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(E)Racing Youth: The Racialized Construction of California's Proposition 21 and the Development of Alternate Contestations

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(E)RACING YOUTH: THE RACIALIZED CONSTRUCTION OF CALIFORNIA'S PROPOSITION 21 AND THE DEVELOPMENT OF ALTERNATE CONTESTATIONS

NICHOLAS ESPIRITU¹

Niggaz with knowledge is more dangerous than niggaz with guns
They make the guns easy to get and try to keep niggaz dumb
Target the gangs and graffiti with the Prop 21 ...
I already know the deal but what the fuck do I tell my son?

Talib Kweli²

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I. INTRODUCTION

Associating with a gang member. Check. Group Photos with gang members. Check. Method of dress. Check. Loitering/Riding with member. Check. As I run down the criteria used by the Oakland Police Department to classify gang members, associates, and sympathizers,³ I am struck by how many of the individuals I grew up with, who had no gang affiliation whatsoever, would be referred to the Cal/Gang database and tracked by the state of California as gang members. Come to think of it, am I in this database?

Weekend nights in San Jose for many young Chicanos/as meant going downtown and "cruising." For my friends and I, it was no different. Sometimes we had a car,

¹J.D. Candidate, UCLA School of Law, 2004, Concentration in Critical Race Studies. I would like to thank Monica Kane, Susan Westerberg Prager, and Devon Carbado for their invaluable help with this paper. I would also like to thank Frank Valdez, Angela Harris, Margaret Montoya, and the staff of the Cleveland State Law Review for helping me make the most of this opportunity.

²Talib Kweli, *The Proud, on QUALITY* (Rawkus Records 2002).

³*Criteria Used by Oakland Police Department to Classify Gang Members, Associates, and Sympathizers*, at <http://www.colorlines.com/waronyouth/Pages/opd4.html> (last modified Mar. 22, 2004).

but this time we didn't, but no matter, we would walk up and down the packed boulevard in a modern reenactment of the Mexican courting rituals that had gone on for centuries in small towns in Mexico. Dressed in the clothes that were the uniform of my generation of youth color (prior to their adoption by mainstream culture), we would spend the night looking for flashily dressed girls and at the flashier cars. To us, the similarities in dress signified stylishness, but to the police, they were verification of what they already suspected because of our race: our membership in gangs.

As always, the police were out in force to try to make sure there wasn't any "trouble." There was no way this was going to deter us from a Saturday night on the strip, but when we approached, the police stopped and forced us to produce identification. Out came the cards they kept on them to record the information they would take from us. They would take our names, home addresses, the names of those we were with, and any tattoos we had, in addition to taking our pictures. We were sure that this information was being used for the gang database they kept. If their criteria was anything like that used by the Oakland Police Department, I was probably a gang member in the eyes of the San Jose Police Department.

Though accustomed to the routine, it still raised all our ire. We would talk among ourselves, indignant that the police were allowed to do this. Do the police keep records of the tattoos of white youth? Do the police stop white youth for no reason other than that they are white?⁴ Do the police use trivial infractions such as anti-cruising laws to harass white youth in their neighborhoods because they assume that the individuals are drug dealers or gang members?⁵ Do the police shoot white youth in the back just because they think they might get away?⁶ Why are we criminalized and treated more harshly just because of our race?

⁴Mexican appearance is an impermissible justification if it is the only factor, however, it can be used as one of many factors in the justification for a stop. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

⁵*See Whren v. United States*, 517 U.S. 806 (1996). The Court said that a pretextual stop did not violate the Fourth Amendment as long as there was some underlying probable cause for the stop. *Id.* *See also* Devon W. Carbado, *Eracing The Fourth Amendment*, 100 MICH. L. REV. 946, 1033 (2002) (claiming that the "Court recognizes Whren's race to deny him remediation and de-recognizes his race to deny the "important" police function blackness performs as a proxy for suspicion"). Professor Carbado highlights the way that the Fourth Amendment ignores the effect that race has in many facets of Fourth Amendment jurisprudence and delineates how this ignoring of purposeful erasure of race constructs a racialized conception of Fourth Amendment rights. *Id.*

⁶*See Tennessee v. Gardner*, 471 U.S. 1 (1985). Gardner, a slight 14 year old, fleeing from the scene of a home burglary was shot in the back and killed because he was presumed to be dangerous. *Id.* These questions raised in this paragraph all were part of the dialogue that my friends and I would have about our roles *vis a vis* the police state. Although most law students probably only deal with issues such as this in the context of case analysis or in a hypothetical, I dealt with this in high school, when my friend was shot in the back by police as he tried to flee from his car. These scenarios are debated and discussed because they form the lived experiences of young people of color, and become part of the context within youth of color situate themselves in the existing social structure.

For some time the Court has been moving toward a conceptualization of youth as being a group that needs policing and control.⁷ However, the rationale that mandates the level of control differs depending on which group of youth is to be controlled.⁸ An analysis of the intersectionality of age, race, and gender demonstrates these differing conceptualizations of the necessary control and how it subordinates and criminalizes youth of color, and creates a racialized conception of youth.⁹

Illustrating the way in which conceptions of race and crime shapes and is shaped by law is California's Proposition 21. Enacted in 2000, Proposition 21, also known as the Gang Violence and Juvenile Crime Prevention Act,¹⁰ was the product of California's direct democratic process through which voters are able to change the California Constitution through a simple majority vote. The proposition system has been employed in California as a tool of majoritarian domination, subjugating communities of color.¹¹ These racialized measures have been constructed in a race neutral manner, utilizing and reinforcing the discourse of colorblindness.

Although the drafters construct the racial dialogue in this way, the racial effect of such laws is well known to them, and its racial impact is well documented. The interest groups behind such legislation are cognizant of what messages will appeal to voters, and draft the legislation and the media campaigns surrounding them to garner the broadest support.¹² Racialized tropes have been successfully deployed in the past, and the interest groups have capitalized on the racial appeal of this legislation through various discourses ranging from xenophobia to colorblindness, formal equality, and reverse racism.

