The Social Reconstruction of Race & Ethnicity of the Nation's Law Students: A Request to the ABA, AALS, and LSAC For Changes in Reporting Requirements

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THE SOCIAL RECONSTRUCTION OF RACE & ETHNICITY OF THE NATION’S LAW STUDENTS: A REQUEST TO THE ABA, AALS, AND LSAC FOR CHANGES IN REPORTING REQUIREMENTS

Kevin Brown* & Tom I. Romero, II**

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INTRODUCTION

Law schools are required annually to report the racial and ethnic ancestries of their students to the Department of Education (DOE), the American Bar Association (ABA), and the American Association of Law Schools (AALS). In 2009, these reporting obligations generally required law schools to provide total counts of students falling into one of the following racial/ethnic categories:

(1) Black American;
(2) American Indian/Alaskan Native;
(3) Asian or Pacific Islander;
(4) Mexican American;
(5) Puerto Rican;
(6) Other Hispanic;
(7) White, not Hispanic Origin.¹

These reporting classifications have now changed again.

In October 1997, the Office of Management and Budget (OMB) issued the Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity (hereinafter the “1997 Revised Standards”).² Generally

1. There were two additional categories for Foreign National and those whose race/ethnicity were unknown. The DOE combined the Mexican American, Puerto Rican, and Other Hispanic categories into a unified Hispanic category.
ally, the collection and reporting of racial and ethnic data for the 2000 and 2010 Census followed the 1997 Revised Standards. After a transition period to review the data from the 2000 Census, the 1997 Revised Standards required that all federal programs adopt consistent reporting standards.\(^3\) Since educational institutions also report the race and ethnicity of their employees to the Equal Employment Opportunity Commission (EEOC), the DOE decided to wait to announce its final implementation plan until after the EEOC published its reporting standards, which the EEOC did in November 2005.\(^4\)

In October 2007, the DOE issued the *Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the United States Department of Education* (Guidance), with a final implementation date for the reporting school year of 2010-2011.\(^5\)

Under the Guidance, when an educational institution, including any law school, collects racial and ethnic information, they must first ask respondents if they are Latino.\(^6\) Then educational institutions must provide respondents with the ability to mark one or more of the racial categories that apply to them: (1) American Indian or Alaska Native;\(^7\) (2) Asian American;\(^8\)

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5. Id. at 59,267, 59,273.


7. "A person having origins in any of the original peoples of North and South America (including Central America), and who maintains a tribal affiliation or community attachment." Guidance, supra note 3, at 59,274.
(3) Black or African American;9 (4) Native Hawaiian or Other Pacific Islander;10 and (5) White.11 While the Guidance does not require the use of ethnic subcategories within these six broad racial/ethnic categories, it does not proscribe their use. If educational institutions use ethnic subcategories in the collection of data, however, they must organize their use in a way that allows for the aggregation of the information into the reporting categories prescribed by the Guidance.

With regard to reporting the racial and ethnic data to the DOE, the Guidance requires that all educational institutions count anyone who indicates that they are Latino as Latino, regardless of the racial categories they select. However, since the Guidance does not require the reporting of separate races of those in the Latino category, law schools do not include this information. Law schools do not report the separate races of those in the Latino category.12 This information is simply lost. Thus, for example, law schools must report in their counts of Latinos any respondent who indicates that they are Latino but also checks “Black” as one of their racial boxes (“Black Latinos”). However, in the Latino counts, Black Latinos cannot be separated out. In addition, the Guidance requires educational institutions to report in a new “Two or More Races” category those non-Latinos who mark two or more of the five broad racial categories.13 As with Latinos, law schools do not supply counts of the separate races of those within the Two or More Races category. Thus, law schools must report a non-Latino person who checks “Black” and one or more other racial categories (“Black Multiracials”) in the Two or More Races category, along with other non-Latino multiracials. As with the inability to separate counts of Black Latinos from Latinos, it is not possible to separate out the counts of Black Multiracials from the other multiracials reported in the Two or More Races category.

The broad racial/ethnic reporting categories of the DOE that law schools must now use are as follows:

(1) Hispanic/Latino;
(2) American Indian or Alaska Native;
(3) Asian American;
(4) Black or African American;

8. “A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.” Id.
9. “A person having origins in any of the Black racial groups of Africa.” Id.
10. “A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.” Id.
11. “A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.” Id.
13. Id. at 59,276-77.
(5) Native Hawaiian or Other Pacific Islander;
(6) White; and
(7) Two or More Races.  

The ABA decided to follow the lead of the DOE and require law schools to report to it the racial and ethnic data that they report to the DOE. The AALS, however, adopted the following categories:

(1) Mexican American;
(2) Puerto Rican;
(3) Other Hispanic/Latino;
(4) American Indian/Alaskan Native;
(5) Asian American;
(6) Black or African American;
(7) Native Hawaiian/Pacific Islander; and
(8) Caucasian/White.

Unfortunately, not all law schools provide the AALS with counts of their students broken down into these categories. Nevertheless, by ostensibly requiring law schools to separate Latinos into Mexican Americans, Puerto Ricans, and Other Hispanic/Latinos, the AALS reporting categories provide the possibility for more detailed information about the ethnic ancestry of those in the Latino category than the DOE counts. The AALS, however, refused to embrace the Two or More Races category. This means that law schools seeking to comply with these reporting requirements will have to reallocate those they report to the DOE in the Two or More Races category into the categories that the AALS lists.

We think the AALS’s decision not to follow the racial/ethnic reporting requirements of the DOE and the ABA was a very wise one, even though conscientious law schools must generate two separate counts. This decision also provides a tremendous opportunity to collect data that will allow law schools to develop a more complete picture about the racial and ethnic mix of their students, without incurring any significant additional costs or administrative burden.

Before 1970, the federal government did not attempt to standardize the collection and reporting of racial and ethnic data. However, due to changes

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14. There is also a category for foreign students and for race or ethnicity unknown. For a detailed discussion of the history of federal racial/ethnic classifications that led up to the adoption of the Guidance, see Kevin Brown, Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?, 54 How. L.J. 255, 266-74 (2011).

15. The authors have on file a copy of the ABA questionnaire for 2010 that lists the racial/ethnic reporting categories.

16. AALS also has a category for students whose race/ethnicity is unknown and for nonresident aliens. A nonresident alien is a person who is not a citizen or national of the United States and who is in this country on a visa or temporary basis and does not have the right to remain indefinitely.
in antidiscrimination laws in the 1950s and 1960s, by the 1970s a number of federal agencies were involved in generating racial and ethnic data. The need to develop consistency in the production of this information generated the first effort by the federal government to standardize its collection and reporting. In 1977, one year before the Supreme Court’s first opinion upholding affirmative action in *Regents of the University of California v. Bakke*, this effort produced *Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting* ("Directive 15"). The driving force for the development of the federal standards on racial and ethnic classifications was “the need for comparable data to monitor equal access, in areas such as housing, education, mortgage lending, health care services, and employment opportunities, for population groups that historically had experienced discrimination and differential treatment because of their race or ethnicity.” According to the DOE, however, the purpose of the Guidance is to “obtain more accurate information about the increasing number of students who identify with more than one race.” Thus, the racial and ethnic classifications required by the DOE no longer track the original justifications for those classifications.

Because of substantial immigration and interracial procreation—particularly with regard to blacks—since the 1970s, substantial changes have occurred in the racial and ethnic mix of population groups traditionally thought to have experienced a history of discrimination in the United States due to race and ethnicity. Thus, there is a tremendous need to refine the broad racial and ethnic categories commonly used to generate racial and ethnic statistics in order to provide a much more accurate picture of the situation of those racial/ethnic subgroups within these broad categories that have the longest histories of discrimination in the United States.

After all, that was the justification for the federal government's original development of the racial and ethnic categories forty years ago. Affirmative action programs also provide another consistent reason to seek to refine the broad racial and ethnic categories that law schools employ to count the race and ethnicity of their students. In Grutter v. Bollinger, the Supreme Court upheld the affirmative action plan of the University of Michigan Law School that sought to achieve "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented . . . in meaningful numbers." We know of no one who contends that affirmative action in the United States is being used to target the history of discrimination suffered by oppressed groups in other parts of the world, such as those who suffered from, say, French Colonialism in Algeria, exploitation of Koreans in Japan, or untouchability in India. Thus, the history of discrimination that matters for the purposes of American affirmative action plans, logically, must be a group's experience in the United States.

We, therefore, believe that the AALS and the ABA should require law schools to use more refined racial and ethnic reporting categories that are closely tied to those specific population groups who have suffered a history of discrimination in the United States and are most likely underrepresented in the nation's law schools than the broad categories required by the DOE. Refining the broad categories to include racial/ethnic subgroups based on histories of discrimination and possible underrepresentation will provide law schools with better information about the impact of the use of racial classifications in admissions. As a consequence, we applaud the AALS's decision to require law schools to separate Mexican American and Puerto Rican students from other Latinos, due to the underrepresentation of these groups in the nation's law schools and the history of discrimination that these two groups have experienced in the United States when contrasted with that of other Latino groups.

The use of more refined racial/ethnic categories can also generate information that is more complete, which can enlighten law schools and the legal academy about the dimensions of a host of issues involving the racial and ethnic make-up of groups with a history of discrimination in the U.S.

21. See supra notes 18-19 and related text; see infra notes 45-48 and related text.
23. Id. at 316 (internal citations omitted) (quoting the University of Michigan Law School's admissions policy).
24. While we choose to focus on the Black and Latino categories because of historic intersectionalities between the experiences of each of these communities, we are mindful that our analysis could apply to other broad categories, such as Asian or American Indian. That inquiry, however, is beyond the scope of this Article.
For example, the reporting requirements of the DOE place Black Latinos in the Latino category.\textsuperscript{25} Under the previous format for collecting racial and ethnic information, these individuals had to choose whether to identify with their race or their ethnicity. Before deciding to place all Black Latinos in the Latino category, law schools should know how many of them applied and were admitted. Since the institution of affirmative action programs, higher education institutions, including law schools, have generally placed all those of African descent into a unified category, without regard to race or ethnicity.\textsuperscript{26} Nevertheless, scholars and commentators have recently pointed to the fact that Black Multiracial and Black Immigrants (blacks with at least one foreign-born black parent) are replacing more traditional blacks in America's selective undergraduate institutions.\textsuperscript{27} We will refer to non-Latino blacks with two U.S. born black (as determined by the one-drop rule) parents as "Ascendant Blacks."\textsuperscript{28} The difference between Ascendant Blacks, on the one hand, and Black Multiracials and Black Immigrants, on the other, is that both parents of Ascendant Blacks are from the ancestral line of blacks who suffered the history of discrimination in the U.S., whereas both Black Multiracials and Black Immigrants have at least one parent whose ancestry is not traced to the history of slavery and segregation of blacks in this country. Thus, Ascendant Blacks clearly have a far greater claim to being members of a group that has suffered from the history of discrimination based on race and ethnicity in the United States than either Black Multiracials or Black Immigrants.\textsuperscript{29} Nevertheless, law schools may be in the process of eth-

\textsuperscript{25} Guidance, supra note 4, at 59,274, 59,276-77.
\textsuperscript{26} For example, in the 2009/2010 academic year, the year before the Guidance took effect, almost 350 public and private colleges accepted the Common Application form and almost 80 institutions accepted the Universal College Application form for their incoming 2009/2010 freshmen class. See Kevin Brown, Now Is the Appropriate Time for Selective Higher Education Programs to Collect Racial and Ethnic Data on its Black Applicants and Students, 34 T. MARSHALL L. REV. 287, 304-05 (2009). Both of these forms lumped all black students into a single "African-American/African/Black" category. Id.
\textsuperscript{28} Others have used the term "Legacy Blacks" or "Descendants" to describe this group of blacks. See Onwuachi-Willig, supra note 27, at 1149 & n.27. We prefer the term "Ascendant Blacks" in order to denote the historical connection between this group of blacks and the history of the ascendency of blacks out of slavery and segregation. The ascendency of this group of blacks not only helped to bring about affirmative action, but also made possible the dramatic increases in interracial cohabitation, mixed-race blacks, and the immigration of blacks to the United States that has occurred over the past forty-five years.
\textsuperscript{29} For an extensive discussion of this, see Brown & Bell, Talented Tenth, supra note 27.
nically cleansing their buildings of Ascendant Blacks without fully realizing it.

The AALS’s decision not to embrace the Two or More Races category is likely to create a heavy administrative burden on law schools as they try to decide how to reallocate the students they report to the DOE in the Two or More Races category. As of yet, the AALS has not provided law schools with directions to follow in reallocating those in the Two or More Races category. Thus, each individual law school must determine how it will perform this reallocation. We think the AALS should rethink its position about rejecting the Two or More Races category. One important reason for refusing to embrace the Two or More Races category is that the DOE reporting requirements place Black Multiracials there instead of in the Black/African American category. Since this Article also urges the AALS to require law schools to report Black Multiracials separately, that should eliminate this objection to the inclusion of the Two or More Races category.

We want to urge the AALS to require law schools to provide counts of their students in the following categories:

1. Mexican American;
2. Puerto Rican;
3. Other Latino;
4. Black Latino;
5. Ascendant Black;
6. Black Immigrant;
7. Black Multiracial;
8. Other Two or More Races;
9. American Indian or Alaska Native;
10. Asian American;
11. Native Hawaiian or Other Pacific Islander; and
12. Caucasian/White.30

As indicated earlier, our rationale for suggesting the above categories is to more closely align the reporting categories for the nation’s law schools with the original justifications for the federal racial classifications, which also correspond to the justifications for the use of racial classifications articulated by the Supreme Court in its opinion in *Grutter v. Bollinger*.31 Thus, these categories are tied to generating information that reflects the twin notions of racial/ethnic groups that have a history of discrimination in the United States and are likely underrepresented in the nation’s law schools. As a result, we have directed our Article to the AALS, because its reporting categories are more closely aligned to our suggestion than those of the ABA. Nevertheless, we also want to urge the ABA to revisit its decision to

30. The AALS should also retain its categories for students whose race/ethnicity is unknown and for nonresident aliens.
adopt the DOE categories and also require law schools to use the above twelve categories.

