideas and developing leaders from various racial communities).

¹³⁶ See Lana Bortolot, *Group Dynamics: Companies Embrace Diversity, Teach Employees Respect*, AM NEW YORK, Mar. 6, 2006, at 33, available at <http://www.amNY.com/careers> (“Remember when ‘synergy’ was the buzzword a few years ago? Well, get ready for a new one. Diversity is what’s hot now.”); Myron Curry, *Diversity: No Longer Just Black and White*, BLACK EOE J., Spring 2005, at 46, 46 (“Most CEO’s and executives alike have come to discover that diversity is what often makes for better business.”); Chris Woodyard, *Multilingual Staff Can Drive up Auto Sales; Ethnic Communities Show Buying Power*, USA TODAY, Feb. 22, 2005, at B1 (reporting that businesses all over the country are realizing that being multicultural has profit benefits); see also Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1937–38 (2001) (“Nor is diversity merely a widespread ideal among social and educational elites; it is now an explicit public policy goal emphatically endorsed by both major parties and opposed by none . . .”). But see Orlando Patterson, *On the Provenance of Diversity*, 23 YALE L. & POL’Y REV. 51, 61 (2005) (“What is true of the private sector has been true of society and the economy at large. The focus has shifted from addressing the very special problems of African Americans to the promotion of a feel-good, but largely empty, goal of ethnic diversity.”).

¹³⁷ Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001) (discussing employers’ “diversity rhetoric” and expansion of the legal concept of diversity to nonlegal dimensions).

¹³⁸ See DIVERSITY IN WORK TEAMS: RESEARCH PARADIGMS FOR A CHANGING WORKPLACE (Susan E. Jackson & Marian N. Ruderman eds., 1995); see also CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003) (discussing the importance of workplace bonds to enhancing inter-group relations); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85 (2000) (summarizing literature demonstrating the business benefits of a diverse workforce); David B. Wilkins, *From “Separate is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117

However, the mere presence of coworkers from various backgrounds in a single workplace does not magically foster racial harmony. Indeed, the research regarding diverse work teams indicates that employers need to cultivate particular conditions in order to generate effective work teams of diverse backgrounds.¹³⁹ Otherwise, racial conflict and poor social relations can continue to exist even within that diverse setting.¹⁴⁰ In fact, many of the emerging Latino inter-ethnic cases describe what appear to be racially hostile environments, even though the cases are not litigated as racial harassment cases. Unfortunately, court opinions reflect a fanciful notion of diversity that is not supported by scientific research or legal doctrine.

The diversity defense is most explicitly and comprehensively articulated in the 2004 case *Arrocha v. CUNY*,¹⁴¹ which serves as the paradigmatic example of the analytical problems surfacing in the emerging inter-ethnic discrimination cases. This Article focuses on *Arrocha* to present the doctrinal problems of the diversity defense. In *Arrocha*, a self-identified Afro-Panamanian tutor of Spanish sued City University of New York (CUNY) for failure to renew his appointment as an adjunct instructor, claiming a violation of Title VII's prohibition against race and national-origin discrimination. The plaintiff alleged that the Latino heads of the Medgar Evers College Spanish department discriminated against "Black Hispanics," and that there was "a disturbing culture of favoritism that favor[ed] the appointments of white Cubans, Spaniards and white Hispanics from South America."¹⁴² Yet the court dismissed his race and national-origin discrimination claims because the judge did not understand how a color hierarchy informs the ways in which Latinos subject other Latinos to racism and national-origin bias.¹⁴³ Indeed, the national-origin claim was

HARV. L. REV. 1548, 1556 (2004).

¹³⁹ See Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229 (2001) (concluding that diverse work teams function better with an "integration-and-learning" approach than with other approaches).

¹⁴⁰ See Shari Caudron, *Diversity Ignites Effective Work Teams*, BLACK EOE J., Spring 2005, at 40 (stating that resegregation can occur when racial bias is ignored as an issue in the workplace). Legal scholar Cynthia Estlund also notes that the potential for conflict is heightened in low-wage settings and contingent employment sectors where employees' motivation to overcome differences is undermined by their tenuous connection to the workplace and employer suppression of communication among workers. ESTLUND, *supra* note 138, at 45, 56.

¹⁴¹ 2004 WL 594981 (E.D.N.Y. Feb. 9, 2004).

¹⁴² *Id.* at *7.

¹⁴³ Ironically, the judge *sua sponte* converted the claim into a color-discrimination claim and allowed it to survive the summary judgment motion. This is an unsatisfactory characterization of Latino inter-ethnic discrimination claims because not all Latino plaintiffs who experience discrimination have dark skin or prominent African features as markers of their social treatment. For those Latino plaintiffs whose African ancestry is not readily discernible, it is important to examine a workplace environment for the deployment of racial stereotypes tied to national origin status that are an aspect of Latino racial discourse. Indeed, judges typically view Latino color-discrimination claims as viable when a Latino plaintiff alleges color discrimination at the hands of a White-Anglo employer or supervisor. See Tanya

dismissed on summary judgment because five of the eight adjunct instructors who were reappointed were natives of other South or Central American countries such as Argentina, Peru, and Mexico, as well as the Dominican Republic. The judge stated in the opinion, “*Diversity* in an employer’s staff undercuts an inference of discriminatory intent.”¹⁴⁴

This is a completely erroneous assessment of the social science doctrine of statistical inference and its evidentiary justification as it has been incorporated into employment discrimination jurisprudence.¹⁴⁵ Population statistics have been traditionally considered relevant to Title VII cases involving gross underrepresentations of racial minorities because our racial history demonstrates that in the absence of any other explanation it is more likely than not that racial discrimination accounts for the gross underrepresentation.¹⁴⁶ Yet the initial Supreme Court authorization in *McDonnell Douglas Corp. v. Green* to use workforce statistics in individual disparate treatment cases was only an authorization insofar as such statistics “may be helpful to a determination of whether petitioner’s refusal to hire respondent in this case conformed to a general pattern of discrimination.”¹⁴⁷ There was no suggestion that workforce statistics could have a conclusive exculpatory use in such cases. Inverting the traditional use of population statistics

Katerí Hernández, *Latinos at Work: When Color Discrimination Means More Than Color*, in HIERARCHIES OF COLOR: TRANSNATIONAL PERSPECTIVES ON THE SOCIAL AND CULTURAL SIGNIFICANCE OF SKIN COLOR (Evelyn Nakano Glenn ed., forthcoming 2007). Unfortunately for the plaintiff in *Arrocha*, the jury trial on the color-discrimination issue returned a verdict in favor of the defendant. Telephone Interview with James A. Brown, Esq., Attorney for Mr. Arrocha (Feb. 28, 2006). Such a result was inevitable once the judge handicapped the jury’s assessment of the issues by entering summary judgment on the racial and national origin discrimination claims and thus presented the color claim in isolation from its connections to race and national-origin discrimination.

¹⁴⁴ *Arrocha*, 2004 WL 594981, at *7 (emphasis added).

¹⁴⁵ See *Castaneda v. Partida*, 430 U.S. 482, 496–97 (1977) (explaining the precise methods of measuring statistical significance of racial disparities). While statistical significance suggests that two or more variables are correlated, its absence yields no definite conclusions about the relationship between the variables. See generally DAVID C. BALDUS & JAMES W.L. COLE, *STATISTICAL PROOF OF DISCRIMINATION* (1980); JOSEPH L. GASTWIRTH, *STATISTICAL REASONING IN LAW AND PUBLIC POLICY* (1988); RAMONA L. PAETZOLD & STEVEN L. WILBORN, *THE STATISTICS OF DISCRIMINATION* (1994). In the absence of statistical significance, it is difficult to conclude from a comparison between workforce composition numbers and those of the relevant labor market that some social construct other than pure chance accounts for the workforce numbers. But that absence does not foreclose the possibility that factors other than pure chance actually did influence the workforce composition numbers, and more importantly that the individual plaintiff might have received discriminatory treatment. See KENT SPRIGGS, *REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS*, 14–28 (2d ed. supp. 2005) (“Courts have sometimes erroneously stated that a statistical calculation yielding less than a finding of a statistically significant level of improbability is affirmative evidence of the absence of discrimination. This is completely illogical and an abuse of statistics for several reasons.”).

¹⁴⁶ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) (“Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination” (emphasis added)).

¹⁴⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973).

by treating a racially diverse workforce as the equivalent of a bias-free workplace also contravenes an early Supreme Court approach to proving Title VII employment discrimination when the plaintiff's protected class is proportionately represented in the workplace.¹⁴⁸

What follows is a detailed account of established employment discrimination doctrine that is completely overlooked in the emerging inter-ethnic discrimination cases. The doctrinal details are presented to underscore the extent to which diversity rhetoric subverts the judicial application of existing relevant doctrine.

C. The Traditional Role of Workforce Composition Data in Employment Discrimination Cases

In 1971, in *Phillips v. Martin Marietta Corp.*,¹⁴⁹ the Supreme Court was presented with a gender discrimination case in which summary judgment had been granted in favor of an employer that did not accept job applications from women with pre-school-age children despite employing men with pre-school-age children. The district court had based its award of summary judgment upon the premise that no question of bias could exist in a workplace in which 75 to 80% of those hired were women from an application pool in which 70 to 75% were women.¹⁵⁰ In vacating the summary judgment due to a conflict with Title VII's mandate, the Supreme Court, in a per curiam opinion, unanimously rejected the equation of significant numbers of women in the workplace with the simplistic conclusion that no bias against women existed.¹⁵¹ In other words, the Supreme Court was fully aware that gender discrimination can exist even where a large number of women are employed in a given workplace. This is because Title VII creates an individual right not to be unfairly treated because of protected group status. It is immaterial to a proof of discrimination against that individual whether other members of the protected group have been hired. It is true that an inference of discrimination can be based upon a statistically significant disproportionate absence of protected group members from a

¹⁴⁸ The diversity defense's esteem for the probative value of workforce composition statistics in discrimination cases stands in marked contrast to courts' usual disinclination to rely upon workforce statistics to decide individual disparate treatment cases. See, e.g., *Bogren v. Minnesota*, 236 F.3d 399, 406 (8th Cir. 2000) ("Second, we conclude the generic type of employment statistics presented by Bogren are not probative of the reason for her termination."); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 349 (7th Cir. 1997) ("[S]tatistics are improper vehicles to prove discrimination in disparate treatment (as opposed to disparate impact) cases."); *Martin v. Citibank, N.A.*, 762 F.2d 212, 218 (2d Cir. 1985) ("We have previously held that such statistical proof alone cannot ordinarily establish a prima facie case of disparate treatment under Title VII or § 1981."); *Davis v. Ashcroft*, 355 F. Supp. 2d 330 (D.D.C. 2005) (holding that plaintiff's workforce statistics were insufficient to show employer's articulated reason for denying promotion was a pretext for discrimination).

¹⁴⁹ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

¹⁵⁰ *Id.* at 543.

¹⁵¹ *Id.* at 544.

workplace because it often reflects unstated bias, unless some other factor such as the unavailability of qualified group members can be shown to exist.¹⁵² But Title VII does not impose the symmetrical abstraction of insisting that a proportionate representation of protected class members precludes a finding of discrimination.