The drafters of these racialized propositions employ the rhetoric of colorblindness because it can withstand constitutional challenges under current Equal Protection jurisprudence. Thus, they can take advantage of the limited ways in which racially subordinating law can be contested. Moreover, the rhetoric of colorblindness also works because it comports with the general societal idea of

⁷See *Bd. of Educ. of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). The Court ruled that random, suspicion less drug testing was permissible for high school students participating in after school sports. *Id.* See also Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 104 (1996) (celebrating the increased power to control students that was authorized by recent Supreme Court decisions because it would make it difficult for schools to be institutions of social reconstruction).

⁸Kenneth B. Nunn, *The End Of Adolescence: The Child As Other: Race And Differential Treatment In The Juvenile Justice System*, 51 DEPAUL L. REV. 679, 707-09 (2002).

⁹See Kimberle Williams Crenshaw, *Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243 (1991) (discussing the necessity to analyze the way in which intersectionality shapes subordinating experience).

¹⁰http://primary2000.ss.ca.gov/Voter_Guide/Propositions/21yesarg.htm (on file with author).

¹¹See *infra* Sections II and III.

¹²LYDIA CHAVEZ, *THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION* 42-3 (1998).

formal equality,¹³ while still using a racialized conception of crime. In this way, the law both reinforces and creates racial construction through its sanctioning and defining of the racial landscape.

Thus, those contesting this legislation from an anti-subordination standpoint are left to determine and orchestrate innovative means of challenging these laws. There is debate over what can be done to effectively challenge these attacks in the socio/political realm. Conventional wisdom dictates that utilizing mainstream politics means utilizing social constructions with the greatest appeal to the largest mass of society. However, often this does nothing to contest the underlying systematic conceptualizations of race. Being forced to work within the dominant conceptualization of racial discourse allows for no adequate criticism of the ways in which the rhetoric of colorblindness is utilized for racial subjugation. Thus, this creates a disjuncture between theory and practice, forcing social justice advocates to adopt a rhetoric that does not allow for a real contestation of the ideology that undergirds this subjugating conceptualization of race.¹⁴

Part II address the ideological foundations of direct democracy and examine critically its ability to serve a democratic function. I examine the founders' rationale behind the decision not to employ a representative form of government, and look at direct democracy in California and the theoretical underpinning behind it. I argue that direct democracy has been used to oppress minority groups, partly due to the undermining of the structural protections in a representative form of government and that further, in the case of California, the racial impact of direct democracy was conceived at the inception of the system. Part III examines the socio-political landscape surrounding Proposition 21. I examine how the proposition system in California has been used to subjugate racial minorities throughout its history. Part IV highlights Proposition 21 and examine the discourse that surrounded youths, race, gangs, and crime at the time of the legislation and analyze the rhetoric employed in the campaign. Part V looks to how this legislation has been challenged, both through traditional litigation and through progressive tactics. I evaluate the strategies' liberatory potential and argue that creating greater transparency in racial dialogue is important from an anti-subordination standpoint and argue that this is necessary to mobilize and empower those most affected by these laws, to create the social change necessary to rectify racial injustice and contest the current discourse on race and class in society. I conclude with some suggestions on how to best build coalitions and steps that need to be taken to move forward with the struggle.

II. IDEOLOGICAL FOUNDATIONS AND CRITICAL ANALYSIS OF DIRECT DEMOCRACY

In 1911, as part of the Progressive reform movement in California, the initiative, referendum, and recall were added to the State Constitution, in large part to destroy

¹³Kimberle Williams Crenshaw, *Race, Reform, And Retrenchment: Transformation And Legitimation In Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378 (1988) (defining Formal Equality as "the disappearance of these symbols of subordination" signaling "the demise of the rhetoric of white supremacy as expressing America's normative vision").

¹⁴Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 838-39 1995 (discussing the necessity to "name" racism, and directly engage white supremacy).

the political influence of the Southern Pacific Railroad.¹⁵ A 1948 amendment to the California Constitution conceptualized a system that would allow for more accurate participation in the proposition system by the common citizen, and thus created safeguards such as the Single Subject Rule¹⁶ to ensure that the voters be able to decide on clear, specific and discrete changes to California law that have been properly presented before them.¹⁷ Despite this stated desire for greater public participation in the political process, one of the methods used to garner support for the proposition system was to enlist xenophobic and racist organizations.¹⁸

The proposition system in the state of California operates as a form of superlegislature, since it can be used to alter the California Constitution. Consequently, the ability to make sweeping changes to the state government with a simple majority of votes means that the proposition plays a huge role in the creation of public policy.¹⁹ To get a proposition on the ballot in California, supporters must gather signatures from five percent of the registered voters in the state if it is a statutory initiative, and eight percent if it is a constitutional initiative,²⁰ with the signatures often being collected by professional signature collection firms.²¹ Public knowledge about the propositions, and thus voter sympathies, are often developed through the use of mass media, with some groups spending tens of millions of dollars for media time to advance their agendas.²² There is no real limit on financial contributions to these campaigns, and thus the party that is able to raise the most resources will be in a good position to influence public opinion.²³

¹⁵http://www.ss.ca.gov/prd/about_the_division/history.htm (on file with the author).

¹⁶CAL. CONST. art. II, § 8(d). The single subject rule reads: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." See generally Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983) (arguing that the single subject rule serves neither the function of avoiding confusion by clarifying the issues or nor that of preventing logrolling).

¹⁷<http://www.aclunc.org/criminal/prop21-brief-sf.html> (on file with the author).

¹⁸DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984).

¹⁹David B. Magleby, *Governing By Initiative: Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 21 Table 1 (1995).

²⁰*Id.*

²¹CHAVEZ, *supra* note 12, at 135.

²²See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1569 (1990). For example, in 1988 \$100 million dollars were spent on the battle over the various competing insurance reform propositions, the majority of which was spent by the insurance companies. See also Becky Kruse, Comment, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CALIF. L. REV. 129, 141 (2001). More recently, over \$100 million was spent on a recent initiative allowing Indian gaming.