One other reason now is a good time to call upon the AALS and the ABA to refine the racial and ethnic reporting categories is that the Supreme Court granted certiorari in *Fisher v. University of Texas at Austin* on February 21, 2012.\(^{32}\) Thus, the Court will address the constitutionality of the college admissions plans administered by the University of Texas at Austin, including the plan that considers race as one factor, among many, in the admissions process. At this point, it is impossible to tell how the Court’s opinion in *Fisher* will impact the current application of affirmative action admissions policies. What is certain, however, is that such a decision guarantees that our society will discuss and debate the impact of affirmative action for the next several years. Many of these discussions will talk about the dire consequences faced by underrepresented minorities with a history of discrimination, particularly for blacks and Latinos, if the Court severely restricts or eliminates affirmative action. Thus, the discussion in this Article will continue to advance the deliberations among scholars, journalists, deans, admission administrators, and legal practitioners about the consequence of the shifting meaning of race for the future of the profession. Because to truly understand the impact of affirmative action, its restriction or its end, it is necessary for law schools to develop more sophisticated statistics on the racial and ethnic ancestry of blacks and Latinos than are currently generated. For it may very well be that current affirmative action policies have come to favor those who fall under the broad categories of blacks and Latinos with the least connection to the very history and practice of discrimination that justified the taking into account of race and ethnicity in the first place, and we may not have known it.

One of our major considerations in developing the twelve racial/ethnic categories listed above is the desire to minimize the reporting difficulties of law schools. Thus, it is very important that law schools use categories easily aggregated into the seven broad racial/ethnic reporting categories of the DOE. Combining the totals for the first four categories will equal the total of Latinos reported to the DOE. Combining the Ascendant Black and Black Immigrant counts will equal the total numbers law schools report to the DOE in the Black/African American category. Combining the Black Multiracials and Other Two or More Races categories will equal the total of Two or More Races students reported. The last four categories are the same reporting categories law schools use for the DOE.

Since individuals applying to law school must register with the Law School Admissions Council (LSAC), by running data reports from the

LSAC databases for their applicants and students, law schools can easily ascertain almost all of the data for the various reporting categories that we list. There is one shortcoming with the LSAC information. LSAC provides Asian respondents with eleven ethnic choices to select from, Latinos with six ethnic choices (including one for Chicano/Mexican and Puerto Rican), and Caucasian/White respondents with four ethnic choices. However, LSAC provides no ethnic choices for the Black/African American category. In order for law schools to generate separate totals for Black Immigrants and Ascendant Blacks, it is necessary that LSAC provide ethnic choices to respondents who check the Black/African American category. If LSAC agrees to do this, then law schools will have little difficulty generating the counts for the twelve racial/ethnic categories that we are suggesting.

Part I argues that the AALS should continue to require law schools to separate Mexican Americans and Puerto Ricans from other Latinos. Part II argues that law schools should also report Black Latinos separately. Part III argues that the AALS should provide a separate category for Black Multiracials and include an “Other Two or More Races” category. Part IV argues that the AALS should require law schools to reject the outmoded concept of treating all blacks alike, regardless of their countries of origin, embodied in the DOE’s “Black or African American” category. Rather the AALS should require law schools to separately report Black Immigrants. This also means that law schools should report Ascendant Blacks separately. Part V discusses the need for LSAC to add ethnic reporting categories on its form to the Black/African American category in order to allow law schools to easily generate separate counts of Black Immigrants and Ascendant Blacks.

I. AALS SHOULD MAINTAIN SEPARATE REPORTING OF MEXICAN AMERICANS AND PUERTO RICANS

The DOE’s reporting categories group all Latinos in a unified category. As with blacks, which will be discussed later, this simplistic way of counting Latinos obscures not only the ethnic diversity of the Spanish-surnamed and Spanish-speaking community, but substantive differences in how each of these communities have experienced patterns and practices of discrimination in America’s past and present. Like various black ethnic groups in the U.S., some Latino ethnic groups are recent migrants that are pushed or pulled (as the result of political, economic, or social forces) into the U.S. Other Latino ethnic groups, however, have long histories of dis-

33. The authors have on file a copy of the LSAC ethnicity questionnaire listing these ethnic reporting categories.
34. Guidance, supra note 4, at 59,274, 59,276-77.
criminalization in the U.S. that are products of their group’s conquest and sub-
sequent uneven incorporation into the U.S.  

The emergence of a catch-all Hispanic category in federal policy is in-
structive. Before the 1970s, no federal standards existed for the collection of
data on race and ethnicity that applied to all federal agencies. Until the
1960s, the primary uses of racial/ethnic classifications in the U.S. were for
the purposes of exclusion, segregation, and discrimination directed at indi-
viduals from minority groups. The proponents of these discriminatory prac-
tices used racial statistics to justify their actions. However, Supreme Court
rulings in the 1950s and 1960s outlawed racial and ethnic discrimination by
governmental entities. Congress passed civil rights legislation in the
1960s, including the 1964 Civil Rights Act, the 1965 Voting Rights Act,
and the 1968 Fair Housing Act. Many of the social welfare programs enacted
as part of President Johnson’s Great Society programs sought to distrib-
ute federal funds based on populations in order to improve living conditions
in the cities and address the problems of disadvantaged groups.

Because of the above developments and others, the need and the pur-
pose of employing racial classifications and collecting racial and ethnic data
changed. Governmental entities and private institutions began to employ
racial and ethnic classifications not to exclude, but to include individuals
from previously discriminated minority groups. Enforcement of federal,
state, and local civil rights statutes required accurate racial and ethnic statis-
tics to demonstrate the existence of legally recognized discrimination. In
addition, the logic of civil rights activists saw racism as a product of a larger
system of discrimination and oppression, not as isolated actions and deci-
sions by individuals. To demonstrate the systematic nature of racial/ethnic
oppression, statistics on various social and economic differences based on
race were crucial. Civil rights activists also used racial statistics as the basis
for generating support for new laws and policies to address the impact of

35. See discussion infra Section I.A and accompanying text.
36. See Wallman et al., supra note 19. Katherine K. Wallman directed the review of
the standards.
37. See Michael Omi & Howard Winant, Racial Formation in the United
States: From the 1960s to the 1990s 81-82 (2d ed. 1994); Charles Hirschman, Richard
Alba & Reynolds Farley, The Meaning and Measurement of Race in the U.S. Census:
Glimpses into the Future, 37 Demography 381, 382 (2000); C. Matthew Snipp, Racial
Measurement in the American Census: Past Practices and Implications for the Future, 29
533 (1964); Loving v. Virginia, 388 U.S. 1 (1967).
39. Thomas F. Jackson, The State, the Movement, and the Urban Poor: The War on
Poverty and Political Mobilization in the 1960s, in The “Underclass” Debate: Views
From History 403-39 (Michael B. Katz ed., 1993); James T. Patterson, America’s
discrimination.\textsuperscript{40} Thus, as the 1960s unfolded, government, private institutions, and advocacy groups employed racial and ethnic classifications and used racial and ethnic statistics to benefit disadvantaged minority populations.

In 1973, the U.S. Commission on Civil Rights noted the "paucity of racial and ethnic data" used to evaluate the effectiveness of a federal entitlement programs.\textsuperscript{41} Of particular concern were requests by Mexican Americans, Puerto Ricans, and Cubans for data about their particular communities.\textsuperscript{42} Though recognizing important differences among these groups, the Commission nevertheless focused on the inadequacy of calling the Spanish-surnamed or Spanish-speaking community "Spanish."\textsuperscript{43} For these reasons, it recommended not only the inclusion of "Spanish descent" category in all federal reporting, but also that separate data should be obtained for Mexican Americans and Puerto Ricans.\textsuperscript{44}

Following on the heels of the U.S. Commission on Civil Rights report, in June 1974 the Federal Interagency Committee on Education established an Ad Hoc Committee to coordinate the development of a standard taxonomy and set of definitions for racial and ethnic groups who "historically were the subjects of racial oppression in American society and who were the objects of special protections under a host of federal policies and programs."\textsuperscript{45} This issue was especially salient for Latinos, who many suspected had long been undercounted in census and other public policy data as a result of shifting racial and ethnic designations.\textsuperscript{46} Such undercounting, moreover, exacerbated what Latinos believed to be a systemic failure of public bureaucrats to acknowledge "the historic discrimination against Mexican Americans" and other Spanish-speaking or Spanish-surnamed groups.\textsuperscript{47} In response to this pressure, Congress in 1976 mandated the collection and dissemination of economic and social statistics for Americans of Spanish origin or descent.\textsuperscript{48}

The Ad Hoc Committee came up with terms and definitions to cover the major categories of race and ethnicity that all agencies could use to meet

\begin{footnotes}
\item[40] See OMI \& WINANT, supra note 37, at 96-106; see generally NANCY MACLEAN, \textit{Freedom Is Not Enough: The Opening of the American Workplace} (2006).
\item[41] U.S. COMM’N ON CIVIL RIGHTS, \textit{To Know or Not to Know: Collection and Use of Racial and Ethnic Data in Federal Assistance Programs} 1 (1973).
\item[42] \textit{Id.} at 5.
\item[43] \textit{Id.} at 31-32.
\item[44] \textit{Id.} at 88.
\item[45] Snipp, \textit{supra} note 37, at 572-73.
\item[46] \textit{Id.} at 571-72; see also Jonathan Borak, Martha Fiellin \& Susan Chemerynski, \textit{Who is Hispanic?: Implications for Epidemiologic Research in the United States}, 15 \textit{EPIDEMIOLOGY \& SOC.} 240, 240-41 (2004).
\end{footnotes}
their particular data requirements. Several federal agencies used the definitions of the Ad Hoc Committee for a trial period.⁴⁹ Afterwards, representatives from a very broad group of federal agencies discussed the experiences of the trial period. As a result of these efforts, OMB adopted Directive 15, which made slight revisions in the definitions for the categories proposed by the Ad Hoc Committee.⁵⁰ As a result of OMB’s actions, federal agencies were required to collect data for at least five distinct groups, “Hispanic” being one of the designated categories.⁵¹ Importantly, “this policy allowed information to be collected with more detailed classifications.”⁵²

In the long run, Directive 15 proved to be an especially tough compromise for Latinos. First, the term “Hispanic” had been used to describe people of Iberian ancestry, not those from Latin America.⁵³ Second, and perhaps of greater concern today, the term “Hispanic” had the capacity to obscure a very heterogeneous population that included not only the tremendous numbers of individuals migrating from Latin America and the Caribbean during the 1980s and 1990s, but the millions of Chicanos and Puerto Ricans who individually and collectively could trace their family’s relationship with the United States back to the Mexican American War of 1848 or Spanish American War of 1898.⁵⁴

The 1980 Census represented the first time that the federal government made a serious effort to count the entire Latino population in the Unit-

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49. In the spring of 1975, OMB; the Department of Health, Education and Welfare; EEOC; and General Accounting Office (GAO) all agreed to use the racial and ethnic categories developed by the Ad Hoc Committee on a trial basis for at least a year. SPENCER, supra note 18, at 68.

50. SPENCER, supra note 18, at 68-70.

51. In its 1975 report, FICE recommended that the “Spanish” category be changed to “Hispanic.” FED. INTERAGENCY COMM. ON EDUC., REPORT OF THE AD-HOC COMM. ON RACIAL AND ETHNIC DEFINITIONS 12-13 (1975). It is important to note that federal bureaucrats treated the “Hispanic” category as an ethnic designation while the other four categories were a race. See id. According to one study, “[t]he OMB did not explain why ethnicity was interpreted as solely a function of Hispanic origins. However, the OMB did stipulate that when race and ethnicity were not collected separately, Hispanic should be among the possible races a respondent might choose to report for her or his racial background.” Snipp, supra note 37, at 573 n.4; see also Hattam, supra note 47, at 63-65. Some of the issues regarding race versus ethnicity are explored in Romero, supra note 6, at 249-54, 263-69. Criticism of the “Hispanic” category was especially harsh from the public health community. See, e.g., David E. Hayes-Bautista, On Comparing Studies of Different Raza Populations, 73 AM. J. PUB. HEALTH 274 (1983); Martha E. Gimenez, Latino/“Hispanic”—Who Needs a Name?* The Case Against a Standardized Terminology, 19 INT’L. J. HEALTH SERVS. 557, 558 (1989). But see Marta Tienda & Vilma Ortiz, “Hispanicity” and the 1980 Census, 67 SOC. SCI. Q. 3 (1986).

52. Snipp, supra note 37, at 573.

53. Borak et al., supra note 46, at 241.

54. See infra notes 64-87, 136-47 and accompanying text.
ed States. The "Hispanic" category was used to identify the Spanish-surnamed or Spanish-speaking population as a whole. However, question 7 of the 1980 Census form asked respondents to indicate whether they were Mexican, Puerto Rican, Cuban, or other Spanish/Hispanic. At that time, the Latino population was approximately 14,600,000, or 6.44% of the U.S. population. Mexicans made up 59.8% of the Latino population, Puerto Rican (13.8%), and Cuban (5.5%). By the year 2010, the Latino population had grown to 50.5 million, or 16% of the total U.S. population. The three largest countries of origin of Latinos, Mexico (63%), Puerto Rico (9.2%), and Cuba (3.5%), still make up over three quarters of the Latino population. Even more salient is the fact that the Census Bureau included a separate reporting sub-category for each of these communities, implying a tacit recognition by the federal agency that the issues of these four groups, including historic and contemporary patterns of discrimination, were different in degree and kind.

Studying the history of Latinos makes it clear that close attention needs to be paid to the distinct and unique histories of each Latino group. One size does not fit all. These histories are stories of racial and ethnic diversity and differential patterns of discrimination, inclusion, and assimilation in American culture and life. It is apparent that many Latino ethnic groups came to the United States in the form of myriad migrations throughout the twentieth century. However, it is also true that the United States came to them, particularly with regard to Mexican Americans and Puerto Ricans. These two groups’ initial incorporation into the U.S. was the result of conquest, not voluntary immigration.

This Part initially discusses the experiences and situation of Latino groups from Mexico, Puerto Rico, and Cuba. Latino groups from these three countries of origin are the largest and have the longest history in the United States.

However, Mexican Americans and Puerto Ricans have a much longer and more contentious history of incorporation and exclusion in the U.S. than Cubans. In addition, the initial reception that Mexican Americans and Puerto Ricans received was vastly different from that of Cubans and some other groups of Latinos. The second Part of this Section points to important socio-economic differences between these groups. These differences strongly suggest the probability that Mexican Americans and Puerto Ricans are more likely to be underrepresented in the legal profession and the nation’s law schools than Cubans and some other Latino groups. This Section concludes by suggesting that the differences in the history and socio-economic statistics of these Latino groups justifies separately reporting Mexican Americans and Puerto Ricans from Other Hispanics.

