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Normative Nominalism: The Paradox of Egalitarian Law in Inegalitarian Cultures - Some Lessons from Recent Latin American Historiography

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Normative Nominalism: The Paradox of Egalitarian Law in Inegalitarian Cultures— Some Lessons from Recent Latin-American Historiography

Robert J. Cottrol*

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I. INTRODUCTION

Despite a long tradition of writing dedicated to the legal history of Latin America, the field in recent decades has been overshadowed by a more extensive body of work examining the social and economic history of the region. For better than a generation, historians of the region, often aided by interdisciplinary training in the social sciences or, even, informed by anthropologists, sociologists, and economists doing historical research on the region, have brought new understandings of previously underexplored populations, such as peasants, the industrial proletariat, women as independent actors, and indigenous and Afro-American populations, among others.¹ This newer historiography has often brought a needed balance to the field, a correction of the tendency of previous generations of historians to concentrate on political history and ruling elites, sometimes to the exclusion of the less powerful and the less visible.²

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1. See, e.g., Alan Knight, Research Report, *Subalterns, Signifiers, and Statistics: Perspectives on Mexican Historiography*, *LATIN AM. RES. REV.*, Summer 2002, at 136, 136-38 (providing an overview of Latin American historiography).

2. *Id.* at 137-48 (advocating Latin-American scholarship that evaluates “paradigms, schools of thought, and theoretical premises”).

This change in emphasis is also coming to legal history. Writings on Latin-American legal history, the functioning of courts, legal doctrine, and the role of lawyers, have until quite recently been a fairly traditional field concerned primarily with institutional histories and the evolution of legal doctrine, largely through the adoption of new codes.³ The history of law and how that history influenced or failed to influence social status, politics, family life, relations among different racial and ethnic groups, and crime and punishment, the kind of legal historiography that U.S. legal historian Lawrence Friedman called, in his effort to similarly reorient American legal history, “a social history of American law” was largely lacking in the writings produced by historians of Latin America.⁴

If historians had been relatively slow in the effort to develop a social history of Latin-American law, legal scholars have also been slow to explore the possibilities of examining the behavior and function of law in the past and how the law has helped to shape, and in turn has been shaped, by the complex social and cultural histories of the different societies of Latin America.⁵ There are perhaps many reasons for this. Certainly the view of many regional specialists that law is little more than an instrument to maintain elite power and privilege and, hence, an institution less worthy of study than political alignments, clientism, or military power has probably contributed to the relative neglect of the field.⁶ There has also been, it is fair to say, a

3. Silvia Marina Arrom, *New Directions in Mexican Legal History*, 50 *AMERICAS* 461, 461-65 (1994) (discussing the formulation and implementation of the Mexican legal system). For two recent examples of historians working in the area of Latin-American legal history and doing important work in combining the history of law with social history, see generally 1 LINDA LEWIN, *SURPRISE HEIRS: ILLEGITIMACY, PATRIMONIAL RIGHTS, AND LEGAL NATIONALISM IN LUSO-BRAZILIAN INHERITANCE, 1750-1821* (2003) [hereinafter 1 LEWIN, *SURPRISE HEIRS*], 2 LINDA LEWIN, *SURPRISE HEIRS: ILLEGITIMACY, INHERITANCE RIGHTS, AND PUBLIC POWER IN THE FORMATION OF IMPERIAL BRAZIL, 1822-1889* (2003); REBECCA J. SCOTT, *DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER SLAVERY* (2005); and VICTOR M. URIBE-URAN, *HONORABLE LIVES: LAWYERS, FAMILY, AND POLITICS IN COLOMBIA, 1780-1850* (2000).

4. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 12 (2d ed. 1985) (emphasis omitted). For a discussion of Latin-American historiography and its relationship to more recent trends in the writing of social history, see Carlos Aguirre & Ricardo D. Salvatore, *Introduction: Writing the History of Law, Crime, and Punishment in Latin America*, in *CRIME AND PUNISHMENT IN LATIN AMERICA: LAW AND SOCIETY SINCE LATE COLONIAL TIMES* 1, 1-32 (Ricardo D. Salvatore et al. eds., 2001).

5. See Arrom, *supra* note 3, at 461-65 (noting from a historical perspective how Mexican law affected local communities).

6. For an edited volume of papers discussing the difficulties of establishing effective conditions allowing law to protect the powerless in Latin America, see generally *THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA* (Juan E. Méndez et al. eds., 1999) [hereinafter *THE (UN)RULE OF LAW*].

formalism and relatively narrow emphasis on legal doctrine in the training of lawyers and legal scholars at most law faculties in Latin America, inhibiting the development of legal scholars as well as practicing attorneys comfortable with the social sciences and prepared to integrate into legal analysis social, economic, or cultural factors necessary to do a truly interdisciplinary legal history.⁷

Underdeveloped in the Latin-American legal historiography is the kind of historical sociology of law suggested by U.S. legal historian William Novak.⁸ Novak, in an article examining James Willard Hurst, discussed the work of the pioneering legal historian and his role in moving the historiography of U.S. law from its fairly narrow doctrinal origins to a broader field of inquiry.⁹ This inquiry encompassed ““a broad concern with law’s operational ties to other components of social order [that] will lead to the contributions the study of legal history should make to an illuminating sociology of law.””¹⁰ This kind of historical sociology of law would presumably use law and its history not merely to illustrate the evolution of legal doctrine, or how the law resolved certain controversies, or even how it was influenced by the social currents of different eras. It would do these things of course, but it would presumably do something more. It would use the law as a window into the very civilization being studied. It would recognize that the law, both as stated and as actually applied, in the values expressed and in the promises unrealized, reveals a society and its culture in both its aims and its contradictions. This approach, I would argue, is an especially important one to bring to the study of legal history in Latin America. Many students of Latin-American law have long noted the gap between the law as stated and the law as actually applied.¹¹ There has been in the history of law in Latin America what might be termed a kind of normative nominalism,

7. See my discussion of Brazilian Supreme Court Justice Joaquim Benedito Barbosa Gomes’ call for the Brazilian adoption of some aspects of legal realism in cases involving race in Robert J. Cottrol, *Brown and the Contemporary Brazilian Struggle Against Racial Inequality: Some Preliminary Comparative Thoughts*, 66 U. PITT. L. REV. 113, 124-27 (2004) (outlining Justice Gomes’ reconciliation of affirmative action with the Brazilian Constitution). For a good, short overview of Brazilian legal education, see Nadia de Araujo, *Estado de la Educación Legal Brasileña*, 70 REV. JUR. U.P.R. 783 *passim* (2001).

8. See William J. Novak, *Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 LAW & HIST. REV. 97, 140-45 (2000).

9. See *id.* at 98-99.

10. *Id.* at 99 (quoting Willard Hurst, *The Law in United States History*, 104 PROC. AM. PHIL. SOC’Y 518, 521 (1960)).

11. See, e.g., Paulo Sérgio Pinheiro, *The Rule of Law and the Underprivileged in Latin America: Introduction*, in THE (UN)RULE OF LAW, *supra* note 6, at 1, 1-15 (asserting that the new democratic constitutions of most Latin American countries did not effectively reform legal institutions or change state agents’ practices).

a desire to use the law to make important normative statements, followed by often minimalist or nominal enforcement or application of legal norms.¹² By no means has this been an exclusively Latin-American phenomenon. One need consider only the unhappy fate of the Fourteenth Amendment's Equal Protection Clause or the Fifteenth Amendment's protection of racial minorities' voting rights in the United States in the first half of the twentieth century to realize this.¹³ But the gap between legal norms and legal applications has been stronger in Latin America than in many other societies. In some ways, the gap has become institutionalized with ordinary citizens, and indeed even public officials, routinely anticipating that the stated rules cannot reasonably be followed and adjusting their behavior on that assumption.¹⁴ All of this makes seeing Latin-American legal history with the kind of historical-sociological lens that Novak suggested more interesting and more compelling.

This Essay examines three books that bring us closer to the integration of Latin-American legal history with the broader political and social history of the region. The three books, *O fiador dos brasileiros: Cidadania, escravidão e direito civil no tempo de Antonio Pereira Rebouças*,¹⁵ *Measures of Equality: Social Science, Citizenship, and Race in Cuba, 1902-1940*,¹⁶ and *Drowning in Laws: Labor Law and Brazilian Political Culture*¹⁷ have all been published since 2001 and represent the newer effort by historians and social scientists concerned with Latin America to integrate legal and social history. Taken together, the three works raise important questions concerning the often profound disjuncture between legal norms and social practice that frequently occurs in much of Latin America. This disjuncture is often most glaring when issues of race and class inequality are considered. All three books give different and important perspectives on this critical issue for scholars concerned with law and Latin-American culture.

12. *Id.* at 2.

13. See ROBERT J. COTTRILL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE AND THE CONSTITUTION* 34-39 (2003).

14. See generally Keith S. Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and Its Developmental Implications*, 19 AM. J. COMP. LAW 514 (1971).

15. KEILA GRINBERG, *O FIADOR DOS BRASILEIROS: CIDADANIA, ESCRAVIDÃO E DIREITO CIVIL NO TEMPO DE ANTONIO PEREIRA REBOUÇAS* (2002).

16. ALEJANDRA BRONFMAN, *MEASURES OF EQUALITY: SOCIAL SCIENCE, CITIZENSHIP, AND RACE IN CUBA, 1902-1940* (2004).

17. JOHN D. FRENCH, *DROWNING IN LAWS: LABOR LAW AND BRAZILIAN POLITICAL CULTURE* (2004).

This Essay will examine these three books, and it is divided into three Parts. The first Part discusses Keila Grinberg's *O fiador dos brasileiros*, placing her biographical study within the context of the paradox of the nineteenth-century Brazilian Empire. The Brazilian Empire's Constitution of 1824 (1824 Constitution) has rightly been described by historians as liberal, and yet it governed the society whose economy was probably more dependent on slave labor than any other nation in the Americas in the nineteenth century.¹⁸ The second Part looks at Alejandra Bronfman's *Measures of Equality* and how the new racial thinking of the early twentieth century helped shape the behavior of legal actors in Cuba and the drafting of the racially liberal, but ultimately ineffective, Constitution of 1940. The third Part considers John French's *Drowning in Laws* and what his volume can tell us not only about labor law, social hierarchy, and political culture in twentieth-century Brazil, but also what his study suggests about the overall effectiveness of law and legal institutions in Brazil more generally.

