

## **Hate Speech and The Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions**

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When she passes she calls my attention, but her hair, there's no way no.  
Her *catinga* [African] (body odor) almost caused me to faint. Look, I  
cannot stand her odor. Look, look, look at her hair! It looks like a  
scouring pad for cleaning pans. I already told her to wash herself. But she  
insisted and didn't want to listen to me. This smelly *negra* (Black woman)  
. . . Stinking animal that smells worse than a skunk.<sup>1</sup>

Lyrics to widely distributed 1996 Brazilian Song "Look At Her Hair."

In Latin America, like many countries in Europe, hate speech is  
prohibited.<sup>2</sup> Yet, Latin America is rarely included in the transnational discussion

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<sup>1</sup> Kia Lilly Caldwell, "Look at Her Hair": *The Body Politics of Black Womanhood in Brazil*, 11  
TRANSFORMING ANTHROPOLOGY 18, 19 (2004) (translating Portuguese lyrics).

<sup>2</sup> Argentina Law No. 23.592, art. 3 (punishing the dissemination of propaganda touting the superiority of a race, color or ethnic group, and the act of inciting the hatred against persons based on their race or ethnic origin with three months to three years of imprisonment); Bolivia Penal Code art. 281 (punishing the dissemination of ideas through whatever medium that justify racial subordination or incite racial hatred with ten to fifteen years of imprisonment); Bolivia Law Against Racism and All Forms of Discrimination, art. 16 (Sept. 10, 2010) (punishing the public incitement towards racial hatred or racial defamation with two to four years of imprisonment); Brazil Lei No. 7716, artigo 20, as amended by Lei No. 8081, de 21 de setembro de 1990 (prohibits "acts of discrimination and prejudice carried out by means of communication or publication of any nature" with 1 to 3 years imprisonment and a fine); Costa Rica Law No. 7711, art. 2 & 4 (Oct. 8, 1997) Law for the Elimination of Racism in Educational Programs and Collective Mediums of Communication (mandating that when publications refer to issues of race, color, and ethnic origin, that they do so respecting the principles of respect, dignity and equality for all human beings); Cuba Penal Code art. 295 (criminalizes those who "disseminate ideas based on racial superiority or racial hatred" in addition to criminalizing "those who commit a violent act or incite others to commit one against any race, ethnic group, or group of a different color"); Ecuador Penal Code art. 212.4 (criminalizes those who through whatever medium, diffuse ideas based on racial superiority or racial hatred); Guatemala Penal Code Decree 17-73 (punishing racial insults); Mexico Law for the Prevention and Elimination of Discrimination, art. 9, para. XV (prohibiting racially offensive messages and images in mediums of communication); Peru Penal Code art. 323 (punishing discriminatory speech or action with two to three years imprisonment, and four years where mental or physical abuse or discrimination by a public employee is involved); Venezuela Penal Code art. 286 (outlaws "he who publicly incites hatred against other inhabitants" and imposes a sanction of 45 days to 6 months of imprisonment); Uruguay Penal Code art. 149.2 (punishes whoever publicly or by

regarding the regulation of hate speech. Instead, the discussion is captured by the binary comparisons between the advisability of Europe's hate speech regulations as opposed to the United States free speech acceptance of hate speech. As a result, the ability to fundamentally examine the connections between hate speech and inequality, in addition to the most effective legal mechanisms for addressing it, is undermined. It is especially critical to broaden the hate speech debate now that we are seeing an apparent rise in the occurrence of hate speech worldwide.<sup>3</sup>

Expanding the transnational hate speech discussion to incorporate the Latin American context can help to provide insights about which legal structures are pragmatically more effective. For persons of African-descent frequently subjected to the blows of racist hate speech in Latin America, there is little effective enforcement of the criminal law sanctions that predominate. In contrast, civil law remedies have shown greater success at responding to the harms of hate speech.

This Essay begins by presenting the international law sanctions against hate speech and the ways in which they have inspired Latin American hate speech laws. The enforcement of the Latin American hate speech laws will then be assessed, and the Brazilian litigation regarding the "Look At Her Hair" song lyrics

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any means suitable for dissemination incites any person to racial hatred or contempt or any form of racial "moral" [non-bodily] violence with imprisonment of between 3 and 18 months); Uruguay Penal Code Art. 149.3 (punishes whoever commits an act of moral [non-bodily] racial violence with imprisonment of between six and twenty-four months).

<sup>3</sup> Jesse Solomon, *Hate Speech Infiltrates Social-Networking Sites, Report Says*, CNN.COM, Mar. 15, 2010 (discussing the report "Digital Terrorism and Hate 2010" released by the Simon Wiesenthal Center for Tolerance which noted that there was a 20 percent increase in hate-affiliated web pages from the prior year); In the Matter of Hate Speech in the Media, Petition For Inquiry Filed on Behalf of The National Hispanic Media Coalition, Federal Communications Commission (Jan. 28, 2009) (discussing the rise in hate speech in the U.S. with the growth of conservative talk radio and television, and internet blogs).

will be examined as a case study. With the benefit of the Brazilian case study, the Essay then concludes that the predominant criminal law approach is a poor vehicle for regulating hate speech. What is needed is a framework for civil remedies that is better formulated to address the harms of hate speech and its hindrance to racial equality.

## **I. Hate Speech and International Law Norms**

“Hate speech” expresses, advocates, encourages, promotes or incites hatred of a group of individuals distinguished by a particular feature or set of features, whom are targeted for hostility.<sup>4</sup> While the English language term “hate speech” is often used as a term of art within Latin American legal publications, commentators appear to use “hate speech” and “discurso del odio” interchangeably. Regardless of which term is used, it is a concept that is globally understood and widely prohibited.<sup>5</sup> The widespread objection to hate speech is reflected in the international law landscape. The United States is thought to stand as the extreme exception of a jurisdiction with such an absolutist vision of free speech, that much of hate speech is in large measure tolerated despite the fact that actual First Amendment doctrine does permit speech regulation in other contexts.<sup>6</sup> Yet it should be noted that Hungary, like the United States, uses a

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<sup>4</sup> Bhikhu Parekh, *Hate Speech: Is There a Case for Banning?*, 12 PUB. POL’Y. RES. 213 (2006).

<sup>5</sup> Jurisdictions which have laws prohibiting hate speech include but are not limited to: Canadian Crim. Code § 319(2); Croatian Penal Code art. 174; Denmark Penal Code § 266B; Finnish Penal Code Chap. 11, § 8; German Constitution GG art. 5(2) (F.R.G.); Icelandic Penal Code art. 233a; Hungary Penal Code art. 269; New Zealand Human Rights Act, 1993 § § 61 & 131; Norwegian Penal Code § 135a; Serbian Penal Code § 317; South Africa Act No. 4, Promotion of Equality and Prevention of Unfair Discrimination Act; Swedish Penal Code Chap. 16 § 8; United Kingdom Race Relations Act, 1965, c. 73 § 6(1), amended in 1976 and 1986.

<sup>6</sup> Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT’L L.J. 277 (2008) (comparing the “American Exceptionalism” of the United States unparalleled protection of freedom

“clear and present danger” test for assessing concerns with racial hate speech in its criminal code.<sup>7</sup>

International law specifically prohibits hate speech. As early as 1963, the United Nations General Assembly adopted the Declaration on the Elimination of All Forms of Racial Discrimination, which punished all incitement to violence on account of color or ethnic origin. The Declaration was viewed as a necessary response to the increase in swastikas as a symbol of hatred globally.<sup>8</sup> Thereafter, in recognition of the importance of the civil rights movement, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) in 1965.<sup>9</sup> CERD explicitly opposes the

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of expression to the majority of jurisdictions like Germany that restrict free speech to promote the protection of human dignity); *see also* Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 *HOW. L.J.* 571, 588 (1996-1997) (discussing the United States reservation to the international value of regulating hate speech embodied in Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination). Yet, it is an overstatement to characterize the U.S. free speech doctrine as absolutist, when the doctrine contains many exceptions for the regulation of speech, and the protections that exist have been abrogated during periods of extreme and populist based repression. *See* David Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 140, 165 (David Kairys ed., 1st ed. 1982) [hereinafter *Freedom of Speech I*] (discussing the traditional free speech exceptions that government may legitimately restrict under certain circumstances such as speech that incites illegal activity, subversive speech, fighting words, obscenity, pornography, commercial speech and symbolic expression). The exceptions to free speech protection have been growing over time to exempt speech in venues where people of limited means might speak like malls and public transit hubs, in addition to limiting public access to the media. *See* David Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 190, 200-206 (David Kairys ed., 3rd ed. 1998) [hereinafter *Freedom of Speech II*]. However, the absolutist position regarding free speech in the United States was not articulated until after the 1940’s. *See* Kairys, *Freedom of Speech I* at 141 (“Despite the persistent but nonspecific references to ‘our traditions’ in legal and popular literature, no right of free speech, either in law or practice, existed until a basic transformation of the law governing speech in the period from about 1919 to 1940. Before that time, one spoke publicly only at the discretion of local, and sometimes federal, authorities, who often prohibited what they, the local business establishment, or other powerful segments of the community did not want to hear.”).

