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The Long, Lingering Shadow: Slavery, Race, and Law in the American Hemisphere (Introduction)

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SLAVERY, RACE, AND LAW
IN THE AMERICAN HEMISPHERE

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Introduction

THIS BOOK IS AN EFFORT to broaden our current conversation on law and race. In the United States, the discussion on law and race has, in my view, tended to focus too narrowly on the American experience. This is perhaps understandable. The law in the United States has played a clear, undeniable role both in the construction of the American system of racial inequality and in the struggle to achieve equal rights. Any student educated in the United States—perhaps one who has simply taken the undergraduate survey course in American history or even one who only vaguely remembers the subject from high school—knows this history, at least in broad outline.

The new nation that began with a ringing declaration "that all men are created equal" quickly adopted a constitution that protected slavery, most prominently in that document's fugitive slave clause. Slavery had the law's imprimatur, an imprimatur reinforced by the Supreme Court's 1857 decision in *Dred Scott v. Sandford*—the infamous *Dred Scott* case. A cataclysmic civil war that killed more Americans than any of the nation's foreign conflicts put an end to slavery. The Constitution was amended in the wake of that conflict. The new Thirteenth Amendment permanently prohibited slavery. The Fourteenth proclaimed the citizenship and equal status of the former slaves. The Fifteenth opened political rights—voting—to all men, regardless of race. The nation enjoyed, briefly, that "new birth of freedom" eloquently proclaimed in Lincoln's Gettysburg Address. But by the end of the nineteenth century, the light of freedom was growing dimmer. Inequality was again being made part of the law of the land. State Jim Crow statutes mandating separate and stigmatizing treatment for Americans of African descent were declared constitutional by the Supreme Court in *Plessy v. Ferguson* in 1896. The stage was set for an early twentieth-century history of rigid segregation, racial violence, and disenfranchisement. The stage was also set for one of the more inspiring chapters in the legal history of the United States and indeed any nation, the struggle to use the law to dismantle the system of state-mandated inequality that prevailed in the southern states and indeed throughout the nation. That struggle would

take many forms, bringing the champions of equal rights many times before the nation's courts and legislatures. The most important triumphs of the civil rights movement in the postwar era—the Supreme Court's 1954 decision in *Brown v. Board of Education*, outlawing segregation in public education; the Civil Rights Act of 1964, outlawing discrimination in public accommodations and employment; and the 1965 Voting Rights Act prohibiting discriminatory practices against minority voters—remain the foundations of modern American antidiscrimination law.

American scholars might be forgiven for thinking that the legal history of race relations in the United States is sufficiently long and difficult enough to unravel so as to demand the exclusive attention of legal historians and others concerned with issues of race and law. The sheer size of the United States, coupled with its governance under a federal system where much of the law is determined not only by the national Congress and the federal judiciary but also by different state courts and legislatures, ensures that simple statements about the law will never be easy. This is as true or perhaps more so for what the law has had to say about issues of slavery and race as it is for other topics. And legal historians have also come to realize that the legal history of race in the United States is made even more complex because it involves more than the histories of those we have come to call black and white. The law has regulated the statuses of other groups—peoples of indigenous descent, and those whose ancestors came from Latin America and Asia as well. This has also contributed to the complexity of any discussion of the role of law in the troubled history of race relations in the United States. It has also contributed to the largely inward gaze of American legal historians concerned with the topic.

This prevailing tendency to focus inward might be contrasted with the broad comparative work essayed by sociologist Frank Tannenbaum in the 1940s. Tannenbaum believed—correctly, in my view—that comparative study can tell us much not only about other societies but also about our own. Tannenbaum was concerned with law as a force that greatly influenced the treatment of slaves in different societies and had a profound impact on race relations after emancipation as well. The Tannenbaum thesis is well known to students of comparative slavery. Tannenbaum's central claim is that the law played a critical role in helping to fashion slave systems in Latin America that were more protective of the rights of slaves and ultimately more conducive to egalitarian race relations than was the

case in the United States. His work remains the starting point for modern discussions on comparative slavery and race relations in the Americas, an impressive accomplishment for a work now more than six decades old.[1]

If the Tannenbaum thesis has been sharply criticized in recent decades, with historians of slavery convincingly challenging its benign portrayal of the institution in Latin America and students of race relations exploding the myth of racial democracy in the region, Tannenbaum still presents a worthy point of consideration and departure for scholars concerned with the role of law in creating and sustaining systems of racial hierarchy. Tannenbaum asked what historical sociologist Theda Skocpol has termed the "big" questions — those questions that force us to confront the fundamental differences between the society or civilization with which we are familiar and others that have developed in different or seemingly different ways. Confronted with the harsh realities of the Jim Crow America of the 1940s, Tannenbaum tried to understand those realities by contrasting the America he knew — with its color lines, its segregated schools, its Jim Crow army, its lynchings, its ubiquitous "white" and "colored" signs in front of water fountains and restrooms, train station waiting rooms, and park benches — with the seeming absence of discrimination in Latin America. He sought to explain what appeared to be the radically different developments of societies that had begun with the common institution of African slavery. He believed he had found the answer in the different ways that the law governed the lives of masters, slaves, and free people of color in what would become the United States and the different nations of Latin America.[2]