The *Marietta* analysis was applied to racial discrimination in 1978, albeit without citation to *Marietta* itself. In *Furnco Construction Corp. v. Waters*¹⁵³ the Supreme Court stated that a “racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.”¹⁵⁴ This is because Title VII is designed to address the individual’s experience of discrimination. The Court noted in *Furnco*, “It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant’s race are already proportionately represented in the work force.”¹⁵⁵ Nor is *Furnco* an outdated articulation of discrimination jurisprudence, given the Court’s reliance upon this particular premise in the 2000 case of *Reeves v. Sanderson Plumbing Products Inc.*¹⁵⁶ To be sure, *Furnco* does note that a court may consider the racial mix of the workforce in making a determination about the existence of discriminatory motive because the composition of the workforce “is not wholly irrelevant on the issue of intent.”¹⁵⁷ However, that is far from treating workforce composition data as conclusively demonstrating the absence of discriminatory intent. Such an equivalence is prohibited by *Furnco*.¹⁵⁸

¹⁵² See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977).

¹⁵³ 438 U.S. 567 (1978).

¹⁵⁴ *Id.* at 579.

¹⁵⁵ *Id.* Contrast the diversity defense use of aggregate workforce statistics with the entrenched treatment of individual disparate treatment claims as unique to the plaintiff so that the aggregate treatment of a class action certification is rarely possible. See, e.g., *Abron v. Black & Decker, Inc.*, 654 F.2d 951, 955 (4th Cir. 1981) (concluding that plaintiff’s claim was “a solitary one that could not support a class certification”); see also Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 787–88 (2005) (describing judicial hostility toward class action certification in disparate treatment cases).

¹⁵⁶ 530 U.S. 133, 153 (2000) (“[T]he other evidence on which the court relied—that Caldwell and Oswald were also cited for poor recordkeeping, and that respondent employed many managers over age 50—although relevant, is certainly not dispositive.” (citing *Furnco*, 438 U.S. at 580)).

¹⁵⁷ *Furnco*, 438 U.S. at 580.

¹⁵⁸ *Id.*; see also *Connecticut v. Teal*, 457 U.S. 440, 453–54 (1982) (holding that for disparate impact claims it is immaterial that “bottom-line” hiring results were racially balanced and concluding that this balance does not preclude a Title VII violation for application of a facially discriminatory policy to an individual plaintiff). The doctrinal focus on discrimination against an individual, as opposed to the diversity of the workplace, is also reflected in the prohibition against the use of race norming. Race norming is any adjustment of test scores to diminish the disproportionate impact on racial minorities. Section 106 of the Civil Rights Act of 1991 prohibits it. 42 U.S.C. § 2000e-2(1) (2000). Although race norming could be used to ensure a racially integrated workforce, it is prohibited by law because Title VII focuses on discrimination, not diversity.

Arrocha disregards *Furnco* and other Supreme Court precedent rejecting the premise that a racially balanced workforce conclusively demonstrates the absence of discriminatory intent. The only juridical support cited in *Arrocha* for the premise that “diversity . . . undercuts an inference of discriminatory intent”¹⁵⁹ is a reference to *Chambers v. TRM Copy Center Corp.*¹⁶⁰ *Chambers* is another inter-ethnic employment discrimination case in which the appellate court opinion discussed in passing how a court might assess the ethnic makeup of a workforce.

In *Chambers*, a “black person of dark skin and Jamaican national origin” alleged employment discrimination based on race and national origin when he received a letter of reprimand from his African American supervisor.¹⁶¹ The appellate court recognized that an inference of no discrimination might be appropriate where the ethnic makeup of the workforce was particularly varied¹⁶² and there was no direct proof of discriminatory animus, as is sometimes provided by racially invidious remarks by supervisors and coworkers. Yet the court was also careful to note that the diverse workforce composition would not be dispositive in all contexts. “[I]f, for example, the company had sought to downsize its operation and chose to do so by firing only one or more of its minority employees,” evidence of a racially balanced workforce would not be salient.¹⁶³ In fact, the appellate court in *Chambers* ultimately vacated the defendant’s summary judgment victory. The court remanded for trial because the plaintiff’s discharge, absent concrete reasons, occurred in circumstances that permitted a rational factfinder to infer invidious discrimination regardless of the workforce’s racial composition.¹⁶⁴

In short, while *Chambers* inaccurately assesses the ability of a racially balanced workforce to support an inference of no discriminatory animus, its overarching import is the need to examine all factors in context before coming to any conclusions. In fact, *Chambers* has been relied upon by the Southern District of New York for the proposition that “a diverse workforce in itself does not preclude the finding of an inference of discrimination.”¹⁶⁵ Yet the Eastern District of New York, which decided *Arrocha*, continues to use *Chambers* as support for the premise that diversity undercuts an inference of discrimination in a manner that equates diversity with the absence of discrimination.¹⁶⁶ This equivalence is struck despite

¹⁵⁹ *Arrocha v. CUNY*, 2004 WL 594981, at *7 (E.D.N.Y. Feb. 9, 2004).

¹⁶⁰ *Chambers v. TRM Copy Ctr. Corp.*, 43 F.3d 29, 38 (2d Cir. 1994).

¹⁶¹ *Id.* at 32.

¹⁶² The twelve-person workforce comprised “5 Caucasian, 4 African-American or dark-skinned West Indians (including the plaintiff and the Service Center Manager), 2 Asians, and 1 Hispanic.” *Id.* at 33.

¹⁶³ *Id.* at 38.

¹⁶⁴ *Id.* at 40.

¹⁶⁵ *Thompson v. Am. Eagle Airlines*, No. 99 Civ. 4529 (JGK), 2000 U.S. Dist. LEXIS 14932, at *16 (S.D.N.Y. Oct. 4, 2000).

¹⁶⁶ See *Subramanian v. Prudential Sec.*, No. CV-01-6500(SJF)(RLM), 2003 U.S. Dist.

its contravention of social science, its conflict with Supreme Court precedent, and the implicit rejection of the premise by an earlier Second Circuit decision.¹⁶⁷

What then might account for the maverick judicial use of bald dialectical reasoning and little else¹⁶⁸ to assert that diversity necessarily indicates the absence of discrimination? Perhaps the diversity defense judges have taken their cue from the dicta in Justice Scalia's majority opinion in *St. Mary's Honor Center v. Hicks*,¹⁶⁹ an example of the rhetorical power of the diversity defense to dismiss a suggestion of discrimination.

D. The New Push for Doctrinal Symmetry in the Treatment of Workforce Composition Data

In *Hicks*, the Supreme Court held that once an employer produces evidence of a nondiscriminatory reason for the adverse employment action, it is immaterial whether the trier of fact is persuaded of the veracity of the proffered nondiscriminatory reason. The mere production of the nondiscriminatory reason is sufficient to rebut the presumption of intentional discrimination from the plaintiff's prima facie case. This is because the ultimate burden of persuasion remains with the plaintiff at all times. In response to the dissent's abhorrence of accepting at face value the proffer of any specious nondiscriminatory reason by an employer, Justice Scalia provides the following hypothetical for consideration:

Assume that 40% of a business' workforce are members of a particular minority group, a group which comprises only 10% of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that *same minority group*,

LEXIS 23231, at *7, *23 (E.D.N.Y. Nov. 20, 2003) (asserting that given diversity in defendant's workforce, where an Asian plaintiff from India worked with Korean, African American, Hispanic, and White-Anglo coworkers, the plaintiff's burden of proof was heightened).

¹⁶⁷ *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1379 (2d Cir. 1991) (concluding that the absence of statistical significance can simply reflect the use of a small sample size and cannot be equated with the absence of a correlation between race and employment decisions).

¹⁶⁸ While courts do have broad discretion in their ability to take judicial notice of legislative facts that relate to the interpretation of applicable law, this discretion does not authorize courts to ignore relevant legal precedents. See the FED. R. EVID. 201(a) advisory committee note suggesting that courts should be free to initiate independent research for legislative facts and take judicial notice of them. But because the Federal Rules of Evidence do not supply guidance as to how legislative facts should be incorporated into a case (in contrast to the guidance set forth in FED. R. EVID. 201(a) for incorporating adjudicative facts), with legislative facts a judge has a dangerous freedom to create new law inappropriately. See Peggy C. Davis, "There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts, 100 HARV. L. REV. 1539, 1541, 1598 (1987) (proposing a tradition of care standard for regulating judicial use of legislative facts).

¹⁶⁹ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

and the search to fill the opening continues. . . . Under the dissent's interpretation of our law . . . [t]he disproportionate minority makeup of the company's workforce and the fact that its hiring officer was of the same minority group as the plaintiff will be irrelevant, because the plaintiff's case can be proved indirectly by showing that the employer's proffered explanation is unworthy of credence [I]t is a mockery of justice to say that if the jury believes the reason they set forth is probably *not* the "true" one, all the utterly compelling evidence that discrimination was *not* the reason will then be excluded from the jury's consideration.¹⁷⁰

While the hypothetical is pure dicta, it is most interesting to note that both the majority and the dissent refer to the hypothetical construction of a disproportionate minority makeup of the workforce and the presence of a racial minority hiring officer as indicating the absence of discrimination. This is evidenced by Scalia's reference to the hypothetical as "utterly compelling evidence that discrimination was *not* the reason,"¹⁷¹ and the dissent's characterization that the hypothetical employer could easily prove a "nondiscriminatory reason it almost certainly must have had, given the facts assumed."¹⁷²

In short, despite the lack of precedent or statistics doctrinal, both the Court's opinion and the dissent are caught up in their own intuitive notion that a diverse workforce is a barometer for nondiscrimination and that racial minorities cannot harbor racial bias themselves. The majority opinion and the dissent can be characterized as based upon intuition to the extent established Title VII doctrine has not similarly applied a symmetrical approach to proof of discrimination and nondiscrimination. For instance, the use of anecdotal evidence is treated differently when presented for purposes of proving discrimination than when presented to prove nondiscrimination.¹⁷³ Anecdotal evidence can be considered strong evidence of intentional discrimination.¹⁷⁴ In contrast, anecdotal evidence of nondiscrimination carries little evidentiary weight.¹⁷⁵ The justification for the asymmetrical approach to anecdotal evidence is the same one that supports the use of a *prima facie* inference of discrimination in disparate treatment cases—namely, the understanding that discriminatory intent is often concealed—and necessitates the admission of circumstantial evidence and

¹⁷⁰ *Id.* at 513–14 & n.5 (internal quotations and citation omitted).

¹⁷¹ *Id.* at 514.

¹⁷² *Id.* at 539 n.12 (Souter, J., dissenting).

¹⁷³ See PAETZOLD & WILLBORN, *supra* note 145, § 3.01 n.2 ("[C]ourts tend to rely on anecdotal evidence only when it cuts in favor of the plaintiff . . .").

¹⁷⁴ See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342–43 n.24 (1977).

