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From sword to plowshare: using race for discrimination and antidiscrimination in the United States

Ann Morning and Daniel Sabbagh

Introduction

A nation's decision to pursue a public policy of antidiscrimination often entails further choices about how to identify the groups who suffer discrimination and how to measure their socio-economic disadvantage. In other words, the adoption of antidiscriminatory policy leads to some mechanism for categorising disadvantaged groups. If ethnic discrimination is the target, a means of classifying the population by ethnicity normally follows.

The United States, however, has experienced this process of antidiscrimination and classification in reverse. Since its inception, the federal government has enumerated the US population by race, as did the colonies that preceded it. But racial discrimination was not meaningfully prohibited in the United States until the civil rights movement of the mid-twentieth century. Thus the official use of racial categories preceded antidiscrimination legislation by three hundred years.

In a society that is already as thoroughly racialised as the United States, the introduction of antidiscrimination measures raises a different set of questions than it does for nations that have traditionally forgone ethnic classification. Instead of asking why policymakers took a certain approach to categorisation as a function of antidiscrimination law, in the American case we must ask how the new measures prohibiting discrimination interacted with longstanding ideas about racial difference. As we will see, the legitimacy widely accorded to racial categories in the United States means that its controversies about the use of race statistics for antidiscrimination purposes tend to call into question the civil rights measures and *not* the classification system itself. This is a sharp contrast to those nations where the objective of eliminating discrimination is widely shared but the use of ethnic demarcation is seen as problematic.

To address the question of how the United States' policies of antidiscrimination drew on existing notions of racial difference – and on official racial categories that were traditionally used explicitly for discriminatory purposes – we structure this article as follows. First, we briefly recount the history of official racial classification practices in the United States and their relation to racist laws and practices. Next we describe the development of legal prohibitions on racial discrimination, culminating in the civil rights movement of the 1950s, 60s, and 70s. This leads to an examination of how race

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data are used to implement civil rights law, before outlining contemporary official racial categories. Finally, we assess the debates that have arisen concerning the collection of racial statistics for the purposes of antidiscrimination enforcement. In conclusion, we stress the challenges that American notions of race pose for the deployment of antidiscriminatory policies.

Historical US racial classification

The United States' contemporary application of its longstanding racial categories to the battle against discrimination is remarkable when we recall that this official classification scheme originated in the government's explicit policies of political, social and economic exclusion of non-whites.

Race figured on the very first US census – that of 1790 – which divided the population into "Free White Males", "Free White Females", "All Other Free Persons", and "Slaves". These categories marked both race and civil status simultaneously, leaving little doubt as to their interrelationship. Race explicitly distinguished "free whites" from "other free persons" (a delineation required by the First Census Act of March 1790), and it implicitly separated the free from those enslaved, who were presumably black. The elision between race and civil status was underpinned in the Constitution, Section 2 of Article I which read, until altered by the 14th Amendment in 1868: "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."

Racial enumeration thus served not only to demarcate slaves – people within the nation but alien to its rights – but also American Indians, who were excluded from the polity as "foreigners" on the lands that they had inhabited before the arrival of Europeans.

In the nineteenth century, census race categories continued to support racist public laws and practices. As political scientist Melissa Nobles (2000) and historian Paul Schor (2001) have shown, census officials expanded the number of categories to include options like "mulatto" and "quadroon" in order to provide scientists with data they believed would demonstrate the perils of racial mixture. And the turn-of-the-century retrenchment back to a single "Negro" category mirrored the post-Civil War hardening of the "one-drop rule", whereby any African ancestry was considered noxious enough to entirely taint its bearer. Over the course of the late nineteenth-century period known as "Reconstruction", a wave of state laws instituted racial segregation in public facilities and social contexts (e.g., forbidding interracial marriage), and a succession of "one-drop" definitions of race were crafted to enforce these segregationist practices. As these examples suggest, racial classification was both an instrument and an outgrowth of a state that was overtly committed to discriminating against non-whites.

In such a political and social context, the use of racial categories provoked little public scrutiny or outcry, but rather constituted a perfectly acceptable – indeed necessary – marker of social difference. This classification scheme was understood as delineating groups that were distinguished by deeply rooted differences of biology and ancestry (Smedley 1999), which in turn dictated different social and political roles. Nor did the fact that the number and labels of census race categories varied from census to census often raise questions about the validity of the classifications (Bennett 2000, Haney López 1996, Lee 1993), perhaps since the sole constant was the "White" category used and approved by the numerically and socially dominant majority. As a result, the classification of the population by race had long enjoyed widespread legitimacy and acceptance in the United States by the time the question of how to implement antidiscriminatory measures arose in the second half of the twentieth century.

Development of US antidiscrimination law and policy

Historical background

The United States' legal apparatus for protection against discrimination traces its roots to the Constitution, the "supreme law of the land",

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which was officially adopted in 1789. Moreover, subsequent amendments to the Constitution play a major role in antidiscrimination law today. Chief among these are the First Amendment (ratified in 1791), which protects freedom of religious worship; the 14th Amendment (1868) guaranteeing equal protection under the law; the 15th Amendment (1870) ensuring citizens' right to vote regardless of "race" or "colour"; and the 19th Amendment (1920) guaranteeing the same right to vote regardless of sex.

As is well known, however, the existence of such legal provisions did not preclude widely sanctioned public and private practices of the most discriminatory nature. Race-based slavery continued until 1865, and even after passage of the 15th Amendment, blacks were effectively disenfranchised through unfair poll requirements, intimidation, and violence (Marx, 1998). Although the nation's first civil rights laws were passed in this post-Civil War "Reconstruction" period, the failure to enforce them rendered them virtually meaningless. In fact, many of the state "Black Codes" and "Jim Crow" statutes forbidding social interaction between blacks and whites were adopted during (and in reaction to) Reconstruction, regardless of non-whites' new constitutional protections (Woodward 1974). Moreover, nineteenth- and early twentieth-century courts routinely interpreted the Constitution as being consistent with segregationist principles that would now be considered discriminatory. Perhaps most prominent among these decisions is the 1896 *Plessy v. Ferguson* case (163 US 537 (1896)), in which the Supreme Court found that "separate but equal" accommodations for different races were not in violation of the 14th Amendment's Equal Protection Clause.

The most extensive development of antidiscrimination protections to date – and the source of most of today's law in this arena – emerged from the civil rights movement of the 1950s, 60s, and 70s. One of the earliest and most widely hailed steps in this process was the 1954 *Brown v. Board of Education of Topeka* decision (347 US 483 (1954)), in which the Supreme Court overturned the *Plessy* principle of "separate but equal" to rule that racially segregated schools were inherently unequal. The Civil Rights Act of 1964 and Voting Rights Act of 1965 were also milestones of this era, and they spurred a tide of subsequent laws such as the Fair Housing Act of 1968, the Equal Employment Opportunity Act of 1972, the Equal Educational Opportunities Act of 1974, and the Equal Credit Opportunity Act of 1974.