A. Brief History of Mexican American, Puerto Rican, and Cuban Experiences

1. Mexican Americans

The history of Mexican Americans in the United States begins in earnest in the mid-1830s. Through annexation, conquest, and purchase, the United States government acquired over one-half of the land mass of Mexico, as well as the mixed-race Mexicans and indigenous communities living in those lands. Mexico began to lose these lands when mostly American immigrants won the Texas War of Independence and formed the Republic of Texas in 1836. Driven by the concept of “Manifest Destiny” as well as “American arrogance and disdain towards Mexicans,” the United States annexed Texas in 1845 and “argued quite seriously” that the country should “annex the whole of Mexico.” The United States declared war against Mexico in 1846. Within two years, its professional army had defeated an out-gunned Mexican militia. In the aftermath of the war, Mexico and the United States negotiated the Treaty of Guadalupe Hidalgo, formally ending the war and allowing the United States to acquire approximately half of the Mexican territory. Five years later, in 1853, the United States ended its
acquisition of Mexican territory by purchasing approximately 30,000 square miles of land in what was to become southern Arizona and southwestern New Mexico.  

As the national boundaries shifted after the war with Mexico, America came into possession of Mexican Territory that included the land that would become the states of California, Nevada, Utah, and Arizona and parts of Colorado, New Mexico, and Wyoming. The nationality and citizenship of those Mexicans living in these lands, however, proved to be one of the most contentious and controversial aspects of American territorial expansion, especially during the negotiation of the Treaty of Guadalupe Hidalgo and its subsequent implementation. Under the terms of the final version of the treaty, Mexicans living in this territory, about 100,000 people, had the option to relocate south to Mexico or stay on their lands and become U.S. citizens. Very few Mexicans opted for relocation. Under Article IX of the Treaty, those who remained were to be:

> [i]ncorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights of citizens of the United States. In the meantime, they shall be maintained and protected in the enjoyment of their liberty, their property, and the civil rights now vested in them, according to the Mexican laws. With respect to political rights, their condition shall be on an equality with that of the inhabitants of the other territories of the United States.

Along with the Querétaro Protocol, the Treaty of Guadalupe Hidalgo seemed to stipulate political rights and formal equality for Mexicans who would become Mexican Americans. In practice, however, the newly created Mexican American community encountered significant obstacles to achieving the equal citizenship and political and property rights afforded to them under the Treaty. Although the Treaty seemed to extend to Mexico's for-
mer nationals ""all the rights of citizens,"" its language "left the decision as to the timing and conditions of conferring citizenship to the U.S. Congress." Congress, in turn, gave American legislators of the newly annexed territories and states the right to determine the citizenship status of Mexican Americans. In so doing, ""[t]his move had a severe impact on Mexicans because the state legislators chose not to give most people of color the legal rights enjoyed by White [C]itizens.""

The final treaty ratified by Congress also struck out Article X of the originally negotiated treaty. Article X ensured the property rights of all those former Mexican nationals (both large and small landowners) who lived on expansive land grants throughout what became the American Southwest. There were large tracts of unoccupied land in the former territory acquired from Mexico. At the time the treaty was signed, however,

74. Id. at 18 (quoting Treaty of Peace, Friendship, Limits, and Settlement, supra note 72).
75. Id. at 18; see generally GRISWOLD DEL CASTILLO, supra note 67.
77. Id. at 218. Menchaca goes on to detail the various federal, state, and territorial laws that failed to extend citizenship to Mexicans who were considered Indian. Id. at 220-33.
79. Article X, stricken out by the United States amendments, reads: All grants of land made by the Mexican government or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, to the same extent that the same grants would be valid, if the said territories had remained within the limits of Mexico. But the grantees of lands in Texas, put in possession thereof, who, by reason of the circumstances of the country since the beginning of the troubles between Texas and the Mexican Government, may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfill the said conditions within the periods limited in the same respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty: in default of which the said grants shall not be obligatory upon the State of Texas, in virtue of the stipulations contained in this Article. The foregoing stipulation in regard to grantees of land in Texas, is extended to all grantees of land in the territories aforesaid, elsewhere than in Texas, put in possession under such grants; and, in default of the fulfillment of the conditions of any such grant, within the new period, which, as is above stipulated, begins with the day of the exchange of ratifications of this treaty, the same shall be null and void. Treaty of Guadalupe Hidalgo, U.S.-Mex., Mar. 10, 1848, 9 U.S.T. 791, 797-98 n. 12. The nature of property ownership under first Spanish and then Mexican law did not track the fee simple designation of American property law. MARÍA E. MONTOYA, TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840-1900, 12-13, 175 (2002). Rather, a variety of individual interests and collective interests could occupy the same land grant. See id. at 163-67; STEVEN W. BENDER, TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING 18-19 (2010).
millions of acres of land, an area “nearly as big as Vermont and New Hampshire combined,” were “owned” by Mexican Americans. Yet, as early as 1880, most Mexican Americans were dispossessed of their lands. The legal divestment of these lands resulted from an unwieldy and expensive process that Congress established for land grant holders. While many land grants were ultimately confirmed by this process, the “fact of land loss by [Mexican Americans] in the Southwest... was real and staggering.” Millions of acres of land grant property owned by Mexican Americans, or to which Mexican Americans had significant property rights, were lost “through legal defeat, fraud, or financial exhaustion.” This devastating loss of property “all but wiped out [Mexican Americans] as a landholding class in the [s]outhwestern United States.

Mexican Americans, most of whom had lived on land for generations, found themselves dependent upon a racially stratified wage-labor economy in mining and an emerging agri-business economy. Often working the most dangerous and lowest paying jobs, Mexican Americans became part of a peonage system that provided farmers housing and food in lieu of wages; relegated them to unskilled, lower paying jobs because they were not considered white; and prevented them from joining labor unions to contest the conditions of their employment.

Mexican migration north to the United States did not occur in significant numbers until the beginning decades of the twentieth century. Federal immigration law was generally receptive to Mexican migrants, largely as a result of the politicking of the Sugar Beet and other related agricultural industries. Mexican migrants were exempt from the kind of wholesale exclusion that affected the Chinese, then the Japanese, and ultimately the large-scale restrictions placed on Southern and Eastern European immigrants en-

81. Id.
82. BENDER, supra note 79, at 19; LISBETH HAAS, CONQUESTS AND HISTORICAL IDENTITIES IN CALIFORNIA 1769-1936, 76 (1995).
84. BENDER, supra note 79, at 26.
86. Id.
87. MENCHACA, supra note 76, at 273.
89. Id. at 66, 131, 138.
acted in various measures by Congress from 1882-1924. Mexican immigrants and Mexican Americans filled the “vacuum” left by the embargo on cheap Asian and European labor. Mexicans, according to one contemporary critic, were called upon to do the “work no white man will do.” And, as Michael Olivas explains:

Most crucial to the agricultural growers was the need for a reserve labor pool of workers who could be imported for their work, displaced when not needed, and kept in subordinate status so they could not afford to organize collectively or protest their conditions. Mexicans filled this bill perfectly, especially in the early twentieth Century Southwest, where Mexican poverty and the Revolution forced rural Mexicans to come to the United States for work. This migration was facilitated by United States growers’ agents, who recruited widely in Mexican villages, by the building of railroads (by Mexicans, not Chinese) from the interior of Mexico to El Paso, and by labor shortages in the United States during World War I.

Proponents of Mexican immigration in the first decade of the twentieth century, particularly those in the agribusiness and railroad industries, “did not propose accepting Mexicans as full-fledged members of society. Rather, employers insisted that . . . Mexicans were an inferior race . . . well suited for hard labor . . . who would return to Mexico when their labor was no longer needed.” This final point was to counter charges that Mexicans were disease ridden, genetically predisposed to crime, would displace American workers, and could never assimilate as white Americans.

These anti-Mexican sentiments contributed to a border crossing that was unique. Mexicans faced entry requirements such as a head tax and visa fee and were subjected to humiliating procedures of bathing, delousing, medical-line inspection, and interrogation. As a result of degrading border crossing procedures, countless Mexicans were compelled to avoid formal admission and inspection to the United States. Mai Ngai, for example, described one requirement that compelled Mexicans “to report to the immigration station once a week for bathing, a hated requirement that gave rise

90. Id. at 3-4, 17-20, 52, 64.
91. Id. at 64.
92. Robert McLean, Tightening the Mexican Border, 64 SURV. 28, 55 (1930).
96. NGAI, supra note 88, at 67-68.
97. Id. at 70-71.
to a local black market in bathing certificates." In addition, the rise of the Border Patrol to police the Mexican border, unequal criminal prosecution, deportation drives, and irregular categories of immigration law made it more difficult to distinguish between those Mexicans legally in the United States and those who were not. Thus, these federal policies "created many thousands of illegal Mexican immigrants" who were seeking to achieve the promises of burgeoning industrial and agricultural interests.

The economic crisis of the Great Depression put Mexican Americans and Mexicans in direct competition with whites, for both the dwindling supply of jobs and limited public relief funds. The belief that the government ought to secure employment for American citizens first was common, as was the fear that immigrants would leech off of highly coveted relief funds. Thus, anti-Mexican sentiments rose, especially in the later years of the 1920s and into the Great Depression. More importantly, during this time, the term "illegal alien" and "Mexican" became ubiquitous and interchangeable terms in national discourse. This charted, for the foreseeable future, an era in which immigration enforcement with respect to Mexicans and Mexican Americans was largely about disciplining, controlling, or repatriating "Mexicans," regardless of their citizenship status, from a city's relief rolls, a state's labor markets, and a panicked nation.

Federal, state, and local anti-Mexican policies lasted until labor pressures shifted at the beginning of the Second World War. As the war effort required the deployment of millions of white Americans overseas, the federal government created the Bracero Program to address the domestic labor shortages. Initiated in an accord signed between President Franklin Delano Roosevelt and Mexican President Manuel Avila Camacho in 1942, the Bracero Program recruited Mexican nationals to work in the United States.
States. The program lasted twenty-two years, until December 1964, and employed nearly 4.6 million Mexicans. Although the Bracero agreements contained stipulations to ensure adequate health care, housing, food, wages, and limited working hours, growers disregarded most of these provisions. The federal government also failed to enforce these requirements and limitations. Mexican migrants were, thus, subjected to the pressures of the labor market, as well as political and ideological pressures over which they had no control.

When labor unions complained about the presence of cheap labor, the federal government turned on the Mexican migrants. The best example of this was the passage by Congress of the McCarran-Walter Immigration and Nationality Act of 1952. Although it liberalized some parts of the nation’s immigration statutes, it greatly expanded the grounds on which an un-naturalized immigrant could be expelled from the country, regardless of character, time in the United States, employment record, or connection to the country through marriage or birth of children. As historian David Gutiérrez pointed out, “Enforcement of such legislation had potentially disastrous ramifications for the resident ethnic Mexican population for the simple reason that large numbers of resident Mexican nationals had not become naturalized American citizens.” Passage of the McCarran Act led to the crackdown known as Operation Wetback. Under the order of Attorney General Brownell, the United States government “conceived and executed . . . a military operation” against the Mexican and Mexican American community in the United States. Operation Wetback “apprehended 3,000 undocumented workers a day and some 170,000 during the first three months.” While INS enforcement was ostensibly directed at illegal Mexican immigration, the military dragnets were indiscriminate. They “devastate[d] Mexican American families, disrupt[ed] businesses in Mexican neighborhoods, and fan[ed] interethnic animosities throughout the border.

107. GONZALES, supra note 65, at 174.
108. Intended as a wartime experiment, Congress gave official public sanction to the Bracero Program by enacting Public Law 78 in 1951. NGAI, supra note 88 at 138-39. For a synthesis of the program, see id. at 138-47.
112. GUTIERREZ, supra note 66, at 161.
113. Id. at 161-62.
114. NGAI, supra note 88, at 155; see also JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980); Bill Ong Hing, Immigration Policy: Thinking Outside the (Big) Box, 39 CONN. L. REV. 1401, 1427-28 (2007).
115. NGAI, supra note 88, 156.
region” of the United States. In two years, a little over 800,000 Mexican migrants (not including U.S. citizen relatives) were returned by bus, train, and boat to Mexico. The crackdown also occurred while the Bracero Program and the number of guest workers admitted under the Program nearly doubled. In so doing, Operation Wetback helped to reinforce the notions of the “illegality” of the Mexicans in the country and their value only as contract labor to meet American economic needs. Even though the Bracero Program lapsed in 1964, the push-pull nature of the Mexican migration and its problematic impact on the Mexican American community continues to this day.

Mexican Americans have had an ambivalent relationship with the color line in American history. As the immigration context showed, almost all federal and state laws either accepted people of Latin American descent as white or did not explicitly define them as non-white, black, or Indian.