¹⁷⁵ *Id.* Anecdotal evidence of nondiscrimination may include employer statements that it does not discriminate. PAETZOLD & WILLBORN, *supra* note 145, § 3.01 n.2.

the use of inferences to enforce the mandate against discrimination. This is not the case for disputing an allegation of discrimination. It is a straightforward matter for an employer to present evidence of actual bases for employment decisions. There is no need for inferences from statistical data or anecdotal evidence, nor would such evidence be probative given the very strong possibility that discriminatory motive can coexist with such statistical data and anecdotal evidence. In contrast, this nation's history of racial inequality has shown that in the absence of a concrete explanation, the inference of discrimination is an accurate indicator for the actual existence of discrimination.¹⁷⁶ Scalia's hypothetical in *Hicks* reveals the extent to which a disregard for the contemporary significance of the nation's history of racism can undermine the justifications for the asymmetrical use of inference and other evidentiary tools.¹⁷⁷ Moreover, it demonstrates how the Court is unacquainted with, or perhaps disinterested in, the manifestation of discrimination within diverse settings and amongst racial minorities themselves, and is thus just as subject to the obfuscation of diversity rhetoric as lower courts. In fact, the general jurisprudential movement of narrowing the applicability of antidiscrimination law provides a hospitable setting for the growth of the diversity defense.¹⁷⁸ Indeed, the narrow vision suggested by the *Hicks* hypothetical is in direct contrast to Supreme Court precedent.

In *Castaneda v. Partida*,¹⁷⁹ the Court stated that "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."¹⁸⁰ *Castaneda* is also particularly relevant given its rejection of the governing majority defense to discrimination that resonates with the equally specious diversity defense. The governing majority theory asserts that a prima facie case of discrimination can be rebutted with the proof that racial minorities were

¹⁷⁶ See *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (describing the *McDonnell Douglas* use of inference for finding discrimination as a "sensible, orderly way to evaluate the evidence in light of *common experience* as it bears on the critical question of discrimination") (emphasis added).

¹⁷⁷ Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 283 (1997) (explaining how the original structures for proving discrimination "functioned properly only when the courts applying them were willing to see discrimination as a viable explanation for social and political conditions" connected to a history that "suggested that discrimination was the most likely explanation"); see also Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 1031 (1999) ("To base Supreme Court precedent on a hypothetical that bears little resemblance to reality is strikingly ill advised."); John Valery White, *The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law*, 53 MERCER L. REV. 709, 747 (2002) ("Scalia's hypothetical is telling. Apart from having absolutely nothing to do with the case he is deciding, Scalia's hypothetical reveals he believes that most discrimination cases do not involve discrimination at all.").

¹⁷⁸ See AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE (Denise C. Morgan et al. eds., 2006).

¹⁷⁹ *Castaneda v. Partida*, 430 U.S. 482 (1977).

¹⁸⁰ *Id.* at 499.

the governing majority of decisionmakers involved. In *Castaneda*, the Supreme Court rejected out of hand the notion that a prima facie case of discriminatory intent based on the exclusion of Mexican Americans from the grand jury could be rebutted with proof that three of the five jury commissioners were Mexican American.¹⁸¹

Yet despite the clearly articulated precedents of *Castaneda*¹⁸² and *Furnco*, which disentangle notions of diversity from proof of nondiscrimination, the *Hicks* opinion presents a hypothetical that recharacterizes diversity as the equivalent of nondiscrimination. As one employment discrimination scholar notes about the case, “[t]o base Supreme Court precedent on a hypothetical that bears little resemblance to reality is strikingly ill advised.”¹⁸³ Moreover, by requiring plaintiffs to provide actual proof of discriminatory intent even after showing that a defendant’s rebuttal was not credible, *Hicks* gives judges vast discretion to create their own definitions of what constitutes discrimination,¹⁸⁴ undermining the adjudicatory force of the prima facie proof established by *McConnell Douglas v. Green*. As civil rights scholar John Valery White astutely observes:

Because *Hicks* and *Reeves* now require plaintiffs to produce evidence of discriminatory intent, judges must specifically decide

¹⁸¹ *Id.* at 500.

¹⁸² Over the years, *Castaneda* has been relied upon as viable precedent regarding the inapplicability of a governing majority defense to discrimination. See *Castaneda v. Pickard*, 648 F.2d 989, 1004 (5th Cir. 1981); *Ausler v. Ark. Dep’t of Educ.*, 245 F. Supp. 2d 1024, 1031 (E.D. Ark. 2003); *Eccleston v. Sec’y of the Navy*, 700 F. Supp. 67, 69 (D.D.C. 1988). In addition, social scientists have continued to document the persistence of intraracial prejudice, which refutes the skepticism about its existence expressed by Justice Powell’s dissenting opinion in *Castaneda*, 430 U.S. at 518 (Powell, J., dissenting) (“There is for me a sense of unreality when Justices here in Washington decide solely on the basis of inferences from statistics that the Mexican-Americans who control the levers of power in this remote border county are manipulating them to discriminate ‘against themselves.’”). See WILLIAM E. CROSS, JR., *SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY* (1991) (exploring the relationship between racial identity attitudes and internalized racism in African Americans); Aaron C. Cargile, *Attitudes Toward Chinese-Accented Speech: An Investigation in Two Contexts*, 16 J. LANGUAGE & SOC. PSYCHOL. 434 (1997) (describing negative attitudes of Asian Americans toward Mandarin-Chinese-accented English within a college classroom); Marta I. Cruz-Janzen, *Lives on the Crossfire: The Struggle of Multiethnic and Multiracial Latinos for Identity in a Dichotomous and Racialized World*, 9 RACE, GENDER & CLASS 47 (2002) (discussing Latinos’ internalization of bias against dark-skinned Latinos).

¹⁸³ Bisom-Rapp, *supra* note 177, at 1031.

¹⁸⁴ White, *supra* note 177, at 759 (“Through a minor adjustment in proof structures, *Hicks* has unleashed district courts to answer these questions on their own, through judges’ imposition of their own definition of race, discrimination, and appropriate workplace behavior.”); see also Henry L. Chambers, Jr., *Getting it Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 43–44 (1996) (describing the post-*Hicks* prima facie case assessment as “the fact-finder’s perceived prevalence of intentional discrimination in society”); Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1525 (2005) (“Instead, the Court has unleashed the factfinder into a world of causal inquiry that is subject to the very biases, stereotypes, and misconceptions that underlie the discrimination of which the plaintiff complains.”).

what acts constitute race acts and which do not. With neither guidance from above, nor coherent categories with which to work, judges after *Hicks* are empowered to answer these questions according to their own theories of life.¹⁸⁵

Indeed, after *Hicks*, district court judges are certainly assessing summary judgment motions through the lenses of their own particular understanding of discrimination.¹⁸⁶ Unfortunately, that understanding seems to be increasingly influenced by public discourse that presents racial diversity as the equivalent of racial harmony.¹⁸⁷ The *Arrocha* case discussed in Section II.B above is an example of a judge who concocts a diversity defense to discrimination based on his own perspectives of what constitutes discrimination.¹⁸⁸

E. Diversity and the Presumed Interchangeability of Latinos

The diversity defense in the *Arrocha* case is problematic in its incoherent understanding of employment discrimination law's application of statistical analysis and of Supreme Court precedents related to the issue. Furthermore, in dismissing the national origin claim because the Afro-Panamanian plaintiff's employer reappointed natives from other South and Central American countries instead of him, the *Arrocha* court treats all Latinos as interchangeable and incapable of national-origin discrimination against other Latinos.¹⁸⁹ The mistaken treatment of the panethnic identifier of Latino/Hispanic as precluding discrimination between various Latinos is also present in other Latino inter-ethnic employment discrimination cases.¹⁹⁰ This,

¹⁸⁵ White, *supra* note 177, at 727.

¹⁸⁶ *Id.* at 716 ("In general *Hicks* was blamed for initiating a considerably more suspicious view of Title VII claims and unleashing federal judges to reject claims on summary judgment when the facts were unpersuasive to the judge.").

¹⁸⁷ See *supra* notes 134–137 and accompanying text.

¹⁸⁸ *Arrocha v. CUNY*, 2004 WL 594981 (E.D.N.Y. Feb. 9, 2004).

¹⁸⁹ The presumed interchangeability of Latinos in employment discrimination cases resembles the judicial treatment of color-bias claims brought by African Americans. Specifically, courts have difficulty identifying the manifestation of discrimination within African American communities when assessing color-based discrimination claims brought by persons of African ancestry. This is because judges presume that all persons of African ancestry are viewed as the same regardless of skin color or ethnicity. The presumed sameness of African ancestry obscures the analysis of colorism claims. See Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1731 (2000) (discussing the influence of the rule of hypo-descent on the judicial application of color-discrimination doctrine to persons of African ancestry); see also Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1544 (2000) (noting that it can be difficult for a court "to believe that a person who hires Blacks will engage in discrimination against other Blacks, or that a person who is Black would discriminate against another Black person").

¹⁹⁰ See, e.g., *Patino v. Rucker*, 1997 U.S. App. LEXIS 29691 (2d Cir. July 25, 1997). In this case a Puerto Rican porter for Columbia University alleged that he was discharged by his Hispanic supervisor and replaced with another Latino porter, in violation of Title VII of

of course, directly contravenes the Supreme Court mandate in *Castaneda* not to presume that intra-ethnic and intraracial discrimination cannot exist.¹⁹¹ Treating Latinos as interchangeable also denies them protection against national origin discrimination when the employer's agents are Latinos as well. The Supreme Court's own definition of national origin as referring "to the country where a person was born, or, more broadly, the country from which his or her ancestors came,"¹⁹² conflicts with the way the diversity defense lumps all Latinos into one undifferentiated group.¹⁹³ Certainly, where a White-Anglo employer is alleged to have discriminated against a Latino, the binary White-Anglo-versus-Latino context may justify the simple reference to the plaintiff as a "Latino" or "Hispanic" with standing to bring a national-origin claim.¹⁹⁴ However, where a Latino plaintiff from a

the Civil Rights Act. In granting the defendant's motion for summary judgment, the judge noted that the plaintiff failed to respond to the defendant's persuasive "evidence" that the plaintiff had previously replaced a Hispanic employee, that the accused supervisor was Hispanic, and that 90% of the employees in the department were Hispanic. Informing the diversity defense in *Patino* is the view of the Hispanic category as a racial unifier that prevents group members from being biased against one another. The notion that Latinos are a racially mixed people may also be informing the court's assessment.

¹⁹¹ *Castaneda v. Partida*, 430 U.S. 482, 499 (1977) ("[I]t would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.").

¹⁹² *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973); *see id.* at 89 ("The only direct definition given the phrase 'national origin' is the following remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill: 'It means the country from which you or your forebears came.'"); *see also Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 766 (3d Cir. 2004) (Scirica, C.J., concurring) (noting that a plaintiff with a national-origin claim must "trace ancestry to a nation outside of the United States" and thus a "Confederate Southern-American" is not a valid national-origin class under Title VII). *But see Earnhardt v. Commonwealth of Puerto Rico*, 744 F.2d 1, 2-3 (1st Cir. 1984) (holding that in Puerto Rico a plaintiff born in the continental United States can assert a national-origin discrimination claim). For an in-depth critique of the current limitations of the legal definition for national origin, *see Perea, supra* note 132, at 857 (proposing that Congress legislate an expansive definition of "national origin" that includes discrimination based upon ethnic traits such as alienage status and language preference).

