



## Alabama Law Scholarly Commons

---

Working Papers

Faculty Scholarship

---

8-10-2008

### Rodrigo and Revisionism: Relearning the Lessons of History

Richard Delgado

University of Alabama - School of Law, rdelgado@law.ua.edu

Follow this and additional works at: [https://scholarship.law.ua.edu/fac\\_working\\_papers](https://scholarship.law.ua.edu/fac_working_papers)

---

#### Recommended Citation

Richard Delgado, *Rodrigo and Revisionism: Relearning the Lessons of History*, (2008).

Available at: [https://scholarship.law.ua.edu/fac\\_working\\_papers/652](https://scholarship.law.ua.edu/fac_working_papers/652)

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.

# Book Review

## RODRIGO AND REVISIONISM: RELEARNING THE LESSONS OF HISTORY

RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE  
by Ian F. Haney López, Harvard University Press (Cambridge,  
Massachusetts; London, England 2003).

*Richard Delgado\**

I.	INTRODUCTION: IN WHICH RODRIGO EXPLAINS HIS NEW PERSONA .....	805
II.	IN WHICH RODRIGO PUTS FORWARD HIS STARTLING THESIS ABOUT <i>BROWN V. BOARD OF EDUCATION</i> AND LATINOS.....	808
	A. <i>Brown's Three Dividends</i> .....	809
	B. <i>Latinos' Two Options</i> .....	816
III.	IAN HANEY LÓPEZ AND THE CHICANO FIGHT FOR JUSTICE.....	819
IV.	LATINO HISTORY, DIFFERENTIAL RACIALIZATION, AND THE LIMITS OF THE BLACK/WHITE BINARY: WHY LATINOS ARE NOT SIMPLY BLACKS WITH SLIGHTLY LIGHTER SKIN .....	823
	A. <i>Two Concepts of Honor</i> .....	832
V.	CONCLUSION.....	836

### I. INTRODUCTION: IN WHICH RODRIGO EXPLAINS HIS NEW PERSONA

It was late one wintry afternoon, and I was desultorily wading through an imposing sheaf of papers full of charts, tables, and financial projections from a folder labeled "*TIAA-CREF, Options for Retirees*"<sup>1</sup> that the self-assured young benefits representative had given me minutes earlier, when a flash of color and a loud twanging sound caused me to look up at my office doorway.

---

\* Professor of Law and Derrick Bell Fellow, University of Pittsburgh Law School; J.D., U.C.-Berkeley, 1974.

<sup>1</sup> TIAA-CREF is a portable investment and retirement fund commonly used by colleges and universities.

“Professor! It’s me, Rodrigo.”<sup>2</sup> My lanky young friend hoisted a guitar case that he had just put down and stepped inside my office. “Do you have a minute?” Then, gesturing toward the papers I had been turning: “Oh, no. I hope you’re not thinking about retiring again.”

“Have a seat,” I said, motioning toward my office couch. “Just keeping my options open. Teresa and I think about Florida or California sometimes—especially this time of year, when it’s cold and the days are so short. Don’t worry. You’ll be the first to know if we decide to call it quits.”<sup>3</sup>

Rodrigo looked stricken. “I can’t see you spending your days watching birds or playing golf.” Motioning toward the pile of blue books stacked on one corner of my desk and a half-finished manuscript on another, he

---

<sup>2</sup> See Richard Delgado, *Rodrigo’s Chronicle*, 101 YALE L.J. 1357 (1992), introducing my interlocutor and alter ego, Rodrigo. The son of an African-American serviceman and Italian mother, Rodrigo was born in the United States but raised in Italy when his father was assigned to a U.S. outpost there. Rodrigo graduated from high school at the base school, then attended an Italian university and law school on government scholarships, graduating second in his class. When the reader meets him, he has returned to the United States to investigate graduate law (L.L.M.) programs. At the suggestion of his half-sister, famed U.S. civil rights lawyer Geneva Crenshaw, see DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 7 (1987), he seeks out “the professor” for career advice. Despite their age difference, the two become good friends, discussing affirmative action and the decline of the West (*Rodrigo’s Chronicle*, *supra*); law and economics (Richard Delgado, *Rodrigo’s Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993)); love (Richard Delgado, *Rodrigo’s Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993)); legal rules (Richard Delgado, *Rodrigo’s Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993)); the critique of normativity (Richard Delgado, *Rodrigo’s Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993)); relations between men and women (Richard Delgado, *Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993)); enlightenment political theory (Richard Delgado, *Rodrigo’s Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994)); black crime (Richard Delgado, *Rodrigo’s Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994)); narrative jurisprudence (Richard Delgado, *Rodrigo’s Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) (final chronicle in first cycle and final chapter of RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995))); the rule of law (Richard Delgado, *Rodrigo’s Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994)); affirmative action (Richard Delgado, *Rodrigo’s Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995)); clinical theory (Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996)); the problem of desperately poor border settlements (Richard Delgado, *Rodrigo’s Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997)); legal formalism (Richard Delgado, *Rodrigo’s Thirteenth Chronicle: Legal Formalism and Law’s Discontents*, 95 MICH. L. REV. 1105 (1997)); interracial indifference (Richard Delgado, *Rodrigo’s Remonstrance: Love and Despair in an Age of Indifference—Should Humans Have Standing?*, 88 GEO. L.J. 263 (2000)), and many other topics over the last few years. During this period, the brash, talented Rodrigo earns his L.L.M. degree and embarks on his first teaching position. The professor meets Rodrigo’s friend and soulmate, Giannina, a playwright, now a law student at a school near Rodrigo’s, and her mother, Teresa; he also learns that Rodrigo’s father’s family immigrated to America via the Caribbean. His father, Lorenzo, looks black and identifies as such but speaks perfect Spanish.

<sup>3</sup> Like Rodrigo, the professor is a fictional character based loosely on a composite of many persons this author has known. As I have drawn him, the professor is a man of color in the late stages of his law teaching career and the veteran of many civil rights struggles.

said, "You're too productive. Besides, you're my mentor, sounding board, and best friend."

"Don't worry," I repeated. "We won't do anything impulsive. By the way, that's a great-looking shirt. And I didn't know you played the guitar."

"Oh, this," Rodrigo said, holding out the front of his shirt, a maze of brightly embroidered geometric designs. "Giannina and I picked it up on our trip to Mexico. We'll get you one next time if you like it. And, yes, I'm learning to play. My specialty is Mexican music, especially the mariachi kind. I sing, too."

"You are a man of many talents. I gather you're emphasizing your Latino roots these days?"

When my visitor nodded, a little warily, I continued: "I know your family immigrated to the States through the Caribbean and that your father, Lorenzo, spoke perfect Spanish. But as long as I've known you, you've identified with your black roots, no?"

"It's a complicated story," Rodrigo began. "My mother was Italian, as you know. So, I've always felt that tie to my Latin side. And then there's all those years Dad's family spent in the Dominican Republic when he was growing up. He and Mom spoke Spanish at home sometimes, when they didn't want me to know what was going on. And this year, the Latino student organization asked me to be their faculty sponsor, probably because we don't have anybody who is more like them. I don't know. I've just been feeling more Latino these days. Maybe it's the cold weather, which makes me long for Mexico."

"Nothing wrong with that," I said. "I love the country myself. And more and more of us are discovering we're the product of racial mixture. Look at the recent flap about Strom Thurmond's daughter.<sup>4</sup> Even I probably have a white or Indian forebear somewhere. And, speaking of identity, wasn't it Ian Haney López who observed that race is largely a matter of choice?<sup>5</sup> Someone like you, with your indeterminate looks, could be practically anything you decided to be."

"I'm relieved that you aren't upset or think me disloyal."

"Not at all. Unless you disavowed your blackness entirely, which I'm sure you have no intention of doing. Now that Latinos are the largest ethnic minority group, they need all the help they can get. I was reading some figures the other day about their school dropout rate, family income, and lack of access to health care. In some ways, they're even worse off than

---

<sup>4</sup> See Michael Janofsky, *Woman, 78, Says She Is a Daughter of Thurmond*, N.Y. TIMES, Dec. 14, 2003, at A41.

<sup>5</sup> See IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 183-95 (1996); 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 (1994).

blacks.”<sup>6</sup> Then, after a pause, I added: “But to what do I owe the pleasure of this visit?”

“Oh—I’m representing our school at an LSAC recruitment fair this weekend.<sup>7</sup> I volunteered when our admissions director couldn’t make it. I hoped it would give me a chance to see you.”

“I’m glad you did. Are you staying at the conference hotel? You’re welcome to spend the night with Teresa and me, of course.”<sup>8</sup>

“Thanks, but the hotel’s more convenient. My law school’s paying, and I have to catch an early flight back tomorrow morning. If you two are free tonight, though, I’d love to take you to dinner. Laz says the hotel restaurant is actually pretty good. It serves Argentine cuisine. I could run my latest thesis past you.”<sup>9</sup>

“Can’t wait to hear it. I’ll check with Teresa. I hope her board meeting isn’t tonight.”

## II. IN WHICH RODRIGO PUTS FORWARD HIS STARTLING THESIS ABOUT *BROWN V. BOARD OF EDUCATION* AND LATINOS

A few hours later, Rodrigo and I were seated in the brightly decorated South American restaurant on the mezzanine of the giant conference hotel where, until minutes earlier, Rodrigo had been answering questions and extolling the virtues of his school to throngs of prospective law students. “Laz says this place has great Argentine beef. Musicians, too, although it looks like they’re not here yet. That’s why I brought this.” Rodrigo patted his guitar case, which was stowed under the table.

“Trying to pick up a few tips, eh? While we’re waiting for the waiter, why don’t you tell me about that idea of yours? Does it have to do with Latinos?”

“It does—with them and *Brown v. Board of Education*.”<sup>10</sup>

<sup>6</sup> On the contours of this group, see *THE LATINO/A CONDITION: A CRITICAL READER* (Richard Delgado & Jean Stefancic eds., 1998). For figures on its poverty and marginalization, see Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion*, 83 TEX. L. REV. (forthcoming 2005).

<sup>7</sup> The Law School Admissions Council (LSAC) sponsors regional and citywide fairs for prospective law students interested in checking out particular schools.

<sup>8</sup> See Delgado, *Rodrigo’s Remonstrance*, *supra* note 2, at 266 (introducing Teresa, Giannina’s widowed mother, with whom the professor, a dignified, elderly gent, is immediately smitten).