II. LIBERAL CONSTITUTION, CONSERVATIVE CULTURE: THE SCHIZOPHRENIC BRAZILIAN EMPIRE

Antonio Pereira Rebouças, the subject of Grinberg's biography, in many ways led a life that encapsulated the contradictions that were the nineteenth-century Brazilian Empire.¹⁹ A prominent lawyer, juriscounselor (or legal commentator), and politician of the Brazilian Empire, Rebouças's life in many ways embodied the contest that was being waged for the soul of the giant empire in the nineteenth century.²⁰ A mulatto, the son of a Portuguese father and a *liberta*, or manumitted, mother, Rebouças would rise high in the legal and political cultures of nineteenth-century Brazil, yet he would always be subject to spoken and unspoken prejudices due to his race and color.²¹ An opponent of racial discrimination, Rebouças would nonetheless become a slaveholder and would defend slaveholders in court in manumission suits between slaves and slave owners.²² Rebouças could eloquently argue against discrimination against free black and

18. HERBERT S. KLEIN, *THE ATLANTIC SLAVE TRADE* 37-38 (1999).

19. GRINBERG, *supra* note 15, at 153-54.

20. *Id.*

21. *Id.*

22. *Id.* at 201-02 (noting that Rebouças participated in four suits representing slaves and five representing slave owners).

mulatto citizens of Brazil while still supporting the suppression of slave revolts and decrying what he saw as African barbarism.²³

In *O fiador dos brasileiros*, Grinberg captures the ideological, economic, and cultural crosscurrents that were an integral part of the Brazilian Empire reflected in the newly-formed empire's 1824 Constitution and the statutes, decrees, and court decisions that were a part of nineteenth-century Brazilian law.²⁴ The Enlightenment, the liberal imagination that would transform the Atlantic world in the late eighteenth and early nineteenth centuries, was having an influence on Portugal and her giant Brazilian colony.²⁵ Toward the end of the eighteenth century, Brazilian elites, chafing under Portugal's mercantilist restrictions, began to find justification for greater autonomy, at least for themselves, in the liberal political philosophies developed in France and elsewhere in Europe.²⁶ These led to abortive struggles for independence in various Brazilian venues, including Rebouças's native Bahia.²⁷ If these struggles proved unsuccessful in separating Brazil from Portugal, they nonetheless helped increase a sense of nationalism among Brazilian elites and indeed, as Brazilian historian Emilia Viotti da Costa has noted, among many of the Brazilian masses, slave and free, as well.²⁸ These elites hoped that independence and the liberal ideals that independence advocates were espousing would lead to freedom and better conditions.²⁹ The Napoleonic Wars would ultimately give independence advocates their victory.³⁰ The French Emperor's occupation of Portugal in 1808 would force the displacement of the Portuguese Monarch to Brazil.³¹ By 1815, Brazil was declared a kingdom united with Portugal.³² By 1822, Brazil had declared itself an independent empire with Pedro I as its emperor.³³

The new empire would need a new constitution, but what would be its basis? If liberal ideals had informed the movement for independence and had served as a vehicle for rallying the population to the nationalist standard, liberalism also posed a problem for the new

23. *Id.* at 174.

24. *Id.* at 23-35.

25. See EMILIA VIOTTI DA COSTA, *THE BRAZILIAN EMPIRE: MYTHS AND HISTORIES* 58-61 (rev. ed. 2000).

26. *See id.*

27. GRINBERG, *supra* note 15, at 48-49.

28. DA COSTA, *supra* note 25, at 7-12.

29. *Id.* at 10-12.

30. *See id.* at 12, 15-23.

31. *Id.*

32. *Id.*

33. *Id.* at 17-20.

nation's most important economic and social institution—slavery.³⁴ This problem was not, of course, uniquely Brazilian. Throughout the Americas, the revolutions for independence generally informed by broad liberal notions of “the rights of man” left the first-generation constitution drafters with the question of what to do about slavery.³⁵ The nations that secured their independence from Spain quickly recognized, as a legal principle, that slavery was incompatible with the professed ideals of their struggles for independence and indeed their new constitutions.³⁶ The Spanish-speaking nations that would emerge from the independence struggles took different routes to emancipation. Mexico abolished slavery directly by statute in 1829, nineteen years after independence.³⁷ Other nations, like Peru and Argentina, had long tortured routes toward emancipation with significant efforts to reverse or ignore earlier legislative attempts to put a gradual end to slavery.³⁸ Many statesmen of the founding generation in the United States recognized the incompatibility of slavery and the professed ideals of the American Revolution and Constitution, although the Constitution did recognize property rights in human beings, even providing a fugitive-slave clause to add federal protection to the institution.³⁹ It nonetheless should be added that any discussion of the United States and the reaction of the founding generation to the contradiction between liberalism and slavery should also include a discussion of state statutes, constitutions, and judicial decisions. If the nation as a whole failed to live up to its professed ideals, it is nonetheless important to note that at least half the states, those northern states where slavery was not central to the economy, did act on the ideals of the American Revolution, legally beginning the process of ending slavery within their borders.⁴⁰

34. *See id.* at 22-23, 126-27.

35. *Id.* at 58-62.

36. *Cf.* GEORGE REID ANDREWS, *AFRO-LATIN AMERICA, 1800-2000*, at 90-91 (2004).

37. LESLIE B. ROUT, JR., *THE AFRICAN EXPERIENCE IN SPANISH AMERICA* 279-82 (Markus Wiener Publishers 2003) (1976).

38. *See, e.g.*, Guyora Binder, *The Slavery of Emancipation*, 17 *CARDOZO L. REV.* 2063, 2079 (noting the “gradual emancipation plan” in Argentina). For an important discussion of the difficulties of achieving final abolition in Peru and the role of Afro-Peruvians in achieving that abolition see CARLOS AGUIRRE, *AGENTES DE SU PROPIA LIBERTAD: LOS ESCLAVOS DE LIMA Y LA DESINTEGRACIÓN DE LA ESCLAVITUD, 1821-1854* (1993).

39. U.S. CONST. art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend XIII; *see* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 *U.C. DAVIS L. REV.* 1773, 1788 (2006) (noting Thomas Jefferson's concern that slavery was incongruent with the ideals of the American Revolution).

40. For a discussion of northern emancipation, *see* generally ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* (1967). Ira Berlin makes the important point that northern abolition was a more difficult and problematic

Brazilians too recognized that slavery contradicted the professed liberal ideals for which the struggle for independence had been waged.⁴¹ But slavery was more profoundly a part of the Brazilian social order than had been the case in the former Spanish colonies or even, for the most part, the southern part of the United States.⁴² By 1822, over one-third of the Brazilian population was enslaved.⁴³ Better than seventy percent of the population consisted of blacks or mulattoes, slave, *liberto*,⁴⁴ and free.⁴⁵ Between 1801 and 1860, Brazil imported some 1,719,500 African slaves, more than three times the number imported into British North America and the United States in the seventeenth, eighteenth, and nineteenth centuries combined.⁴⁶ Owning slaves was not merely a means to a livelihood—the cultivation of a sugar plantation in Bahia or the extraction of gold from a mine in Minas Gerais—it was a symbol of a person’s wealth, power, and indeed status, an indication to all that one was part of the better classes.⁴⁷

It was against this background that Brazil’s 1824 Constitution was debated and finally adopted.⁴⁸ The 1824 Constitution reflected the influence of the Enlightenment and its ideas of fundamental rights and equality for all citizens.⁴⁹ Title 2 of the 1824 Constitution recognized

process than generally has been appreciated. See IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 228-55 (1998).

41. DA COSTA, *supra* note 25, at 126-27; Antonio Penalves Rocha, *Idéias antiescravistas da Ilustração na sociedade escravista brasileira*, 20 REV. BRASILEIRA DE HISTÓRIA 37 *passim* (2000) (Braz.).

42. Cf. ANDREWS, *supra* note 36, at 55.

43. DA COSTA, *supra* note 25, at 128.

44. *Liberto* status was something of a midpoint between slavery and freedom. Manumission in Brazil was typically accomplished by means of a document known as an *alforria*. EUNICE APARECIDA DE JESUS PRUDENTE, *PRECONCEITO RACIAL E IGUALDADE JURÍDICA NO BRASIL* 93 (1989). It was discretionary on the part of the slave owner and could be accompanied by conditions. *Id.* at 93-94. Those who were conditionally manumitted had the status of *libertos*. *Id.* at 95-97. In some cases their manumissions could be revoked. *Id.* One potential ground for revocation was ingratitude, a condition that of course maintained, or possibly increased, patron-client ties between *libertos* and former masters. *Id.* The Constitution of 1824 made *libertos* citizens, although they were prohibited from voting. *Id.* The children of *libertos* were *ingênuos*, and they had voting rights. *Id.*; see Robert J. Cottrol, *The Long Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 TUL. L. REV. 11, 57 (2001).