¹⁹³ *See Gloria Sandrino-Glasser, Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 73 (1998) (detailing the ways Latinos are inappropriately depicted as a homogeneous group). Symbolic homogenization is not restricted to Latinos. *See Aaron Celious & Daphna Oyserman, Race From the Inside: An Emerging Heterogeneous Race Model*, 57 J. SOC. ISSUES 149, 150-53 (2001) (describing how African Americans are often presented as a homogeneous group despite the ways social, economic, gender, and physical traits vary the racial experiences of different African Americans).

¹⁹⁴ It is probably for this very purpose that while the EEOC does not define national origin, it chooses to define national origin discrimination "broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (2007) (emphasis added). Accordingly, at least one district court has permitted Latino plaintiffs to bring national-origin discrimination allegations based upon their "Spanish-speaking characteristic" alone where a White-Anglo defendant may have had no actual knowledge of the plaintiff's exact place of origin, but instituted policies that disparately impacted and discriminated based upon the foreignness of the plaintiffs. *See Alemendares v. Palmer*, 2002 U.S. Dist. LEXIS 23258, at *31 (N.D. Ohio Dec. 2, 2002) ("Because plaintiffs have linguistic

particular country is alleging national-origin discrimination at the hands of a Latino from another country of origin, it would be nonsensical to ignore the distinctions in country of origin. Similarly, it would defy logic to presume that an employer's preference for one Latino over another should insulate the employer from an inquiry about discriminatory intent. Such an interpretation of antidiscrimination jurisprudence would, like the emerging diversity defense to discrimination, be yet another misplaced application of symmetry to the doctrine.¹⁹⁵

Supreme Court precedent should temper any district court inclination to presume symmetrically that because the replacement of a discharged racially excluded employee with a White employee gives rise to a prima facie case of discrimination,¹⁹⁶ the replacement of a discharged racially excluded employee with another racially excluded employee is, in turn, proof of nondiscriminatory intent on the part of the employer. In *O'Connor v. Consolidated Coin Caterers Corp.*, the Supreme Court explicitly held in the context of age discrimination that it is immaterial that a statutorily protected class member was replaced by someone who is also a protected class member.¹⁹⁷ Because *O'Connor* entailed a development of the *McDonnell Douglas* prima facie standard for discrimination,¹⁹⁸ its discussion of protected class member replacements in the age discrimination context is analytically applicable to race discrimination cases.¹⁹⁹

Unfortunately, the treatment of Latinos of varying racial and ethnic backgrounds as a homogeneous group also adversely influences the analysis

characteristics of a particular national origin group—as required in the EEOC's definition of 'national origin discrimination'—they have sufficiently pled a claim of national origin discrimination. Plaintiffs' Spanish-speaking characteristics reflect their national origin.'").

¹⁹⁵ See *supra* notes 173–181 and accompanying text.

¹⁹⁶ A number of jurisdictions have concluded that proof that a protected class member has been unfavorably treated relative to someone not in the protected class can be an element of a prima facie case of racial discrimination. See, e.g., *Leadbetter v. Gilley*, 385 F.3d 683, 690 (6th Cir. 2004) (requiring reverse-discrimination plaintiffs to prove that other employees of similar qualifications who were not members of the protected class were more favorably treated in order to set forth a prima facie case of discrimination); *Sledge v. Goodyear Dunlop Tires N. Am., Ltd.*, 275 F.3d 1014, 1015 (11th Cir. 2001) (per curiam) (noting that part of establishing a prima facie case of discrimination is showing that employer either filled plaintiff's position with a person not of the same racial minority or left the position open); *Cones v. Shalala*, 199 F.3d 512, 516 (D.C. Cir. 2000) (requiring as an element of a prima facie case of discrimination proof either that someone not of the plaintiffs' protected class filled the position or that the position remained vacant).

¹⁹⁷ 517 U.S. 308, 312 (1996) ("The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age.").

¹⁹⁸ *Id.* at 312 ("Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case.").

¹⁹⁹ See *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996) (per curiam) (applying *O'Connor* to a Title VII racial discrimination case). "Laws against discrimination protect persons, not classes, the Court remarked, an observation with equal force in a case under the Civil Rights Act of 1964." *Id.*; see also *Pivrotto v. Innovative Sys.*, 191 F.3d 344, 355 (3d Cir. 1999) (applying *O'Connor* to a Title VII gender discrimination case).

of the nature of Latino inter-ethnic discrimination that cannot be addressed by *O'Connor* alone. For instance, the interchangeability of Latinos' perspectives in *Arrocha* completely fails to appreciate the ways in which internal Latino national origin bias is rooted in a racialized hierarchy of Latin American countries, where countries perceived as European are viewed as more advanced than those more significantly populated with people of indigenous descent or those of African descent.²⁰⁰ In the list of countries the judge thought equivalent, Latin American racial constructs would rank Argentina as a highly valued White country, followed by Peru and Mexico with their indigenous populations, followed by the Dominican Republic and the plaintiff's own country of origin, Panama, because they are populated by more people of African descent. For Latinos influenced by Latin American racial paradigms where each country has a racial identification, a diverse workforce of Latinos is not the immediate equivalent of a bias-free context. Nor is a color preference divorced from a racialized ideology within the Latino context.²⁰¹ Diversity means something more nuanced to people of color, who do not view all ethnic groups as the same simply because they are non-White. The public discourse about diversity as a panacea for racial discrimination overlooks the complexity of actual diversity.

Part of the difficulty that judges have in disentangling notions of diversity from discrimination may stem from overlooking the operation of what Devon Carbado and Mitu Gulati term "working identity."²⁰² Carbado and Gulati assert that judges utilize such a narrow conception of what race is that they often disregard the extent to which racial and ethnic discrimination manifests itself not simply by a plaintiff's membership in a protected class, but also by an employer's stereotyped expectations about "racial conduct."²⁰³ To be precise, Carbado and Gulati theorize that discrimination in a diverse setting can occur when the least racially assimilated employee

²⁰⁰ See *supra* notes 43–44 and accompanying text.

²⁰¹ See DE GENOVA & RAMOS-ZAYAS, *supra* note 106, at 214 (describing how "intra-Latino divisions seem always to be entrenched in the hegemonic denigration of African Americans" and blackness).

²⁰² Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 702 (2001) ("Understanding the relationship between discrimination and performance, we argue, is crucial to developing a plausible and coherent theory of discrimination."); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); accord Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004) (arguing that Title VII has been misinterpreted to exclude those cases in which employees are disparately treated based upon racially specific grooming choices that are integral to racial identity).

²⁰³ Carbado & Gulati, *Working Identity*, *supra* note 202, at 1262; see also Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995) (describing the ways in which Whites' lack of consciousness of having a race disconnects them from recognizing the full spectrum of their racialized decisionmaking when assessing the conduct of employees who do not conform to expectations of racial assimilation within predominantly White workplaces).

or prospective employee is targeted for disparate treatment.²⁰⁴ One example that Carbado and Gulati provide is of a law school faculty inclined to exclude any female Asian American teaching candidate whose conduct does not challenge the stereotype of “Asian-American females as lacking authority and being quiet and submissive.”²⁰⁵ If the law school faculty were instead to hire another Asian American female candidate whose racial performance was more visibly commanding and vocal, it would not vitiate the disparate treatment that the faculty accorded the first candidate based on their unconscious stereotypes. “To make this concrete, if ten black employees are up for promotion, and nine are promoted, a court should still not negate the possibility that the tenth was denied a promotion because of his race: The other nine employees may have been engaged in racially palatable identity performances.”²⁰⁶ Judicial willingness to inquire into the possibility of discrimination in an individual instance of racial exclusion within an otherwise “diverse” workplace setting will depend upon jurists’ attention to what racial differences an employer finds acceptable and unacceptable, and the ways in which that calculus itself is discrimination.²⁰⁷ Cer-

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An employer that has a record of promoting black employees is likely to persuade a court that insufficient evidence of racial animus exists. The court assumes that because the employer thinks that some blacks are “good,” the reason the employer thought the plaintiff was “bad” had nothing to do with the plaintiff’s race. The court is likely to conclude that the reason for the termination was simply the employer’s dislike of the individual, which does not produce an actionable discrimination case.

Carbado & Gulati, *Working Identity*, *supra* note 202, at 1298.

²⁰⁵ *Id.* at 1272.

²⁰⁶ *Id.* at 1298.

²⁰⁷ One example of a judge who demonstrates an understanding of the implications of a racial performance in working identity can be found in *Davis v. Boykin Mgmt. Co.*, 1994 WL 714517, at *4 (W.D.N.Y. Dec. 21, 1994):

[A]n employer might tolerate outspokenness in his white employees but find objectionable a comparable lack of reserve by a black employee because of a feeling that blacks should “know their place.” If his solution is to fire the outspoken black in favor of a more docile or reserved black employee, his action obviously still is discriminatory even though the position was not filled by a “non-protected class member.”

One scholar has raised concerns about using employment discrimination doctrine to address issues of racial assimilation. RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 189 (2005) (concluding that an assimilation focus in employment discrimination doctrine “invites confusion as to the underlying purpose and practical application of disparate impact doctrine and ultimately ill serves the broader social goals of reducing underrepresentation and segregation in the workplace”). Yet a singular doctrinal focus on proportional representation in the workplace that ignores questions of racial assimilation could ultimately undermine the goal of eradicating racially biased decisionmaking. That is why Kenji Yoshino proposes that employer demands to “act White” be addressed by requiring employers to offer a rational reason for coercing conformity. Yoshino in fact states that “covering demands are the modern form of subordination.” KENJI YOSHINO, *COVERING: THE HID-*

tainly, the EEOC's recent settlement agreements in cases in which employers have categorically preferred one non-White racial group over another non-White racial group attests to the fact that employer stereotypes about preferred racial conduct do exist.²⁰⁸ It is thus not unlikely that employer racial conduct preferences also inform those diverse work settings in which an individual from one racial/ethnic group is disparately treated from an individual from another racial/ethnic group, such as in *Arrocha*.

Unfortunately, the misconstrued application of diversity discourse is not limited to the isolated case of intra-racial bias among Latino subgroup members, as in *Arrocha*. Although *Arrocha* serves as the paradigmatic example of all the deficiencies of the diversity defense, the deficiencies also manifest themselves in varying ways in other reported Latino inter-ethnic employment discrimination cases in which the alleged bias is instead amongst Latinos and other people of color (most often African Americans). For example, in *Sprott v. Franco*,²⁰⁹ an African American woman who worked as deputy director of the New York City Housing Authority's Office of Equal Opportunity alleged that her Hispanic supervisor harassed her and denied her salary increases because of her race. In dismissing the plaintiff's claim upon defendant's request for summary judgment, the judge noted that the facts failed to raise an inference of discrimination because "the new Director is an Hispanic woman There are now two deputy directors—one African-American and one Caucasian The remaining staff is comprised of [sic] twenty-four Hispanics, twenty-three African Americans, nine Caucasians, and one person categorized as 'other.'"²¹⁰ Thus, the judge accorded a diverse workplace and the supervisor's Hispanic status great power to circumvent racism, without questioning what diversity actually means in the new demographic social order. While some judges mistakenly assert that the existence of a diverse workplace may undercut a claim about discriminatory hiring practices, it certainly has no relevance to a claim about an individual plaintiff's racial harassment and pay raise disputes. Yet this court conflates those two contexts in ways that seem to presume that Latino coworkers and diverse workplaces cannot be bearers of racism.