In retracing the historical evolution of US antidiscrimination protection, it must be noted that affirmative action was not an element of the early wave of civil rights legislation, but rather such programmes came to be undertaken later as strategies for preventing or addressing charges of discrimination. The Civil Rights Act of 1964, for example, did not push beyond antidiscrimination measures to institute preferential treatment goals. By the early 1970s, however, the "equal opportunity" rhetoric of the civil rights movement seemed insufficient to counter entrenched patterns of discrimination, and President Nixon approved the use of numerical quotas in construction-industry hiring as part of what became known as the Philadelphia Plan. This local experiment served as the blueprint for regulations that would later be applied to all private federal contractors, requiring them to establish statistical "goals and timetables" under the supervision of the Department of Labour's Office of Federal Contract Compliance Programmes (OFCCP). Similarly, minority "set-aside" programmes emerged in the 1970s, requiring government contracts to dedicate a certain proportion of funds for minority firms.

The Philadelphia Plan and its descendants illustrate the use of what has come to be called "hard" affirmative action – such as mandatory hiring quotas – as distinct from "soft" measures like special recruitment or outreach (Swain 2001). The distinction is important because hard affirmative action has met with public resistance since its introduction, and it continues to provoke widespread outcry today (Sabbagh 2003).

Contemporary antidiscrimination law and policy

Today United States law at the federal, state, and local levels includes antidiscrimination provisions on the basis of race, along with colour and national origin. Racial discrimination is prohibited in a wide range of sectors, including employment, education, voting, housing, public accommodations, credit, and banking.

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As described previously, US legal protection against racial discrimination is grounded both in the Constitution and in more recent statutory law. With regard to the former, the 14th Amendment's Equal Protection Clause and the 15th Amendment's protection of voting rights are central. However, the two Amendments represent distinct approaches to the recognition of difference in the service of antidiscrimination. Whereas the 15th Amendment explicitly names race as a form of difference that cannot underpin discrimination (in matters of voting rights specifically), the 14th Amendment requires "equal protection" without specifying any particular class of individuals whose protection is to be assured. Yet to date the Equal Protection Clause has not been interpreted as embracing a strict principle of colour-blindness that would preclude the state from drawing distinctions on the basis of race. In recent years, the Supreme Court's case law has gestured toward equating the Equal Protection Clause with the principle of colour-blindness, by considering that classifications based on race are inherently "suspect" and should trigger the most exacting level of judicial scrutiny (Calvès 1998, pp. 191–219).[1] As a practical matter, this means that race-based classifications are now allowed to stand only if they are proved to be "narrowly tailored" – that is, strictly indispensable – in achieving a "compelling state purpose".[2] But the Court has never gone so far as to establish a general prohibition on the use of race classifications by state authorities, thereby leaving them free to set up race-conscious antidiscrimination and affirmative action policies within certain parameters.[3]

In addition to the competing "colour-blind" versus "race-conscious" approaches to outlawing discrimination, the Supreme Court has also established two distinct bases for identifying the existence of discrimination. "Disparate treatment" cases seek to demonstrate that an individual or group has been treated differently (e.g., by an employer) on account of their race. In such cases, evidence of discriminatory *acts* is crucial. In contrast, "disparate impact" law revolves around race differentials in *outcomes*. In that case, courts may make findings of discrimination on the basis of unequal impact even when it is considered to result from facially neutrally employment practices. As we will discuss in greater detail below, disparate impact law has been the gateway for the introduction of statistics as evidence of discrimination.

Use of racial statistics in antidiscrimination law and policy

Quantitative data that are classified by race have played a major role in the implementation and enforcement of antidiscrimination laws since the 1960s. In particular, statistical analysis of potential patterns of racial discrimination has been most commonly applied in the areas of employment, education, and voting. In these realms, numerical targets are also routinely required, further necessitating the collection and analysis of quantitative data. Below we focus on two of the fields in which the application of statistical data on race to antidiscrimination is most extensive today in the United States: voting rights and employment.

Voting rights

The Voting Rights Act of 1965 prohibits states or subdivisions from using any "standard, practice or procedure" for voting that will deny or "abridge" the right to vote "on account of race or colour" or because a citizen "is a member of a language minority" (this last concern was added in 1975). As amended, the Act considers that abridgement is found when "based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Voting Rights Act] (. . .) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (Voting Rights Act Amendments of 1982, Public Law No. 97-205, 96 Stat. 131). To ascertain whether such a violation had been committed, in 1982 Congress suggested a list of "typical factors", several of which were contingent on a clear means of delineating population group boundaries with great precision: the presence of

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racially polarised voting – that is, a significant and systematic opposition between the electoral preferences of different racial groups; continuing minority disadvantages in various spheres; the unresponsiveness of elected officials to the particular needs of minority groups; and the repeated electoral failure of the ''chosen representative[s]'' of a particular racial group (*Thornburgh v. Gingles*, 478 US 30 (1986), at 68 [Brennan, J., plurality opinion]; another of those ''typical factors'' is whether ''racial appeals'' were made during the electoral campaign by one or several of the competing candidates). In order to assess the latter, one was to consider ''the extent to which members of the minority group have been elected to public office in the jurisdiction'' (*Thornburgh v. Gingles*, 36–7) and, more specifically, the potential existence of a significant discrepancy between the percentage of blacks and Hispanics among the elected representatives and their proportion in the district's population (to be assessed on the basis of census data).

Moreover, in case there is evidence of such ''dilution'' of minority voting power, the Congressional remedy consists of a redistricting process specifically designed to increase the number of black and Hispanic representatives. Such redistricting requires racial data on at least two grounds. First, according to the 1986 *Thornburgh v. Gingles* Supreme Court decision, a minority group filing a complaint must show that it is large enough to form a numerical majority (i.e., greater than 50%) in a redrawn district. Second, if this condition is met, some ''minority-majority'' districts will be drawn in which blacks and Hispanics will be concentrated so as to increase the probability that they will be in a position to elect ''the candidate of their choice'' – ''concentration'' meaning that members of these two groups will represent 65% of the population of the district.

Consequently, the ''results'' standard of contemporary Voting Rights Act litigation relies heavily upon racially classified data, particularly that provided by the Census Bureau. Indeed, the Bureau is legally required to provide population data on race and Hispanic ethnicity to state authorities responsible for drawing up redistricting plans (Public Law 94-171 (1975)). However, the Supreme Court has since moved to curb the use of race in redistricting: its 1995 decision *Miller v. Johnson* holds that the state cannot use race as the ''predominant'' factor in drawing a district's boundaries.[4]

Employment

Covering private employers with 15 or more employees, as well as federal, state, and local governments, educational institutions, employment agencies and labour unions, the 1964 Civil Rights Act (as amended) prohibits discrimination on the basis of race, colour, religion, national origin, and sex in access to public accommodations (Title II), access to all programmes subsidised by the federal government (Title VI) and in employment (Title VII). The Act also established the US Equal Employment Opportunity Commission (EEOC), charging it with enforcing Title VII by investigating complaints of unlawful discrimination in employment. Similarly, Executive Order 11246 (1965) simultaneously prohibited employment discrimination and created the Office of Federal Contract Compliance Programmes (OFCCP) in the US Department of Labor to enforce its provisions. As amended, the Order prohibits discrimination in hiring or employment decisions on the basis of race, colour, gender, religion, and national origin, applying to all non-exempt government contractors and subcontractors and federally assisted construction contracts and subcontracts in excess of $10,000 (Office of Federal Contract Compliance Programmes, 2002). Moreover, EO 11246 requires that contractors and subcontractors with a federal contract of $50,000 or more and 50 or more employees develop a written affirmative action programme.