45. GRINBERG, *supra* note 15, at 46.

46. KLEIN, *supra* note 18, app. tbl. A-2. By way of comparison, the total number of Africans estimated to have been forcibly brought into what is now the United States is 559,800; the total number to Brazil 4,029,800. See *id.*

47. Cf. Cottrol, *supra* note 44, at 56.

48. See DA COSTA, *supra* note 25, at 58-61 (discussing the debates and adoption of the 1824 Constitution).

49. See *id.*

the citizenship of all free Brazilians, including *libertos*.⁵⁰ Title 8 recognized the principles of freedom of speech and of the press, of freedom from religious persecution, freedom of the home from government searches, the right to due process in criminal procedures, and prohibitions on *ex post facto* criminal law.⁵¹ Title 8 also prohibited torture, special privileges, and recognized the equality of all citizens before the law.⁵² Although the 1824 Constitution did not mention slavery, it had strong guarantees for property rights that were generally recognized as protecting the rights of slaveholders.⁵³ Of equal or probably even greater importance, the 1824 Constitution insured that political power would remain in the hands of slaveholding elites.⁵⁴ Property and income qualifications for voting allowed few men who were not of the elite, slaveholding class the opportunity to participate in politics.⁵⁵

The profound paradox presented by the imperial Brazilian constitutional order lay in a curious combination of constitutional liberalism, race-based slavery, and the formal commitment of the law to the ideal of equality for all, regardless of race or color.⁵⁶ In some ways it was a cognitive dissonance even more profound than that found in the constitutional order in the United States. If the U.S. Constitution originally had nothing explicit to say concerning race, before the Civil War, it also had no provisions defining citizenship or asserting the equal status before the law of all citizens.⁵⁷ Race-based slavery existed in the United States but it was largely justified, i.e., made coherent in a liberal society, through a national ideology that increasingly used principles of racial inferiority and the doctrine that even free Negroes were not citizens.⁵⁸ Brazil could not easily turn to

50. CONSTITUIÇÃO POLÍTICA DO IMPÉRIO DO BRASIL DE 1824 [BRAZILIAN EMPIRE CONSTITUTION OF 1824] tit. 2, available at <http://pdba.georgetown.edu/Constitutions/Brazil/brazil1824.html>.

51. *Id.* tit. 8.

52. *Id.*

53. *See id.* tit 8, art. 179, § XXII.

54. *See* DA COSTA, *supra* note 25, at 58-62.

55. *Id.*

56. *See id.*

57. *See* Robert J. Cottrol, *The Thirteenth Amendment and the North's Overlooked Egalitarian Heritage*, 11 NAT'L BLACK L.J. 198, 199-200 (1990) (noting that an impetus behind the Thirteenth Amendment was establishing a mechanism for equality).

58. This, like all generalizations, is too broad and fails to capture the full complexity of race and legal status in the antebellum United States. *Id.* at 202-03. There was, as I have argued previously, a period roughly between the end of the American Revolution and the 1820s, and in some states later, where black men enjoyed the status of citizens—as evidenced by their having the right to vote—if they could satisfy existing property qualifications. *Id.* These suffrage rights existed in a majority of states, both North and South, and only began to

racialist ideology as a source of justification for its slave system.⁵⁹ Profound racism existed, to be sure, in nineteenth-century Brazil. Race and color prejudice combined with strong class barriers and, often, profound cultural distances between slaves, who were often recently imported Africans and free Brazilians of both Portuguese and African descent.⁶⁰ But these barriers did not give rise to the rigid kinds of legal distinctions that, more often than not, limited the lives of people of African descent in the United States in the era of slavery and beyond.⁶¹

Grinberg provides an important insight into the formation of the Brazilian constitutional and social order when she discusses the impact of the Haitian revolution on Brazilian constitutional debates.⁶² The revolution in Santo Domingo had the effect of horrifying slave owners throughout the Americas, spurring some toward quicker acceptance of proposed emancipatory measures, moving others toward greater repression, and causing still others to consent to the adoption of ameliorative measures designed to forestall potential rebellion as well as criticisms from a Western world increasingly skeptical of slavery.⁶³

be lost in the nineteenth century, ironically at the same time as the broadening of suffrage rights, i.e., the dropping of property requirements that occurred for white men. *Id.* (discussing suffrage rights of free black men in the antebellum United States). Supreme Court Justice Benjamin Robbins Curtis used the existence of black suffrage at the time of the adoption of the Constitution to make a persuasive argument that free Negroes were citizens in his dissent in *Scott v. Sandford (Dred Scott)*. See 60 U.S. (19 How.) 393, 573-76 (1856) (Curtis, J., dissenting), superseded by U.S. CONST. amend. XIII. Arguably the situation in slave states, such as North Carolina and Tennessee where free black men retained the right to vote until the mid-1830s, bore a great deal of resemblance to the legal and social order that existed in the Brazilian Empire, i.e., slavery had the sanction of law, it was based on race, and yet an individual of the enslaved race could attain citizen status. Compare Cottrol, *supra* note 44, at 50 (discussing the rights of free black men in the antebellum South) with DA COSTA, *supra* note 25, at 125-28 (discussing Brazil's transition from free to slave labor). As the nineteenth century unfolded, the possibility for that kind of ambiguity in racial ideology in the slave states of the United States became less and less possible as free Negroes in the southern states became subject to an increasing regime of restrictions making clear the rights associated with citizenship would be reserved for whites. See generally IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* (1974) (discussing the emergence and culture of free Blacks in the antebellum South). For a good discussion of regional variation in the legal status of free blacks in the antebellum North, see Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 *passim* (1986).

59. DA COSTA, *supra* note 25, at 55-62, 234-46.

60. *Id.*; see JOÃO JOSÉ REIS, *SLAVE REBELLION IN BRAZIL: THE MUSLIM UPRISING OF 1835 IN BAHIA* 5, 63, 142 (Arthur Brakel trans., Johns Hopkins Univ. Press 1993) (1986).

61. Cottrol, *supra* note 57, at 199-206 (discussing the struggle for racial equality following the Civil War).

62. GRINBERG, *supra* note 15, at 50-51.

63. See DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 212-14, 237 (2006).

In Brazil, the realization that free mulattoes had joined with rebellious slaves in Santo Domingo caused a fear that similar alliances might occur in Brazil.⁶⁴ This certainly contributed to a greater willingness on the part of the drafters of the 1824 Constitution to accept the principle of equal rights and citizenship for all free Brazilians.⁶⁵

Rebouças's legal and political career helps give us some sense of how free Brazilians in the nineteenth century navigated their nation's cognitively difficult combination of race, slavery, and enlightenment values.⁶⁶ For Rebouças, liberal values, a rejection of discrimination based on race or color, a revulsion against African culture and an acceptance—and indeed participation to a point—in the system of slavery all were part of a coherent way of looking at the world and one that was by no means singular in the Brazilian Empire of the early nineteenth century.⁶⁷ This world view was shaped by the dynamics of a slave society, which although based almost from the beginning on the enslavement of Africans and their descendants,⁶⁸ had social and demographic currents that made race per se less important than it would be in a society like the United States.⁶⁹ The very harshness of Brazilian slavery insured that there would be a continuous importation of new African slaves to replace those who perished in the harsh conditions that prevailed in the plantations of Bahia or the mines of Minas Gerais.⁷⁰ These Africans would be culturally distinctive and not infrequently frightening not only to whites but often to native born Afro-Brazilians as well.⁷¹ The society that had emerged by the early

64. GRINBERG, *supra* note 15, at 50-51.

65. *See id.* The influence of French thought and French examples more broadly also had significant influence on the development of Brazilian political and constitutional thought. *See DA COSTA, supra* note 25, at 2-52. French enlightenment thought was a guiding influence in the struggles for independence; yet, the excesses of the French Revolution horrified Brazilian elites, helping to produce a more conservative approach to the constitution and the building of the independent Brazilian state. *Id.* at 27-46 (discussing this within the context of the career of nineteenth-century Brazilian statesman José Bonifácio de Andrada e Silva).

66. *See* GRINBERG, *supra* note 15, at 153-54, 201-02.

67. *See id.* at 24-30.

68. The Portuguese had begun the process of enslaving Africans even before their settlement of Brazil. Although there were efforts to enslave the indigenous population in the sixteenth and seventeenth centuries, the intercession of the Catholic Church had caused the Portuguese Crown to outlaw formally the practice in the seventeenth century, even though some enslavement of Indians continued informally beyond that point. *See id.* Still, Africans and their descendants were the principal group that was enslaved in Brazil and other parts of the Americas. *See id.*; FREDERIC MAURO, *LE PORTUGAL, LE BRESIL ET L'ATLANTIQUE AU XVII^e SIECLE (1570-1670)*, at 166-71 (1983).

69. *See* DA COSTA, *supra* note 25, 181-201.

70. *See id.* at 132-39.

71. *Id.*

nineteenth century was one where slaves were often predominately African.⁷² It was also one where African culture, often including Islamic-African culture—often seen as a distinct challenge to Portuguese Catholicism—provided a cultural basis for rebellious behavior on the part of slaves, either through outright revolts or the establishment of reconstituted African communities and cultures, the *quilombos*.⁷³

Many native born Afro-Brazilians managed to attain their freedom and a measure of equality despite the harshness of Brazilian slavery.⁷⁴ This occurred in part because the paucity of Portuguese settlers in Brazil left social and economic space for a free Afro-Brazilian class capable of filling such roles as free artisan, truck farmer, and enlisted soldier, among others, that were filled by poor whites in the slave societies of North America.⁷⁵ Mulattoes, like Rebouças, were also able to benefit from formal family ties with whites, such as legal recognition as legitimate children of white fathers.⁷⁶ This formal recognition and consequent support were particularly important in Brazilian society where personal advancement was often strongly dependent on family ties and patron-client relations.⁷⁷

By giving us the Rebouças story as a man of the law in the early Brazilian Empire, Grinberg does much to shed light on the complex web of race, color, culture, class, and clientism in nineteenth-century Brazil.⁷⁸ Rebouças began as an outsider to the elite world of practitioners of law and state affairs, the world of the *bacharel* in which he would attain preeminence.⁷⁹ His status as a mulatto contributed to this and throughout his career would lead to charges that he sympathized with slave rebellions or that he sought to recreate a

72. *Id.*

73. See GRINBERG, *supra* note 15, at 144 (discussing Rebouças's role in putting down the slave rebellion in 1835); REIS, *supra* note 60, at 112-28 (discussing the role of Islam in the Bahian slave rebellion).

74. FRANCISCO VIDAL LUNA & HERBERT S. KLEIN, *SLAVERY AND THE ECONOMY OF SÃO PAULO: 1750-1850*, at 158 (2003).

75. *Id.* at 158-63.