116. GUTIÉRREZ, supra note 66, at 161-64.
117. NGAI, supra note 88, at 156.
118. Id.
119. GUTIÉRREZ, supra note 66, at 161-64; NGAI, supra note 88, at 156.
120. Several authors have extensively discussed the legal treatment and racial definition of Latina/os in the history of the United States. E.g., THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 2d ed. 2011); see, e.g., IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 15-40 (2003); Neil Foley, Straddling the Color Line: The Legal Construction of Hispanic Identity in Texas, in NOT JUST BLACK AND WHITE 341-57 (Nancy Foner & George M. Fredrickson eds., 2004); Iain Haney López, Race and Colorblindness After Hernandez and Brown, 25 CHICANO-LATINO L. REV. 61, 64-75 (2005); GÓMEZ, supra note 64; MARIO BARRERA, RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY (1979); Ariela J. Gross, “The Caucasian Cloak”: Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest, 95 GEO. L.J. 337 (2007). By the beginning of World War II, the United States Census had officially categorized most Spanish-surnamed Americans as White. Thomas A. Guglielmo, Fighting for Caucasian Rights: Mexicans, Mexican Americans, and the Transnational Struggle for Civil Rights in World War II Texas, 92 J. AM. HIST. 1212, 1215-16 (2006); see also Mario T. Garcia, Mexican Americans and the Politics of Citizenship: The Case of El Paso 1936, 59 N.M. HIST. REV. 187, 199-200 (1984) (describing the strong negative reaction of Mexican Americans in El Paso in 1936 to their short-lived legal classification as “colored”). The United States Supreme Court, in a 1934 case, Morrison v. California, dealing with the constitutionality of California’s alien land law, explicitly questioned whether In re Rodriguez, 81 F. 377 (W.D. Tex. 1897) (which made Mexican nationals who were not clearly indigenous eligible for citizenship) was still good law given that “not all that was there said is consistent with later decisions of this court.” Morrison v. California, 291 U.S. 82, 95 n.5 (1934). According to Justice Cardozo, “There is a strain of Indian blood in many of the inhabitants of Mexico as well as in the peoples of Central and South America. . . . Whether persons of such descent may be naturalized in the United States is still an unsettled question.” Id. Based upon the reasoning that Mexicans were “Indians” in Morrison, at least one federal court in 1935 denied the naturalization petitions of three Mexican nationals. Indian Blood Bars Mexicans as Citizens: Judge Knight at Buffalo Denies Petitions of Three for Naturalization, N.Y. TIMES, Dec. 12, 1935, at 4. The racial language
Theoretically, this entitled many Mexican Americans residents to all of the benefits of whiteness, from the ability to naturalize as free white people and attend “Caucasian” schools, to the ability to marry Anglo partners, ride with whites on public railroads, or feel secure in their property. However, there were many Mexican Americans who found that legalized “whiteness” had its limits.2 Discrimination against Mexican Americans in places such as California is well-documented,2 as are the exclusionary experiences of Mexican Americans in northern cities like Chicago, Detroit, and Minneapolis.2 All such evidence indicated how and in what ways Mexican Americans operated on the non-white side of the nation’s color line.2

The nation’s legal machinery also systematically worked to place Mexican Americans on the non-white side of the color divide.2 This reality was apparent beginning with the systematic dispossession of Mexicans’ land in the decades following the end of the Mexican American War.2 It continued in the inequitable application of immigration law and labor policy to the community in the early decades of the twentieth century2 and the exclusion or segregation of them from white public facilities.2 It is still apparent today in the intense policing and surveillance of Mexican neigh-

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121. See GÓMEZ, supra note 64, at 83-87.
124. Romero, supra note 6, at 249-54, 263-69.
125. See Guglielmo, supra note 120, at 1216.
126. See supra notes 71-84 and accompanying text.
127. See supra notes 86-117 and accompanying text; see also McKiernan-Gonzalez, supra note 95 (discussing the compulsory vaccination of Mexicans crossing the United States border in the early twentieth century).
128. See MENCHACA, supra note 76, at 135-36.
borhoods and young men and the long-standing denial of equality of educational opportunity. As historian Thomas Guglielmo has shown, such realities reinforced "powerful ideas, attitudes, assumptions, and stories about Mexican Americans . . . that not only demeaned and dehumanized them but also explained, justified, and nurtured the system of inequality."31

The Supreme Court has also recognized the history of discrimination visited upon Mexican Americans in several cases. For example, in the seminal case of Hernandez v. Texas, the Supreme Court first recognized that governmental discrimination against Mexican Americans could violate the Equal Protection Clause of the Fourteenth Amendment. In its opinion, the Court found:

[R]esidents of the community [in southern Texas] distinguished between ‘white’ and “Mexican.” The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing “No Mexicans Served.” On the courthouse grounds at the time of the hearing, there were two men’s toilets, one unmarked, and the other marked “Colored Men” and “Hombres Aquí” (“Men Here”).132

While Hernandez referenced a seemingly discrete community in Southern Texas, it pointed to a growing awareness about the past history and present

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129. See generally ESCOBAR, supra note 122 (describing the events that led to the “Zoot Suit” riots in Los Angeles in 1943).


131. Guglielmo, supra note 120, at 1216. As Professor Guglielmo points out, “Not all Mexicans and Mexican Americans experienced this system the same way; gender, class, nationality, skin color, and other factors all mattered.” Id.; see generally Foley, THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE (1997) (exploring the impact of racial, social, and economic forces in the discriminatory experiences encountered by Mexican Americans from the Civil War to World War II); LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION (1999) (describing the factual circumstances behind the United States Supreme Court’s decision to uphold Protestant White women’s abduction of White orphans who had been delivered to Catholic Mexican American families at the end of the nineteenth century); SÁNCHEZ, supra note 122 (detailing the role of citizenship, class, and gender in the ability of Mexicans to become Americans).

conditions of racial inequality and exclusion experienced by Mexican Americans across the United States.

Nearly twenty years after Hernandez, the Supreme Court decided its first non-Southern school segregation case, Keyes v. School District No. 1, which involved the public schools of Denver, Colorado. In that opinion, the Court recognized, “There is also much evidence that in the Southwest Hispanics and Negroes have a great many things in common.” The Court went on in Keyes to point out that in the United States Commission on Civil Rights reports on Hispanics education, “the Commission concluded that Hispanics suffer from the same educational inequities as Negroes and American Indians.” The Supreme Court also noted that the District Court in the Keyes case recognized that “though of different origins Negroes and Hispanics in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students.”

2. Puerto Ricans

Puerto Ricans are not immigrants to the United States, but U.S. citizens. As Pedro Malavet explains:

Like any other U.S. citizens, the Puerto Ricans are free to travel from the island to the fifty states without travel documents or immigration checks. They also qualify for government employment and serve in the U.S. armed forces. Besides Puerto Rico’s nearly four million residents, more than 2.7 million Puerto Ricans live on the United States mainland.

Nevertheless, Puerto Ricans do not possess the same legal and political rights as American citizens in the fifty states. For instance, Puerto Ricans are not allowed to vote for President or Vice-President of the United States, nor do they have voting representation in Congress. A single non-voting representative from Puerto Rico is entitled to non-voting participation in the House of Representatives.

133. See Keyes v. Sch. Dist. No. 1, Denver, 413 U.S. 189, 198 (1973). For an extensive treatment of Keyes and its relationship to equality of educational opportunity for Latinos, see Romero, supra note 6, at 263-70; see also Guadalupe Salinas, Comment, Mexican-Americans and the Desegregation of Schools in the Southwest, 8 Hous. L. Rev. 929 (1971); Gary A. Greenfield & Don B. Kates, Jr., Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866, 63 Calif. L. Rev. 662, 692-93 n.149 (1975) (“[T]he conclusion we have reached is that courts should take judicial notice of the fact that Mexican Americans have been generally perceived as nonwhite throughout the Southwest.”).


135. Keyes, 413 U.S. at 198.

Like the Mexican experience, the vicissitudes of war, foreign aggression, and racism also define the Puerto Rican experience. Puerto Rico's relationship with the United States dates to the Spanish American War and the conquest of the island by the United States. Spain ceded Puerto Rico and Cuba to the United States in the 1898 Treaty of Paris. The U.S. allowed Cuba to become an independent nation in 1905, however, Puerto Rico remained a U.S. colony. Congress did not grant Puerto Ricans U.S. citizenship until the passage of the Jones Act in 1917, nearly twenty years after the Treaty of Paris.¹³⁸

One of the main obstacles to incorporating Puerto Ricans as full citizens or admitting the island of Puerto Rico to the U.S. as a state was the racial character of the Puerto Rican people.¹³⁹ During early debates by Congress on the status of Puerto Rico, Representative Joseph Cannon of Illinois pointed out that pure-blooded Africans made up about 30% of the Puerto Rican population and another 45% to 50% had an African strain in their blood.¹⁴⁰ Representative James L. Slayden of Texas noted that full-blooded African Negroes had demonstrated their inability to govern themselves in Haiti.¹⁴¹ He also argued that the countries of Cuba and the Dominican Republic showed that hybrids could not sustain a republican form of government either.¹⁴² Slayden argued that the problem with the Puerto Ricans stemmed from their color, not their language.¹⁴³ These debates about the incorporation of Puerto Rico put into stark relief the question of the racial suitability of Puerto Ricans. As Professor José Luis Morin explains, the "entry of inferior, non-Anglo-Saxons undermined the deeply rooted ideal

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¹³⁷. *Id.* at 2.
¹⁴⁰. Weston, supra note 139, at 195, 200-01.
¹⁴¹. *Id.* at 195-96
¹⁴². *Id.* at 195.
¹⁴³. *Id.*
that the United States was to be a homogeneous nation consisting of, and designated for, Anglo-Saxon Americans."

The U.S. Supreme Court reinforced the second-class nature of Puerto Rican citizenship in a series of decisions known as the Insular Cases.\textsuperscript{145} Shortly after Congress granted Puerto Ricans citizenship, the Court in \textit{Balzac v. People of Porto Rico} made it clear that Congressional whims controlled the extension of rights to the people of Puerto Rico.\textsuperscript{146} Because Puerto Rico was never settled by "American" citizens according to the \textit{Balzac} Court, it necessitated a different legal status for the non-white residents who inhabited the island.\textsuperscript{147}

While some Puerto Ricans migrated to the United States prior to 1898, it was not until the 1950s and 1960s that Puerto Rico began to experience a noticeable exodus of its residents to the mainland. Like the history of Mexican Americans we documented earlier, economic forces drove Puerto Rican migration. As Clara Rodriguez points out, "The political relationship between Puerto Rico and the United States made Puerto Rico not just politically dependent, but also economically dependent. This dependence led to economic development strategies that resulted in the creation of a surplus population that was forced to migrate to the States."\textsuperscript{148} Driven by agricultural and manufacturing demand for labor in the Northeast and an economic downturn on the island, about 52,000 Puerto Ricans came to the mainland in 1952 alone.\textsuperscript{149} Migration from Puerto Rico to the mainland during the second half of the twentieth century has come to be known as the "Puerto

\begin{footnotes}
\item[146.] See 258 U.S. 298.
\item[147.] \textit{Id.} at 311. The legal construction of second class citizenship and its consequences for mainland Puerto Ricans are explored further in Malavet, \textit{supra} note 136, at 28-48.
\end{footnotes}
Rican Diaspora," resulting in a significant percentage of all Puerto Ricans living in the United States.\(^{151}\)

As with Mexican migrants and Mexican Americans, the experience of Puerto Rican citizens in the United States has been shaped by patterns of discrimination and exclusion. For example, according to the 1976 report from the United States Commission on Civil Rights, “the evidence is compelling that racial, ethnic, and sex discrimination are barriers to job opportunities for Puerto Ricans.”\(^{152}\) The Commission also found that mainland Puerto Ricans, despite a generation of migration from the island, are among the nation’s most destitute citizens.\(^{153}\) This situation has continued to this day for Puerto Ricans living on both the mainland and the island.\(^{154}\) Puerto Ricans who migrated to the United States continue to experience much language discrimination,\(^{155}\) persistent residential segregation,\(^{156}\) as well as “disinterest in their academic achievement.”\(^{157}\)

3. Cubans

The history of Cuban Americans in the United States is far different from that of Mexican Americans and Puerto Ricans, though Cuba itself was occupied by the United States in the aftermath of the Spanish-American War until 1903.\(^{158}\) Though there were small amounts of migration from Cu-

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150. Rodriguez, supra note 148, at 441; see also Virginia E. Sánchez Karrol, From Colonia to Community: The History of Puerto Ricans in New York City (1994).
151. Bender, supra note 79, at 114.
153. Puerto Ricans in the Continental United States, supra note 152.
158. The Treaty of Peace concluded between Spain and the U.S. on December 18, 1898, relinquished Spanish sovereignty over Cuba and allowed for U.S. occupation of the island until 1902, when the United States recognized the independence of the island. Treaty of Peace, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754. The U.S., however, continued to maintain a military presence under a lease agreement that authorized its presence at the now infamous Guantanamo Bay. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, February 23, 1903, Treaties, Conventions, Etc. 358.
to the United States in the late nineteenth and early twentieth century, a sizeable Cuban community did not emerge until the early 1960s. These Cubans were refugees to the United States from one of its Cold War adversaries. The Castro revolution in Cuba in the late 1950s produced the first big wave of Cuban immigrants. These migrants came to the U.S. as political refugees and were mostly from the educated and professional classes, mainly doctors, lawyers, and professors. They had the most to lose economically when Castro imposed a socialist regime on the island. This wave also included high-level government officials and other political dissidents. The first Cubans also received the friendliest welcome as they arrived in the U.S. The second wave of Cuban migration came to the U.S. between 1965 and 1973, arriving on daily flights from Cuba to Miami. This group of migrants was far more representative of the Cuban people as a whole than those in the first wave, though it was dominated by remaining professionals and elites and those of the middle-class. However, they also left the island for political reasons. The third wave came to the U.S. in the early 1980s. This group of Cubans, known as the “Marielitos,” was far more representative of the working class and non-white on the island.

Another exodus of Cubans started to come to the U.S. in 1994. However, in the aftermath of the collapse of the Berlin Wall and the dissolution of the Soviet Union, the Clinton Administration changed the decades-old policy of welcoming Cuban refugees. The Administration ordered the military to interdict Cubans on the high seas and detain them in safe havens set up at Guantanamo Bay and Panama. Due to this policy change, eventually


160. GARCIA, supra note 159, at 26.

161. See RICHARD R. FAGEN ET AL., CUBANS IN EXILE: DISAFFECTION AND THE REVOLUTION 75-98 (1968). Of course, those who choose to migrate were themselves torn by social distinctions and class ideologies. See Francisco Valdez, Diaspora and Deadlock, Miami and Havana: Coming to Terms with Dreams and Dogmas, 55 FLA. L. REV. 283, 284-86 (2003).