The "big" questions posed by Tannenbaum — How can we account for different patterns of race relations in the Americas, and to what extent can these differences be traced to the different slave regimes that developed in the New World and to the laws that governed those regimes? — remain critical. The black experience in the United States is a small part of a much larger history of the forced transportation and settlement of Africans in the Americas and the histories of their Afro-American and non–Afro-American descendants. Our best information indicates that less than 4 percent of Africans brought to the Americas settled in what became the United States. The experiences of Portugal, Spain, and later Latin America with African and Afro-American slavery were of a far longer duration than that of British North America. African slavery would begin in metropoli-

tan Spain and Portugal before the fifteenth century. Latin American slavery would formally end nearly four hundred years after Columbus's voyage to the New World with Cuban emancipation in 1886 and the abolition of slavery in Brazil in 1888. This final emancipation occurred a generation after Lee's surrender at Appomattox and the enactment of the Thirteenth Amendment. Nearly 5,000,000 of the more than 10,000,000 Africans forcibly brought to the Americas (roughly 45 percent) went to Brazil alone. The giant Lusophonic colony and nation received the largest number of Africans from the trans-Atlantic slave trade, more than twelve times the 388,700 Africans who are estimated to have come to British North America. The Spanish-speaking regions of the Western Hemisphere received 1,292,900 African captives. The sugar plantation economies of the Americas were by far the biggest magnet for the African slave trade. British and French Caribbean colonies combined received more than 3,000,000 Africans. The pull of the sugar plantation economy was so strong that Cuba is estimated to have imported more than 780,000 African slaves between 1790 and 1867 alone, nearly double the total number of Africans brought to the United States between the seventeenth century and the end of the Civil War.[3]

Today, the descendants of those African captives who were forced to come to the Americas to labor, and often perish, in the plantations and mines of the New World inhabit every nation in the hemisphere. In some countries, the presence of people of African descent is highly visible. In the Caribbean, the states of Bahia and Pernambuco in northeastern Brazil, and other parts of the Americas, large numbers of people are visibly of African descent; in addition, African cultures have been preserved in these regions, often influencing the language, religion, music, architecture, and other aspects of the daily lives of most people. In other nations, the African presence is more elusive. Descendants of Africans, some visibly Afro-American, others regarded as white or mestizo may be found in nations such as Argentina and Chile, although most people in both countries are largely unaware of this phenomenon and in many cases would vigorously deny it. In some nations, the business of locating Afro-Americans is complicated by national ideologies, legacies of stigmatization, and traditional antagonisms. A substantial Afro-Mexican population lives on that nation's Atlantic and Pacific coasts. There is an even larger population of Mexican mestizos who do not acknowledge and in many cases are probably unaware of their African ancestry. And yet the African contribution

to what Mexicans have long celebrated as "La Raza Cósmica" remains largely unrecognized, in large part because of a national racial ideology that stresses that the nation is a biological and cultural synthesis of the indigenous Aztec Empire and the conquering Spaniards. Both groups are given a noble history in the national narrative, while the large presence of African slaves in colonial Mexico and the subsequent history of their Afro-Mexican descendants is often ignored.[4]

In many American nations, the stigma associated with black or African ancestry causes many who clearly have that ancestry to deny it. The population of the Dominican Republic is predominantly of African descent. Only a minority of the population is phenotypically white, and even a majority of that group probably has some African ancestry. Nevertheless, many Dominicans customarily define themselves as "Indios" — Indians or descendants of indigenous peoples — and not as Afro-Dominicans. Blacks have frequently used the term *Indio Oscuro* (dark Indian), while mulattoes have tended to use the term *Indio Claro* (light Indian) to describe themselves and their ancestry. This tendency has in part reflected the traditionally higher status for people of Indian descent in Latin America as well as the history of strong enmity between Haitians and Dominicans.[5]

It is this broad variety of Afro-American experiences that I want to contrast with the experience in the United States. At one time, researchers embarking on such a task believed that their comparisons were made easier by looking at Latin American societies as racial democracies free of the kinds of prejudice and discrimination that existed in the United States. Such explanations, like Tannenbaum's discussion, which played a critical part in developing the racial democracy thesis, should be seen in context. Students of race relations who accepted this thesis did so due in no small part to the stark differences between the often rigidly segregated United States of the Jim Crow era and Latin America. If, as we are becoming more and more aware, racism, racial exclusion, and racial hierarchy have been part — indeed, a strong part — of the social history of Latin America, racial barriers nonetheless took on different forms from those in the United States. Exclusions were less absolute. As historian Alejandro de la Fuente reminds us, the ideology of racial democracy that developed in Latin America after the First World War worked to prevent the rigid segregation and often total exclusion from national life that was the lot of Afro-Americans in the United States. And the law did not mandate a separate and inferior

position for Afro-Americans in Latin America. Legal institutions and legal actors discriminated, to be sure, but that discrimination did not have the kind of official sanction — the formal support from the highest courts and legislatures — and the normative and physical power that comes from such support, as was the case in the United States for the first half of the twentieth century and, indeed, beyond.[6]