76. This was true not only for legitimate children, but, as Linda Lewin informs us, Brazilian law had mechanisms to remedy or cure illegitimacy that was often presumed in cases involving people of African descent. See 1 LEWIN, *SURPRISE HEIRS*, *supra* note 3, at 63-64. Illegitimacy was considered a "defect" of birth. See *id.* It was also possible in the colonial period to have a "defect" of color, i.e., African or indigenous ancestry by royal certificate. See *id.*

77. See DA COSTA, *supra* note 25, at 188-91.

78. GRINBERG, *supra* note 15, at 153-54, 201-02.

79. *Id.* at 186.

revolution similar to the one that had occurred in Santo Domingo.⁸⁰ But race was not the only reason Rebouças was an unlikely candidate for this elite world of law and governance. The Brazilian bar and the *bacharel* class more generally were dominated by the sons of the elite, young men who had the time and money to study law, philosophy, and political economy at Portugal's Coimbra University.⁸¹ Rebouças had neither and instead taught himself the law while working as a clerk in a notarial office.⁸² His efforts paid off. In 1821, he was admitted to the practice of law with all the privileges normally reserved for graduates of the Portuguese university.⁸³ By 1823, in part because of his support for the cause of independence, Rebouças met with Emperor Dom Pedro I, was appointed to a government position, and was made a Knight of the Order of the Cruzeiro.⁸⁴ His public career was underway.

It is easy, too easy, to see an historical public figure's public life and policy positions simply as an extension of his personal biography, social background, struggles for achievement and recognition, and as the sum total of his personal alliances and animosities. We would like to believe, and indeed should believe, that more goes into the stands a public figure takes on the issues of his time. This would be especially problematic to do with Rebouças, a complex man of both strong ambition and profound learning. And yet Rebouças's constitutional vision clearly owed much to both the harsh realities of social prejudice with which he was familiar as well as the potentialities for equality and mobility that the 1824 Constitution provided.⁸⁵ Rebouças firmly resisted encroachments on the legal equality promised by the 1824 Constitution.⁸⁶ The struggle over who could be an officer in the National Guard was particularly revealing of Rebouças's views of the links between law, race, and civilization.⁸⁷ As a member of the Chamber of Deputies, in 1832 he opposed a measure that would have prevented *libertos* from receiving commissions in the National Guard, a militia controlled by the central government and used for internal security.⁸⁸ Rebouças denounced the measure as "unjust, incendiary,

80. *Id.* at 24-26, 102-03.

81. *Id.* at 238-42.

82. *Id.* at 69.

83. *Id.* at 71.

84. *Id.* at 77-78.

85. *Id.* at 34-35, 85, 101-02.

86. *Id.*

87. *Id.* at 101-02.

88. See DA COSTA, *supra* note 25, at 66, 68, 72-73, 186.

impolitic, and unconstitutional.”⁸⁹ He noted that *libertos* aided in the struggle for independence.⁹⁰ More revealingly, Rebouças cautioned his fellow deputies that they were following the dangerous example of the French in Haiti.⁹¹ By excluding *libertos* and other free people of color from the rights of citizenship in Haiti, they had set the stage for an alliance between the African slaves of that island and the free people of color who should have been the allies of the French.⁹²

Grinberg discusses Rebouças’s position on the National Guard issue, noting that the Bahian deputy differed from a number of his liberal peers who were prepared to restrict the rights of *libertos* as a means of reinforcing the social order in which racial boundaries were important, even if not specifically sanctioned by law.⁹³ And yet Rebouças’s dissent in this regard is not at all hard to understand. Rebouças’s fight for a broadly inclusive vision of citizenship was one that validated his own being—that of the self-made man of color who was able to use the law’s lack of formal restrictions, his own talents, and a bit of good fortune in securing powerful patrons to rise in a society where social prejudices were strongly arrayed against him.⁹⁴ It was a formula that had not only worked well for Antonio Rebouças, but, as Grinberg informs us, for two of his brothers as well.⁹⁵ Rebouças feared the growth of the kind of restrictions that had occurred in France’s Caribbean colony were increasing in the United

89. GRINBERG, *supra* note 15, at 102 (author translation).

90. *Id.*

91. *Id.* at 102-03.

92. Historian Gwendolyn Midlo Hall discussed the growth of discrimination and legal restrictions against free mulattoes in Haiti throughout the course of the eighteenth century. Gwendolyn Midlo Hall, *Saint Dominique*, in *NEITHER SLAVE NOR FREE: THE FREEDMEN OF AFRICAN DESCENT IN THE SLAVE SOCIETIES OF THE NEW WORLD 172, 174-79* (David W. Cohen & Jack P. Greene eds., 1972). Her research indicated that what had been a fairly mobile society for free people of color at the beginning of the eighteenth century became more and more restrictive toward the century’s end as French planters sought to maintain control over the expanding plantation economy. *See id.* Despite this, even at the end of the eighteenth century, Saint Dominique (Santo Domingo) nonetheless had a significant free mulatto elite who were themselves planters and slaveholders. *See id.* Also, see historian Laurent Dubois’ discussion of increasing restrictions on the legal rights of *gens de couleur* and the loss of rights once guaranteed under the code noir in the French Caribbean in LAURENT DUBOIS, *A COLONY OF CITIZENS: REVOLUTION & SLAVE EMANCIPATION IN THE FRENCH CARIBBEAN, 1787-1804*, at 73-80 (2004).

93. GRINBERG, *supra* note 15, at 101-02.

94. *Id.* at 77-78.

95. Grinberg notes that one brother, Manoel Maurício, studied medicine in Paris and later practiced and taught medicine in Bahia and another, José Pereira, studied classical music in Europe and became master of the Orchestral Theater in Salvador, Bahia. *Id.* at 70. A third brother Manoel Pereira was less successful. *Id.* He spent his working life as an office clerk. *Id.*

States at the time, and were closing off the possibilities of citizenship and equality that had so benefitted Rebouças and his family.⁹⁶

But Rebouças, who could eloquently and forcefully defend the rights of all free citizens and, indeed, demonstrate a special concern for the rights of free and *liberto* Afro-Brazilians, had a decidedly less liberal record with regard to slavery.⁹⁷ His views in some respects might be difficult for North Americans accustomed to equating racial liberalism with antislavery sentiment to sort out, but they were not all that singular in the Brazilian society of the first half of the nineteenth century.⁹⁸ Rebouças at once believed slaves to be outside of “the Empire of law and rights” which governed free people.⁹⁹ Slaves were property with only limited claims to the law’s protection.¹⁰⁰ Yet, Rebouças strongly believed in the meritocratic ideal that allowed manumissions and the acquisition of citizenship and equal rights for *libertos*, the recently manumitted.¹⁰¹ He rejected racial restrictions on citizenship yet felt no problems denouncing African culture and African-led slave revolts and using the specter of such revolts to press the case for an alliance of the free regardless of color.¹⁰² As a deputy, Rebouças would support the abolition of the slave trade and yet would argue the case less on moral grounds and more on the grounds that the trade had to be outlawed to placate British sentiment.¹⁰³ He would also argue for the importation of free Africans as agricultural laborers.¹⁰⁴

Grinberg details Rebouças’s political career and how the political demands of Brazil’s increasingly conservative 1830s helped produce a conservative reaction in Rebouças that would later cause critics to see him as a representative of an old liberalism centered around the 1824 Constitution and that failed attempt to adapt to Brazil’s evolving political and social realities.¹⁰⁵ Particularly telling was his opposition to the Sabinada rebellion of 1837, a rebellion led by free mulattoes motivated in part because social prejudices were increasingly cutting off avenues of upward mobility, particularly in the military.¹⁰⁶

96. *Id.* at 108-09, 117-18.

97. *Id.* at 119.

98. *Id.*

99. *Id.* (author translation).

100. *Id.*

101. *Id.* at 100-07.

102. *Id.* at 120.

103. *Id.* at 170.

104. *Id.* at 170-72.

105. *Id.* at 24-26.

106. *Id.* at 150-51.

Rebouças's reticence with respect to this rebellion might be seen as part of his larger nationalist ideology, his strong support for national unity, and his opposition to a number of regional rebellions that were occurring in Brazil in the early decades of the nineteenth century.¹⁰⁷

Rebouças's political career effectively ended in 1848 with electoral defeat.¹⁰⁸ He would devote the rest of his career to his law practice.¹⁰⁹ Grinberg is especially skillful at showing how Rebouças's complex combinations of sentiments and interests played out in one part of his practice, disputes over manumission claims.¹¹⁰ Students of slavery in the Americas have long known that in Brazil, as indeed in other parts of Latin America, slaves could make legally enforceable contracts for manumission.¹¹¹ These contracts usually specified prices and terms under which slaves could purchase their freedom.¹¹² In the cities of Latin America, including such Brazilian urban centers as Salvador, Rio de Janeiro, and São Paulo, the ability of slaves to make legally binding manumission contracts, coupled with the constant demand for labor that existed in the urban economies, contributed greatly to the growth of free Afro-American populations.¹¹³ In Brazil, Rio de Janeiro's *Tribunal da Relação* had appellate jurisdictions over

107. Grinberg makes the interesting point that Rebouças saw his very identity as a mulatto as emblematic of Brazilian national unity. *Id.* at 150. His view that because his ancestry included both races he could empathize with all Brazilians enabling him to be "O fiador dos brasileiros" or "the guardian of the Brazilians." *Id.* In a curious way, Rebouças anticipated the racial ideology of a number of twentieth-century Latin-American thinkers who emphasized that *mestizaje*, or race mixture, was critical to the formation of various national identities in Latin America. GILBERTO FREYRE, BRAZIL: AN INTERPRETATION 94-108 (1945). This was particularly true of Brazilian social scientist Gilberto Freyre, who stressed the importance of race mixture and the resulting mulatto population to the formation of Brazilian national identity. *Id.*; see GILBERTO FREYRE, THE MASTERS AND THE SLAVES: A STUDY IN THE DEVELOPMENT OF BRAZILIAN CIVILIZATION 66-84 (Samuel Putnam trans., Univ. of Cal. Press 2d rev. ed. 1986) (1971).