Along with the US Department of Justice, the EEOC and the OFCCP have played a central role in the application of racial statistics to antidiscrimination law. They did so by developing and promoting the legal theory of discrimination as ''disparate impact'' in the mid-1960s, as they sought to implement and enforce the new civil rights legislation (Blumrosen 1993, 1994). Disparate impact cases have been more amenable to statistical analysis because they are more likely than disparate treatment charges to concern broad groupings of individuals (as in race- or gender-based class-wide discrimination suits). As a result, disparate impact law draws

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more heavily on data about group representation in a particular industry or occupation – the kind of data that lend themselves more readily to statistical analysis. In addition, disparate impact cases have also proven more likely to result in the establishment of an affirmative action programme as a remedy for discrimination (Landsberg, 1997), thereby giving rise to subsequent use of quantitative data.

Influenced by the legal theory developed by EEOC and OFCCP attorneys, the Supreme Court came to embrace the disparate-impact approach in its unanimous 1971 decision, *Griggs v. Duke Power Company* (401 US 424 (1971)). In this milestone case, which concerned an ostensibly colour-blind testing requirement that was in fact designed to exclude black workers, since Title VII of the 1964 Civil Rights Act no longer permitted employers to do so openly, the Court declared that the Civil Rights Act of 1964 did not prohibit only *intentional* discrimination; it also banned hiring practices that were ''fair in form but discriminatory in operation'' – such as tests which, ''though facially neutral (...), would have the effect of freezing the *status quo* created by past discrimination'' (*Griggs v. Duke Power Company*, 430–1; for legal precedents of ''disparate impact'' theory and the ''business necessity'' standard in earlier voting, school desegregation, and employment cases, see Landsberg 1997, pp. 127–129). Thus the Court enlarged the meaning of the term ''discrimination'' to include within the purview of Title VII all forms of *indirect* discrimination, that is, hiring practices that do not rely on any of the unlawful grounds for employment decisions listed in the Civil Rights Act (race, colour, religion, sex, or national origin), but which still work to the disadvantage of a disproportionate number of minority group members who were targeted for official, intentional discrimination in the past. In short, actual minority employment had become the measure of ''discrimination'', which meant that ''antidiscrimination'' was now officially conceived as a results-oriented and group-centred policy.

The *Griggs* case not only established the doctrine of disparate impact, but it simultaneously sanctioned the use of statistical data as acceptable proof of discrimination. Since a statistical imbalance in the racial distribution of the workforce was now considered as evidence of discrimination (unless the recruitment procedure producing it could be justified as a matter of ''business necessity''), statistical data were obviously – if implicitly – required both to document the ''disparate impact'' of employment practices and to devise an affirmative action programme designed to correct it. Moreover, statistical proof of unequal outcomes could be accepted as sufficient evidence of disparate-*impact* discrimination, whereas statistical evidence was only one ingredient, neither sufficient nor necessary, for a finding of (intentional) disparate *treatment*.

As for what actually constituted a measure of ''disparate impact'' or ''adverse impact'', the next critical step came with the August 1978 *Uniform Guidelines on Employee Selection Procedures*, a document that was supposed to draw up operational prescriptions that the EEOC and the OFCCP could rely on in their enforcement activities. The key point was the following:

> For any hiring test used by a firm subject to Title VII requirements, if the success rate achieved by any racial, ethnic or gender group is less than four-fifths of the rate of the most successful group, the test will be considered to have an adverse impact on the first group. (28 CFR § 50. 14 (1978), First part, §4)[5]

Under this ''four-fifths rule'', a hiring test that 50% of white applicants passed but fewer than 40% of black applicants passed would have to be withdrawn and replaced by another test devoid of any adverse impact on women or ethno-racial minorities. This standard remains in wide use today, particularly in the Office of Federal Contract Compliance Programme's (OFCCP) monitoring of federal contractors. It is made possible by the Civil Rights Act's requirement (Title VII of the 1964 Act, Section 709 c) that all covered employers make and preserve records of the racial breakdown of their workforces and applicant pools.

Since the 1971 *Griggs* ruling, disparate-impact theory has become widely established in US antidiscrimination law, yet it has faced challenge as well. On one hand, the disparate-impact interpretation of Title VII was upheld in subsequent employment discrimination cases like *Albemarle Paper Co. v. Moody* (422 US 405, 1975), and it was incorporated into statutory law by way of the Civil Rights Act of 1991. On the other hand, adverse impact law had

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been circumscribed by the *Wards Cove Packing Co. v. Atonio* (490 US 642 (1989)) and *Price Waterhouse v. Hopkins* (490 US 228 (1989)) decisions of 1989, in which the Supreme Court made it more difficult to bring charges of discrimination, ruling that simple statistical comparisons were insufficient to make a *prima facie* case, and that the burden of proof lay with the plaintiff to prove illegitimate criteria behind employment practices (rather than employers being required to justify their practices). Although these 1989 rulings were subsequently and expressly invalidated by the Civil Rights Act of 1991, they reflected a broader political shift coinciding with the transition from Democratic to Republican administrations in the 1980s – a shift away from the class-based claims of institutional discrimination that typified disparate impact litigation, toward an enforcement focus on individual complaints of disparate treatment (Wasby, 1995). Similarly, the Reagan administration curtailed the Justice Department's previous position that disparate impact theory was applicable beyond the realm of employment – for example, to fair housing law – limiting it instead to Title VII (employment) cases only Landsberg, 1997. Furthermore, the Supreme Court clearly blocked the extension of adverse impact doctrine to the arena of constitutional law early on, in *Washington v. Davis*, 426 US 229 (1976). As a result, cases brought under the Equal Protection Clause of the Constitution require a showing of disparate treatment, or intentional discrimination.

Beyond the monitoring of antidiscrimination law strictly conceived, the collection of data on race and ethnicity is also required by the implementation of affirmative action programmes. With respect to employment in particular, in 1969 the OFCCP issued "Order No. 4" requiring all firms with federal contracts over $50,000 and more than 50 employees to devise an affirmative action programme and to set "goals and timetables" in order to remedy any "underutilisation" of their area's available minority workforce. The failure of federal contractors to comply with that Order could result in termination of their federal contracts and debarment from future contracts (Executive Order 11246 (1965), Section 209(a)). This new requirement was all the more effective because it permitted the OFCCP to scrutinise an employer without having to wait for an individual complaint to materialise.