<sup>7</sup> Gabor Halmai, *Free Speech in the New Hungarian Constitutional Practice*, 26 *INT’L J. SOC.* 66 (1996-97); Peter Molnar, *Towards Improved Law and Policy on “Hate Speech” – The “Clear and Present Danger” Test in Hungary*, in *EXTREME SPEECH AND DEMOCRACY* 237 (Ivan Hare & James Weinstein eds., 2009).

<sup>8</sup> Nathan Courtney, Note, *British and United States Hate Speech Legislation: A Comparison*, *BROOK. J. INT’L L.* 727, 733 (1993).

<sup>9</sup> Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 *STAN. J. INT’L L.* 57, 86 (1992-1993) (noting the connections between the U.S. civil rights movement and the adoption of CERD in 1965).

manifestation of racist hate speech. Article 4 of CERD provides that states shall condemn the dissemination of all ideas based on racial superiority or hatred. In addition, states must prohibit all organizations that “promote and incite racial discrimination, and shall recognize participation in such organizations or activities an offense punishable by law.” The Committee on the Elimination of Racial Discrimination, has stated that when CERD was adopted, Article 4 was seen as “central to the struggle against racial discrimination.<sup>10</sup>” It was hoped that the prohibition of racist expression before an overt act of racial discrimination occurred would help in the struggle against racism.<sup>11</sup> The concern with the role of racist speech in the rise of the Nazi regime informed the drafting of CERD.<sup>12</sup> Similarly, Article 20 of the International Covenant on Civil and Political Rights (ICCPR) provides that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” More recently, the Council of Europe has issued a protocol criminalizing racist and xenophobic acts committed through the operation of a computer.<sup>13</sup> Furthermore, there has also been the development of a customary international law against hate speech.<sup>14</sup>

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<sup>10</sup> Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Recommendation XV (42) on Article 4 of the CERD*, §§ 1, 3, U.N. Doc. HRI/GEN/1/Rev. 1 (1994).

<sup>11</sup> Michael A.G. Korengold, Note, *Lessons in Confronting Racist Speech: Good Intentions, Bad Results, and Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination*, 77 MINN. L. REV. 719, 723 (1992-1993).

<sup>12</sup> *Id.* at 721.

<sup>13</sup> Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, Council of Europe, ETS No. 189, (2003), available at <http://conventions.coe.int/Treaty/en/Treaties/html/189.htm>.

<sup>14</sup> Mariana Mello, Notes & Comments, *Hagan v. Australia: A Sign of the Emerging Notion of Hate Speech in Customary International Law*, 28 LOY. L.A. INT’L & COMP. L. REV. 365 (2006).

## II. Hate Speech Harms

The current widespread international consensus about the illegality of hate speech is influenced by the significant harms that it causes. When hate speech is permitted to be propagated, it encourages a social climate in which particular groups come to be denigrated and their discriminatory treatment accepted as normal. It creates discord in the community, harms the target group, and infringes equality.<sup>15</sup> For instance, the knowledge that anti-Semitic hate propaganda was clearly connected to the rise of Nazism, informed the development of the international laws against hate speech.<sup>16</sup> Scholars of discourse analysis and philosophy have similarly noted that racism is taught and legitimated through public discourse.<sup>17</sup>

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<sup>15</sup> See, e.g., *Regina v. Keegstra*, [1990] 3 S.C.R. 697 (Can.). Even the free speech absolutist United States has come to implicitly acknowledge the hate speech infringements on equality, through the employment discrimination jurisprudence of racial and sexual harassment. CATHARINE A. MACKINNON, *ONLY WORDS* 45-51 (1993) (discussing a plethora of employment discrimination cases in which the defendant's hate speech has been understood as the primary form of illegal harassment in the workplace). In contrast, outside of the employment sector, public utterance of hate speech is viewed as protected speech in the United States, and as a result facilitates the continued harassment of victimized racial groups and women. See LAURA BETH NIELSEN, *LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH* 168 (2004) (stating "[l]aw offers an implicit license to harass women and minorities. In the courthouse and the legislature, law as interpreted by sitting judges says that harassers have a constitutional right to utter abusive comments in public, virtually no matter how harmful to remarks might be for particular individuals and groups, and virtually without regard to whether they constitute public speech in any meaningful way.").

<sup>16</sup> Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 17, 27 (Mari J. Matsuda et al. eds., 1993).

<sup>17</sup> See TEUN A. VAN DIJK, *RACISM AND DISCOURSE IN SPAIN AND LATIN AMERICA* 92 (2005) ("Racism has to be learned, hence taught, and does not arise spontaneously from everyday experiences: People need social categories of difference, criteria of superiority, examples, and in general a legitimization for their racism. The mass media, political discourse and didactic discourse are the main sources for such processes of communicating and reproducing racism."); see also ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* 96 (2002) ("Hate speech is integral to maintaining hierarchies by helping to legitimize degrading social stereotypes and dangerous attitudes."). "Derogatory generalizations about minorities direct cultural thought about them. They are like blinders that restrict the range of public perceptions of outgroups to a narrow set of defamations, charged with cultural meanings, that misrepresent outgroup characteristics. Stereotypes help sustain the status of minorities as outsiders who are indelibly inferior and downright evil. The language of racism comes to define outgroups in the public mind, particularly when there is little interaction [of equality] between ethnic groups ." *Id.* at 103.

[R]acism is often based on, legitimated by, or acquired by discourse. It is through this discourse that dominant group members learn the dominant ideologies of their group, as well as the norms, values and attitudes that organize the daily social practices of everyday discrimination and exclusion. Daily discrimination has reasons, and these reasons need to be acquired, reproduced, and legitimated within the dominant groups. Prevalent social representations about indigenous or black peoples thus not only explain the reasons of unequal treatment but also need to show up in the many elite discourses of the dominant groups.<sup>18</sup>

In short, hate speech directly implicates a nation-state's pursuit of racial equality.<sup>19</sup>

In fact, it has been noted that political discourse and elections become healthier and more moderate in jurisdictions that enact hate speech legislation (like England, Germany, Austria, the Netherlands, India and South Africa).<sup>20</sup>

This is because there is little social value in racist speech whose basic purpose is

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<sup>18</sup> VAN DIJK, *supra* note 17, at 95.

<sup>19</sup> In addition, hate speech has also been shown to impose direct health harms. *See, e.g.*, Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353 (2009) (summarizing the literature that details the psychosocial harms of depression, repressed anger, diminished self-concept, impairment of work or school performance, inability to sleep, increased blood pressure, and negative childhood development). Moreover, individuals are harmed by the continued bombardment of hate speech messages and their recurrence repeatedly in life in ways that make each instance inflict a cumulative harm. RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 66-69 (1997).

<sup>20</sup> Parekh, *supra* note 4, at 218. While it is true that Denmark also has hate speech legislation yet suffered great public discord regarding the September 2005 publication of cartoons that violated the Muslim ban on depicting the Islamic prophet Muhammad, it appears that much of the actual violence was generated by extremists outside of Denmark disinterested in utilizing the Denmark hate speech legislation for peaceful political engagement. *See* Daniel Howden et al., *How a Meeting of Leaders in Mecca Set Off the Cartoon Wars Around the World*, THE INDEPENDENT, Feb. 10, 2006; *see also* *Protestors Killed as Global Furor Over Cartoons Escalates*, MIDDLE EAST TIMES, Feb. 6, 2006 (describing violent protests at Danish embassies in Beirut, Syria, Tehran, and deaths following protests in Nigeria, Libya and Afghanistan after police fired into the crowds). In contrast, within Denmark, Muslim organizations filed a blasphemy and hate speech criminal complaint with the police. While the complaints against the Danish newspaper were dismissed, the newspaper did issue a public apology. *See* G. Fouché, *Danish Court Dismisses Muhammed Cartoons Case*, THE GUARDIAN UNLIMITED, Oct. 26, 2006; *Honourable Fellow Citizens of the Muslim World*, JYLLANDS-POSTEN, Jan. 30, 2006, *available at* <http://www.jp.dk/meninger/ncartikel:aid=3527646>. Moreover, the public disturbances that occurred within Denmark appear to have been set off more by concern with police harassment of ethnic minorities and the deportation of Tunisians without trial, rather than violent protest regarding the cartoons. Frances Harrison, *Danish Muslims in Cartoon Protest*, BBC NEWS, Feb. 15, 2008.

to degrade others, deny them their identity as human beings, exclude them from the entitlements of the basic social and constitutional covenant, and to expose them to violence. By denying human dignity to some people, hate speech attacks the very basis of democratic systems.<sup>21</sup>

Yet, it should be noted, that the regulation of hate speech can also be viewed as a danger to democracy.<sup>22</sup> This alternative vision of hate speech regulation as a harm itself arises out of the concern that regulation is a form of censorship that can hinder expressive platforms for advocating racial equality and lead to selective prosecution targeted at unpopular political minorities.<sup>23</sup> The history of the Civil Rights Movement in the United States, is emblematic of the importance of having unfettered free speech rights to demonstrate, march and express dissident perspectives about the existence of white supremacy and need for social justice.<sup>24</sup> It is certainly true that the First Amendment of the U.S. Constitution has historically enabled civil rights proponents to articulate their political speech even when socially unpopular.<sup>25</sup>

However, the contemporary insistence that the history of the Civil Rights Movement should effectively bar any consideration of hate speech regulation,

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<sup>21</sup> Friedrich Kubler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 364 (1998).