Like Tannenbaum, I believe that the greater rigidity, the greater tendency toward exclusion, mandated by law in U.S. race relations had its origins in the system of slavery that prevailed in the United States. Tannenbaum saw the different legal systems governing slavery in the New World as having played a critical role in this process. The law in Latin America, he noted, protected the slave's life, his right to maintain his family, and — perhaps most important for future race relations — his right to purchase his freedom through binding manumission contracts and his right to be recognized as a citizen and equal after attaining that freedom. Tannenbaum was not a student of law as such and it is not unfair to say that he presented a somewhat unsophisticated legal history in which he read the relevant codes and assumed that they accurately reflected the legal history of slavery in Latin America and the United States as well. But his essential claims have been reiterated by more knowledgeable students of comparative law, including Roman law scholar Alan Watson, who has argued that the receptivity to manumission that originated in Roman law and continued in the slave codes of the Spanish and Portuguese Empires provide a stark contrast to slave law in Anglo-American jurisdictions. That law, according to Watson and others, was uniquely hostile to manumission and, it should be added, to the rights of free people of African descent. This hostility provides the genesis of the rigidity that has historically characterized race relations in the United States.[7]

This point can be oversimplified and overstated. The history of North American slavery is long and complex. The colonial period is particularly instructive, and we will spend some time in this volume examining it. Slavery existed in every one of the English colonies that would become the United States. Slavery in the North would last for two centuries, longer than the period between the adoption of the Thirteenth Amendment and the present. It would only die a lingering death in that region after the American Revolution. The physical conditions under which slaves lived, toiled, and died and the legal regimes that governed masters, slaves, and

free people of African descent would vary greatly in different times and places. In some colonies slaves were totally outside the protection of the law. They could be killed by white persons with legal impunity. In other colonies, slaves were protected by the law. In some colonies, slaves could and occasionally did manage to successfully sue their owners for freedom. In some colonies, particularly in the seventeenth century, relatively little difference seems to have existed between the legal and social statuses of Africans forced to labor on farms and plantations and the white indentured servants who toiled alongside them. At times, the laws of different colonies treated free Negroes as citizens, making few distinctions between their rights and the rights of others. At other times, the laws made clear the inferior legal and social status of Africans and their descendants. Generalizations about Anglo-American law and its supposed hostility to manumission and citizenship for people of African descent are made difficult when the record of the English colonies that would become the United States is closely examined.

But it is in the world of race and slavery in the United States in the nineteenth century where scholars such as Tannenbaum and Watson are at their most accurate, both in their descriptions of the differences between the United States and Latin America and in their efforts to find the origins of the rigid racial exclusions that for so long dominated American life. This is true whether we consider the slave states, the Cotton Kingdom of the antebellum era, or the increased racial restrictions endured by free Afro-Americans in the states that had abolished slavery. The American caste system—the determination that people of African descent could not be citizens or equals and that even their very freedom was an evil to be barely tolerated, if at all—was a feature more of American slavery and race relations in the antebellum years of the nineteenth century than the previous centuries. Racism, discrimination, and restrictions on manumission existed in the colonial era to be sure, but these would become more systematic and more of an integral part of a full-throated ideology of white supremacy and a vigorous defense of what would come to be called the "Peculiar Institution" in the nineteenth century. This ideology would argue that slavery was not merely necessary but virtuous, a positive good, the optimal arrangement for the governance of the inferior and dependent Negro. In antebellum America, that ideology would gain increasing support in the law. It was an integral part of Roger B. Taney's opinion in *Dred*

Scott. That opinion, in which the nation's chief justice spoke through its highest court, gave the law's imprimatur to more than a system of race-based slavery. Race-based slavery was not unique; it had been part of the Atlantic world of European expansion since the fifteenth century. What *Dred Scott* reflected was a view that found increasing support in antebellum America that not only slavery but citizenship as well was to be based on race, that the system of inequality forged in slavery was to be a system of caste, inescapable and indelible. That new legal thinking and the cultural change that supported it would also leave an indelible mark on race relations in the United States, the creation of a caste-like system of race relations that would survive long after the demise of the Peculiar Institution that helped give it birth.

