

2004

## Color/Identity/Justice: Chicano Trials (Book Review)

Anthony V. Alfieri

*University of Miami School of Law*, [aalfieri@law.miami.edu](mailto:aalfieri@law.miami.edu)

Follow this and additional works at: [https://repository.law.miami.edu/fac\\_articles](https://repository.law.miami.edu/fac_articles)



Part of the [Criminal Procedure Commons](#), [Law and Race Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Anthony V. Alfieri, *Color/Identity/Justice: Chicano Trials (Book Review)*, 53 *Duke L.J.* 1569 (2004).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## Book Review

# COLOR/IDENTITY/JUSTICE: CHICANO TRIALS

ANTHONY V. ALFIERI†

### *A Review of*

RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE, by Ian F. Haney López (Belknap Press of Harvard University Press, 2003).

The color line has come to seem a fiction, so little do we apprehend its daily mayhem.<sup>1</sup>

### INTRODUCTION

This Book Review seeks to rectify in small measure the omission of color from American documents of black/white legal and political struggle. Enlarging the spectrum of struggle beyond the black/white paradigm not only works to correct the historical record of color in law, but also helps to advance the progress of color in society. As a starting point for this revision, the review turns to Ian F. Haney López's new book, *Racism on Trial: The Chicano Fight for Justice*. *Racism on Trial* broadens and deepens the study of indigenous and immigrant legal and political struggle by documenting the defense of

---

Copyright © 2004 by Anthony V. Alfieri.

† Professor of Law and Director, Center for Ethics and Public Service, University of Miami School of Law. I am grateful to Adrian Barker, Ricardo Bascuas, Troy Elder, Zanita Fenton, Michael Fischl, Clark Freshman, Ellen Grant, Patrick Gudridge, Amelia Hope, Dennis Lynch, Cynthia McKenzie, Janet Reno, Karen Throckmorton, Frank Valdes, and Laura Walker for their comments and support. I also wish to thank Wendy Blasius, Chauncey Kelly, Claudine Rigaud, and the University of Miami School of Law library staff for their research assistance, as well as the editors of the Duke Law Journal for their commitment to the study of race in American law. This Book Review is dedicated to John Hart Ely: friend, mentor, piano player, and patron saint.

1. IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* vii (2003).

the Chicano movement in its rise out of the East Los Angeles Mexican community of California amid the turmoil of the 1960s.

Alert to gradations of color in race and their shading of white and nonwhite identity, Haney López infuses the terms Mexican, Chicano, and Mexican American with particularized meaning. Under his chosen lexicon, the term Mexicans refers to “people in the United States descended from the inhabitants of the southwestern region acquired from Mexico in the mid-nineteenth century, as well as permanent immigrants from Mexico and their descendents.”<sup>2</sup> By contrast, the term Mexican Americans denotes “Mexican community members who insisted that Mexicans were white” whereas Chicanos describes “those who argued instead that Mexicans constitute a non-white race.”<sup>3</sup> According to Haney López, these sociohistorical terms carry distinct racial signifiers—white and nonwhite—central to the law and politics of identity. To illustrate the racial politics of the 1960s and the legal clash over racial identity typified by the Chicano movement in its break from the Mexican-American community, Haney López traces two criminal prosecutions of Chicano activists arising out of widely publicized incidents of mass protest and insurgent violence: the trials of the *East L.A. Thirteen* (*People v. Castro*)<sup>4</sup> and the *Biltmore Six* (*People v. Montez*).<sup>5</sup>

Haney López’s exacting reportage and skillful synthesis affirm his stature as a young scholar of wide acclaim. The author of numerous articles and a previous highly praised book, Haney López has for more than a decade marshaled the diverse fields of history, psychology, and sociology to mount a sustained interdisciplinary study of racial identity in American law.<sup>6</sup> The subject of unrelenting

---

2. *Id.* at 3.

3. *Id.*

4. *People v. Castro* (East L.A. Thirteen), No. A-232902 (Cal. Super. Ct. 1968) (on file with the *Duke Law Journal*). The indictment was ultimately quashed on appeal. *Castro v. Superior Court*, 88 Cal. Rptr. 500 (Ct. App. 1970) (on file with the *Duke Law Journal*).

5. *People v. Montez* (Biltmore Six), No. A-244906 (Cal. Super. Ct. 1969) (on file with the *Duke Law Journal*).

6. Haney López addresses racial identity in the multifaceted terms of ethnicity, nationality, and race. He charts identity within the currents of law, culture, and society, and across the categories of age, generation, and gender. See generally IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (examining the judiciary’s tortured attempts to define whiteness in the early twentieth century); IAN F. HANEY LÓPEZ, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (analyzing racism as a particular failure of the judicial process); Ian F. Haney

controversy in law, culture, and society, racial identity intertwines claims of color, ethnicity, and nationality. Over time, such claims become entangled with pronouncements of moral character, political citizenship, and social status. In society, the merger of color and character resonates in discriminatory animus.<sup>7</sup> In culture, the union of ethnicity and status echoes in assimilationist bias.<sup>8</sup> In law, the joinder of nationality and citizenship reverberates in xenophobia.<sup>9</sup>

Familiar artifacts of culture and society, commonplace identity pronouncements also influence the enactment and interpretation of

---

López, *The Prerequisite Cases*, in *CRITICAL RACE THEORY*, *supra*, at 127 (recounting the judiciary's struggle to define whiteness under race-based naturalization laws using juridical theories ranging from "common sense" to "scientific" categorization); Ian F. Haney López, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205, 207 (2001) (emphasizing "the role of law, and legal violence in particular, in the evolving [self] racialization of Mexicans as non-White"); Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 10 LA RAZA L.J. 57 (1997) [hereinafter Haney López, *Race, Ethnicity, Erasure*] (urging the retention of race as a language for understanding Latino/a identity given the racialization of U.S. society); Ian F. Haney López, *Racial Restriction in the Law of Citizenship*, in *CRITICAL RACE THEORY: ESSAYS ON THE SOCIAL CONSTRUCTION AND REPRODUCTION OF "RACE"* 109 (E. Nathaniel Gates ed., 1997) (surveying early-twentieth-century race-based restrictions on immigration and naturalization); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (characterizing race "as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics"); Ian F. Haney López, *White Latinos*, 6 HARV. LATINO L. REV. 1 (2003) (criticizing aspirations to whiteness by Latino/a leadership as playing into the economic interests and power politics of white elites).

7. Consider for example the renewed debate over the character of Nat Turner and his place in the history of American slavery. See generally SCOT FRENCH, *THE REBELLIOUS SLAVE: NAT TURNER IN AMERICAN MEMORY* (2004) (describing Turner in heroic terms and outlining later changes in Americans' perception of him); WILLIAM STYRON, *THE CONFESSIONS OF NAT TURNER* (1967) (offering an interpretation of Turner as a complex hero of religious visions and sexual demons); Felicia R. Lee, *Nat Turner in History's Multiple Mirrors*, N.Y. TIMES, Feb. 7, 2004, at B7 (tracing the different and opposing uses of Turner's iconic stature through various historical movements).

8. For studies of assimilationist bias, see generally KEVIN R. JOHNSON, *HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY* 152-74 (1999); CLARA E. RODRIGUEZ, *CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY* 47-62 (2000); Kevin R. Johnson, "Melting Pot" or "Ring of Fire"? *Assimilation and the Mexican American Experience*, in *MIXED RACE AMERICA AND THE LAW: A READER* 176, 176-78 (Kevin R. Johnson ed., 2003).

9. On nativism and xenophobia, see generally ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION STATE* 11-42 (1999); BILL ONG HING, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION* 13-31 (1997); *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* (Juan F. Perea ed., 1997).

rights in lawmaking and law enforcement. Legislators regularly repeat identity tropes in policy debates and statutory texts regarding crime, welfare, and immigration.<sup>10</sup> Police routinely employ identity profiles in targeting suspected offenders, particularly the young, black, and poor.<sup>11</sup> Descriptively, neither tendency stirs general alarm. Prescriptively, neither escapes objection. Indeed, many protest the corrosion of liberal, democratic values under identity-based regulatory systems operating through customs, policies, and practices as well as local ordinances, state laws, and federal mandates. Remarkably, that protest seems muted when lawyers deploy racial identity claims in advocacy. Doubtless such claims sway the methods of advocacy and the outcomes of adjudication in cases where race, racial identity, and racialized narrative are in dispute. However prejudicial, they survive effectively unscathed, their adversarial legitimacy intact.

Like Haney López, for more than a decade I have studied racial identity and racialized narrative in the legal representation of race cases, initially in the field of poverty law<sup>12</sup> and subsequently in the arena of criminal justice.<sup>13</sup> The focal point of this ongoing survey

---

10. Racial tropes of crime, welfare, and immigration typically interlock. See generally MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003) (describing these tropes and white Americans' tendency to think of them as the result of African-American cultural or individual failure).

11. KATHERYN RUSSELL-BROWN, *UNDERGROUND CODES: RACE, CRIME, AND RELATED FIRES* 55–71, 97–118 (2004). Such identity profiles racialize community policing. *Id.*

12. See generally Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994) (reviewing GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (noting this author's involvement in aiding subordinated groups in impoverished communities)); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) (arguing that the heroic tradition that plagues even well-meaning attorneys robs indigent clients of their dignity, agency, and voice).

13. See generally Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) (criticizing the use of racialized narratives in criminal defense); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997) (examining the uses and justifications of racialized criminal defenses in lynching cases); Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999) (presenting a "race-conscious, community-oriented model of prosecutorial discretion" as an alternative to the "dominant colorblind prosecutorial canon of race neutrality"); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000) (challenging prosecutors to "overcome the burden of silencing tradition and to explore the discretionary freedom of reconstructing interracial community"); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001) (prodding practitioners to "reevaluate the place of racial identity, racialized narrative, and race-neutral representation in law, lawyering, and ethics"); Anthony V.

concerns public and private acts of racially motivated violence, both black-on-white and white-on-black. Predicated on a series of case studies investigating the rhetoric of race, or race-talk, in the prosecution and defense of high-profile trials of racial violence, the survey scrutinizes the role of lawyers in representing clients and communities of color. The representation comprises criminal and civil rights cases spanning incidents of hate crime, rape, and police brutality. At the same time, the survey inspects the rules of ethics governing lawyer representation, searching out alternative race-neutral and race-conscious regulatory canons for guidance. Close inspection reveals that the ethics rules and their professional customs, inured to the stigmatizing harm of racial subordination, condone color-coded partisanship and public nonaccountability in the service of purportedly colorblind, zealous advocacy.

Tolerance of racial subordination by code or tradition reinforces the material and interpretive sociolegal structures of racial violence in American history. Of long-standing provenance, the structures undergird both rules and relationships. In rules, they sanction interpretive violence, for example in the case of racialized speech.<sup>14</sup> In relationships, they sanction material violence, for example in the spectacle of police brutality.<sup>15</sup> These deep structures of racist tolerance deplete reconstructive visions of racial dignity and community in American law.

Haney López gleans his reconstructive vision from varied, multidisciplinary sources. His jurisprudence derives from Critical Race Theory<sup>16</sup> and its rebellious progeny LatCrit

---

Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998) (analyzing the ethics and rhetorical meaning of race in the prosecution of racially motivated violence); Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003) (examining the ethics and social meaning of prosecuting long-dormant criminal and civil rights cases of white-on-black racial violence arising out of the 1950s and 1960s).

14. See generally MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (challenging the First Amendment orthodoxy that protects racial epithets as free speech while excluding defamation, invasion of privacy, and fraud from such protections).

15. On race-incited police brutality, see KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS 33–46 (1998).

16. See generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997) (explaining the intersection of Critical Race Theory and feminist theory); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stenfancic eds., 2d ed. 2000) (developing an intellectual history of Critical Race Theory); CRITICAL RACE THEORY: THE

Theory.<sup>17</sup> His political aspirations carry on the labor of Professors Derrick Bell, Richard Delgado, and Angela Harris.<sup>18</sup> His ethnographic methods borrow from Professors Laura Gomez, Rachel Moran, and Eric Yamamoto.<sup>19</sup> And his social psychological accounts draw upon the work of Professors Linda Krieger and Reva Siegel.<sup>20</sup> However numerous and enriching,

KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (same); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jr. et al. eds., 2002) (delineating recent developments in Critical Race Theory); RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (Juan F. Perea et al. eds., 2000) (providing a systematic analysis of various racial groups).

17. On the commonalities between Critical Race Theory and LatCrit Theory, see Jerome M. Culp, Jr., *Latinos, Blacks, Others, and the New Legal Narrative*, 2 HARV. LATINO L. REV. 479, 479 (1997); Stephanie L. Phillips, *The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, 53 U. MIAMI L. REV. 1247, 1251 (1999); Francisco Valdes, *Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 7 (1996).

18. See generally DERRICK A. BELL, JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1989) (urging reforms that would account for class as well as racial disparity); RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995) (suggesting racism is a cultural paradigm rather than a matter of individual preference); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000) (arguing that gender and racial violence extend to state actors within the judicial system).

19. See generally ERIC K. YAMAMOTO, *RACE, RIGHTS AND REPARATION* (2001) (analyzing the law surrounding the internment of Japanese Americans in World War II and the law regarding reparations for that internment); Laura E. Gomez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 LAW & SOC'Y REV. 1129 (2000) (examining racial power sharing through an examination of criminal justice litigation); Laura E. Gomez, *Race Mattered: Racial Formation and the Politics of Crime in Territorial New Mexico*, 49 UCLA L. REV. 1395 (2002) (analyzing racial politics through empirical studies); Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321 (1987) (examining the dynamics of status-based racial conflict within the legal process); Rachel F. Moran, *Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1 (1995) (describing the demographic shifts among Latinos); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997) (questioning the traditional anti-discrimination law scheme for multiracial conflicts).

20. See generally Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CAL. L. REV. 1251 (1998) (discussing the impact of social cognition and social identity theory on the affirmative action debate); Linda Hamilton Krieger, *The Content of Our Categories: Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (same); Reva B. Siegel, *Text in Contest: Gender and the Constitution From a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) (arguing that in certain cases constitutional interpretation is best understood as reflecting social movements that aim to reshape popular understanding); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) (arguing that contemporary constitutional interpretation of equal protection cases

when applied to the fields of criminal defense and civil rights advocacy, these strands of normative and methodological instruction inevitably confront law practice traditions deformed by intractable racial stereotypes.