163. Id.; Pérez, supra note 159, at 129.

the Clinton Administration detained 38,000 Cubans, until it could work out a solution with the Castro government.\footnote{165}

To help the first wave of Cuban refugees, the federal government and the City of Miami created several programs to assist the acclimation of these immigrants to the United States.\footnote{166} The ABA and the University of Miami worked to retrain Cuban lawyers so that they could obtain positions in the legal profession.\footnote{167} Faculty members of the University of Miami’s School of Medicine participated in a program to provide postgraduate education to hundreds of Cuban physicians in order to qualify them as licensed doctors in the U.S.\footnote{168} In 1966, Congress passed the Cuban Adjustment Act.\footnote{169} This Act provided that any native or citizen of Cuba who had “been inspected and admitted or paroled into the United States subsequent to January 1, 1959, and has been physically present in the United States for at least two years” could be adjusted to the status of an alien lawfully admitted for permanent residence.\footnote{170} The Cuban Adjustment Act set Cubans apart from most immigrants from Latin America because once they made it to the U.S. mainland they were on a path to permanent residence.\footnote{171} The ability to achieve legal status was true whether one was white or black in Cuba. A study by Professors Aguirre and Bonilla Silva assessed racial differences among Cubans who came or attempted to come to the United States.\footnote{172} Whereas white Cubans used the refugee system to gain status in the United States, Black Cubans used the more traditional immigration lottery visa

\footnotesize
\begin{itemize}
\item \textit{For a discussion of these efforts see} Richard Delgado, Juan F. Perea & Jean Stefancic, \textit{Latinos and the Law} 81-95 (2008).
\item \textit{See} Delgado, Perea & Stefancic, \textit{supra} note 166, at 81-95 (reprinted a portion of the testimony of Robert King High, Mayor of the City of Miami, Florida Before the Subcommittee to Investigate Problems Connected with Refugees and Escapees, Judiciary Committee).
\item Some have suggested, however, that the power of this act is waning. \textit{See generally} Reynolds, \textit{supra} note 165, at 1014-15.
\end{itemize}
system that typifies Mexican migration to the United States. Nevertheless, the study concluded that because this lottery system gives preference to applicants with education and technical training, black and white Cubans coming to the United States are similar in family income, education, employment, their use of the mass media, and their relative integration into the nation-state.

The recent arrival of Cubans in an era of civil rights and the vital role that Cuba played in American Cold War policy, created a different historical trajectory for Cuban Americans than Mexican Americans or Puerto Ricans. Stephen Bender explains that Cuban Americans faced neither the severity of loss nor the exclusion that imperiled Mexican Americans in the Southwest. Moreover, prior to the toughening of immigration policies toward Cubans in the mid-1990s... Cuban immigrants enjoyed a special status of "political refugees" and thus were shielded from the perils that many Mexican immigrants faced.

Though it would be a gross-oversimplification to conclude that Cuban Americans do not have some of the same social and economic challenges faced by either Mexican Americans or Puerto Ricans, a significant degree of economic, political, and social capital underlie the relatively better opportunities available to the Cuban community in the United States.

B. Social-Economic Differences

The different historical and contemporary experiences of Mexican Americans, Puerto Ricans, and Cuban Americans have resulted in important socio-economic and educational differences between the three major ethnic groups of the Latino population. These differences suggest that Mexican Americans and Puerto Ricans are more likely underrepresented in the legal profession and the nation’s law schools than Cubans and some other Latino groups.

The median family income in 2000 for Cubans is $42,642, which far outpaces that of Mexican Americans ($33,156) and Puerto Ricans ($32,791). The explanations for these disparities are not difficult to dis-

173. Id. at 317-19.
174. Id. at 318-20. Aguirre and Bonilla Silva also note that “[f]or reasons that are not well understood at present, there is... greater... illegal emigration, among [Cuban] whites than among blacks in Cuba. It is almost certainly fuelled by contacts with relatives abroad, most of whom are white.” Id. at 322. Moreover, research suggests that black Cubans tend to seem themselves distinct, apart, and “invisible” from their white Cuban peers. See Newby & Dowling, supra note 162, at 348.
175. BENDER, supra note 79, at 108.
cern. Puerto Ricans are the group with the highest proportion of individuals living under the poverty line as well as the highest rate of dependence on welfare.\textsuperscript{177} While the poverty rate for all Puerto Ricans is 25.8\% (and 32.9\% under the age of 18), the corresponding figures for Mexican Americans are 23.5\% (28.4\%) and Cuban 14.6\% (15.9\%), respectively.\textsuperscript{178} Puerto Ricans “show increasing withdrawal from formal labor markets.”\textsuperscript{179} While Mexican Americans have a higher rate of participation in the labor force, they are working in low wage jobs.\textsuperscript{180} In contrast, Cubans do “exceptionally well” in terms of employment and income.\textsuperscript{181} This is because many of them are political refugees and live in Miami, “an enclave economy that provides employment opportunities for other Cubans, even those who speak little English or who are new arrivals.”\textsuperscript{182} Even today, almost 70\% of Cubans still live in Florida.\textsuperscript{183}

Beyond the three largest Latino groups from these countries, about 5.5\% of the Latinos are from South America.\textsuperscript{184} This group of Latinos includes those from Argentina, Bolivia, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, Venezuela, and other South American countries.\textsuperscript{185} The average family income in 1999 of $42,824 for South Americans is comparable to that of Cubans and also substantially exceeds that of Puerto Ricans and Mexican Americans.\textsuperscript{186} In addition, the rates of poverty for South Americans are also comparable with those of Cubans, 15.0\% for all and 17.1\% for those under the age of 18.\textsuperscript{187}

The economic disparities between the Latino groups noted above extends to educational attainment. For example, for populations over twenty-five years of age in 2000, South Americans (76.1\%) were most likely to graduate from high school, followed by Puerto Ricans (63.3\%), Cubans (62.9\%), and Mexican Americans (45.8\%).\textsuperscript{188} However for purposes of po-

\textsuperscript{177.} LATINOS IN A CHANGING U.S. ECONOMY 17 (Rebecca Morales & Frank Bonilla eds., 1993).
\textsuperscript{178.} See Ramirez, supra note 176, at fig.14.
\textsuperscript{180.} Id.
\textsuperscript{181.} Id.
\textsuperscript{182.} Id. (citing ALEJANDRO PORTES & ROBERT L. BACH, LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES 197-98 (1985)).
\textsuperscript{184.} Id. at tbl. 1.
\textsuperscript{185.} Of the 35,238,481 Latinos counted in the 2000 census, 1,811,676 or 5.5\% were from South America. See Ramirez, supra note 176, at tbl. 1.
\textsuperscript{186.} Id. at fig. 14.
\textsuperscript{187.} Id.
\textsuperscript{188.} Id.
tential applicants to law school, South Americans (25.2%) and Cubans (21.2%) are far more likely to obtain a bachelor’s degree than Puerto Ricans (12.5%) and Mexican Americans (7.5%).189 For the eighteen to twenty-four year old age bracket, the rate of Cuban high school graduates enrolled in undergraduate, graduate, or professional schools (45%) compared favorably with that of white, non-Hispanics.190 In contrast, the percentages are 33% and 30% for Mexican Americans and Puerto Ricans, respectively.191 Looking specifically at the twenty-five to thirty-four year old bracket of high school graduates, 3.4% of Cubans and South Americans attend graduate school, which easily outpaces Puerto Ricans (2.3%) and Mexican Americans (1.4%) and comes close to the white, non-Hispanic rate (3.8%).192

C. Why Mexican Americans and Puerto Ricans Should Be Separately Reported

To this day, the data on Latino lawyers remains scarce at best.193 Writing a few years back, Cruz Reynoso lamented the lack of statistics on Latino lawyers.194 This is still true today. For example, the “latest U.S. census figures show that Latinos now account for 16 percent of the U.S. population, but only 4 percent of its lawyers.”195 Also, the statistics showed: 1.7% of partners in U.S. law firms and 3.81% of associates were Latino.196 As Maria Chávez’s recent study found, Latino lawyers are marginalized in a profession that is not color-blind.197 However, beyond these figures and preliminary research, we do not know much more.

189. Id. at fig. 9.
191. Id.
192. See id. at 20; see also Daniel Dockterman, Country of Origin Profiles, PEW HISPANIC CENTER (2011), http://pewhispanic.org/data/origins/.
193. The only study to date is MARIA CHÁVEZ, EVERYDAY INJUSTICE: LATINO PROFESSIONALS AND RACISM (2011) (detailing how the experiences of Latino lawyers reflect the broader experiences of Latino professionals in a multiracial United States).
197. Chávez, supra note 195, at 167. Chávez argues extensively that education makes a tremendous difference in the professional outcomes of Latino lawyers. Id. at 133-51.
The AALS’s reporting requirements already require law schools to report Mexicans and Puerto Ricans separately from Other Latinos. This makes sense. The history of both Mexican Americans and Puerto Ricans in the United States is a history of conquest and colonialism, coupled with racial discrimination. Many of them are involuntary migrants, in the sense that the United States came to their country through war and conquest. The economic and educational situation of Mexican Americans and Puerto Ricans also suggests that they are likely to be more underrepresented among Latinos than other ethnic groups, including Cubans. In the year prior to the United States Supreme Court’s decision in *Grutter*, for instance, the University of Michigan Law School “had an entering class with a total minority population of about 25%, but with no Mexican-Americans among its 6.8% Hispanics and 6% African Americans.” Thus, if law schools complied with the AALS’s reporting requirements, this information would likely show that Mexican Americans and Puerto Ricans are more underrepresented among the nation’s law students than other Latino ethnic groups, despite having lengthier histories of discrimination in the U.S. By distinguishing Latino ethnic groups in the way AALS does, these reporting requirements will allow the legal academy to know with greater precision how well a given school’s diversity programs accomplish their stated goals.

One additional suggestion that we are making to the AALS with regard to how law schools should report Latino students addresses those who check multiple Latino ethnic boxes. The AALS has not provided guidance to law schools regarding what they should do with someone who indicates that they are Mexican American and Other Hispanic, Puerto Rican and Other Hispanic, or Mexican American and Puerto Rican. Since the AALS has a catchall category of Other Hispanics for those who are neither Mexican American nor Puerto Rican, we believe that law schools should also report the first two groups of multi-ethnic Latinos in this category. Law schools should divide those who only check the Mexican American and Puerto Rican equally between both categories. Thus, law schools should count 50% of them as Mexican American and 50% as Puerto Rican.

II. BLACK LATINOS SHOULD BE REPORTED SEPARATELY

Prior to the Guidance, law schools could use the one-question format for collecting racial and ethnic information. Under the one-question format, respondents were asked to select one of the following categories: “American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of His-
panic origin; Hispanic; and White, not of Hispanic origin. The one-
question format required a person to choose between identifying with their
Hispanic origin or their race. Thus, Latinos who were also black had to
choose between designating their racial/ethnic category as Black or Latino.
This dilemma is reflected in the experience of a Black Latino living in Al-
buquerque, New Mexico.

"The United States expects me to choose. I've been Black (negro) all my life.
Black in Cuba, and I'd be Black in China. When I came here I found out that I
wasn't really Black any more, Now I was Hispanic. I have to pick a box: Am I
Black or Hispanic?"

The DOE seems to be somewhat responsive to the above dilemma in
that it now requires educational institutions to use the two-question format,
which separates the Latino ethnicity question from the question about
race. In issuing the Guidance, the DOE followed the lead of OMB in the
1997 Revised Standards. OMB indicated that the preferred method for gather-
ing racial and ethnic information is the two-question format, with the La-
tino ethnicity question first. OMB noted that the reason this format should
be preferred is that Latinos do not always identify with the American racial
categories. The 2000 Census counts provided plenty of evidence to sup-
port this statement. The 1997 Revised Standards did not allow for the use of

200. Directive 15 stated that it was preferable to collect data about race separate from
ethnicity. However, it also provided a means to collect the data in a one question format. If
collected in a one question format the minimum acceptable categories were as follows:
"American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic
origin; Hispanic; and White, not of Hispanic origin." Directive No. 15: Race and Ethnic
Standards for Federal Statistics and Administrative Reporting (as Adopted on May 12,

201. Newby & Dowling, supra note 162, at 343 (quoting Lazaro, Afro-Cuban immi-
grant in Albuquerque, New Mexico).

202. The issue about whether "Hispanic"/"Latino" is an ethnic category or a racial
category has long vexed federal bureaucrats as well as those who self-identify as such. See
Jonathan Borak, Martha Fiellin & Susan Chemerynki, Who is Hispanic? Implications for
Indeed, historical as well as contemporary divisions between Blacks and Latinos make the
question of categorization even more troubling, especially when it comes to access to public
as well as private resources. See Neil Foley, QUEST FOR EQUALITY: THE FAILED PROMISE OF
BLACK-BROWN SOLIDARITY 140-57 (2010); Tom I. Romero, II, War of a Much Different
Kind: Poverty and the Possessive Investment in Color in a Multiracial 1960s United States,
26 CHICANA/O-LATINA/O L. REV. 69 (2006). Nevertheless, we believe that if the current
reporting framework is maintained in its basic racial-ethnic form, Black Latinos should be
counted separately.

203. Wallman et al., supra note 19, at 1705.

204. See id. at 1705.
a “Some Other Race” category. However, the Census Bureau obtained an exemption to permit its use for the 2000 Census, primarily because it believed that many Latinos would mark it. Slightly more than thirty-five million people indicated that they were Latino. About 47.9% checked only the white racial box and an additional 42.2% checked only the “Some Other Race” Category. Of those who checked the “Some Other Race” box on the 2000 Census, over 95% also identified themselves as Latino. “Thus it is clear that reporting of [Some Other Race] is highly related to how [Latinos] report [their] race.”

The DOE also mandates that educational institutions count any individual who indicates that they are Latino as Latino, regardless of what racial categories they check. According to the DOE, this will lead to the most accurate counting of Latinos. As a result, law schools’ reporting requirements for the DOE provide that they include Black Latinos among those in the Latino category.

According to the 2000 Census, 3.9% of Latinos indicated that they were black. Under the one-question format, the problem of classifying


206. See Reynolds Farley, Identifying with Multiple Races: A Social Movement that Succeeded But Failed?, in THE CHANGING TERRAIN OF RACE AND ETHNICITY 134 (Maria Krysan & Amanda E. Lewis eds., 2004) (stating that approximately one-third of those who identified with more than one race wrote their second race in a Spanish term).


208. del Pinal et al., supra note 205, at tbl. 1.

209. Id. About 15.4 million respondents checked just the “Some Other Race” (SOR) category and 3.2 million checked SOR along with another racial category on the 2000 Census. Id. Approximately ninety-seven percent of those who just checked only SOR also responded that they were Hispanic or Latino, and over ninety percent of those who checked SOR and another racial category also indicated that they were Hispanic or Latino. Id. See also Sharon M. Lee & Barry Edmonston, New Marriages, New Families: U.S. Racial and Hispanic Intermarriage, 60 POPULATION BULL. 9 (2005), available at http://www.prb.org/pdf05/60.2NewMarriages.pdf.

210. del Pinal et al., supra note 205, at 4. For the 2010 census, 53% of Latinos checked only the white racial box and 36.7% checked only the Some Other Race box. See Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, Overview of Race and Hispanic Origin 2010, U.S. CENSUS BUREAU tbl. 2, (2011), available at http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf. In addition, 97% of those who checked only the “Some Other Race” box also answered that they were Latino. Id. at 16.