<sup>9</sup> For an introduction to Laz, Rodrigo’s colleague and best friend at the law school, see Delgado, *Rodrigo’s Tenth Chronicle*, *supra* note 2, at 1740. A conservative who serves as the faculty advisor to the local chapter of the Federalist Society, Laz engages Rodrigo in spirited and freewheeling discussions about faculty politics, race, and affirmative action. For an introduction to Giannina, Rodrigo’s life companion and soul mate, see Delgado, *Rodrigo’s Sixth Chronicle*, *supra* note 2. A published poet and playwright, Giannina is also adept at social and legal analysis. See, e.g., Delgado, *Rodrigo’s Fourth Chronicle*, *supra* note 2, at 1137; Delgado, *Rodrigo’s Third Chronicle*, *supra* note 2, at 402.

<sup>10</sup> 347 U.S. 483 (1954).

“*Brown v. Board of Education?*” I said, raising my eyebrows. “I know the case consolidated appeals from five different school districts. But I didn’t realize it had a Latino component. Was one of the cases from Texas?”

“No,” Rodrigo replied. “Not at all. The connection with Latinos is indirect, if subtle and powerful. The idea occurred to me when I received an invitation to speak at a law school in New York. They’re having a year-long series of programs on that famous case.”<sup>11</sup>

“Lots of schools are,” I said. “This year’s the fiftieth anniversary. I’ve had an invitation or two myself. What’s your thesis about *Brown* and Latinos? I don’t see a connection.”

#### A. *Brown’s Three Dividends*

“I didn’t either at first, and was thinking of turning down the invitation. But then it hit me while talking about it with Giannina. My thesis is that that famous case did very little good for blacks, a lot of good for whites, and was an unmodified disaster for Latinos.”

“This I’d love to hear. I’m familiar, of course, with the revisionist view according to which *Brown* did relatively little to advance black interests, but did much for whites.<sup>12</sup> Derrick Bell even wrote that that was more or less its very point.<sup>13</sup> But the part about Latinos, I hadn’t heard.”

“That’s because no one seems to have addressed it. Until now, I mean. Oh, here’s our waiter.”

We paused for a moment to examine the menu. “I’ll have the grilled beef,” said Rodrigo. “When in Rome . . .”

“And for me, the seafood paella. With a small dinner salad.” After the waiter wrote down our orders and left, I continued: “Why don’t you run through all the parts of your argument. That way, we can see how they fit together.”

“Sure,” said Rodrigo with his trademark animation. Leaning forward and taking a long draft from his water glass, he began as follows:

I. *Brown v. Board of Education and White Self-Interest*.—“Most people think *Brown v. Board of Education* came about because of advanc-

<sup>11</sup> Many law journals sponsored symposiums on *Brown* during the anniversary year. See, e.g., Symposium, *Brown at Fifty*, 117 HARV. L. REV. 1302 (2004); Symposium, *Brown@50*, 47 HOW. L.J. 471 (2004); Symposium, *Brown v. Board of Education at Fifty: Have We Achieved Its Goals?*, 78 ST. JOHN’S L. REV. 253 (2004).

<sup>12</sup> See text and notes *infra* Part II.A.1; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–173 (1991). On the role of revisionist history in Critical Race Theory, see CRITICAL RACE THEORY: THE CUTTING EDGE 93–124 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).

<sup>13</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

ing standards of morality—that in 1954, white folks finally woke up and realized that segregating little white and black schoolchildren in separate schools could scar them for life. Derrick Bell and Mary Dudziak have demonstrated that that was not the prime reason for the *Brown* decision.”

“I’m familiar with that argument,” I said. “I assume you mean the one Bell put forward in his Harvard article<sup>14</sup> and Dudziak in her recent book, *Cold War Civil Rights*.”<sup>15</sup>

“Exactly,” Rodrigo replied. “Bell posited that the Supreme Court decided *Brown* when it did because racism was becoming an embarrassment for the United States and a possible source of domestic disruption.<sup>16</sup> We had just completed a prolonged world war against an implacable enemy during which thousands of black servicemen and women had fought for freedom and democracy. They were unlikely to return to the former regime of servility and menial labor. For the first time in decades, racial unrest loomed. At the same time, we were in the early stages of the Cold War.”

“Right,” I interjected. “A war against the forces of godless, monolithic Communism for the loyalties of the uncommitted Third World.”

“Which was dominantly black, brown, and Asian,” Rodrigo continued. “But the world press had the nasty habit of splashing across its front pages stories and photographs of murders like that of Emmett Till and Southern sheriffs with batons and police dogs brutalizing peaceful civil rights protestors.”<sup>17</sup>

“Providing political capital for the Soviets each time,” I added. “And so, Bell posited, the establishment prevailed on the Supreme Court to grant blacks a great breakthrough.”

“Precisely. He pointed out that the NAACP under Charles Hamilton Houston had been litigating cases throughout the South for decades and either getting nowhere or winning very narrow victories. Then, in 1954, the skies opened. The Court overruled *Plessy v. Ferguson* . . . .”<sup>18</sup>

“And the rule of separate but equal . . . .”

“Exactly. And why did the breakthrough come about just then, if not as a product of material and ideological forces? White folks simply decided to do themselves a favor. They needed to burnish America’s image abroad and keep peace at home; *Brown* was simply the vehicle.”<sup>19</sup>

“And that’s where Mary Dudziak comes in, I gather?”

“Indeed. Using newly discovered documentary and archival evidence, she proved what Bell only hypothesized. Citing document after document,

<sup>14</sup> *Id.* (proposing several explanations for the *Brown* decision).

<sup>15</sup> MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

<sup>16</sup> Bell, *supra* note 13, at 524–25.

<sup>17</sup> See *id.*; DUDZIAK, *supra* note 15, at 34, 38, 43, 77, 142–45, 147, 160–89, 208–11, 234–45.

<sup>18</sup> 163 U.S. 537 (1896).

<sup>19</sup> Bell, *supra* note 13.

she showed that decisionmakers in Congress, the White House, and other circles of power implored the Justice Department to throw its weight behind the NAACP.<sup>20</sup> She also showed that several of the Supreme Court Justices who heard the case were acutely conscious of international appearances.<sup>21</sup> It is now beyond dispute that *Brown v. Board of Education* was an effort to advance white elite self-interests.” Rodrigo paused briefly, so I took the bait.

“And did those hoped-for gains accrue?”

“They did. *Brown* and subsequent civil rights legislation succeeded in postponing domestic disruption for several crucial years.<sup>22</sup> And on the international front, the U.S. won the Cold War, although this took a little longer. Whites also got to celebrate and feel much better about themselves.”

“Especially our liberal friends,” I added. “Thinking the problem solved, many of them shifted their attention to other areas, such as saving the whales.”

2. *Brown and Blacks*.—“One could argue that blacks were even worse off as a result of *Brown*,” Rodrigo continued. “Our friends, the liberals, stole away, thinking all our problems were solved. Meanwhile, our enemies—the conservatives—redoubled their resistance, believing the Supreme Court had, yet again, given away the store to those undeserving minorities. Today more black schoolchildren attend segregated schools than did before *Brown* was decided.”<sup>23</sup>

“Surely you’re not saying that that case, the crown jewel of American legal thought, made absolutely no difference?” I asked.

“I wouldn’t go that far,” Rodrigo said. “Although some writers come close.”

“I’m familiar with their work. I assume you mean people like Gerald Rosenberg and Michael Klarman.”<sup>24</sup> When Rodrigo nodded, I went on: “But I’m curious why you part company with them. You’re not losing your critical edge, are you?”

Rodrigo smiled. “You can decide. Here’s my reasoning. *Brown*, like all breakthrough cases, sparked resistance. Southern officials interpreted its holding in light of their experience and common sense,<sup>25</sup> fortified, of course,

<sup>20</sup> DUDZIAK, *supra* note 15, at 18–46, 79–202 (describing how the State Department and other agencies made known their desire for a civil-rights breakthrough).

<sup>21</sup> *Id.* at 104–06.

<sup>22</sup> See Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002).

<sup>23</sup> See *Segregation Matters*, ST. LOUIS POST-DISPATCH, Aug. 17, 2002, at 30 (editorial); Gary Orfield & Susan Eaton, *Back to Segregation*, NATION, Mar. 3, 2003, at 5.

<sup>24</sup> KLARMAN, *supra* note 12; ROSENBERG, *supra* note 12.

<sup>25</sup> See Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995).



by the invitation to proceed at ‘all deliberate speed.’<sup>26</sup> And common sense meant, of course, that the opinion could not possibly mean what it said. And that’s the fate of most law reform cases. Whittled away by administrative foot-dragging, narrow interpretation, or delay, they end up changing relatively little.<sup>27</sup>

“I read an article by two crits who coined a term for it. They called it the *reconstructive paradox*. The idea is that the more deeply entrenched a social evil, the less effective law is for remedying it.<sup>28</sup> But do you really believe that *Brown* changed nothing?”

“That’s where I part company with the detractors. The case did make things better for blacks, if only by deepening empathy.<sup>29</sup> Its equal protection framework invited Americans to ponder the ways in which blacks were treated differently from whites. Imagine that it’s a blazing hot day . . . .”

“I wish it were,” I said, gesturing out the window at the snowflakes that were starting to fall.

“Well, imagine it’s mid-summer. A white family is going swimming at a public pool. Liberals, they think what a rotten shame that black families can’t go to the pool, like us, to cool off.”

“I see what you are saying,” I said. “Because *Brown* was decided on equal protection grounds, it heightened empathy, at least for those capable of it. It forced people to think about what things they enjoyed that blacks could not. Equal protection analysis encourages that sort of comparison.”

“And so, *Brown* increased social identification, which is all to the good,” Rodrigo concluded. “In addition to the great benefits it conferred on whites, it did a small amount of good for blacks.”

“But not for Latinos, if I understand you. Why not them, too?”

3. *Brown and Latinos*.—“That’s what Giannina and I were talking about the other day. We were pondering my panel presentation in light of a recent book by that same writer you mentioned just now.”

“You mean Ian Haney López’s *Racism on Trial: The Chicano Fight for Justice*?”<sup>30</sup> I asked. “I saw a notice from the law library the other day and put it on my list of things to read. You’ve read it, I gather?”

“I have,” Rodrigo replied. “It’s excellent—a good read. Especially the parts about the L.A. uprisings of the sixties and early seventies. But I draw a different lesson from those events from the one the author did. I’m getting ahead of myself.”

<sup>26</sup> See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).

<sup>27</sup> See Delgado & Stefancic, *supra* note 25.

<sup>28</sup> *Id.* at 558–60.

<sup>29</sup> On the role of empathy in the law, see Delgado, *Empathy and False Empathy*, *supra* note 2; Lynn N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

<sup>30</sup> IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003).

“True,” I said, smiling in spite of myself. The intellectually audacious Rodrigo was always jumping from one startling new idea to another. “Let’s hear the last part of your three-part thesis first. Oh, here’s our waiter.”