The practice customs of criminal defense and civil rights lawyers alike dictate that the colors of black and white animate the reconstructive visions of racial advocacy. Forged from juridical and political struggle, those monochromatic visions evoke stark periods of constitutional and democratic contest. Yet the historical memory of the past half-century of contest obscures the diversity and multiplicity of racial struggle in American law and politics. Wedded to a divided past, recollections in black and white omit the kindred struggle of people of color in Asian, Latino, and Native American communities. This omission stymies current efforts to formulate an ethic of good lawyering based on a color-conscious, contextual approach to criminal defense and civil rights advocacy. Unresolved in critical legal theory and clinical practice, a more inclusive ethical approach would strive to accommodate the identity interests of client dignity and group integrity in designing race-conscious, community-regarding duties of representation.<sup>21</sup>

In the criminal justice system, trials of race-incited protest and violence directly confront the racial world of advocacy and adjudication, exposing bias in the operation of the prosecution and defense functions. Of multifarious form and content, those functions fuel my own continuing investigation of race and crime, prosecutors and defenders, and criminal justice ethics. Extending that larger investigation, this Review explores the racial meaning of the prosecution and defense of the East L.A. Thirteen and the Biltmore Six against the backdrop of the Chicano movement.<sup>22</sup> The purpose of

---

limiting the rights of women and minorities may be looked upon in the future with the same disdain that *Plessy v. Ferguson* receives today); see also R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1081-88 (2001) (explaining that race-based suspect description in law enforcement, when used as a racial classification, results from the structuring of society along racial lines and therefore escapes equal protection review).

21. On race-conscious, community-regarding duties of representation and reconciliation, see ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 173 (1999).

22. For searching examinations of the sociolegal meaning of race in both the civil and criminal justice systems, see Symposium, *LatCrit and the Criminal Justice System*, 78 DENV. U.



this inquiry is to begin to evaluate prosecutor and defender roles in cases of mixed racial/ethnic violence inflicted by private citizens and state agents, white and nonwhite.<sup>23</sup> Grounded in the shared premise of race and racism in American law and society, the inquiry also seeks to assess the transformative role of prosecutors and defenders in grassroots, identity-based reform movements. The review is divided into three Parts. Part I connects color, identity, and legal violence to the trials of the East L.A. Thirteen and the Biltmore Six, and the concomitant growth of the Chicano movement. Part II links color and the criminal justice system in both theoretical and practical terms. Part III considers the transformative politics of color-conscious criminal trials for prosecutors and defenders of racial violence.

### I. COLOR, IDENTITY, AND LEGAL VIOLENCE: THE CHICANO TRIALS

For Haney López, the *East L.A. Thirteen* and the *Biltmore Six* trials exemplify the vigorous cultural and sociolegal struggle over the meaning of Mexican identity. The trials provided a forum for litigating both Mexican-American and Chicano identity framed by the logic of racialized common sense and race-inspired legal violence. Common sense racial violence, exerted daily by public and private actors, manifests itself in the discriminatory tolerance of legislative action and the prejudicial discretion of law enforcement. Throughout nine carefully crafted chapters, Haney López uncovers the ideology

---

L. REV. 1059 (2001); Symposium, *Representing Race*, 95 MICH. L. REV. 723 (1997); Colloquium, *Retrying Race*, 101 MICH. L. REV. 1133 (2003).

23. Reconsideration challenges traditional adversarial conceptions of prosecutor and defender roles in the criminal justice system. See, e.g., Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788, 791–93 (1996) (discounting a rule against “black deviance” narratives as unworkable because it would limit an attorney’s ability to provide the best possible defense); Richard Delgado, *Making Pets: Social Workers, “Problem Groups,” and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571, 1575–59 (1999) (urging the discussion of “racist treatment and deployment of racialized narratives” to reach beyond the black-white paradigm); Christopher Slobogin, *Race-Based Defenses: The Insights of Traditional Analysis*, 54 ARK. L. REV. 739, 747–75 (2002) (“The trial judge, not the defense attorney, must be the ultimate arbiter of which arguments [implicating negative race-based messages] are permissible.”). Compare Abbe Smith, *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1592–97 (1999) (defending race-animated adversarial advocacy as an essential tool that should be available for attorneys defending the disproportionate number of minorities accused of crimes), with Alex J. Hurder, *The Pursuit of Justice: New Directions in Scholarship About the Practice of Law*, 52 J. LEGAL EDUC. 167, 185–86 (2002) (mentioning the possible practical consequences of traditional adversarial conceptions).

of common sense embedded in a complex set of implicit ideas that guide daily cultural, socioeconomic, and political affairs. The ideas steer the litigation of Mexican identity. Moreover, they spark the race-based legal violence attending the Chicano movement. The first Section in this Part explores the litigation of Mexican identity. The second Section examines the common sense of color applied to suppress the Chicano movement and, moreover, the professed rationale for legal and extralegal violence declared by state agents and insurgent leaders.

#### A. *Litigating Mexican Identity*

Haney López devotes the opening chapters of *Racism on Trial* to a description of the formation of Mexican identity, describing the ascendance of the Chicano movement and outlining the history of Mexicans in East Los Angeles.<sup>24</sup> The chapters also introduce the broad social currents and political themes of the *East L.A. Thirteen* and the *Biltmore Six* trials.<sup>25</sup> They commence with a dramatic description of the educational crisis in the East Los Angeles school system.<sup>26</sup> Attributing the crisis to racial politics in California and in American society as a whole, Haney López explains the community-based effort to organize reform initiatives at four public high schools, mentioning the futility of earlier reform efforts.<sup>27</sup>

In search of the instigators of reform, Haney López discovers a new generation of Mexican students characterized by increasing militancy over continuing inequity in education and inequality in economic opportunity. The student militants, emerging from neighborhood high schools in 1966, hurriedly founded the Young Citizens for Community Action, a group later transfigured into the

---

24. See HANEY LÓPEZ, *supra* note 1, at 15–87.

25. See *id.* at 31–40.

26. See *id.* at 16–24; see also JUAN INDA, LA COMUNIDAD EN LUCHA: THE DEVELOPMENT OF THE EAST LOS ANGELES HIGH SCHOOL BLOWOUTS (Stanford Center for Chicano Research Working Paper Series No. 29, Mar. 1990) (providing a simple history of the crisis and the student strikes and protests).

27. See HANEY LÓPEZ, *supra* note 1, at 16–18; see also JUAN GÓMEZ-QUINONES, CHICANO POLITICS: REALITY AND PROMISE, 1940–1990, at 33 (1990) (“For Mexicans, reform movements of the Populist-Progressive and the New Deal eras had only a modest impact . . . .”); Gerald Rosen, *The Development of the Chicano Movement in Los Angeles from 1967 to 1969*, 4 AZTLÁN 155, 155–56 (1973) (attributing earlier reform failures to the “relative[ly] small supply of politically relevant resources” held by the Chicano population of Los Angeles).

Brown Berets.<sup>28</sup> In March 1968, approximately 10,000 defiant students walked out of local high schools striking in protest.<sup>29</sup> The protests or "Blowouts" attracted swift police attention and intervention, resulting in mass student arrests. Quickly radicalized, Mexican college students formed the campus group United Mexican American Students.<sup>30</sup> For many in East Los Angeles, the school demonstrations and campus strikes marked the political awakening of the Mexican youth movement.<sup>31</sup>

Alarmed by growing protests, in May, 1968 police swept through East Los Angeles with arrest warrants for thirteen suspected militants, including the prime minister and officers of the recently established Brown Berets.<sup>32</sup> Prosecutors convened a grand jury and indicted the group on both misdemeanor (e.g., disturbing the peace, failing to disperse, and trespassing) and felony conspiracy charges.<sup>33</sup> The arrests and indictments infuriated residents of the East Los Angeles community, precipitating local rallies and hunger strikes.<sup>34</sup>

To mount a defense, the *East L.A. Thirteen* retained Oscar Acosta, a former legal aid lawyer and political activist born to Mexican immigrant parents in Texas.<sup>35</sup> Acosta advanced a three-pronged defense strategy denouncing the indictments on the grounds of insufficient evidence, violation of the First Amendment, and deprivation of the defendants' equal protection rights under the

---

28. HANEY LÓPEZ *supra* note 1, at 18-19.

29. *Id.* at 19-22.

30. *Id.* at 18-19.

31. *Id.* at 18-24; see JUAN GÓMEZ-QUÍÑONES, *MEXICAN STUDENTS POR LA RAZA: THE CHICANO STUDENT MOVEMENT IN SOUTHERN CALIFORNIA, 1967-1977*, at 42-47 (1978) (describing how the student movement formed the foundation of the overall movement); Ruben Salazar, *Brown Berets Hail 'La Raza' and Scorn the Establishment*, L.A. TIMES, June 16, 1969, at 24 (describing the Brown Berets' involvement in the student movement and the burgeoning Mexican youth movement).

32. Ron Einstoss, *13 Indicted in Disorders at 4 L.A. Schools; Arrests Underway*, L.A. TIMES, June 2, 1968, at 1.

33. HANEY LÓPEZ, *supra* note 1, at 27.

34. *Id.* at 24-27, 168-69. Five of the East L.A. Thirteen defendants engaged in hunger strikes. See *Arrests Were Political*, LA RAZA, June 7, 1968, at 12 (describing the "political motives" of the "Establishment" to crush the liberation movement among Chicanos); *Political Prisoners Speak*, LA RAZA, June 7, 1968, at 7 (compiling letters from political prisoners that indicate their involvement in hunger strikes).

35. OSCAR Z. ACOSTA, *AUTOBIOGRAPHY OF A BROWN BUFFALO* 71 (1972). For later biographical history, see generally OSCAR Z. ACOSTA, *THE REVOLT OF THE COCKROACH PEOPLE* (1973).

Fourteenth Amendment, citing the discriminatory exclusion of Mexicans from the California grand jury system.<sup>36</sup> When Acosta's evidentiary attack failed to quash the indictment, he turned to the First Amendment, garnering strength from free speech and association claims.<sup>37</sup> He also pressed an equal protection claim of "judicial discrimination,"<sup>38</sup> assailing Los Angeles Superior Court judges for the underrepresentation of Mexicans in the Los Angeles County grand jury pool.<sup>39</sup> Acosta favored this claim for its "political message and explosive impact."<sup>40</sup> By way of support, he contrasted the nearly doubling of the Los Angeles County Mexican population during the 1960s with the scarcity of Mexican grand jurors during the same period.<sup>41</sup> In fact, demographic figures produced a striking 18:2 Mexican citizen to grand juror ratio.<sup>42</sup> Converting that ratio into legal-political theater, Acosta repeatedly summoned superior court judges as witnesses to account for the underrepresentation, subjecting each to scornful direct examination of anti-Mexican bias.<sup>43</sup> Haney López juxtaposes the trial of the East L.A. Thirteen against the rising turmoil in East Los Angeles spurred by community-wide political activism. In addition to street protests and police skirmishes, the turmoil engulfed the Los Angeles County Board of Education in a week-long occupation of its headquarters by activists from the United Mexican American Students, the Brown Berets, and allied community groups.<sup>44</sup> The protests also provoked widening incidents of police brutality.<sup>45</sup> Unsurprisingly, law enforcement agencies identified

---

36. HANEY LÓPEZ, *supra* note 1, at 104–05.

37. Oscar Acosta, *ELA 13 and Biltmore 6*, LA RAZA, Dec. 1969, at 2; *Lawyers File Motions for 13*, LA RAZA, Aug. 15, 1968, at 8.

38. HANEY LÓPEZ, *supra* note 1, at 37.

39. *Id.* at 31–33.

40. *Id.* at 32.

41. See Edward Villalobos, *Grand Jury Discrimination and the Mexican American*, 5 LOY. L.A. L. REV. 87, 89 (1972) ("Although the Spanish surnamed population of Los Angeles County has increased from 6.93 percent of the total population in 1950 to approximately 14 percent in 1971, only 3.6 percent of jury nominees from 1959 through 1972 have been Spanish surnamed."). See generally RODOLFO ACUÑO, *A COMMUNITY UNDER SIEGE: A CHRONICLE OF CHICANOS EAST OF THE LOS ANGELES RIVER, 1945–1975*, at 83–228 (1984) (discussing Mexican population growth in the 1960s).

42. HANEY LÓPEZ, *supra* note 1, at 32.

43. *Id.* at 30–33.

44. *Id.* at 33–34.

45. See, e.g., *Chicano Legal Defense: The Dominguez Family Case*, LA RAZA, Oct. 15, 1968, at 2 (recounting the story of the Dominguez family and police abuses they suffered).

specific East Los Angeles groups for monitoring pursuant to an FBI policy command urging disruption of nationalist movements in minority communities.<sup>46</sup>

Fearing spiraling disorder, in April 1969 the California Department of Education convened a conference on Mexican education at the Biltmore Hotel in downtown Los Angeles.<sup>47</sup> During a keynote speech by Governor Ronald Reagan, Chicano activists disrupted the conference, holding demonstrations and igniting fires.<sup>48</sup> Following numerous arrests, state prosecutors again convened a grand jury and indicted ten protesters on felony charges of arson, burglary, malicious destruction, and conspiracy.<sup>49</sup> Only six of the named defendants stood trial, the Biltmore Six.

Like the *East L.A. Thirteen*, the *Biltmore Six* defendants retained Oscar Acosta as lead defense counsel. Once more, Acosta immediately challenged the racial composition of the Los Angeles County grand jury on equal protection grounds.<sup>50</sup> To buttress his renewed claim of discrimination, Acosta again called scores of superior court judges to testify, 109 in all, interrogating each as a witness to the grand jury selection process. During the hearings, the trial judge twice jailed Acosta for contempt.<sup>51</sup> At the close of the six weeks of pretrial hearings, the judge rejected Acosta's allegations of discrimination.<sup>52</sup> Nevertheless, none of the defendants suffered convictions either at the initial trial or at a second trial; indeed, both trials ended in dismissals or in acquittals.<sup>53</sup>

---

46. HANEY LÓPEZ, *supra* note 1, at 34-35.

47. *Id.* at 35.