211. Guidance, supra note 4, at 59,266-67.

212. Id. at 59,270.

213. del Pinal et al., supra note 205, at 4. The Census Bureau developed procedures for modifying race data to eliminate the “Some Other Race” category, because other federal agencies do not use this category. Under the modified procedure, 3.9% of Latinos were reported as black. Id. The unmodified percentage was 2%. Id.
someone with black ancestry as Latino who identifies more with the offered racial category never arose. Now, however, law schools run the risk of counting someone as Latino who actually identifies more with being black than with being Latino. After the promulgation of the Guidance in October of 2007, some selective colleges and universities began to allow individuals to check more than one racial/ethnic box. Their common practice was to classify students who indicated that they were both black and Latino as black.

Classifying Black Latinos as Latinos instead of as black could affect their admissions prospects. When law school admissions committees use race and ethnic classifications for determining admissions, they must employ an individualized admissions process. Nevertheless, there is little doubt that admissions officials—at least in their minds—compare the standardized test scores and grade point averages of a particular applicant from a given racial/ethnic group to the scores and grade point averages of other applicants of the same racial/ethnic group. The average LSAT score for African Americans who took the test during the 2008-09 academic year was 142.25, for Latinos generally 146.6, for Mexican Americans 147.8, and Puerto Ricans 138.5. Since the DOE requires law schools to count Black Latinos as Latinos, admissions officials could come to compare Black Latinos with those in the Latino categories instead of the Black/African American category. This change in comparison group could harm the admissions prospects of many Black Latinos. Before law schools make a definitive decision about how to count Black Latinos, it makes sense to see how many Black Latinos there are among the applicant pools and student bodies of law schools.


215. *Id.*


217. This was one of the points that Chief Justice Rehnquist stressed in his dissenting opinion in *Grutter.* *See id.* at 382-86 (Rehnquist, C.J., dissenting).

218. SUSAN P. DALESSANDO ET AL., LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2003-2004 THROUGH 2009-2010 TESTING YEARS 19 (2010), available at http://www.lsac.org/LsacResources/Research/TR/TR-10-03.pdf. The standard deviations of the various racial/ethnic groups were 8.5, 9.5, 8.8, and 10.1, respectively. *Id.* LSAT scores for Puerto Ricans for 2009/10 were Hispanics/Latinos 146.4 and for Puerto Ricans 138.4. *Id.* at 20. LSAC combined the LSAT scores of Mexican Americans with those of the other Hispanic Latinos for 2009/2010. *Id.*
III. BLACK MULTIRACIAL AND OTHER TWO OR MORE RACES CATEGORIES SHOULD BE INCLUDED

Like law schools, selective higher education undergraduate institutions have not typically separated black students into different racial/ethnic categories. However, scholars and commentators have recently pointed to a growing historic change in the racial and ethnic ancestry of blacks enrolled in America's selective undergraduate colleges and universities.\(^{219}\) Black Multiracials and Black Immigrants appear to constitute a disproportionately large percentage of black students attending these institutions.\(^ {220}\) In fact, we may be witnessing the ethnic cleansing of Ascendant Blacks from the campuses of many of these institutions, with the nation's law schools following a few years behind them. The first Section of this Part will argue that the AALS should include a separate reporting category for Black Multiracials in order to provide data to assess the magnitude of the changing racial ancestry of blacks in law schools.

Law schools must report non-Latinos who mark more than one racial category to the DOE in a new Two or More Races category. The AALS, however, has rejected the inclusion of this category. Thus, law schools seeking to provide totals using the AALS categories will have to reallocate those in the Two or More Races category to reporting categories of the AALS. This is a very complex issue. Placing Black Multiracials in the Two or More Races category could significantly reduce the counts of Black/African American students. Thus, we believe that a principal reason to reject the Two or More Races category is the fact that Black Multiracials are placed in this category.\(^ {221}\) However, separately reporting Black Multiracials should

\(^{219}\) See infra note 239 and accompanying text.

\(^{220}\) See Brown, supra note 14, at 261-62.

\(^{221}\) During the comment period for the Guidance, some respondents expressed concern that the reporting requirements of the Guidance regarding the Two or More Races category could lead to a significant reduction in the black student population. The DOE responded to these concerns by stating, "In most instances, the Department anticipates that the size of the [T]wo or [M]ore [R]aces category will not be large enough to cause significant shifts in student demographics." Guidance, supra note 4, at 59270. The DOE noted in the background information that "[i]n the 2000 Census, 2.4 percent of the total population (or 6.8 million people) identified themselves as belonging to two or more racial groups. For the population under [eighteen] years old, 4.0 percent (or 2.8 million children) selected two or more races." Id. at 59,274. The problem with these national statistics is that the small percentage of non-Hispanic whites that are multiracial (2%) obscures the much higher percentage of multiracials among the minority racial groups. Sonya M. Tafoya et al., Who Chooses to Choose Two?, in The AMERICAN PEOPLE: CENSUS 2000, at 349 (Richard Farley & John Haaga eds., 2005). "In the 2000 Census, 4.8% of those who checked the Black category also checked another category, twice the percentage of the American population as a whole." Brown, supra note 14, at 289. Thus, from the 2000 Census, the percentage of blacks between the ages of 17 and 21 that were multiracials was 6.3% at the time the DOE issued the Guidance. See Brown, supra note 14, at 262.
alleviate this concern. The second Section of this Part will urge the AALS to consider including an “Other Two or More Races” category.

A. AALS Should Consider Adding a Black Multicultural Category

William Bowen and Derek Bok in their groundbreaking book, The Shape of the River, noted that “it is probably safe to say, . . . that prior to 1960, no selective college or university was making determined efforts to seek out and admit substantial numbers of African Americans.” Such a situation also prevailed in the nation’s predominately-white law schools. Law schools began employing affirmative action admissions practices in 1965.

In 1960, interracial marriage between blacks and whites was still illegal in over twenty states. Of the almost twelve million blacks over the age of fifteen in the country, only 51,000 were married to whites. The instructions for determining a person’s race on the 1960 Census form stated, “‘A person of mixed White and Negro blood was to be returned as Negro, no matter how small the percentage of Negro blood.’” Thus, the one-drop rule was official census policy. In addition, census enumerators were still responsible for determining a person’s racial classification based on phenotypical appearances. Using an enumerator’s visual acuity to determine an individual’s racial identity, as opposed to self-identification, however, was consistent with viewing race as a socially ascribed identity. Thus, the census tallies with regard to racial data provided information that allowed American society to map out the effects of racial social practices,
casual racial identification, and the structure of racial hierarchies. The number of blacks counted by the Census Bureau represented the number of individuals in our society who “appeared” to be black as determined through the application of the one-drop rule, not the numbers of individuals who self-identified as black.

Much has changed with regard to the racial ancestry of blacks in the United States since the adoption of affirmative action admissions policies. The Supreme Court’s 1967 decision in *Loving v. Virginia* struck down antimiscegenation statutes throughout the country.\(^{229}\) As time passed from the beginning of the Civil Rights Movement in the 1960s, the objections to interracial dating and marriage between blacks and whites began to wane. For example, in 1958, only 4% of whites approved of interracial marriage between blacks and whites.\(^{230}\) A year after the *Loving* decision, a Gallup poll showed that 17% of whites and 56% of blacks approved of interracial marriage.\(^{231}\) By 2003, the Gallup poll showed that 70% of whites and 80% of blacks approved of interracial marriages.\(^{232}\)

The greater societal acceptance of interracial dating and marriage also increased its frequency and the numbers of mixed-race blacks. According to the 2000 Census, 9.7% of married black men and 4.1% of married black women reported having a spouse of another race.\(^{233}\) Younger blacks are even more likely to cohabitate and marry outside of their race.\(^{234}\) A recent Pew Center Research Report noted that 22% of black male and 9% of black female newlyweds, married outside of their race.\(^{235}\) Increased interracial dating, cohabitation, and marriage has also increased the percentage of mixed-race blacks. According to the 2010 Census, 7.4% of blacks,\(^{236}\)

\(^{229}\) 388 U.S. 1, 12 (1967).
\(^{231}\) Id.
\(^{232}\) Id.
\(^{234}\) A recent study of data from the 2000 census data showed that interracial marriage and cohabitation were much more frequent among blacks married between the ages of 20 and 34. See Zhenchao Qian & Daniel T. Lichter, *Social Boundaries and Marital Assimilation: Interpreting Trends in Racial and Ethnic Intermarriage*, 72 Am. Soc. Rev. 68, 76-81 (2007).
from 4.8% in 2000\textsuperscript{237}) also indicated another racial category, over two and a half times the 2.9% of the American population as a whole.\textsuperscript{238} As one might expect, the younger blacks are, the more likely they are to be multiracial. The percentage of mixed-race blacks between the ages of 15 and 19 was only 6.5%.\textsuperscript{239} However, for blacks between the ages of 10 and 14 it increased to 9.3%, for those between the ages of 5 and 9 to 11.9%, and for those under the age of 5 to 13.7%.\textsuperscript{240}

As the number of mixed race blacks and biracial couples has increased, more of them (or their parents on their behalf) are asserting a racial identity that is distinct from other blacks. In his recently published book entitled \textit{Disintegration: The Splintering of Black America}, noted black journalist Eugene Robinson pointed to several divisions within the black community.\textsuperscript{241} One of these divisions included highlighting the existence of Black Multiracials. Robinson observed that the concept of thinking of all blacks as alike is obscuring the importance of these divisions.\textsuperscript{242}

The requirement of the DOE that mandates that law schools, and all other educational institutions, allow individuals to check multiple racial boxes traces back to advocacy by multiracial groups in the late 1980s and 1990s to add a separate "multiracial" category on the 2000 Census form.\textsuperscript{243} From this process, OMB eventually adopted the 1997 Revised Standards. OMB indicated that the most controversial and sensitive issue during discussions about the 1997 Revised Standards dealt with how to address the classifications of individuals with parents of different races.\textsuperscript{244}

\begin{itemize}
\item \textsuperscript{237} See \textsc{CensusScope, United States Multiracial Profile}, http://www.censusscope.org/us/print_chart_multi.html (last visited Jan. 18, 2012).
\item \textsuperscript{238} See \textsc{Humes, Jones & Ramirez, supra note 210, at 8}.
\item \textsuperscript{239} According to the 2010 Census, of the 3,544,000 individuals between the ages of 15 and 19 who were classified as Black or African American or Black or African American in Combination, 229,000 were classified as Black or African American in combination (229,000/3,544,000 = 6.5%). See tbl. 1. Population by Sex and Age, for Black Alone and White Alone, Not Hispanic: 2010, U.S. Census Bureau (Jun. 2011), http://www.census.gov/population/race/data/files/ppl-bc10/bc10tab1.xls [hereinafter \textit{Black Alone and White Alone}]; tbl. 1. Population by Sex and Age, for Black Alone or in Combination and White Alone, Not Hispanic: 2010, U.S. Census Bureau (Jun. 2011), http://www.census.gov/population/race/data/files/ppl-bc10/bc10tab1.xls [hereinafter \textit{Black Alone or in Combination and White Alone}].
\item \textsuperscript{240} For ages 10 and 14 the corresponding figures were 307,000 and 3,294,000 (307,000/3,294,000 = 9.3%); for ages 5 to 9 the corresponding figures were 407,000 and 3,415,000 (407,000/3,415,000 = 11.9%); for under the age of five the corresponding figures were 518,000 and 3,780,000 (518,000/3,780,000 = 13.7%). \textit{Black Alone and White Alone}, supra note 239; \textit{Black Alone or in Combination and White Alone}, supra note 239.
\item \textsuperscript{241} See generally \textsc{Eugene Robinson, Disintegration: The Splintering of Black America} (2010).
\item \textsuperscript{242} \textit{Id.} at 19-24.
\item \textsuperscript{243} For a discussion of this advocacy see Brown, supra note 14, at 275-82.
\item \textsuperscript{244} See \textsc{Katherine K. Wallman et al., supra note 19, at 1704-05}.
\end{itemize}
Groups like the Association of MultiEthnic Americans (AMEA), Project RACE (Reclassify All Children Equally), and A Place for Us (APFU) spearheaded this effort. According to Kim Williams—who extensively studied the movement to alter the federal forms to allow individuals to mark one or more boxes—“white, liberal, and suburban-based middle-class women (married to black men) held the leadership roles in most multiracial organizations.” Multiracial advocates generally argued that mixed-race individuals viewed themselves as multiracial rather than belonging to a single racial or ethnic group. A “multiracial” designation was, therefore, a better reflection of the true understanding of the multiracial person’s racial identity. These groups noted the psychological problems created for biracial children who were forced to identify with one parent more than the other. Multiracial advocates also argued that the “one-drop rule,” long-used to classify any person with any black blood as black, was inherently racist, does not apply to any other racial or ethnic group in the U.S., and appears to exist only in the U.S.

Multiracial groups were unsuccessful in their efforts to get a multiracial category added to federal forms. However, OMB took account of their arguments in deciding that when programs that receive federal assistance seek to gather racial and ethnic information on forms filled out by respondents, they allow respondents to mark one or more racial boxes.

Even though selective higher education undergraduate institutions have not typically divided their black students into different racial/ethnic categories, scholars and commentators have recently pointed to a growing historic change in the racial and ethnic ancestry of blacks enrolled in America’s selective undergraduate colleges and universities. For example, at a

245. See Kerry Ann Rockquemore & David L. Brunsma, Beyond Black: Biracial Identity in America 1-2 (2d ed. 2008); see also Williams, supra note 230, at 7, 9.
246. Williams, supra note 230, at 112.
247. See Rockquemore & Brunsma, supra note 245, at 3.
248. See id. at 19-20.
249. In sociological circles, this “One Drop Rule” is referred to as “hypodescent.” Id. at 4, 58.
250. Id. at 18-19.
gathering of black Alumni in 2003, Harvard professors Lani Guiner and Henry Louis Gates noted that Black Multiracials and Black Immigrants together comprised two-thirds of Harvard’s black undergraduate population. Following the “Harvard Revelation,” a 2005 article written by Ronald Roach in *Diverse Issues in Higher Education* pointed to the findings of a study of the black presence that entered twenty-eight selective colleges and universities in 1999. The study revealed that 17% of those black freshmen were Black Multiracials. In addition, a 2007 survey of college freshmen who entered the thirty-one elite colleges and universities comprising the Consortium on Financing Higher Education (COFHE) revealed that 19% of the black students at these institutions were Black Multiracials. In contrast, according to the 2000 Census counts, in 2007, multiracials only accounted for 6.3% of the black population between the ages of seventeen and twenty-one. As further evidence of the widespread nature of the increase in Black Multiracials at selective higher education institutions, statistics from the admissions office of Indiana University-Bloomington show that Black Multiracials comprised 18.7% of black students in the combined incoming freshman classes in the Fall of 2010 and 2011.

