

FOREWORD SELECTION MEMORANDUM

To: Harvard Law Review Editors
From: Tashrima Hossain
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Re: Volume 138 Foreword Candidate: Professor Ian Haney López

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I. Executive Summary

Ian Haney López is a Chief Justice Earl Warren Professor of Law at University of California, Berkeley. At center stage in his work are race, constitutional law, and judicial legitimacy. Haney López's scholarship has been featured across leading law journals, including the *Yale Law Journal*, *Stanford Law Review*, and *California Law Review*. In addition to his work in the academy, Haney López has published articles in *The New York Times*, *The Los Angeles Times*, *The Atlantic*, and *USA Today*. He has also served as the co-chair of the AFL-CIO's Advisory Council on Racial and Economic Justice and co-founder of the Race-Class Narrative Project, two efforts envisioning a multiracial country with universal economic opportunity.

Haney López's scholarship has played a crucial role in redefining the discourse on race, law, and political theory, seamlessly integrating critical race theory with constitutional analysis. His writings embrace an interdisciplinary approach – melding historical research and sociolinguistics with rich quantitative analysis – to scrutinize how legal systems perpetuate racial hierarchies and propose strategies for fostering racial justice and equality. His work is distinguished by its innovative use of critical race theory to reinterpret established legal doctrines and political practices; this undertaking has earned him widespread recognition among academic and popular audiences alike. Haney López's project challenges conventional narratives, providing novel recontextualizations of key legal doctrines and political practices, and highlighting the ways in which they have been shaped by, and continue to perpetuate, racial inequalities.

Today, Haney López is actively contributing to ongoing scholarly conversations, with numerous publications that continue to push the boundaries of legal and political theory.¹ Building on his established reputation as a leading scholar in the field, his forthcoming works promise to further unpack the intersections of race, law, and politics. With a proven record of publishing compelling pieces for mass audiences and a commitment to real-world outcomes (for example, through his work with AFL-CIO and the Race-Narrative Project), Haney López will likely pen a Foreword that will garner attention from academia, legal practitioners, and even a popular audience.

If chosen as the Volume 138 Foreword author, Haney López may write about race as an overarching theme of the Term, *Alexander v. South Carolina State Conference of the NAACP* (a pending equal protection and election law case regarding South Carolina's redistricting map), or the legitimacy of the Court. A Foreword by Haney López can be expected to draw on his deep understanding of critical race theory, constitutional law, and jurisprudence. Finally, if selected, Haney López would likely be the second Latinx scholar to write the Foreword – a momentous step for the *Harvard Law Review* and the legal academy in itself.

II. Biography

One of the nation's leading thinkers on how American racism has evolved since the civil rights era, Haney López is a scholar of race, constitutional law and equal protection, and the legitimacy of the

¹ See Ian Haney López, *Can Democracy Survive Racism as a Strategy?*, PROTECT DEMOCRACY (Jul. 9, 2021), <https://protectdemocracy.org/work/can-democracy-survive-racism-strategy/>; IAN HANEY LÓPEZ, *Latino Voter Outreach that Mobilizes White Voters, Too*, in TURNOUT! MOBILIZING VOTERS IN AN EMERGENCY (2020); IAN HANEY LÓPEZ, *Averting Climate Collapse Requires Confronting Racism*, in WINNING THE GREEN NEW DEAL: WHY WE MUST, HOW WE CAN (2020).

Court. Haney López earned his B.A. and M.A. in history from Washington University (1986), M.P.A. from Princeton (1990), and J.D. from Harvard (1991); he is now the Chief Justice Earl Warren Professor of Law at UC Berkeley. Haney López’s research traverses the interstices between racial and wealth inequality, often wrestling with the political outcomes of such disparities.