In *Bernard v. New York City Health and Hospitals Corp.*,²¹¹ the diversity defense is raised again by a district court judge, albeit more subtly. In a pro se application the plaintiff, a self-described dark-skinned Black woman born in Trinidad, alleged that she had been terminated from her posi-

DEN ASSAULT ON OUR CIVIL RIGHTS 177 (2006). "If civil rights law fails to protect these groups against coerced conformity, it will have stopped short of its end." *Id.* at 178.

²⁰⁸ See *supra* note 12 and accompanying text.

²⁰⁹ *Sprott v. Franco*, 1998 WL 472061 (S.D.N.Y. Aug. 7, 1998) (Section 1981 employment discrimination claim).

²¹⁰ *Id.* at *6.

²¹¹ *Bernard v. N.Y. City Health & Hosps. Corp.*, 1996 WL 457284 (S.D.N.Y. Aug. 14, 1996).

tion as an administrative assistant because of her race, color, and national origin. In dismissing her case upon motion for summary judgment by the defendant employer, the court took pains to note that the plaintiff's former work environment had been an "ethnically diverse office" staffed predominantly by Hispanic and African American women.²¹² Although the plaintiff alleged several instances of negative interactions with her Puerto Rican manager and other Latina co-workers, the court was persuaded to resolve the dispute on summary judgment. The court based its decision on the fact that the associate personnel director, who never previously had any contact with the plaintiff, independently concluded that the plaintiff should be terminated after reviewing all the records and hearing statements at a disciplinary meeting. Why is this personnel director's opinion so significant to the court? The court opinion noted that at the disciplinary meeting "Ms. Gloria Simmons . . . the Associate Personnel Director, presided in her capacity as Labor Relations Officer . . . Simmons *who is black*, had no contact with Bernard prior to the meeting."²¹³ As Ms. Simmons was never identified as a party to the discrimination, there is no legally relevant reason for identifying her racial affiliation. Instead, the racial identification is situated in the opinion as a mechanism for attesting to the absence of any discrimination in the workplace. In other words, if a Black woman found there was no discrimination then there could not have been any discrimination. Her racial minority status raises her credibility and is part of the rhetorical understanding that diverse workplaces are somehow impervious to racism.

The influence of diversity-as-antidote-to-discrimination discourse has also surfaced in a defendant's proffer of proof of nondiscriminatory intent. For instance, in *EEOC v. Rodriguez*,²¹⁴ the EEOC filed a pattern and practice discrimination case based upon an automobile dealership's failure and refusal to hire African Americans as salespersons. The automobile dealership was owned by a man of Spanish and Italian ancestry. The EEOC amassed a significant amount of evidence about the owner's stated policy of not hiring African Americans as salespersons²¹⁵ and his promotion of a racially hostile environment.²¹⁶ Yet despite the wealth of evidence demon-

²¹² *Id.* at *2.

²¹³ *Id.* at *3 (emphasis added).

²¹⁴ 66 Fair Empl. Prac. Cas. (BNA) 1649 (E.D. Cal. Nov. 16, 1994).

²¹⁵ *Id.* The evidence included testimony regarding racist commentary at the workplace, such as "I don't care how good that nigger is, he will never work here." There was also testimony that other dark-skinned ethnic group members would only be hired upon demonstrating they were not African American. For instance, an East Indian applicant whose skin color was disfavorably contrasted against a dark-colored desk as a test for acceptable skin color was told that the managers might still be able to hire him because he was Indian and not African American. Similarly, a dark-skinned Mexican employee salesperson was saved from being fired by a manager who thought he was Black when another manager explained, "It's ok, he's not black, he's Mexican."

²¹⁶ *Id.* Sales meetings often contained verbal references to "niggers." Other racially disparaging terms included "nigger," "sand nigger," "we-bes," "I-be," "large lips," "fucking

strating the employer's discriminatory practices, the defendant claimed he could not be "prejudiced" against African Americans because he had been the subject of discrimination himself. He asserted that his own ethnic heritage as a Spaniard exposed him to racism and thereby inoculated him against being racist. While the defense ultimately failed amidst the significant evidence of discrimination, the defendant's decision to assert his own ethnic diversity as a defense highlights the potential for continued misapplication of diversity discourse in employment discrimination litigation.

F. Diversity and the "Cultural Misunderstanding" Dismissal of Discrimination

If many judges in these emerging cases do not view inter-ethnic discrimination as actual discrimination, what do they believe the cases describe? Two workplace narratives seem to suggest that decisionmakers may instead read inter-ethnic discrimination claims as instances of mere cultural misunderstanding. A July 2004 report from a human resources director provides a helpful illustration:

I was called in because a small work team in a laboratory was not meeting deadlines on an important project. On the surface it looked like a time management issue to their supervisor when in fact, two Hispanic employees on the team had issues that were culturally rooted—one being Puerto Rican and the other being Dominican. Their issues were getting in the way of the team's progress. While unfortunate and inaccurate, people who were working with and supervising these employees never thought something diversity-related was going on. It never came up on their radar screens because they saw both employees as "Hispanic."²¹⁷

This workplace case study illustrates two separate aspects of the opacity of inter-ethnic disputes for decisionmakers. First, the supervisor simply identifies a mere personality conflict between two Latino employees because of the presumption that all Latinos are part of a monolithic group. Then, the human resources director, who is African American and asserts knowledge about the existence of intra-racial bias within racial groups, is better able to appreciate that two Latinos from different ethnic subgroups can harbor group-based bias against one another. Yet even this human resources director presumes that the conflict is simply "culturally rooted" rather than informed by Latino racial ideology about the "inherent racial differences" between Puerto Ricans and Dominicans. Thus, even when a

niggers," "hey buckwheat," and "hey boy."

²¹⁷ E-mail from Manager of Learning & Organizational Dev., to author (July 29, 2004) (on file with author).

workplace identifies inter-ethnic conflicts, it is not necessarily equipped to appreciate that “culture” is not divorced from racism.

Cultural misunderstanding was also the explanatory factor in entering summary judgment against a plaintiff in *Webb v. R&B Holding Co.*²¹⁸ In *Webb*, an African American title clerk in a predominantly White-Hispanic car dealership was often referred to as “la negra” (the black girl) and reprimanded for being “rude.”²¹⁹ In her complaint, the plaintiff noted that other employees were not disciplined for rude behavior. In granting the defendant’s motion for summary judgment, the judge chastised the plaintiff for filing the discrimination claim with the following reprimand:

Over the years, work environments have come to reflect our increasingly multi-cultural world. With the coming together of numerous diverse ethnicities and cultures in the common workplace, there are bound to be not only many instances of cultural harmony but also some occasions of *cultural friction* While this Court sincerely hopes that all employees of all cultures will choose to exercise common respect and courtesy, it cannot allow Title VII to be used as a sword by which one culture may achieve supremacy in the workplace over another”—by filing a Title VII claim!²²⁰

The judicial assumption seems to be that when Latino workplace disputes arise they are cultural misunderstandings and not rooted in racism. This judicial assumption conflicts with the growing body of social science research discussed in Section I of this Article, illustrating the racial stereotypes that can exist within Latino communities. What is needed is a mechanism for incorporating the realities of racial complexity demonstrated in the social science research into antidiscrimination jurisprudence. This Article proffers a Multiracial Racism Litigation Approach as one possible mechanism for more effectively analyzing inter-ethnic employment discrimination cases.

III. THE MRLA PROPOSAL: THE MULTIRACIAL RACISM LITIGATION APPROACH

How can we add nuance to the jurisprudence of antidiscrimination to make the new demography less opaque to factfinders and assist the judiciary and others in identifying the new markers of racial discrimination?²²¹

²¹⁸ *Webb v. R&B Holding Co.*, 992 F. Supp. 1382 (S.D. Fla. 1998).

²¹⁹ The stereotyped characterization of Black women as rude has a long history. See Regina Austin, *Sapphire Bound!*, 1989 Wis. L. Rev. 539.

²²⁰ *Webb*, 992 F. Supp. at 1389 (emphasis added).

²²¹ The jurisprudential problem with Latino inter-ethnic discrimination cases identified in this Article is also subject to all the pre-existing concerns that many scholars have described regarding the growing limitations on proving employment discrimination cases. See,

The first step will need to be a mechanism for developing a fuller record of inter-ethnic racial animus across groups. For judges who do not understand racial discrimination unless a White-Anglo person is present as an instigator or victim, pleadings will need to be more detailed, expert witnesses will need to be brought in, and depositions will need to be more expansive. In addition, judicial training sessions will need to be targeted for curriculum reform to address inter-ethnic discrimination specifically. But this cannot be done without judicial willingness to consider empirical data about the broader phenomenon of inter-ethnic bias and its contravention of the diversity defense.

A. *The MRLA Method*

One method for facilitating the judicial admission of inter-ethnic specific empirical data to defuse the application of the diversity defense is the development of a “Multiracial Racism Litigation Approach” (“MRLA”). The MRLA is the mechanism for justifying the admission of data about the details of a specific ethnic/racial group’s racial attitudes that judges might otherwise view as irrelevant to the judicial proceedings. In turn, the MRLA can help judges to move beyond the veil of a diverse workplace and summary conclusions of nonactionable “cultural misunderstanding.” This will then reinforce for judges the applicability of firmly established employment discrimination doctrines to the context of inter-ethnic discrimination.

The term “multiracial” in Multiracial Racism Litigation Approach both describes the multiracial/multi-ethnic context of the cases and the ways in which multiracial contexts can be imbued with racism even as they are stereotyped as transcending race.²²² Therefore, this Article will use the term

e.g., E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441 (1998) (“Lower courts’ reluctance to apply the Supreme Court’s formation of the prima facie case suggests a discomfort with the explicit recognition of historical disadvantage that the prima facie presumption entails.”); Samuel L. Gaertner et al., *Aversive Racism: Bias Without Intention*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 377, 393 (Laura Beth Nielsen & Robert L. Nelson eds., 2005) (concluding that Title VII needs to be reformed to address “ingroup favoritism” as a form of discrimination); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

²²² See Hernández, *Multiracial Matrix*, *supra* note 37, at 1098 (describing the ways in which racially diverse contexts are publicly depicted as resolving racial problems by transcending race). This Article uses the term “multiracial” more expansively than do mixed-race persons using it to denote racial identity. Yet the term does encompass the broader societal notions about the presumed racial enlightenment of mixed-race persons and diverse racial demography. While the term “multiracial/multi-ethnic” is more descriptive, it is also more cumbersome and less apt to capture the racialization that occurs in the manifestation of animus across groups characterized as ethnic. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1980S* (1986) (theorizing how the treatment of various ethnic groups in the United States is more

“multiracial racism lens” to describe a conceptual focus on whether a defendant’s conduct is an assertion of racial privilege in a multiracial/multi-ethnic diverse workplace setting. In a nutshell, the MRLA suggests that inter-ethnic employment discrimination plaintiffs contextualize the discrimination they allege by: (1) explicitly foregrounding the narrative with the premise of inter-ethnic hierarchy and bias; (2) focusing the inquiry on whether there were racially advantaged and disadvantaged employees among the diverse non-White workers; (3) providing the social science data about the specific racial attitudes; and (4) demonstrating the applicability of established employment discrimination doctrine to diverse workplaces.