Why did slavery bequeath to the people of the United States a system of racial exclusion more rigid than those found in Latin America? Slavery was certainly not more benign in Latin America—indeed, everything we know about the physical conditions that slaves endured indicates that slavery was harsher, at least in those regions whose economies were dominated by large-scale plantation agriculture, than was the case in the United States. And Latin America was certainly not free of racial prejudice: Spanish and Portuguese law had codified the legal disabilities of people of African descent long before such legislation was attempted in British North America.[8]

What was different in the United States was an ideology of freedom and egalitarianism that clashed with the institution of human bondage in a way that it did in no other slave society. Slavery had existed largely unquestioned in many societies until the end of the eighteenth century. The common law of England was somewhat unusual in that its jurists refused to sanction the institution, declaring it to be contrary not only to natural law but to the common law as well. But law and custom elsewhere in Europe and the rest of the world recognized the right of human beings to own property in other human beings. There was, to be sure, some recognition that slavery was contrary to natural law. The law recognized that slaves naturally yearned for freedom. Provisions were made to facilitate manumissions. Civil codes recognized the freedom of fugitive slaves under some circumstances. But the institution itself remained largely unquestioned, unremarkable in most societies, where inequality and restraints on liberty were generally common.[9]

But the Enlightenment, the liberal ideology that informed that historical moment, and the revolutions and constitutions, including the American, that derived from it brought new challenges for the institution of slavery. The new thinking that was informing the Atlantic world at the end of the eighteenth century was causing many people to question the institution of slavery, not in the traditional terms of whether or not an individual slave might be deemed worthy and set free but instead whether the whole practice was fatally flawed, inconsistent with the professed ideals of the new age. This new antislavery thinking—and, it should be added, African American participation in the American Revolution—helped put the northern states on the road to emancipation. That same combination of liberal thought and Afro-American participation in national wars for independence would also bring about emancipation in the former colonies of Spain. This process would be relatively rapid in some of the new nations: Mexico, for example, would abolish slavery soon after attaining independence. In other nations—Peru and Argentina are examples—emancipation would come slowly, in stages, and with significant attempts to circumvent the law's mandate to end slavery.[10]

The United States in the early nineteenth century stood alone as a slave society that also strongly proclaimed and indeed acted on liberal and egalitarian values. Brazil would become an independent empire in 1822. Its first constitution in 1824 would certainly show considerable liberal influence. But the newly independent Brazil remained an extremely hierarchical society. The empire had both a royal family and a noble class. Suffrage was restricted to substantial property owners. One's well-being frequently depended on the protection of powerful patrons. Brazil's liberalism was largely a liberalism of and for the propertied elite, confined primarily to issues of free trade and the protection of property rights. The contradiction, at least initially, between Brazilian liberalism and the practice of slaveholding was not seen by many as a particularly acute one.

But that contradiction was quickly acknowledged in the United States, even as early as the Declaration of Independence, and would grow even deeper in the nineteenth century with the expansion of democratic rights and egalitarian practices. In the land of universal (white) manhood suffrage, expanded access to landholding, education, the abolition of indentured servitude, and restrictions on the severity of punishments, slavery stood in marked contrast to the practices of the infant republic. American

law, unlike the law in Latin America, had the cognitively difficult task of reconciling first race-based slavery and later race-based hierarchy with a strongly liberal national ideology and a normatively antihierarchical national culture. This was a unique, intellectually difficult, and ultimately impossible task. The law of slavery had to resolve two irreconcilable demands, that of the South's slave economy—made more robust by the spread of the Cotton Kingdom in the nineteenth century—with that of the nation's strong liberal ideology and culture. The law had to engage in a kind of cognitive dissonance that was not to be found, at least not to the same degree, in any other slave society.

Out of that dissonance would come an emphasis on race and racial difference that was stronger in the United States than elsewhere in the hemisphere. Slavery had to be justified in racial terms in a way that did not occur in other New World slave societies. To be sure, racism (a belief in African inferiority) existed throughout the hemisphere and had always provided a rationale for why Africans and their descendants could be enslaved while Europeans and the indigenous peoples of the Americas could not. But the United States in the nineteenth century took the business of making Africans and their Afro-American descendants outcasts to new levels. The racial rationale for slavery in a society that otherwise celebrated freedom meant that the barriers between black and white had to be made more rigid, less permeable. That determination meant, among other things, a greater hostility to the possibility that free people of color could exercise the rights of citizens. The slave states increasingly would pass limitations on manumission and restrictions on the rights of those blacks who were free. Even in the free states, free Negroes came to lose rights that they enjoyed immediately after the revolution, a reflection of the fact that the American nation of the nineteenth century that was expanding rights and opportunities for white people was becoming increasingly hostile to any suggestion of equality and inclusion for blacks.

The notion of race as a fixed caste line would strengthen in the early nineteenth century and would shape the world of American race relations long after emancipation. If there was an attempt to undo these caste lines during Reconstruction, they would nonetheless be firmly reconnected in the twentieth century with the establishment of Jim Crow and the elimination of black voters from southern politics. These practices were more stringent in the southern states than in the rest of the nation, to be sure,

but a majority of Afro-Americans — nearly 90 percent — lived in the former slave states at the start of the twentieth century, and the South in many ways was setting the pace for the nation in race relations.