48. *Fires, Protests, Jar Reagan Talk*, L.A. HERALD, Apr. 25, 1969, at A1; Tom Newton, *Demonstration Disrupts Talk by Governor*, L.A. TIMES, Apr. 25, 1969, at 1.

49. *Nuevas Vistas 10*, LA RAZA, July 1969, at 13.

50. See *Montez v. Superior Court (Biltmore Six)*, 88 Cal. Rptr. 736, 737 (1970) (noting a motion to quash the indictment because it violated the equal protection clause).

51. HANEY LÓPEZ, *supra* note 1, at 38; Ron Einstoss, *Acosta Quits Defense for Two Brown Berets: Judge Delays Retrial, Names Two New Lawyers in Biltmore Hotel Arson Case*, L.A. TIMES, May 18, 1972, pt. 2, at 8; Ron Einstoss, *Two Acquitted After Biltmore Jurors Deadlock; Remaining Two Granted Mistrial by Judge; Jury Cites Witness Credibility*, L.A. TIMES, Nov. 16, 1971, at 22; William Farr, *2 Freed in Hotel Fire; Lack of Evidence Cited*, L.A. TIMES, May 18, 1972, pt. 2, at 8; *Lawyer Gets Five-Day Term in Biltmore Case*, L.A. TIMES, Aug. 13, 1971, at 5.

52. Ron Einstoss, *No Bias Found Against Latins on Grand Juries*, L.A. TIMES, Apr. 1, 1971, at 3.

53. HANEY LÓPEZ, *supra* note 1, at 39.

The trials of the East L.A. Thirteen and the Biltmore Six illustrate the difficulty of litigating racial identity under American law. From the outset, establishing race-based identity and discrimination under federal constitutional standards required each collection of Chicano defendants to meet the status criterion of a protected class. Forged out of the Supreme Court's 1954 decision in *Hernandez v. Texas*,<sup>54</sup> that status marker proved factually elusive and historically ill-suited for persons of Mexican descent officially designated by mid-century census counts as "white persons of Spanish surname."<sup>55</sup> Constrained by that status designation, *Hernandez* reached only the systematic exclusion of Mexicans from jury service, affording none of the race-specific protection announced that same 1954 Supreme Court term in *Brown v. Board of Education*.<sup>56</sup> In an attempt to enlarge the boundaries of constitutionally protected racial status, Acosta identified Mexicans as a distinct cultural group formed by blood and descent.<sup>57</sup>

Attentive to the significance of Acosta's strategic differentiation, Haney López carefully examines the claim of racial distinctiveness in light of the settlement history of Mexican enclaves in East Los Angeles, California, and the Southwest. He reports that from the early nineteenth century, originally under Spanish dominion and subsequently under United States annexation, Mexicans condoned divisions of race and class.<sup>58</sup> Typically, he explains, wealthy Mexicans of predominantly European ancestry (Californios), shunned poor

---

54. See 347 U.S. 475, 482 (1954) (reversing a criminal conviction because of the systematic exclusion of persons of Mexican descent from service as jury commissioners, grand jurors, and petit jurors).

55. Each census from 1940 through 1970 categorized Mexicans as white. HANEY LÓPEZ, *supra* note 1, at viii, 43–44 (quoting U.S. BUREAU OF THE CENSUS, UNITED STATES CENSUS OF POPULATION: 1960, PERSONS OF SPANISH SURNAME: SOCIAL AND ECONOMIC DATA FOR WHITE PERSONS OF SPANISH SURNAME IN FIVE SOUTHWESTERN STATES, FINAL REPORT PC(2)-1B (1960)).

56. See 347 U.S. 483, 495 (1954) (holding the "separate but equal" doctrine unconstitutional).

57. HANEY LÓPEZ, *supra* note 1, at 41–50. See generally Kevin R. Johnson, *Comparative Racialization: Culture and National Origin in the Latina/o Communities*, 78 DENV. U. L. REV. 633 (2001) ("By considering the variety of different Latin cultures, we are better able to appreciate how various Latin American groups are differentiated in law and popular culture."); Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197, 199–205 (1998) (citing intra-Latino tensions within the community fueled, in part, by differences between Mexican Americans and Mexican immigrants).

58. HANEY LÓPEZ, *supra* note 1, at 56–57.

Mexicans of African, mixed European, and Native American descent (Mexicanos). Consistent with this class hierarchy, Anglo traders migrating to California in the early 1840s entered mutually enriching alliances with Californios.<sup>59</sup> The annexation of the Southwest and the discovery of gold in California accelerated Anglo migration and, conversely, eroded Mexican racial and social status.<sup>60</sup>

The erosion of Mexican status implicated culture, economics, and geography. Galvanized by the ideology of white racial superiority, Anglos declared Mexicans inferior and eschewed interracial relations. Disparaging miscegenation,<sup>61</sup> they espoused a Darwinian view of natural social selection predicting the decline of mixed origin, nonwhite races and the triumph of white Manifest Destiny.<sup>62</sup> The postwar status of a defeated Mexico and the influx of refugees under the 1848 Treaty of Guadalupe Hidalgo magnified this view, encouraging what Haney López describes as the racialization of Mexicans in terms of ancestry and skin color.<sup>63</sup>

The rhetoric of Social Darwinism and Manifest Destiny, combined with the conquest of Mexico and immense land transfer to the United States, propelled the century-long degradation of Mexicans as indolent, dark-skinned criminals, notwithstanding their treaty-endowed standing as American citizens. Likened to dogs in popular culture, Mexicans suffered the degradation accorded members of an inferior race, treatment nearly equivalent to the coinciding subjugation of blacks and Native Americans.<sup>64</sup> Predictably, evidence of Mexican racial inferiority alluded to skin color and

---

59. *Id.* at 57.

60. TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* 26–29 (1994); RICHARD GRISWOLD DEL CASTILLO, *THE LOS ANGELES BARRIO, 1850–1890: A SOCIAL HISTORY* 25–45 (1979); HANEY LÓPEZ, *supra* note 1, at 56–62; ROBERT HEIZER & ALAN ALMQUIST, *THE OTHER CALIFORNIANS: PREJUDICE AND DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES TO 1920*, at 92 (1971); CAREY MCWILLIAMS, *SOUTHERN CALIFORNIA: AN ISLAND ON THE LAND* 314–21 (1973).

61. Compare *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (striking down Virginia's antimiscegenation statute), with *Roldan v. Los Angeles County*, 18 P.2d 706, 709 (Cal. App. 1933) (upholding California's antimiscegenation statute).

62. See HANEY LÓPEZ, *supra* note 1, at 61 (describing a “celebration of Anglo-Saxon superiority” that was “supposedly rooted in nature” and “revealed through physical differences”).

63. See *id.* at 58–62; REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF RACIAL ANGLO-SAXONISM* 229–71 (1981) (describing the historical roots of the racialization of Mexicans in America).

64. HANEY LÓPEZ, *supra* note 1, at 58–65.

physical appearance. Inferences from this evidence extended to accusations of cowardice, ill temperament, and immoral character. As expected, poor dark-skinned Mexicans suffered more virulent forms of racism than their wealthy, light-skinned neighbors.<sup>65</sup>

Throughout the nineteenth century, Haney López remarks, Mexicans repeatedly bore the degradation of white prejudice in custom and in statute. California, for example, barred Mexicans from court testimony and enacted "antigreaser" vagrancy laws.<sup>66</sup> At times, custom burst into vigilante violence. In 1857, for instance, Anglo mobs lynched eleven Mexicans in Los Angeles.<sup>67</sup> The demographic and geographic custom of segregation in Los Angeles contributed to the growing cultural isolation and socioeconomic vulnerability of the Mexican community. Although census data from Los Angeles show dramatic Mexican population growth, sparked by turbulence in Mexico's political economy and enlarged demand for labor in the Southwest, the Great Depression halted Mexican numerical dominance in the region.<sup>68</sup> At the same time, spatial segregation in school districts and residential neighborhoods rendered Mexicans increasingly invisible.<sup>69</sup>

Neither high rates of immigration nor rapid strides in assimilation checked the spreading sense of Mexican social invisibility and economic exploitation. Haney López notes that even as Mexican identity shifted from disenfranchised immigrant to rights-bearing citizen, Mexican status deteriorated.<sup>70</sup> He attributes that deterioration to Depression-era discrimination and unemployment, conjoined with government-ordered mass deportations and repatriations.<sup>71</sup> The development of patriotic civic associations, such as El Congreso, The League of United Latin American Citizens, and the Mexican

---

65. *Id.* at 62–65.

66. *Id.* at 66.

67. *Id.* at 67.

68. *Id.* at 68, 70–72.

69. *Id.* at 69; RICARDO ROMO, *EAST LOS ANGELES: HISTORY OF A BARRIO* 136–42 (1983); GEORGE SÁNCHEZ, *BECOMING MEXICAN AMERICAN: ETHNICITY, CULTURE, AND IDENTITY IN CHICANO LOS ANGELES, 1900–1945*, at 258–59 (1993).

70. HANEY LÓPEZ, *supra* note 1, at 70–79.

71. *Id.*; see JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954*, at 21 (1980) (discussing the political tension that developed between Mexico and the United States after the mass deportation of many Mexican citizens during the 1930s).



American Movement, failed to slow the decline of Mexican status.<sup>72</sup> Similarly, the swelling of Mexicans in the American ranks of World War II and their disproportionately high casualty rate failed to alleviate white prejudice.<sup>73</sup> In fact, in 1943, white antipathy stirred anti-Mexican mob violence, police round-ups, and a Los Angeles City Council resolution banning zoot suits.<sup>74</sup>

The scope of white vigilante violence and white-associated government discrimination against Mexicans varied in accordance with geography, class, and skin color.<sup>75</sup> Haney López recapitulates, for example, that poor, dark-skinned Mexicans in the Southwest suffered more blatant bias than wealthy, light-skinned Mexicans in Texas.<sup>76</sup> As a result, Southwestern Mexicans increasingly rejected assimilation and instead proclaimed their cultural allegiance to, and national pride in, Mexico. By contrast, other Mexicans, specifically Mexican Americans, embraced the identity category of "white persons of Spanish surname" promulgated by the U.S. census.<sup>77</sup> Common sense dictated that adoption. Legal violence rendered it legitimate.

The interplay of common sense and legal violence bridged the easily traversed boundaries separating law from society. Conceptualized in the multifaceted terms of color, ethnicity,

---

72. MARIO GARCÍA, *MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY, AND IDENTITY*, 1930-1960, at 26-61 (1989); HANEY LÓPEZ, *supra* note 1, at 70-72; *see also* Kevin R. Johnson, "Melting Pot" or "Ring of Fire"? *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1297-98 (1997) (discussing the heterogeneity of Latinos and the difficulties that this creates for civic organizations).

73. HANEY LÓPEZ, *supra* note 1, at 72-73; *see* RAÚL MORIN, *AMONG THE VALIANT: MEXICAN-AMERICANS IN WWII AND KOREA* 112 (1966) (narrating the conflicted experience of a Mexican-American World War II soldier). *But see* CAREY MCWILLIAMS, *NORTH FROM MEXICO: THE SPANISH-SPEAKING PEOPLE OF THE UNITED STATES* 259 (1949) ("Long before the war was over the cumulative effect of the casualty lists and the stories of Mexican-American gallantry had left a noticeable impression on the Anglo-American conscience.").

74. HANEY LÓPEZ, *supra* note 1, at 75.

75. *Id.* at 79-82; Neil Foley, *Becoming Hispanic: Mexican Americans and the Faustian Pact with Whiteness*, in *REFLEXIONES 1997: NEW DIRECTIONS IN MEXICAN AMERICAN STUDIES* 53-70 (Neil Foley ed., 1997); Ricardo Romo, *Southern California and the Origins of Latino Civil-Rights Activism*, 3 W. LEGAL HIST. 379, 379 (1990).

76. HANEY LÓPEZ, *supra* note 1, at 79-82.

77. *Id.* at 43 (quoting U.S. BUREAU OF THE CENSUS, *UNITED STATES CENSUS OF POPULATION: 1960, PERSONS OF SPANISH SURNAME: SOCIAL AND ECONOMIC DATA FOR WHITE PERSONS OF SPANISH SURNAME IN FIVE SOUTHWESTERN STATES, FINAL REPORT PC(2)-1B* (1960)); JOAN MOORE & ALFREDO CUÉLLAR, *MEXICAN AMERICANS* 7-9 (1970).

nationality, and race,<sup>78</sup> common sense ideas of Mexican identity both aroused and legitimated violence. Legal violence shifted the locus of identity from the social sphere of neighborhood and school to the legal sphere of criminal justice advocacy and adjudication. Inscribed in law and legal relationships, common sense ideas of identity resurfaced in the judgments of prosecutors and defenders and in the decisions of federal and state court judges. Less of a biological marker than a creature of practice, race for Haney López proves to be a social construct shaped by difference and disparity of treatment. Accordingly, when seized by political organization and mobilization, it may be reshaped, as shown in the erupting Chicano racial ideology of the late 1960s. The next Section tracks the emergence of racial common sense and racialized legal violence in repressing the grassroots insurgency of the Chicano movement.

### *B. Common Sense and Legal Violence: Race and the Chicano Movement*

Haney López dedicates the middle chapters of *Racism on Trial* to the racialized common sense and legal violence embodied in the judicial reasoning, prosecutorial coding, and police profiling animating the trials of the East L.A. Thirteen and the Biltmore Six.<sup>79</sup> California superior court judges<sup>80</sup> benign neglect in discounting the

---

78. See, e.g., RODOLFO F. ACUÑO, ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES 37–38 (1996) (noting the difficulties of developing a coherent history of the Chicano population in Los Angeles); CHRISTOPHER RODRÍGUEZ, LATINO MANIFESTO: A CRITIQUE OF THE RACE DEBATE IN THE U.S. LATINO COMMUNITY 133–72 (1996) (describing barriers toward future race-based coalitions); Aída Hurtado & Carlos Arce, *Mexicans, Chicanos, Mexican Americans, or Pochos . . . ¿Qué somos? The Impact of Language and Nativity on Ethnic Labeling*, 17 AZTLÁN 103, 121–24 (1986) (describing the imprecise usage of ethnic labels among people of Mexican descent).