The MRLA is not a whole new theory about the origins of discrimination.²²³ Instead, it is a tool for recognizing our current understandings of discrimination when it occurs in a multiracial or an inter-ethnic context. Just as eyeglasses assist a person to see more clearly images that already exist, the multiracial racism lens clarifies the discrimination that can manifest in diverse workplaces. It does so by focusing the pre-existing Title VII proof structure on the question of who is functionally privileged and subjugated in a given context and time.²²⁴ It provides needed context for the application of the Title VII proof structures without altering them. Plaintiffs will attempt to carry their traditional burden of demonstrating how the alleged facts amount to discrimination, but will do so by focusing on cultural and historical context.²²⁵ Defendants will still have the same opportunity for rebuttal by proffering a nondiscriminatory reason for the

accurately characterized as a series of “racial projects”).

²²³ See, e.g., FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 126–78 (John J. Donohue III ed., 2d ed. 2003) (delineating various theories of racial prejudice and discriminatory conduct).

²²⁴ The understanding of racial privilege and disadvantage as fluid and thereby shifting given a particular context and timeframe is embodied in Eric Yamamoto’s concept of simultaneity. Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33, 38 (1995). Yamamoto uses simultaneity to describe how racially subordinated groups “contribute to and are responsible for the construction of their own identities and sometimes oppressive inter-group relations.” *Id.* In other words, a racialized group can simultaneously be subordinated and a subordinator of others. Similarly, Neil Gotanda’s articulation of racial hierarchy incorporates the helpful perspective of “racial stratification” which includes the model of a “hierarchical structure between minorities,” instead of a model that exclusively “emphasizes the subordinate position of all racial and ethnic minorities.” Neil Gotanda, *Multiculturalism and Racial Stratification*, in MAPPING MULTICULTURALISM 238, 240 (Avery F. Gordon & Christopher Newfield eds., 1996) (emphasis omitted).

²²⁵ While the MRLA recommends that litigators provide a more extensive narrative in their pleadings to include data about inter-ethnic racial animus in order to counteract the diversity defense, the MRLA does not abrogate Federal Rule of Civil Procedure 8(a)(2). Because the MRLA is a suggested framework for litigation, it does not interfere with that Rule’s simple mandate for a “short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Indeed, the Supreme Court has explicitly rejected a heightened pleading requirement for employment discrimination cases because it would conflict with this Rule. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

challenged employment decision, in addition to providing expert witnesses of their own regarding the relevant cultural and historical context presented by the plaintiff. As such, the MRLA is flexible enough to be applied to inter-ethnic discrimination cases that do not involve Latino defendants.²²⁶ Indeed, it was *Ali v. National Bank of Pakistan*, a case not involving Latinos, in which a federal judge took this approach and came closest to demanding that plaintiffs utilize what this Article characterizes as the MRLA.²²⁷

In *Ali*, a self-described light-skinned Pakistani citizen from the province of Punjab employed at the National Bank of Pakistan's New York branch alleged that the Bank discriminated against him in favor of darker-skinned Pakistani citizens from the province of Sind.²²⁸ In dismissing the plaintiff's claim, the court noted that although light-skinned employees predominated in the lower-paid job positions, it was problematic that no "evidence by way of expert testimony or treatise was presented with respect to color differences among the various provinces of Pakistan, or discrimination based on color."²²⁹ The court was disturbed by the lack of a fuller record because it was unclear whether a light-skinned Pakistani who "is darker in complexion than those commonly termed white in the United States"²³⁰ warranted "protected class status" under the *McDonnell Douglas*²³¹ prima facie evidentiary standard. The court stated:

Suffice it to note that the presumption of a protected class status on the basis of color is bound up with an entire national racial history. It may well be that there are indigenous discriminatory practices around the world having nothing to do with the American experience. However, there is no basis on this record for the recognition of skin color as a presumptive discriminatory criterion (rooted, one would suppose, in the intermingling of distinctive national or racial groups) in employment in Pakistan, or among Pakistanis in New York, under the *McDonnell Douglas* guidelines.²³²

In short, the judge is asserting that when Title VII cases are brought that implicate racial meanings beyond the U.S. setting, a fuller record about

²²⁶ While Latino inter-ethnic claims are the focus of this Article, the MRLA, justifying the admission of empirical data, should be just as helpful in explicating the context of non-White-Anglo/African American allegations of discrimination. See, e.g., VIJAY PRASHAD, *THE KARMA OF BROWN FOLK* (2000) (discussing the racial attitudes of Indians and their anti-Black racism as well). See also GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954) (describing the ubiquitous and historically pervasive construction of "in-groups" and "out-groups").

²²⁷ *Ali v. Nat'l Bank of Pak.*, 508 F. Supp. 611 (S.D.N.Y. 1981).

²²⁸ *Id.* at 613-14.

²²⁹ *Id.* at 612.

²³⁰ *Id.*

²³¹ *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

²³² *Ali*, 508 F. Supp. at 613-14.

those meanings should be set forth in order for the existing legal doctrine to be applied effectively.

B. The MRLA Benefits

When specifically applied to the context of Latino inter-ethnic discrimination with its empirical data regarding Latino anti-Black sentiment and the idealization of whiteness, the MRLA enables an inquiry into the manifestations of racial privilege with a focus on how a defendant's conduct positions him or her as an agent of White supremacy, while not being viewed as racially White himself or herself. This is because the MRLA incorporates the understanding that systems and norms of White supremacy do not disappear simply because the census count of racial Whites has diminished.²³³ Indeed, the seduction of "performing whiteness" by subjugating others continues to exist.²³⁴ This is because "intergroup conflict

²³³ See STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 30 (1996) (describing the need for employment discrimination doctrine to acknowledge the importance of context in appreciating how "each of us lives at the juncture of privilege in some areas and subordination in others"); López, *supra* note 29, at 93 (1998) (describing the process of racialization as subject to the varying contingencies of time, place, and identity); see also John Valery White, *The Turner Thesis, Black Migration, and the (Misapplied) Immigrant Explanation of Black Inequality*, 5 NEV. L.J. 6, 24, 24–29 (2004) (describing the way in which the racial diversity of Northern California in the 1940s, with its mixed population of Mexicans, Chinese, Japanese, and Filipino residents, still maintained a system of White privilege that thoroughly segregated African Americans from most employment opportunities despite the absence of an official Jim Crow system).

²³⁴ "Performing whiteness" in its most narrow interpretation is when individuals assert their claim to a White racial identity by evidencing "whiteness in their character, religious practices and beliefs, class orientation, language, ability to intermarry, and a host of other traits that [have] nothing to do with intrinsic racial grouping." John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 821 (2000) (applying Judith Butler's work on gender and the performance of identity to the analysis of judicial evaluations of immigrant petitions for naturalization). But performing whiteness can also refer more generally to the ways in which people of color engage in interracial distancing and attempt to "occupy both the marginalized and the privileged ends of the Black/White paradigm." Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1311 (2002). In this way, "discrimination becomes a strategic tool manipulated" by one racial or ethnic group against another. Louis Herns Marcelin, *Identity, Power, and Socio-racial Hierarchies Among Haitian Immigrants in Florida*, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 209, 223. In addition to self-conscious attempts by individuals to assert a White identity or an elevated social status built on White privilege, there is also the societal dynamic of particular ethnic groups being offered certain facets of White privilege in order to lessen their interest in forming alliances with other racially subordinated groups. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 227 (2002) ("By offering this option of whiteness over time to selected nonblack nonwhites, the racial binary of black and white is preserved and race in the United States is made more manageable for those seeking to hold onto zero-sum power."). This can take the form of actually incorporating new ethnic groups into the category of whiteness as was done with the Irish over time. See NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995). It can also take the form of treating particular groups as "honorary whites" in a particular place and time. See Mark Sawyer, *Racial Politics in Multiethnic America: Black and Latino/a Identities*

can [often] be best understood as the product of internalized white supremacy,"²³⁵ and the search for group-based status production.²³⁶ Accordingly, the MRLA seeks to infuse the analysis of inter-ethnic discrimination claims with the fundamental understanding that acts of racial discrimination preserve racial privilege for whoever is situated as racially valued in any given context, and that such bias also furthers systemic White privilege more generally, regardless of whether a self-identified White-Anglo person is directly involved.²³⁷

For example, legal scholars who analyzed the 1992 Los Angeles riots have noted the way in which both Koreans and African Americans were in turn positioned as functionally White-privileged in nativist constructs of the racial conflict in the public discourse.²³⁸ Korean Americans were described as immigrant foreigners in opposition to African Americans with "White" U.S. citizenship, a description that alternated with the description of Korean Americans as pursuing the American entrepreneurial dream as Whites in opposition to African Americans as a socially problematic Black underclass.²³⁹ The MRLA can recognize the White privilege of non-White groups in varying contexts.²⁴⁰ Rather than introducing further complexity into employment discrimination cases, the MRLA builds upon the knowledge judges already have about the operation of White privilege and provides a language for describing its manifestation in non-White contexts.²⁴¹ In addition, the vast literature regarding the legacies of colonial-

and Coalitions, in NEITHER ENEMIES NOR FRIENDS, supra note 4, at 265, 272 ("Hollywood portrayals of [Puerto Rican actress Jennifer Lopez] emphasize the attempt to portray Latinas/os as 'potential whites.'"); Frank H. Wu, Neither Black Nor White: Asian Americans and Affirmative Action, 15 B.C. THIRD WORLD L.J. 225, 226 & 249 (1995) (using the concepts of "honorary whites" and "constructive blacks" to describe the public discourse about affirmative action and the attempt to dissuade Asian Americans of their common interests with African Americans). Some scholars assert that Latinos are particularly predisposed to being "seduced into thinking [they] are White." Enid Trucio-Haynes, Why "Race Matters": Latcrit Theory and Latina/o Racial Identity, 12 LA RAZA L.J. 1, 1 (2001).

²³⁵ Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 75 (1997).

²³⁶ Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1044 (1995) (theorizing that individuals are driven in part by their competition for esteem and that racist behavior is a process by which one racial group seeks to produce esteem for itself by lowering the status of another group).

²³⁷ See WILDMAN, *supra* note 233, at 33 (emphasizing the need for employment discrimination doctrine to include issues of privilege in its traditional examination of subordination).

²³⁸ See, e.g., Janine Young Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2398 (1999).

²³⁹ *Id.*

²⁴⁰ See Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 406 (2000) ("[W]e need to know the definition of the ingroup in a given context . . .").