<sup>22</sup> See Robert Post, *Hate Speech in EXTREME SPEECH AND DEMOCRACY* 123, 136 (Ivan Hare & James Weinstein eds., 2009) (expressing concern that hate speech regulations may “have the counterintuitive effect of undermining democratic cohesion” by those who are silenced and then question the democratic legitimacy for censorship).

<sup>23</sup> See ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

<sup>24</sup> See SAMUEL WALKER, *RIGHTS REVOLUTION: RIGHTS AND COMMUNITY IN MODERN AMERICA* 91 (1998) (observing that “the protection of allegedly offensive speech has been central to the growth of a more inclusive community in America”); see also NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS* (1995) (stating that free speech has had important role in advancement of women’s rights).

<sup>25</sup> WALKER, *RIGHTS REVOLUTION* *supra* note 24, at 89-100 (providing examples from U.S. history illustrating role of free speech in allowing unpopular groups to be heard and recognized).

ignores the domestic and global shift to embrace the value of racial equality. It is no longer the case that blanket questioning of the human status of racial minorities can be considered a continuing topic of debate.<sup>26</sup> Today, the universal value in the formal equality of all human beings, provides a very different context for the consideration of hate speech harms and regulation. Against the backdrop of a universal condemnation of ideologies of racial superiority, racist speech has no political value.<sup>27</sup> Nor is a racist epithet equivalent to a generally offensive epithet like “murderer.”<sup>28</sup> This is because racist epithets are embedded in the notion that the core of who a racial minority is problematic and inferior. In contrast, generally offensive epithets like “murderer” simply refer to the action or choice an individual has made, and not their common humanity. Similarly, the concern with avoiding McCarthy-like censorship abuses of the past is also historically over-determined. This is because, contemporary censorship “occurs less through explicit state policy than through official and unofficial privileging of powerful groups and viewpoints.”<sup>29</sup> In fact, it has been noted that in countries

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<sup>26</sup> The iconic desegregation case of *Brown v. Board of Ed. of Topeka*, marks the beginning of a gradual shift in the United States towards embracing the value of racial equality. *Brown*, 347 U.S. 483 (1954). Internationally, this shift is manifested by the United Nations Declaration on the Elimination of All Forms of Racial Discrimination in 1963, and the United Nations Convention on the Elimination of All Forms of Racial Discrimination in 1965.

<sup>27</sup> See CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993) (arguing that from a civic republican perspective, racial epithets contribute nothing of value to the public dialogue that is crucial to democratic self-government as deliberative democracy).

<sup>28</sup> See WALKER, *RIGHTS REVOLUTION* *supra* note 24, at 107 (equating the shouting of “murderer” with racial epithets).

<sup>29</sup> MACKINNON, *supra* note 15, at 77. See Kairys, *Freedom of Speech II*, *supra* note 6, at 191 (“And despite all the rhetoric about free speech and our democratic political process, a very large proportion of us – perhaps most – feel silenced and disenfranchised. There is a widespread recognition across the political spectrum that the American people lack the effective means to be heard or to translate their wishes into reality through the political process. There is, and has been for some time, a crisis of democracy and freedom that has been ignored by public officials and the media.”); *but see* Corey Brettschneider, *When the State Speaks, What Should It Say? Freedom of Expression and Democratic Persuasion*, 8 *PERSPECTIVES ON POL.* \_\_ (2010), available at <http://papers.ssrn.com> (arguing that the state should protect the expression of illiberal beliefs, but that the state should also be obligated to criticize those beliefs publicly).

with hate speech laws, the laws have not been disproportionately abused to censor government critics or against racial minority group members.<sup>30</sup>

Alternatively, the speculation that hate speech may have a “value” in operating as a kind of safety-valve outlet for racial hatred that thereby obviates racial violence, is undermined by the social science studies of the subject.<sup>31</sup> For instance, in a 2005 economic analysis of hate crimes and the influence of hate speech, it was determined that raising the costs of engaging in hate speech will tend to deter hate crime rather than increase the rate of hate crime.<sup>32</sup> In a related vein, other research has shown that across many countries the main source of racist beliefs stem not from an individual’s daily experiences but rather from the racist speech prevalent in public discourse and racially biased media sources.<sup>33</sup> Indeed, linguists note that language itself organizes habits of mind and influences perception in different cultures.<sup>34</sup> Moreover, social psychologists have documented that implicit (unconscious) biased attitudes and beliefs are learned in large measure through passive exposure to mass media and other modes of

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<sup>30</sup> Sandra Coliver, *Hate Speech Laws: Do They Work?*, in STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 363, 365 (Sandra Coliver ed., 1992) (observing that in France for example “most local prosecutors are ill-inclined to initiate hate speech prosecutions and thus there is scant concern about overzealous or even selective prosecutions”).

<sup>31</sup> TESIS, *supra* note 17, at 110 (“Empirical evidence makes it abundantly clear: hateful voices have long and resonant effects on the real world. Denigrating labels about historically persecuted groups are not cathartic for ingroups; however, they are devastating for outgroups.”). “Hate speech is not a harmless release for misethnic attitudes. It does not mitigate threats to minorities. To the contrary, during opportune times, it inflames and recruits persons who can be catalyzed to wreak havoc on outgroups.” TESIS, *supra* note 17, at 117.

<sup>32</sup> Dhammika Dharmapala & Richard M. McAdams, *Words That Kill? An Economic Model of the Influence of Speech on Behavior (With Particular Reference to Hate Speech)*, 34 J. OF LEG. STUD. 93, 132 (2005) (discussing economic model of how speech may influence behavior by revealing social attitudes).

<sup>33</sup> VAN DIJK, *supra* note 17, at 5-6.

<sup>34</sup> GUY DEUTSCHER, *THROUGH THE LANGUAGE GLASS: WHY THE WORLD LOOKS DIFFERENT IN OTHER LANGUAGES* (2010).

public discourse.<sup>35</sup> In turn, implicit bias unconsciously influences outward actions in ways that can perpetuate and aggravate structural inequalities in the workplace and elsewhere.<sup>36</sup> In fact, studies have shown that when individuals are immersed in situations where they are repeatedly exposed to racialized examples of African Americans, respondents show a higher rate of implicit bias than when exposed to non-racial stimuli or positive images of African Americans.<sup>37</sup> In short, to the extent that hate speech is an act of “racial venting,” the “racial venting” appears to increase hate crime rather than decrease it, and in turn an environment containing racist speech increases implicit bias and its influence on racist conduct.

It is thus interesting to note that the characterization of U.S. law as ignoring the connections between hate speech and inequality is of recent vintage.<sup>38</sup> Before the enactment and effective enforcement of civil rights laws, U.S. courts upheld convictions for hate speech as group defamation excludable

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<sup>35</sup> Nilanjana Dasgupta, *Color Lines in the Mind: Implicit Prejudice, Discrimination, and the Potential for Change*, in *COLOR LINES: EXPLORING THE FRONTIERS OF AMERICA’S MULTIRACIAL PRESENT AND FUTURE* (A. Grant-Thomas & Gary Orfield eds., 2007).

<sup>36</sup> J.F. Dovidio, et al., *The Nature of Prejudice: Automatic and Controlled Processes*, 33 *J. EXPERIMENTAL SOC. PSYCH.* 510 (1997); R.H. Fazio, *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 *J. PERSONALITY & SOC. PSYCH.* 1013 (1995); A.R. McConnell & J.M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 *J. EXPERIMENTAL SOC. PSYCH.* 435 (2001); D. Sekaquaptewa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 *J. EXPERIMENTAL SOC. PSYCH.* 75 (2003).