Haney López’s scholarship is shaped in part by his upbringing as the “son of a White father from the United States and a brown-skinned mother from El Salvador.”² He grew up in Hawaii but was troubled by an unexpected racial milieu when he first arrived to St. Louis, Missouri, for college.³ To make his “Latino identity less easy to disregard,” Haney López changed his last name to follow the Hispanic custom in graduate school – transforming from Ian Haney to Ian Haney López.⁴

In the following years, Haney López has been a prolific author on matters of constitutional law and race. Haney López’s first book on judicial adjudications of whiteness, *White by Law*, was published in 1997 and met with significant acclaim. Over a decade after its first publication, Professor Devon Carbado commented that the work “remains the definitive treatment of the naturalization cases, and provides a compelling account of the role of law in constructing race.”⁵ Since then, Haney López has written on the racialization of Mexican-American activists due to police violence in the late 1960s,⁶ politicians’ exploitation of racial stereotypes to support rule by the rich,⁷ and most recently, the import of racial solidarity in overcoming coded racism in the Trump era.⁸

Haney López’s work has been published widely – from the *Yale Law Journal* to *The New York Times*. In addition to his professorship at UC Berkeley, he has been a visiting professor at Yale, New York University, and Harvard, as well as a Rockefeller Fellow in Law and Humanities at Stanford.

Putting his academic theories into practice, Haney López has been a champion for race-class fusion as the basis for a multi-racial progressive majority. He co-chaired the AFL-CIO’s Advisory Council on Racial and Economic Justice and co-founded the Race-Class Narrative Project (a research project designed to uncover how to counter dog whistle campaign tactics).⁹ Based on polls of 2,000 Americans nationwide, the Race-Class Narrative team found that “highlighting the class agenda behind the constant racial provocations provides the best antidote to dog whistling” – a thread that remains a throughline in Haney López’s work today.¹⁰

² IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* xiii (10th ed. 2006) (hereinafter referred to as *White By Law*).

³ *Id.*

⁴ *Id.* at xiv.

⁵ *White by Law 10th Anniversary Edition: Praise*, N.Y.U. PRESS, <https://nyupress.org/9780814736944/white-by-law-10th-anniversary-edition/>.

⁶ *See generally* IAN HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003).

⁷ *See generally* IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014) (hereinafter referred to as *Dog Whistle Politics*).

⁸ *See generally* IAN HANEY LÓPEZ, *MERGE LEFT: FUSING RACE AND CLASS, WINNING ELECTIONS, AND SAVING AMERICA* (2019).

⁹ *Race-Class*, IAN HANEY LÓPEZ, <https://ianhaneylopez.com/race-class-about>; *see also* Ian Haney López and Anat Shenker-Orsorio, *The Answer to GOP Dog Whistles? Democrats Should Talk About Race More, Not Less*, WASHINGTON POST (Aug. 22, 2018), https://www.washingtonpost.com/outlook/the-answer-to-gop-dog-whistles-democrats-should-talk-more-about-race-not-less/2018/08/22/7cfa4d3a-a184-11e8-8e87-c869fe70a721_story.html.

¹⁰ Roge Karma, *How Democrats can talk about race and win*, VOX (Feb. 18, 2020), <https://www.vox.com/2020/2/18/21116867/ian-haney-lopez-merge-left-race-class-project-trump-racism-dog-whistles-2020-democrats>; Ian Haney López, *How to Beat Trump at His Own Game*, N.Y. TIMES (Oct. 15, 2019), <https://www.nytimes.com/2019/10/15/opinion/debate-dog-whistle.html>.

III. Overview of Scholarship

Haney López’s scholarship spans from four books and two anthologies to a stunning array of academic articles and op-eds. Before turning to four representative works in the following section, this section details his writing style and methods and reveals three principal themes in his scholarship: race; constitutional law and equal protection; and the legitimacy of the Court.

A. Writing Style & Methods

Across the diverse mediums employed by Haney López, there are four common features in his writing. First, Haney López adopts interdisciplinary/dedisciplinizing techniques – history, sociology, political science, and law – for a more robust approach. Second, he engages in extensive empirical research, combining both qualitative and quantitative methods. For example, in *Dog Whistle Politics*, Haney López relies on voting patterns, public opinion polls, and social and economic statistics to demonstrate the impact of dog whistle politics on electoral outcomes, public opinion, and racial and economic inequality.¹¹ This combination of qualitative and quantitative modes is similarly relevant in “Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination.”¹² Third, Haney López frequently uses narrative and storytelling techniques, incorporating personal stories, historical anecdotes, and case narratives to buttress his arguments.¹³ Fourth and finally, he consistently integrates theoretical analysis with practical recommendations, providing not just a critique of existing conditions but also a roadmap for reform. This attention to real-world change manifests in his endeavors outside of academia as well, from AFL-CIO to the Race-Narrative Project.