However, the question of how exactly to measure minority underutilisation has been subject to debate, much like the uncertainty that gave rise to the "four-fifths" measure of discrimination. Originally, underutilisation was to be determined by comparing an employer's workforce to the total number of unemployed black and Hispanic workers living in the vicinity of the firm's production unit, whether qualified or unqualified for the job at issue. Data on the local area workforce would be available from the census (and this usually held true regardless of the benchmark population selected). But in 1977, the Supreme Court began to delimit the appropriate benchmark population more narrowly for the purposes of underutilisation analysis, suggesting that comparison should be made to minorities in the area who possessed the requisite job skills for the position being evaluated. As the Court made clear in *Hazelwood School District v. United States* (433 US 299 (1977)), "when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." (308, n.13).[6]

As the review above describes, the use of racial statistics was an integral feature of the development of antidiscrimination law in the United States. Not only did courts sanction the use of racially classified data, but they gave guidance to legal parties concerning the acceptable statistical analysis of such information. In the next section, we examine the classification practices that shape the racial statistics that are used to implement and enforce antidiscrimination laws today.

Post civil-rights classification by race

Origin of the Federal racial classification standards

As part of their work implementing the new civil rights legislation, the Equal Employment Opportunity Commission (EEOC) and Office of Federal Contract Compliance Programmes

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Swearing in new US citizens at a naturalization ceremony in New York, July 2004. Spencer Platt/Getty Images/AFP

(OFCCP) jointly developed a single racial classification framework that would permit comparison of the data they collected nationwide. Their early efforts, incorporated in *Standard Form 100* (or *Employer Information Report EEO-1*), would become the kernel of the United States' official racial classification framework (Graham, 2002). Although the federal government had routinely employed racial categories since its founding – most notably on the decennial census – it did not promulgate an official, fixed set of racial groupings until the mid-twentieth century growth of antidiscrimination law made new demands on its data collection procedures.

Drafted by a joint EEOC - OFCCP Reporting Committee in 1966, *Standard Form 100* (*EEO-1*) was sent by both agencies to every employer in their jurisdiction. From then on, all firms with more than 50 employees and a contract with the federal government and all firms with more than 100 employees – regardless of whether they had a contract with the federal government – were asked to provide, on a yearly basis, a document showing the distribution of their workforce broken down by gender, by job group, and by ethnoracial identity. Despite the wide usage of this standardised form, however, the racial categories it employed were not the product of public debate or independent examination of whether they fit any theory of social justice or equity. Government officials simply "categorized some groups as 'minorities' – a never-defined term that basically meant 'analogous to blacks' " – without ever "spell[ing] out what were the necessary and sufficient conditions or qualities for minority-hood" (Skrentny 2002, pp. 12–13).

Initially, the civil rights agencies considered extending antidiscrimination protection to white ethnic groups. In 1971, the OFCCP proposed guidelines maintaining that "experience has indicated that members of various religious

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groups, primarily Jews and Catholics, and members of certain ethnic groups, primarily of Eastern, Middle, and Southern European ancestry, such as Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based on their religion/national origin. These guidelines are intended to remedy such unfair treatment.'' (*Federal Register*, vol. 36, n. 250, December 29, 1971). However, this proposal was ultimately abandoned because it conflicted with the identification procedure preferred by the EEOC and OFCCP, namely that of observer (or ''external'') identification. As explained in various internal memorandums, ''Current affirmative action programmes (. . .) which apply to minority groups and women concern people with unchanging physical attributes which are typically observable. Identifying such persons as targets for affirmative action is relatively simple. (. . .) It would not require invasions of privacy. . .'' (*Federal Register*, vol. 36, n. 250, December 29, 1971, pp. 287, 298). White ethnics and members of religious minorities, however, could not be identified by a visual survey, and proceeding through self-identification would arguably jeopardise such ''privacy'' and infringe on the principle of the separation of church and state enshrined in the First Amendment. Besides, the extent of *interethnic* mixing would have made the extension of affirmative action to Poles or Slovaks an administrative nightmare, it was argued (no one thought that the same might be said of *interracial* mixing at some point). Also, constraints of time and resources reinforced the unspoken principle that there was a threshold of victimhood that a group was required to meet before policy recognition was available, that threshold being implicitly defined by the extent of the still-perceptible, present effects of past discrimination.

Historian David Hollinger (1995) has dubbed the resultant classification framework ''the ethno-racial pentagon'', because it incorporated five relevant categories: black, white, Native Americans, ''Orientals'' – later to be renamed ''Asians'' – and ''Spanish-surnamed individuals'' – later to be called ''Hispanic''. This classificatory scheme was subsequently codified and extended to all federal agencies in 1977, and has remained in place ever since.

Statistical Directive 15: Introduction of the Federal Racial Standards

As new civil rights laws went into effect in the 1960s and 1970s, government officials increasingly perceived the need for a uniform set of racial categories that would facilitate the exchange and combination of data collected by the myriad federal agencies now required to enforce antidiscrimination law to some degree – including, in addition to institutions like the OFCCP or EEOC the primary objective of which is the enforcement of civil rights law, several other federal agencies that also hold some responsibility for guaranteeing antidiscrimination protection, such as the US Department of Education's Office of Civil Rights, the Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity, the Departments of Transportation and of Health and Human Services, and the Federal Communications Commission (US Department of Justice, 2002). In the early 1970s, different agencies employed different categorisation schemes (Edmonston *et al*. 1996). As a result, in 1974 the Federal Interagency Committee created an Ad Hoc Committee on Racial and Ethnic Definitions to develop a uniform set of designations. The Committee's report, issued in 1975, would become the basis for the federal racial classification standards established two years later.

In 1977, the Office of Management and Budget (OMB) issued Statistical Policy Directive 15 establishing the racial and ethnic categories to be used by all federal agencies. Although technically limited to the activities of federal agencies, this scheme has come to be adopted by state and local governments as well as private sector actors and academic researchers. The four race categories specified in Directive 15 were:

— American Indian or Alaskan Native
— Asian or Pacific Islander
— Black
— White

In addition, the Directive designated an ethnic category: ''Hispanic'', to include persons ''of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or

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origin, regardless of race'' (Edmonston *et al.* 1996, p. 66).

The treatment of Hispanics as a cultural but not a racial group reflects the unique route that led to official recognition of the Latino population. The other four categories were present in some form on the census as far back as the nineteenth century; for example, the 1870 enumeration included the categories ''White'', ''Black'', ''Chinese'', and ''Indian''. In contrast, the seed of a Hispanic category did not appear until 1930, when the census introduced ''Mexican'' as a racial category. This designation surfaced in the context of a growing Mexican immigration stream that was all the more conspicuous after immigration from Europe had been severely restricted in the early 1920s, and immigration from Asia had been entirely banned (Ngai 1999). However, the category was eliminated before the next census, due to opposition from both Mexican-American organisations such as the League of United Latin American Citizens (LULAC) in Texas, as well as the Mexican Ambassador in Washington. In particular, they objected to the classification of Mexican Americans as a distinct, non-white race, especially in the context of a struggle against growing school segregation in the Southwest, in which being recognised as white by the federal census mattered a great deal. In subsequent years, however, census officials sought to enumerate native Spanish speakers and/or those individuals with Spanish surnames (Gibson & Jung 2002). In short, after rejecting the equation of Mexican origin with a race, demographers redefined the population as an ethnic group – that is, distinctive in cultural (primarily linguistic) terms only, rather than in the biological sense commonly – if not explicitly – associated with race.