²³See Kruse, *supra* note 22 (comparing two articles that demonstrating that there is differing opinion on money in campaigns); BETTY H. ZISK, *MONEY, MEDIA, AND THE GRASSROOTS* 90-109 (1987) (finding in a study conducted of fifty ballot propositions between 1976 and 1980 that the high spending side won eighty percent of the elections); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice*

The late Professor Julian Eule critiqued direct democracy, claiming that it lacks many of the essential power filters to stem the tyranny of the majority.²⁴ During the founding of this country, the Federalists argued that a representative form of government alone would not be enough because they feared government leaders might prove too responsive to popular will and would still succumb to majority tyranny. To prevent such a situation, they divided the power among several branches,²⁵ and came to see the adoption of the bill of rights as “another device for filtering majoritarian preferences,”²⁶ and Professor Eule lists several filters to ward against majoritarian tyranny in the representative process.²⁷

Professor Eule considers direct democracy to be problematic, because although a rhetoric of formal equality has been adopted, there has been a continuation of racially oppressive legislation.²⁸ Part of this is attributable to what Professor Charles Lawrence terms “unconscious racism.”²⁹ Voters, though no longer making decisions on overtly racial basis, still are influenced by the racialized hegemony of this country’s culture. Thus, even though formal racism has been disavowed, legislation that has a disparate racial impact is able to pass because the predominant construction of racism only condemns the overt mention of race, while containing no mandate that public and private decisions be made from an anti-subordination standpoint. Professor Eule points to the then-recent passage of the waves of racist, xenophobic, English-only legislation by direct democratic plebiscites.³⁰ Professor Derrick Bell has also been critical of direct democracy, claiming that despite its promise to include the voice of the common man, it has weakened the ability of minorities to participate in the political process because it allows racialized legislation to pass into law, unchecked by the representative process.³¹

Professor Eule points to the problems of current equal protection law that limit the ability of racial minorities to challenge these racialized propositions. Under

Theory and the First Amendment, 29 UCLA L. REV. 505, 519-47 (1982) (examining twenty-five California propositions from 1968-1980 with heavy, one-sided spending and finding that the high spending side was successful for forty-six percent of initiative proponents and ninety percent of initiative opponents).

²⁴See Eule, *supra* note 22.

²⁵*Id.* at 1528.

²⁶*Id.* at 1530.

²⁷*Id.* at 1555-56.

²⁸*Id.* at n.223 (quoting Kimberlé Crenshaw, *Race, Reform, Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1347 n. 62 (1988)).

²⁹Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987). Lawrence posits a connection between unconscious racism and the existence of cultural symbols that have racial meaning. He suggests that the “cultural meaning” of an allegedly racially discriminatory act is the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly.

³⁰Eule, *supra* note 22, at 1567.

³¹Derrick Bell, *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 9, 13-18 (1978).

Washington v. Davis disparate impact is not enough to trigger strict scrutiny under the Equal Protection Clause.³² Thus, because many of the propositions are constructed in a race neutral manner, they would be adjudicated using a rational basis test and are unlikely to be overturned. Professor Eule suggested that propositions that negatively impact minority groups should be given a judicial “hard look when:”

the people eschew representation, courts need to protect the Constitution's representational values. This approach might be called representation-enforcement in contrast to John Ely's representation-reinforcement model for review of legislative efforts. Where the structure itself is unable to guarantee a hearing for a variety of voices or to prevent factional domination, courts must pick up the slack and ensure that the majority governs in the interests of the whole people.³³

However, this conceptualization has never been adopted by courts, leaving minorities to deal with an unchecked direct democracy that, in at least the case of California, has been used as a tool of racial subjugation.

III. CALIFORNIA'S RACIALIZED PROPOSITIONS

California's recent history has been littered with numerous examples of propositions that have either directly or indirectly affected the educational and social opportunities for people of color in California. Proposition 14, which repealed California's Fair Housing Act, was the first of these racialized propositions.³⁴ Many later propositions have either directly or indirectly focused on youth of color. In the 1978, California's Proposition 13 limited the monies available to school districts by changing the ways property tax could be assessed. This had a disparate effect on children of color because they were overrepresented in public schools and thus were most drastically affected by the change in the law.³⁵

³²426 U.S. 229 (1976).

³³Eule, *supra* note 22, at 1559.

³⁴CAL. CONST. art. I, § 26; See Nisha Vayas, *One Step Forward, Two Steps Back: The Fair Housing Controversies of 1960s California* (2002) (unpublished manuscript, on file with author)

³⁵Martha S. West, *Equitable Funding of Public Schools Under State Constitutional Law*, 2 J. GENDER RACE & JUST. 279, 310 (1999). West writes, “I worry that wealthier white people simply do not want to pay for the education of poor children, many of whom are children of color. One of the problems we face in California is that the characteristics of the people who vote differ remarkably from the characteristics of the students who are enrolled in our public schools. In 1994-95, public school students were only 41% white, whereas the voters in 1996 were 77% white. Voters in 1996 were 10% Latino, whereas public school students were 38% Latino in 1994-95. Voters were 4% Asian American; public school students were 8.2% Asian American. The discrepancy was not so great among African Americans: 6% of voters; 8.7% of public school students. The largest discrepancy between students and voters is among Latinos, due to the increasing number of Latino children in the public schools whose parents are not active voters, are not registered, or are not eligible to register because of immigrant status.” See generally Kevin R. Johnson & George A. Martinez, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law: Discrimination by Proxy: The Case of*

In 1994, the passage of Proposition 187 harkened the beginning of the wave of propositions that would directly and dramatically affect communities of color in California.³⁶ Proposition 187 was an attempt to limit the services and benefits available to undocumented persons, including undocumented children. Some of its provisions included the denial of emergency medical services to undocumented persons, and the exclusion of undocumented children from public schools.³⁷ It required many public agents including public school teachers to report suspected undocumented children.³⁸

While Proposition 187 was for the most part eviscerated in the federal courts by *League of United Latin American Citizens v. Wilson*,³⁹ its political success emboldened its supporters to continue pressing their agenda, and solidified the potential of the proposition system as a successful vehicle for the reactionary agenda.⁴⁰ The rhetoric that was employed to support Proposition 187 was directed primarily at Latino immigrants, thereby reinforcing a racialized conceptualization of immigration status. The pro-Proposition 187 campaign capitalized the growing anti-immigrant sentiment in a mid-recession California, using images of immigrants running unchecked across the Mexico-California border and other rhetoric centering on the loss of jobs and threat to the economy that would supposedly come with continued immigration from Latin America.⁴¹ While Proposition 187 may have created an existing backlash against the Republican party and certain prominent proponents of the measure,⁴² it also revealed the usefulness of nationalistic, xenophobic, and racialized discourse to build support for conservative legislation.⁴³

The passage of Proposition 209 in 1996 effectively ended affirmative action for racial minorities in California's public educational institutions. Ironically titled the "California Civil Rights Initiative," this amendment to the California Constitution used rhetoric of colorblindness, meritocracy, and reverse racism to appeal to California voters. The proponents of this campaign legitimated their agenda using concepts of formal equality, thus billing the proposition as being anti-racist because

Proposition 227 and the Ban on Bilingual Education, 33 U.C. DAVIS L. REV. 1227, 1237 (2000) (Commenting on Proposition 13's particularly onerous consequences for Latinas/os).