²⁴¹ Scholars have observed that trial judges in antidiscrimination cases are disinclined

ism and postcolonial racial stratification in multiracial societies around the world gives further context to the premise of racial privilege in multi-racial/multi-ethnic societies.²⁴² Another advantage of the MRLA is that it can identify who is functionally privileged in a given context, without losing sight of the continuing privilege of self-identified White-Anglos.²⁴³ Thus, it does not make the mistake of recasting White-Anglos “as just another [racial] group competing with many others.”²⁴⁴ In this way, the focus on inter-ethnic disparate treatment claims need not undermine the need to continue enforcing discrimination claims against White-Anglo defendants. Similarly, the MRLA is not meant to subvert the enforcement of disparate impact claims, nor should it diminish an employer’s desire to foster a diverse workplace.²⁴⁵

While the multiracial racism lens is an analytical approach that litigators will need to persuade judges to consider, it is not one that requires the enactment of new laws or other legislative reform.²⁴⁶ Rather, it is a con-

to consider the complexity of racial identity categories. See Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 644 (2002). The advantage of the MRLA is that it builds upon pre-existing judicial knowledge about White racial privilege. It seeks to elucidate the dynamics of inter-ethnic discrimination by grounding its analysis in the operation of racial privilege rather than the particularities of how a party to the case racially identifies.

²⁴² See, e.g., COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER (Patrick Williams & Laura Chrisman eds., 1994).

²⁴³ Cf. WILDMAN, *supra* note 233, at 36 (“Privileging of whiteness in the workplace can occur even when all participants are African American.”).

²⁴⁴ Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1062 (1995) (concluding that the Supreme Court’s current equal protection doctrine exploits the changing racial demography of the United States to transform Whites rhetorically into a victim group like any other).

²⁴⁵ Because this first wave of Latino inter-ethnic employment discrimination cases have all been litigated as individual disparate treatment claims, this Article focuses upon the judicial misunderstandings that arise in that context. More empirical data is needed before an assessment can be made as to whether diverse workplaces also alter the judicial application of traditional disparate impact doctrine. Nonetheless, it is quite possible that the MRLA may have some utility for plaintiffs attempting to prove that an employer’s proffered justification for the employment practice in question is a pretext for discrimination. For instance, in *EEOC v. Consolidated Services*, 989 F.2d 233 (7th Cir. 1993), the court noted the persuasiveness of the employer’s expert witness in explaining the cultural factors that would encourage a Korean-owned business to hire mostly Korean workers to the exclusion of African American workers. If the plaintiff EEOC had deployed the MRLA, it too could have proffered expert testimony about the pre-existing racial attitudes of Koreans informing the alleged employment practice of word-of-mouth recruitment. In short, for those inter-ethnic discrimination plaintiffs able to aggregate the statistical evidence to show a disparate impact upon their racial or ethnic subgroup from a particular employment practice, the MRLA may further support the plaintiff’s case rather than undermine it. Similarly, the MRLA does not undermine diversity in the workplace or dispute the overarching value of diversity in the workplace. See *supra* notes 138–139 and accompanying text.

²⁴⁶ In fact, the request for a judicial inquiry into who is functionally advantaged and disadvantaged in a specific racial hierarchy resonates with the post-Civil War judicial assessments of who was functionally White or Black for purposes of Jim Crow segregation enforcement. See, e.g., *Gong Lum v. Rice*, 275 U.S. 78 (1927) (concluding that a child of Chinese descent was functionally “colored” and thus not qualified to enroll in Whites-only public schools); see also IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUC-*

ceptual framework that plaintiffs can use to displace the judicial inclination towards the diversity defense and its disregard for established legal doctrine. For instance, if the paradigmatic case of *Arrocha v. CUNY*,²⁴⁷ discussed in Part II of this Article, had been crafted by the plaintiff using the proposed MRLA, the court would not have summarily dismissed the plaintiff's claims of race and national-origin discrimination, because the plaintiff would have been better able to dispel the judicial enchantment with diversity rhetoric by: (1) explicitly foregrounding his narrative with the premise of inter-ethnic hierarchy and bias; (2) focusing the inquiry on whether there were racially advantaged and disadvantaged employees among the diverse non-White workers; (3) providing the social science data about Latino racial attitudes; and (4) demonstrating the applicability of established employment discrimination doctrine to diverse workplaces. In *Arrocha*, the plaintiff's statement that there was a "disturbing culture of favoritism that favor[ed] the appointments of white Cubans, Spaniards, and white Hispanics from South America" was insufficient to invoke the long legacy of racial hierarchy in Latin America.²⁴⁸ For a judge focused on an understanding of discrimination as solely a U.S. White/non-White phenomenon, the *Arrocha* plaintiff needed to present explicit documentation of racial privilege and bias in non-White contexts. Using the insights of the multiracial racism lens, the plaintiff would have been more likely to persuade the judge to consider the empirical data about Latino racial attitudes and their manifestation. The plaintiff's submission of expert testimony regarding the long legacy of anti-Black bias against Afro-Latinos within Latin America would have dispelled the judicial inclination to view Latinos as homogeneous and interchangeable. In turn, the disruption of the judicial presumption of Latino homogeneity would have eliminated the rationalization that "[d]iversity in an employer's staff undercuts an inference of discriminatory intent."²⁴⁹ Further, established employment discrimination doctrine would not have been overlooked. Similarly, in other Latino inter-ethnic discrimination cases in which the plaintiffs are African American, the presentation of empirical information about Latino anti-Black bias would be useful in dismantling fanciful notions about the inherent harmony of a diverse workplace. Furthermore, the scholarly literature explaining how systemic White privilege encourages non-White racial/ethnic group members to harbor bias against other non-Whites would also be useful.²⁵⁰

TION OF WHITENESS (Richard Delgado & Jean Stefancic eds., 1996). Although official Jim Crow segregation has been abolished, racial hierarchies continue as does the need to address the differential employment status of those racially privileged and racially disadvantaged.

²⁴⁷ *Arrocha v. CUNY*, 2004 WL 594981 (E.D.N.Y. Feb. 9, 2004).

²⁴⁸ *Id.* at *7.

²⁴⁹ *Id.*

²⁵⁰ See *supra* note 234; see also FRANTZ FANON, BLACK SKIN, WHITE MASKS 10–30 (Charles Lam Markmann trans., Grove Press 1967) (describing how subordinated group

The MRLA is a concept influenced by Charles Lawrence's articulation of a "cultural meaning test." In a 1987 *Stanford Law Review* article, he proposed the overt judicial examination of context as a method for recognizing racial meanings and motivations.²⁵¹ Lawrence proposed the cultural meaning test as a mechanism for helping judges address the harm of unconscious racism in the equal protection context. Lawrence suggested that judges look to the cultural meaning of an allegedly discriminatory governmental act as a method for identifying unconscious racism that should be addressed and subjected to strict scrutiny. This could be done by considering evidence regarding the historical and social context in which a governmental decision was made.

Because Lawrence's analysis focused on the racial subordination of African Americans, his articulation of the cultural meaning test relies upon the usefulness of considering whether a significant portion of the population views a particular action as being of racial import.²⁵² In contrast, the MRLA concerns itself with the racial and ethnic discrimination of which much of the population in the United States may very well be ignorant. Accordingly, the MRLA instead encourages the search for cultural meaning that is outside of the U.S. Jim Crow racial history but serves as its functional equivalent for understanding racial subordination in the inter-ethnic context.

While no court has ever directly referenced the Charles Lawrence cultural meaning test,²⁵³ "much of what judges do entails this kind of inter-

members can internalize the biases of the privileged class and thereby adopt disdain for other subordinated group members). In contrast, when the EEOC files class actions alleging that an employer has privileged a particular racial/ethnic group in order to exclude another racial/ethnic group in its employment decisions, it may instead find the scholarly literature regarding the strategic positioning of "middleman minorities" more useful for informing a judge. *See, e.g.*, HUBERT BLALOCK, JR., TOWARD A THEORY OF MINORITY-GROUP RELATIONS 79–84 (1967); Edna Bonacich, *A Theory of Middleman Minorities*, 38 AM. SOC. REV. 583, 584 (1973). This separate body of literature may be more useful because it focuses upon a White privileged-class interest in favoring one racial/ethnic group over another. In contrast, the internalized racism literature focuses upon the racialized attitudes of non-White racial/ethnic group members and is thus more applicable to establishing a framework for understanding employment discrimination cases in which non-Whites are the identified agents of discrimination in a workplace dominated by non-Whites.

²⁵¹ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355–81 (1987) (using cognitive theory to develop a cultural meaning test for addressing the social harms of unconscious racism).

²⁵² *Id.* at 356.

²⁵³ Courts thus far have only cited Lawrence's article for its discussion of unconscious racism rather than to apply the proposed cultural meaning test. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 332–33 (1987); *Crum v. Alabama*, 198 F.3d 1305, 1321 (11th Cir. 1999); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1450 (9th Cir. 1994); *United States v. Bishop*, 959 F.2d 820, 827–28 (9th Cir. 1992); *Brown v. Bd. of Educ.*, 892 F.2d 851, 863 (10th Cir. 1989); *Chin v. Runnels*, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004); *Thomas v. Troy City Bd. of Educ.*, 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004); *Dobbs-Weinstein v. Vanderbilt Univ.*, 1 F. Supp. 2d 783, 801 (M.D. Tenn. 1998); *United States v. Burroughs*, 897 F. Supp. 205, 208 (E.D. Pa. 1995); *United States v. Clary*, 846 F. Supp. 768, 778–79 (E.D. Mo. 1994); *Harris v. Int'l*

pretation: It requires the same skills they employ when they decide a case by characterizing or interpreting a line of precedent in the way that seems most true to them."²⁵⁴ Moreover, at least one Supreme Court case implicitly supports the search for cultural meaning in the manner proposed by the MRLA. In *St. Francis College v. Al-Khazraji*, the Court was presented with the question of whether a person of Arabian ancestry born in Iraq has standing to seek protection from racial discrimination under the Section 1981 mandate against racial discrimination in the making of private and public contracts.²⁵⁵ The Court refused to decide the case on the fact that under current racial classifications Arabs are Caucasians and thus precluded from raising a Section 1981 claim that they are not treated like "white citizens."²⁵⁶ Instead, the Court held that:

Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.²⁵⁷

In effect, the Court looked beyond the attempts at formalizing what constitutes a racial group for coverage under discrimination law, and instead sought to have the law address the reality of racial discrimination in our more racially and ethnically diverse society. It did this by recognizing that those often viewed racially as Caucasian, as was the *St. Francis College* plaintiff, can also be treated as non-White depending upon the context.²⁵⁸ The MRLA proposed here would extend that analysis to recognizing how those often viewed as racially non-White can still exert White privilege in various contexts.

Paper Co., 765 F. Supp. 1509, 1515–16 (D. Me. 1991); *Knop v. Johnson*, 667 F. Supp. 467, 503 (W.D. Mich. 1987); *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 963 (Alaska 2005); *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 575 (Minn. 1994).

²⁵⁴ Lawrence, *supra* note 251, at 362. "If the jurisprudential task is to give sense to broad propositions of law—deriving that sense from an ongoing judicial interpretation of culturally created moral norms—then application of the proposed cultural meaning test is clearly within the courts' competence." *Id.* at 386.

²⁵⁵ *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987).

²⁵⁶ Section 1981 prohibits racial discrimination that denies individuals the same rights "as [are] enjoyed by white citizens." 42 U.S.C. § 1981 (2000).

²⁵⁷ 481 U.S. at 613.