B. Areas of Scholarship

Race

To begin, race – and critical race theory – is the undercurrent across Haney López’s scholarship and advocacy. From his discussions of constitutional law to the legitimacy of the Court, his work exhibits how race runs through all of law.¹⁴ For example, in “Institutional Racism,” Haney López suggests race is embedded into the judicial system and thus permeates into any action by the Court.

The institutional scripts and paths the judges followed – for example, the automatic recourse to selecting acquaintances or the casual but consistent invocation of qualifications – did not draw on race explicitly. Nevertheless, these scripts and paths incorporated at unexamined levels significant racial components. Taken-for-granted understandings of both White and Mexican-

¹¹ Haney López, *supra* note 7.

¹² Ian Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L. J. 1717 (2000) (hereinafter referred to as “Institutional Racism”).

¹³ See, e.g., Haney López, *supra* note 1 (“One interaction, at the intersection of encounters with the police and responses by my White peers, particularly influenced my intellectual engagement with race and law. In a confrontation that my educated accent and elite bravado did not neutralize, a cop on the University of Virginia campus, where I was visiting a friend, took up the shotgun he had rested on the hood of his patrol car and ordered me to back away when I stepped forward to proffer my Harvard Law School student ID.”).

¹⁴ “Race suffuses all bodies of law, not only obvious ones like civil rights, immigration law, and federal Indian law, but also property law, contracts law, criminal law, federal courts, family law, and even ‘the purest of corporate law questions within the most unquestionably Anglo scholarly paradigm.’” Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. REV. 1, 62 (1994) (footnote omitted) (hereinafter referred to as “The Social Construction of Race”).

American identity, operating in the form of racial institutions, penetrated the Los Angeles superior court judges' ostensibly race-neutral institutionalized behavior. Racial institutions did not, however, influence the judges' behavior in an ad hoc or idiosyncratic fashion. Instead, racial institutions operated on the judges through standard mental dynamics and heuristics. The judges followed institutionalized patterns of behavior generated at an organizational level, and racial institutions in turn informed those patterns through standard cognitive distortions that almost uniformly affected all judges.¹⁵

Haney López suggests that resisting racial categories may be an emancipatory force: after all, race is “a social construction that, however perilously, remains subject to contestation at the hands of individuals and communities like.”¹⁶ His work has laid the groundwork for profound explorations of racial equality. In praise for *White by Law*, Professor Martha Minow writes, “Haney López performs a major service for anyone truly interested in understanding contemporary debates over racial and ethnic politics... A sobering and crucial lesson for a society committed to equality.”¹⁷

Constitutional Law & Equal Protection

In connection with his work on race, Haney López has closely considered the Court's interpretation of the constitutional command of “equality” and the doctrine of “colorblindness.” Haney López's dissection of constitutional law appears through (1) historical analysis, (2) critique of legal doctrine, and (3) advocacy for transformative change.

First, Haney López delivers a comprehensive historical inquiry into how constitutional law both challenges and upholds racial hierarchies. He scrutinizes the evolution of the Fourteenth Amendment, for example, through which he evaluates how the judiciary has interpreted and applied equal protection in racial discrimination cases. This rigorous historical study is present in “Intentional Blindness,”¹⁸ “A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness,”¹⁹ and *White by Law*.²⁰

Second, Haney López has lamented constitutional law's evolution toward codified racial subjugation – for instance, the colorblind conception of equal protection or the racialization of the law. In “A Nation of Minorities,” he explicates how the trajectory of colorblindness doctrine is anathema to the aims of the Equal Protection Clause:

Drawing on decisions and reasoning from the 1970s, the Supreme Court in the last three decades has moved ever closer to a full embrace of an anticlassification or colorblind conception of the Equal Protection Clause. Under this approach ... the Fourteenth Amendment demands the highest level of justification whenever the state employs a racial distinction, irrespective of whether such race-conscious means are advanced to enforce or to ameliorate racial inequality. Contemporary constitutional race law insists on a stark congruence between hostile racial practices on the one hand and efforts to respond to societal discrimination on the other. But when this risible equivalence is stated so baldly, the

¹⁵ Haney López, *supra* note 12, at 1812.