We suspended our conversation while the waiter placed steaming plates of South American food on the table in front of us. “Anything else?” he asked. When we both shook our heads no and Rodrigo grinned and said, “Looks great!” the waiter departed.

We ate our food in tacit silence for a few minutes, then Rodrigo looked up. “How’s the paella?”

“Great. And your steak?”

“Melts in your mouth. Where were we?”

“You were going to say how *Brown* set back the cause of Latino civil rights.”

“Oh, right. For them, the case proved something of a disaster, although this may not have been apparent right away.”

“How do you mean?”

Rodrigo paused for a second, then said: “It begins with that very equal protection rationale we just discussed.”

“That made it so valuable for blacks, you mean.”

“Right. *Brown* deepened empathy, at least for them.”

“But not for Latinos?” I asked. “I’m not sure I follow you.”

“Let me explain. Do you remember the black-white binary paradigm of race we discussed once?”<sup>31</sup>

“I do. A couple of years back. You had just returned from that LatCrit conference in the Midwest. We discussed Juan Perea’s . . . .”<sup>32</sup>

“And before him, Elizabeth Martínez’s . . . .”<sup>33</sup>

“Right. Their thesis that American race relations law and discourse incorporate an implicit black-white binary paradigm in which two races, the black and the white, and two only, constitute the primary objects. Others enter the national conversation only by analogizing themselves to one or the other of the two groups.”<sup>34</sup>

“Your memory is good, Professor. Perea and Martínez spell out how that binary came into force and trace its consequences in current discourse and activism.<sup>35</sup> And my new thesis builds on their insight and shows how

<sup>31</sup> Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997).

<sup>32</sup> Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

<sup>33</sup> Elizabeth Martínez, *Beyond Black/White: The Racisms of Our Time*, 20 SOC. JUST. 22 (1993).

<sup>34</sup> See Delgado, *supra* note 31; Ruben J. García, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 128 (1995) (pointing out inadequacy of dualistic approach to race and ethnicity); Martínez, *supra* note 33; Perea, *supra* note 32.

<sup>35</sup> Martínez, *supra* note 33; Perea, *supra* note 32.

*Brown v. Board of Education* simply reinforces that binary, so that Latinos end up excluded and marginalized.”

“Reinforces it? I’m not sure I see what you mean.”

“Let me see if I can explain. You recall the doctrinal basis of that opinion?”

“Of course, it was equal protection.<sup>36</sup> *Brown*’s great realist insight was that separate is never equal. In a society like ours, separating schoolchildren into black and white schools sends one group, and one only, an unmistakable message of its own inferiority.”<sup>37</sup>

“And a successful equal protection challenge requires what?”

“That two groups, similarly situated, are treated differently under some state law or program.<sup>38</sup> Oh, now I think I see where you are going.”

“I thought you would. In our country, because of its peculiar history, those two groups are likely to be black and white,” Rodrigo said. “That’s what I mean by saying *Brown v. Board of Education* etched the black/white binary of race a little deeper. After *Brown*, if you were a non-black minority, such as an Asian or Latino, you could gain relief only by showing that the treatment you received was comparable to one blacks endure.”

“So, if what happened to you would have been actionable had it happened to a black, then the Latino or Asian can gain relief. That’s what you mean, right?”

“Exactly. Non-black groups found themselves pushed to the margins of social discourse. They came into the equation only by analogizing themselves to blacks, the paradigmatic civil rights plaintiffs. If what happened to you never happens to blacks, then courts are likely to deny relief.”

“I could use an example.”

“Sure. Imagine a Latino worker whose boss tells him, ‘I can’t stand all you strange non-whites working here. You make me feel uneasy. You’re fired.’”

“Let me guess. The Latino worker would gain relief because if the very same thing happened to a black worker, he could sue and win.”<sup>39</sup>

“Exactly. But suppose the boss says, ‘I can’t stand all you Latinos working here. Your accents bug the heck out of me, and I can’t stand the smell of all that Mexican food you bring in and eat at lunchtime. You’re fired.’”

<sup>36</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (*Brown I*) (“We come then to the questions presented: Does segregation of children in public schools solely on the basis of race . . . deprive [them] of equal educational opportunities? We believe that it does.”).

<sup>37</sup> *Id.*

<sup>38</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1436–39 (2d ed. 1988) (setting out the basic requirements for an equal protection challenge).

<sup>39</sup> See Delgado, *supra* note 31 (noting that binaries, by their very nature, reduce groups falling outside them to arguments by analogy); Perea, *supra* note 32.

"I suppose your point is that such a worker might easily lose. Most blacks don't suffer discrimination for speaking with a foreign accent, so little case law would support the Latino worker. And the same is true for other forms of discrimination, such as religion, speaking Spanish on the job site, foreign origins, or some other particularly nasty stereotypes that Latinos suffer."<sup>40</sup>

"Some of which they have in common with blacks, but others not."

"Such as greaser, bandito, or the ever-romantic Latino lover,"<sup>41</sup> I assume."

"Those and more," Rodrigo went on. "So Latinos can recover only by making out that they are, essentially, black. Or at any rate, that they were treated the way a black often is."<sup>42</sup>

"I bet Haney López's book deals with that."

"It does, in a way. Although I think that even he falls prey to binary-type thinking. Maybe we'll talk about this later, if we have time. But first, consider the trap that *Brown*—equal protection, generally—sets for the Latino litigant."

"A trap?"

"Yes, the binary paradigm it reinforces left Latinos exactly two choices. They could be white, or they could be black."

"There was no third option?" I asked.

"No, not at first. And the situation is little better even today. Even after *Hernandez v. Texas*<sup>43</sup> and one or two other cases dealing with discrimination against Latinos,<sup>44</sup> their status under civil rights law is insecure. They have to prove in each case that they are a group subject to discrimination.<sup>45</sup> Sometimes, the Supreme Court fails to see discrimination in the most obvious of cases, such as in a prosecutor's practice of challenging Spanish-speaking jurors, ostensibly because they cannot follow the official translation."<sup>46</sup>

<sup>40</sup> Delgado, *supra* note 31; Perea, *supra* note 32. On Latino stereotypes, see, for example, STEPHEN W. BENDER, *GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION* (2003); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1273–75 (1992).

<sup>41</sup> E.g., BENDER, *supra* note 40, at xiii–xv, 17–20, 32–35, 48–49, 183–84; Delgado & Stefancic, *supra* note 40, at 1274–75.

<sup>42</sup> Feminists of color argue, in similar fashion, that white-themed feminism and sex discrimination law marginalize the concerns of women of color. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>43</sup> 347 U.S. 475 (1954).

<sup>44</sup> See *Plyler v. Doe*, 457 U.S. 202 (1982); see also *Lau v. Nichols*, 414 U.S. 563 (1974) (discrimination against Chinese-Americans).

<sup>45</sup> See Richard Delgado & Vicki Palacios, *Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME L. REV. 393 (1975).

<sup>46</sup> See *Hernandez v. New York*, 500 U.S. 352 (1991).

“A pretty weird result,” I agreed. “They’re punished because they know their language, Spanish, better than the fumbling court interpreter. But tell me a bit more about those two options. And that trap Haney López fell into.”

### B. *Latinos’ Two Options*

1. *The “Other White” Strategy.*—“Here’s where my argument really takes off.” (I smiled at Rodrigo’s unintentional braggadocio. The young *enfant terrible* had never been one to hide his candle under a bushel.) “I hope you don’t think me immodest. But consider the historical support I’ve found for my position. *Brown* and the black/white binary of race left Latinos two choices. In one, they could be white.”

“I think I know what you’re going to say. I recently read an article in a law and history journal by a historian named Wilson.<sup>47</sup> He showed that Latino litigators, especially in Texas and the Southwest, challenged school segregation for Mexican-American kids by arguing that it was not countenanced by law.”

“Right,” Rodrigo seconded. “An essay by Neil Foley makes a similar point.<sup>48</sup> Early litigators, taking their cue from moderate, middle-class Mexican-American improvement associations like LULAC (League of United Latin American Citizens) and the GI Forum, argued that Latinos were white.<sup>49</sup> State law throughout the Southwest at that time permitted discrimination against blacks, Asians, and in some states Indians. So, Latino litigators went before judges and argued that their clients were not black, but white, so the discrimination they suffered was illegal—not countenanced by law.”<sup>50</sup>

“Mortifying,” I said. “I don’t see how they could have done that—at least not with a straight face.”

“But they did,” Rodrigo replied. “Haney López points it out, too.<sup>51</sup> And the strategy sometimes worked. It was not particularly empowering, nor calculated to endear Latinos to blacks, but it did persuade the occasional court to order the discriminatory practice against Latinos stopped.”

“Things certainly changed in the sixties,” I said.

<sup>47</sup> Steven H. Wilson, *Brown over “Other White”*: Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation Lawsuits, 21 LAW & HIST. REV. 145 (2003).

<sup>48</sup> Neil Foley, *Becoming Hispanic: Mexican Americans and the Faustian Pact with Whiteness*, in REFLEXIONES 53 (N. Foley ed., 1997).

<sup>49</sup> Wilson, *supra* note 47; see also HANEY LÓPEZ, *supra* note 30, at 76–77.

<sup>50</sup> E.g., Foley, *supra* note 48; Gary A. Greenfield & Don B. Kates, Jr., *Mexican-Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975); George A. Martinez, *Legal Indeterminacy, Judicial Discretion, and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555 (1994); Wilson, *supra* note 47.

<sup>51</sup> HANEY LÓPEZ, *supra* note 30, at 76–87.

2. *The Racial-Grievance Strategy*.—"Exactly. And that's the very period Haney López focuses on. Beginning in the late nineteen sixties, Chicanos abandoned the 'other white' strategy. Realizing, perhaps, that white people had never seen them that way . . . ."

"In fact, whites applied some particularly vicious stereotypes to them," I added.

"Right. Lazy, immoral, dark, untrustworthy, shoot-you-in-the-back, only interested in women, gambling, and song."<sup>52</sup>

"Slow to learn. Suited mainly for manual labor or agricultural work," I added.<sup>53</sup>

"Those and more. Realizing that, Latino litigators and social activists began taking the opposite approach. Emphasizing their clients' non-whiteness, lawyers began insisting that civil rights laws, designed for minorities, applied to Latinos as well.<sup>54</sup> And a host of Latino activists moved in that direction, too."

"Are you referring to the Brown Power movement?" I asked.