The lack of a need to reconcile chattel slavery with strong liberal and egalitarian sentiments contributed to a different style in race relations in much of Latin America. Let's be clear, racism and racial exclusion are very much a part of the culture in Latin America. Racial hierarchies exist and exist in ways that would be familiar to most North Americans. Whiteness is considered superior, blackness inferior. Groups that fall between the two extremes have an intermediate status. But there are important differences as well. Perhaps the most important of these is that race is seen not as a binary divide but as a continuum. Latin Americans make distinctions between blacks and mulattoes in ways that people in the United States generally do not. Latin American racial taxonomies owe much to colonial demography. The Portuguese captaincies that became Brazil had few white colonists. Mulattoes — children of those white colonists and enslaved African women — would come to have a status different from blacks in part to bolster the initially small ranks of those who were not African and not enslaved. Spaniards achieved much the same end through formal codification, providing legal definitions for mulattoes and other intermediate categories between black and white. Spanish colonial codes attempted to categorize every conceivable mixture of the three groups — African, European, and Indian, that inhabited Spain's American empire. Such codes sought in part to ensure divisions among the subject peoples of colonial Latin America by preventing combinations that might threaten the domination by the tiny minority of whites. This system of meticulous distinctions had unintended consequences, including helping to develop a culture of racial mobility. If there were many gradations between black and white, then improvements in one's social standing, acquisition of wealth, or education or status could also bring an improvement in one's racial designation from perhaps *negro* to *moreno* or *moreno* to *mulato* or *mulato* to *trigueño* or perhaps even *blanco*. The etiquette of race in many parts of Latin America would dictate that as a matter of courtesy, the unfortunate fact of one's African ancestry might be minimized or even overlooked in an inappropriate social setting. This stood in some contrast with the United States, where even when racial mixture was acknowledged — mulatto, quadroon, and octoroon are, after all, part of the American vocabulary — it was still

within a context that rigorously divided the population into two groups, black and white.[11]

Notions of racial mobility, of course, reflect notions of racial hierarchy. The felt need to disguise, minimize, or excuse an individual's African background reflected the inferior status accorded African ancestry. It was stigmatized, certainly not as noble as a European background, even less noble than an indigenous one, especially after nationalist authors in many parts of Latin America began to celebrate indigenous heritage in an effort at national mythmaking and nation building. But racial—indeed, racist—attitudes in Latin America in some ways did not produce an exclusion from national life in quite the same way that they did in the United States. Latin America after emancipation did not have a codification of petty apartheid similar to the Jim Crow laws of the U.S. South. The Catholic Church in Latin America ensured that black and white and all the myriad classifications in between shared the experience of worshiping together and not in separate denominations as usually occurred in the Protestant United States. Marriages across racial lines were accorded an official tolerance not to be found in the United States, where such marriages were illegal in a number of states until the Supreme Court's 1967 decision in *Loving v. Virginia*. The history of popular political and social movements also illustrates an important difference in the dynamics of racial inclusion. The United States has a long history of conflict between Afro-Americans and populist movements designed to better the circumstances of working-class whites. In Latin America there has been a greater history of inclusion of peoples of African descent in working-class populist movements, even such right-wing populist movements as those led by Getúlio Vargas in Brazil and Juan Domingo Perón in Argentina.

Latin America has a history of men with some African ancestry serving as presidents or senior officials in the nineteenth and early twentieth centuries, at a time when such achievements would have been inconceivable in the United States. Nineteenth-century Mexico and Argentina had presidents who were generally believed to have some African ancestry. A few Afro-Brazilians achieved national prominence as statesmen in the nineteenth century, when the Brazilian Empire was the largest slaveholding society in the Americas. In the early decades of the twentieth century, at a time when the American Bar Association prohibited black members and more than a half century before Thurgood Marshall's appointment

to the Supreme Court, Brazil had two mulatto ministers on that nation's highest tribunal, the Supremo Tribunal Federal. A mulatto, neurosurgeon Ramón Carrillo, served as Juan Perón's minister of health in Argentina in the 1950s. Both Cuba and Venezuela had Afro-American presidents, Fulgencio Batista and Rómulo Betancourt, in the 1940s and 1950s. The people of African descent who were able to move into the upper reaches of the political, economic, or social sectors of their nations usually were of mixed racial background. Their rise to prominence was helped in part by lesser prejudices against mulattoes and frequently by the ability to have openly acknowledged family connections with influential white relatives. This kind of mobility was largely impossible in the United States. [12]

These differences helped contribute to the notion of racial democracy in Latin America. They also helped to hide very real racism and racial discrimination. If the occasional mulatto might find his way into national office or become a doctor or lawyer with a largely white clientele, the situation for Afro-Americans generally remained grim. Victims of strong prejudice, they were also frequently victims of governmental policies that sought to ignore their very existence. These policies actively and openly sought through *blanqueamiento* (whitening) to replace the African- and indigenous-descended populations with new European immigrants who would transform the brown nations of nineteenth-century Latin America into white ones in the twentieth century. White immigration was encouraged with land grants and guarantees of education that were frequently denied to Afro-American and indigenous-descended populations. Discrimination in employment, particularly in the more modern industrial and commercial sectors would increase in the twentieth century to reflect the increased preference for the development of white nations. Severe discrimination often also existed in the provision of governmental services.