¹⁶ Haney López, *supra* note 14, at 62.

¹⁷ *White by Law 10th Anniversary Edition: Praise*, *supra* note 5.

¹⁸ Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1789 (2012).

¹⁹ Ian Haney López, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (hereinafter referred to as “A Nation of Minorities”).

²⁰ Haney López, *supra* note 2.

intellectual problem with contemporary colorblindness is immediately manifest: what justifies the strict moral and constitutional equation of affirmative action and Jim Crow?²¹

Third, Haney López's scholarship often concludes with an exhortation for transformative constitutional change. In "Intentional Blindness," Haney López intervenes: without understanding colorblindness and discriminatory intent as "intentional blindness," these purportedly separate doctrines will "hide from public view the Court's ferocious disfigurement of equal protection."²² By probing the Court's interpretation, Haney López champions legal and real-world change.

Legitimacy of the Court

A final theme in Haney López's scholarship is the legitimacy of the Court, particularly from a race and discrimination lens. Many of Haney López's works illuminate the interplay between civil rights movements and their impact on electoral outcomes, judicial appointments, and the Court's adjudications of discrimination claims. In "Intentional Blindness," Haney López articulates how racial politics led to the reversal of equal protection:

[E]qual protection's transmogrification since the 1970s follows most fundamentally from a broad backlash against civil rights that resulted in the election of presidents, and in turn the appointment of Justices, hostile toward racial progress. Those Justices, who consistently refused to find discrimination against non-Whites, or to support affirmative action programs, were prepared to reach those results without doctrine or evidence on their side. ... Colorblindness and intent doctrine are the bandages the Justices use to blind themselves to continued racism against non-Whites.²³

The politics of judicial appointments – with Presidents who campaigned on coded themes of racial threats from people of color appointing Justices hostile to civil rights – is a theme underpinning *Dog Whistle Politics*.²⁴ Such notions of institutionalized discrimination are similarly interwoven throughout "Institutional Racism."²⁵ Haney López's project consistently unearths how the judiciary is mired in racial politics and makes practical recommendations for reviving the Court's legitimacy.

IV. Representative Works

This section elevates the central arguments, contributions, and methodology of four representative works – a steady crescendo from Haney López's most recent to earliest pieces: "Intentional Blindness" (2012), "Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama" (2010), "Institutional Racism" (2000), and "The Social Construction of Race" (1994).

A. *Intentional Blindness*, 87 N.Y.U. L. REV. 1179 (2012)

In "Intentional Blindness," Haney López contends that the "emancipatory potential of the Fourteenth Amendment has been thoroughly undone" since the end of the civil rights era, largely due to reversals in two areas: "in how the Supreme Court evaluates claims of discrimination against

²¹ Haney López, *supra* note 19, at 987-88.

²² Haney López, *supra* note 18, at 1789.

²³ *Id.* at 1789.

²⁴ Haney López, *supra* note 7.

²⁵ Haney López, *supra* note 12.

non-Whites, an area governed by intent doctrine; and in how it regards affirmative action designed to ameliorate racial inequality, where colorblindness reigns.”²⁶

Central Arguments

Haney López argues the Equal Protection Clause has bifurcated into a strict scrutiny domain governing affirmative action and an extremely permissive domain governing discrimination against non-White people – though colorblindness and intent doctrine are so entwined that “we should no longer see equal protection as divided between intent and colorblindness.”²⁷ He postulates:

[W]e should understand it as unified under what might best be termed ‘intentional blindness.’ Combining the names of the two doctrines, this portmanteau expresses the marrow of the Court’s racial jurisprudence – which seems intentionally blind to racial context, including the persistence of racial discrimination against non-Whites, and the desire of democratic majorities to remedy this lingering stain on American justice.²⁸

At the outset, the article considers equal protection before the advent of colorblindness. From the historical analysis of how intent doctrine “undergirded the Court’s dismantling of Jim Crow segregation” to a discussion of how *Washington v. Davis*²⁹ and *Arlington Heights v. Metropolitan Housing Development Corporation*³⁰ formalized the contextual intent approach post-*Brown*,³¹ Haney López weighs the role of intent in “detecting discrimination against non-Whites and distinguishing invidious from remedial government practices.”³²