"Right. It burst on the scene a few years after the black civil rights movement took a militant turn.<sup>55</sup> Latino high school students walked out of their classrooms, demanding an end to racist teachers, inferior schools, and Anglocentric curricula.<sup>56</sup> The Brown Berets raised their fists and wore paramilitary uniforms, like the Black Panthers.<sup>57</sup> Land-grant activists in New Mexico took up arms and demanded the return of ancestral lands.<sup>58</sup> Less militant groups sang songs, wore armbands, joined hands, and sat in for social justice and farm labor unionization.<sup>59</sup> Cesar Chavez fasted in support of nonviolent social change."<sup>60</sup>

<sup>52</sup> E.g., BENDER, *supra* note 40.

<sup>53</sup> *Id.*

<sup>54</sup> On the turn to civil-rights style activism and litigation strategies, see, for example, RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 319–28 (5th ed. 2004); JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 304–10 (2000); Ian F. Haney López, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205, 213–27 (2001).

<sup>55</sup> IGNACIO M. GARCIA, *CHICANISMO: THE FORGING OF A MILITANT ETHOS AMONG MEXICAN AMERICANS* 38 (1997); HANEY LÓPEZ, *supra* note 30, at 18; ARMANDO B. RENDON, *CHICANO MANIFESTO* 205 (1971); Haney López, *supra* note 54, at 213–27.

<sup>56</sup> See, e.g., ACUÑA, *supra* note 54, at 319–20; HANEY LÓPEZ, *supra* note 30, at 160, 184–85; CARLOS MUÑOZ, JR., *YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT* 64 (1989).

<sup>57</sup> GARCIA, *supra* note 55, at 106–07; HANEY LÓPEZ, *supra* note 30, at 181, 188–89; MUÑOZ, *supra* note 56, at 86; Lorena Oropeza, *Antiwar Aztlan: The Chicano Movement Opposes U.S. Intervention in Vietnam*, in *WINDOW ON FREEDOM* 216 n.1 (Brenda Gayle Plummer ed., 2003).

<sup>58</sup> See ACUÑA, *supra* note 54; PATRICIA BELL BLAWIS, *TIJERINA AND THE LAND GRANTS: MEXICAN AMERICANS IN STRUGGLE FOR THEIR HERITAGE* (1971); MUÑOZ, *supra* note 56, at 57.

<sup>59</sup> JACQUES E. LEVY, *CESAR CHAVEZ: AUTOBIOGRAPHY OF LA CAUSA* (1975); MUÑOZ, *supra* note 56, at 54.

<sup>60</sup> GARCIA, *supra* note 55, at 31, 90. See generally F. ARTURO ROSALES, *CHICANO! THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT* xvi, 138–40 (1996).

“All patterned after the black civil rights movement. Is that your point?”

“Right—the only other course open to them under the black/white binary. Some Chicano theorists even maintained that Chicanos were effectively black.”<sup>61</sup>

“I hadn’t heard that,” I said. “It sounds a little strange when you first hear it. But if Haney López is right about the social construction of race, what’s wrong with that? For the sake of argument, I mean.”

“The problem is that the American people simply never bought it. The idea that Latinos stood on a comparable footing, morally and historically, to blacks struck many as ridiculous, with overtones of opportunism. It didn’t sit well with the quietist, religious elements of the Latino community, either. All the fist-shaking and posturing and talk of a new nation, Aztlán, struck them as disrespectful and out of keeping with the community’s culture and traditions.”

“The movement did last a fairly short time, if I recall.”

“Only three or four years.”<sup>62</sup> The opportunity to develop authentic Latino politics and identity—not to mention legal strategies geared toward the group—was lost. Today, all we have are some Chicano Studies departments, a handful of radical scholars and historians, and a small legal group, the LatCrits, who are not particularly revolutionary.”

“I’ve met a few who are,” I said quietly. “But go on. I’d like to hear your thoughts on how Latinos should position themselves in the civil rights equation.”

Just then, the waiter showed up at our tableside. “Desean ustedes algo de postre?” he asked. “Any dessert?” (He did look Latino, I recalled, wondering if he had heard a snatch of our conversation and, if so, what he had thought.) “Nothing for me,” I said. “Doctor’s orders.”

“I think I’ll have the flan,” Rodrigo said. “We do have time, I hope. I’m not tiring you out?”

“Not at all,” I said. “I’m going strong. Got a short nap this afternoon, in fact. Oh, heck, maybe I’ll have the flan, too. It can’t be too bad for me.”

The waiter quickly but knowledgeably explained what went into the flan and how it was full of healthy ingredients, then, when I seemed reassured, departed with our orders.

“Smart guy,” Rodrigo said. “Maybe he’s studying to be a chef. So, where were we?”

“You were going to tell me about the Ian Haney López book. Then, you were going to explain where he missed some sort of golden opportu-

<sup>61</sup> See HANEY LÓPEZ, *supra* note 30, at 161–67, 211; see also ROSALES, *supra* note 60, at 216 (noting that early Chicano theorists studied Eldridge Cleaver, Stokely Carmichael, and other Black Power figures).

<sup>62</sup> See HANEY LÓPEZ, *supra* note 30, at 202–04.

nity. And you were going to tell me your thoughts on what a genuine, indigenous Latino response to their current predicament might be.”

“Let’s look at each of those three in turn,” Rodrigo said, emptying his water glass. “Too bad Teresa isn’t here. We can continue this on e-mail after I’ve gone, if need be. That way, we can include her.”

### III. IAN HANEY LÓPEZ AND THE CHICANO FIGHT FOR JUSTICE

“In *Racism on Trial: The Chicano Fight for Justice*,<sup>63</sup> López builds on his Yale article on institutional racism<sup>64</sup> and his more recent Penn piece . . . .”<sup>65</sup> When I nodded that I was familiar with both, Rodrigo continued: “. . . to set out a theory of the relation between violence, protest, and racial self-identity. He traces the history of violence against Chicanos in L.A. and shows that the group mobilized to protest that violence, which led in turn to further repression. Out of this cycle emerged a new identity: Chicanos, a brown race, with roots in a mythical homeland, Aztlán.”<sup>66</sup>

“Race, in other words, and official violence are opposite sides of the same coin,” I said. “Is that right?”

“The one begets the other. For Haney López, a social constructionist, official violence gave rise to a new brown identity. Before then, Mexicans clung to whiteness.”<sup>67</sup>

“What part did the black civil rights movement play in all this?”

“An important catalyst, that movement inspired the brown counterpart, so that the arrest of the East L.A. Thirteen for encouraging the high school walkouts sparked an interpretation of events in racial terms.<sup>68</sup> Latino activists saw what happened to their group as comparable to earlier police crackdowns on the Panthers and civil rights protesters. One early Chicano student organization expressly patterned itself after the ‘Negro Black Power groups.’”<sup>69</sup>

“Was that UMAS or MECHA?”<sup>70</sup>

<sup>63</sup> HANEY LÓPEZ, *supra* note 30.

<sup>64</sup> Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

<sup>65</sup> Haney López, *supra* note 54.

<sup>66</sup> HANEY LÓPEZ, *supra* note 30, at vii–viii, 2, 9, 24, 215–17, 250.

<sup>67</sup> *Id.* at ix, 1, 77–80; *see also supra* notes 47–50 and accompanying text.

<sup>68</sup> *See* HANEY LÓPEZ, *supra* note 30, at 2, 9, 18, 161–62, 164–72, 178, 181–204; *see also* ROSALES, *supra* note 60, at 252 (making similar point years earlier).

<sup>69</sup> HANEY LÓPEZ, *supra* note 30, at 18, 161–67, 206–10; *see id.* at 9; *see also* ROSALES, *supra* note 60, at 216 (noting that Chicano leaders studied the works of Stokely Carmichael, Eldridge Cleaver, and Malcolm X).

<sup>70</sup> These acronyms stand for United Mexican American Students (UMAS), and Movimiento Estudiantil Chicano de Aztlán (Chicano Student Movement of Aztlán).



“UMAS,” Rodrigo replied.<sup>71</sup> “And another, the Young Citizens for Community Action, changed its name to the Brown Berets and shifted its attention from education to police brutality right around this time.<sup>72</sup> Many Latino community organizations claimed a non-white identity as a basis for solidarity and social action.”<sup>73</sup>

“So, according to Haney López, Latinos, who had previously been ambivalent about their identity, began identifying as a non-white race only when white society started bashing heads. It all began with education. But the school protests, which sparked a police crackdown and criminal prosecution of leaders who were merely protesting unfair conditions, changed both the focus and the terms of the debate. When the school protests were met with oppression, the Latinos generalized their complaints to the degrading treatment they received on a range of fronts and defined them in racial terms.”<sup>74</sup>

“In a way, they followed the opposite course from that of the early ethnic immigrants,” Rodrigo observed. “The Italians, Greeks, Irish, and Jews came over and were immediately seen as non-whites.<sup>75</sup> This irked them, so they identified with whites and put distance between themselves and blacks. Chicanos, at least in L.A., pursued the opposite course.”

“And that, I gather, is the basic structure of Haney López’s book?”

“It is. The book proceeds in three Parts, each containing three short chapters. After a short Prologue and Introduction, Part I describes the litigation strategies the Chicano community and their principal lawyer, Oscar Zeta Acosta, pursued in two legal struggles: the East L.A. Thirteen and the Biltmore Hotel cases.<sup>76</sup> In both, Acosta needed to prove that Mexican-origin people constituted a legally cognizable group and that discrimination against them contaminated the selection of grand jurors hearing the two cases.”

“And that’s where the author relies, I gather, on his Yale article that puts forward a theory of institutional racism—the low-level, ordinary racism of everyday life.”<sup>77</sup>

“Exactly. Only now he gives it a different name—racism as common sense.<sup>78</sup> The judges who selected members of the grand jury in the East

<sup>71</sup> HANEY LÓPEZ, *supra* note 30, at 18.

<sup>72</sup> *Id.* at 18–19, 181–204.

<sup>73</sup> *Id.* at 19.

<sup>74</sup> *Id.* at 8–27, 33–35, 136–54, 164–75.

<sup>75</sup> See, e.g., CRITICAL WHITE STUDIES: LOOKING BEYOND THE MIRROR 354–56, 395–405 (Richard Delgado & Jean Stefancic eds., 1997); PEREA ET AL., *supra* note 54, at 445–54.

<sup>76</sup> HANEY LÓPEZ, *supra* note 30, at 3, 16–40; see also *id.* at 41–87 (describing Acosta’s task of proving that Mexicans exist and are a legally cognizable class).

<sup>77</sup> Haney López, *supra* note 64 (explaining that much of racism today is not of the intentional variety that deliberately degrades or injures another person on account of their race; rather, it consists of habits, patterns, and institutional arrangements that consistently advance whites and subordinate blacks).

<sup>78</sup> HANEY LÓPEZ, *supra* note 30, at vii, 6–7, 109–33, 228–29.