<sup>37</sup> Nilanjana Dasgupta & A.G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 *J. PERSONALITY & SOC. PSYCH.* 800 (2001); B. Wittenbrink, et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 *J. PERSONALITY & SOC. PSYCH.* 815 (2001). See also Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?* 77 *CORNELL L. REV.* 1258 (1992) (discussing social stereotypes of various racial and ethnic groups and the role of hate speech in inscribing them).

<sup>38</sup> See Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 *CARDOZO L. REV.* 1523, 1536 (2003).

from free speech protection.<sup>39</sup> With the advent of the Civil Rights Act of 1964 and its widespread enforcement in the 1970's, a new approach to hate speech was articulated that drew the line at incitement to imminent violence (an elevated standard that is notoriously difficult to meet).<sup>40</sup> It would seem that with the imposition of legal constraints on the acts of racial segregation and exclusion, group defamation was transformed into free speech that permits an "outlet" for racist expression. In turn, the racial outlet propagates and recycles racist stereotypes and ideologies that maintain traditional race-based hierarchies without the need for explicit Jim Crow laws of exclusion in the United States.<sup>41</sup>

In Latin America where Jim Crow state-mandated exclusion never existed, racist speech about Afro-descendants is ubiquitous and facilitates the social exclusion of Afro-descendants.<sup>42</sup> In addition, to the term "negro" (black/negro) being derogatory, Afro-descendants are stereotyped and referred to as inherently criminal, intellectually inferior, overly sexual, and animalistic.<sup>43</sup> Because the racialized stereotypes of Afro-descendants are pervasive, they are commonly understood to smell like animals and in particular monkeys.

In addition to the commonalities in anti-black expression in Latin America, each country has also developed its own subset of derogatory phrases for blacks

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<sup>39</sup> *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

<sup>40</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>41</sup> At least one author suggests an alternative theory that the jurisprudential shift away from enforcing group-based racial defamation was in part caused by the decision of civil rights groups to prioritize other racial justice litigation agendas to the exclusion of advancing hate speech restrictions that might undermine their goal for promoting individual rights. SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 15-16, 104-107 (1994). See also Kairys, *Freedom of Speech I*, *supra* note 6, at 149-159 (describing the transformation of the law of free speech in the U.S. as a history of political struggle by progressive movements to empower people with expansive freedoms of expression).

<sup>42</sup> Kairys, *Freedom of Speech I*, *supra* note 6, at 93.

<sup>43</sup> Peter Wade, *Afro-Latin Studies: Reflections on the Field*, 1 LATIN AM. AND CARIBBEAN ETHNIC STUD. 105-124 (2006).

and blackness.<sup>44</sup> In Argentina, “negro de mierda<sup>45</sup>” (shitty negro”) is a popular expression, and “negro” is viewed as the worst of insults.<sup>46</sup> As a result, even children’s songs in Argentina are replete with anti-black references.<sup>47</sup> In Brazil, Afro-descendants are referred to as “macaco” (monkey), “besta” (animal), “vagabundo” (bum), “filho de puta” (son of a whore), “safado” (insolent person), “ladrão” (thief), and “nega fedorentas” (stinking nigger).<sup>48</sup> In fact, the Brazilian insults are viewed as being coterminous with blackness. In Colombian newspapers, even the polluted air of Cali is blamed on the presumed dirtiness of blacks.<sup>49</sup> In Costa Rica, blacks are typically described as “pigs,” “stinking,” “unkempt,” and “ugly.<sup>50</sup>” In Cuba, “doing things like a black person” is a common expression to describe a poorly done task or acts of delinquency.<sup>51</sup> In fact, the Cuban Academy of Sciences found in 2003, that dozens of Cuban phrases are used to connect blacks with delinquency and inferiority.<sup>52</sup> This is

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<sup>44</sup> There is also a whole panoply of racial epithets reserved for denigrating indigenous communities in Latin America. See RACISM AND DISCOURSE IN LATIN AMERICA (Teun A. van Dijk ed. 2009).

<sup>45</sup> Corina Courtis et al., *Racism and Discourse: A Portrait of the Argentine Situation*, in RACISM AND DISCOURSE IN LATIN AMERICA 32 (Teun A. van Dijk ed. 2009). In fact, a young Argentinean created the Facebook page “Extermination of the (Negros de Mierda) Shitty Negroes.” Carlos Neri, *Un Grupo Argentino “Exterminación de los Negros de Mierda” Indigna en Facebook*, MOEBIUS, March 2, 2008, available at <http://enmoebius.com.ar/?p=972>.

<sup>46</sup> Marina Ari, *Argentina: Empanada, Asado de Vaca y Mucho Racismo*, KAOS EN LA RED, May 22, 2010, available at <http://www.kaosenlared.net/noticia/argentina-empanada-asado-vaca-mucho-racismo>.

<sup>47</sup> *Piden Que Un Libro Infantil Que Fomenta El Racismo Sea Quitado de Circulación*, MDZ NACIONALES, May 27, 2010, available at <http://www.mdzol.com/mdz/nota/212497/> (describing children’s book and CD with lyrics “I like the white, long live the white, let the black die”).

<sup>48</sup> DIJK, *supra* note 17, at 136-137.

<sup>49</sup> Hernando Salazar, *Colombia Contra el Racismo*, BBC MUNDO, May 23, 2008, available at [http://news.bbc.co.uk/hi/spanish/latin\\_america/newsid\\_7415000/7415897.stm](http://news.bbc.co.uk/hi/spanish/latin_america/newsid_7415000/7415897.stm).

<sup>50</sup> Marjorie Jiménez Castro, *Las Mascara del Chiste Racista*. 2 INTERSEDES: REVISTA DE LAS SEDES REGIONALES 43 (2001).

<sup>51</sup> Fernando Ravsberg, *Advierten Sobre Racismo en Cuba*, BBC MUNDO, Feb. 13, 2003, available at [http://news.bbc.co.uk/hi/spanish/latin\\_america/newsid\\_2759000/2759775.stm](http://news.bbc.co.uk/hi/spanish/latin_america/newsid_2759000/2759775.stm).

<sup>52</sup> *Id.*

best exemplified by the popular phrases “it had to be a negro<sup>53</sup>” and “there is no such thing as a good black or a sweet tamarind.<sup>54</sup>” In Ecuador, an often repeated joke is that “a black person running is a thief, a white person running is an athlete.” This helps to account for the 2009 survey findings in Ecuador, demonstrating that five out of seven Ecuadorians harbor racial prejudice against blacks.<sup>55</sup> In Mexico, Afro-Mexicans respond to the stereotypes that they are “ugly” and “dark” with the focus on marrying lighter-skinned partners in the Latin American hope to lighten and thus “improve the race” of their progeny.<sup>56</sup> In Nicaragua, the phrase “100 negroes for one horse<sup>57</sup>” ties to how blacks are viewed as drug addicts and drunks.<sup>58</sup> In Peru, the common statements about blacks are that they are criminals, can only work in low level positions, that they only think until midday, that they are delinquents and live badly, that they are a leisurely race, and that black women are prostitutes.<sup>59</sup> A study of Peruvian newspapers from 2008, found a total of 159 different racist adjectives for describing Afro-descendants.<sup>60</sup> In Venezuela, despite the national pride in being

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<sup>53</sup> T. Avellaneda, *Manifestaciones del Racismo en Cuba: Varias Caras de Un Viejo Mal*, CONSENSO REVISTA DIGITAL, 2005, available at [http://www.desdecuba.com/02/articulos/11\\_01.shtml](http://www.desdecuba.com/02/articulos/11_01.shtml).

<sup>54</sup> Rafael Duharte Jiménez & Elsa Santos García, “No Hay Negro Bueno Ni Tamarindo Dulce:” *Cuba, 118 Años Después de la Abolición de la Esclavitud*, MATICES, 1997, available at <http://www.matices.de/18/18pcuba.htm>.

<sup>55</sup> José Alfredo Andaluz Prado, *Prácticas Racistas y Discriminatorias Es Castigada Con Prisión*, DIARIO CORREO, July 6, 2009, available at : <http://www.diariocorreo.com.ec/archivo/2009/07/06/practicas-racistas-y-discriminatorias-es-castigada-con-prision>.

<sup>56</sup> Alicia Castellanos Guerrero et al., *Racist Discourse in Mexico*, in *RACISM AND DISCOURSE IN LATIN AMERICA* 217, 233 (Teun A. van Dijk ed., 2009).

<sup>57</sup> K.W. Stephenson, *Michael Campbell: El Racismo Está Enraizado en la Sociedad Nicaragüense*, LA BRÚJULA DIGITAL, Feb. 25, 2009, available at <http://www.labrujula.com.ni/noticia/159>.