³⁶CHAVEZ, *supra* note 12, at xi.

³⁷*Id.* at 37.

³⁸*Id.*

³⁹997 F. Supp. 1244 (C.D. Cal. 1997). The court granted summary judgment to the initiative opponents, in part, where federal immigration law directly preempted the initiative provisions, and where federal law and the state regulation were in conflict. The court continued the preliminary injunction that prevented implementation because the evidence was in conflict as to whether several provisions were totally or partially preempted by conflicts with federal law.

⁴⁰CHAVEZ, *supra* note 12, at 179.

⁴¹Nancy Cervantes, et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 5-6 (Fall, 1995).

⁴²A.G. Block, *The Legacy of Proposition 187 Cuts Two Ways: Democrats Can't Count on the Fear Tactic Forever*, L.A. TIMES, April 7, 2002, at M2.

⁴³CHAVEZ, *supra* note 12, at 40.

of its colorblind stance.⁴⁴ The proponents of the proposition described it and themselves as antiracist, creating a discourse that labeled their opponents as racist whenever they stressed the proposition's racial impact.⁴⁵ Constructing race consciousness as being equal to racism was a strategy that proved very useful in passing this amendment.

Among Proposition 209's opponents, there was a split in the ideology of how to contest the construction of race-consciousness as racism. Some argued that they should equate proponents of the proposition with David Duke and other overt and uncontestable racists.⁴⁶ However, others felt it was better to adopt language that utilized the dominant paradigm of formal equality, and argue that affirmative action was still necessary to achieve this goal, akin to President Clinton's, "Mend it, don't end it" rationalization for affirmative action.⁴⁷ This indecision about how to construct race and racism led to the lack of a coherent message that could adequately contest the pro-Proposition 209 campaign.⁴⁸

Also successful was California's Proposition 227. Billed as "English for Our Children," this proposition also won by a landslide.⁴⁹ This proposition aimed to end bilingual education in California. While the proposition was ostensibly about providing a better education for all children, many scholars and community leaders argued that it would in fact have a detrimental impact on children of limited English proficiency, eliminating programs that had been in place to provide education for children and replacing it with legislation that was proposed by individuals with no educational experience or expertise.⁵⁰ Some have argued that the animating purpose of laws such as this that limit the breadth of linguistic freedom are rooted in a nativist philosophy that disenfranchises other language speakers and posits them as un-American.⁵¹ In this way language serves as a proxy for race, and racializes language and linguistic ability.⁵²

⁴⁴*Id.* at 187-89, 217-22.

⁴⁵*Id.* at 187.

⁴⁶*Id.* at 226-30.

⁴⁷*Id.* at 155.

⁴⁸Lawrence, *supra* note 14.

⁴⁹Johnson, *supra* note 35, at 1227 (reporting that Proposition 227 passed by a margin of sixty-one to thirty-nine percent).

⁵⁰CHAVEZ, *supra* note 12, at 46-7. Proposition 227 was drafted and supported by businessman, Ron Unz, who was also a financial supporter of Proposition 209.

⁵¹Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 369-70 (1992). Perea argues that current official English laws symbolize the rejection of this nation's Hispanic heritage and culture, a heritage legal history amply bears out. This heritage predates the English in some areas of the United States and remains vitally alive. Official English laws symbolize the rejection of the other non-core cultures of recent immigrants and Native Americans. Proof of the nativist meaning of the official English symbol lies in the history of the movement and in the distress, anger, and threat its proponents express in response to the mere presence of several languages on voting ballots. The animating premise of the official English movement is that Hispanic people, and their language, do not belong within the concept of what is American. The movement's demand for disenfranchisement, its rejection of Spanish and other

IV. PROPOSITION 21

When they be speaking in code words about crime and poverty
 Drugs, welfare, prisons, guns and robbery
 It really means us.

Dead Prez⁵³

On March 7th, 2000, over sixty percent of voters approved California's Proposition 21, titled the "Gang Violence and Juvenile Crime Prevention Act."⁵⁴ One of the major provisions in this proposition involved a change in the waiver procedure used to prosecute juveniles as adults. Previously, prosecutors could file a "fitness" hearing in which a judge would determine whether or not to try juveniles as adults. Proposition 21 allows prosecutors to circumvent the "fitness" hearing and to directly charge youth as young as fourteen years old as adults.⁵⁵ Under some circumstances, Proposition 21 even confers mandatory adult jurisdiction for certain offenses. Finally, Proposition 21 allows for increased surveillance, tracking, and invasion of privacy for "Gang Members," by allowing the use of "wiretaps" against known or suspected gang members and requiring anyone convicted of a gang-related offense to register with local law enforcement agencies. The measure increases the extra prison terms for gang-related crimes to two, three, or four years. However, if they are serious or violent crimes, the new extra prison terms would be five and ten years, respectively. In addition, this measure adds gang-related murder to the list of "special circumstances" that make offenders eligible for the death penalty. It also makes it easier to prosecute crimes related to gang recruitment.⁵⁶

As mentioned above, Proposition 21 was passed as part of a wave of racialized propositions. White Californians consistently supported propositions 187, 209, and 227, while minorities opposed them, often staging protests and rallies in the campaign against them.⁵⁷ As part of then-Governor Pete Wilson's push for a presidential campaign, he and his political allies once again mobilized anti-minority

American languages for voting purposes, sends a powerful message of rejection and exclusion to certain segments of the American citizenry, defined by national origin. It is a familiar message of rejection experienced by unpopular groups in this society. This message, targeted principally at Hispanics, and the resulting discouragement of non-English-speaking citizens from voting, constitutes a serious defect in the political process of the kind that merits heightened judicial scrutiny.