The concept of a pan-ethnic ''Hispanic'' population was still new when the Census Bureau incorporated the term on the 1970 census, at a time when the first affirmative action programmes were being set up. Yet fairly soon after, Congress passed the 1976 Roybal Act requiring the Bureau and other federal statistical agencies to produce separate counts of persons of Hispanic origin (Public Law 94–311 (1976)). However, the implementation of this item has not been straightforward, as the census question on Hispanic ethnicity has been plagued by high non-response rates. Thus, in 1990, the Hispanic-origin question had the highest ''allocation rate'' of any item on the census questionnaire (the ''allocation rate'' being the technical term for the percentage of non-responses to a specific question, for which missing values are then imputed). Fully 10% of those responses had to be imputed, which is substantially higher than the allocation rate for any other census questions. Most of those who failed to respond to the Hispanic-origin question were non-Hispanics who mistakenly assumed that it did not apply to them, even though the first listed response was ''No (not Spanish/Hispanic)''. But others were Hispanics who confounded race and ethnicity. They responded to the race question by turning to the ''other race'' category, where they wrote in ''Hispanic'' or, more likely, a national origin (for example, ''Mexican''). When these individuals came to the Hispanic-origin question a few items later, they skipped over it, believing it to be superfluous. And the absence of some form of a Hispanic option on the census race question has led to relatively high non-response rates on the part of Hispanics for that question as well. After the 1990 census, one proposed improvement was to incorporate the separate Hispanic-origin question into the race question, making ''Hispanic'' one of several items listed under the race heading. This step would also make census categories consistent with the prevailing usage in law and politics – not to mention popular and media usage – where Hispanics, along with other minorities, have become one of the main protected groups under the current antidiscrimination regime. And initially, most Hispanic advocacy organisations supported the proposed change (see generally Rodríguez 2000). However, after research conducted by the Bureau of Labour Statistics in 1995 suggested that such a revision would depress the national count of Latinos, support for the proposal quickly eroded.

Evolution of Statistical Directive 15

Since Directive 15 established the five ethnoracial categories to be used in federal collection and analysis of racial statistics, it has been revised only once, in 1997 (OMB 1997). One element of this change was to split the ''Asian and Pacific Islander'' group into two categories: ''Asian'' and ''Native Hawaiian and Other Pacific Islander''. The most widely publicised

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revision – and the issue that drove OMB's reassessment of the racial standards in the first place – was the move to permit the collection of multiple-race responses. Prior to 1997, individuals could only be affiliated with one racial group on official records; since then, an individual may be identified with any combination of the standard racial groups. This change was perhaps most publicly visible on the 2000 census, which included the instructions "Mark one or more races" for the first time.

The revision of Directive 15 was not undertaken because federal agencies saw a need for multiple-race data. Indeed, many long-time analysts of racial data felt the change would hinder the enforcement of civil rights law (e.g., Harrison 2002). Instead, the revision was adopted to allow respondents to report their race or races in accordance with the way they subjectively identified themselves, and to do so in the highly symbolic venue of the national census. At issue were expressive considerations, not distributive ones, as conceived by the members and offspring of interracial marriages, the number of which has grown steadily since the Supreme Court's 1967 *Loving v. State of Virginia* decision, which struck down all state bans on interracial unions.

In addition to the five racial categories now promulgated by the revised Directive 15 – i.e., "American Indian or Alaska Native", "Asian", "Black or African American", "Native Hawaiian or Other Pacific Islander", and "White" – the Census Bureau enjoys a special dispensation to include a "Some other race" category. This total of six race options makes for 63 potential single-and multiple-race categories, consisting of six mono-racial categories and 57 categories for biracial and multiracial respondents. And since there are two ethnic categories – Hispanic and not Hispanic – the population can now be categorised into 126 unique racial and ethnic combinations. Given the potential complexity of the resultant record-keeping and tabulation for employers, not to mention analysis by enforcement agencies, in 2000 the OMB issued Bulletin 00-02, "Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement" (OMB 2000). This guidance gave enforcement agencies permission to collect data using a limited schedule of racial/ethnic classifications, namely the single-race categories named above plus four dual-race combinations – white/black; white/Asian; white/American Indian; and black/Indian – as well as any other multiple-race combination that surpasses 1% of the population under study.

According to the Census Bureau, in 2000 the US population – a total of 281.4 million persons – was 75.1% white, 12.3% black, 3.6% Asian, and 0.9% Native American (Grieco & Cassidy 2001). In addition, 2.4% of the population chose two or more races, and 12.5% identified themselves as Hispanic. Moreover, 5.5% selected the "Some other race" box alone; the overwhelming majority of this group – 97% – were Hispanics.

Controversies of racial classification and antidiscrimination

The intersection of statistics and antidiscrimination has not been uncontroversial in the United States. However, public concern about the links between them has revolved largely around the belief that the application of racial classification to civil rights is antithetical to meritocracy and discriminates against whites. In other words, it is ambivalence about antidiscrimination policies – especially affirmative action – that shape public feeling about racially categorised data collection and analysis. In this connection, it must be noted that affirmative action remains unpopular with a majority of the American public (Sniderman & Carmines 1997, Sniderman & Piazza 1993) and has been challenged repeatedly over time. In contrast, a review of the most high-profile recent debates over racial classification points to the fundamental lack of opposition to the act of official racial categorisation itself.

Debate over multiple-race classification

As described above, the decision to permit multiple-race responses was greeted with dismay in some quarters. One line of argument came from African American political leaders, who feared that many blacks would avail themselves of the option to "dilute" their racial affiliation by checking off more than one census box. That worry proved to be largely unfounded, as blacks

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were the minority group least likely to choose multiple races on the 2000 census. Not only do American Indians and Asians tend to have higher intermarriage rates than blacks (Eschbach 1995, Heaton & Albrecht 1996, Lee & Fernandez 1998, Sandefur & McKinnel 1986), but these numerically smaller populations are most affected by conversions to multiracial reporting. The 2000 census data indicate that about 40% of American Indians and 14% of Asians are multiracial, whereas only 5% of African Americans (and 3% of whites) selected more than one race. This is all the more remarkable as the proportion of the population identifying as black with some degree of non-black ancestry is at least three-quarters and perhaps closer to 90% (Davis 1991).