<sup>58</sup> Carlos Salinas Maldonado, *Alta Hooker Rectora de la Uraccan “El Chamán es Sólo la Punta del Iceberg,”* DIARIO DE LA PRENSA, Feb. 22, 2009, available at [http://archivo.laprensa.com.ni/archivo/2007/abril/02/especiales/reportajes/181078\\_print.shtml](http://archivo.laprensa.com.ni/archivo/2007/abril/02/especiales/reportajes/181078_print.shtml).

<sup>59</sup> DIJK, *supra* note 17, at 160.

<sup>60</sup> Centro de Estudios y Promoción AfroPeruanos Lundu, *Informe 2008: Presencia de Afrodescendientes en los Medios Impresos en el Año 2008* (2008), available at <http://lundu.org.pe/web2/informe%20anual%20web/informe%202008.pdf>.

a mixed-race “café con leche” (coffee with milk) society, amongst the plethora of racist sayings commonly iterated includes the saying “kill a negro and live a Pepsi [enchanted] day.”<sup>61</sup> The widely circulated racial stereotypes about Afro-Venezuelans include: “black people are dangerous, they’re thieves, they smell bad, they have bad habits, they discredit a company’s image and even . . . it’s not their fault if they’re like that; black people when they don’t do it [make a mess] on the way in they do it on the way out.”<sup>62</sup> Such racialized stereotypes also get repeatedly circulated through the distribution of Venezuelan popular music with lyrics such as “Black woman! . . . if you were white and had straight hair/My mother told me in distress not to marry a black woman, because when she’s asleep, she looks like a coiled snake/ A black woman with a big nose doesn’t cook for me, because she hides the mouthfuls in her nostrils.”<sup>63</sup>

Within Latin America there is also the use of racialized language as terms of endearment which unconsciously invoke the paternalism of the slavery past. For instance, affection is expressed by stating “that’s my black person,” or calling someone “my little black person.” Even compliments of those who are black are reserved for those presumed to “supersede” their blackness by having other “superior” traits. Such racialized compliments include: “he is black, but has the heart of a white;” “she is black, but good looking;” “he is black, but well groomed and scented.” While such statements are not meant to carry racial malice, they still activate racialized stereotypes about the inferiority of blacks. As such the

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<sup>61</sup> Jesús Chucho García, *El Racismo Nuestro de Cada Día*, Geledés Instituto da Mulher Negra, Mar. 21, 2010, available at <http://www.geledes.org.br/venezuela/el-racismo-nuestro-de-cada-dia.html>.

<sup>62</sup> Adriana Bolívar et al., *Discourse and Racism in Venezuela: A “Café Con Leche” Country*, in RACISM AND DISCOURSE IN LATIN AMERICA 291, 292-93 (Teun A. van Dijk ed., 2009).

<sup>63</sup> *Id.* at 293.

racialized endearments and comments are within the spectrum of what is racially problematic speech, but they would not be encompassed by the hate speech regulations discussed herein because they would be difficult to characterize as “inciting racial hatred” or intended as an act of discrimination. Nor does this Essay suggest that such terms be made actionable. Nonetheless, it is important to note that even the non-actionable race-based endearments and compliments energize racialized conceptions of Afro-descendants.

In fact, the racialized perspectives about Afro-descendants are so embedded in the social fiber of Latin American societies, that their subordinated status in society is naturalized and viewed as logical. Furthermore, the historical notion that “racism does not exist” in Latin America disinclines those unaffected by hate speech to acknowledge the harms it causes marginalized groups.<sup>64</sup> Nevertheless, with the growing mobilization of black social justice organizations, the voices of the traditionally excluded are being heard.<sup>65</sup> As a result, with the urging of black social justice organizations, more nations in Latin America are considering hate speech laws as a complement to other legal measures for addressing the racism that facilitates the socioeconomic exclusion of Afro-descendants.<sup>66</sup> The lobbying for hate speech regulation is in part a recognition of the work of social norms theorists who have argued that law can and does influence social norms generally

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<sup>64</sup> Ariel E. Dulitzky, *A Region in Denial: Racial Discrimination and Racism in Latin America*, in NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AFRO-LATINOS 39, 42-50 (Anani Dzidzienyo & Suzanne Oboler eds., 2005).

<sup>65</sup> MINORITY RIGHTS GROUP, NO LONGER INVISIBLE: AFRO-LATIN AMERICANS TODAY (1995).

<sup>66</sup> The International Law Department of the Organization of American States organized a workshop to address the legal needs of Afro-descendants in Latin America on January 22, 2010, and devoted a significant amount of time to the concern with hate speech in the region. Taller de Expertas/os de la Temática Afrodescendiente en las Américas, International Law Department, Secretary of Judicial Issues, Organization of American States, *available at* <http://www.oas.org/dil/afrodescendants.htm>.

and race discrimination in particular.<sup>67</sup> The historical example of how the U.S. shift from Jim Crow state mandated segregation to a legal landscape of antidiscrimination laws undermined the justifications for white supremacy, is a powerful beacon for those concerned with hate speech in Latin America.<sup>68</sup> But to be clear, social justice activists in Latin America are seeking more than just a legal symbol of anti-racist sentiment. They instead wish to deploy the expressive function of law to substantively challenge the justifications for racial exclusion in Latin America and the language which is used to do so.<sup>69</sup>

This is because while there are approximately 150 million persons of African descent in the Spanish speaking Caribbean and Latin America representing one third of the total population, they have a highly limited presence in politics and government.<sup>70</sup> Throughout the region, African descendants are disproportionately living in poverty and illiteracy, with limited access to education and employment opportunities, all resulting in shorter life expectancies.<sup>71</sup> Most African descendants live in rural areas and suffer a lack of infrastructure and utilities, with no health services, few schools, high

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<sup>67</sup> See, e.g., Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1026, 1064, & 1081 (1995) (applying social norms theory to the context of racial discrimination). “[T]he law can change behavior merely by signaling on what grounds the majority will henceforth give and withhold esteem.” *Id.* at 1081.

<sup>68</sup> “When Jim Crow laws mandated certain forms of segregation, whites confidently spoke of segregation as the natural order of things; when the laws forbade segregation, discriminatory whites had a greater difficulty believing their own ideology.” *Id.* at 1081.

<sup>69</sup> See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 964 (1996) (“Many laws have an expressive function. They ‘make a statement’ about how much, and how, a good or bad should be valued. They are an effort to constitute and to affect social meanings, social norms, and social roles. Most simply, they are designed to change existing norms and to influence behavior in that fashion.”).

<sup>70</sup> Econ. Commission for Latin Am. and the Caribbean, *Ethnic-Racial Discrimination and Xenophobia in Latin America and the Caribbean*, 2001. And these are considered conservative demographic figures given the histories of undercounting the number of Afro-descendants on Latin American national censuses, and often completely omitting a racial/ethnic origin census question.

<sup>71</sup> Bryce Pardo, *Member of Congress Discuss Challenges Facing Afro-Descendants in Latin America*, Inter-American Dialogue, April 9, 2008.

unemployment and low income.<sup>72</sup> In fact, scholars attribute the slow economic growth of Latin American and Caribbean countries to their discriminatory exclusion of Afro-descendants, who make up large part of the populations of many of the countries but are a small proportion of the traditional labor market.<sup>73</sup> In addition, they attribute Latin America's lower economic standing as compared to East Asia and Eastern Europe, to its exclusion of the rural poor (many of whom are Afro-descendants) from social protections and services.<sup>74</sup> Despite the variation in demographic density and political histories, studies of the region show a remarkable similarity in the marginalization of Afro-descendants and the racial discrimination they encounter.<sup>75</sup>

In much of the region, Afro-descendants are considered to be the "poorest of the poor." When poverty rates are estimated by race, Afro-descendants constitute 30 percent of Latin America's population but represent 40 percent of the region's poor.<sup>76</sup> The picture for Afro-descendants is particularly bleak when one considers that Latin America and the Caribbean is a region with one of the most unequal income distributions in the world. Furthermore, the social exclusion of Afro-descendants remains consistent even when income level is controlled for in statistical analyses. All of which has motivated the interest in

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<sup>72</sup> Margarita Sanchez & Maurice Bryan, *Afro-descendants, Discrimination and Economic Exclusion in Latin America*, MINORITY RIGHTS GROUP INT'L, 3, May 2003.

<sup>73</sup> Jonas Zoninsein, *The Economic Case for Combating Racial and Ethnic Exclusion in Latin America and the Caribbean Countries*, in *Towards a Shared Vision of Development*, (Mayra Buvinic, Jacqueline Mazza & Ruthanne Deutsch eds., 2001).