108. GRINBERG, *supra* note 15, at 197-200.

109. *Id.*

110. See *id.* at 201-07.

111. See, e.g., FRANK TANNENBAUM, SLAVE AND CITIZEN: THE NEGRO IN THE AMERICAS 52-62, 99-107 (1946); ALAN WATSON, SLAVE LAW IN THE AMERICAS 142-57 (1989).

112. TANNENBAUM, *supra* note 111, at 54-57 (discussing manumission in Cuba); WATSON, *supra* note 111, at 54-55 (noting the development of manumission in Spanish America).

113. It should be noted that throughout the Americas cities were the venues where slaves were most likely to achieve freedom through self-purchase. T. STEPHEN WHITMAN, THE PRICE OF FREEDOM: SLAVERY AND MANUMISSION IN BALTIMORE AND EARLY NATIONAL MARYLAND 3-14 (1997) (discussing the growth of the free Negro population in Baltimore). Although the law in the southern states of the United States did not recognize the enforceability of manumission contracts, agreements between masters and slaves for self purchase and manumission existed nonetheless and were often honored, resulting in the growth of free Negro populations in a number of southern cities. *Id.*

such cases known as “actions for freedom.”¹¹⁴ Here Grinberg was able to draw on her earlier work that examined the functioning of that court in freedom suits allowing her to place Rebouças’s advocacy before the Rio court in broader context.¹¹⁵

Grinberg’s discussion provides a truly valuable synthesis of legal, as well as social and cultural, analysis. Rebouças would enter practice in Rio mostly representing property holders seeking indemnity from the government for losses incurred during the struggle for independence.¹¹⁶ His talent, ambition, and political connections had brought him into the ranks of the imperial city’s elite.¹¹⁷ He had a grand home, which included a magnificent library of nearly 3000 volumes.¹¹⁸ Rebouças was the owner of seven slaves who acted as his house servants.¹¹⁹ And most importantly his admission to practice before the Brazilian Empire’s highest courts, despite not having a law degree, ensured that he could maintain a lucrative practice to support his seigneurial lifestyle.¹²⁰

O fiador dos brasileiros takes us through the complex and changing ideological and legal terrain that shaped both advocacy and judicial decision making in the manumission cases.¹²¹ Certainly a foundational principle of Brazilian constitutionalism was the inviolability of property rights.¹²² This was consistently reiterated by a parliament and indeed a social elite in which slaveholders predominated.¹²³

Yet, Brazilian law recognized manumission and indeed liberal sentiment in the empire was becoming increasingly antislavery as the nineteenth century unfolded.¹²⁴ The contradiction between slavery and Brazil’s at least nominally liberal values was increasingly being recognized by more and more members of Brazil’s elites, including members of the bar.¹²⁵ Grinberg outlines the important role played by the Brazilian bar, particularly from the 1860s onward, in moving the

114. The actual term in Portuguese was *ações de liberdade* or actions of liberty. See KEILA GRINBERG, *LIBERATA: A LEI DA AMBIGÜIDADE* (1994).

115. See generally *id.*

116. GRINBERG, *supra* note 15, at 197-98.

117. *Id.*

118. *Id.* at 199.

119. *Id.* at 198. Grinberg notes that Rebouças inherited his slaves from his father-in-law and that they were freed by self-purchase in the 1860s. *Id.* at 218-19.

120. *Id.* at 198-99.

121. *Id.* at 201-11.

122. DA COSTA, *supra* note 25, at 59-62.

123. *Id.*

124. *Id.* at 164-65.

125. See *id.* at 74-77.

courts toward a pro-manumission posture.¹²⁶ To do this, both bar and bench had to fight some of the newer developments in legal methodology.¹²⁷ Civil law jurisdictions, particularly in the wake of the French Revolution, were moving toward greater codification as a device to reign in both creative advocacy and judicial latitude through strict adherence to codified rules.¹²⁸ This ideal, of a jurisprudence constrained by a code and technical rules, ran up against the increased antislavery sentiment of members of the bar.¹²⁹ It also ran up against the equities of individual manumission cases, despite the law's presumptions in favor of the property rights of slave owners.¹³⁰ These presumptions usually placed the burden of proof on the slave to demonstrate both the existence of a manumission agreement and that the slave had fulfilled the contractual requisites.¹³¹ Grinberg is especially insightful in showing how antislavery lawyers used multiple sources of law: Roman law, Canon law, concepts of natural law taught at Coimbra, customary law, and other authorities were used to make the argument for freedom in individual cases where the positive law seemingly argued against manumission.¹³² The *Tribunaisdais Relações* (Relations Tribunals) would reject the view that it was bound by *stare decisis*, instead holding to a broad view of its interpretive prerogatives.¹³³

It is in her discussion of the legal profession's balancing of the demands of its own antislavery idealism with the often harsh realities of proslavery positive law where Grinberg supplies a masterful interdisciplinary synthesis that combines a strong technical understanding of nineteenth-century Brazilian legal history with the history of ideas, particularly political philosophy, and the sociology of group consciousness. In part, Grinberg's discussion treads on some of the same ground explored by Robert Cover, in another context, when he looked at the response of antislavery northern jurists confronted with the dilemma of enforcing proslavery positive law, including federal fugitive-slave legislation.¹³⁴ Grinberg sees the reaction of the

126. GRINBERG, *supra* note 15, at 233-43.

127. *See id.*

128. *See generally* M.C. Mirow, *The Power of Codification in Latin America: Simón Bolívar and the Code Napoléon*, 8 TUL. J. INT'L & COMP. L. 83 (2000).

129. GRINBERG, *supra* note 15, at 216-17.

130. *See id.* at 217.

131. *Id.* at 217-18.

132. *Id.* at 233-39.

133. *Id.* at 238-39.

134. *See* ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 175-91 (1975).

bar and bench in Rio in the latter half of the nineteenth century as an example of the autonomy of the legal profession and to an extent it certainly is.¹³⁵ But as Grinberg demonstrates, it is also a study in class attitudes and ideologies and how the legal profession and an important segment of the literate, university-educated *bacharel* class came to be connected to the wider world of liberal thought in the late nineteenth century and, by doing so, came to reject slavery and use the judicial process to undermine it.

Rebouças too would come to develop stronger antislavery views toward the end of the nineteenth century and his life.¹³⁶ His son, Andreas, would become a significant figure in Brazil's abolitionist movement as well as a collaborator with that nation's great abolition leader Joaquim Nabuco.¹³⁷ Through her study of Rebouças, previously a largely forgotten man in Brazilian history, Keila Grinberg has provided us with the kind of study of a life in the law that provides us with an important examination of the link between legal history and broader social and cultural influences that help shape history. In a work that is in many ways both broadly interdisciplinary and also comparative, Grinberg helps to set the stage for an historiography of Brazilian law that takes us into previously underappreciated corners—corners that tell us about the cultural origins of legal doctrine and the actual behavior of courts, jurists, and advocates. She does this with reference to the institution—slavery—that perhaps more than any other helped to define Brazilian society and Brazilian culture.

III. SCIENTIFIC RACISM AND EGALITARIAN CONSTITUTIONS

If slavery as an institution played a critical role in defining the society and culture of nineteenth-century Brazil, and indeed beyond, the generalization might be made with equal vigor concerning Cuba.¹³⁸ Cuba too would experience a sugar-fueled economic boom in the nineteenth century, fueled in part by the impact of the Haitian Revolution on sugar and coffee plantations in Santo Domingo.¹³⁹ Like Brazil, Cuba would continue importation of African slaves well into

135. See GRINBERG, *supra* note 15, at 233-43.

136. *Id.* at 275-76.

137. See ROBERT BRENT TOPLIN, *THE ABOLITION OF SLAVERY IN BRAZIL* 66, 116-17, 122 (1972).

138. See LAIRD W. BERGAD ET AL., *THE CUBAN SLAVE MARKET: 1790-1880*, at 28 (1995).

139. *Id.*

the nineteenth century.¹⁴⁰ Cuba, like Brazil, did not abolish slavery until the 1880s.¹⁴¹ Spain abolished slavery in Cuba in 1886, two years before final abolition in Brazil in 1888.¹⁴² Alejandra Bronfman's *Measures of Equality: Social Science Citizenship, and Race in Cuba, 1902-1940*, looks at the aftermath of Cuba's nineteenth-century history of slavery and its derivative history of increased racial discrimination and differentiation.¹⁴³

Like Grinberg, Bronfman is, in part, examining something of a constitutional dilemma. Cuba's Constitution of 1901 recognized the citizenship of all regardless of race.¹⁴⁴ A constitution written in the Americas at the beginning of the twentieth century could hardly do less. Besides, Afro-Cubans had played a major role in the struggle for independence.¹⁴⁵ Antonio Maceo, an Afro-Cuban who became a general in the revolutionary forces and died in the struggle to liberate Cuba from Spain, had become a national icon.¹⁴⁶ Still, if the law formally recognized the equality of all, the early twentieth century in Latin America, as indeed was also the case in the United States and other parts of the western world, was a time when strong ideological and scientific forces argued against doctrines of racial equality.¹⁴⁷ In the United States, scientific racism and social Darwinism provided an intellectual underpinning for the willingness of the judiciary to allow Jim Crow laws and disenfranchisement in many American states.¹⁴⁸ In Latin America, similar doctrines were causing intellectual and political leaders to ponder what to do with the large, frequently a majority, portions of their populations that were of indigenous or African

140. Cuba continued the importation of slaves until 1867, two years after the adoption of the Thirteenth Amendment to the United States Constitution, which prohibited slavery. U.S. CONST. amend. XIII; see BERGAD ET AL., *supra* note 138, at 38.