Firmly rooted in this analysis, Haney López then sets forth the thrust of his argument: there is an “unrecognized symbiosis between colorblindness and intent.”³³ Although *Personnel Administrator of Massachusetts v. Feeney*³⁴ may have fragmented equal protection claims, the Court consistently turned to contextual evidence to “defeat claims of discrimination against non-Whites” but disallowed the same evidence in plaintiff claims of mistreatment.³⁵ With the continued consolidation of intent and colorblindness in the 1990s, the Roberts Court’s use of intentional blindness in *Parents Involved*³⁶ and *Ricci*³⁷ reflects an even further devolution of equal protection – including contemporary assaults on antidiscrimination statutes, the demise of affirmative action, and larger reversals in equality law.

Contributions

Per Hein Online, “Intentional Blindness” has been cited 168 times. These citations have appeared in law review articles pertaining to constitutional law, civil rights, and judicial legitimacy. In fact, Khiara M. Bridges referenced this piece seven unique times in her argument in the *Harvard Law Review*’s

²⁶ Haney López, *supra* note 18, at 1781.

²⁷ *Id.* at 1783-84.

²⁸ *Id.* at 1784.

²⁹ 426 U.S. 229 (1976).

³⁰ 429 U.S. 252 (1997).

³¹ Haney López, *supra* note 18, at 1806.

³² *Id.* at 1785-86.

³³ *Id.* at 1786.

³⁴ 442 U.S. 256 (1979).

³⁵ Haney López, *supra* note 18, at 1786-87.

³⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

³⁷ *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

Volume 136 Foreword; she uses Haney López’s inquiry to substantiate that “the Roberts Court has adopted a contrived, ‘common sense’ approach to what counts as racism against people of color.”³⁸

Methodology

Haney López’s methodological approach is built upon historical and legal analysis. The piece tracks the evolution of judicial interpretation – from the Court’s earliest years when it “recognized that enforcing the Constitution required judging the intentions of state actors,” to the volatility of the Court’s method for reviewing government purposes during the first half of the twentieth century, to the “sustained focus on illicit purposes” during the civil rights era.³⁹ Through his chronological legal study, Haney López elucidates how common law decisions illustrate the ebb and flow of equal protection doctrine.

B. *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010)

In “Post-Racial Racism,” Haney López delves into the notion of post-racial racism in the context of the United States during Barack Obama’s presidency. The essay “uses the tremendous racial disparities in the American crime control system to assess race and racism as key features of contemporary society.”⁴⁰ In true Haney López fashion, he concludes with a call for readers to remedy issues of post-racial racism.

Central Arguments

Haney López first synchronizes high rates of subjection to the American carceral system and the highly disproportionate targeting of nonwhites – two features which “form the essence of mass incarceration.”⁴¹ Paradoxically, a dramatic expansion in incarceration rates since the 1960s has occurred alongside a steady slide down in the number of crimes per hundred persons from 6 in 1981 to 4 in 2002.⁴² If crime rates do not explain the uptick in mass incarceration, Haney López wonders whether the thesis that racialized mass incarceration stems from anti-civil rights backlash has merit.

If this story is correct, however, then Obama’s electoral victory may be especially relevant to mass incarceration, for he triumphed not by meeting Republicans on the terrain of Nixon’s southern strategy, but by winning the presidency despite the opposition of southern whites, and indeed without a majority of white support at all. Perhaps, then, Obama’s election presages an end to racialized crime rhetoric and policies, and the mass imprisonment that has resulted.⁴³

Haney López rejects this notion. He instead argues there is “a deeper, more enduring connection between race and criminal justice than that implied by the story of racial backlash.”⁴⁴ Citing Douglas Massey’s racial stratification theory (that “categorical inequality” is a product of social categories and

³⁸ Khiara M. Bridges, *The Supreme Court, 2021 Term – Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 1, 32 (2022).

³⁹ *Id.* at 1791-92.

⁴⁰ Ian Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1023 (2010) (hereinafter referred to as “Post-Racial Racism”).