⁵²Johnson, *supra* note 35, at 1230

⁵³Dead Prez, *Propaganda*, on LETS GET FREE (Loud Records 2000).

⁵⁴Mark Gladstone, *Proposition 21: Authorities Fear Fallout but Weigh Options: State and county officials brace for costly impact on courts and prisons as more juvenile lawbreakers are charged as adults*, L.A. TIMES, Mar. 9, 2000, at A3.

⁵⁵See ALEXIS HARRIS, SENDING "SOPHISTICATED" CHILDREN "UPSTAIRS": THE SOCIAL, LEGAL AND ORGANIZATIONAL CONTEXT OF CONTEMPORARY JUVENILE WAIVER PROCEEDINGS 8 (2002); Jennifer Taylor, Note, *California's Proposition 21: A Case of Juvenile Injustice*, 74 S. Cal. L. Rev. 983, 990 (2002).

⁵⁶http://www.lao.ca.gov/initiatives/2000/21_03_2000.html (on file with author).

⁵⁷CHAVEZ, *supra* note 12, at 198-201.

sentiment. Minority youth were an easy target, and public opinion polls showed that youth of color were perceived as the cause of the explosion of violent youth crime.

The passage of Proposition 21 was in part due to a perception of rising youth crime, and cities under assault by street gangs.⁵⁸ At the time of the campaign for Proposition 21, sixty-two percent of the American public believed that the youth crime rate was rising, despite youth crime being at its lowest level in decades.⁵⁹ This misperception was likely created by several factors, especially by an over-reporting of violent crime. From 1990 to 1998, the homicide rate was down thirty-three percent, while the network coverage of homicide rose four hundred and seventy-three percent.⁶⁰ There was also an overrepresentation of interracial crime where the victim was white, increasing the perception that people of color are responsible for the violence against whites and thereby racializing crime.⁶¹ Youth are also overrepresented in the coverage of violent crime. In California, sixty-eight percent of stories about violent crime involved youth, while only fourteen percent of arrests for violent crime involve young people.⁶²

The media representations of young Black males as “criminals” that began in the 1960s and 1970s still exist, but now Latino males are racialized as criminal as well.⁶³ This racialized perception of youth violence is mirrored in the decisions to move youth out of the juvenile justice system. While Blacks under eighteen years old make up twenty-six percent of all juvenile arrests, they constitute fifty-eight percent of all youth sent to state prisons. The Cal/Gang database and other gang monitoring systems are notorious for overrepresenting the number of youths actually involved with gang activity.⁶⁴ The factors used in the Cal/Gang database create a greater likelihood that minorities, who are more likely to grow up in environments where gangs are present, will be registered in the gang database, regardless of actual involvement in gang activity. In this way, the racialization of crime is furthered, constructing youth of color, regardless of actual gang affiliation, as gang members just because of their lived socioeconomic experience.

This racialized conceptualization of crime and gang membership functions to subordinate youth of color by criminalizing them on a de facto presumption of gang membership.⁶⁵ The generalized conception of gangs is of teen and young adult males, sharing a group identity, occupying a certain territory, and engaging in

⁵⁸Jane Twomey, *Media fuels fear about youth crime; Perception: If juvenile crime is at its lowest in decades, why do so many Americans believe otherwise?* BALTIMORE SUN, May 13, 2001, at 1C.

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.*

⁶³*Id.*

⁶⁴Ryan Pintado-Vertner, *How Is Juvenile Justice Served? Racially biased system just sweeps troubled youths under the rug*, S.F. CHRON., Feb. 27, 2000, at 1/Z1.

⁶⁵Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth, Race & Crime in the News*, at <http://www.buildingblocksforyouth.org/media/media.html>.

criminal activity.⁶⁶ They are generally from poor neighborhoods and consist overwhelmingly of youth of color.⁶⁷ While most youth gang members are of color, this does not mean that most youth of color are in gangs. Recent reports show that often there is a huge amount of over reporting of gang identification by police. Police in Los Angeles classify forty-seven percent of the city's African-American youth as gang members, and Denver classifies sixty-seven percent as gang members.⁶⁸ This over reporting and over classifying of youth of color as "gang members"⁶⁹ reflects the way in which gang membership is racialized. While nowhere near this percentage of youth are involved in gang activity, this evidences the fact that youth of color are perceived to be involved in gangs.

Studies of youth transfers to the adult system reveal further racial disparities. A recent study of the racial disparities in the criminal justice system in California prior to the changes brought about by Proposition 21 reveal that there are "imbalances that are stark and vast."⁷⁰ It showed that minority youths are 8.3 times more likely than white youths to be sentenced by an adult court.⁷¹ Some argument can be made that this disparity is due in part to minority youth being arrested more often for violent crime. Part of the reason for this is due to minority youth being 2.7 times more likely than white youths to be arrested for a violent felony, though part of this racial disparity is because decisions to arrest are often made on a racialized basis.⁷² However, once arrested, minority youth arrested for violent crime are 3.1 times more likely than white youth arrested for violent crime to be transferred to adult court.⁷³ Thus, there is a much greater disparity in the sentencing that white and minority youth receive for similar offenses.

Proposition 21 demonstrates and augments the racialization of youth status. The inter sectionality of youth, race, and gender is demonstrated in light of the differential treatment that youth of color receive. The criteria that judges used prior to the passage of Proposition 21 in determining "fitness" for the juvenile system also demonstrate the racialization of youth status.⁷⁴ The underlying concept of the juvenile justice system is that youth lack the full moral culpability that adults possess

⁶⁶Kim Strosnider, *Anti Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 105 (2002).

⁶⁷*Id.* at 105-06.

⁶⁸*Id.* at 106, n.40 (citing the Brief of Amicus Curiae Chicago Alliance for Neighborhood Safty et al.).

⁶⁹Joan Moore, *Gangs, Drugs, and Violence*, in *GANGS: THE ORIGINS AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES* 27-28 (Scott Cummings & Daniel J. Monti eds., 1993).