141. REBECCA J. SCOTT, *SLAVE EMANCIPATION IN CUBA: THE TRANSITION TO FREE LABOR, 1860-1899*, at 3 (1985).

142. Scott notes Spain's effort to have a gradual emancipation in the 1880s. *Id.* at 127-97.

143. See BRONFMAN, *supra* note 16, at 1-15. Historian George Reid Andrews notes the increase in measures designed to restrict the rights of free Afro-Cubans in the nineteenth century, a result that could be partially attributed to the increased African and Afro-Cuban population and the resulting fear that free Afro-Cubans would make common cause with slaves. See ANDREWS, *supra* note 36, at 69-73. As in Brazil, there were also special efforts to curtail expressions of African culture in the fear that such could cause or promote slave rebelliousness. See *id.*

144. See CONSTITUCIÓN DE LA REPÚBLICA DE CUBA DE 1901 [CUBAN REPUBLIC CONSTITUTION OF 1901]; BRONFMAN, *supra* note 16, at 2-3.

145. ALEJANDRO DE LA FUENTE, *A NATION FOR ALL: RACE, INEQUALITY, AND POLITICS IN TWENTIETH-CENTURY CUBA* 12, 56-59 (2001).

146. BRONFMAN, *supra* note 16, at 1, 79; DE LA FUENTE, *supra* note 145, at 38-39.

147. BRONFMAN, *supra* note 16, at 4-10.

148. See COTTRILL ET AL., *supra* note 13, at 37-39.

descent.¹⁴⁹ These populations were seen as an embarrassment and a bar to national progress, i.e., the ability of a nation to join fully the western world dominated by Europeans and white North Americans.¹⁵⁰ Throughout the Americas the ideology of *blanqueamiento*, or whitening, would develop.¹⁵¹ Its tenets were fairly simple: the nations of the Americas would try to become white nations through a combination of encouraging European immigration and encouraging the black and brown populations to disappear through *mestizaje* and by trying to define the children of mixed unions as white whenever possible.¹⁵²

The issue could be especially acute in Cuba. The island nation had a large Afro-Cuban population and one that retained significant African cultural practices, due in part to large scale African immigration in the nineteenth century.¹⁵³ And Cuba at the beginning of the twentieth century was a society where U.S. influence was strong, owing in no small part to its proximity to the United States and the American occupation of the island between 1899 and 1902.¹⁵⁴ Consequently, as Bronfman details, early twentieth-century Cuba became a battleground between those who adhered to the constitutional ideal of racial equality and those who felt that the new scientific learning of the twentieth century dictated a subordinate, and hopefully only temporary, place for the Afro-Cuban.¹⁵⁵

The war between these two sides was often fought out over the issue of expressions of African culture in Cuban life.¹⁵⁶ For legal historians of race relations, postemancipation Latin America has often presented daunting challenges in trying to determine the role of law in maintaining racial hierarchy. Unlike South Africa or the United States, the nations of Latin America had no body of racial legislation designed to mandate a superior status for whites and a subordinate status for others.¹⁵⁷ Indeed the absence of such legislation and official apartheid or apartheid-like practices caused many observers from Latin America

149. See Cottrol, *supra* note 44, at 62-66 (discussing the impact of social Darwinism on Brazilian emancipation).

150. *Id.*

151. *Id.* at 63-66 (citing WINTHROP R. WRIGHT, *CAFÉ CON LECHE: RACE, CLASS, AND NATIONAL IMAGE IN VENEZUELA* 67-68 (1990)).

152. *Id.*

153. See ANDREWS, *supra* note 36, at 69-73.

154. See DE LA FUENTE, *supra* note 145, at 12, 56-57.

155. BRONFMAN, *supra* note 16, at 6-10, 28-33, 71-73.

156. *Id.* at 18-35.

157. Alejandro de la Fuente, *Myths of Racial Democracy: Cuba, 1900-1912*, *LATIN AM. RES. REV.*, Fall 1999, at 39, 43-49 (discussing the misperception that Brazil and Cuba “resemble[] South Africa without apartheid”).

and elsewhere to argue that Latin American societies were, in fact, racial democracies, free from the kinds of discrimination that prevailed in the United States and South Africa.¹⁵⁸ Bronfman points to legal efforts to stigmatize and criminalize expressions of African culture as one way in which the presumably egalitarian law of Cuba could be put to the service of scientific racism and *blanqueamiento*.¹⁵⁹ Bronfman tells a fascinating story of the enlistment of the new composite discipline of criminology along with anthropology to discover criminogenic features supposedly inherent in Afro-Cubans.¹⁶⁰

Throughout the Americas the suppression of African cultural expression served many purposes. It was seen as a defense of Catholicism and civilized values.¹⁶¹ It also served to deemphasize the large Afro-American element in Latin-American populations.¹⁶² Latin-American nations trying to project, for the outside world and for themselves, an image of being essentially European could ill afford displays of still vibrant African cultures to be too public.¹⁶³ In Brazil, legal suppression of expressions of African culture took the form of statutes forbidding the practice of the Afro-Brazilian religious rites, *candomblé*.¹⁶⁴ Bronfman tells us of one effort to suppress African culture: the campaign against *brujo*, or witchcraft, based on African cultural traditions.¹⁶⁵ The campaign against *brujo* combined many of the elements that would define Cuban race relations in the first decades after independence.¹⁶⁶ The concern with *brujo* was part of the obsession Cuban social scientists had with race and crime and the idea of an inherently criminogenic quality in Afro-Cubans.¹⁶⁷ It would lead to hysteria, accusations of ritual murder, and lynchings.¹⁶⁸ Here one might have wanted a somewhat more expanded discussion on

158. In the United States, this view was most closely associated with the work of sociologist Frank Tannenbaum. TANNENBAUM, *supra* note 111, at 105-06. Historian Alejandro de la Fuente argues that, despite the fact that most modern researchers tend to reject or disparage the racial-democracy thesis, there is still much to be said for it. *See* De la Fuente, *supra* note 157, at 43-48. He points to, among other things, the fact that Afro-Cubans in the early years of the twentieth century attained senior civil and military positions in the government that would have been inconceivable in the United States at the same time. *See id.*

159. BRONFMAN, *supra* note 16, at 6-7, 30-33.

160. *Id.*

161. *Id.* at 23-24, 34-35.

162. *Id.* at 22-35.

163. *Id.* at 38-41.

164. ANDREWS, *supra* note 36, at 9, 73-74, 121-22.

165. BRONFMAN, *supra* note 16, at 23-35.

166. *Id.* at 23-38.

167. *Id.* at 37-49.

168. *Id.* at 30-33.

Bronfman's part, perhaps more of a comparative discussion. There is a considerable literature from the sociology of deviance on boundary maintenance, crime waves, and hysteria that could help to frame the discussion of the *brujo* hysteria in early twentieth-century Cuba.¹⁶⁹ Similarly, the phenomenon of lynching in the U.S. South has been examined by sociologists and historians and that literature also could help place in context Bronfman's study of the *brujo* mobilization.¹⁷⁰

Bronfman provides a good account of the Afro-Cuban reaction to the often hostile intellectual atmosphere that prevailed in elite circles.¹⁷¹ There was a range of Afro-Cuban reactions, as might be expected in a society where the possibility of advancement for an individual Afro-Cuban existed if he were willing to accept certain ideological preconditions—especially the cultural and racial inferiority of Africans and Afro-Cubans.¹⁷² Acceptance of these premises, coupled with the notion that the better elements of the Afro-American population could be civilized and join the ranks of the elite, were often the keys to upward mobility in Latin America, as we have seen with Grinberg's discussion of Rebouças in Brazil.¹⁷³ Bronfman details how some accepted this arrangement and also how increasingly Afro-Cuban intellectuals began to struggle against scientific racism and notions of African cultural and racial inferiority.¹⁷⁴

Bronfman's discussion is particularly valuable as she leads us through the role of Afro-Cuban intellectuals and political organizers and their struggle over the Republic of Cuba Constitution of 1940 (1940 Constitution) and the effort to achieve a constitution that would effectively guarantee equal rights under law.¹⁷⁵ The 1940 Constitution provided explicit provisions against discrimination based on sex, race, color, or class.¹⁷⁶ It also prohibited the formation of political parties or pressure groups based on race, class, or sex.¹⁷⁷ The provision banning

169. See, e.g., Kathleen Auerhahn, *The Split Labor Market and the Origins of Antidrug Legislation in the United States*, 24 *LAW & SOC. INQUIRY* 411, 415-16 (1999) (noting literature supporting the theory that crime waves and hysteria "arise in response to boundary crises in society" (emphasis omitted)).

170. See, e.g., David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *LAW & SOC'Y REV.* 793, 798-99, 830-32 (2005) (providing an overview of literature discussing lynchings in the southern United States).

171. BRONFMAN, *supra* note 16, at 67-69.

172. *Id.*

173. *Id.* at 88-89.

174. *Id.* at 67-117.

175. *Id.* at 159-81.

176. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA DE 1940 [CUBAN REPUBLIC CONSTITUTION OF 1940] tit. IV, art. 20.

177. *Id.* tit. VII, art. 102.

racial discrimination was not self-enforcing, but empowered the Cuban Congress to pass enforcement legislation.¹⁷⁸

And yet, as Bronfman concludes, the nominally liberal 1940 Constitution failed in its promise to achieve racial equality, as indeed it failed in many other ways.¹⁷⁹ The Cuban Congress failed to pass enforcement measures that would give teeth to the antidiscrimination provisions of the 1940 Constitution.¹⁸⁰ Bronfman also ends with a telling observation that to understand how a constitution will be applied, the student must examine not only the written provisions but indeed the real structures of the state, “public opinion, political culture, corruption and the use of political violence” to understand how the law is actually going to be applied.¹⁸¹ It might be added that this was particularly true of the provision outlawing racial discrimination.¹⁸² The article specifically required legislative enforcement, invariably throwing the rights of Afro-Cubans and other racial minorities back into the political process where skill and the formation of alliances would play a major part in determining whether the normative prescriptions of the 1940 Constitution would ever find effective enforcement.¹⁸³

IV. NORMATIVE NOMINALISM, GOOD INTENTION, INDIFFERENT RESULTS, AND BRAZILIAN LABOR LAW

It is the question of the gap between legal norms and effective enforcement that engages John D. French in *Drowning in Laws: Labor Law and Brazilian Political Culture*.¹⁸⁴ French, a historian who has written extensively on Brazilian labor history, focuses his attention on Brazil’s *Consolidação das leis do trabalho*, or Consolidated Labor Code (CLT).¹⁸⁵ The CLT was enacted in 1943 by the administration of populist dictator Getulio Vargas.¹⁸⁶ It has remained the foundation of Brazilian labor law down to the present.¹⁸⁷

178. BRONFMAN, *supra* note 16, at 180.

179. *Id.*

180. *Id.* at 180, 184.