After the Second World War, the comparative history of race in the United States and Latin America would take an ironic turn. If the contradiction between slavery and racism and the strong liberal and egalitarian norms of the United States had historically contributed to the development of a caste-like approach to race relations, those very norms would help bring about a more thoroughgoing civil rights revolution in the United States than has occurred to date in Latin America. This revolution has included the development of a more effective body of antidiscrimination law and remedial policies, including often highly contested affirmative action

measures. By way of contrast, Brazil, the Latin American nation that has been most forthright in addressing issues of the exclusion and marginalization of its Afro-American population, just began tentative steps toward affirmative action in universities and government employment in 2001. On April 26, 2012, the South American nation's highest court decided its first case on race-based affirmative action in public universities. The Supremo Tribunal Federal declared in a unanimous decision that the practice was constitutional. Throughout the hemisphere, Afro-American groups are seeking recognition and a greater inclusion in society. They are often, ironically enough, looking at the civil rights movement in the United States and the legal and social progress that it brought about as a potential model for their own struggles.[13]

It is this curious comparative odyssey that is the focus of this book. I have tried to follow the role of legal doctrine, legal institutions and public policies in helping to develop the often differing racial cultures in the Americas. The book examines Afro-American experiences in the Western Hemisphere. I should note in passing that Latin America presents other, still largely underexplored, possibilities for students of comparative race and ethnic relations. For those with an interest in indigenous populations and for legal scholars working in the area of Indian law and indigenous rights, Latin America is a particularly fruitful area for comparative exploration. Almost every country in the hemisphere has significant Indian or indigenous populations. While the study of indigenous populations as a separate and discrete group is well developed among Latin Americanists, the study of peoples who are of indigenous descent but who have joined the general population — in short, the study of people of indigenous descent as a racial group subject to the problems of discrimination in the general society — is less well developed. Similarly, Latin America presents interesting possibilities for those who might wish to do comparative explorations of immigration and adaptation. Those who have concentrated their research on Asian American populations would find much to explore and contrast in Latin America. Brazil's state of São Paulo has the largest ethnic Japanese population in the world outside of Japan. Large ethnic Chinese and Japanese populations can also be found in Peru. Significant populations of Chinese descent can be found throughout Central America and the Caribbean. Descendants of twentieth-century European immigrants are significant segments of the population in southern Brazil, Argentina,

Uruguay, and Venezuela, among other parts of Latin America. The possibilities for fruitful comparative research, perhaps involving greater collaboration between scholars interested in American studies and those interested in Latin American studies, would add greatly to our understandings in a number of fields, including the formation of racial and ethnic identities, the acculturation of newcomers, and the development of patterns of social inclusion and exclusion.

But in this volume the discussion will be confined largely to Afro-Americans. This is a complex enough topic. If race, as we are frequently told, is a social construct, it is one that is often difficult for North Americans to grasp in its Latin American manifestations. The range of racial classifications, the fact that some individuals have racial identities that seem to shift not only over the course of a lifetime but sometimes over very brief periods, changing with differing social contexts, puzzles the North American observer who grew up on our false but oddly settling certitudes that a person can be readily classified as black or white. The fact that this received tradition is now under increasing dispute in the United States only adds complexity, challenge, and hopefully value to this comparative discussion.

This volume examines the Afro-American experience in nine nations—Brazil, the United States, and seven nations carved from Spain's American empire (Argentina, Uruguay, Peru, Colombia, Costa Rica, Cuba, and the Dominican Republic). The discussion of slavery and emancipation looks at the place of Africans and their descendants in the Spanish Empire as a whole. The examination of the independent nations of Spanish-speaking Latin America looks at the seven nations, with occasional material from the histories of other countries. This discussion is less complete than the examinations of Brazil and the United States. The historiography on Afro-American life in Spanish America after emancipation is less well developed than is the comparable study of Afro-Brazilian or African American history. The primary sources are also less likely to reflect the considerable Afro-American presence in those nations than are similar records in Brazil and the United States. My efforts are not directed at doing in-depth histories of the selected nations but at using them to illustrate broader themes concerning race in the Spanish-speaking nations of the hemisphere. I believe that the seven Spanish-speaking nations combined with Brazil and the United States are helpful in illustrating a range of

significant legal and social issues that have confronted peoples of African descent in the Americas.

I have chosen the United States not only because I am an American of African descent and have spent a good deal of my personal and professional lives trying to unravel the mysteries of race in our society but also because the United States has been the American society where law has played the most unambiguous role both in constructing a racial hierarchy and in the struggle to dismantle it.

I selected Brazil as the American society with the longest history of slavery. It is also the nation that received the most African slaves and today has the largest population of African descent in the Americas and indeed the second-largest African-descended population in the world, trailing only Nigeria. Brazilian slavery in the nineteenth century also presents what to many U.S. readers will be a paradox. Brazil had an economically vigorous slave regime with strong legal protections for the property rights of slaveholders. This was combined with a regime of legal equality for free Afro-Brazilians as well as actual political and social prominence for some free Afro-Brazilians. Brazil also presents another important issue for students of race relations. Like the United States, it is a huge continent-sized nation. And like the United States, Brazil is a nation of different, often contrasting regions. This statement is as true in the area of race relations as it is in others. Regional differences and their impact on Brazilian law and policy governing race form an important part of this discussion.