79. HANEY LÓPEZ, *supra* note 1, at 91–154.

80. California statutes charge superior court judges with the duty to administer the grand jury selection process. See *id.* at 94; Lorenzo Arredondo & Donato Tapia, *El Chicano Y the Constitution: The Legacy of Hernandez v. Texas Grand Jury*, 6 U.S.F. L. REV. 129, 135 (1971) (“Under [the] alternative method, the judges may disregard the list presented by the commissioner and instead may compile their own list of nominees from which to choose 19 . . . grand jurors by lot . . . [which] [i]n actual practice . . . is the general rule in California.”); Patricia Mar, *The California Grand Jury: Vestige of Aristocracy*, 1 PAC. L.J. 36, 40 (1970) (“Superior Court judges are given almost unlimited latitude in determining the makeup of grand juries in their respective counties.”); Edward A. Villalobos, Comment, *Grand Jury Discrimination and the Mexican American*, 5 LOY. L.A. L. REV. 87, 91–92 (1972) (explaining that California incorporates variations of both jury commissioner and trial judge selection procedures).

underrepresentation of Mexicans on grand juries and their steadfast denial of intentional discrimination signifies for Haney López the colorblind fallacy of racial reasoning.<sup>81</sup> State prosecutors' insistence on proof of purposeful state discrimination in the face of conspicuous *de facto* racial disparity in grand jury representation showed the color-coded masking of racial advocacy. Crime prevention strategies relying on racial stereotypes and excessive force demonstrate the vigor of color-conscious, racialized policing.

Thwarted by the cognitive, doctrinal, and institutional constraints that vexed Acosta and the criminal defense teams in the *East L.A. Thirteen* and the *Biltmore Six* trials, Haney López turns to the social sciences, particularly to the common sense ideology of racialized scripts and stock stories.<sup>82</sup> Racialized scripts and stock stories cast people of color in marginal and subordinate roles, often depicting their character in immoral terms and relegating their voice to silence.<sup>83</sup> This turn to social psychology reveals how judicially scripted white racial orthodoxy in law and social action channeled the grand jury selection process toward exclusionary juror pools and qualifications.<sup>84</sup> Likewise, it discloses how police-scripted race-based criminal stereotypes pushed law enforcement in East Los Angeles toward higher Mexican arrest rates and incidents of harassment. However unintentional, race-contaminated common sense reasoning in law and sociolegal relations constituted a systemic form of racism.<sup>85</sup>

---

81. For discussions of racial diversity and judicial reasoning, see, for example, Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329 (2002); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 409 (2000).

82. HANEY LÓPEZ, *supra* note 1, at 109–13. On the form and content of stock stories in law and lawyering, see Gerald Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984). The same stock stories structure social life. See, e.g., PETER BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 14 (1966) (arguing that “common sense ‘knowledge’ rather than ‘ideas’ must be the central focus for the sociology of knowledge”); HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* 77 (1967) (analyzing the “common sense knowledge of social structures as an object of theoretical sociological interest”).

83. HANEY LÓPEZ, *supra* note 1, at 92–113.

84. *Id.* at 118–27.

85. *Id.* at 134–54. On the interaction of cognitive and material forms of racism, see, for example, Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2281 (2001); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 387–88 (1987). See also John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 63 (2002) (discussing racial attitudes, perceptions, and interracial interactions); Allen R. McConnell & Jill M. Leibold,

Ironically, for the Mexicans of East Los Angeles, the conscious and collective engagement with state-sponsored racism opened the door to the reconfiguration of racial identity.

In the closing chapters of *Racism on Trial*, Haney López follows the progression of Chicano racial identity from student activism to community mobilization.<sup>86</sup> He links this progression to the corresponding struggles of the California farmworker movement, the New Mexico land grant movement, and the urban youth-based Crusade for Justice.<sup>87</sup> He locates inspiration for these movements in the adjoining Black Power movement's celebration of nonwhite identity. This identity position, proclaimed by Chicano activists and defense lawyers at the trials of the East L.A. Thirteen and the Biltmore Six, fused race, collective resistance, and state repression. The fusion of race and the politics of resistance transformed both trials into political trials. Ordinarily, the goal of a criminal trial is acquittal and exoneration. By comparison, the goal of a political trial is public education and mobilization.<sup>88</sup> To Acosta, "trials should be used not so much to free the accused but to educate the masses and advance the movement."<sup>89</sup> That inflammatory, race-conscious ambition informed Acosta's portrayal of the East L.A. Thirteen and the Biltmore Six defendants as political prisoners jailed and driven to hunger strikes by state persecution.

To Haney López, the key to the Chicano movement in East Los Angeles hinged on the political education of Mexican youth about racial identity and the connections linking community protest, law and legal repression, and race.<sup>90</sup> Political education about this

---

*Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 440-41 (2001) (discussing prejudice and intergroup discrimination).

86. HANEY LÓPEZ, *supra* note 1, at 157-229.

87. *Id.* at 158-60.

88. *Id.* at 174-77. For useful discussions of the framework and history of political trials, see, for example, RON CHRISTENSON, *POLITICAL TRIALS: GORDIAN KNOTS IN THE LAW* 3 (1986); Nathan Hakman, *Political Trials in the Legal Order: A Political Scientist's Perspective*, 21 J. PUB. L. 73, 125 (1972); Georgia W. Ulmschneider, *Rape and Battered Women's Self-Defense Trials as "Political Trials": New Perspectives on Feminists' Legal Reform Efforts and Traditional "Political Trials" Concepts*, 29 SUFFOLK U. L. REV. 85, 86 (1995).

89. HANEY LÓPEZ, *supra* note 1, at 174; see also *Francisco Martinez Found Guilty*, LA RAZA, Oct. 15, 1968, at 12 (describing the trial of a picketer as highly relevant to the movement and its mission).

90. HANEY LÓPEZ, *supra* note 1, at 164-72.

"protest-repression-race"<sup>91</sup> identity equation may come from high-profile criminal trials or street-level police harassment. Whatever the source of instruction, race consciousness converts everyday incidents of police harassment and brutality into systematic acts of violence.<sup>92</sup> The Brown Berets' resistance to police harassment, coupled with their military idolatry and political romanticism, aroused police-led state violence, culminating in the Chicano Vietnam War Moratorium Riot of 1971.<sup>93</sup> Escalation of this sort caused the Brown Berets to degenerate into militant violence and, gradually, to alienate the Mexican community and its youth altogether.<sup>94</sup>

Curiously, political alienation never prompted a disavowal of Chicano racial identity. To be sure, Chicano racial identity spurred quarrels and cleavages within the Mexican community. Haney López, in fact, mentions squabbles over racial authenticity as well as Mexican-American-Chicano tensions over cross-racial indigenous ties to African Americans and Native Americans.<sup>95</sup> He attributes that tension to two competing visions of race: the first imagined as an extension of filial blood and descent, and the second conjured as a colored expression of character and culture.<sup>96</sup>

Haney López notes that those competing visions ensnared Acosta in the doctrinal morass of discrimination law, socioeconomic desperation, and legal violence, finally persuading him to abandon

---

91. *Id.* at 11; see also Edward Escobar, *The Dialectics of Repression: the Los Angeles Police Department and the Chicano Movement, 1968-1971*, 79 J. AM. HIST. 1483, 1488 (1993) ("Police repression not only invigorated the Chicano movement but also helped politicize and empower the Mexican-American community.").

92. HANEY LÓPEZ, *supra* note 1, at 167-82; see also CARLOS MUÑOZ JR., *YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT* 15 (1989) (acknowledging "racial, class, and gender inequality as significant factors in the shaping of student movements").

93. HANEY LÓPEZ, *supra* note 1, at 183-95. On stereotypes of Latino/a political leadership, see, for example, GLORIA BONILLA-SANTIAGO, *BREAKING GROUND AND BARRIERS: HISPANIC WOMEN DEVELOPING EFFECTIVE LEADERSHIP* 2 (1992); Berta Esperanza Hernández-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 915-18 (1997); Berta Esperanza Hernández-Truyol, *Las Olvidadas—Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER RACE & JUST. 353, 375-86 (1998).

94. HANEY LÓPEZ, *supra* note 1, at 195-204.

95. *Id.* at 218-29; see also SUSAN F. KEEFE & AMADO M. PADILLA, *CHICANO ETHNICITY* 1 (1987) (presenting a "sophisticated and empirically based conceptualization of what it means to be Chicano"); Francisco Valdes, *Race, Ethnicity, and Hispanismo in a Triangular Perspective: The "Essential Latina/o" and LatCrit Theory*, 48 UCLA L. REV. 305, 312-32 (2000) (examining the formation of racial identity and cultural privilege in the Latino/a community).

96. HANEY LÓPEZ, *supra* note 1, at 218-29.

law and flee American society.<sup>97</sup> Moreover, he points out that the Chicano movement, buffeted by police surveillance and internecine quarrel, dissipated quickly leaving only remnants of a political counterculture marked by racial identity and ethnic pride.<sup>98</sup> Regrettably, both grand jury discrimination and racial inequality survived as well, tainting the courthouse and the marketplace.<sup>99</sup> The same discrimination and inequality continue to plague the criminal justice system, itself similarly hardened to racism.<sup>100</sup> The next Part employs Haney López's analysis of race-coded police, prosecutorial, and judicial conduct in the trials of the East L.A. Thirteen and the Biltmore Six as a springboard to examine the links binding color and the criminal justice system.

## II. COLOR AND CRIMINAL JUSTICE

In *Racism on Trial*, Haney López documents the interconnections among color, community, and criminal justice in legal theory and practice. Rooted in sociolegal hierarchy, the interconnections tie power and privilege to racial exclusion and inequality. Both exclusion and inequality suppress the diverse alternative texts of subordinate communities of color. The texts may be symbolic and narrative. Suppression occurs when the everyday social practices of such communities are marginalized in schools, workplaces, and neighborhood streets. The practices extend to ways of knowing, seeing, and speaking. Marginality is intensified by political and legal clashes with the state, its courts, its prosecutors, and its police.

Haney López strives to comprehend these clashes and their competing ideologies. An astute observer, he discovers deep-seated and irreconcilable conflicts in the ideological and institutional structures of white law and nonwhite society. The first Section in this Part sketches the racial architecture of law and society enclosing the

---

97. *Id.* at 230–36.

98. *Id.* at 236–39; see also IGNACIO M. GARCÍA, *CHICANISMO: THE FORGING OF A MILITANT ETHOS AMONG MEXICAN AMERICANS* 145 (1997) (“The [Chicano] Movement institutionalized a political counterculture that defines itself through its ethnicity and historical experience.”); ILAN STAVANS, *BANDIDO: OSCAR “ZETA” ACOSTA AND THE CHICANO EXPERIENCE* 124 (1995) (describing Oscar Acosta’s legacy as one of hope).

99. HANEY LÓPEZ, *supra* note 1, at 239–41.

100. *Id.* at 241–50; see MARC MAUER, *RACE TO INCARCERATE* 129–36 (1999) (pointing out that “there is a correlation between race and rates of conviction and incarceration”).

criminal justice system. The second Section appraises that architecture from the standpoint of Critical Race Theory. The third Section reassesses that appraisal from the stance of LatCrit Theory.

### A. *White Law and Nonwhite Society*

To Haney López, law is fundamental to the preservation of racist social structures. It regulates the structure of relationships and institutions marking both personal and interpersonal boundaries. Preservation of racist social structures occurs through the accumulation of large and small acts of aggression. The aggression targets individuals, groups, and communities. Ubiquitous in culture and society, law-ratified aggression appears everywhere—in classrooms, workplaces, and public spaces. For young Chicanos of the 1960s, white law directed the regulation of their schools, the policing of their streets, and the segregation of their neighborhoods.<sup>101</sup>

Prior studies of race in legal education<sup>102</sup> and in the profession<sup>103</sup> graph the changing contours of racist structures and register their adverse impact on students, lawyers, and clients of color.<sup>104</sup> The very same structures overlap gender and sexuality, compounding the impediments to equality.<sup>105</sup> By organizing sociolegal relations and

---

101. HANEY LÓPEZ, *supra* note 1, at 245–49.

102. On race, legal education, and identity development, see, for example, Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 2 (1989); David B. Wilkins, *Two Paths to the Mountaintop?: The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1984 (1993).

103. On race, professional identity, and social responsibility, see, for example, David B. Wilkins, *Beyond "Bleached Out" Professionalism: Defining Professional Responsibility for Real Professionals*, in ETHICS IN PRACTICE 207 (Deborah L. Rhode ed., 2000); David B. Wilkins, *Social Engineers or Corporate Tools: Brown v. Board of Education and the Conscience of the Black Corporate Bar*, in RACE, LAW AND CULTURE 137, 138 (Austin Sarat ed., 1997).

104. For accounts of racial and cultural differences in the lawyering process, see, for example, Bill O. Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1808 (1993); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 346 (1997); Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLINICAL L. REV. 65, 77 (1997); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 374 (2002).

105. For treatments of racial differences across gender and sexuality, see, for example, Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POL'Y & L. 23, 28–41 (1994); Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 186–220 (1994);

institutions, the structures implicate lawyer identity, role, and responsibility in prosecuting and defending racial violence.<sup>106</sup>

Both lawyer and client identity are embodied in narrative and expressed in advocacy. The racial representation of colored narratives in advocacy shapes the prosecution and defense of racial violence. Basic to the lawyering process in race cases, racial representation exhibits colorblind, color-coded, and color-conscious norms. The contest between race-neutral and race-conscious norms in part determines the form and content of advocacy in cases of Mexican-American and Chicano violence, whether committed by the state or its citizens. Advocacy tainted by racial identity, racialized narrative, and race-coded representation usefully serves prosecutors and defenders of violence but frequently proves inimical to the divergent interests of clients and communities of color. In the trials of the East L.A. Thirteen and the Biltmore Six, for example, California prosecutors rebuffed the claim of Mexican racial distinctiveness, citing the white/nonwhite ambiguity of the Spanish-surname classification and the nonwhite singularity of the black census category, despite opposition from Chicano groups.<sup>107</sup> In turn, Acosta and his defense team abandoned references to Mexicans under the 1950 census category of white persons of Spanish surname, thereby forsaking Mexican-American groups committed to white identity.<sup>108</sup>

For Acosta and other militants, the abandonment of white Mexican-American identity affirmed the intrinsic value and social reality of nonwhite Chicano identity. The *East L.A. Thirteen* trial court declined to join this affirmation. Instead, faithfully applying

---

Francisco Valdes, *Afterword: Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265, 1322 (1999).