<sup>74</sup> Robert Kaufmann & Stephan Haggard, *Development, Democracy and Welfare States: Latin America, East Asia and Eastern Europe* (Princeton 2008).

<sup>75</sup> Inter-American Development Bank, *Forum on Poverty Alleviation for Minority Communities: Communities of African Ancestry in Costa Rica, Honduras, Nicaragua, Argentina, Colombia, Ecuador, Peru, Uruguay, Venezuela* (Washington, D.C., 1996).

<sup>76</sup> Inter-American Development Bank, *OUTSIDERS? The Changing Patterns of Exclusion in Latin America and the Caribbean*, 15-17 (2007).

using law to more effectively address racial inequality and combat the pervasive presumption that racism does not exist in Latin America despite the ubiquitous social and economic exclusion of blacks.

The longstanding myth that Latin America is a racial utopia that stands in marked contrast to the United States (where “real” racism exists) facilitates the normalization of hate speech and in turn makes hate speech an even greater danger for blacks than elsewhere in the Americas.<sup>77</sup> This is because racist speech is labeled “humorous” and “cultural” and thus not indicative of a racialized society. Accordingly, the hate speech laws discussed in this Essay are but one part of a larger web of legal anti-discrimination remedies being considered and implemented slowly in Latin America.<sup>78</sup>

### **III. Latin American Hate Speech Laws**

Latin American hate speech laws generally range from criminally prohibiting the dissemination of ideas based on racial superiority to the criminal prohibition against inciting racial hatred.<sup>79</sup> These laws do not encompass defamation laws which are typically focused on harms to an individual rather than to a group and thus do not address public group-based hate speech.<sup>80</sup> Two

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<sup>77</sup> Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Anti-Discrimination Laws, a United States – Latin America Comparison*, 87 CORNELL L. REV. 1093-1176 (2002).

<sup>78</sup> ROBERT COTTROL & TANYA KATERÍ HERNÁNDEZ, *THE LONG LINGERING SHADOW: RACE, LAW, AND INEQUALITY IN THE AMERICAS* (forthcoming 2011 UNC press).

<sup>79</sup> See *supra* note 2.

<sup>80</sup> See, e.g., Sallie Hughes & Chappell Lawson, *The Barriers to Media Opening in Latin America*, 22 POL. COMM. 9, 11 (2005) (discussing how the majority of countries in Latin America have criminal defamation laws as protection for the reputation of an individual not a group). Related to the laws of defamation are “descato” (insult) laws which penalize disrespect toward public officials. See Ruth Walden, *Insult Laws in THE RIGHT TO TELL: THE ROLE OF MASS MEDIA IN ECONOMIC DEVELOPMENT*, 207, 207 & 222 (World Bank ed., 2002) (discussing the existence of “descato” laws in Latin America).

examples of literal legislative compliance with the international law norms against hate speech can be found in Cuban and Ecuadorian domestic laws. Article 295 of the Cuban Penal Code criminalizes those who “disseminate ideas based on racial superiority or racial hatred” in addition to criminalizing “those who commit a violent act or incite others to commit one against any race, ethnic group, or group of a different color.”<sup>81</sup> Article 212.4 of the Ecuadorian Penal Code criminalizes those who through whatever medium, diffuse ideas based on racial superiority or racial hatred.<sup>82</sup>

In both Cuba and Ecuador the sanction for a hate speech infraction is the same as that for an act of racial discrimination. In Cuba, that is 6 months to 2 years of imprisonment or a fine, or both. And Ecuador, that is 6 months to 3 years imprisonment. Even though the Venezuelan Penal Code does not specifically refer to race-based hate speech, Article 286 outlaws “he who publicly incites hatred against other inhabitants” and imposes a sanction of 45 days to 6 months of imprisonment.<sup>83</sup>

Brazil’s hate speech law is part of the crime of racism that prohibits “acts of discrimination and prejudice carried out by means of communication or publication of any nature.”<sup>84</sup> The penal code makes such acts punishable by 1 to

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<sup>81</sup> Art. 295, Cuba Penal Code (“el que difunda ideas basadas en la superioridad u odio racial o cometa actos de violencia o incite a cometerlos contra cualquier raza o grupo de personas de otro color u origen étnico”).

<sup>82</sup> Art. 212.4, Ecuador Penal Code (“el que, por cualquier medio, difundiere ideas basadas en la superioridad o en el odio racial”).

<sup>83</sup> Art. 286, Venezuela Penal Code (“el que públicamente, excitare al odio de unos habitantes contra otros”).

<sup>84</sup> Lei No. 7716, artigo 20, as amended by Lei No. 8081, de 21 de setembro de 1990 (Brazil). See Alex Lobato Potiguar, *Igualdade e Liberdade: A Luta Pelo Reconhecimento da Igualdade Como Direito A Diferença no Discurso do Odio* (dissertação pela Mestrado em Direito da Universidade de Brasília, Faculdade de Direito Programa de Pós-Graduação em Direito, 2009) (Masters in Law Thesis Paper “Equality and Liberty: The Fight for Recognition of Equality as a Right to Difference in Hate Speech”) available at <http://repositorio.bce.unb.br/handle/10482/5328>.

3 years imprisonment and a fine.<sup>85</sup> In 2003, the Federal Supreme Court enforced the prohibition against hate speech in the criminal prosecution of Siegfried Ellwanger, for practicing racism when he published books that were anti-Semitic and falsely denied the existence of the Holocaust.<sup>86</sup> The Court noted that free speech is not absolute, and that publishing books with discriminatory ideologies is racism that free speech will not tolerate. Ellwanger was sentenced to two years imprisonment.

With the 2003 Ellwanger case as a guidepost, Brazil's hate speech proscription has been extended to the venue of the internet as well. In 2006, Google was ordered to provide government prosecutors data that could help them identify users accused of taking part in online communities (of Google's social networking site called Orkut) that encourage racism, pedophilia and homophobia.<sup>87</sup> Google went on to agree to remove Orkut member submissions from the internet that the Brazilian prosecutors classified as illegal racist content.

#### **IV. Legislation Drafting Considerations: Civil vs. Criminal Provisions**

Because of its great symbolic power, a ban on hate speech can easily become a symbol that is an end in of itself rather than part and parcel of an

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<sup>85</sup> This racial crime law is distinct from Brazil's "Injúria Racial/Racial Insult" (Artigo 140, § 3 Código Penal Brasileiro) which is a crime against honor like that of defamation, in which the dignity of a specific individual is targeted and harmed. In contrast, the crime of racism targets an undetermined number of persons in its exclusion of an entire race or color. For that reason, unlike the individualized crime of Racial Insult, the group-based crime of racism is not subject to a prescription period and is a non-bailable offense. With Racial Insult, a judge has discretion to suspend the 1 to 3 year jail sentence, and the claim is subject to an 8 year prescription period. See SAMANTHA RIBEIRO MEYER-PFLUG, *LIBERDADE DE EXPRESSÃO E DISCURSO DO ÓDIO (FREEDOM OF EXPRESSION AND HATE SPEECH)* 102-103 (2009) (describing differences between hate speech and racial insult).

<sup>86</sup> S.T.J.. *Habeas Corpus* No. 82.424-2. Relator: min. Maurício Corrêa. 19.09.2003.

<sup>87</sup> Ellen Nakashima, *Google to Give Data to Brazilian Court*, WASHINGTON POST, Sept. 2, 2006.

overarching policy against racism. It is thus centrally important to enact hate speech legislation that focuses on its anti-discrimination role rather than viewing it as an anti-defamation inspired law or simply as a dignitary harm. The anti-discrimination role of hate speech legislation would also be enhanced by incorporating civil as well as criminal code provisions.

Restricting hate speech legislation to the criminal code context, as is done in many jurisdictions, may limit its efficacy for a number of reasons. Entrusting the enforcement of the criminal law to public authorities risks having the law undermined by the complacent inaction of public authorities who may harbor the same racial bias as the agents of hate speech. This is a particular danger in Latin America, where police officers are consistently found to discourage Afro-descendants from filing racial discrimination complaints, and are often the perpetrators of discrimination and violence themselves.<sup>88</sup> Furthermore, even well-meaning government officials may be reluctant to impose the sanctions of the criminal law out of concern that hate speech is a social problem that should otherwise be addressed outside of the harsh penalties of the criminal law. This may help to explain why so few hate speech cases are actually brought despite the many jurisdictions that have hate speech criminal laws.<sup>89</sup> In addition, the criminal laws focus on racial discrimination as a dynamic of isolated incidents caused by individual bad actors, and distracts needed attention away from

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<sup>88</sup> DANIEL M. BRINKS, *THE JUDICIAL RESPONSE TO POLICE KILLINGS IN LATIN AMERICA: INEQUALITY AND THE RULE OF LAW* 49-54 (2008); Michael J. Mitchell and Charles H. Wood, *Ironies of Citizenship: Skin Color, Police Brutality, and the Challenge to Democracy in Brazil*, 77 *SOCIAL FORCES* 1001 (1999).