⁷⁰Mike Males & Dan Macallair, *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California*, at www.buildingblocksforyouth.org/colorofjustice/coj.html (last modified Mar. 22, 2004).

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.*

⁷⁴HARRIS, *supra* note 55, at 322.

because they are not fully mature and are still in the process of developing.⁷⁵ Thus, the focus of the juvenile justice system is on rehabilitation for these developing individuals who have gone astray. To be considered unfit for this system, juveniles must be considered fully developed individuals who are fully culpable for their actions, and thus irredeemable and unworthy of a system designed for rehabilitation.

Although the criteria used by judges under the previous system appeared to be race-neutral on their face, they were, in fact, racialized. Here, the process of judicial waiver set unrecognized boundaries for decision making, and delimit decision making in a way that enforces racial hierarchy. In a directed manner, judges utilized criteria for judicial waiver that reinforced the racialization of certain attributes because of their potential for overselection for youth of color.⁷⁶ Assuming gang affiliation connotes sophistication, the emphasis on drug crimes, and court's importance of "good families" and strong school attachment overselects for youth of color. These factors could easily be read to mean that the youth that possess them need extra rehabilitation because they have not had the support networks non-similarly situated youth have had, instead youth of color they are disproportionately lock up.

The courts differentiate between youth, decreeing that some are not worthy of rehabilitation due to their "sophistication." In this way the courts and the legal system construct a racialized conception of youth. By "sophisticating" or placing the full moral culpability that is reserved for adults on some youth, they are creating differing categories of youth. By making these sophistication-based determinations using criteria that overselects for the socioeconomic realities of youth of color, they are racializing the concept of youth. Youth of color lose the conceptualization of being morally redeemable and worthy of rehabilitation.

There is little reason to think that the modification of the waiver system under Proposition 21, which allows prosecutors to directly file charges against youth in the adult system, will reduce the racial disparities, rather, several factors will most likely exacerbate them. (The ability of overtly political agents to file adult charges directly allows for politics, rather than other criteria, to be the determining factors.) As demonstrated, public opinion about crime and race means that pressure will be on prosecutors to sentence these youth severely. Previously, youth of color were overrepresented in those youth who had fitness hearings and were subsequently determined to be fit. If prosecutors are allowed to directly file charges against youth in adult court, the check of the fitness hearing will be removed; thus, these youth of color will most likely be sentenced in adult court, exacerbating the number of youth in the adult prison system.⁷⁷

⁷⁵*Id.* at 4-5.

⁷⁶See Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L. J. 1717, 1820 (2000) (discussing the institutional, path racism that judges would use in their selection of grand jurors).

⁷⁷HARRIS, *supra* note 55, at 106.

V. CHALLENGES

A. Court Challenges

The first youth to be charged as an adult through the direct prosecutorial waiver was a sixteen year old charged with murder for fatally wounding a sixty-seven year old woman in a drive-by shooting that was allegedly meant for a rival gang member.⁷⁸ However, the first constitutional challenge to Proposition 21 came from a less likely source. The challenge came in *Manduley v. Superior Court*,⁷⁹ a case in which several white teenagers attacked the Latino residents of a makeshift labor camp east of Del Mar, California. The youth were charged with beating several victims who were in their 60s and 70s, with clubs and metal rods, and shooting them with a pellet gun while shouting racial epithets. Two of the youth involved had their cases adjudicated through the juvenile justice system, while the other two who were deemed most culpable were charged as adults and sentenced to ninety days each in state correctional facilities.⁸⁰ The parents appealed unsuccessfully.

This case highlighted the racialization of Proposition 21. One of the parents of the *Manduley* defendants, Debra Manduley, claims she did not understand what the proposition was really about, but now she feels the measure is unjust.⁸¹ Op-ed commentaries from the public in response to her claim pointed out that she and other white parents just did not realize that the law could be applied to their (white, hate crime perpetrating) children. They supported what they believed was a measure against violent and gang related (Black and Latino) youth.⁸² Although there may well have been confusion about what this measure would do,⁸³ the overwhelming majority vote to pass the proposition can easily be read as a demonstration of the majoritarian will to pass a racialized measure.⁸⁴ It was a community expression of who is considered a unredeemable, adult criminal, and who is considered to be a youth who made a mistake and just needs some guidance to get back on the right track. Here, the parents of these white youth felt that their children deserved rehabilitation and special consideration because they were young, despite the overt racism that motivated the attack. This is a far cry from the conceptualization of what constitutes the perceived youth crime epidemic, in which minority youth are perceived as vicious, irredeemable criminals.

The *Manduley* defendants appealed the rulings on several grounds, including separation of powers, the single subject rule, due process, and equal protection. They were unsuccessful in their appeal, effectively shutting off further litigation in

⁷⁸TAYLOR, *supra* note 55, at 984.

⁷⁹104 Cal. App. 2d 140 (2001).

⁸⁰Tony Perry, *Teens Get Jail for Hate Crime Attack*, L.A. TIMES, June 29, 2002, at 12.

⁸¹Alex Roth, *Teen-Ager Charged in Rampage Speaks Out; Youth Calls Role in Attack on Latino Workers Minor*, S.D. UNION-TRIBUNE, Feb. 1, 2001, at B1.

⁸²Perico Diaz, Opinion editorial, *Justice is Cruel When it Hits Home*, S.D. UNION-TRIBUNE, Feb. 9, 2001, at B11.

⁸³See Kruse, *supra* note 22 (arguing that misleading adds harm the effectiveness of the proposition as a true representation of the will of the people).

⁸⁴Eule, *supra* note 22, at 1519.

these areas.⁸⁵ The California Supreme Court found there were no grounds to even bring an Equal Protection Claim. However, even if they had been able to, they most likely would have been unsuccessful due to the current nature of Equal Protection jurisprudence. Currently, a facially neutral law can only trigger strict scrutiny if it is shown that there was the intent to discriminate; a disparate impact is insufficient. Thus, it would be difficult to trigger this stricter standard of review that would likely be necessary to overturn the law. Under the rational basis test that would be used, the law would most likely be upheld. This lesser standard would be used despite the racialized motivation behind the passage of this legislation. While the proposition utilized racialized concepts of such as “youth crime” and “gang relation” that effectively act as proxies for race, these are insufficient to trigger strict scrutiny. Thus, despite the racialized nature of the proposition, and the racialized motivation for its passage, opponents would most likely fail in bringing an Equal Protection challenge.