The overrepresentation of Black Multiracials among black students in selective higher education undergraduate programs is not surprising. Studies have pointed out that “black/white intermarriages tend to occur when the white spouse trades the privilege of racial status for the higher status of a better-educated black partner.” Census Bureau statistics indicate that

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255. Id.
256. Id.
257. The thirty-one institutions that are part of COFHE are among the most prestigious in the country. They are: Amherst College, Barnard College, Brown University, Bryn Mawr College, Carleton College, Columbia University, Cornell University, Dartmouth College, Duke University, Georgetown University, Harvard University, Johns Hopkins University, MIT, Mount Holyoke College, Northwestern University, Oberlin College, Pomona College, Princeton University, Rice University, Smith College, Stanford University, Swarthmore College, Trinity College, University of Chicago, University of Pennsylvania, University of Rochester, Washington University in St. Louis, Wellesley College, Wesleyan University, Williams College, and Yale University. *CONSORTIUM ON FINANCING HIGHER EDUCATION*, http://web.mit.edu/cofhe/ (last visited Nov. 6, 2011).
258. See Brown, *supra* note 14, at 262.
259. Id.
260. See statistics on the racial breakdown of black students obtained from the Vice Provost of Enrollment Services of Indiana University-Bloomington on September 10, 2011. E-mail from David B. Johnson, Vice Provost, Office of Enrollment Management, Indiana University-Bloomington, to author (Sept. 9, 2011) (on file with author).
261. Simon Cheng & Selena Mostafavipour, *The Differences and Similarities between Biracial and Monoracial Couples: A Sociodemographic Sketch Based on the Census*
Black Multiracials tend to come from parents with more education and live in families with higher incomes than other blacks. In addition, Black Multiracials, especially if their non-black parent is white or Asian, may have fewer cultural discontinuities with educational institutions and school officials than other blacks.

The advocacy by multiracial groups asserting a different racial identity from that of Black/African Americans, the evidence of the overrepresentation of Black Multiracials among black students at selective undergraduate institutions, and the growing numbers of Black Multiracials approaching the ages at which most people apply to law schools, are all good reasons to separate Black Multiracials from Black/African Americans. However, grouping Black Multiracials with the Two or More Races students has its own problems. The average LSAT score for African Americans who took the test during the 2009-2010 academic year was 142, for American Indian/Alaskan Natives (AIAN) 147, for Asian Americans 152.4, and for Caucasians 152.9. Before the 2010-11 academic year, law schools could require individual LSAT scores for each racial or ethnic group.


263. Scholars have interpreted the way that African Americans’ culture affects their educational performance in different ways. For example, the Afrocentrist argued that the Anglocentric bias of the traditional educational curriculum was responsible for the poor performance of black schoolchildren. Kevin Brown, Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education, 78 IOWA L. REV. 813, 853-56 (1993). Scholars like John H. McWhorter argue that the problem of African American culture is the “stranglehold of Victimology, Separatism, and Anti-Intellectualism.” See John H. McWhorter, Losing the Race: Self-Sabotage in Black America 260 (2000). Nigerian-born educational anthropologist, John Ogbu, draws distinctions between the cultures of involuntary minorities like African Americans and voluntary immigrants, like African and Caribbean immigrants. John U. Ogbu, Immigrant and Involuntary Minorities in Comparative Perspectives, in MINORITY STATUS AND SCHOOLING: A COMPARATIVE STUDY OF IMMIGRANT AND INVOLUNTARY MINORITIES 3, 3-30 (Margaret A. Gibson & John U. Ogbu eds., 1991). He notes that involuntary minorities throughout the world have difficulty succeeding in education. Id. at 4. Their situation is unfavorably contrasted to that of voluntary immigrants who generally come to the host country in search of better economic, political, or religious motivations. Id.

individuals with more than one race to select only one racial category. Prior to having the ability to mark multiple racial categories, it is likely that the overwhelming majority of Black Multiracials would have chosen the Black box. This choice would maximize their admissions prospects. However, if admissions officials start to compare Black Multiracial applicants to others in the Two or More Races box, such a comparison is likely to have a devastating impact on the admissions prospects of self-identified Black Multiracials. White/Asian Multiracials are likely to constitute the largest single multiracial group in the Two or More Races category. Thus, the LSAT score for the comparison group of Black Multiracials could go from 142.25 to as high as 152.4. In fact, LSAC reported that the median LSAT score of “Multiple Ethnicities” on the 2009-2010 LSAT was 150.8.

Many Black Multiracials who self-identify with multiple racial categories may selfishly choose to mark only the Black racial box for fear of this very consequence. Thus, requiring law schools to report Black Multiracials separately could encourage them to be more honest in their box checking. In addition, it will allow law schools the opportunity of discovering how many Black Multiracial applicants they have in their applicant pools and student bodies.

B. AALS Should Consider Adding an Other Two or More Races Category

The AALS decided not to include the Two or More Races category required by the DOE. Having eliminated the Two or More Races category means that law schools will have to reallocate those they report to the ABA in the Two or More Races category into the categories that the AALS lists. As of the time of this writing, the AALS had not provided law schools with directions on how to conduct these reallocations. If the AALS does not provide such directions, then it will leave the decision about how to perform this reallocation up to the individual law schools’ judgment. Reallocation of individuals who have indicated that they perceive themselves as multiracial into monoracial categories is a very complicated process. For example, should a law school report an Asian/Black multiracial as black, Asian, or both? If allocated between both categories, should the allocation be 50% to each category or should a higher percentage be allocated to the black cate-

4B (2010), available at http://www.lsac.org/LsacResources/Research/TR/TR-10-03.pdf. The standard deviations of the various racial/ethnic groups were 8.7, 9.1, 10.7, and 9.3, respectively. Id.

265. The largest groups of non-Latino multiracials on the 2000 census were White/Asians (1,623,234) followed by White/AlAN (1,432,309). See Humes, Jones & Ramirez, supra note 210, at 6 tbl. 2.

266. DALESSANDRO ET AL., supra note 264, at 20. The 2009/2010 LSAT mean scores for American Indian/Alaskan Native was 146.9, for Native Hawaiian/Other Pacific Islander was 146.4, for Asian 152.4, and for White/Caucasians 152.9. Id.
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gory than the Asian category or vice versa, and why? How should law schools report an Asian/White multiracial or an Asian/American Indian multiracial? Some law schools may simply report these students as students whose race is unknown. Since different law schools will employ different methods, the data regarding the racial composition of various law schools will not be uniform and easily comparable.

When OMB adopted the 1997 Revised Standards, it understood that data collected pursuant to these standards would not be comparable with prior racial and ethnic data. The Interagency Committee, which recommended the revised standards eventually adopted by OMB, created a Tabulation Working Group. So that the data collected after the change could be compared to earlier data, that Group came up with eleven different ways to reallocate multiracials into the single race categories that existed prior to the adoption of the 1997 Revised Standards.

Whatever allocation method a given law school uses for multiracial individuals, the officials responsible for that decision must justify it in light of the evidence that these individuals self-identify in multiple racial categories. If the law school opts to place these multiracial individuals into a single racial category, then the law schools are imposing a racial identity on multiracials that these individuals have implicitly rejected. In addition, law schools that choose to place Black Multiracials in the Black/African American category would revive the one-drop rule. However, as noted, many law schools may simply avoid this problem and report these students as ones whose race is unknown.

As an alternative to reallocation of those reported to the DOE in the Two or More Races category, the AALS should include an Other Two or More Races category. We believe that a principal reason to refuse to embrace the Two or More Races category is that it places Black Multiracials there instead of in the Black/African American category. However, since this Article urges the AALS to separately list Black Multiracials, that should

267. AALS also has a category for students whose race/ethnicity is unknown.
268. From 1993 to 1997, the federal government conducted an extensive review of the racial categories specified in Directive 15. For a listing of the steps taken, see Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,783-84 (Oct. 30, 1997). Various federal agencies created an Interagency Committee for the Review of Racial and Ethnic Standards (hereinafter "Interagency Committee") to make recommendations to OMB. Id. at 58,782. The Interagency Committee included representation from thirty federal agencies. Id. The Tabulation Working Group was a subcommittee of the Interagency Committee.
eliminate a principal objection to the inclusion of an Other Two or More Races category.\footnote{See supra Section III.B.}

If the AALS adds the Other Two or More Races category it will simplify the reporting requirement issues that law schools will have to address. It also means that adding the totals in the Black Multiracial category to the totals in the Other Two or More Races category will provide law schools with an easy way to aggregate back to the Two or More Races totals that they report to the DOE.

Another potential concern about using the Two or More Races category is the implications for American Indian and Alaskan Native (AIAN) multiracials. First, we want to note that under our scheme, as well as that of the DOE, law schools must report a person who indicates that they are Latino and AIAN in their counts of Latinos. Under our scheme, an AIAN who also checks the Black/African American box will be reported as a Black Multiracial. Thus, we are primarily talking about AIANs who also check only a white and/or Asian American box. However, the overwhelming majority of these individuals will be White/AIAN multiracials.\footnote{According to the 2010 census, there were 2,288,331 AIANs in combination with one or more races. See \textit{Humes, Jones & Ramirez}, supra note 210, at 13 tbl.7. Of this number, 505,754 also indicated that they were Latinos and, thus, educational institutions would report them in their counts of Latinos. \textit{Id}. In addition, there were also 237,850 that were black alone and 180,848 that indicated both black and white in addition to American Indian. \textit{Id}. Thus, at least 418,698 would be reclassified as Black Multiracials. As a result, at least 40.4\% \((505,754 + 505,754 + 418,698)/2,288,331\) of the AIAN multiracials will be classified as either Latinos or Black Multiracials. Of the remaining AIAN multiracials, 1,205,924 (52.7\% of the total) only indicated white as the other racial box and 46,572 (2\% of the total) indicated only Asian as their other racial box. \textit{Id}. Thus, the percentage of AIAN multiracials that are Latinos, Black Multiracials, or just checked either the white or Asian racial box amounts to almost 95\% of the AIAN multiracials.}

The main reason we chose to leave these multiracials in the Two or More Races category is to reduce the administrative burden on law schools. However, we also want to note that our suggestion for not reallocating AIAN multiracials into the AIAN category is consistent with what commentators C. Anthony Broh and Stephen D. Minicucci proposed. They looked into the reallocation of those in the Two or More Races category into single race categories for the 31 elite colleges and universities comprising COFHE. Broh and Minicucci concluded that it was best to put AIAN/White multiracials in the Caucasian/White category, not the AIAN category.\footnote{See \textit{C. Anthony Broh & Stephen D. Minicucci, Racial Identity and Government Classification: A Better Solution} 1 (2008), http://mededits.duhs.duke.edu/wp-content/uploads/broh-and-minicucci-ii-air-2008.pdf.} They based their decision on the fact that these multiracials come from families with higher levels of income that are closer to whites than to American Indians. In addition,
the AIAN/White multiracials were more likely to identify with being white than with being American Indian.274 Broh and Minicucci also suggested that these institutions should put AIAN/Asian multiracials in the Asian category. We are not going as far as Broh and Minicucci because we are embracing the use of an Other Two or More Races category.

IV. BLACK IMMIGRANTS AND ASCENDANT BLACKS SHOULD BE REPORTED SEPARATELY

As with Black Multiracials, there is also evidence that Black Immigrants constitute a disproportionately large percentage of the black students in selective undergraduate institutions. For example, a follow-up study to the study mentioned earlier275 of the black presence that entered twenty-eight selective colleges and universities in 1999 focused solely on the presence of Black Immigrants. That study revealed that Black Immigrants constituted only 13% of the black eighteen and nineteen year olds, yet they made up 27% of black freshmen at these institutions.276 The percentage of Black Immigrants was actually higher at the ten most selective schools in the study, constituting 35.6% of their student bodies.277 It was even higher at the four Ivy League schools (Columbia, Princeton, University of Pennsylvania, and Yale) in the survey where they made up 40.6% of the black students enrolled.278 According to Dr. Michael T. Nettles, Vice President for Policy Evaluation and Research at the Educational Testing Service, “If Blacks are typically 5 and 6 percent of the population at elite colleges, then the representation of native U.S. born African-Americans might be closer to 3 percent.”279

As with Black Multiracials, the percentage of Black Immigrants approaching the age at which most individuals enter law schools is on a steep upward trajectory. Changes in American immigration law since the adoption of affirmative action policies, starting with the landmark Hart-Cellar’s Act that became effective in 1968, have led to substantial increases in the number of foreign-born blacks in the U.S.280 The percentage of blacks that

274. Id. at 21.
275. See infra note 264 and accompanying text.
277. Id.
278. Id.
279. Roach, supra note 254.
are foreign-born has increased from 1.1% in 1970,281 to 4.9% in 1990,282 to 6.1% in 2000,283 to 8.8% in 2010.284 In addition, foreign-born black women bore approximately one out of every six black children in 2004.285 These rapidly increasing percentages of foreign-born blacks strongly suggest that the percentage of Black Immigrants at selective undergraduate institutions has increased significantly since the study noted above.

The overrepresentation of Black Immigrants among black students at selective undergraduate institutions should not come as a surprise either. Like Black Multiracials, Black Immigrants tend to come from families with more parental education and higher family incomes than Ascendant Blacks.286 Also, like Black Multiracials, Black Immigrants have a parent that is not a descendant of the ancestral line of blacks who experienced the history of discrimination of blacks in the United States. Eugene Robinson, in his book Disintegration: The Splintering of Black America, also distinguished foreign-born blacks from other groups of blacks. Robinson went on to note that "[f]or black immigrants from Africa and the Caribbean, the United States may be judged guilty of modern sins, but not the ancient kind that fester in the blood."287 In addition, John Ogbu—a Nigerian born, American educated scholar—asserted that many voluntary immigrants who encounter discrimination view it as part of the cost-benefit analysis that justified their decision to move to their new homeland.288 Since the conditions in the U.S. tend to be considerably better than the conditions foreign-born blacks left, their overall calculation leaves them with a very positive view of America, despite the racism, discrimination, and prejudice that they encounter here.289 In contrast to voluntary immigrants, involuntary minority groups, like Ascendant Blacks, do not become part of their present society voluntarily.