<sup>89</sup> Eric Heinze, *Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* 182, 183 (Ivan Hare & James Weinstein eds., 2009) (noting the limited enforcement of hate speech bans across Europe).

overarching systemic racism. Accordingly, it may be useful to incorporate civil remedies as well.

The contrast between the civil and criminal contexts is best exemplified by the Brazilian case of *Tiririca*, in which the same fact pattern of hate speech yielded a success for the plaintiffs in the civil court but not in the criminal court. Francisco Everado Oliveira Silva, whose stage name is Tiririca is a Brazilian entertainer who in 1996 released a song with the Sony Music company entitled “Veja os Cabelos Dela” (“Look at Her Hair”). The song was in essence a long tirade against the inherent distasteful animal smell of black women and the ugliness of their natural hair.<sup>90</sup> The lyrics stated in significant part,

When she passes she calls my attention, but her hair, there’s no way no. Her *catinga* [African] (body odor) almost caused me to faint. Look, I cannot stand her odor. Look, look, look at her hair! It looks like a scouring pad for cleaning pans. I already told her to wash herself. But she insisted and didn’t want to listen to me. This smelly *negra* (Black woman) . . . Stinking animal that smells worse than a skunk.<sup>91</sup>

The black feminist NGO Criola, and a number of other social justice organizations, filed lawsuits against the singer and Sony Music company in both criminal and civil courts. In the criminal court action, the plaintiffs filed a complaint of racism. The plaintiff lost because the judge found that there was no intent to offend black women.<sup>92</sup> As a result, the song was allowed to remain in circulation for commercial sale.

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<sup>90</sup> EDWARD E. TELLES, RACE IN ANOTHER AMERICA: THE SIGNIFICANCE OF SKIN COLOR IN BRAZIL 154 (2004).

<sup>91</sup> Caldwell, *supra* note 1, at 19 (translating Portuguese lyrics).

<sup>92</sup> 23 Vara Criminal do Rio de Janeiro, 18/02/1998, Juiz Carlos Flores da Cunha.

In contrast, the civil court action filed pursuant to the constitutional provision stating the national objective of promoting the well being of all without prejudice was successful.<sup>93</sup> The court held that the defendant's conduct was discriminatory and meant to provoke feelings of humiliation in black women.<sup>94</sup> The court also took note that because the singer Tiririca was also a popular entertainer for children (who was often nationally televised in a clown costume), the insulting and injurious content of the song was also prejudicial to the formation of black youth. As compensation for the moral damages of collective pain and suffering, in 2008, the court ordered payment of 300,000 reais in addition to attorney's fees and costs [approximately US\$ 162,000]<sup>95</sup>. The monetary payment was directed towards the creation of educational anti-racism youth programs disseminated through radio, television, film, and printed materials for elementary schools in the state.

Brazilian commentators attempted to trivialize the criminal prosecution of Tiririca, as innocent joking that the Black Movement exaggerated as a racial harm. In addition, there was the concern that the Black Movement's focus on racist speech was frivolous in comparison to the significance of black poverty and underemployment. Yet such critiques overlook the particular significance of racist speech litigation in a context where racial justice movements are still struggling to educate the general public about the existence of racism in a long mythologized "racial democracy." While hate speech cases may not take up a

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<sup>93</sup> Constituição Federal do Brasil, art. 3, ¶ IV.

<sup>94</sup> T.J.C.Civ.R.J., Embargos Infringentes no. 2005.005.00060, CEAP v. Sony Music Entertainment Brasil, 11 Câmara Cível do Tribunal de Justiça do Estado do Rio De Janeiro, Acórdão de 28 sept. 2008.

<sup>95</sup> See Bank of Canada Currency Converter Calculator, available at [http://www.bankofcanada.ca/cgi-bin/famecgi\\_fdps](http://www.bankofcanada.ca/cgi-bin/famecgi_fdps) (indicating a 0.54 U.S. dollar exchange rate for the Brazilian real on September 28, 2008 [the date of the *Tiririca* civil damages award judgment]).

large portion of the Black Movement litigation dockets, even a few high profile cases have the potential for large scale “consciousness raising.” In jurisdictions such as Brazil and elsewhere in Latin America, where it is commonplace for virulent derogatory racial stereotypes to coexist with the notion that racism is not present in the society, there is a tremendous value in having a public articulation of the ways in which black humanity is questioned, black citizens are excluded, and racism is manifested. In this way, hate speech litigation serves as a much needed intervention for disrupting the Latin American myth of racial democracy and the implicit biases that inform the maintenance of racial hierarchies in education, employment, and politics.

In short, the criminal context with its threat of imprisonment, can inhibit the judicial willingness to make racist expressions legally actionable because they are a predominant feature of the culture. The singular Brazilian case of *Ellwanger* was in large measure a successful criminal prosecution of hate speech because of the view that the blatant anti-Semitic Holocaust denial in the case was rare in Brazil. In contrast, the more pervasive anti-black racist speech is viewed as too commonplace to be worthy of criminal prosecution. Like the *Tiririca* criminal case, other criminal prosecutions of hate speech have not been successful in Brazil.<sup>96</sup> Furthermore, the punitive focus of criminal law can create a backlash against the targets of hate speech, whereby they are resented by the

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<sup>96</sup> Superior Tribunal de Justiça do Ceará, Sexta Turma, Processo RESP 273067, Sept. 14, 2001 (affirming innocence of newspaper journalist Claudio Cabral who published a commentary in which he stated that “feijoada [black bean stew] is the food of Bahian musicians, black and indian – obviously inferior races” because there had been no evidence of a criminal intent to commit the crime of racism with the motive to racially offend and because there had been no evidence of a belief in racial segregation which is what racial prejudice is). See also Cezario Correa Filho, *Humor, Racismo e Julgamento: Ou Sobre Como Se Processa I Ideia de Racismo no Judiciario Brasileiro*, 6 REVISTA DA ESCOLA SUPERIOR DA MAGISTRATURA DO ESTADO DO CEARA 275 (2008).

public for incarcerating others for their speech. Such public resentment would undermine the goal of enforcing hate speech regulations to further racial equality.<sup>97</sup>

This in part may help to explain how Tiririca was elected into the Brazilian Chamber of Deputies (the lower house of Brazil's Congress) on October 3, 2010. With a criminal trial that martyred him and then later acquitted him of the crime of racial discrimination, Tiririca was well positioned to continue attracting public attention. Building upon his public notoriety, the obscure PR (Partido da República) political party provided generous financing to mount a campaign designed to catch the attention of voters disillusioned with mainstream politics following numerous corruption scandals. Tiririca's principal slogan was "It can't get any worse," in addition to, "What does a congressman do? The truth is I don't know, but vote for me and I'll tell you."<sup>98</sup> Because voting is compulsory in Brazil there is a tradition of voting for preposterous candidates as a mechanism of protest (including a São Paulo zoo rhinoceros back in 1959). Such protest votes advantage the sponsoring political party which can then take any votes cast in excess of those needed to win for the protest candidate and have those excess voted reallocated to other candidates in the party's coalition. Because the Chamber of Deputies is formed by an open-list proportional representation system, it makes it easier for celebrity candidates to win office. Nevertheless, elected officials are required to be able to read and write, and there is an allegation that Tiririca is illiterate. The Regional Electoral Tribunal of São Paulo

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<sup>97</sup> C. Edwin Baker, *Autonomy and Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* 139, 148 (Ivan Hare & James Weinstein eds., 2009) (suggesting that hate speech regulations may create a "backlash against the enforcers and sympathy for the 'suppressed' racists").

<sup>98</sup> *Brazilians Vote Clown Into Office*, THE TORONTO SUN, Oct. 3, 2010.

is currently investigating the allegation of election fraud based on Tiririca's alleged submission of false proof of literacy which is the basis for removal from elected office.

Tiririca's criminal trial vindicated him and at the same time enhanced his notoriety and thereby made him strategically attractive to his political party. Because the individual perpetrator emphasis of the criminal context ends up focusing on the messenger (as an alleged racist) rather than the message of racist speech, it undermines the potential of hate speech regulations to promote equality. In contrast the *Tiririca* civil trial more adeptly worked towards undermining Tiririca's message of racial inferiority and thus was not part of his campaign platform.