L.A. Thirteen trial simply selected their friends. And because those up-standing citizens included few Latino people, the grand jury ended up being almost completely white.<sup>79</sup> Acosta's strategy in that case marked a turn in Latinos' way of conceiving themselves, because before this time they had maintained that they were white. Now, finding themselves mistreated by the police and excluded from the legal system, they began arguing the opposite."<sup>80</sup>

"I see what you are saying," I interjected. "They had to do so, in a way. At least with the jury-discrimination claim. If Latinos were white, a grand jury composed entirely of whites would not raise any constitutional questions. A supposedly white person, Rodriguez, would be judged fairly by a white jury—composed of jurors with white skins and names like Roger M. Hollingsworth IV, Abigail Bundy, Hayworth Lowell, Bill Gavin, and so on.<sup>81</sup> And the police-brutality cases would simply be ordinary torts. Where does he go from there?"

"The rest of Part I describes Acosta's legal strategy, which included questioning more than 100 judges on the Los Angeles Superior Court to see how they had arrived at their selection of grand jurors.<sup>82</sup> Most simply appointed friends and acquaintances, from their country clubs for example.<sup>83</sup>

"Acosta also had to prove that Mexican people existed—that they were an identifiable and distinct group in the Los Angeles area.<sup>84</sup> This turned out to be fairly easy, since this group was not only relatively large by that time but had been the subject of some raw-boned racist treatment, such as Operation Wetback and the Zoot Suit riots. Haney López reviews this history, including parts that Acosta left out."<sup>85</sup>

"How does all this fit with López's previous writing?"

"It connects his social constructionist theories with Chicano history.<sup>86</sup> For him, as for most serious writers today, race is not a biological phenomenon but a matter of attitudes and tacitly agreed categories. So, in Part II, he addresses the question of how racial ideas enter into public discourse and change over time.<sup>87</sup> His answer, in part, is that they become part of common sense—that collection of scripts, presuppositions, and unconscious thought patterns that enable us to cope with complex realities. Common sense helps us cope with complexity, as well as to be comfortable with dilapidated schools in the ghetto or barrio, no Chicanos on the grand jury, and

<sup>79</sup> *Id.* at 6–9; *see id.* at 24, 31–52.

<sup>80</sup> *E.g., id.* at 136–54.

<sup>81</sup> In other words, a jury of whites of European origin, but including no Latinos.

<sup>82</sup> *Id.* at 27, 40–50, 91–108, 113–26.

<sup>83</sup> *Id.*; *see also id.* at 94–104.

<sup>84</sup> *Id.* at 4–5, 41–45, 53, 174–77.

<sup>85</sup> *Id.* at 55, 75–83.

<sup>86</sup> *See, e.g.,* HANEY LÓPEZ, *supra* note 5; Haney López, *supra* note 5.

<sup>87</sup> HANEY LÓPEZ, *supra* note 30, at 91–154.

a prison population that is largely black and brown.<sup>88</sup> When the judges picked Anglo friend after Anglo friend for the grand jury, they thought they were just pursuing common sense, everyday meritocratic criteria.”

“Selecting the best jurors.”

“Right. Ones who held responsible positions in the community and could be counted on to represent its collective conscience. To pick a Mexican—their gardener, for example—would have been to compromise that ideal.”<sup>89</sup>

“But had not Mexicans in the Southwest suffered official violence for a century or more?” I asked. “Surely, they were on the receiving end of racist treatment long before this period.”

“True. But until the L.A. uprisings, they had responded, according to Haney López, by insisting they were white. Part III shows that their new turn came about, in large part, because of the influence of the black civil rights movement.<sup>90</sup> Images of televised violence, police dogs, and the beatings of peaceful civil rights protesters changed the common sense.”<sup>91</sup>

“Including Chicanos’, you mean?”

“Yes. The black civil rights movement demonstrated that when minorities protested, society responded with violence. When the police and court system responded the same way to Chicano leaders and their demands, the conclusion was irresistible: They see us that way because we are a minority.”<sup>92</sup>

“Like blacks.”

“Precisely. Before the indictments, Mexicans in L.A. or elsewhere had not talked much about their non-white identity.<sup>93</sup> Soon after, the entire community was talking in those terms. Haney López supports his point with original archival research from Latino newspapers from the period, showing that the new militants saw themselves as sharing a common identity and biological descent—Latinos, Aztlán, a new bronze race.”<sup>94</sup>

“What about the majority group? Did they take on that same common sense?”

“They did. An Epilogue traces the continuing discrimination Latinos suffer nationwide—including a war on crime that is thinly race-coded, a grand jury system that still excludes all but a token number of Latino people even in the face of that group’s exploding numbers, and a host of other

<sup>88</sup> See *id.* at 7–9, 95–97, 104–05, 116–33.

<sup>89</sup> See *id.* at 5, 50–51, 98.

<sup>90</sup> *Id.* at 9–11, 161–72.

<sup>91</sup> *Id.* at 9–10; see *id.* at 135–54, 161–64, 189–98.

<sup>92</sup> See *id.* at 8–10, 24, 75–78, 136–54, 164–75, 211, 237.

<sup>93</sup> *Id.* at 1–3, 76–82.

<sup>94</sup> *Id.* at 214–18, 238; see also HANEY LÓPEZ, *supra* note 30, at 212 (suggesting that Chicanos may have chosen to emphasize their indigenous roots, in part, to distance themselves from blackness); Carlos Villareal, *Culture in Lawmaking: A Chicano Perspective*, 24 U.C. DAVIS L. REV. 1193, 1214 (1991).

measures of social pathology, pain, and exclusion that this poor group suffers.”<sup>95</sup>

“Sobering,” I said.

“Yes. It also provides a wonderful, rich, stirring account of a community’s decisive turn toward race consciousness and away from whiteness.”

“One of the few such turns in American history,” I added.

“Right, the story of almost every other group is the mirror opposite—other immigrants migrate surely and inexorably toward whiteness. Haney López shows how the exceptional happened, how Latinos became non-white, and offers a social-constructionist theory based on the history of the times, to explain how it happened.”

“I can see why you give it high marks. I’m going to go right out and read it. But, you mentioned that Haney López missed an opportunity of some sort. What was it?”

#### IV. LATINO HISTORY, DIFFERENTIAL RACIALIZATION, AND THE LIMITS OF THE BLACK/WHITE BINARY: WHY LATINOS ARE NOT SIMPLY BLACKS WITH SLIGHTLY LIGHTER SKIN

“I don’t want to be too harsh,” Rodrigo began. “It’s a wonderful book that, like the author’s earlier work, makes a great contribution to knowledge. It informs the legal community about Chicano history, something that few know about. Using primary sources and even photographs from the period, it shows how Latino people have been mistreated, and how this mistreatment has sparked resentment, protest, and color-consciousness.”

“On both sides, it would seem,” I interjected. “But you say he missed a chance to do even more. I hope you’re not going to say he should have written another book, for I think that is a most unfair way to review another person’s writing.”

Rodrigo winced a little. “Touché. And I hope my remarks won’t strike you that way.” Then, after a short pause: “No, I don’t think they will because they confront the book and its ambitions on their own terms.”

“Do you mean the link Haney López forges between violence and race-consciousness?”

“Not just that,” Rodrigo replied. “Although I do think he overdraws that connection. For example, the Japanese, during World War II, were forcibly detained and interned in camps behind barbed wire.<sup>96</sup> Many lost businesses, homes, and farms in the process. Yet the community as a whole did not rise up in protest. Many continued to identify strongly as American and encouraged others to go along with internment as their patriotic duty.

<sup>95</sup> HANEY LÓPEZ, *supra* note 30, at 239–50; *see also id.* at 11–12 (describing what author believes his epilogue demonstrates); *id.* at 82 (describing the common sense of Mexican identity).

<sup>96</sup> *See, e.g.,* PETER IRONS, *JUSTICE AT WAR* (1983); PEREA ET AL., *supra* note 54, at 407–10, 511–16, 980.

Others volunteered for service in the Army of the nation that was imprisoning their families."<sup>97</sup>

"And there's the 'other white' strategy that Latinos pursued for several decades in the early and mid-twentieth century, despite suffering racial oppression.<sup>98</sup> They reacted to segregation and degrading treatment by stridently proclaiming themselves white."

"All true," Rodrigo picked up. "Haney López glides over that by pointing out that by 1965 or so, Chicanos had the example of black activism. That's why they abandoned quietism, took to the barricades, and began calling themselves brown. But his analysis could have gone deeper."

"How? I'm all ears."

"A more complete canvassing of Chicano history would have led him—and the sixties-era activists alike—to a deeper and more satisfying identity. That and a better model for claiming redress."

"Legal model, you mean?"

"That too. But I mean a broad, conceptual one for the wider society. A new, more authentic way to think about Latinos, society, and their relationship vis-à-vis each other."

"And all of this is based on history, I think you said. This I'd love to hear."

"I owe part of this to Giannina. The first thing to notice is that Latinos' racialization did not begin in the 1960s, as Haney López asserts. It began more than a century earlier, when the Euro-Americans first encountered the Mexicans in the Southwest."

"I read about that era," I said. "Reginald Horsman and others have written about how the early Anglos were greatly perturbed to find small settlements of hardy, Spanish-speaking farmers and settlers on the rich lands of California and the Southwest.<sup>99</sup> They needed ousting. So, to justify the next step in Manifest Destiny, the Anglos coined stories and myths of their inferiority. Senators, travel writers, and newspaper editors spoke about their laziness and moral depravity—even though they enjoyed an advanced culture with irrigation, communal ownership, a chain of missions, and relatively enlightened relationships with the Indians."<sup>100</sup>

"At least compared to what came later at the hands of the Anglos," Rodrigo picked up. "Yet the land-hungry settlers pronounced the Mexicans a mongrel race and unfit to inhabit that rich land. Horsman even says that the term Anglo-Saxon came into use during this period in order to justify

---

<sup>97</sup> PEREA ET AL., *supra* note 54.

<sup>98</sup> See Wilson, *supra* note 46.

<sup>99</sup> REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLLO-SAXONISM* (1981).

<sup>100</sup> See BENDER, *supra* note 40, at 2; PEREA ET AL., *supra* note 54, at 254–60, 264; see also HANEY LÓPEZ, *supra* note 30, at 58–63 (briefly mentioning this period).

repression and highlight the superiority of the English-speaking newcomers to the Mexicans.”<sup>101</sup>

“So, Chicanos in the Southwest were racialized in their very story of origin,”<sup>102</sup> I summarized. “And that’s a key difference between them and the Southern Europeans who arrived in large numbers beginning a few decades later.”