181. *Id.* at 180 (citing Nicolas Graizeau, *Genèse, exégèse et pratique de la Constitution de 1960*, in CUBA SOUS LE REGIME DE LA CONSTITUTION DE 1940: POLITIQUE, PENSÉE CRITIQUE, LITTÉRATURE (James Cohen & Françoise Moulin Civil eds., 1997)).

182. *Id.* at 174.

183. *Id.* at 179.

184. See, e.g., JOHN D. FRENCH, THE BRAZILIAN WORKERS’ ABC: CLASS CONFLICT AND ALLIANCES IN MODERN SÃO PAULO 4-16 (1992).

185. FRENCH, *supra* note 17, at 1; see Decreto-lei No. 5.452, de 1 de maio de 1943, D.O.U. de 09.08.1943 (Braz.).

186. See Decreto-lei No. 5.452, D.O.U. de 09.08.1943; FRENCH, *supra* note 17, at 1.

187. See FRENCH, *supra* note 17, at 3-4.

By its stated terms, the CLT was visionary, arguably the most advanced and protective labor legislation of the time.¹⁸⁸ The Vargas government, proud of its work and seeing the law as a model for other nations, had the code translated into English for international consumption.¹⁸⁹ Among other provisions, it protects the right to form labor organizations, prescribes conditions of employment and work, outlines procedures for the resolution of employment disputes, sets maximum hours and minimum salaries, sets limits on the discharge of employees, and provides regulations protecting the health and safety of workers, including special provisions for women and minors.¹⁹⁰ As French notes:

One is immediately struck by the extraordinary liberality with which the CLT accords rights and guarantees to urban working people and their organizations. If the universe of work did in fact operate according to the CLT, Brazil would be the world's best place to work. And if even half of the CLT was enforced, Brazil would be one of the more decent and reasonably humane places for those who work.¹⁹¹

But it is the failure of the CLT, its history of nonapplication and inadequate protection for Brazilian workers, that is French's focus in *Drowning in Laws*.¹⁹² Key provisions of the CLT were routinely violated.¹⁹³ Employers did so openly, often with the connivance of sympathetic government officials.¹⁹⁴ Corruption was rampant among government inspectors charged with enforcing safety and other provisions protecting industrial workers.¹⁹⁵ Labor courts also proved inadequate to the task of protecting Brazilian workers.¹⁹⁶ Even when

188. *Id.* at 1.

189. *Id.* at 41.

190. Decreto-lei No. 5.452, D.O.U. de 09.08.1943; FRENCH, *supra* note 17, at 40-41; see Roberto Fragale Filho, *Employment Litigation on the Rise? A Brazilian Perspective*, 22 COMP. LAB. L. & POL'Y J. 281, 288 (2001). Filho is a Brazilian legal scholar and labor judge who has noted that the CLT provides full protection against dismissal without cause for an employee with at least ten years of service. Decreto-lei No. 5.452, D.O.U. de 09.08.1943; Filho, *supra*, at 288. An employee in that category can only be dismissed for significant cause as determined by judicial procedure. Decreto-lei No. 5.452, D.O.U. de 09.08.1943; Filho, *supra*, at 288. Employees with less than ten years of service are entitled to indemnification of one month's pay for each year of service before dismissal. Decreto-lei No. 5.452, D.O.U. de 09.08.1943; Filho, *supra*, at 288.

191. FRENCH, *supra* note 17, at 41.

192. *Id.* at 42-46.

193. *Id.*

194. *Id.*

195. *Id.* at 42-46.

196. *Id.* at 49-53; see Stanley A. Gacek, *Revisiting the Corporalist and Contractualist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CARDOZO L. REV. 21, 69-70 (1994) (noting that Brazilian labor courts have been less concerned with the protection of worker's rights).

they had strong cases or actually prevailed in court against employers, the prospect of delay in appellate litigation forced claimants to settle for a fraction of what they were owed.¹⁹⁷

French traces the enforcement or failure to enforce the CLT through the different governments of postwar Brazil.¹⁹⁸ The CLT remained an underenforced legal norm through a succession of governments, democratic and military, right and left.¹⁹⁹ Particularly telling is French's discussion of how even during the early 1960s under leftist labor-supportive Presidents Jânio Quadros and João Goulart, Brazil's labor courts proved inadequate to the task of CLT.²⁰⁰

How does one account for the failure of Brazilian law in so critical an area? French takes us through several model explanations, pointing out their flaws and inadequacies. North American scholars in the 1960s sought to explain labor relations within the context of Latin corporatism, i.e., a dependence on a strong state and state intervention in labor affairs to mediate working conditions.²⁰¹ In a sense, this corporate model was an extension of the kind of paternalistic and hierarchical social relations that traditionally had prevailed in Latin societies with the state taking the place of the traditional patron as paternalistic protector.²⁰² Under this model, labor protection remained weak because it was not the result of organizing and bargaining on the part of workers, but instead was an extension of traditional clientism with workers still dependent on others for protection.²⁰³ French dismisses this explanation at its simplest, not only for its ethnocentricity, but also for its assumption that past cultural patterns would have such a profound effect on present behavior patterns.²⁰⁴ I will return to this point a bit later.

French also rightly sees as too facile simplistic Marxist explanations that the CLT was fraudulent from the start, i.e., an attempt by the quasi-Fascist Vargas regime to impose the CLT on a reluctant industrial proletariat in order to preclude more radical, working class organization.²⁰⁵ French dismisses this view, as he had done in his earlier work.²⁰⁶ If the CLT was in part designed to forestall a certain

197. FRENCH, *supra* note 17, at 42-46.

198. *Id.* at 7-8.

199. *Id.* at 60-72.

200. *Id.* at 49-53; see Gacek, *supra* note 196, at 69-70.

201. FRENCH, *supra* note 17, at 56-59.

202. *Id.*

203. *Id.* at 58-60.

204. *Id.* at 56-60.

205. *Id.*

206. See FRENCH, *supra* note 184, at 4-16.

degree of working-class militancy, it nonetheless, as French notes, was also meant to provide a measure of labor protection, and it also left a political and social space for labor organizing that might otherwise have been absent.²⁰⁷

French sees a bit more promise in looking at the legal culture in Brazil as an explanation for the gap between reality and performance in the field of labor law.²⁰⁸ Students of Brazilian law and culture have long noted the conflict between the idealism and reality in Brazilian law.²⁰⁹ That tension was inherent from the beginning with the drafting of the 1824 Constitution containing strongly egalitarian and libertarian language masking its protection of slaveholding.²¹⁰ That duality would continue in 1830 when Brazil signed a treaty outlawing the slave trade.²¹¹ It was a legal restriction Brazil's elites had no intention of following: they scornfully termed the treaty as something "for the English to see," a device to placate the British committed to ending the African slave trade.²¹²

But it would be a mistake to too quickly attribute the Brazilian gap between stated law and the law as actually applied as simply the result of self-conscious deception or of cynical manipulation of the legal system to benefit ruling elites. These factors are at work, at times to be sure, but something more contributes to the failure of the Brazilian legal system to deliver on the promise of an effective legal regime. That something more extends beyond the discussion of law and the rights of workers outlined in French's study. A 1971 article by North American legal scholar Keith Rosenn points us, at least part of the way, toward an understanding of Brazilian legal culture and how that culture regularly produces wide gaps between the stated and actual law.²¹³ And although Rosenn's article is steeped in the kind of culturalist explanation that French cautions us about, it does provide a useful historical and cultural context against which to understand Brazilian law and Brazil's legal community.²¹⁴ Rosenn's explanation that the concept of *jeito*, roughly translated as knack or skill, is often

207. FRENCH, *supra* note 17, at 59.

208. *Id.* at 41-42.

209. *Id.* at 5-6.

210. DA COSTA, *supra* note 25, at 60-61.

211. FRENCH, *supra* note 17, at 97-121; *see* LESLIE BETHELL, THE ABOLITION OF THE BRAZILIAN SLAVE TRADE 88-95 (1970) (discussing the Additional Convention to the Treaty Between Great Britain and Portugal for the Purpose of Preventing Their Subjects from Engaging in Any Illicit Traffic in Slaves, July 8, 1817, *available at* http://www.pdavis.ne/Treaty_Portugal.htm).

212. DA COSTA, *supra* note 25, at 60-61.

213. Rosenn, *supra* note 14, at 515.

214. *Id.* (discussing the importance of *jeito* in Brazilian legal culture).

key to understanding how Brazilians understand the purpose of law and indeed how the law will actually work out.²¹⁵ For Rosenn and others who have emphasized cultural explanations and Brazil's legacy of paternalistic social relations, the multiplicity of legal sources that existed both during Brazil's period as a colony of Portugal and during the nineteenth-century empire all contributed to a culture where the rule of law, at least as officially intended and stated, was weak—where one's expectations of achieving satisfaction in the nation's courts or from officials who staffed administrative agencies were frequently unfulfilled.²¹⁶

And yet a cultural explanation such as the one proffered by Rosenn invites questions. If social relations in parts of Brazil still bear the marks of the nation's seigneurial past, there are parts of the nation for which, at least on the surface, this is decidedly not the case. Brazil is the eighth-largest industrial economy in the world.²¹⁷ Much of that economy is centered in São Paulo, a gigantic industrial megalopolis, and a large percentage of São Paulo's population is descended from twentieth-century immigrants.²¹⁸ Why, as French has shown in both *Drowning in Laws* and *The Brazilian Workers' ABC*, haven't modern labor relations and a more modern approach to labor law taken over in the more industrialized regions, regions less heir to the paternalistic past of the colony and empire?