However, if a judicial “hard look” would be given to this legislation because of its disparate impact on subordinated minorities, the law might be invalidated.⁸⁶ If the court were to “enhance their sensitivity to the quality of suspectness”⁸⁷ then the use of racialized concepts such as gang status, or definitions of youth criminality might be sufficient to deem Proposition 21 as attempting to utilize a “suspect classification.” This is unlikely to happen given the current conceptualization of race and racism.

While the California Supreme Court rejected all of the major constitutional challenges to Proposition 21 put before it,⁸⁸ two possible choices for Court challenges remain. The prosecutorial waiver provision can still be challenged through a separation of powers argument,⁸⁹ and the gang affiliation provisions may still be able to be challenged through the vagueness doctrine.⁹⁰

B. Political Challenges

California is already a majority-minority state,⁹¹ and, by 2025, Latinos are projected to be a near majority.⁹² This provides some hope that the initiative process will no longer be a tool that can be used to effectively subjugate minority groups.⁹³ With no one group constituting a majority of the population, it may become more difficult to pass such divisive legislation. However, several obstacles remain for this to be a viable option.

⁸⁵TAYLOR, *supra* note 55, at 1016-17 (“The court rejected a multipronged attack on the juvenile justice measure, including claims that it violated separation of powers doctrine, that it deprives juveniles of due process of law, and that it violates the Equal Protection Clause.”).

⁸⁶Eule, *supra* note 22, at 1533.

⁸⁷*Id.* at 1568.

⁸⁸TAYLOR, *supra* note 55, at 1019.

⁸⁹*Id.*

⁹⁰*See generally* Strosnider, *supra* note 66.

⁹¹<http://www.census.gov/prod/2002pubs/censr-4.pdf> p.98 (on file with author).

⁹²<http://www.census.gov/population/projections/state/stpjpjpop.txt> (on file with author).

⁹³Lou Cannon *The New Americans* WASH. POST, Aug. 11, 1996, at C07.

Historically, there has been low voter power within the Latino community.⁹⁴ There are a myriad of social factors that contribute to the historically low minority voter participation. Latinos are overrepresented in the lower ends of the socio-economic scale, and this contributes to them having much lower educational achievement than the general population. Both of these factors correlate with low voter turn out.⁹⁵ Latino population growth is in part fueled by immigration, both documented and undocumented, thus many Latinos who are affected by these laws have no voice in elections. Latinos are also overrepresented in felony convictions,⁹⁶ which effectively bar those convicted from being able to participate in the political process through voting.⁹⁷ The passage of Proposition 21 means that Latinos youth, who are overrepresented in both the juvenile justice system and the judicial waiver process,⁹⁸ will have a significant number of their youth transferred into the adult criminal justice system and convicted of felonies, thereby ending their ability to vote before they ever are eligible to participate.⁹⁹

Furthermore, there are economic hurdles to be overcome for progressives contesting racialized propositions. The supporters of such propositions are often very well funded. For example, Proposition 21 was funded by the Hilton Corporation, Chevron, Pacific Gas & Electric, Unocal 76, San Diego Gas & Electric and others.¹⁰⁰ Even if there were a progressive voter base large enough to successfully contest the passage of these racialized propositions, the financial realities of trying to mobilize such a population create in contesting the legislation.

These realities disadvantage grassroots organizations because, as stated previously, just getting a proposition on the ballot requires a large investment of manpower and money to collect the necessary signatures. Most grassroots organizations lack the resources to mount a successful signature garnering campaign. Further, the need for media access to mount an effective campaign limits the viability of utilizing the proposition system to effectuate progressive social change. Access to mass media requires a significant amount of money, and this poses a problem for low income groups, effectively limiting access to this supposedly more

⁹⁴CHAVEZ, *supra* note 12, at 36.

⁹⁵Kim Cobb, *Americans Uninspired by Election* HOUSTON CHRONICLE, Oct. 29, 2000, at A1.

⁹⁶<http://www.nccd-crc.org/> (on file with author).

⁹⁷Tanya Dugree-Pearson, *Disenfranchisement-A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLIN J. PUB. L. & POL'Y 359, 372-80 (2002) (arguing that through disenfranchisement due to felony conviction, the minority vote is being diminished and the electoral process is being distorted).

⁹⁸<http://www.buildingblocksfor youth.org/issues/latino/facts.html> (on file with author).

⁹⁹Interview with Mary Claire Gatmaiten, Intern, University of California, Cooperative Extension in Contra Costa. Youth recently interviewed found it especially troubling that these laws which were directly affecting them were passed without their having any say. *Id.* When asked about Public Policy, the youth cited Prop. 21 as a source of frustration. *Id.* They argued that Prop. 21 was directed at youth, yet they legally could not vote on the issue. *Id.* They felt that all they could do was to tell their parents to vote against it, but often their parents were often at a disadvantage in terms of ability to vote. *Id.*

¹⁰⁰<http://www.colorlines.com/waronyouth/Pages/enemies.html> (on file with author).

directly responsive form of governance to those segments of the population with financial leverage. Thus, while the proposition system is perceived to be a movement closer to direct democracy, access to shaping the political agenda is delineated according to socio-economic status.

Even if these financial hurdles could be overcome, there remains the problem of how to garner public support for counterstrategies to the legislation. Two strategies are available to groups hoping to contest this legislation. One possible way is to shape the discourse so as to appeal to the greatest possible number of likely voters to hopefully defeat the legislation. Under this system, shaping the discourse in such a way as to appeal to the broadest possible population means adopting the dominant paradigm of racial construction in order to win the broadest possible appeal by bringing together those who oppose the subordinating laws despite differing interests or ideologies.¹⁰¹ While this may be effective in ensuring short-term victory, this is in fact problematic because it does not allow the dominant, subjugating discourses of race and racism to be contested in a meaningful way. Rather, by positing the discourse within the rhetoric of colorblindness, it merely reinforces this conceptualization, allowing the space to remain for this subordinating conceptualization of race, while reinforcing its legitimacy.