“It is,” Rodrigo agreed. “The early European immigrants were scarcely welcomed with open arms. But they came from intact cultures, many of which boasted records of great cultural accomplishment. But there’s an even more important difference. The Mexicans in those five Southwest states—Puerto Ricans, too—are a conquered people. Their presence here is a product of conquest.”<sup>103</sup>

“Of course!” I exclaimed. “And the two factors work together. They were demonized because they had the misfortune of being in the way. They needed to be removed, so the invaders pronounced them inferior. Then, using that very inferiority, the U.S. launched an aggressive takeover of Texas and later, a pretextual war during which the U.S. Army marched all the way to Mexico City, dictating surrender terms in which it acquired almost one-half that nation’s land.”<sup>104</sup>

“You catch my drift,” Rodrigo said. “Haney López doesn’t talk much about this period. But if he had, he might have realized that the Chicano image was highly racialized from that group’s very first dealings with the Anglos. But that’s only half of it.”

“I bet I know what you are going to say,” I said. “The other half would be Chicanos’ self-conception—their own sense of themselves as non-white and as different from their conquerors.”

“Exactly,” Rodrigo exclaimed. “And there, too, history tells us a richer story than the one Haney López tells. If you examine Southwestern culture, traditions, and myths, you find a people intensely aware of its own subjugation. Chicanos—the common people, I mean—told *corridos*, *cuentos*, and other forms of oral literature in which they railed against their own mistreatment at the hands of Anglo justice.<sup>105</sup> They spoke about brutal Texas Rangers, conniving surveyors, lawyers, and county officials who helped

<sup>101</sup> HORSMAN, *supra* note 99 (book-length treatment tracing historical development of Anglo-Saxon identity during this period).

<sup>102</sup> The term refers to the early construction of a people in narrative and myth. See Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989).

<sup>103</sup> PEREA ET AL., *supra* note 54, at 253–66; Juan Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283 (2003).

<sup>104</sup> ACUÑA, *supra* note 54, at 50–54; PEREA ET AL., *supra* note 54, at 253–54.

<sup>105</sup> See, e.g., ACUÑA, *supra* note 54, at 66, 71–74; PEREA ET AL., *supra* note 54, at 293–97 (describing the Cortina Wars, celebrated in Chicano oral history, and the role of outlaw Gregorio Cortez); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

greedy Anglo ranchers steal ancestral lands guaranteed the Mexicans in the Treaty of Guadalupe Hidalgo, and celebrated their own *mestizaje*.”<sup>106</sup>

“I’ve heard the word ‘gringo,’” I added. “I bet it dates from this period.”

“It does,”<sup>107</sup> Rodrigo said with alacrity. “What a nice piece of evidence! It shows that the Mexicans coined this term—which means an offensive, pushy Anglo—in contradistinction to themselves. It’s an early term marking race consciousness, the awareness of a beleaguered people that they are marked by inferiority, marked by difference.”

“A leading history of Chicanos captures this idea,” I ventured. “Doesn’t Rodolfo Acuña’s *Occupied America*<sup>108</sup> show that Chicanos in the Southwest are a conquered people? An ‘internal colony,’ as he put it.”<sup>109</sup>

“It’s a controversial term,” Rodrigo said. “For some, it implies passivity. But it does mark an important aspect of Chicano history.”

“And important for your purposes, I think,” I volunteered. “For if race consciousness, on both sides, began much earlier than Haney López recognizes—and continued uninterrupted<sup>110</sup>—that would lead to different consequences, it seems to me. I bet you’ve been giving this some thought.”

Rodrigo eagerly took the bait. “It would make a tremendous difference. Conquest would emerge as the defining event in Latino history, the counterpart of slavery for blacks. Using it as a template offers a better, richer way of understanding Latinos’ racialization . . . .”

“And all those stereotypes,” I added. “Lazy, not making use of their opportunities, interested in only menial labor, with a *mañana* attitude, not very ambitious, and so on.”<sup>111</sup>

<sup>106</sup> See sources cited *supra* note 97. On *mestizaje*—racial mixture—see PEREA ET AL., *supra* note 54, at 270–71; see also HANEY LÓPEZ, *supra* note 30, at 218–20 (briefly mentioning term).

<sup>107</sup> See BENDER, *supra* note 40, at 154–61 (dating term to mid-1800s).

<sup>108</sup> See ACUÑA, *supra* note 54.

<sup>109</sup> RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* vii–ix (2d ed. 1981) (explaining author’s use of the term in first and second editions).

<sup>110</sup> See, e.g., Tom Schram, *Thrown Out: The Depression-Era Deportation of Thousands of Mexicans Still Resonates in Detroit and Beyond*, METRO TIMES (Detroit, Mich.), July 28–Aug. 2, 2004, at 16. A number of early sixties-era manifestations of Chicano activism displayed the group’s race consciousness even before the events Haney López recounts. See ACUÑA, *supra* note 109, at 352 (describing 1960 actions on behalf of J.F. Kennedy’s campaign, including voter registration drives and formation of Viva Kennedy clubs among the Chicano community to advance its interest through political means); see also MUÑOZ, *supra* note 56, at 56 (describing elections and takeover in Crystal City, Texas in 1963). And, earlier still, Latino youth in L.A. in the 1940s began wearing Zoot Suits to symbolize their alienation from American society. See BENDER, *supra* note 40, at 2–3, 32–36, 157. Haney López himself dates the beginning of Chicano race consciousness to 1968. See HANEY LÓPEZ, *supra* note 30, at 1 (“Since the 1930s, members of the Mexican community had insisted, in the face of a strong presumption by Anglo society to the contrary, that Mexicans were white. . . . Now, for the first time, Mexicans asserted a different racial conception: Chicanos . . . proud members of a brown race.”).

<sup>111</sup> See *supra* notes 40–41, 100 and accompanying text; BENDER, *supra* note 40.

"Exactly. And it explains some of the community's long-suffering quietism. Their proud indignation. Their ambivalent response to school desegregation but warm embrace of bilingual education and neighborhood schools that would teach Aztec and Mayan history, and the stories of Juan Diego, Emiliano Zapata, and Pancho Villa.<sup>112</sup> And even their understandable desire, at times, to be white. At least if you're white, you're not likely to be attacked and conquered all over again. But just as important is what the conquest template means for law and politics."

"I'm not sure what you mean."

"Here's where my approach really departs from Haney López's. If your defining moment is the sixties and your defining act police oppression—bashed heads—then what follows is not much different from what blacks demanded: cessation of police brutality, segregation, discrimination, and separate schools."

"But that model doesn't fit, or fits inexactly, I think you were saying. It goes back to the two options you mentioned earlier, the only two available to Latinos under the black-white binary of race."

"I don't mean to overstate," Rodrigo quickly added. "The black-themed body of civil rights law and consciousness that developed out of the sixties proved at times genuinely useful to Latinos."<sup>113</sup>

"When their treatment resembled that forced on blacks, you mean?"

"Right. In the old days, school authorities used to comply with desegregation decrees by mixing Chicano and black schoolchildren in one school and pronouncing it integrated.<sup>114</sup> They would point out that Mexican Americans themselves had insisted they were white.<sup>115</sup> So a school with one-half Latino and one-half black kids would be integrated. With Latinos demanding recognition as non-white, school boards found this strategy blocked."

"So Latinos were able to make some strides by riding the coattails of blacks."

<sup>112</sup> See Tom Romero, *Of Race and Rights: Legal Culture, Social Change, and the Making of a Multiracial Metropolis, Denver 1940-1975*, at 411-15 (2004) (unpublished Ph.D. dissertation, University of Michigan) (on file with author) (noting that, in Denver at least, social protests and walkouts were in support of these issues, and not integration). These protests looked to a more remote past than Haney López realizes, with links to Conquest and a people's desire for vindication, wholeness, and identity.

<sup>113</sup> See HANEY LÓPEZ, *supra* note 30, at 31-32 (describing Acosta's use of equal protection doctrine to challenge grand jury panel in L.A. trial); PEREA ET AL., *supra* note 54, at 298-310; CHARLES WOLLENBERG, *ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS* (1996); *The Crisis of American Capitalism and the Struggle for Chicano Liberation*, in *THE POLITICS OF CHICANO LIBERATION* (Olga Rodriguez ed., 1977) (1976 resolution of the Socialist Worker's Party, adopted at their twenty-seventh National Convention); see also CAREY MCWILLIAMS, *NORTH FROM MEXICO* 280-81 (1949).

<sup>114</sup> See Wilson, *supra* note 47.

<sup>115</sup> See *supra* notes 47-50 and accompanying text.



“Some. But not many. As we mentioned earlier, the model proved quite inexact. You could not use it to redress a host of indignities society visited on Latinos that were unique to them, visited on them on account of who they were.<sup>116</sup> Also, society quickly tired of Latinos acting black. It didn’t ring true. Seeing little parallel between the two groups, they began to see the Brown Berets, the raised fists, and the Mexican patriotic songs as wannabe black manifestations.”<sup>117</sup>

“Opportunistic,” I added.

“And they saw the Chicanos’ demands as out of proportion to the harm,” Rodrigo went on. “If Haney López and his sixties-era predecessor activists had gone back a little further in history, they might have unearthed a model and an experience that would have rung truer in the American mind.”

“It might have inspired greater sympathy, as well,” I added. “Conquest goes against the American self-concept. We are not supposed to be a conquering nation, which takes prisoners, enslaves other nations, and steals their territory. That would demand reckoning with.”

“At the same time, it might have given Latino people today greater insight into their condition.”

“Into the source of their continuing subjugation,” I added. “Their lack of resources and land. Their political disenfranchisement. The way popular culture demeans and belittles them, despite their history of cultural accomplishment.”<sup>118</sup>

“Looking at things this other way also has legal consequences,” Rodrigo continued. “If you are an illegitimately conquered people, your remedy is political, and massive.<sup>119</sup> If you are merely a group of people with bashed heads, your remedy lies in tort, or maybe in having the police go through sensitivity training. Then, the scores are equalized.”

“Different legal doctrine would be in order, as well,” I said. “Although I’m not quite sure what it would be.”

<sup>116</sup> See *supra* notes 38–46 and accompanying text.

<sup>117</sup> See *supra* notes 61–62 and accompanying text; HANEY LÓPEZ, *supra* note 30, at 202–04; see also ROSALES, *supra* note 60, at 108 (noting that two scholars, Joan Moore and Ralph Guzman, from the Mexican American Study Project at UCLA, observed that “[t]he New Mexican leader studies Negro civil rights techniques with a degree of attention approaching the Pentagon’s study of Chinese guerrillas”).

<sup>118</sup> E.g., BENDER, *supra* note 40.