Another concern about the shift to multiple-race data collection was voiced largely within technical circles of academic demographers and government analysts. This was the question of how multiple-race statistics could be used to monitor and enforce civil rights laws that were based on a single-race classification system that unequivocally distinguished between those who were members of minority groups and those who were not. In response, in 2000 the Office of Management and Budget issued "allocation rules" or guidelines for the use of multiple-race data by civil-rights enforcement agencies. Under these rules, "if the enforcement action [was] in response to a complaint", one should "allocate to the race that the complainant alleges the discrimination was based on" (OMB 2000, Section II, pp. 161–162). In other words, for civil rights purposes, people who marked "white" and a non-white race should be counted as members of the non-white group, whereas mixed-race individuals without white ancestry were to be treated as having whichever racial affiliation they claimed was the basis for discrimination. In the unlikely event that a case turned on how the multiracial population was counted, the data should be presented in the light most favourable to the plaintiff in a civil rights action. Thus, a systematic reallocation of multiple responses back to single-race categories was in order.

Although the government's move to permit multiple-race reporting garnered considerable press attention in the period surrounding the 2000 census, and might be considered a topic of controversy, it does not represent in any way a rejection of the policy of enumerating by race. Instead, the revised federal standards retain the fundamental presumption that Americans should be classified by race. Although some multiracial activists have suggested that recognition of the multiracial population will eventually entail a rejection of the race concept (e.g., Daniel 2002) – for example, by revealing the malleability of racial boundaries – that calculation seems quite far in the future.

Multiple-race classification might, however, raise public suspicion of race categories if it comes to be seen as extending affirmative action benefits to people who do not "deserve" them: namely, mixed-race individuals who would identify themselves as white on single-race forms. This concern is not trivial: according to one study, some 60 to 80% of those likely to mark more than one race choose "white" when asked to mark only a single race.[7] In this light, it is hard to imagine that a court case will not arise in which the eligibility for affirmative action of a mixed-race person will be challenged, particularly if it can be shown that that person had in the past identified himself as white. Again, however, this points to the likelihood of controversy over the implementation of racial preferences, rather than a rejection of the principle of racial classification.

Debate about the use of race as a proxy for disadvantage

A related challenge to the application of racial statistics to antidiscrimination policy is the argument that minority racial status per se is a poor proxy for socioeconomic disadvantage. Racial groups are hardly homogeneous in terms of life outcomes. For example, one Asian American group (Koreans) has the highest rate of business formation in the nation, and another (Laotians) has the lowest (La Noue & Sullivan 2001). Different rates of achievement among Latino groups (Cuban relative to Puerto Ricans or Mexican Americans) and blacks (American-born relative to West Indian or African) can also be observed in education and income (Graham, 2002), not to mention differences in the degree of discrimination suffered. This inequality within categories may thus result in most preferences and opportunities going to the most advantaged ethnicities within each category: an employer

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required to implement an affirmative action programme will usually consider the proportion of blacks, Hispanics and Asians within his workforce, but he remains perfectly free to recruit only West Indians and no native-born American black, only middle-class Cubans and no Puerto Rican, only Chinese and Japanese applicants and no individual from the Indochinese peninsula, and so on and so forth. Again, the concerns revolve around the issue who – if anyone – "deserves" the benefit of racial preferences.

Debate about collection of data on race

Although Americans routinely identify their race on records in settings as varied as those of school, the work place, and the medical office, this widespread collection of racial data has occasionally been challenged.

One ground for questioning the collection of race data has been the argument that race is not "real", and thus should not figure on official forms. The American Anthropological Association argued this view in its 1997 statement on the proposals to revise Statistical Directive 15:

> The American Anthropological Association recommends the elimination of the term "race" from OMB Directive 15 during the planning for the 2010 Census. During the past 50 years, "race" has been scientifically proven to not be a real, natural phenomenon. More specific, social categories such as "ethnicity" or "ethnic group" are more salient for scientific purposes and have fewer of the negative, racist connotations for which the concept of race was developed. (American Anthropological Association, 1997)

This depiction of the race concept as being scientifically ungrounded is in fact shared by the OMB and Census Bureau. The text of the original Directive 15 read in part: "These classifications should not be interpreted as being scientific or anthropological in nature"; similarly, the Census Bureau maintains that its categories "generally reflect a social definition of race recognised in this country. They do not conform to any biological, anthropological or genetic criteria" (US Census Bureau 2001). However, this contention on the part of academics and census officials that race is not a biological phenomenon appears to have had little effect in cultivating public opposition to the use of racial classification.

A more highly publicised attempt to dismantle the state apparatus of racial categorisation has been launched by an organisation called the Racial Privacy Initiative. In 2003, the organisation brought a measure (Proposition 54) banning state racial classification to referendum in California. The proposition was that: "The state shall not classify any individual by race, ethnicity, colour or national origin in the operation of public education, public contracting or public employment." Although the measure was defeated at the polls in California, the Initiative's founder, Ward Connerly, has begun work on putting a similar proposition to the voters of Michigan.

In its supporting material, the authors of Proposition 54 echo some of the American Anthropological Association's dismissal of race, claiming their proposal will "junk a 17th-century racial classification system that has no place in 21st-century America" (Racial Privacy Initiative, 2003). However, the primary motivation of their efforts is not that racial categorisation is unscientific, but rather that it is the basis for implementing state affirmative action policies. Indeed, Ward Connerly previously led the successful effort to strike down state affirmative action programmes in California in 1996; the text of his Proposition 209 read in part: "The state shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, colour, ethnicity or national origin in the operation of public employment, public education, or public contracting." As this text makes clear, the main goal of the Racial Privacy Initiative's founder is the elimination of race-based preferences. Accordingly, the Initiative's website prominently argues:

> The California Constitution forbids state government from discriminating against or granting preferential treatment to any citizen based on race. Therefore, since government has no reason to classify persons by race, why should it even ask us for the data? Like religion, marital status or sexual orientation, race should become a private matter that is no business of government's. Think how refreshing it would be to throw out the entire system of checking little boxes.

As the most ethnically diverse state in the Union, California has the most to gain by compelling its government to treat all citizens equally and without regard to race.

In short, eliminating "the entire system of checking little boxes" emerged as a logical

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extension of the pre-existing drive toward preventing the government from granting preferential treatment on the basis of race – which is equated here with racial discrimination.

The relative lack of importance of the racial statistics themselves, however, is evident in the little-noticed fact that the Racial Privacy Initiative calls only for a selective erasure of racial categories. Proposition 54 emphasised the removal of race from consideration in "public education, public contracting, and public employment" – the three sites where affirmative action policies were once in effect and might be reinstated at some point, or so its supporters fear. At the same time, though, the Proposition indefinitely exempted from its purview medical research and criminal enforcement (including prison administration). In other words, the Racial Privacy Initiative foresees no problem for the application of race to medicine and crime, retaining the longstanding spirit of racial essentialism that expects racial differences in health outcomes and criminality. These exemptions make clear the fact that it is not racial classification per se that the Initiative's supporters find noxious.

True, objection to affirmative action plans may be the wedge that ultimately serves to prohibit state collection of race data for any purpose, including the monitoring and identification of discriminatory patterns in employment, housing, education and the like. Given the centrality of race to Americans' understanding of the social world, however, it is more likely that racial statistics will be retained even if affirmative action is rolled back. If the past is any indication, the use of racial categories in the United States does not necessarily depend on the existence of statistically grounded, strongly enforced antidiscrimination policies.