⁴¹ *Id.* at 1028.

⁴² *Id.* at 1031.

⁴³ *Id.* at 1026-27.

⁴⁴ *Id.* at 1039.

the misdistribution of resources between those groupings), Haney López maintains that “ever since the late-stage civil rights movement set its sights on breaking down entrenched patterns of inequality, significant segments of the white electorate have sought to defend their privileged access.”⁴⁵

Not only does mass incarceration engender the misdistribution of resources by subjugating racial minorities economically, politically, and culturally, but structural racism in the crime control system also entrenches existing social categories. The essay concludes with a request to readers: “We must proceed by developing and disseminating a countervailing narrative about race as a form of social stratification – a narrative that pushes far beyond the numbers and the disparities to explain how racism actually functions in today’s society.”⁴⁶

Contributions

“Post-Racial Racism” propounds a straightforward theory that vast racial disparities plague our criminal system, are reinforced by continuing patterns of racism, and require redress. According to Hein Online, this article has been cited 162 times, including in influential publications by Monica Bell in the *Yale Law Journal*, Alexandra Natapoff in the *Vanderbilt Law Review*, and Kimberlé Williams Crenshaw in the *Connecticut Law Review*. References to the article largely occur in conversation around constitutional law, jurisprudence, race, and civil rights. Haney López’s argument for a renewed focus on racism, in particular on post-racial racism, is the work’s primary contribution to the field.

Methodology

The article is grounded in an empirical analysis of the incarceration rate in the United States, as well as the disconnect between crime and incarceration rates.⁴⁷ Similarly salient is the study of history, for instance, in Haney López’s tracing of criminal law’s involvement in racial exploitation from convict leasing in the post-bellum South to contemporary racialized mass incarceration. Through an appeal to quantitative measures over time and historical examples, Haney López endeavors to prove that racial stratification theory undergirds the modern crime control system.

C. Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination, 109 YALE L. J. 1717 (2000)

“Institutional Racism” reimagines a “theory of racism that explains organizational activity that systematically harms minority groups even though the decision-making individuals lack any conscious discriminatory intent,” in order to shed light on judicial decision-making practices that give rise to discrimination.⁴⁸

Central Arguments

The article launches with a description of two Los Angeles cases. In the first, the grand jury indicted thirteen activists, but the defendants raised First and Fourteenth Amendment claims and ultimately prevailed on free speech grounds.⁴⁹ In the second, three of the original thirteen activists were among six persons indicted on arson and burglary charges from protests at the Biltmore Hotel; this time,

⁴⁵ *Id.* at 1040-41.

⁴⁶ *Id.* at 1067-68.

⁴⁷ *Id.* at 1029-31.

⁴⁸ Haney López, *supra* note 12, at 1723.

⁴⁹ *People v. Castro*, No. A-232902 (Cal. Super. Ct. 1968) (colloquially known as “*East LA 13*”).

without a plausible free speech claim, the judge rejected their equal protection defense, though a jury subsequently acquitted the defendants.⁵⁰ Haney López uses these cases to demystify the opaque nature of institutional racism.

After reflecting on the statutory grand jury nomination process, actual practices described by judges, and numerical evidence of discrimination, Haney López depicts the lack of reform in the grand jury system in the years immediately following *East LA 13* and *Biltmore 6*.⁵¹ In keeping with the absence of successful reform, Haney López finds that “in all but one [of twenty California counties], judges still wield substantial discretionary power,” and “in the 1990s, Los Angeles superior court judges excluded Latino/as from grand jury service at a six-to-one ratio.”⁵²

Haney López then applies the sociological New Institutionalism theory to the facts underlying *East LA 13*, constructing “a model of institutional racism that neither relies on motivated behavior nor dismisses behavior altogether, but rather one that focuses on the sort of *nonintentional behavior* emphasized by institutional analysis.”⁵³ To validate that the judges’ actions amounted to racism, Haney López explains how the patterns of the Los Angeles superior court judges are a function of their subscription to and reliance on racial institutions.⁵⁴