<sup>119</sup> See, for example, the Colorado and New Mexico campaigns for land restoration, which seek the return of lands illegally seized (or rights extinguished) in the wake of the war against Mexico. *Feds Will Present Land Grant Report*, ALBUQUERQUE J., July 27, 2004, at 2; Adam Saytanides, *Land-Grant Heirs Win a Historic Ruling in Colorado*, SANTA FE NEW MEXICAN, June 20, 2004, at A1. For the background to these cases, see ACUÑA, *supra* note 54, at 324–25; BLAWIS, *supra* note 58. Compare Rodrigo’s contention and its consequences with the campaign for black reparations. See, e.g., *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (Roy Brooks ed., 1999).

“Equal protection doctrine would not be your primary recourse,” Rodrigo said with conviction “since that doctrine is designed to remedy minor flaws in an otherwise intact, legitimately formed society. Although it’s a little harder to see what would replace it. Perhaps some form of due process theory would be better.”

“My goodness!” I exclaimed, thunderstruck. “I think you’ve hit upon something incredibly valuable. I’ve always thought something was wrong about equal protection as an avenue for protecting black rights. But now I see that the approach you coin for Latinos might be better for all concerned. Do you follow me?”

“I think I do.” Rodrigo sat bolt upright. “I was especially eager to run this part of my thesis past you because you’ve been teaching race law longer than I. The idea would be that the right to integrated schooling, in the company of a diverse body of students, is an aspect of the right to a minimally adequate education.<sup>120</sup> Education in a classroom with only one race does not equip a student to function in a society like ours. It’s not a real education. So, *Brown v. Board of Education*<sup>121</sup> should have deemed education a fundamental interest . . . .”

“It came close to that,” I added.<sup>122</sup>

“But then veered away, deciding the case instead on equal protection grounds. This other way would have brought great advantages.”

“A Latino denied an integrated education could file suit. So could a white,” I added. “Anyone would have standing because everyone can claim a right to an adequate education. In some circumstances that would be one that is not rendered artificially monochromatic. In others, it might mean a community-based school geared to, and respectful of, a particular culture and set of traditions.”<sup>123</sup>

“Such an approach could easily extend beyond the school setting,” Rodrigo added. “Consider how many indignities foisted on Latinos are not easily redressed in equal protection terms—language discrimination, discrimination based on how you speak, your accent, your last name, your national and cultural origins and identity.<sup>124</sup> Yet these might easily be cognizable as denials of a fundamental right of due process, of human dignity.”

<sup>120</sup> See *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (noting that education might be bilingual—in two languages—and include outsider histories and stories). See *supra* note 112.

<sup>121</sup> 347 U.S. 483 (1954) (*Brown I*).

<sup>122</sup> See *id.* at 493 (“[E]ducation is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities . . . the very foundation of good citizenship.”).

<sup>123</sup> For example, Chicanos in Denver initially opposed school desegregation and bussing and demanded a culturally relevant education that taught, and respected, Latino language and traditions. When white educators resisted, walk-outs followed. Romero, *supra* note 112.

<sup>124</sup> See *supra* notes 40–42 and accompanying text.

“You would no longer have to prove that white people are afforded some benefit that you are not. This doesn’t work well with a host of deprivations Latinos suffer,” I added. “This other basis works better; it’s legally more efficacious, more suited to the harms that need redressing. But what about in the eye of society at large? Would it work there, too?”

“It might,” Rodrigo said. “The legal strategy draws on narratives and ideals such as equal dignity for all and respecting everyone’s heritage and personhood. The words on the Statue of Liberty.<sup>125</sup> Cases such as *Meyer v. Nebraska*<sup>126</sup> and *Pierce v. Society of Sisters*.<sup>127</sup> Ideals such as valuing everyone’s unique personality and ways of being.”

“What about the Latino people? How would it fit with their experience?”

“Much better, I think,” Rodrigo replied. “Recall how uneasy many elements of that community were with Latino militancy, chants, paramilitary posturing, and raised fists?<sup>128</sup> The black civil rights model gave many pause, and not just those who, a few years earlier, had been clamoring that they were white.”

“In what sense would it have been better?” I asked. I wanted to press my young protégé as far as possible. But I was also curious where this audacious new approach, with historical roots, legal ramifications, and contemporary implications might lead.

“Here I’m less sure of myself,” Rodrigo said. Then, after a pause: “Remember how the clamorous Brown Power period petered out in four years?”<sup>129</sup> When I nodded, he went on: “Cesar Chavez’s grape boycott did not. His program of nonviolent protest and civil disobedience on behalf of farm unionization and decent conditions for farm workers proved far more long-lasting.”<sup>130</sup>

“It’s successful even today,” I added. “I was just reading recently about a resurgence of it.”<sup>131</sup>

“It not only works,” Rodrigo went on, “it enlists widespread support in all sectors of the Latino community and among liberal whites, who are glad to buy grapes, lettuce, or other farm products with a union label when reminded to do so. They have a generally good impression of Cesar Chavez

<sup>125</sup> “Give me your tired, your poor, your huddled masses yearning to be free.”

<sup>126</sup> 262 U.S. 390 (1923) (striking down Nebraska prohibition against teaching a modern foreign language).

<sup>127</sup> 268 U.S. 510 (1925) (invalidating a state statute requiring that students attend public schools).

<sup>128</sup> HANEY LÓPEZ, *supra* note 30, at 163–64, 200–03, 206–07; *supra* notes 61–62 and accompanying text (noting that many Latinos, especially in the older generation, did not embrace militant tactics).

<sup>129</sup> See *supra* note 62 and accompanying text.

<sup>130</sup> See GARCIA, *supra* note 55, at 31, 90–100; LEVY, *supra* note 58; ROSALES, *supra* note 60, at xvi, 138–40.

<sup>131</sup> Sharon Tubbs, *Church Bells Ring in Boycott*, ST. PETERSBURG TIMES (Florida), Dec. 1, 2003, at 1E.

and his farm workers union. So they shape their buying and eating habits accordingly."<sup>132</sup>

"This is genuinely exciting!" I said. "You're suggesting, if I hear you correctly, that conquest as a way of understanding racialization and mistreatment against Latino people commands greater sympathy from society at large. It promises greater staying power because it draws on unconscious themes and narratives that we all grew up with. The remedies are broad, appealing, and intuitively appropriate. They also resonate better with Latino culture and traditions."

"My point exactly," Rodrigo said modestly. "My approach would tap the near-magical narrative of Aztlán, the mythical Latino homeland.<sup>133</sup> It would leapfrog the black civil rights era entirely and go back to some of its roots in Gandhian theory and the writing of Henry Thoreau. Martin Luther King drew on some of those sources in his work with the Southern Christian Leadership Conference and the Poor People's Campaign.<sup>134</sup> He wrote some of the foundational documents on nonviolent civil disobedience, including *Letter from a Birmingham Jail*."<sup>135</sup> Cesar Chavez drew on them, too.<sup>136</sup>

"And so, Latinos would borrow a model based on India's successful campaign for freedom from England.<sup>137</sup> Prayer, demonstration, discipline, noncooperation with the invading army, but respect for their basic personhood.<sup>138</sup> Skipping the violent, fist-shaking stuff from the sixties."

"I'm not sure I'd skip that entirely," Rodrigo said. "It might be necessary at times. Remember that Thoreau advocated civil disobedience as a last resort when faced by illegitimate laws.<sup>139</sup> And remember, too, that his famous essay on civil disobedience was written, in part, as a protest against the war with Mexico.<sup>140</sup> But the basic idea would be to highlight Latinos' distinct history, drawing on it to develop a coherent theory of that group's

<sup>132</sup> E.g., ROSALES, *supra* note 60, at 138–40.

<sup>133</sup> See ACUÑA, *supra* note 54, at 14; Patricia Gonzalez & Roberto Rodriguez, *Protecting the Center of the Universe*, Sept. 17, 2004 (calling attention to long traditions of native-indigenous revolutionary consciousness among Mexican-origin people), available at <http://www.commondreams.org/views04/0917-13.htm> (last visited Oct. 29, 2004).

<sup>134</sup> See PEREA ET AL., *supra* note 54, at 162–63, 1121. Cesar Chavez did as well. See WINTHROP YINGER, *CESAR CHAVEZ: THE RHETORIC OF NONVIOLENCE* (1975).

<sup>135</sup> See PEREA ET AL., *supra* note 54, at 1097–104.

<sup>136</sup> See *supra* notes 130–132 and accompanying text.

<sup>137</sup> See MOHANDAS K. GANDHI, *AN AUTOBIOGRAPHY OR THE STORY OF MY EXPERIMENTS WITH TRUTH* (Mahadev Desai trans., 1957).

<sup>138</sup> *Id.*; ROBERT L. HAYMAN, JR., NANCY LEVIT, & RICHARD DELGADO, *JURISPRUDENCE: CLASSICAL AND CONTEMPORARY; FROM NATURAL LAW TO POSTMODERNISM* 41–60, 904–05 (2d ed. 2002) (setting out the theory of civil disobedience).

<sup>139</sup> HENRY THOREAU, *ON THE DUTY OF CIVIL DISOBEDIENCE* (1849).

<sup>140</sup> See JOSEPH WOOD KRUTCH, *HENRY DAVID THOREAU* 232–33 (1948); HARVEY SEIDEL CANBY, *THOREAU* 232–34 (1939) (reporting that Thoreau was inflamed by the war against Mexico and went to jail in protest of it).

situation and a theory of relief capable of remedying many of the wrongs that grow out of that history and that are visited on the group today.”<sup>141</sup>

“As Native Americans have done,” I added. “Indian lawyers and activists sometimes draw criticism for being uninterested in equality. Instead, they demand sovereignty—recognition as independent peoples.<sup>142</sup> Sitting out civil rights struggles and arguments, they demand instead a remedy that better fits Indians’ history and experience.”

“And my idea would be to frame an approach for Latinos that combines both traditions—civil rights and legacies of conquest,” Rodrigo said.

“Let me press you on that point a little,” I said. “Some people might say that conquest was a long time ago.”

“Not that long,” Rodrigo retorted. “Every American knows the expression ‘Remember the Alamo.’”<sup>143</sup>

“Sure. But the Mexican-American War was a century and a quarter ago. Maybe its impact has worn off. Maybe Latino people are like Germans or Japanese, one-time enemies who are now back in everyone’s good graces.”

#### A. *Two Concepts of Honor*

“Maybe not entirely back,” Rodrigo replied. “But let that pass. Consider the concept of honor, the sort of status we sometimes bestow on an enemy we have defeated but are prepared to forgive.”

“Like the Germans or the British, whom we fought successfully for independence.”

“We won against both of them,” Rodrigo continued. “But no one today considers them a dishonored race or people. No one attaches stereotypes to them like the ones Haney López describes for Mexican Americans—dark, dirty, lazy, immoral, etc.”<sup>144</sup>

“And I suppose you have a theory for this?”