Conclusion

The United States' collection of race-classified data can be likened to a double-edged sword. On one hand, the analysis of racial statistics has contributed significantly to the civil rights assault on centuries-old practices of exclusion in the social, economic, and political spheres. Statistical portraits of racial groups' differing experiences in schooling, housing, the labour market, and elsewhere held up a mirror to a nation that few Americans wanted to face. The reflection continues to startle: for example, sociologist Devah Pager's recent finding that whites with criminal records are more likely to be considered for employment than blacks with clean records has been widely reported in the media (Pager 2003). On the other hand, the collection of data on "race" arose from – and may help perpetuate – longstanding American beliefs in the reality and significance of race (Morning 2004).

At any rate, more than any autonomous political challenge to the principle of government race classification, what *has* emerged powerfully in recent years – as indicated by the debate on the introduction of multiple-race identification and its side effects – is an awareness of tensions between "the requirements of bureaucratic rationality" and "the vagaries of personal identity" (Skerry 2000, p. 6), the needs of the civil rights enforcement machinery and the emerging claim of Americans' "right" to self-define racially as they see fit – in short, between the *politics of distribution* and the *politics of recognition*. As Kenneth Prewitt, the former Director of the Census Bureau, has put it, "The current [post-2000] classification has too many categories for practices using statistical proportionality yet too few to accommodate the pressures of identity politics and the desire for separate recognition. A taxonomy that has both few and too many categories is inherently unstable" (Prewitt 2001, p. 9).

If that conflict is resolved, the politics of recognition may ultimately prevail. At least that much was intimated by a recent reversal of the Equal Employment Opportunity Commission's longstanding reliance on employer observation as a way of handling the racial identification of employees. In June 2003, the EEOC published new rules in the Federal Register specifying that "Self-identification is the preferred method of identifying the race and ethnic information necessary for the EEO-1 report. Employers are strongly encouraged to rely on employee self-identification to obtain this information. If self-identification is not feasible, (...) observer identification may be used to obtain this information" (EEOC 2003, p. 34967). Technically speaking, the EEOC is only following the lead of the Office of Management and Budget, which had taken the position several years earlier that since "respect for individual dignity

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should guide the processes and methods for collecting data on race and ethnicity (. . .), ideally, respondent self-identification should be facilitated to the greatest extent possible'' (OMB 1995, p. 44692). And it is in large part a side-effect of the introduction of multiple-race identification in the 1997 standards: as a practical matter, asking third parties to guess whether a person is mixed-race, and if so, what the person's component races are, is asking an impossible task. Yet the move toward employee self-identification is a meaningful shift because self-identified race is not likely as relevant to the occurrence of discrimination as employer-identified race. In other words, an employer who discriminates does so on the basis of his or her perception of the worker or applicant's race, not according to that employee's racial self-identity.

The growing acceptance of the principle of racial self-identification, and particularly the realisation that it may not yield the same results as external identification, may usher in a new way of thinking about race in the United States. By recognising the malleable and context-dependent nature of racial identity, its socially constructed origins might eventually become widely apparent to the American public, and race might become a social status akin to ethnicity. In that event, the group categories whose roots stem from a racially oppressive state regime might remain weapons in the public-policy battle against discrimination, or they might simply fade into the political and social irrelevance that ethnicity largely enjoys today. As the American Anthropological Association argued in its 1997 brief against the use of racial classifications, ''today's ethnicities are yesterday's races''.

Notes

1. Other ''suspect'' classifications triggering strict scrutiny are those based on national origin (*Hernandez v. State of Texas*, 347 US 475 (1954)), alienage (*Graham v. Richardson*, 403 US 365 (1971)) and birth illegitimacy (*Levy v. Louisiana*, 391 US 68 (1968)).

2. See *Korematsu v. United States*, 323 US 214 (1944), at 216; *San Antonio Independent School District v. Rodriguez*, 411 US 1 (1973), at 16–17. When there is no ''suspect'' classification involved, heightened scrutiny is not triggered and the Court only subjects the law to a ''rational basis'' review. Under this test, courts presume the law is constitutional and will uphold it if they can find that it is a rational means of advancing *any* legitimate state interest.

3. See, e.g., *Regents of the University of California v. Bakke*, 438 US 265 (1978) (an affirmative action programme in university admissions that considers race as a ''plus'' without establishing a quota is permissible under the Equal Protection Clause); *Miller v. Johnson*, 515 US 900 (1995) (taking race into account within a redistricting process is constitutionally allowed so long as race is not the ''predominant'' factor).

4. *Miller v. Johnson*, 515 US 900 (1995), at 916. In *Bush v. Vera*, 517 US 952 (1996), at 967, the Supreme Court ruled that in order to determine whether a state has made race the ''predominant factor'' in the redistricting process, it should be considered ''evidentially significant'' if the racial data compiled is ''more detailed'' than the data the state claims to have used to identify non-racial ''communities of interest''.

5. Yet, ''greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programmes cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group'' (*ibid.*). Disparate-impact analysis is feasible only in those cases in which the total number of minority group members applying for a job is high enough for the potential discrepancies between their success rates on the tests involved and that of white applicants to be statistically significant. This condition is usually met as far as lower-middle class occupations are concerned (fire-fighters, policemen, truck-drivers . . .), but not for those more prestigious positions to which access is often regulated by ''subjective'' recruitment procedures (e.g., interviews) that cannot always be translated into a quantified assessment. This is clearly one of the factors that

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accounts for the "glass ceiling" preventing those minority group members specifically protected against indirect discrimination by Title VII of the Civil Rights Act from reaching the upper levels of private sector management.

6. In the same year, the Court ruled in *International Brotherhood of Teamsters v. United States* (431 US 324) that proportional representation of blacks in non-skilled jobs could be considered as a reference point in the process of eradicating the discrimination held unlawful under Title VII. In that case, the Court approved the use of statistics comparing workforce data with the demographics of the surrounding metropolitan area to prove employment discrimination and identify the extent of the wrong to be remedied.

7. Insofar as the National Health Interview Survey (NHIS) – which included a follow-up question on *primary* racial identification – provides an indicator of how respondents would have reported their race on the census form in 2000 absent the revisions to the collection and tabulation methods, the minority assignment rule correctly assigns only about half of respondents reporting as black and white, 34.6% of those reporting as Asian and white, and only 12.4% of those who identified as American Indian and white (Harrison 2002). Besides, not only does the reallocation procedure not conform to the single races that respondents would self-identify; it does not necessarily map individuals to the closest single race in terms of socioeconomic characteristics either.

References

American Anthropological Association, 1997. Response to OMB Directive 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting.Internet: http://www.aaanet.org/gvt/ombdraft.htm

Bennett, C. 2000. Racial categories used in the decennial censuses, 1790 to the present. *Government Information Quarterly*, 17, 161–180.