282. Id.
285. See Kent, supra note 280, at 4 (asserting that the figure drops to just 13% of black children if only non-Hispanic blacks are considered).
287. ROBINSON, supra note 241, at 188.
Without the voluntary aspect of their original incorporation, involuntary minorities differ from voluntary immigrants in their perceptions, interpretations, and responses to their situation. Unlike voluntary immigrants, involuntary minorities cannot refer to a native homeland to generate a positive comparative framework for their condition. Instead, they compare themselves to the dominant group. Since the dominant group is generally better off, this comparative approach often produces a negative interpretation of involuntary minorities’ experiences and conditions. Thus, the cultural differences between Black Immigrants and Ascendant Blacks may provide Black Immigrants with certain cultural advantages in the pursuit of valued educational credentials.

This Article urges the AALS to require law schools to report Black Immigrants and Ascendant Blacks separately. This will allow law schools the opportunity of discovering how many Black Immigrants and how many Ascendant Blacks they have in their applicant pools and student bodies.

290. See Ogbu, supra note 263, at 13.
291. Id. at 13-14.
292. Id. at 14.
293. For over two decades, this oppositional cultural theory has been one of the most popular cultural explanations for the low achievement of black youth in American schools. See Natasha Warikoo & Prudence Carter, Cultural Explanations for Racial and Ethnic Stratification in Academic Achievement: A Call for a New and Improved Theory, 79 REV. EDUC. RES. 366, 370 (2009). There is a growing amount of literature that argues this is overemphasized. See, e.g., James W. Ainsworth-Darnell & Douglas B. Downey, Assessing the Oppositional Culture Explanation for Racial/Ethnic Differences in School Performance, 63 AM. SOC. REV. 536, 536-53 (1998); Douglas B. Downey, James Moody & Donna Bobbitt-Zeher, Academic Success and Popularity Among Black Adolescents: Do Blacks Face a Burden of “Acting White?” (Aug. 12, 2005) (unpublished manuscript, presented at the annual meeting of the American Sociological Association, Philadelphia, PA), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/2/1/4/4/pages21445/p21445-1.php; Karolyn Tyson, William Darity & Domini R. Castellino, It’s Not a ‘Black Thing’: Understanding the Burden of Acting White and Other Dilemmas of High Achievement, 70 AM. SOC. REV. 582, 582-605 (2005). However, there is “a growing body of evidence that raises questions about whether oppositional culture is a meaningful explanation of blacks’ educational outcomes.” Pamela R. Bennett & Amy Lutz, How African American Is the Net Black Advantage? Differences in College Attendance Among Immigrant Blacks, Native Blacks, and Whites, 80 SOC. EDUC. 70, 90 (2009). Other scholars down play the sociocultural differences between the children of foreign-born blacks and those of native blacks as explanations for differences in educational performance. These scholars focus their attention on the family characteristics noted above to explain the educational differences. See, e.g., id. (asserting that “much of the literature on immigration has made theoretical assumptions about the cultural propensities of African American students with respect to education without the kind of explicit empirical comparisons of their educational outcomes to those of immigrant blacks”).
V. CHANGES NEEDED IN THE LSAC RACIAL AND ETHNIC CATEGORIES

A major consideration in our process for deciding which racial/ethnic categories the AALS should ask law schools to use is the desire to minimize the reporting difficulties of law schools. In collecting racial and ethnic data, the Guidance also allows educational institutions to use ethnic subcategories as long as educational institutions can aggregate the collected information back into the seven broad racial/ethnic reporting categories. The DOE’s restriction about using the seven broad racial/ethnic reporting categories does not bind the AALS when it decides what reporting categories law schools should use. However, if the AALS uses categories that law schools can easily aggregate back to the ones required by the DOE, then the AALS minimizes the administrative burden on law schools.

Almost all law schools require students to take the LSAT administered by the LSAC and to apply to their individual law school through the admissions services of LSAC. LSAC prepares a data report on every student that registers with it. At the request of the respondent, LSAC sends this data report to the various law schools to which a given student applies.

LSAC allows respondents to “select one or more races/ethnicities” from a wide array of ethnic subcategories. LSAC lists nine category headings for racial and ethnic choices; however, there are thirty-two subcategories within these nine category headings. The choices are as follows:

- **Aboriginal or Torres Strait Islander Australian** – Australian Aboriginal and Torres Strait Islander Australian
- **American Indian or Alaskan Native** – Alaskan Native and American Indian
- **Asian** – Cambodian, Chinese, Filipino, Indian, Japanese, Korean, Malaysian, Other Asian, Pakistani, Thai, and Vietnamese
- **Black or African American** – Black or African American
- **Canadian Aboriginal** – First Nation, Metis, Inuit, and Other Canadian Aboriginal
- **Caucasian/White** – European, North African, Middle Eastern, and Other Caucasian/White
- **Hispanic/Latino** – Central American, Chicano/Mexican, Cuban, Other Hispanic/Latino, and South American

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295. The authors have on file a copy of the LSAC ethnicity questionnaire listing these ethnic reporting categories.
296. The authors have on file a copy of the LSAC ethnicity questionnaire listing these ethnic reporting categories.
297. Puerto Ricans are actually placed in a separate category from Hispanic/Latino.
- **Native Hawaiian or Other Pacific Islander** – Native Hawaiian and Other Pacific Islander
- **Puerto Rican** – Puerto Rican.\(^{298}\)

What jumps out when looking at the numerous categories within the nine category headings is that LSAC provides multiple subcategories for all but the Black or African American category. Whereas an Asian respondent has eleven choices to select from, a Hispanic/Latino (and Puerto Rican) has six choices, and even a Caucasian/White respondent has four choices, LSAC does not present the Black/African American respondent with any ethnic choice. Thus, even while recognizing the ability for self-identified ethnic choices for every other racial/ethnic category, the LSAC list continues to treat all blacks alike. Thus, it ignores the growing reality of ethnic differences among blacks in the U.S. as a result of the explosion of immigration of blacks from the rest of the world.

Law schools have access to LSAC databases for their applicants and students. Thus, law schools can easily ascertain almost all of the data for the various reporting categories that we list by running data reports from the LSAC databases. The one shortcoming, as noted above, is that LSAC does not provide any ethnic choices for the Black/African American category. In order to provide an easy mechanism for law schools to generate separate totals for Black Immigrants and Ascendant Blacks, it is necessary that LSAC add ethnic choices that respondents who check the Black/African American category can choose. If LSAC does this, then law schools will have little difficulty generating the counts for the twelve racial/ethnic categories that we are suggesting.

We want to encourage AALS to use its influence with LSAC to have it modify its Black/African American category to read as follows:

Black or African American (please specify one or more below)
- Ascendant Black
- African
- Caribbean
- Other Blacks.

The reason to list these ethnic categories is that according to a December 2007 Population Reference Bureau report, “[i]n 2005, two-thirds of the 2.8 million foreign-born blacks were born in the Caribbean or another Latin America country and nearly one-third were born in Africa. Another 4 percent (about 113,000) were born in Europe, Canada, or elsewhere.”\(^{299}\)

\(^{298}\) The authors have on file a copy of the LSAC ethnicity questionnaire listing these ethnic reporting categories.

\(^{299}\) Kent, supra note 280, at 4.
Law schools are required to report the racial and ethnic ancestries of their students to the DOE, the ABA, and the AALS. The DOE adopted the Guidance, which went into effect for the 2010-2011 academic year. Under the Guidance, when any law school collects racial and ethnic information, they must first ask respondents if they are Latino. Then law schools must provide respondents with the ability to mark one or more of the racial categories that apply to them: (1) American Indian or Alaska Native; (2) Asian American; (3) Black or African American; (4) Native Hawaiian or Other Pacific Islander; and (5) White. With regard to reporting the racial and ethnic data to the DOE, the Guidance requires that all educational institutions count anyone who indicates that they are Latino as Latino, regardless of the racial categories they select. Thus, for example, law schools must report Black Latinos in their counts of Latinos. In addition, the Guidance requires educational institutions to report in a new Two or More Races category those non-Latinos who mark two or more of the five broad racial categories. As a result, law schools must report “Black Multiracials” in the Two or More Races category, along with other non-Latino multiracials. Thus, under the DOE, law schools must report the racial and ethnic data in one of seven categories: Latino; American Indian or Alaska Native; Asian American; Black or African American; Native Hawaiian or Other Pacific Islander; White; and Two or More Races.

The ABA adopted the DOE’s new reporting categories. However, the AALS has established different reporting categories. Unlike the DOE, which groups all Latinos into one category, the AALS requires law schools to separate Mexican Americans, Puerto Ricans, and Other Latinos in their counts of Latinos. The AALS also rejected the Two or More Races category. As a result, law schools must reallocate students reported to the DOE in this category to the single race categories adopted by the AALS. Law schools, however, will find this reallocation process fraught with complications. As a result, many schools may simply report these students as ones whose race is unknown.

The changes made by the Guidance in the collection and reporting of racial and ethnic information have generated a number of significant issues regarding the current mix of student bodies of law schools. For example, the reporting requirements of the DOE place Black Latinos in the Latino category counts. Yet, before this academic year, law schools could use the one question format to collect racial and ethnic information. Under the one-question format, respondents were, generally, required to select only one category from the following list: American Indian or Alaskan Native; Asian

300. See supra Part III.
or Pacific Islander; Black, not of Hispanic origin; Hispanic; and White, not of Hispanic origin. This procedure meant that an individual had to choose whether to identify with their race or their ethnicity. Thus, the one-question format prevented law schools from counting someone who was black and Latino as Latino who identified more with their race than their ethnicity. Counting such a person as Latino instead of as Black or African American, however, could affect their admissions decision. In addition, Black Multiracials are now counted within the Two or More Races category with other multiracials. How should law school admissions officials treat applications from Black Multiracials, given the fact that they no longer increase the total of black students admitted to the law school? For admissions purposes, should they be compared with black students or with other multiracials students, the largest number of which will probably be White/Asian Multiracials?

Before 1970, the federal government did not attempt to standardize the collection and reporting of racial and ethnic data. However, by the 1970s a number of federal agencies were involved in generating racial and ethnic data. This led to the adoption by the federal government of Directive 15 in 1977. The purpose behind the development of these federal standards was the need for comparable data for population groups that historically had experienced discrimination and differential treatment because of race and ethnicity. According to the DOE, however, the purpose of the Guidance is "to obtain more accurate information about the increasing number of students who identify with more than one race." Thus, the racial and ethnic classifications required by the DOE no longer track the original justifications for those classifications.

Beyond the issues raised by the Guidance, since the institution of affirmative action programs, substantial changes have occurred in the racial and ethnic mix of population groups traditionally thought to have experienced a history of discrimination in the United States due to race and ethnicity. Thus, there is a tremendous need to refine the broad racial and ethnic categories commonly used to generate racial and ethnic statistics in order to provide a much more accurate picture of the situation of those racial/ethnic subgroups within these broad categories that have the longest histories of discrimination in the United States. For example, since the institution of affirmative action programs, higher education institutions, including law schools, have generally placed all those of African descent into a unified category, without regard to race or ethnicity. Nevertheless, recent studies have pointed out that Black Multiracials and Black Immigrants are replacing Ascendant Blacks in America's selective undergraduate institutions. The difference between Ascendant Blacks, on the one hand, and Black

301. Guidance, supra note 4, at 59,267.
Multiracials and Black Immigrants, on the other, is that both parents of Ascendant Blacks are from the ancestral line of blacks who suffered the history of discrimination in the U.S.; in contrast, both Black Multiracials and Black Immigrants have at least one parent whose ancestry is not traced to the history of slavery and segregation of blacks in this country. Thus, Ascendant Blacks clearly have a far greater claim to being members of a group that has suffered from the history of discrimination based on race and ethnicity in the United States than either Black Multiracials or Black Immigrants. Nevertheless, the changing racial and ethnic ancestry of blacks benefiting from affirmative action could suggest that the nation’s law schools may be in the process of ethnically cleansing their buildings of Ascendant Blacks without fully realizing it.

We, therefore, believe that the AALS and the ABA should require law schools to use more refined racial and ethnic reporting categories that are closely tied to those specific population groups who have suffered a history of discrimination in the United States and are most likely underrepresented in the nation’s law schools than the broad categories required by the DOE. Refining the broad categories to include racial/ethnic subgroups based on histories of discrimination and possible underrepresentation will provide law schools with better information about the impact of the use of racial classifications in admissions. As a consequence, we applaud the AALS’s decision to require law schools to separate Mexican American and Puerto Rican students from other Latinos, due to the underrepresentation of these groups in the nation’s law schools and the history of discrimination that these two groups have experienced in the United States when contrasted with that of other Latino groups.

We want to urge the AALS and the ABA to require law schools to provide them with counts of their students in the following racial/ethnic categories:

1. Mexican American;
2. Puerto Rican;
3. Other Latino;
4. Black Latino;
5. Ascendant Black;
6. Black Immigrant;
7. Black Multiracial;
8. Other Two or More Races;
9. American Indian or Alaska Native;
10. Asian American;
11. Native Hawaiian or Other Pacific Islander; and

One of the major considerations in developing the twelve racial/ethnic categories we list above is the desire to minimize the reporting difficulties of law schools. Thus, it is very important that law schools use categories
easily aggregated into the seven broad racial/ethnic reporting categories of the DOE. The twelve categories noted above can easily be combined back into the seven reporting categories of the DOE.

Law schools have access to LSAC databases for their applicants and students. Thus, they can easily ascertain almost all of the data for the above reporting categories by running data reports from their LSAC databases. There is, however, one problem with the LSAC databases. LSAC does not provide any ethnic choices for the Black/African American category. Yet, for law schools to easily separate out Black Immigrants from Ascendant Blacks by running LSAC database reports, LSAC needs to add ethnic choices for respondents who check the Black/African American category. If LSAC agrees, then law schools will be able to generate counts in the above categories with little difficulty. Thus, we also want to urge LSAC to add ethnic subcategories for Black/African American respondents to use.