106. On racialized lawyer roles and responsibilities, see, for example, Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 772 (1997); Kenneth P. Troccoli, "I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer, 20 LAW & INEQ. 1, 6 (2002); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1506 (1998); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1069 (1995); David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999) (reviewing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999)).

107. HANEY LÓPEZ, *supra* note 1, at 44–45.

108. *Id.* at 45.



*Hernandez*, the court deemed Mexicans a distinct class subject to discrimination; but the court nowhere found Mexicans a distinct and separate racial group.<sup>109</sup> Nonetheless, Acosta repeatedly invoked race at trial, proffering three accounts of Mexican racial identity alternately based on descent, physical features, and group culture.<sup>110</sup> On these shifting and perhaps irreconcilable accounts, Haney López observes, "race was not socially constructed but physically real, something fixed by nature."<sup>111</sup>

Prosecution and defense practices in the criminal justice system divulge recurrent tendencies in constructing racial identity, deploying racialized narrative, and configuring race-coded trial strategies. Fashioned instinctively and reinforced by training, the strategies encompass police profiling, plea bargaining, jury selection, trial tactics, sentencing, and appeals. Informing police, prosecutorial, and defender actions, these "race card" tactics exploit the imagery and rhetoric of racial inferiority and its incendiary corollary deviance, thus bolstering existing cultural stereotypes.

The subordinate imagery and rhetoric of color suffuse cases of racially motivated violence, both white and nonwhite.<sup>112</sup> Litigation strategies of color infect both federal and state criminal proceedings. Prosecutors embroiled in such proceedings often infuse the racial identity of alleged lawbreakers with an antebellum vision of irreparable inferiority and inscribe in legal doctrine a stigmatizing narrative of immutable deviance.<sup>113</sup> Defenders similarly invoke the racial inferiority of the accused or victim and reiterate a racialized legal narrative of irredeemable moral depravity. Neither prosecutors nor defenders seriously consider the collective harm spawned by racialized legal rhetoric, or entertain alternative race-conscious community-regarding rhetoric.

---

109. *Id.* at 51.

110. *Id.* at 52–55.

111. *Id.* at 54.

112. On the subordinate imagery and rhetoric of color in law-induced identity constructions, see, for example, Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 354 (1996); Sheri L. Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1794–1803 (1993); Bela A. Walker, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 COLUM. L. REV. 662, 664 (2003).

113. On antebellum trial narratives, see ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* 122–52 (2000).

Although contaminated by centuries of applied racial animus, the norms of liberal citizenship afford prosecutors and defenders some recourse from the adversarial zeal of racialized advocacy. Liberal legalism offers both procedural and substantive norms. Procedurally, liberal norms offer a more open, process-oriented means of considering the racial identity of the accused and his victim in criminal justice proceedings from the preliminary stages of charging and investigation to the concluding stages of trial and sentencing. Substantively deduced from contractarian and communitarian traditions of civic engagement, liberal norms provide for the formal consideration of racial identity in the lawyering process. Consideration of this kind entails independent counseling appropriate to the client's situation, candor toward the tribunal, fairness to the opposing party and victim, and evenhanded extrajudicial statements to the public. It also demands an abiding consciousness of stigma and solicitude for the harms unleashed upon parties and nonparties in racial contexts.

Heightened consideration of party and nonparty racial identity enhances lawyer public accountability for the stigmatizing harm suffered by offenders, victims, and their communities in criminal trials. Fuller consideration of the harm to individual dignity and collective welfare in the public forum of a trial sometimes works to heal identity-based interracial violence and to encourage community participation in the criminal justice process. Under the participatory logic of liberalism, citizen involvement in crime prevention through local churches, neighborhood associations, and schools helps to advance the interests of individual dignity, collective equality, and interracial reconciliation. Facilitating those interests in advocacy comports with the accepted traditions of lawyer independence and moral activism.<sup>114</sup> To revitalize those traditions, prosecutors and defenders must work to adopt race-conscious advocacy, counseling, and advisory roles in alliance with communities of color beset by crime and injustice.<sup>115</sup>

---

114. For strong versions of lawyer independence and moral activism, see, for example, Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 10 (1988); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084 (1988). See also WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 77 (1998) ("[T]he plausibility of a duty of obedience to law depends on how we define the law.").

115. See, e.g., T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062 (1991) (contrasting colorblind and color-conscious theories in the law and advocating

Race-conscious advocacy and adjudication within the criminal justice system links identity, community, and equality. *Racism on Trial* seizes equality as its guiding principle of reform. Haney López envisions the norm of equality beyond socioeconomic and political freedom. In his view, gathered from natural law and democratic covenant, individuals hold fundamental the right to freedom from economic privation and the right to participation in civic governance. Building on this view, Haney López espouses the freedom of an egalitarian culture and society.<sup>116</sup> That egalitarian vision collides with the identity distinctions and group polarities of race and racism.

Studies of the criminal justice system grasp race and racism to explain identity-based discrimination against widely disparate groups and to elucidate the polarization among such groups.<sup>117</sup> The studies point to ingrained racial patterns in the incidence of crime and in the application of criminal law.<sup>118</sup> For blacks and Chicanos, those patterns are displayed in racial profiling<sup>119</sup> and immigrant regulation.<sup>120</sup>

---

the latter); Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 844–88 (1997) (advocating color-conscious affirmative action in the criminal law).

116. HANEY LÓPEZ, *supra* note 1, at 236–50.

117. On identity-based group animus and polarization, see, for example, Regina Austin, “The Black Community,” *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1775 (1992); Sheila A. Bedi, *The Constructed Identity of Asian and African Americans: A Story of Two Races and the Criminal Justice System*, 19 HARV. BLACKLETTER L.J. 181, 182 (2003); Robert García, *Latinos and Criminal Justice*, 14 CHICANO-LATINO L. REV. 6, 19 (1994); Mary Romero, *State Violence and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1118 (2001).

118. See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 12 (1999) (“[A] realistic response to crime, and in the end [to] our society’s survival as a cohesive community, depend[s] on a candid assessment of the uses of inequality in criminal justice.”); RANDALL KENNEDY, RACE, CRIME AND THE LAW 387 (1998) (“[M]uch remains to be done to make the administration of criminal law racially just.”).

119. On governmental discrimination through racial profiling, see, for example, Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 164 (2002); Frank R. Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 851–52 (2002); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 680 (2000); Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 342 (2003).

120. Heightened immigrant regulation reveals patterns of racial profiling. See, e.g., Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481 (2002) (describing how current immigrants are primarily people of color and arguing for a change in current racially discriminatory immigrant regulations); Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 851 (2003) (pointing out that new post-September 11 immigration measures will predominately affect people of color).

Furthermore, they are entrenched in constitutional doctrine<sup>121</sup> and in the institutional decisionmaking of judges and juries.<sup>122</sup>

Curing the afflictions of racialized advocacy and adjudication pervading the criminal justice system requires Haney López and others to grapple with elite lawyer-engineers (prosecutors, defenders, and judges) over the leadership, methods, and objectives of reform. To a valuable extent, Haney López's guiding principle of equality in race relations creates a means to form alliances between identity-conscious, community-based movements in agitating for reform in law, politics, and society.<sup>123</sup> Calls for equality and equal justice, however, will not reconcile the competing group and community interests at stake in the criminal trials of racial violence. For identity-based outsider groups dominated by elite-engineered leadership, only a broader ethic of community advocacy promises political progress.<sup>124</sup> Community advocacy may take many forms, ranging from the basic

---

121. Racial entrenchment is increasingly visible in Fourth Amendment jurisprudence. See, e.g., Devon W. Carbado, *[E]Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 967–68 (2002) (“[T]he Supreme Court’s construction and reification of race in Fourth Amendment cases legitimizes and reproduces racial inequality in the context of policing.”); Alfredo Mirandé, *Is There a “Mexican Exception” to the Fourth Amendment?*, 55 FLA. L. REV. 365, 368 (2003) (“[T]here is considerable support for the view that with regard to suspected alienage status, there is a *de facto*, unwritten Mexican exception to the Fourth Amendment.”).

122. Both judges and juries suffer racial contamination. See, e.g., Jody D. Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 768 (1995) (distinguishing between rationality-enhancing and rationality-subverting racial references during trial); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 66 (1993) (concluding that “judicial estimates of the effects of jury discrimination on jury decisions are feasible”); Martha L. Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1203 (1992) (suggesting that the sociolegal desire for jurors and judges to empathize with litigants reflects a “misunderstanding of the preconditions for impartiality and of the role of fair representation in producing impartial jurors and panels of judges” that results in contamination); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 203 (2001) (“Run-of-the-mill trials of Black defendants in which racial issues are not obvious are more likely to elicit prejudicial responses from Whites.”); Michael Vitiello & J. Clark Kelso, *Reform of California’s Grand Jury System*, 35 LOY. L.A. L. REV. 513, 602 (2002) (contending that “California will be best served by well-trained grand juries that reflect [the state’s] diverse population”).

123. HANEY LÓPEZ, *supra* note 1, at 178–229.

124. On community advocacy, see, for example, Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 950 (1992); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1104 (1990).

protectionist goals of brutality prevention to the more affirmative goals of economic development.<sup>125</sup>

Extending Haney López, progress itself begins in dialogue about crime, criminal law, and criminal justice reform among prosecutors, defenders, judges, and affected communities. The more diverse the participants and the more public the forums, the better the chances of systemic improvement. Public dialogue on racial reform that encourages community activism and mobilization on behalf of equality-based criminal justice initiatives can integrate prosecutors and defenders into collaborative roles.<sup>126</sup>

The collaboratively fostered egalitarian initiatives invited by Haney López, which seem more intrinsically compelling than conventional ethical standards, may help check prosecutorial excesses. Curbing adversarial zeal in race trials enhances the public accountability of the prosecution and criminal defense bar, and restores public confidence in the bench. Both accountability and confidence wane when the public perceives advocacy strategies and adjudication methods as incompatible with mythic colorblind traditions. Incompatibility undermines institutional claims of impartiality and neutrality. In describing how to avert the normative collapse of the adversary system of criminal justice in race trials, the next Section considers the color-conscious prescriptions of Critical Race Theory.

### *B. Critical Race Theory*

At the intersection of civil rights, jurisprudence, and interdisciplinary movements, Critical Race Theory furnishes accounts of racial bias in law,<sup>127</sup>

---

125. See WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* 7-40 (2001) (pointing out that "grassroots [community economic development] activities depend on an elaborate network of larger-scale efforts").

126. For illustrations of community-based prosecutorial collaboration, see, for example, Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465, 1469 (2002); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 379 (2002).

127. See, e.g., BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW* 9 (1998) (analyzing "two central examples of race discrimination law with the ultimate objective of exploring the implications of transparency-conscious doctrinal reform, reciprocally, for law and for white race consciousness itself"); Kimberlé W. Crenshaw, *Race Reform, and Retrenchment: Transformation, and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334-36 (1988) (arguing that antidiscrimination laws, though successful in eliminating symbolic manifestations of racial oppression, have allowed the perpetuation of

economics,<sup>128</sup> and narrative.<sup>129</sup> The accounts augment empirical evidence of discrimination<sup>130</sup> and anecdotal evidence of colorblind prejudice.<sup>131</sup> Although these evidentiary accounts fail to abate racism

---

material subordination of African Americans); Tanya K. Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1101-69 (2002) (examining the role of race ideology in the enforcement of antidiscrimination laws).

128. See, e.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* 13 (1986) (arguing that race, as the "fundamental axis of social organization in the United States," critically affects class economics); Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1596-97 (1995) (exploring "the interaction between racism and poverty and the effect this interaction has on the consignment of Blacks to segregated, substandard housing").

129. See, e.g., Margaret Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L.J. 4, 5 (1995) ("Within the realm of outsider jurisprudence, narrative methodology has been deployed less frequently by or on behalf of Asian Americans than it has been by or on behalf of others on the margins."); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2415 (1989) (examining "the use of stories in the struggle for racial reform"); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 807 (1994) (showing "the value inherent in Critical Race Theory and Narrative while providing insiders with the tools and insight needed to assess the value of such work"); Gerald Torres, *Translation and Stories*, 115 HARV. L. REV. 1362, 1364 (2002) ("[U]nderstanding the role of narrative interpretations of reality is critical for designing policy changes and for engaging in legal analysis that illuminates more than the problems associated with doctrine and the internal understanding of the law.").

130. See, e.g., IAN AYRES, *PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* 4 (2001) (using empirical data to "contest the idea that race and gender discrimination in the retail sale of goods is nonexistent or unimportant"); Clark Freshman, *Prevention Perspectives on "Different" Kinds of Discrimination: From Attacking Different "Isms" to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2293, 2334 (2003) ("[R]egression analysis, such as Ayres's analysis of records of how hospitals assigned kidneys, how one dealer priced cars, or how judges and bail bondspeople set bail and sold bonds . . . has much general promise for promoting awareness of the disease of discrimination.").

131. See, e.g., LESLIE G. CARR, "COLOR-BLIND" RACISM x (1997) (arguing that "color blindness is not the opposite of racism . . . [but] another form of racism"); Jerome M. Culp, Jr., *Colorblind Remedies and Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 166-67 (1994) (arguing "that the colorblind principle is not a moral requirement, but rather a policy argument resting on several invalid assumptions"); Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1137 (1996) ("[R]ace color blindness actively blocks efforts to address conscientiously the multitude of issues surrounding race."); Tanya K. Hernandez, "Multiracial" Discourse: *Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 103 (1998) ("[A]lthough multiracial discourse may seem benign and appealing on a humanitarian level, its implementation will produce counter-egalitarian results in the struggle for racial equality.").

or segregation, they give meaning to racial identity, content to racialized narrative, and form to race-neutral and race-conscious representation.