²⁵⁸ *St. Francis College* has been relied on to recognize that Jews, Iranians, and Italians can be protected from racial discrimination under Section 1981 even though they are today racially classified as Caucasian. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (recognizing Jews as protected under Section 1981); *Amini v. Oberlin Coll.*, 259 F.3d 493 (6th Cir. 2001) (recognizing Iranians as protected under Section 1981); *Bisciglia v. Kenosha Unified Sch. Dist. No. 1*, 45 F.3d 223 (7th Cir. 1995) (recognizing Italians as protected under Section 1981).

In order to be able to examine an employment context for racial discrimination in a richer demographic workforce, the MRLA will entail an engagement with the particularities of how various racial and ethnic groups have historically treated and continue to stereotype one another. For instance, in the context of Latino inter-ethnic discrimination claims, plaintiffs' lawyers would have available to them a vast literature on Latino Studies²⁵⁹ and Ethnic Studies²⁶⁰ with which to understand and present such claims. Such literature would be especially useful in the context of Latino inter-ethnic discrimination claims as a mechanism to remedy the ill-informed characterizations of Latino racial attitudes that currently pervade the public discourse and unconsciously influence judges and other legal decisionmakers.²⁶¹ Legal scholars Laurens Walker and John Monahan describe this process as the admission of empirical information to construct a frame of reference for deciding factual issues.²⁶² While this is a form of judicial notice that involves neither legislative facts nor adjudicative facts as contemplated in Federal Rule of Evidence 201, "a growing number of courts have held that the use of social frameworks to correct beliefs that are erroneous does indeed 'assist the trier of fact.'"²⁶³ This is because the Federal Rules of Evidence do not bar this third use of social science in law,²⁶⁴ thereby allowing a court to admit empirical information "to keep it responsive to its changing environment."²⁶⁵

Judges customarily admit empirical information through the use of expert witnesses for the purpose of assisting a trier of fact to understand the evidence.²⁶⁶ For instance, judges have accepted the presentation of expert testimony on the deployment of racial stereotypes in the workplace in order to disabuse factfinders of what they believe is "common sense."²⁶⁷ In *Walker v. State*, a law professor provided expert testimony on behalf of an Afri-

²⁵⁹ See Pedro A. Cabán, *Moving from the Margins to Where? Three Decades of Latino/a Studies*, 1 *LATINO STUD.* 5 (2003) (describing the evolution of Latino Studies).

²⁶⁰ See generally *INTRODUCTION TO ETHNIC STUDIES: A READER* (Phillip Q. Yang ed., 1999).

²⁶¹ See Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and New Theory of Racial Discrimination*, 109 *YALE L.J.* 1717, 1723–25 (2000) (articulating a theory of "institutional racism" to explain how judges can unconsciously follow elaborate social scripts that manifest prejudice and racism without a conscious intent to discriminate); see also LU-IN WANG, *DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE* 135–37 (2006) (describing how discrimination in the legal system can occur by default, due to legal actors' unconscious biases and resort to automatic racial stereotypes).

²⁶² Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 *VA. L. REV.* 559, 570 (1987) (defining social framework as "the use of general conclusions from social science research in determining factual issues in a specific case").

²⁶³ *Id.* at 580.

²⁶⁴ *Id.* at 582.

²⁶⁵ E.F. Roberts, *Preliminary Notes Toward a Study of Judicial Notice*, 52 *CORNELL L.Q.* 210, 210 (1967).

²⁶⁶ Walker & Monahan, *supra* note 262, at 583.

²⁶⁷ SPRIGGS, *supra* note 145, § 17.03[3][g].

can American state trooper alleging discriminatory discharge.²⁶⁸ The testimony was based on research in the literature of racial stereotyping that permitted the expert witness to conclude that it was extremely likely that the plaintiff was the victim of race-based performance evaluations. Expert testimony will be especially useful in delineating how Latinos and other populations of color racialize one another.²⁶⁹ Such information would be presented for the sole purpose of creating a social framework to construct a frame of reference for deciding the factual issues, and not as a vehicle for imparting a general group bias to an individual defendant on the legal question of discriminatory intent.²⁷⁰ In this way, the MRLA will call on expert witnesses to act in their traditional role of educating the decision-maker about their areas of expertise.²⁷¹ One federal district court has already been very explicit about the need for such expert testimony and literature.²⁷² As discussed earlier in this section, *Ali v. National Bank of Pakistan* represents what is sure to become a growing dynamic of cases presenting judges with inter-ethnic discrimination claims that they are unable to assess and evaluate without in-depth assistance from the plaintiff.²⁷³ It is at least encouraging that the judge in *Ali* expressed a willingness to receive expert testimony and documentation about systems of racialization with which he was not familiar. It is in such spaces of willingness that the multiracial racism lens concept may gain traction in the same manner that some judges have implicitly and explicitly applied Critical Race Theory in their analysis of social issues.²⁷⁴ Once the judiciary is made more aware of the existence of inter-ethnic discrimination expertise, judges may become more disposed to exercising their discretion to appoint expert witnesses themselves.²⁷⁵ In addition to using expert witnesses, empirical re-

²⁶⁸ No. EV 87-12-C (S.D. Ind. Jan. 21, 1987).

²⁶⁹ See WANG *supra* note 261, at 136-37 (explaining that one way to counteract a factfinder's unconscious biases is to present more normative clarity about the role of race in the case).

²⁷⁰ See FED. R. EVID. 702 (authorizing the use of expert witnesses with specialized knowledge to "assist the trier of fact to understand the evidence"); see also JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 12 at 50 (1992) ("[T]he Federal Rules of Evidence do not permit opinion on law except questions of foreign law . . ."); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 7.7 at 905 (2d ed. 1999) ("[When] parties offer expert testimony on the content of law during the ordinary course of trial, it is properly rejected.").

²⁷¹ MUELLER & KIRKPATRICK, *supra* note 270, § 7.6 at 902 ("Often the best thing an expert can do is to provide standards or criteria, estimates of feasibility or likelihood, or descriptions of *social frameworks* that juries can then constructively use in resolving more particular issues relating to such things as due care, intent or purpose, and who likely did what and why.") (emphasis added).

²⁷² See *Ali v. Nat'l Bank of Pak.*, 508 F. Supp. 611 (S.D.N.Y. 1981).

²⁷³ See *supra* notes 228-232 and accompanying text.

²⁷⁴ See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 109-19 (2001) (describing some cases in which judges have either explicitly or implicitly used Critical Race Theory in their opinions).

²⁷⁵ See FED. R. EVID. 706 ("[T]he court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed . . . and

search can be presented in briefs, and later in the proposal for jury instructions.²⁷⁶ Over time a set of pattern jury instructions could be developed to standardize the use of a set of social science findings.²⁷⁷ This will in turn become useful for those plaintiffs financially unable to obtain expert witnesses of their own. Given the longstanding use of statistical empirical data in employment discrimination cases to provide context for an allegation of discrimination, judges should be amenable to the presentation of other forms of empirical data as well.

With respect to Latino inter-ethnic discrimination claims, plaintiffs will need not only to develop the record with regard to Latino racial biases, but also to countermand the misleading public discourse that currently exists about Latinos and race.²⁷⁸ Specifically, much of the public discourse about Latinos and racism has focused on the depiction of a problematic relationship between Latinos and African Americans and has presented Latinos as racial innocents incapable of racial discrimination.²⁷⁹ Given the fact that the vast majority of reported Latino inter-ethnic claims to date involve claims of anti-Black bias, it is especially important to have a more complete picture of Latino racial attitudes as described in Part I of this Article. The value of the MRLA, with its attention to racial hierarchy and privilege in diverse workplace settings, is that it validates the need to submit empirical information to expand the judicial understanding of how employment discrimination is manifested amidst workplace diversity.

Because of the long legacy of White/non-White racism in the United States, discussion of race has rightly focused on the White/non-White paradigm of U.S. race relations and its effects on civil rights enforcement. But the changing demographics of the United States mean that we need to expand the judicial analysis of racism to include considerations of how groups of color can be complicit and even active agents in discrimination

may appoint expert witnesses of its own selection . . .”).

²⁷⁶ Walker & Monahan, *supra* note 262, at 588. The model for inserting empirical information into legal memoranda is the “Brandeis brief.” See BLACK’S LAW DICTIONARY 98 (5th ed. 1983) (“Form of appellate brief in which economic and social surveys and studies are included along with legal principles and citations and which takes its name from Louis D. Brandeis, former Associate Justice of Supreme Court, who used such briefs while practicing law.”).

²⁷⁷ See Walker & Monahan, *supra* note 262, at 597–98.

²⁷⁸ See Sawyer, *supra* note 234, at 270 (discussing how the public emphasis placed on “Latinas/os as representative of a new mixed-race America is meant to distance Latinas/os from Blacks and to redefine race in U.S. society as a concept not so very different from the Latin American myth of racial democracy, which effectively denies racism by emphasizing miscegenation”).

²⁷⁹ See, e.g., NICOLÁS C. VACA, THE PRESUMED ALLIANCE: THE UNSPOKEN CONFLICT BETWEEN LATINOS AND BLACKS AND WHAT IT MEANS FOR AMERICA (2004) (presenting race relations between African Americans and Latinos as unharmonious because of the resentment African Americans are presumed to have for Latinos). *But see* Sawyer, *supra* note 234, at 270 (describing how authors like Vaca “overemphasize differences between Latinas/os and African American and ignore political and ideological convergences . . . [and also] overemphasize conflict in the service of an assimilationist political agenda”).

against other groups of color. Accordingly, the national dialogue about race needs to examine each ethnic group's racial attitudes in order to have a complete picture of race relations in today's United States, and of the growing dynamic of inter-ethnic civil rights claims. The failure to address the interplay of diversity discourse and inter-ethnic discrimination claims will undermine the social importance of equality in the workplace.²⁸⁰ Allowing diversity discourse to proceed unchecked in employment discrimination cases will leave open the very concrete possibility that employers will begin to construct their workplaces as "diverse" to ward off lawsuits, while simultaneously maintaining a racial hierarchy.²⁸¹ The MRLA proposed here is but one possible method for more effectively navigating the realities of racism in a multiracial world. The concept seeks to focus judges on the applicability of established employment discrimination doctrine to the context of inter-ethnic discrimination. Such an endeavor is imperative if inter-ethnic discrimination allegations are to receive the full inquiry that they deserve.

²⁸⁰ Richard Delgado, *The Current Landscape of Race: Old Targets, New Opportunities*, 104 MICH. L. REV. 1269, 1272 (2006) ("The black-white binary paradigm of race thus requires expansion to deal with our increasingly multicultural, multiracial society—and even, sometimes, to do justice to the black cause.").

²⁸¹ See Carl G. Cooper, *Diversity: Denied, Deferred or Preferred*, 107 W. VA. L. REV. 685, 687 (2005) ("[A] diverse workforce cuts down on litigation. It is very difficult when you have all groups, all racial groups and all kinds of individuals, sexual orientation, disability, age, all employed by the same employer to mount a successful discrimination lawsuit.").

[A]n anecdotal example is the statement of a Filipino American who, in a recent interview, said that she and other Asian Americans are promoted to and kept at low management positions so that they can do the face-to-face firing of African Americans and Latino employees, thereby immunizing their employers from Title VII suits; after all, how can one racial minority illegally discriminate against another?

Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 2 HARV. LATINO L. REV. 495, 497 (1997).