“I do. One that also explains why *Brown v. Board of Education* had so little impact in the real world. Professor, have you spent any time in the South?”

“I served as a visiting professor for a semester at a school in Virginia.”

“And did you learn about southern honor?”

“I did. It plays a prominent role in the region, with all those statues of Jefferson Davis and Robert E. Lee. With all the attention paid to military service and wartime valor. The uniforms. The stirring songs. The school I taught at even featured a monument to Traveler, General Lee’s horse.”

<sup>141</sup> For example, stolen lands. See *supra* note 118 and accompanying text. . .

<sup>142</sup> See PEREA ET AL., *supra* note 53, at 218, 230–31.

<sup>143</sup> Of uncertain origin, the expression reminds America’s enemies that setbacks are only temporary; this country avenges all losses.

<sup>144</sup> HANEY LÓPEZ, *supra* note 30, at 62, 119, 239; see also BENDER, *supra* note 40.

“Did your school have an honor code?”

“It did. And it really worked. No one stole books or cheated on exams. It was unthinkable. It just wasn’t done.”

“And did you ever wonder, first, why the region stresses honor so much, and, second, why the rest of society lets them get away with it?”

“As for the first, I guess I just assumed that the culture was quietly rebelling against its defeated status. A little like the role you described earlier for Latinos.”

“But with a difference, as I’ll explain,” Rodrigo interjected. “But, go on. What about the broader society’s tolerance of it?”

“I did wonder about that,” I replied. “I don’t know. Maybe it’s because society wants to close ranks, let bygones be bygones. Allow the wounds, brother to brother, to heal. That sort of thing. Maybe the North finds the whole thing rather amusing.”

Rodrigo looked up quickly. “Amusing—I think that captures something. We do easily tolerate a few Confederate songs and flags. It’s important to the South . . .”

“And their sense of honor,” I added.

“Right. But we don’t let it go too far. If a southern judge erects a ten-ton monument in front of the local courthouse and tries to pass it off as a symbol of regional pride, we draw the line.”<sup>145</sup>

“Or if a state like South Carolina wants to fly the Confederate flag on top of the Capitol,”<sup>146</sup> I added.

“Or . . .” Rodrigo looked up meaningfully, “perhaps if, well into the middle of the century, southern officials continue separating black schoolchildren by race.”

“Then we slap them down.”

“That’s right. Southern honor, solidarity, the southern way of life can’t go that far. From time to time we send them little reminders.”

I looked up with dawning realization. “I see what you’re getting at. Intriguing: *Brown v. Board of Education* as degradation ceremony. A little message the North sent the South that it lost the war, after all. And I gather you see some parallel with Latinos?”

“I do. With Latinos, we set the bar much higher. We won the war, and we expect them to be humiliated. Except we want them to be humiliated all the time, not just sporadically.”

“So they can’t get away with symbols of regional or cultural pride.”

“Not nearly as many. A Chicano can’t get away with placing a bumper sticker saying ‘Viva Mexico’ or a Mexican flag decal on his car.”

<sup>145</sup> See Jeffrey Gettleman, *He’d Do It Again, Says the ‘Ten Commandments Judge’*, N.Y. TIMES, Nov. 13, 2003, at A18.

<sup>146</sup> On Confederate symbols, see RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 97–99, 143–44 (2004).

“As southerners do with the Confederate flag,” I seconded. “It would make the Latino’s neighbors distinctly edgy. And if it comes out that a Chicano candidate for governor of California once belonged to MECHA . . . .”<sup>147</sup>

“The Chicano student organization that, thirty years ago, handed out literature vaguely extolling the idea of Aztlán . . . .”<sup>148</sup>

“The mythical homeland, including much of the American Southwest and Mexico,” I added.

“It proved the kiss of death. Conservative radio show hosts immediately jumped to the conclusion that he favored secession of the whole region, reuniting it with Mexico.”<sup>149</sup>

“Which was surely the farthest thing from Cruz Bustamante’s mind,” I agreed. “But I see your point. American society does not grant Latinos the latitude to display the very group solidarity that we afford southerners. Conquest means something different for them. Some people even get upset hearing Spanish spoken. No one would think of firing a worker just because he had a southern accent. Which I suppose is your point.”

“Yes—conquered status means something more in the case of Latinos than of others.”

After a pause, I asked, “What about intermarriage? Aren’t a lot of Latinos intermarrying with whites? The group might lose its fervor or at least its sense of itself and its own history.”<sup>150</sup>

“Giannina and I talked about that. In a way, I’m the product of such a union. My dad was black but my mom Italian.”

“Yet you haven’t lost your Latino identity,” I pointed out.

“Nor has my marriage to Giannina altered that,” Rodrigo added. “Even though her forebears are Italian, like my mom’s. In fact, she’s something of an activist for Latino causes. The other day, she sat in outside the dean’s office at her law school with a group of Latino students agitating for more Latino professors. Fortunately, none of them got arrested.”

“Hmmm,” I said. “I can see the outlines of a new theory emerging. You could call it subversive assimilation. It would be what happens when a Latino—or Asian, for that matter—marries a white.”

“As many do. The odds are in favor of interracial marriage,” Rodrigo pointed out.

<sup>147</sup> See Rodolfo Acuña, *Fair and Unbalanced Racism* (Aug. 29, 2003) (unpublished manuscript on file with author) (noting that Fox News and the O’Reilly Factor set off a “tempest” by denouncing California Lieutenant Governor Cruz Bustamante for not renouncing his affiliation with MECHA on this ground).

<sup>148</sup> See MUÑOZ, *supra* note 56, at 77–79 (explaining Aztlán and its relation to MECHA).

<sup>149</sup> See ACUÑA, *supra* note 147.

<sup>150</sup> See GEORGE YANCEY, *WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE* (2003).

“Right. There are many more opportunities to meet white mates than ones of your own ethnicity. Especially as you move up the educational ladder.”

“Most commentators have assumed this means that racial identity will weaken over time. One writer, George Yancey, even suggests that Latinos and Asians will disappear as separate groups by mid-century. They’ll intermarry, take on white attitudes, and distance themselves from blacks, so that for all intents and purposes they will have joined the white race.”<sup>151</sup>

“Like the early Southern Europeans we were talking about,” I commented.

“No one considers that the opposite may happen,” Rodrigo continued. “The white spouse radicalizes. Through marriage to the member of the minority group, he or she takes on double consciousness. Becomes, in effect, brown or yellow.”

“So that the number of minorities would not decrease, as Yancey predicts, as Latinos and Asians whiten, but grow, as whites darken—take on brown and Asian ways and consciousness.”

“I think Giannina may have done at least a little of that since marrying me,” Rodrigo said. “Although she was plenty left in her politics when we met.”

“Reminds me of an article I read by James Gordon.<sup>152</sup> Were we talking about it once?” When Rodrigo looked blank, I explained: “Gordon, a legal historian, showed that the first Justice Harlan, who wrote the famous dissent in *Plessy v. Ferguson* . . . .”<sup>153</sup>

“Insisting that the U.S. has no place for caste, and that the Constitution is color-blind . . . .” Rodrigo interjected.

“Right. Shockingly modern and audacious at the time, his opinion set the stage for advances in civil rights protection for blacks and other minorities nearly a century later. Gordon points out that Harlan may have had a black brother.”

“Now I remember that article!” Rodrigo exclaimed. “It was an extraordinary piece of research. Gordon showed that Harlan’s father, a southern patriarch and slaveowner, may have been the father of Robert Harlan, a red-haired, light-skinned black child whom he raised in his household and staked to an education.<sup>154</sup> Robert and the future Justice, who were about the same age, grew up as close friends. Gordon posits that this experience of a loving relationship with a black man while growing up may have enabled

<sup>151</sup> *Id.*

<sup>152</sup> See James Gordon, *Did the First Justice Harlan Have a Black Brother?*, 15 W. NEW ENG. L. REV. 159 (1993).

<sup>153</sup> 163 U.S. 537, 559–60 (1896) (Harlan, J., dissenting).

<sup>154</sup> Gordon, *supra* note 152, at 159, 164–83, 197–234.



Harlan to reach a level of racial awareness rare in his generation and set the stage for his extraordinary dissent.”<sup>155</sup>

“And you think something like that may happen in America’s future as groups continue to intermarry?”

“We shouldn’t discount it,” Rodrigo replied. “It seems just as likely as the other scenario, namely whitening and deradicalization. A policy of subversive assimilation might extend the circle of supporters for minority causes, increase the political and voting strength of Latino and Asian groups, and, over time, ease America’s comfort level with its multicultural, multiracial future.”

“Including Latinos,” I added.

But any further conversation was cut short by the simultaneous arrival of my new wife, Teresa, and the band. Teresa’s board meeting had ended a little early and, finding herself in the neighborhood, she had decided to join us for dessert. We spent the next hour discussing Rodrigo’s new baby, our retirement plans, and Rodrigo’s law school recruitment conference over the rising din of the musicians, who quickly warmed to their task. If I don’t need a hearing aid now, I’ll need one soon if we stay here long, I confided to Teresa while Rodrigo was tuning his guitar. (It turned out that this was play-along/sing-along night at the restaurant.)

## V. CONCLUSION

We departed soon, leaving Rodrigo to exchange animated conversation about Argentinean music with his new-found musician friends. As Teresa and I took the long taxi ride home, I recounted to her the substance of my conversation with Rodrigo, in which she turned out to be greatly interested. I recounted Rodrigo’s extraordinary analysis of *Brown v. Board of Education* as benefiting whites, doing little if anything for blacks, and setting back brown fortunes markedly.

I described how Rodrigo had painted a picture of *Brown* as reinforcing a black/white binary of race, in which Latinos, who are neither black nor white, were forced into one or the other mode, neither of which proved very satisfactory. I told her of Rodrigo’s analysis of the Haney López book, its story of 1960s-era Chicano activism, and how both Haney López and the 1960s activists missed a major opportunity when they patterned Latino liberation after the black civil rights model.

Teresa was fascinated at Rodrigo’s suggestion that Latinos embrace, instead, a new self-understanding in which Conquest, not slavery, served as the decisive story of origin and coin litigation strategies accordingly. But the part of our conversation in which she was most interested was the part Rodrigo and I had left for another day: the role of intermarriage and mixture in altering whiteness and white solidarity.

---

<sup>155</sup> *Id.* at 234–38.

In fact, I concluded my recounting of this part of our conversation just as we paid the taxi driver and walked up the steps to Teresa's townhouse, in which we had been living since our marriage a few months ago. Dear reader, may I confide something? Once inside, she put down her purse, coat, and gloves, smiled, and looked at me out of the corner of her eye. "What do you say, Professor? Shall we continue this conversation about racial mixture upstairs?"