As was the case with Grinberg in *O fiador dos brasileiros*, French realizes the importance of the legal profession as an autonomous subculture, setting to an extent its own rules and

215. Rosenn notes the term *jeito* is used to cover a wide range of behavior from out-and-out corruption on the part of public officials to creative behavior on the part of governmental officials seeking to get around rules that are either outmoded or that should not be applied in a specific case. *Id.* at 515-16 (outlining several applications of the term *jeito*). Rosenn began his article with an illustration of *jeito*, which he notes has no precise counterpart in the English language:

A perceptive satirical study of the Brazilian way of life relates a European immigrant's first contact with Brazilian administrative practice. During his visa appointment with the Brazilian consul in Paris, the would-be immigrant was asked his profession. He replied that he had recently graduated from medical school. The consul responded, "Then in place of doctor, let's put down agronomist. In that way I can issue you a visa immediately. You know how these things are In any event, this way will make it perfectly legal."

Id. at 514 (footnote omitted).

216. *Id.* at 526-37.

217. Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 315 (2003) (comparing Brazilian and U.S. societies).

218. See Charles W. Cookson II, *Long-Term Direct Investment in Brazil*, 35 U. MIAMI INTER-AM. L. REV. 345, 348 (2004) (discussing the immigrant population in São Paulo).

developing its own system of values.²¹⁹ This too would affect the behavior of law in Brazil in both direct and indirect ways. This is true in the most obvious way—Brazilian lawyers, whether they are practicing attorneys, academics, jurists, or legislators are part of a wider world of people trained in law and in universities more generally.²²⁰ They historically have been part of the *bacharel* class.²²¹ That class in Brazil has been responsible for legal reforms—often doing so because they were influenced by liberal thought in the western world of which they were a part and often because they wanted to ensure the acceptability of Brazil in the eyes of their peers in Europe and the Americas.²²² The 1824 Constitution, for example, clearly reflected the influence of the French Enlightenment.²²³ French antislavery thought and the example of American abolition fueled growing antislavery sentiment in this class and their ultimate support for the 1871 “Law of the Free Womb” and final abolition in 1888.²²⁴ The roots of the CLT were influenced less by liberal ideology than by the corporatism of Benito Mussolini after whose regime Getulio Vargas modeled much of his *Estado Novo*.²²⁵ But even then the Vargas government translated the code into English, probably in part to impress the government of his wartime ally, Franklin Delano Roosevelt.²²⁶ In the postwar period Brazil would pass national civil

219. FRENCH, *supra* note 17, at 70-72.

220. *Id.* at 60-64.

221. *Id.*

222. *Id.*

223. DA COSTA, *supra* note 25, at 59-60.

224. *Id.* at 163-66.

225. Ricardo Silva Seitenfus, *Ideology and Diplomacy: Italian Fascism and Brazil (1935-38)*, 64 HISP. AM. HIST. REV. 503, 525-26 (1984) (indicating the influence of Fascist legislation on the Brazilian *Estado Novo*).

226. FRENCH, *supra* note 17, at 41. Despite the fascist influence on Vargas’ political thinking, Brazil declared war on Germany and Italy in the summer of 1942 after German U-boats sank a number of Brazilian merchant ships in the South Atlantic. The Brazilian Armed Forces took an active role in the war against the Axis; some 25,000 Brazilian troops took part in the Italian campaign. The Brazilian army maintains a Web site detailing the history of the Brazilian Expeditionary Force (FEB). See EXÉRCITO BRASILEIRO, FORÇA EXPEDICIONÁRIA BRASILEIRA (FEB), A FEB NA II GUERRA MUNDIAL, <http://www.exercito.gov.br/03Brafor/feb/meiramat.htm> (last visited Feb. 19, 2007); EXÉRCITO BRASILEIRO, FORÇA EXPEDICIONÁRIA BRASILEIRA (FEB), JORNAL DA GUERRA, <http://www.exercito.gov.br/03Brafor/feb/octavio.htm> (last visited Feb. 19, 2007). Vargas’ social legislation was lauded in the short (nine minute) U.S. War Department propaganda film, *Brazil at War*. BRAZIL AT WAR (Office of the Coordinator of Inter-American Affairs 1943). The film depicted Brazil as a nation where constitutional rights were respected and the population was protected by progressive social legislation including, presumably, the CLT. For one discussion of the FEB and its impact on postwar politics in Brazil, see Shawn C. Smallman, *The Official Story: The Violent Censorship of Brazilian Veterans, 1945-1954*, 78 HISP. AM. HIST. REV. 229 (1998).

rights legislation, *Lei Afonso Arinos*, in part to make a statement that the nation was in fact the racial democracy that it claimed to be.²²⁷

But if the separate culture that was the legal community helped develop legal reforms and laws that made the outside world aware of Brazilian policies and Brazilian values, they also had internal norms and practices that sometimes thwarted the very reforms they were trying to implement.²²⁸ Brazilian lawyers and jurists have helped to develop a very inefficient legal system.²²⁹ Whether it can be explained, as Rosenn attempted, as a holdover from the Portuguese colonial system and the nineteenth-century empire of Dom Pedro I and Dom Pedro II, or whether some other explanation should be sought, the inefficiencies of the system are real.²³⁰ These inefficiencies play an important role in thwarting the stated aims of the written law, perpetuating a system where personalistic ties and *jeito* often play as great or greater a role in determining how, or indeed if, conflicts are resolved.²³¹ If we take but two examples: (1) Brazilian courts have historically not recognized *stare decisis* as a limitation on judicial decision making,²³² and (2) the 1988 Constitution gives broad standing to potential litigants.²³³ The lack of *stare decisis* is common in civil law systems where the text of the code or constitutional provision, and not prior decisions, are supposed to be governing law.²³⁴ Broad standing is seen as part of a commitment to keep the courts open to all, a value that has been seen as particularly important since the return to democratic rule in the 1980s.²³⁵

227. Lei No. 1.390, de 3 de julho de 1951, D.O.U. de 10.7.1951 (Braz.); Cottrol, *supra* note 7, at 120-21 (analyzing the disconnect between Brazilian law promoting racial harmony and actual practice); Tanya Katerí Hernández, *To Be Brown in Brazil: Education and Segregation Latin American Style*, 29 N.Y.U. REV. L. & SOC. CHANGE 683, 694 (2005) (highlighting the Brazilian “myth of racial democracy” through its cultural practice of public segregation).

228. Rosenn, *supra* note 14, at 543-46 (discussing the costs associated with Brazil’s legal structure).

229. *Id.* at 526-34 (analyzing the legal culture of Brazil).

230. *Id.* at 517-19 (tracing the roots of Brazil’s legal structure to Portuguese colonialism).

231. *Id.* at 515, 523 (emphasizing the importance of *jeito* and personal ties in Brazilian legal culture).

232. See Megan J. Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, 17 BERKELEY J. INT’L L. 230, 258-59 (1999).

233. *Id.* at 247-48 (explaining the expanded rights and reforms of the 1988 Constitution); see Constituição Federal [C.F.] (Braz.).

234. Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 779, 787 (2005).

235. Ballard, *supra* note 232, at 244-48.

And yet both the absence of *stare decisis* and liberal standing, or broad access to the courts, has helped produce a judicial system often simply incapable of handling the sheer volume of cases that come before it. Roberto Fragale Filho's examination of Brazilian employment litigation illustrates this. His article discusses both the open access Brazilian workers had to the labor courts in the 1990s and the large amount of employment litigation; nearly 2.5 million cases came before the labor courts toward the end of that decade (in the year 1997).²³⁶ The problem is seen most acutely in the caseload and function of Brazil's *Supremo Tribunal Federal*, the nation's highest court.²³⁷ Because of the absence of both certiorari and *stare decisis*, the Brazilian high court receives and must decide over 100,000 cases per year, often producing huge backlogs.²³⁸ Decisions made by the court become, of course, the law of the case, but end up having value only as persuasive precedent, one of many sources of law.²³⁹ The legal issues raised and decided in a prior case can be revisited again by the lower courts.²⁴⁰

Efforts to make the system more efficient have frequently been resisted by the Brazilian bar.²⁴¹ At least part of the task of studying the gap between the law as stated and the law as actually applied in Brazil, and indeed other legal cultures, involves examining the interplay between cultures, institutions, and the law. If Brazilian lawyers are part of an educated class that reflect and try to implement international norms on workers' rights, protection of minorities and women, and safeguarding the environment, among other areas, they are also part of an internal Brazilian legal culture committed to continuing traditional practices. It would be surprising if this were not the case. The legal profession in every society takes great pains to socialize new members into existing norms and practices. It does so both through formal education in law schools as well as informal apprenticeships where newly minted law school graduates are turned into practicing attorneys. People become familiar with and try to maintain those practices and structures with which they are not only familiar, but within which they indeed have been successful.

236. Filho, *supra* note 190, at 282.

237. Maria Angela Jardim de Santa Cruz Oliveira, *Reforming the Brazilian Supreme Federal Court: A Comparative Approach*, 5 WASH. U. GLOBAL STUD. L. REV. 99, 100-13 (2006) (reviewing the heavy caseload of the Brazilian Supreme Federal Court).

238. *Id.* at 100.

239. *Id.*

240. *Id.*

241. *Cf. id.* at 141.

All of which adds to the complexity of analyzing why and how the law gets implemented in different societies. The juncture of often clashing societal interests that law is meant to mediate is often joined by a fragmented legal culture, lawyers representing different factions and interests combined with frequently conflicting internal demands from within the legal system. In Brazil, and indeed other parts of Latin America, this combination has helped to produce a kind of normative nominalism where egalitarian norms have become enshrined in constitutions and statutes but have proven elusive in application. Keila Grinberg, Alejandra Bronfman, and John D. French have all pointed us toward a better understanding of the complexities of the law's formation and application in Latin America and by doing so have pointed us toward a richer and more textured legal history of the region.