

FRENCH COLOR BLINDNESS IN PERSPECTIVE

The Controversy over “*Statistiques Ethniques*”

Introduction

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In the United States, while some race-based policies such as affirmative action have faced often successful political and legal challenges over the last quarter-century, historically, the very principle of official racial classification has met with much less resistance. The Equal Protection Clause of the Constitution's Fourteenth Amendment, according to which “no state shall deny to any person within its jurisdiction the equal protection of the laws,” was not originally intended to incorporate a general rule of “color blindness.”¹ And when in California, in 2003, the “Racial Privacy Initiative” led to a referendum on a measure—Proposition 54—demanding that “the state shall not classify any individual by race, ethnicity, color or national origin,” this restriction was meant to apply exclusively to the operation of public education, public contracting or public employment, that is, the three sites where affirmative action was once in effect and might be reinstated at some point, or so the proponents of that initiative feared. In any case, that measure was roundly defeated at the polls.

In France, by contrast, the issue of whether one ought to infer a *rule of color blindness* from the constitutionally-grounded *principle of equality* was not left open for the courts to decide: it was settled beforehand, and the answer was incorporated into the text of the Constitution itself. Article 1 of the 1958 Constitution thus provides that “the Republic ... ensures the equality of all citizens before the law, *without any distinction of origin, race, or religion.*”² As a result, corrective or “remedial” uses of race by state authorities, legally speak-

ing, are put on the same plane as invidious ones and simply ruled out. Moreover, this difference of constitutional framework arguably reflects a difference of public culture. In the United States today, the vocabulary of race remains in wide use, although “race” arguably denotes less the formerly predominant pseudo-anthropological classification of human beings into a set of genetically distinct and hierarchizable collectivities than the subset of groups having experienced the most severe forms of racist discrimination—in an implicitly derivative and self-referential way. In France, in contrast, the delegitimization of racism has entailed the disqualification of “race” as a descriptive category altogether. As a matter of fact, the word “race” will only be used in a very limited number of settings: by the most radical fractions of the extreme right, by social scientists looking into the history and the effects of racism, and by lawmakers concerned with prohibiting distinctions based on that disreputable concept.³

Yet, recent developments suggest there is currently a window for innovation in French antidiscrimination strategies. The creation in 2005 of a new agency, the High Authority for Antidiscrimination and Equality (Haute autorité de lutte contre les discriminations et pour l'égalité - HALDE), may be taken to reflect the emergence of a national commitment to promoting greater opportunity for minority and immigrant populations. Since October 2004, more than 1,600 firms have signed a “Diversity Charter”—whose name testifies to the circulation of American frames and slogans.⁴ Last but not least, French researchers and policymakers have even begun debating the use of ethnoracial statistics—the topic explored in this special issue of *French Politics, Culture & Society*. This is one of the most contentious topics that emerged from the dialogue between French and US scholars and advocates organized within the frame of the inaugural seminar of the French-American Foundation's Equality of Opportunity Program, held at New York University's Institute of French Studies on November 13-14, 2006, with financial support from the Ford Foundation and the Florence Gould Foundation. While there was general agreement among the American participants about the necessity and value of using statistical data to measure discrimination based on race and ethnicity, as well as to assess the impact of antidiscrimination policies, only a minority of the French participants—including the spokesman for the Representative Council of Black Associations (Conseil représentatif des associations noires – CRAN), Louis-Georges Tin, and, from a different, more academic perspective, sociologist and demographer Patrick Simon—expressed support for the idea of introducing such statistics in France, for reasons exposed in the articles that follow. Alain Blum and France Guérin-Pace, though not present at the November 2006 seminar, offer a rejoinder to the arguments put forth by Simon and Tin, and a case can be made that their views are still congruent with those of most French policymakers.⁵

Finally, over the last year-and-a-half, the public controversy over what has come to be called elliptically “*statistiques ethniques*” has spread beyond the aca-

demic sphere. Thus, in November 2007, one of the major French antiracist associations, SOS Racisme, circulated a petition demanding two things—and basically conflating one with the other.⁶ The first request was for the withdrawal of an amendment to the new—and particularly restrictive—immigration control bill allowing for the collection of data on race and ethnicity within the frame of “studies designed to measure diversity . . . , integration, and discrimination.”⁷ Secondly, SOS Racisme requested the removal of questions on respondents’ skin color that for the first time had been introduced independently in a major public survey to be conducted in 2008 by the National Institute of Demographic Studies (Institut national d’études démographiques—INED) and the National Institute for Statistics and Economic Studies (Institut national de la statistique et des études économiques—INSEE). The survey, “*Trajectoires et origines*,” included these questions in order to better understand the connections between perceptions of skin color and of the discriminatory behaviors based on that individual feature, on the one hand, and access to various social goods, on the other.⁸ A few days later, the Constitutional Council did strike down the legislative provision challenged by SOS Racisme on procedural grounds, holding that it was basically a rider devoid of the required link with the main object of the bill, insofar as both “diversity” and “discrimination” obviously involved not only foreign immigrants but also French citizens. Yet, in an *obiter dictum*⁹—understood as such within the circles of legal experts though not necessarily by the general public—, the Council also intimated that the provision could have been struck down on substantial grounds as well, because of its alleged incompatibility with Article 1 of the 1958 Constitution. In this light, race and ethnicity would definitely be off limits for the aforementioned “studies,” in contrast with “objective data” such as the name, birthplace, and (past and present) nationality of the individual under consideration. (Never mind that these variables, obviously relevant for assessing the “integration” of first-generation immigrants, are irrelevant for documenting the discrimination potentially suffered by a significant number of French-born blacks.)¹⁰ As for the specific items on skin color included in the questionnaire “*Trajectoires et origines*,” while it is far from certain that the Council’s decision has any implication on their permissibility—because of the holding/dicta distinction¹¹ and because color is arguably more “objective” than race—, it is yet unclear whether they shall be maintained, as INED and INSEE seem to differ in their assessment of the legal risk involved.¹²