Blumrosen, A. 1993. *Modern Law: The Law Transmission System and Equal Employment Opportunity*. Madison, WI: University of Wisconsin Press.

Blumrosen, A. 1994. Strangers in paradise: *Griggs v. Duke Power Co.* and the concept of employment discrimination. *In*: Burstein, P., ed., *Equal Employment Opportunity: Labour Market Discrimination and Public Policy*. New York: Aldine de Gruyter, 105–119.

Calvès, G. 1998. *L'Affirmative Action dans la jurisprudence de la Cour suprême: le problème de la discrimination "positive"*. Paris: LGDJ.

Daniel, G. R. 2002. *More than Black? Multiracial Identity and the New Racial Order*. Philadelphia, PA: Temple University Press.

Davis, F. J. 1991. *Who is Black? One Nation's Definition*. University Park, PA: Pennsylvania State University Press.

Edmonston, B., Goldstein, J., and Lott, J. T., eds, 1996. *Spotlight on Heterogeneity*. Washington, DC: National Academy Press.

EEOC [Equal Employment Opportunity Commission]. 2003. Agency Information Collection Activities: Revision of the Employer Information Report (EE0-1) Comment Request. *Federal Register*, 68(112), June 11: 34965–34969. Internet: http://edocket.access.gpo.gov/2003/03-14739.htm

Eschbach, K. 1995. The enduring and vanishing American Indian: population growth and intermarriage in 1990. *Ethnic and Racial Studies*, 18, 89–108.

Gibson, C., and Jung, K. 2002. *Historical census statistics on population totals by race, 1790 to 1990, and by Hispanic origin, 1970 to 1990, for the United States, regions, divisions, and states*. Washington, DC: US Census Bureau, Population Division.

Graham, H. D. 2002. The origins of official minority designation. *In:* Perlmann, J., and Waters, M. C., eds, *The New Race Question: How the Census Counts Multiracial Individuals*. New York and Annandale-on-Hudson, NY: Russell Sage Foundation and the Levy Economics Institute of Bard College, 288–299.

Grieco, E., and Cassidy, R. 2001. *Overview of Race and Hispanic Origin*. Washington, DC: US Department of Commerce.

Haney López, I. 1996. *White by Law: The Legal Construction of Race*. New York: New York University Press.

Harrison, R. 2002. Inadequacies of multiple-response race data in the Federal statistical system. *In:* Perlmann, J., and Waters, M. C., eds, *The New Race Question: How the Census Counts Multiracial Individuals*. New York and Annandale-on-Hudson, NY: Russell Sage Foundation and the

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Levy Economics Institute of Bard College, 137–160.

Heaton, T., and Albrecht, S. 1996. The changing pattern of interracial marriage. *Social Biology*, 43, 203–217.

Hollinger, D. 1995. *Post-Ethnic America: Beyond Multiculturalism*. New York: Basic Books.

La Noue, G., and Sullivan, J. C. 2001. Deconstructing affirmative action categories. *In:* Skrentny, J. D., ed., *Colour Lines: Affirmative Action, Immigration, and Civil Rights Options for America*. Chicago, IL: The University of Chicago Press, 71–86.

Landsberg, B. 1997. *Enforcing Civil Rights: Race Discrimination and the Department of Justice*. Lawrence, KS: University Press of Kansas.

Lee, S., and Fernandez, M. 1998. Trends in Asian American racial/ethnic intermarriage: a comparison of 1980 and 1990 census data. *Sociological Perspectives*, 41, 323–342.

Lee, S. 1993. Racial classification in the US census: 1890–1990. *Ethnic and Racial Studies*, 16, 75–94.

Marx, A. 1998. *Making Race and Nation: A Comparison of South Africa, the United States, and Brazil*. Cambridge: Cambridge University Press.

Morning, A. 2004. *The Nature of Race: Teaching and Learning about Human Difference*. Ph.D. dissertation. Princeton, NJ: Princeton University, Department of Sociology.

Ngai, M. M. 1999. The architecture of race in American immigration law: a re-examination of the Immigration Act of 1924. *Journal of American History*, 86, 67–92.

Nobles, M. 2000. *Shades of Citizenship: Race and the Census in Modern Politics*. Stanford, CA: Stanford University Press.

Office of Federal Contract Compliance Programmes. *What We Do: OFCCP Mission Description*. Washington, DC: US Department of Labour, Employment Standards Administration.

OMB [Office of Management and Budget], 1995. Standards for the Classification of Federal Data on Race and Ethnicity. *Federal Register* 60 (August 28). Internet: http://www.whitehouse.gov/omb/fedreg/race-ethnicity.html

OMB, 1997. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity. Washington, DC.

OMB, 2000. Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement (Bulletin 00-02). Washington, DC.

Pager, D. 2003. The mark of a criminal record. *American Journal of Sociology*, 108, 937–975.

Prewitt, K. 2001. The census counts, the census classifies. Paper presented on 17 December at the international conference "The Measure and Mismeasure of Populations: The Statistical Use of Ethnic and Racial Categories in Multiracial Societies". Paris: Centre d'études et de recherches internationales.

Racial Privacy Initiative, 2003. Prop 54: Racial Privacy Initiative.

Rodríguez, C. 2000. *Changing Race: Latinos, the Census, and the History of Ethnicity in the United States*. New York: New York University Press.

Sabbagh, D. 2003. *L'Égalité par le droit: les paradoxes de la discrimination positive aux États-Unis*. Paris: Économica.

Sandefur, G., and McKinnel, T. 1986. American Indian intermarriage. *Social Science Research*, 15, 347–371.

Schor, P. 2001. *Compter et classer: les catégories du recensement américain de la population, 1740–1940*. Ph.D. dissertation. Paris: EHESS.

Skerry, P. 2000. *Counting on the Census? Race, Group Identity, and the Evasion of Politics*. Washington, DC: Brookings Institution.

Skrentny, J. D. 2002. *The Minority Rights Revolution*. Cambridge, MA: Harvard University Press.

Smedley, A. 1999. *Race in North America: Origin and Evolution of a World View*. Boulder, CO: Westview.

Sniderman, P., and Carmines, E. 1997. *Reaching Beyond Race*. Cambridge, MA: Harvard University Press.

Sniderman, P., and Piazza, T. 1993. *The Scar of Race*. Cambridge, MA: Harvard University Press.

Swain, C. 2001. Affirmative action: legislative history, judicial interpretations, public consensus. *In*: Smelser, N. J., Wilson, W. J., and Mitchell, F., eds, *America Becoming: Racial Trends and Their Consequences*. Washington, DC: National Academy Press, 318–347.

US Census Bureau, 2001. *Questions and Answers for Census 2000 Data on Race*. Washington, DC: US Census Bureau.

US Department of Justice, 2002. Civil Rights Division Activities and Programmes.

Wasby, S. 1995. *Race Relations Litigation in an Age of Complexity*. Charlottesville, VA: University Press of Virginia.

Woodward, C. V. 1974. *The Strange Career of Jim Crow*. New York: Oxford University Press.

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