The seven Spanish-speaking nations were somewhat harder to select. Almost all of the Spanish-speaking nations of the hemisphere have compelling Afro-American histories, many of which remain underexplored for the postemancipation period. I believe that the countries I have chosen are important because they illustrate the range of issues that have confronted peoples of African descent in the Spanish-speaking nations of the hemisphere. The history of Afro-Americans in Argentina and its fraternal Rioplatense republic, Uruguay, illustrate the problem of marginalization and invisibilization. *Blanqueamiento,* governmental policies designed to transform the nations of Latin America into white nations through European immigration, were common throughout the region at the beginning of the last century. Latin America's leading intellectuals and governmental policy makers shared in the thinking of the age, including beliefs in scientific racism and Social Darwinism. They believed that the inferior in-

digenous and African elements of the national populations would not and should not survive competition with the superior European newcomers. New immigrants would create white nations, and with that would come the progress that was the promise of the new century. This project would meet with considerable success in both Argentina and Uruguay. Massive waves of Spanish, Italian, and other European immigrants would transform the two nations into reconstituted European societies. Both countries would develop inaccurate but powerful self-images as exclusively white nations with few indigenous, Afro-American, or mestizo elements. Argentina and Uruguay provide exaggerated examples of one pattern in Latin America race relations, the invisibilization of the Afro-American.

Cuba and Colombia represent the opposite end of the spectrum. Afro-Americans are quite visible in both societies. Although intellectuals and public officials in both nations at the beginning of the twentieth century also championed national whitening, it became clear early on in both Colombia and Cuba that the Afro-American populations were not going to disappear. The history of the twentieth century in both nations was in part a history of coming to grips with the Afro-American presence, including Afro-American cultures with strong African elements. Both societies were also the scenes of significant struggles against racial exclusion and of integrated working-class populist movements. Cuba has also had since 1960 a Marxist regime that has struggled with the issue of racial inequality with mixed results. Colombia since 1991 has had a constitution committed to providing land rights and a minimum of congressional representation for Afro-Colombians and yet has also had difficulty in providing protection against many forms of racial discrimination.

Peru is included in this volume because it represents two important issues that complicate and enrich our examination of race in the Americas. Afro-Peruvians live in a society that has too often ignored them or overlooked them, in part because their circumstances were overshadowed by a larger fault line in their nation — the line between those Peruvians who are still part of the indigenous culture (that is, those who are of indigenous descent, speak Quechua as a first language, and live in distinct indigenous communities) and those who are part of what we might call the Peruvian mainstream. This latter population speaks Spanish as a first language, lives in more or less modern communities, and adheres to a somewhat less alloyed version of the Catholic faith than those who are labeled *indigenous*.

As in other parts of Latin America, ethnic division — in this case, the division between those called indigenous or Indian and the other parts of the population — has served to mask very real racial divisions and patterns of discrimination in that society. The immigration of large numbers of Chinese and to a lesser extent Japanese to Peru after emancipation has also added to the complexity of any discussion of racial and ethnic hierarchies in that nation.

Costa Rica presents yet another issue, one that combines the issues of racial and ethnic exclusion. Costa Rica, like other Central American nations, has an Afro-American population largely descended from late-nineteenth- and early-twentieth-century immigrants from the British Caribbean. The Afro–Costa Rican population has historically been concentrated in and near the Caribbean port city of Limón. They were brought to work on that nation's railroads and banana plantations and have been the subject of no small amount of legal and social discrimination. English-speaking and black, they have had a difficult struggle gaining acceptance in a nation whose majority is Spanish-speaking and accustomed for much of the twentieth century to thinking of itself not only as white but also as citizens of a white nation. The black population of the Limón region would not in fact gain full Costa Rican citizenship until after the Second World War. Their struggle against marginalization and discrimination continues into the twenty-first century.

This volume also discusses the Dominican Republic. The historic enmity between Haitians and Dominicans has led to some of the most dramatic and tragic examples of racial tension and racial exclusion in the American hemisphere. This history is made more tragic and more ironic because most Dominicans share with Haitians not only the troubled island of Hispaniola but also a significant amount of African ancestry. The hostility between Haitians and Dominicans in part reflects sharp cultural and linguistic differences between the two groups and serves as a vivid reminder that race and racial difference can often reflect more than ancestry or appearance.