To his credit, in *Racism on Trial* Haney López synthesizes extensive sociolegal accounts of race and racism to underscore the multiplicity of racial identities in law, culture, and society. He links that multiplicity to the conceptual malleability of race in public and private spheres, and to the diverse practices of racism among individuals, groups, and communities.<sup>132</sup> Melded fragments of social life and state policy, racism inflicts particularized and generalized harm. Experienced at individual and collective levels, the harm appears natural and even necessary to the efficient and just ordering of society.

At the outset, Haney López challenges the natural order of race and the necessity of racial harm. He discerns nothing natural in the ideological deployment of racial hierarchy as the fulcrum for colonial expansion in the Americas under early Spanish conquest or, later, under American military intervention sanctioned by the 1848 Treaty of Guadalupe Hidalgo.<sup>133</sup> Assessing this expansion, he finds no logic in the creation of a racially segmented, dual colonial society. In fact, he views the contemporary duality separating dominant whites and subordinate nonwhites as a remnant of European custom and colonial privilege, rather than as a constituent part of the natural world.<sup>134</sup> And yet this duality survives in a persistent white/nonwhite hierarchy rationalized by color, ethnic culture, and nationalism.

The rationality of white/nonwhite racial hierarchy derives from the ideology of consent and the violence of coercion. To explicate consent, Haney López weaves together assorted theories of oppression, specific to colonized minorities, based on psychosocial research of white racism. He enumerates conscious and unconscious types of racist microaggression emblematic of European colonialism in contemporary manifestations of cognitive bias and nativism.<sup>135</sup> Microaggression enmeshes both perpetrator and victim in the transverse dynamics of bias, engendering domination and subordination instead of resistance.

---

132. HANEY LÓPEZ, *supra* note 1, at 205–29.

133. *See id.* at 56–62.

134. *See id.* at 56–65.

135. *See id.* at 58–76.

In the *East L.A. Thirteen* and the *Biltmore Six* trials, racial microaggressions routinely took the form of stereotyping in courtroom advocacy, trial testimony, and judge-made rulings. The stereotypes entwined juridical and public prejudice. Haney López shows how public stereotyping and state-sanctioned exclusion occurred through the practices of administrative and street-level differentiation employed by judges, prosecutors, and police officers in racially classifying grand jurors, offenders, and witnesses.<sup>136</sup> Winnowing the social science literature, he reconceives race as a pan-ethnic category of social knowledge with its own system of designation and proof.<sup>137</sup> Admittedly race conscious, this cultural category collides against purported colorblind traditions in constitutional, statutory, and common law jurisprudence.

The ratification of ethnic and pseudoscientific racial classifications under colorblind traditions hampered the identity struggle of Mexican Americans and Chicanos. Because that struggle spans two centuries of resistance to colonial expansion, it disperses widely across color, geography, political economy, and region. That diffusion or disaggregation of color changes racial subordination's caste distinctions but not its unity of experience. Endorsing the political and litigation campaigns of the civil rights movement, Haney López seeks to find racial unity in the collective action and mobilization of the Chicano student protesters in East Los Angeles. The next Section shows how LatCrit Theory strengthens that racial unity.

### C. *LatCrit Theory*

LatCrit Theory discerns a broad unity of identity and narrative in the splintered experience of Latinos.<sup>138</sup> In the criminal justice system, that

---

136. See *id.* at 91–108, 134–54.

137. See *id.* at 109–33.

138. Compilations of the LatCrit literature include Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997) (LatCrit I); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 UCLA CHICANO-LATINO L. REV. 1 (1998) (LatCrit II); Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 575 (1999) (LatCrit III); Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 U.C. DAVIS L. REV. 751 (2000) (LatCrit IV); Symposium, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DENV. U. L. REV. 467 (2001) (LatCrit V); Symposium, *Latinas/os and the Americas: Centering North-South*



experience merges with the subordination of other communities of color in selective state prosecution<sup>139</sup> and prosecutorial racism.<sup>140</sup> In fact, state-sanctioned racism permeates jury selection and fosters nullification.<sup>141</sup> Likewise, racism deforms witness credibility, identification, and testimony.<sup>142</sup>

---

*Frameworks in LatCrit Theory*, 55 U. FLA. L. REV. 1 (2003), 54 RUTGERS L. REV. 803 (2003) (LatCrit VI); Symposium, *Coalitional Theory and Praxis: Social Movements and LatCrit Community*, 81 OR. L. REV. 587 (2003); 13 LA RAZA L.J. 113 (2002) (LatCrit VII); Symposium, *City and the Citizen: Operations of Power, Strategies of Resistance*, 51 CLEV. MARSHALL L. REV. (forthcoming 2004) (LatCrit VIII).

139. On race-guided prosecutorial discretion, see, for example, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 17 (1998) (arguing that prosecutorial discretion—a major cause of racial inequality in the criminal justice system—may instead be used to construct effective solutions to racial injustice); Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 181, 195 (1996) (proposing that reason, not rhetoric, should guide the federal government's consideration of selective prosecution on the basis of race); Robert B. Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1314–15 (1997) (advocating for meaningful judicial review of the federal charging decision because of the constitutional rights implicated); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 606 (1998) (“The [*United States v. Armstrong*] ruling will prevent many defendants who were selectively prosecuted from gaining discovery, and thereby ensure that many meritorious claims will never be proven.”); Kenneth B. Nunn, *The “Darden Dilemma”: Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1474–75 (2000) (“[T]he best resolution of the ‘Darden Dilemma’ is for African Americans to refrain from prosecuting crimes and to reject employment opportunities with prosecutors’ offices.”); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 129 (2003) (“questioning the desirability of the intent doctrine in the area of selective prosecution and . . . proposing an alternative standard”).

140. On the trial-specific insinuations of prosecutorial racism, see, for example, Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 338 (2001); Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1242 (1992).

141. On the dynamics of race in jury selection and nullification, see generally HIROSHI FUKURAI & RICHARD KROOTH, *RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION* (2003); Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209 (2003); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

142. Witness credibility, identification, and testimony frequently depend on race. See generally Maria L. Ontiveros, *Rosa Lopez, David Letterman, Christopher Darden, and Me: Issues of Gender, Ethnicity, and Class in Evaluating Witness Credibility*, 6 HASTINGS WOMEN'S L.J. 135 (1995) (commenting on the presentation of Rosa Lopez's testimony in the O.J. Simpson criminal trial); Radha Natarajan, Note, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821 (2003) (arguing that criminal defendants accused on the basis of cross-racial eyewitness identification are denied due process under the U.S. Constitution); cf. Leslie V. Dery, *Hear My Voice: Reconfiguring the Right to Testify to Encompass the Defendant's Choice of Language*, 16 GEO. IMMIGR. L.J. 545, 546 (2002)

Further, it relentlessly molds defense tactics<sup>143</sup> and litigation strategy.<sup>144</sup>

The historical subordination of Latinos in the criminal justice system underscores the Mexican experience of double conquest, initially by Spain and later by the United States in the annexation of Texas after the 1846–1848 Mexican War. Driven by the imperatives of white supremacy and racial dominion, both conquests trumpeted the rhetoric of imperial superiority. Yet the ratification of the 1848 Treaty of Guadalupe Hidalgo actually diminished the status of Mexican citizenship and diluted the right of land ownership in America.<sup>145</sup> This diminution was certified by law and litigation, for example, in the white-only electoral franchise restriction of the California Constitution and in the New Mexico land grant litigation dispossessing Mexican property owners under the ideology of Manifest Destiny.<sup>146</sup>

---

("[D]efendant's right to testify should be recast to include 'in the language of the defendant's choice.'").

143. Defense tactics often rely on race. See generally JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997) (arguing that common race-based claims of reasonableness must be rejected); Kristen L. Holmquist, *Cultural Defense or False Stereotype? What Happens When Latina Defendants Collide with the Federal Sentencing Guidelines*, 12 *BERKELEY WOMEN'S L.J.* 45, 47, 50–56 (1997) ("As a result [of the Federal Sentencing Guidelines], defense attorneys . . . often find creative, and sometimes disingenuous, paths around guilt, failing to present an honest, straightforward look at the defendant's culpability . . ."); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 *MINN. L. REV.* 367 (1996) (discussing the powerful interaction between race and the doctrine of self-defense); Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 *LAW & SOC. INQUIRY* 39 (2003) (offering a principled strategy for the courts to identify and handle the uses of culture as a defense in criminal proceedings); Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 *RUTGERS L. REV.* 45 (1998) (proposing criteria to govern the admissibility of social science evidence, including evidence used in a race-based fear criminal defense).

144. Litigation strategy may hinge on racial bias and prejudice. See generally Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 *GEO. J. LEGAL ETHICS* 1, 1 (1994) ("Criminal defense lawyers are frequently required to utilize legal strategies that are morally repugnant because they perpetuate racial, gender, or cultural stereotypes."); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 *HOFSTRA L. REV.* 925, 934 (2000) (discussing "the issues raised by theories of defense that exploit racism, sexism, homophobia, or ethnic bias").

145. HANEY LÓPEZ, *supra* note 1, at 62, 158–59.

146. Anthony V. Alfieri, *Teaching the Law of Race*, 89 *CAL. L. REV.* 1605, 1613–14 (2001) (reviewing *RACE AND RACES: CASES AND SOURCES FOR A DIVERSE AMERICA* (Juan F. Perea et al. eds., 2000)).

The juridical tolerance of racially discriminatory state constitutions and court decisions, which resembled the antebellum laws of slavery and the postbellum Jim Crow codes in the South, repeatedly encountered Mexican resistance. The history of the Cortina Wars and the New Mexico Land Grant Wars document fierce Mexican resistance.<sup>147</sup> That resistance reappears now in the continuing battles over state bilingual education, public school segregation, and immigrant agricultural labor in the Southwest. Haney López extracts lessons from this early Mexican resistance in chronicling the trials of the East L.A. Thirteen and the Biltmore Six. The next Part assesses the *East L.A. Thirteen* and the *Biltmore Six* trials jointly as a transformative bridge to the color-conscious conduct of criminal trials.

### III. COLOR-CONSCIOUS CRIMINAL TRIALS

The transformative politics of color-conscious criminal trials have their roots outside the law and the boundaries of the adversary system. Here, as it is so often in American history, transformative politics flow from community settings and the dynamic social and cultural forces of grassroots resistance. The call for a prosecutor and defender politics of color-conscious criminal trial advocacy anchored in community power enlarges the principal teaching of *Racism on Trial*. By design, that teaching engages two main facets of race: ideology and violence. In the context of race, ideology refers to the conscious and unconscious attitudes, beliefs, and habits that shape individual and collective understanding of color, ethnicity, and nationality. Staked in the crucible of race relations, violence attaches to the segregationist aggressions of bias—including hate speech and poverty—as well as to the disparate force of police brutality and state killing.

*Racism on Trial* adroitly dismantles the ideology and violence of race in the legal customs of the police and prosecutors, the procedural and substantive rules of courts and grand juries, and the administrative and legislative mandates of state policy in public education, agricultural employment, and immigration. Equally important, it lays the groundwork for a more race-conscious advocacy framework integrating the elements of racial identity, harm, and

---

147. *Id.*

community. The first Section in this Part evaluates the integration of racial identity, harm, and community in Chicano and, by extension, Latino advocacy. The second Section explores this integration in the *East L.A. Thirteen* and the *Biltmore Six* trials. The third Section considers such integrative efforts involving currently embattled Latino criminal defenders.

#### A. *Chicano Identity, Harm, and Community in Advocacy*

Construed broadly, *Racism on Trial* culls the jurisgenerative properties of racial identity, harm, and community from repressive traditions of ideology and violence, and then refashions them into a politics of law and advocacy.<sup>148</sup> Fueled by Haney López's racial and reformist commitments, his work acquires the pronounced egalitarian cast common to the civil rights<sup>149</sup> and community lawyering<sup>150</sup> movements. Indeed, for Haney López, *Racism on Trial* is about equality in race relations.

In pursuit of equality, Haney López strives to explore the nature of race in Mexican-American history and to map its past, present, and future Chicano trajectory. To that end, he undertakes a legal and cultural history of the Chicano movement through a wide-ranging analysis of racial inequality and violence under the criminal justice system.<sup>151</sup> His central premise is that race and racism are historically

---

148. On jurisgenerative properties in law and advocacy, see generally ROBERT M. COVER, *NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* 95-172 (Martha Minow et al. eds., 1992); Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess, and Opposition*, 94 COLUM. L. REV. 1721 (1994) (reviewing *LAW'S VIOLENCE* (Austin Sarat & Thomas R. Kearns eds., 1992)).

149. For convergences in civil rights scholarship and Critical Race Theory, see generally Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference*, 82 CAL. L. REV. 787 (1994); Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1 (2002).

150. Gerald Lopez contextualizes community lawyering in multiple settings. See GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (describing the social separation between lawyer and client and prescribing a solution for bridging that gap by presenting multiple fictitious case studies and analyses).

151. Comparable forms of analysis are found in cultural studies and LatCrit Theory. See generally STEVEN W. BENDER, *GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION* (2003) (discussing the confluence of stereotypes and the law); Steven W. Bender, *Silencing Culture and Culturing Silence: A Comparative Experience of Centrifugal Forces in the Ethnic Studies Curriculum*, 5 MICH. J. RACE & L. 913, 914 (2000), 33 U. MICH. J.L. REFORM 329, 330 (2000) (discussing his experiences "with regard to silence and race in an

contingent practices linked to injustice. It is injustice, Haney López laments, that "creates races, especially where such injustice seems like common sense."<sup>152</sup>

From this starting point, Haney López examines long-standing racial beliefs and practices within the Mexican-American community and beyond. Disassembling those beliefs and gauging their repercussions, he discovers both psychological and material harm.<sup>153</sup> Psychological harm affects identity, which, akin to the liberal notion of personhood, in this instance encompasses ethnicity, nationality, and race.