Ultimately, one of the most salient features of current French debates on “*statistiques ethniques*” may well be their degree of confusion—a confusion regarding both the *kind* of statistics that one is talking about and the *purpose(s)* those may reasonably be held to serve. On the one hand, the distinction between the conduct of special surveys of a social-scientific nature on some aspects of the diversity of the French population ensuring the anonymity of respondents and the creation by the state of an *official, standardized, permanent, and policy-oriented* nomenclature of ethnoracial categories endowed with a

legal status is either dimly perceived or openly challenged. On the other hand, while as a general matter the collection of statistical data on race and ethnicity is often defended as a precondition for both measuring and waging the fight against disparate impact discrimination, reaching that goal requires information on the ethnoracial distribution of various “benchmark populations” that can most readily be made available by the establishment of a national nomenclature (*référentiel*) and that a one-time survey on a sample of 24,000 respondents such as “*Trajectoires et origines*” surely cannot—and is not meant to—deliver. Ironically, however, while the survey at least stands a decent chance of overcoming the obstacles placed in its way, the prospect of a national ethnoracial nomenclature has been rejected explicitly by both the HALDE and the CNIL, and even the most radical antidiscrimination advocates are reluctant to endorse it. As far as it seems, French “color blindness,” as a legal and political frame with practical consequences, will remain with us for some time.

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Notes

1. See Andrew Kull, *The Color-Blind Constitution* (Cambridge, MA: Harvard University Press, 1992).
2. Emphasis ours.
3. The rejection of race remains so powerful in contemporary French society that even those advocates asking for the collection of statistical data on phenotypically defined minorities for antidiscrimination purposes are still reluctant to detract from it, as reflected in the following statement by Patrick Lozès, the president of the Conseil représentatif des associations noires, during a meeting organized by the National Council on Statistical Information (Conseil national de l'information statistique—CNIS) on October 12, 2007: "I wish we could definitively expel from our vocabulary this 'ethnoracial categories' phrase that relies on concepts which our history and our morality of science itself reject. Races do not exist, and I don't think ethnicity is a relevant concept in the French context. This is not about measuring races or ethnic groups, but the diversity of French society ("... je souhaiterais que nous puissions chasser à jamais de notre vocabulaire le terme de 'catégories ethnoraciales' qui renvoie à des concepts que notre histoire, notre morale de la science même récusent. Les races n'existent pas et, dans le contexte français, l'ethnie ne me semble pas être un concept pertinent. Ce ne sont pas des races ou des ethnies qu'il s'agit de mesurer mais la diversité de la société française") (http://www.cnis.fr/ind_actual.htm; « Formation Démographie, Conditions de vie »).
4. See Erin Kelly and Frank Dobbin, "How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996," *American Behavioral Scientist* 41, 7 (1998): 960–84; Lauren Edelman, Sally Riggs-Fuller, and Iona Mara-Drita, "Diversity Rhetoric and the Managerialization of Law," *American Journal of Sociology* 106, 6 (2001): 1589–1641.
5. The choice of including in this special issue two articles arguing for the collection of some statistical data on race and ethnicity in France and only one opposing it does not indicate that the editors favor the former position over the latter. In fact, a fourth article, which would have presented another perspective against "ethnic statistics", was originally scheduled for inclusion.
6. <http://www.fichepasmonpote.com/>. That petition was signed by more than 100,000 persons—including the leader of the Socialist Party, François Hollande.
7. <http://www.assemblee-nationale.fr/13/amendements/0057/005700055.asp>
8. This new SOS Racisme petition (for a rejoinder, see <http://www.liberation.fr/rebonds/291503.FR.php>) is one of the last moves in a series of conflicting public interventions of various kinds by researchers, leaders of antiracist associations, and the Commission nationale de l'informatique et des libertés (CNIL), three of which are included as an appendix to the articles in this special issue.
9. See note 11.
10. Décision n°2007- 557 DC, November 15, 2007: see <http://www.conseil-constitutionnel.fr/decision/2007/2007557/2007557dc.htm>
11. The holding is a court's determination of a matter of law based on the issue presented in the particular case. Dicta are remarks or observations that, although included in the body of the court's opinion, do not form a necessary part of the decision.

12. The first question asks: "When someone meets you, what color do you think you are seen as being?" (*"Quand on vous rencontre, de quelle couleur pensez-vous que l'on vous voit?"*). The following question asks: "And you, what color(s) would you say you are?" (*"Et vous, de quelle(s) couleur(s) vous diriez-vous?"*). The order in which the two questions are to be asked, the somewhat contrived phrasing, and the possibility of checking the "I don't know" and/or the "I refuse to answer" boxes are evidence of how sensitive the topic is perceived to be.