I look at race relations in these nine countries largely, though not exclusively, through the lens of a legal historian. A few words about this are in order. Legal history is a broad field done in different ways by different practitioners of the art. Many legal historians have greatly enhanced our knowledge of the law's development by focusing primarily and in some

cases exclusively on the evolution of legal doctrine. Mine is a somewhat different task. I am concerned, of course, with law and legal doctrine. But my concern is not with legal rules and doctrine alone. Instead my concern is with those symbiotic relationships between legal processes and social structure, between doctrinal evolution and cultural change, that force a synthesis between legal analysis and social inquiry. I share Lawrence Friedman's view that legal history must be approached "not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society." This charge, this challenge that Friedman made to the community of legal historians in the early 1970s, was directed largely at historians of law who would be looking at one complex nation, the United States. His approach is even more appropriate for scholars essaying a comparative legal history, where different political institutions, social structures, and national legal cultures inevitably influence how law affects social relations.[14]

At times, the role of law in constructing or dismantling patterns of racial inequality has been clear. The slave codes throughout the Americas and the postemancipation Jim Crow laws of the United States were clearly designed to ensure the inequality of Afro-Americans. Similarly, court decisions such as *Brown v. Board of Education* in the United States and Brazil's first civil rights statute, the Lei Afonso Arinos,[15] were clearly meant to address the issue of racial discrimination. At other times, the role of law in regulating race relations has been more ambiguous. The United States is somewhat unusual in historically having a body of law that formally mandated discriminatory treatment of its native-born Afro-American population after the abolition of slavery. Yet we know that profound racial inequalities have been a part of Latin American history and that the law in its application if not its formal pronouncements has played a role in perpetuating that inequality. I intend to show how this has been the case even when the law has been nominally egalitarian.

I have tried to keep Lawrence Friedman's advice on how to do legal history in mind during the course of this study. This volume covers a great deal of territory in a fairly short space, and it does so with one overarching concern — the relationship between a society's broader sentiments concerning equality and the rights of individuals and the role of law in sustaining or combating patterns of racial inequality. This focus can help us to understand the complicated relationship between law and racial inequal-

ity in the past as well as provide a guide to law's future role in helping to eradicate slavery's long, lingering shadow from the American hemisphere.

I would like to add a terminological postscript to this introduction. There has been a tendency for historians and other writers in recent decades to feel compelled to take sometimes strenuous efforts either to avoid using the word *Negro* or to preface their use of the term with an apology or perhaps to bracket the word with quotation marks when usage is unavoidable. That will not be my practice in this volume. *Negro* was the term that most black people used to describe themselves for a good portion of American history. It was used with pride by some of the most courageous people in the history of the United States. Ida B. Wells would so describe herself when she was an outspoken newspaper editor taking a brave and physically dangerous stand against lynch law and mob rule in late nineteenth century America. Carter Woodson would use the term when he founded the Association for the Study of Negro Life and History in 1915, at a time when American apartheid was becoming even harsher and when the best scientific minds proclaimed the doctrine of white supremacy and commended the virtues of Jim Crow policies. His efforts and those of his associates and successors would, over time, change the way the world viewed peoples of African descent. Thurgood Marshall and Constance Baker Motley and their associates used the term in *Brown v. Board of Education* when they asked the Supreme Court why Negroes, out of all the peoples in the American nation, were singled out for separate and stigmatizing treatment in segregated schools. Martin Luther King Jr. used the word *Negro* throughout his inspiring career and most notably when he stirred and changed the nation with his "I Have a Dream" speech during the 1963 March on Washington. The name *Negro* requires neither avoidance nor apology. It will be used in this volume with respect along with other names to describe peoples of African descent. One name that you will see frequently in this volume is *Afro-American*, used to describe both Americans of African descent and also citizens of other nations of the Western Hemisphere who are of African descent. Afro-American will be used somewhat more frequently in this volume than the currently more popular term *African American* for three reasons. First, it corresponds more closely to usage in other parts of the hemisphere—that is,

the general practice is to speak of *Afro-Brazilians*, *Afro-Cubans*, *Afro-Colombians*, and so forth. Second, the term *Afro-American* also has had a long history in the study of peoples of African descent in the Americas, particularly comparative studies. Finally, *Afro-American* immediately denotes a person of African descent native to the Western Hemisphere. The term *African American* can be more ambiguous. It can certainly describe an American of African descent, but it also might describe more recent African immigrants who have come to the United States, a point that has been made by sociologist Orlando Patterson, among others.[16]

If the racial terms used in this volume require a little explanation, so do the terms indicating national identity. It is common in the Spanish-speaking countries of the hemisphere (the Brazilians seem less worried about this) to insist that those of us who are citizens of the United States not describe ourselves simply as *Americans*. The argument, quite well made and quite well taken, is that everyone in the hemisphere might reasonably describe themselves as *American* and that those of us who are from the United States should use the term *norteamericano* or *North American* to describe ourselves. The difficulty with that is that Canada and Mexico are also in North America, and the peoples of both nations have equal rights to the term *North American*. Our geographical difficulties do not end there. The inhabitants of the state of Hawaii as well as the residents of Puerto Rico, the U.S. Virgin Islands, Guam, and other U.S. territories in the Pacific are citizens of the United States, although it would hardly be accurate to call them "North Americans." There is a term in Spanish, *estadounidense*, used to describe citizens of the United States. It would probably best be translated as "United Stateser"—accurate enough, perhaps, but really just a little too clunky in its English manifestation to be really serviceable. In this volume, I generally use the term *American* to describe citizens of the United States with the occasional use of *North American* either for emphasis or distinction. I do so realizing that we do not have, nor should we claim, a monopoly on the name.