Racial subjugation in advocacy stigmatizes identity, spawning colored distortions of the interior self and the exterior other. Evidence of self-distortion surfaces in attempts to cross or straddle color lines, for example in nonwhites' passing for whites. Evidence of other-distortion manifests itself in efforts to demarcate color lines, for example in whites' segregating of nonwhites. The coloring of the "self" and the "other" generates intrafamily and intracommunity quarrels over white and nonwhite identity status and group membership.

By contrast, material harm influences health and socioeconomic status. In addition to the familiar indicia of poverty and inequality, material harm also reflects the state violence of police harassment and brutality.<sup>154</sup> Racially motivated violence in law enforcement stigmatizes victims of brutality by publicly profiling them as lawbreakers. When victims of color suffer brutality, their public lawbreaking profile too often alienates whites who stand at a distance from segregated policing.

Sensitive to the stigmatizing injury of identity deformation, material deprivation, and state violence, Haney López records the evolution of racial attitudes toward Mexicans. Next, he measures the constraining impact of these attitudes upon the political standing and socioeconomic status of individual Latinos and of Mexicans, Chicanos, and Mexican Americans as distinct groups. He ties these

---

Ethnic Studies classroom"); Kevin R. Johnson & George A. Martínez, *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship*, 53 U. MIAMI L. REV. 1143 (1999) (discussing how critical Latina/o theory "finds its roots in a long tradition of Chicana/o activism and scholarship").

152. HANEY LÓPEZ, *supra* note 1, at 250.

153. *See id.* at 109-54.

154. *Id.* at 134-54, 245-49.

attitudes to dominant claims of a natural and just social order, an order bound up in the inextricable logic of common sense. The quotidian logic of cultural bias, bigoted commerce, and nativistic politics binds race to common sense. To Haney López, "race has become common sense: accepted but barely noticed, there though not important, an established fact that we lack the responsibility, let alone the power, to change."<sup>155</sup> It is the stubborn fact of race that makes common sense and the color line appear so tightly interwoven and inescapable.

Haney López charts the emergence of the color line in American history while documenting its daily mayhem in the Mexican community.<sup>156</sup> He follows the civil rights and racial pride movements of the 1960s, noting their demands for new rights and their assertion of new identities.<sup>157</sup> He cites 1968 as a turning point when residents of East Los Angeles, to this day the largest Mexican community in the United States, mobilized street demonstrations petitioning for better schools and protesting police brutality.<sup>158</sup> Like many political activists in 1968, Mexican insurgents in East Los Angeles articulated a new

155. *Id.* at vii.

156. The mayhem of racism extends to covert cultural forms of violence, see Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1559 (1989) (examining the "source and the strength of minority conviction that courts . . . are capable of bias"), and to overt criminal forms of violence, see Kathryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593, 595 (1996) (arguing for "more affirmative race-based sanctions within the criminal justice system").

157. Race and identity are intimately bound up in rights discourse. See generally Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intra-racial Conflict*, 151 U. PA. L. REV. 1913, 1915 (2003) (providing an analysis of the effects of race and class on two civil rights cases); Enid Trucios-Haynes, *Why "Race Matters": LatCrit Theory and Latina/o Racial Identity*, 12 LA RAZA L.J. 1 (2001) (discussing how Latina/o identity should figure in Critical Race Theory discourse).

158. Protests over affirmative action, bilingual education, and school segregation continue in California and elsewhere. See generally Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000) (examining the history of mistreatment of citizens of color in California and the recent attacks on remedial measures such as affirmative action); Kevin R. Johnson & George A. Martinez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1227-28 (2000) (arguing that Proposition 227, which severely limited bilingual education in California, violates the Equal Protection Clause of the Fourteenth Amendment); Steven H. Wilson, *Brown Over "Other White": Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145 (2003) (discussing how Mexican Americans, for a time, avoided using *Brown v. Board of Education* to pursue their civil rights claims and how debate over school desegregation continues).

racial identity: the vision of Chicano pride and power. Paradoxically, in the decades prior to 1968, leaders of the Mexican community claimed to be white.<sup>159</sup> But, in the aftermath of 1968, many insisted they were Chicanos, proud members of a brown race.

To capture this transformation, Haney López probes Mexican identity and interracial relations using the historical prism of U.S. census archives to trace changes in perception and treatment.<sup>160</sup> He reports that in 1930, the census defined Mexicans as nonwhite, i.e., “as a part of a ‘Mexican race.’”<sup>161</sup> From 1940 through 1970, however, the census categorized Mexicans as white.<sup>162</sup> Since 1980, the census classified Mexicans as Hispanic “independent of race.”<sup>163</sup> These categorical shifts disclose conflicting understandings of Mexican identity based on cultural, ethnic, and racial group characteristics.<sup>164</sup>

Throughout *Racism on Trial*, Haney López discerns contradictory notions of Mexican identity fixed in culture, ethnicity, nationality, and race. To disentangle these notions, he catalogues overlapping ways of conceptualizing group differences<sup>165</sup> among

---

159. The flight from color to neutrality and privilege is well documented. See generally Ariela J. Gross, *Texas Mexicans and the Politics of Whiteness*, 21 LAW & HIST. REV. 195 (2003) (discussing how some Texas Mexicans sought to be in the “other white” category to achieve and maintain privilege); Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 2 HARV. LATINO L. REV. 307 (1997) (discussing white privilege in the context of Critical Race Theory and some Latinos’ desire to obtain that privilege).

160. For correlations in government-sanctioned racial categories and identity, see generally Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997); Angel R. Oquendo, *Re-Imagining the Latino/a Race*, 12 HARV. BLACKLETTER L.J. 93 (1995); Luis Angel Toro, “A People Distinct From Others”: Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15, 26 TEX. TECH L. REV. 1219, 1223 (1995). See also Mireya Navarro, *Going Beyond Black and White, Hispanics in Census Pick ‘Other’*, N.Y. TIMES, Nov. 9, 2003, at A1 (noting the difficulties that the U.S. Census Bureau has had with categorizing Hispanics).

161. HANEY LÓPEZ, *supra* note 1, at viii.

162. *Id.*

163. *Id.* See generally David E. Hayes-Bautista, *Identifying “Hispanic” Populations: The Influence of Research Methodology Upon Public Policy*, 70 AM. J. PUB. HEALTH 353 (1980) (commenting on the difficulties associated with categorizing Hispanics).

164. On the enmeshing of ethnicity and race in identity, see generally Haney López, *Race, Ethnicity, Erasure*, *supra* note 6; Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as’ Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69 (1998).

165. Differences of color and race are embodied in law and the legal process. See generally MARY FRANCES BERRY, *THE PIG FARMER’S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT* (1999) (providing examples of racism and sexism in trials from 1865 to the present); A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS IN THE*

whites, blacks, Asians and Pacific Islanders,<sup>166</sup> and Native Americans.<sup>167</sup> Group differences, he points out, conform to a socially constructed duality of color: white against nonwhite. This categorical dichotomy assigns an unequal social status to, and imposes a dominant-subordinate racial order upon, whites and nonwhites, harming each group's sense of self and community. With this order comes a set of corresponding cultural, political, and socioeconomic privileges. Situated in positions of privilege, white non-Mexicans construe Mexicans as inferior in both legal and societal terms.<sup>168</sup> The next Section demonstrates how the integration of reconceived notions of racial identity, harm, and community in the *East L.A. Thirteen* and the *Biltmore Six* trials struggled to combat images and narratives of inferiority.

### B. Chicano Trials

For Haney López, race is not simply an artifact of cultural inferiority. Rather, race and racism are embedded in diffuse social structures that confer identity, status, and privilege. Sanctioned by

---

AMERICAN LEGAL PROCESS (1996) (providing a broad overview and history of the effect of race on American law); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000) (describing discrimination in the law between people of different shades of color, especially between light-skinned and dark-skinned blacks).

166. Racial hierarchy has long infected Asian American status. See generally ANGELO N. ANCHETA, *RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE* (1998) (describing racial discrimination toward Asian Americans and the legal system's response); CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* (1994) (describing the history of discrimination against the Chinese in America during the nineteenth-century, especially legal discrimination); Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347 (1997) (suggesting that changing the legal system may not be the best way to overcome the racial subordination of Asian Americans); Taeku Lee, *Racial Attitudes and the Color Line(s) at the Close of the Twentieth Century*, in *THE STATE OF ASIAN PACIFIC AMERICA: TRANSFORMING RACE RELATIONS* 103 (Paul M. Ong ed., 2000) (surveying empirically racial attitudes of and toward Asian Americans and documenting a hierarchy of perception).

167. Race-based claims marked the conquest and subordination of Native American tribes. See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (describing the history of legal attitudes toward Native Americans, much of which revolved around race); Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986) (describing the history of race-based claims in the law used to subordinate Native Americans).

168. HANEY LÓPEZ, *supra* note 1, at viii-ix.



law and tradition, these omnipresent structures erect barriers to access and achievement. The barriers of law, culture, and society partition race relations, producing a political economy of nonwhite inequality and impoverishment. Insurmountable in appearance, such barriers nonetheless may, at critical moments, fall to popular resistance and political lawyering.

*Racism on Trial* focuses on one such critical moment of racial transformation within the Mexican community in East Los Angeles during the late 1960s, a moment when that community and the nation witnessed an explosion of Chicano militancy. Reasoning from that explosion, Haney López distills the history of the Chicano movement into a struggle “to negotiate the tension between white and non-white status.”<sup>169</sup> For him, individual and collective acts negotiating the tensions of color-imbued status confront the racial world and the “potentially emancipatory consequences of directly engaging with racial ideas and practices.”<sup>170</sup>

By evaluating both the disciplinary and emancipatory forms of race and racism in the criminal justice system, *Racism on Trial* provides important lessons to prosecutors and defenders of racial violence. The lessons derive from Haney López’s thoroughgoing accounts of the *East L.A. Thirteen* and the *Biltmore Six* trials. Deftly crafted and meticulously researched, the accounts unravel the cultural, psychological, and sociological intricacies of Mexican identity. These historically contingent and multilayered facets of identity help define and locate racial identity inside American society and outside its borders. The joinder of racial identity with the overlapping categories of gender, ethnicity, and sexuality highlights the complex, changing meaning of native and immigrant identity.<sup>171</sup>

Moreover, Haney López’s trial accounts powerfully depict the violence of state-sponsored police harassment and the countervailing force of community resistance. Radiating out from the Mexican enclave of East Los Angeles, the violence initially matched standard common sense notions of crime and punishment. On further inspection, the violence rapidly lost its gloss of legitimacy and instead

---

169. *Id.* at x.

170. *Id.*

171. On the coalescing of ethnic, racial, and queer communities, see Barbara J. Cox, *Coalescing Communities, Discourses and Practices: Synergies in the Anti-Subordination Project*, 2 HARV. LATINO L. REV. 473 (1997).

acquired the appearance of a racialized practice calculated to harass Mexican students and monitor Chicano militants.<sup>172</sup> Uncloaked, that practice warrants scrutiny not only as a misguided mode of community policing, but also as an effective means of inciting community resistance. Germane to both state-supervised community policing and grassroots-initiated community empowerment, the alternative LatCrit logic of color-conscious common sense recommends collaboration. Applied to street-level law enforcement and community empowerment, collaboration entails the cross-racial cooperation of police officers, prosecutors, defenders, and neighborhood residents in maintaining order and ensuring justice.

Additionally, Haney López's trial accounts carefully parse the internal inconsistencies of equal protection doctrine still evolving under the Fourteenth Amendment. Earlier inscribed in *Hernandez v. Texas*,<sup>173</sup> those identity and intent-based incongruities increasingly hinder efforts to uncover, prove, and remedy race discrimination. Whether the discrimination at issue involves colorblind *de facto* bias or color-coded *de jure* prejudice is of little consequence. Without evidence of purposeful conduct directed at a protected class, the discriminatory practices more than likely survive equal protection scrutiny.

Even with such evidence as existed in the trials of the East L.A. Thirteen and the Biltmore Six, it may be impossible to establish proof of intent. Absent intent, the challenged conduct may freely exploit racial stereotypes without running afoul of the Constitution. Buffeted by the crude white/nonwhite dichotomy of unstable census categories, the status of Mexicans as a protected class disintegrates into colorblind stereotype or color-coded disparagement. When, as here, that status is historically ambiguous and culturally disputed, the Constitution withholds protection. Neither Acosta nor Haney López stands able to rectify this constitutional vulnerability, a vulnerability springing from the complexity of culture, blood, and descent. The next Section considers the equivalent integrative efforts of Chicano criminal defenders who, like Acosta, have struggled and ultimately failed to overcome the obstacles of race in advocacy and adjudication.

---

172. HANEY LÓPEZ, *supra* note 1, at 134–54.

173. 347 U.S. 475 (1954).

### C. Chicano Defenders

Although *Racism on Trial* teaches crucial, albeit abject, lessons about prosecutorial treatment of identity status and systemic discrimination in cases of racial violence, the transcendent lesson of the book pertains to defender treatment of the accused. At both the *East L.A. Thirteen* and the *Biltmore Six* trials, Acosta and his defense teams deployed an overtly color-conscious defense strategy defying immigrant-inspired stereotypes to reframe the notion of Mexican citizenship and identity.<sup>174</sup> To Acosta, citizenship entailed democratic participation in governance, equal representation in grand jury pools, and the robust dialogue of political protest.<sup>175</sup> In this version of citizenship, democracy, equality, and political violence are inseparable. Together, they grant and deny status, setting the boundaries of inclusion and exclusion. Indeed, they confirm the privilege of color, endowing the status of whiteness and the caste of nonwhite otherness.

Acosta's criminal defense representation in the *East L.A. Thirteen* and the *Biltmore Six* trials signaled an end to the Mexican-American flight to whiteness. Calibrated to escape the cultural denigration of race and the danger of state violence, the flight to whiteness corroded visions of the racial self. By repudiating that flight and renouncing its racial privilege, Acosta and the defendants successfully overcame the corrosive effect of common sense white racism, envisioning and celebrating a discrete Mexican race consciousness embodied in the rebellious concept of Chicano identity.<sup>176</sup> Commencing from the liberal framework of equality, together they enlarged the axiom of equal protection to remedy the harm of status-based racial exclusion. Furthermore, by integrating the vectors of culture, blood, and descent, they recontextualized Mexican identity to reflect Chicano self-determination and community sovereignty.<sup>177</sup> The recontextualization of racial identity in advocacy departed from the neutral formalism of colorblind rationality.