Contributions

“Institutional Racism” has been cited in 199 articles and three cases between 2002 and 2022. These citations have appeared in law review articles pertaining to administrative law and discrimination. Haney López’s forceful appeal to respond to such discriminatory judicial practices captures the main contribution of the piece: “To talk of institutional racism may be to engage in dry analysis, but to posit institutional racism places at center stage our responsibility to address largely unrecognized processes of organizational and social life that harm our society.”⁵⁵

Methodology

Sociology lends the backdrop for Haney López’s theory of racism in this piece; he turns to Harold Garfinkel’s foundational model of New Institutionalism, which posits that “frequently repeated but largely unexamined social practices or patterns at once structure and give meaning to human interaction.”⁵⁶ In the foreground is the intersection of qualitative and quantitative evidence of judicial discrimination: “actual practices described by the judges in their testimony [including] emphatic denials of discriminatory intent” and “numerical evidence of discrimination, which shows that [Mexican Americans] accounted for only one of every fifty-eight Los Angeles County grand jurors” despite much greater representation in the overall population.⁵⁷ The interdisciplinary approach offers multiple paradigms for understanding and acknowledging Haney López’s thesis.

D. *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. REV. 1 (1994)

⁵⁰ *People v. Montez*, No. A-244906 (Cal. Super. Ct. 1969) (colloquially known as “*Biltmore 6*”).

⁵¹ Haney López, *supra* note 12, at 1728.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1812.

⁵⁵ *Id.* at 1844.

⁵⁶ *Id.* at 1723.

⁵⁷ *Id.* at 1728.

“The Social Construction of Race” displays the weight of race in contemporary society, as well as how the law reifies racial identities. Haney López uses an interdisciplinary framework to engage with various interpretations of race before concluding that race is a fact of community and identity.

Central Arguments

*Hudgins v. Wright*⁵⁸ is an anchor throughout the piece, espousing how “law serves not only to reflect but to solidify social prejudice, making law a prime instrument in the construction and reinforcement of racial subordination.”⁵⁹ Race is omnipresent for the individual and community.

Race dominates our personal lives. It manifests itself in our speech, dance, neighbors, and friend – “our very ways of talking, walking, eating and dreaming are ineluctably shaped by notions of race.” Race determines our economic prospects. The race-conscious market screens and selects us for manual jobs and professional careers, red-lines financing for real estate, green-lines our access to insurance, and even raises the price of that car we need to buy. Race permeates our politics. It alters electoral boundaries, shapes the disbursement of local, state, and federal funds, fuels the creation and collapse of political alliances, and twists the conduct of law enforcement. In short, race mediates every aspect of our lives.⁶⁰

The article unfolds in two parts, critiquing existing theories of race across biology, sociology, and literature, then advancing a new theory of race as a social complex of meanings continually replicated in our daily lives. In the first part, Haney López repudiates “biological race” (that “there exist natural, physical divisions among humans that are hereditary”) and “social race” (“ethnicity, nationalist, and colonialist theories of race”).⁶¹ He instead defines race as “neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.”⁶² In light of this interdisciplinary study, Haney López ultimately finds race is closely tied to communities, provides an essential component of identity, and is a force that must be reckoned with.

Contributions

Hein Online suggests that the piece has been cited in 490 articles and five cases, including in the Ninth and Eleventh Circuits between 1998 and 2021. The articles referencing “The Social Construction of Race” have spanned the *Harvard Law Review*, *Yale Law Journal*, *Stanford Law Review*, and countless other top legal publications. Most often, Haney López’s work has provided support for the idea of race as a social construction, rather than a fixed essence.

Methodology

In this article, Haney López employs his classic “interdisciplinary/disciplinizing approach,”⁶³ using biology, sociology, and literature to grapple with understandings of race and suggest a conclusion about the meaning of race in the context of modern jurisprudence. He cites and debunks scholars from the other disciplines in order to add credence to his ultimate findings.

⁵⁸ 11 Va. (1 Hen. & M.) 134 (Sup. Ct. App. 1806) (holding in favor of the freedom of enslaved woman, Jackey Wright, based on her descent from Indian women and appearance as “white”).

⁵⁹ Haney López, *supra* note 14, at 3.

⁶⁰ *Id.*

⁶¹ *Id.* at 10-53.

⁶² *Id.* at 7.

⁶³ *Id.* at 6.