In the civil context, the absence of the imprisonment feature enables judges to consider how modern perspectives about racial equality should make actionable the discrimination that has been historically prevalent in Latin America but invisible as "culture." A civil framework can provide broader theories of discrimination and less burdensome evidentiary standards.<sup>99</sup>

In fact, legal scholar Richard Delgado proposes a tort action for racial insults.<sup>100</sup> Delgado suggests that while a racial insult is itself certainly an act of racial discrimination, many courts might be hesitant to impose the sanctions of racial discrimination laws. The option of a tort suit permits the victim to circumvent the potential bias of government enforcers in the criminal context, and the reticence of judges to apply the sanctions of criminal law. Nevertheless,

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<sup>99</sup> Seth Racusen, "A Mulato Cannot Be Prejudiced:" The Legal Construction of Racial Discrimination in Contemporary Brazil (2002) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology).

<sup>100</sup> Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133-181 (1982).

the focus of this Essay is not upon individual racial insult cases, but rather the group-based discrimination of hate speech more generally.<sup>101</sup>

Treating hate speech solely through the vein of individual racial insult cases runs the risk of reducing the issue to the sensitivity of the plaintiff and the “non-racial” ways an individual plaintiff was otherwise disliked, rather than addressing the racial subordination harms to entire racial groups and society as a whole when hate speech is disseminated without an effective mechanism for an adequate response.<sup>102</sup> In contrast, group-based civil hate speech litigation actually permits an opportunity for responsive speech that levels the playing field in ways that the abstract “marketplace of ideas” does not permit.<sup>103</sup> Specifically, while civil litigation may infrequently result in the outright banning of hate speech, the civil remedies of compensation for public education, can enable those who are victimized by hate speech to more effectively respond with public education remedies whose influence extends beyond tort compensation to individual plaintiffs or criminal fines paid to the state treasury.

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<sup>101</sup> To be sure, as a procedural matter a jurisdiction can extend to individuals and NGOs alike, the standing to bring group-based claims.

<sup>102</sup> Seth Racusen, *The Ideology of the Brazilian Nation and the Brazilian Legal Theory of Racial Discrimination*, 6 SOCIAL IDENTITIES 775, 789-790 (2004) (describing how before the enactment of the hate speech provisions of the antidiscrimination law in Brazil most incidents of racism were treated as “injuria” that is an injury to one’s honor parallel to racial insult for which officials tended to dismiss the claims as personal problems rather than enforcing the law).

<sup>103</sup> Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 53, 77-78 (Mari J. Matsuda et al. eds., 1993) (describing the “marketplace of ideas” as defective because “the idea of racial inferiority of nonwhites infects, skews, and disables the operation of a market”). See also STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO 118 (1994) (“the marketplace of ideas – the protected forum of public discourse – will be structured by the same political considerations it was designed to hold at bay: and therefore, the workings of the marketplace will not be free in the sense required”); OWEN M. FISS, THE IRONY OF FREE SPEECH 16 (1996) (noting “the fear is that the [hate] speech will make it impossible for these disadvantaged groups even to participate in the discussion. In this context, the classic remedy of more speech rings hollow. Those who are supposed to respond cannot.”); SUNSTEIN, *supra* note 27, at 178 (“Rules that are content-neutral can, in light of an unequal status quo, have severe harmful effects on some forms of speech.”).

Indeed, a principal critique of the ACLU “more speech” being the best response to hate speech line of thought has been the well founded concern that few individuals have the access to public forums that can effectively counter the discriminatory effects of hate speech.<sup>104</sup> The result being that hate speech silences any further speech rather than promote a fuller discourse.<sup>105</sup> Group-based civil actions that provide remedies and resources for public education enable an effective platform for the public response to hate speech that an individual speaker alone cannot have. Commentator Katharine Gelber describes the provision of educational, material and institutional support to victims of hate speech, as a “capabilities-oriented” hate speech policy that enables hate speech victims to “speak back.”<sup>106</sup>

By way of further comparison, in Australia, a network of state and federal laws prohibit hate speech in both the criminal and civil context. But, the most widely enforced are those that are civil complaints-based laws.<sup>107</sup> Yet, the Australian context also cautions against relying upon the use of a civil context without a public education campaign focus, inasmuch as the preponderance of out-of-court settlements and confidential conciliation proceedings limit the educative impact of the cases on the public.

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<sup>104</sup> WALKER, HATE SPEECH, *supra* note 41, at 45 (describing the ACLU position that best response to bad speech is more speech).

<sup>105</sup> FISS, *supra* note 103, at 17 (advocating regulation of hate speech for “a conception of democracy which requires that the speech of the powerful not drown out or impair the speech of the less powerful”).

<sup>106</sup> KATHARINE GELBER, SPEAKING BACK: THE FREE SPEECH VERSUS HATE SPEECH DEBATE 117 (2002); *see also* Coliver, *supra* note 30, at 374 (concluding that civil and administrative remedies are preferable to criminal hate speech remedies because they “are far more effective in granting relief to injured parties and promoting education than jail sentences”).

<sup>107</sup> Judith Bannister, *It’s Not What You Say But the Way That You Say It: Australian Hate Speech Laws and the Exemption of “Reasonable” Expression*, 36 FLA. ST. U. L. REV. 23, 28 (2008).

## V. Conclusion

In short, civil remedies should be incorporated into the Latin American struggle against hate speech, because civil as opposed to criminal law sanctions are better equipped to address the deleterious effects of hate speech on racial equality. Furthermore, this exploration of the Latin American experience with hate speech may also serve as a useful contribution to the scholarly conversation about hate speech globally. The issue of racist speech and racial discrimination in Latin America as it affects Afro-descendants in particular is rarely discussed when comparative analyses of hate speech laws are presented. It is typically the comparison between the United States as a presumably free speech absolutist jurisdiction that is oft compared to European jurisdictions that restrict hate speech in varying ways.<sup>108</sup> The longstanding comparisons between the United States and Europe often get stymied in the competition between prioritizing free speech or human dignity as democratic values.<sup>109</sup> When the binary comparisons are made it is presumed that the U.S. experience is entrenched in its concern with avoiding the First Amendment abuses of the McCarthy era's persecution of Communists and suspected-Communists, while Europe is entrenched in its concern with avoiding the abuses of the Holocaust, and thus typically criminalizes hate speech.<sup>110</sup> While it is certainly true that each nation's free

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<sup>108</sup> Nevertheless, U.S. commentators do find that there is some traction within US law for addressing the concerns with hate speech harms. See e.g., Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993).

<sup>109</sup> See, e.g., THE CONTENT AND CONTEXT OF "HATE SPEECH": RETHINKING REGULATION AND REMEDIES (Michael Eric Herz & Peter Molnar eds., forthcoming 2010).

<sup>110</sup> See MACKINNON *supra* note 15, at 74 ("The official history of speech in the United States is not a history of inequality – unlike in Europe, where the role of hate propaganda in the Holocaust has not been forgotten. In America, the examples that provide the life resonance for the expressive freedom, the backdrop of atrocities for the ringing declarations, derive mostly from attempts to restrict the political speech of communists during the McCarthy era").

speech doctrines pertain to very specific historical developments, the exclusion of Latin America in the hate speech comparative literature misses the opportunity to consider the experiences of a region that has both endured historical censorship of voices of dissent, at the same time that racial minorities have been stigmatized and exposed to racial violence most typically at the hands of law enforcement officials. Examining the Latin American context provides the opportunity to reconsider the entrenched positions of the traditional hate speech comparative law binary.

Specifically, the Latin America context demonstrates the enhanced value that hate speech regulations with civil remedies have in the new world order where racism is globally rejected and explicit racial segregation laws are absent, but racist discourse sustains racial hierarchy nonetheless. Broadening the hate speech debate beyond the U.S.-Europe binary, with the consideration of Latin America, more clearly demonstrates the connection between hate speech and furthering equality that Critical Race Theory scholars have longed emphasized as essential.<sup>111</sup> Perhaps with the concrete example of hate speech harms in Latin America, the transnational conversation about hate speech regulations can be enriched and entrenched positions on racist speech reconsidered. “Speech always matters, is always doing work; because everything we say impinges on the

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<sup>111</sup> See WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari J. Matsuda et al. eds., 1993). See also Charles R. Lawrence III, *Crossburning and the Sounds of Silence: Antisubordination Theory and The First Amendment*, 37 VILL. L. REV. 787, 797 & 803-804 (1992) (describing how an antisubordination theory of free speech recognizes the injury done to hate speech victims whose own speech is suppressed and the historical reality that hate speech systematically silences the less powerful to maintain their inferior group status and treatment).

world in ways indistinguishable from the effects of physical action, we must take responsibility for our verbal performances – all of them.<sup>112</sup>”

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<sup>112</sup> FISH, *supra* note 103, at 114.