For Acosta and Haney López, colorblind constitutional rationality is status-enforcing. However facially neutral, as Los

---

174. HANEY LÓPEZ, *supra* note 1, at 15–55.

175. *Id.* at 33, 230–36.

176. *Id.* at 42–55.

177. *Id.* at 51–55.

Angeles prosecutors and judges steadfastly insisted,<sup>178</sup> sociolegal status classifications incorporate extant racial hierarchies. Incorporation recirculates naturalist and necessitarian discourses of discrimination based on unacknowledged racial privilege. Naturalist discourses treat racial status hierarchies as normal. On this account, white/dominant and nonwhite/subordinate status hierarchies are not only natural but also intrinsic to a social order. They are inherent parts of social reality. Necessitarian discourses treat such hierarchies as socially constructed. On this divergent account, racial hierarchies are contingent and instrumental; they emerge and survive out of a deformed sense of pragmatism. They are constructed elements of social reality. In the contexts of the *East L.A. Thirteen* and the *Biltmore Six* trials, racial privilege attached to the judicial selection of grand jurors and the police use of excessive force. Both privileges were expressed in naturalist discourses of Mexican citizen incompetence and lawbreaking immorality.

Instead of yielding to white privilege and resorting to the portrayal of the defendants as deviant or inferior citizens in need of state punitive discipline or paternalism, Acosta heralded democratic norms of participation, equal citizenship, and political struggle by casting the defendants as populist dissenters and political prisoners. In doing so, he underscored the role of law and legal advocacy in pursuing a strategic union with political organizing. Haney López highlights this union, observing the partial efficacy of combining advocacy and organizing to halt the disenfranchisement of Mexican communities.<sup>179</sup> His endorsement of advocacy in support of democratic participation points to the value of public education as a core element of grassroots insurgency.

By rejecting a defense strategy built on the demeaning artifacts of anti-Mexican imagery and narrative,<sup>180</sup> Acosta momentarily prevailed over racial stereotypes. However, because the trial strategy

---

178. See *id.* at 45–55, 103–08 (providing multiple statements by politicians, legislators, and judicial figures that the judicial process was racially neutral).

179. See *id.* at 167–77 (describing the somewhat successful efforts at combining legal advocacy and political organization).

180. For descriptions of anti-Mexican imagery and narrative, see generally Cedric J. Robinson & Luz Maria Cabral, *The Mulatta on Film: From Hollywood to the Mexican Revolution*, 45 *RACE & CLASS* 1 (2003); Ediberto Roman, *Who Exactly Is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 *J. GENDER RACE & JUST.* 37 (2000).

of discarding racial caricature risks tactical disadvantage, it must be counterbalanced by outside mobilization of community power. Mobilization is a function of identity and the memory of solidarity.<sup>181</sup> Within the criminal justice system, it may operate independently of offender innocence and guilt. It also may proceed despite race-motivated police brutality and imprisonment.<sup>182</sup> It falters only when aligned with racial neutrality.

As Haney López mentions, Acosta firmly grasped that community mobilization required color-conscious texts in advocating and organizing around protest, race, and legal violence.<sup>183</sup> In the Chicano movement, trial texts helped advocates and activists "to see themselves as brown."<sup>184</sup> Such texts must address the multiple sites of racial contest scattered across cultural, social, and political landscapes. Such sites are innumerable. They include courts, schools, and city streets. To be effective, the texts must incite diverse acts of resistance, such as individual disobedience, group protest, and community-wide insurgency.<sup>185</sup> Resistance of this kind may spring from color consciousness or rights consciousness. Whatever the source, resistance promises insoluble lawyer-client tensions and intracommunity conflicts.<sup>186</sup> Both tensions and conflicts will be

---

181. Mobilization springs from collective empowerment. See generally Stacy Brustin, *Expanding Our Vision of Legal Services Representation—The Hermanas Unidas Project*, 1 AM. U. J. GENDER & L. 39 (1993) (describing the author's involvement in two projects bringing together low-income, marginalized women); Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217 (1999) (providing a vast overview of the history and theory of community development law, and analyzing the relationship between empowerment and the realities of practicing such law).

182. Police brutality may trigger community mobilization. See generally Jessica A. Rose, *Rebellious or Regnant: Police Brutality Lawyering in New York City*, 28 FORDHAM URB. L.J. 619 (2000) (describing the community mobilization that often occurs after incidents of police brutality in New York City, and arguing that lawyers involved in police brutality cases must become more "rebellious" in their methodology).

183. See HANEY LÓPEZ, *supra* note 1, at 167–77.

184. *Id.* at 177.

185. For early expressions of lawyer-promoted resistance, see generally Steve Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984–85); Peter Gabel and Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982–83).

186. On client-lawyer tensions in civil and criminal advocacy, see generally Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998).

aggravated by interracial distrust.<sup>187</sup> Lacking adequate cross-racial modes of discourse, color-conscious lawyers, their clients, and their affiliated communities may be condemned to interminable struggle against the state and, more disturbing, against themselves.

Read gravely, *Racism on Trial* condemns prosecutors and defenders of racial violence to an endless circle of engagement with race and racism in the criminal justice system. Indeed, Haney López's dissection of the *East L.A. Thirteen* and the *Biltmore Six* trials demonstrates that neither rights advocacy nor community mobilization may be able to overcome the racialized structures of law enforcement, legal advocacy, and judge-managed dispute resolution. That futility is doubly vexing given the rapid and continuous demographic shift in American society in the direction of Latino diversity.<sup>188</sup>

Haney López declines to explicate fully the causes of this futility, adopting an unexpectedly ambivalent stance toward legal education, the legal profession, and the adversary system of dispute resolution.<sup>189</sup> Considered from this problematic stance, it is unclear whether the overall systemic futility of the *East L.A. Thirteen* and the *Biltmore Six* trials should be properly attributed to deficiencies in civil rights and criminal defense advocacy and their accompanying ethics

---

187. Interracial distrust is common in cross-cultural lawyering contexts. See generally Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001) (describing a pedagogical method for increasing cross-cultural competence in a clinical setting); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993) (describing the author's experiences with various forms of distrust, including interracial distrust, in his three clinical law courses over four years).

188. On the legal and racial ramifications of such demographic shifts, see generally John A. Powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 FORDHAM URB. L.J. 1395 (2002); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995).

189. For wide-ranging discussion of race in legal education, see generally SHERENE H. RAZACK, *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS* 1-36, 130-170 (1998); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847, 33 U. MICH. J.L. REFORM 263 (2000); Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117 (1994); Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education—A Curricular Study With LatCritical Commentary*, 13 LA RAZA L.J. 119 (2002); David B. Wilkins, *Rollin' on the River: Race, Elite Schools, and the Equality Paradox*, 25 LAW & SOC. INQUIRY 527 (2000).

paradigms,<sup>190</sup> or to the basic fallacies of legal reasoning and lawyer regulation.<sup>191</sup> Similarly, it is uncertain whether such deficiencies inhere in the very nature of civil rights and criminal defense advocacy<sup>192</sup> and, therefore, fatally infect related forms of identity-based advocacy in the fields of environmental justice,<sup>193</sup> gay rights,<sup>194</sup> and poverty law.<sup>195</sup>

Likewise, it is unclear whether defects of this kind may be cured by the inclusion of more participatory modes of community-based

190. Quarrels over aggressive defense tactics persist. Compare David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993) (endorsing aggressive defense tactics), with William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) (arguing against aggressive defense tactics).

191. Haney López devotes little attention to lawyer reasoning and regulation. For exceptional accounts, see generally David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

192. The tensions internal to civil rights advocacy are widely acknowledged. See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing tensions among participants in the evolution of school desegregation litigation); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995) (discussing the difficulty that lawyers have in drafting pleadings in emotional civil rights cases); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1625 (1997) (examining internal disputes in civil rights litigation and noting that such litigation "challenges conventional ways that groups make political decisions"); Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101 (1996) (offering an empirical study of lawyer deference to and domination of civil rights clients).

193. Environmental justice campaigns furnish opportunities for racial collaboration. See generally LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* (2001) (discussing the broad grassroots origins of the environmental justice movement to combat environmental racism); Sheila Foster, *Environmental Justice in an Age of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459 (2002) (discussing the emergency of "local, 'place-based' decision-making" in environmental activism).

194. Lesbian and gay rights advocacy embraces identity. See generally PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* (2000) (discussing the legal battles that have been part of the lesbian and gay rights movement); Douglas NeJaime, Note, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511 (2003) (describing a model of gay-based advocacy focusing on pluralism and representation in the context of same-sex marriage).

195. Poverty law advocacy may seize upon identity. See generally Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992) (discussing litigation strategies, including the use of identity-based strategies, on behalf of the disabled poor); Lucie E. White, *Mobilizing on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88) (discussing identity-based "impact litigation" as a weapon in the war on poverty).

advocacy<sup>196</sup> or more political styles of movement-inspired advocacy.<sup>197</sup> Contemporary chronicles of lay participatory experiments in the civil justice arena show mixed results and noteworthy fragmentation of the lawyer's role. The same fragmentation infects the criminal justice arena, undermining the defender's traditional function and thereby

---

196. Participatory modes of community-based advocacy draw on community organizing traditions. See generally Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999) (discussing how clinical instructors and students can prepare for lawyering within distinct native communities); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001) (presenting a critical assesment of the law and organizing paradigm); Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195 (2002) (relating personal experiences of community lawyering, and concluding that while different communities have radically different internal dynamics, common lessons may be taught in clinical courses which help lawyers transcend these differences); Joseph Erasto Jaramillo, *The Community-Building Project: Racial Justice Through Class Solidarity Within Communities of Color*, 9 LA RAZA L.J. 195 (1996) (arguing that a closer examination of socioeconomic divisions within communities is necessary in order to more effectively achieve racial justice); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1995) (considering the observations and reflections of three non-lawyer community organizations concerning the role of lawyers in community groups).

197. Political styles of movement-inspired advocacy seem romantic in retrospect. See generally ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER* (1983) (describing the personal experiences of a "people's lawyer" in politically-charged cases); LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS (Robert Lefcourt ed., 1971) (presenting a series of essays in agreement that the legal system, as well as the education, health, military, and political systems, are collapsing and can no longer be saved); RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS (Jonathan Black ed., 1971) (offering insight into the basic political questions confronting radical lawyers); Carol Oppenheimer, *Rebel with a Cause: The Movement Lawyer in the Criminal Courts*, 2 AM. J. CRIM. L. 146 (1973-74) (describing and evaluating the role of the movement lawyer in the criminal law system). Their heroic styles have been largely displaced by the sociolegal calibrations of cause lawyering. See generally John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927 (1999) (arguing that effective representation should include collaboration with individual clients as well as their communities); Kevin R. Jolmsen, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201 (1999) (arguing that social change is more likely to occur through mass political movements than litigation, and that ethical duties to clients limit the ability of lawyers to shape the world in ways that they see fit); Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493 (1996) (situating the impact litigation/client services debate as a dichotomy which values detachment over connection in providing legal services); Karen L. Loewy, Note, *Lawyering for Social Change*, 27 FORDHAM URB. L.J. 1869 (2000) (arguing that the objections to political lawyering can either be overcome using specific lawyering techniques or counterbalanced by the need to protect legal rights).



creating role ambiguity and institutional tension.<sup>198</sup> Even when the individual and collective results of representation prove effective, it is unclear whether the curative adjustments of race-conscious and community-centered advocacy ought to be accompanied by the cross-racial coalitions<sup>199</sup> more common to electoral politics<sup>200</sup> and social justice movements.<sup>201</sup> Undoubtedly important, for now these questions exceed the reach of Haney López's intended analysis and of my own.

## CONCLUSION

*Racism on Trial* enriches academic and lay understanding of the interplay between race and culture in legal theory and practice. Both inside and outside the academy the subject of race in American law, culture, and society continues to inflame intellectual and political passions.<sup>202</sup> Haney López embraces those passions to enlarge the

198. Role ambiguity increases as lawyer engagement in community mobilization expands. See generally Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401 (2001) (exposing the tension between the public defender as an individual actor and as a part of a broader institutional force pursuing consistent approaches to recurrent issues); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996) (exploring an expanded conceptual model of the role of the defense attorney in which public defenders build institutions to support their community-oriented work).

199. On the feasibility of cross-racial coalitions, see generally Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 CORNELL L. REV. 855 (2003) (reviewing LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002) and ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999)); George A. Martínez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO-LATINO L. REV. 213 (1998).

200. On the relevance of race to electoral politics and structures, see generally LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002); Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209 (2003).

201. On the intertwining of identity and social justice movements, see generally Stephen W. Bender & Keith Aoki, *Seekin' the Cause: Social Justice Movements and LatCrit Community*, 81 OR. L. REV. 595 (2002); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

202. For an exhibition of racial passions in the legal academy, see generally Eleanor Brown, *Black Like Me?: "Gangsta" Culture, Clarence Thomas, and Afrocentric Academics*, 75 N.Y.U. L. REV. 308 (2000); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights*

scholarship of race and to embolden racial reform in the Mexican community. Insightfully viewing the rise of the Chicano movement through the prism of the *East L.A. Thirteen* and the *Biltmore Six* trials, he reveals the interdependence of color, identity, and legal violence in the criminal justice system. Additionally, he deciphers the key transformative rudiments of color-conscious criminal trials for prosecutors and defenders of racial violence, and for the offenders, victims, and communities devastated by such violence. The Chicano insurgents of East Los Angeles in the 1960s, both lawyers and clients, understood well the gravity and peril of racially transformative reform. In *Racism on Trial*, Haney López pays elegant heed to the despair and unrealized hope of their struggle to give voice to a community coming to power in an America too long accustomed to silencing stereotypes.

---

*Literature*, 132 U. PA. L. REV. 561, 562 (1984); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1745 (1989).