Thus, for social change to occur we must articulate a counterhegemonic concept of race, the focus of which is anti-subordination. This runs into difficulty because concepts of racism that disavow colorblindness are delegitimated. Under this system, individuals wishing to contest racialized legislation by addressing the racial impact of this legislation have been marginalized and perceived as being counterproductive. Students wishing to contest the purported ethics of colorblindness undergirding Proposition 209 by attempting to highlight former Klansman David Duke's support for its passage were deemed to be extremists, and labeled as "Stupid Students."¹⁰²

This conceptualization of more progressive groups as extremist comports with the dominant ideal of colorblindness. To employ the concept of race in contesting this facially race neutral legislation directly confronts these ideals.¹⁰³ This confrontational discourse has been discredited in the dominant hegemony for some time now, and the voices that espouse it have been marginalized.¹⁰⁴ For this reason, contestations of this legislation that attempt to address its racialized nature in their discourse become discredited due to the "colorblind" and "race-neutral" majoritarian conceptualization as the acceptable racial discourse. Groups looking to voice the racialized nature of this legislation find their voices silenced as extreme, and thus, no adequate contestation of this legislation can occur, because the only voices legitimated are those operating under the "colorblind" mode of discourse, which offers no effective contestation to the current conceptualizations of race and crime which are shaping the dominant hegemony that undergirds the support for these racialized proposition.

¹⁰¹See generally Derrick A. Bell, *Brown v. Bd. of Educ. and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

¹⁰²CHAVEZ, *supra* note 12, at 203.

¹⁰³Gary Peller, *Race-Consciousness*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 150 (Kimberle Crenshaw et. al., eds., 1995).

¹⁰⁴*Id.* at 149.

Part of the difficulty in formulating an effective challenge to the dominant conceptualization of race is due to the discourse that has been developed through mainstream media. The way in which dialogue is constructed does not leave room for complex contestations of current racial paradigms.¹⁰⁵ Current mass media relies heavily on the use of quick, digestible, and attention-garnering forms of communication that do not allow for any sophistication of information or foster any kind of reflection on the ideas presented.¹⁰⁶ This simplification of discourse is problematic because it enables the dominant hegemony to continue by eliminating the viability of counterhegemonies.¹⁰⁷ Thus, it becomes difficult to shift the dialogue using a medium that does not allow for critical reflection.

C. Theories on Alternate Contestations

A true contestation would mandate that a differing view of race and racism be the cornerstone of any anti-subordination movement, but as stated above, this will be difficult to do because neither the society at large nor the legal system, has adopted this conception of race and racism.¹⁰⁸ Courts very rarely are solely responsible for social change.¹⁰⁹ Even if they are acting as the tail end of agents for social change, their gains are easily stripped away due to shifting alliances of interests and changing social pressures.¹¹⁰

However, some have suggested that the ineffectiveness of traditional legal avenues necessitates attorneys adopting new and innovative strategies, such as the attorney becoming a facilitator of a community empowerment contest racially subordinating laws such as this.¹¹¹ Part of what must unfold is a grand scheme of the structure of institutions so that they can create a viable alternate vision of social institutions.¹¹² This conceptualization must be ingrained into the practice of anti-subordination lawyering, thus shaping the choices of legal strategies and discourses

¹⁰⁵CHAVEZ, *supra* note 12, at 81.

¹⁰⁶Eule, *supra* note 22, at 1517; NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS*, Ch. 9 (1986)

¹⁰⁷See Margaret M. Russell, *De Jure Revolution?*, 93 MICH. L. REV. 1173, 1192 (1995) (commenting on how critical race theory might seem to lead to frustration because of ever more embedded racism).

¹⁰⁸CRENSHAW, *supra* note 13, at 1386-87 (cautioning “Black people can afford neither to resign themselves to, nor to attack frontally, the legitimacy and incoherence of the dominant ideology. The subordinate position of Blacks in this society makes it unlikely that African-Americans will realize gains through the kind of direct challenge to the legitimacy of American liberal ideology that is now being waged by Critical scholars. On the other hand, delegitimizing race consciousness would be directly relevant to Black needs, and this strategy will sometimes require the pragmatic use of liberal ideology.”).

¹⁰⁹See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (discussing the efficacy of the courts in achieving social change)

¹¹⁰Bell, *supra* note 101.

¹¹¹See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

¹¹²*Id.* at 377.

to be utilized by social change advocates.¹¹³ Under this paradigm, it would be antithetical to adopt the rhetoric of colorblindness because in the end it would not challenge the existing social structure, rather it would only serve to reinforce it.¹¹⁴ Professor Gerald Lopez points out:

colorblind, radical populism never has been what it was made out to be. At some basic level, it is incoherent. In the name of effective coalition building, it tries to define out of existence the very differences—gender, ethnic, class, ideological—that define and give life to politics of all sorts. That’s how it can present itself (and be marketed) as a political stance for everyone, an ideology that goes down easily. Ultimately, too, that it serves most often to affirm, not to challenge the status quo.¹¹⁵

In order to contest Proposition 21’s racialization of youth and crime, progressive attorneys must eschew this rhetoric and instead take an anti-subordination standpoint in the manifestation of challenges. There must be the creation of alternate visions. The concept of political race¹¹⁶ is useful in both contesting this racialization and as an organizing concept. This form of race consciousness seeks to address the racialization of social institutions.

Dissatisfied with the way that the status quo was being legitimated, activists are attempting to establish contestations of the dominant ideologies of colorblindness and meritocracy. Recently, student interveners in *Grutter v. Bollinger*¹¹⁷ filed a separate motion to intervene because they felt that the ideology surrounding the University of Michigan’s arguments relied too heavily on traditional arguments based on the diversity rationale.¹¹⁸ Instead of emphasizing the rationales for affirmative action that currently carry the most saliency with the court,¹¹⁹ they offered an alternate contestation¹²⁰ with a focus on anti-subordination that does not reinforce the existing constructions of race and racism in this society.¹²¹ The development of this counterhegemony through student action in the form of days of action, panel discussions, teach-ins, and weeks of education surrounding affirmative

¹¹³*Id.*

¹¹⁴*Id.* at 373.

¹¹⁵*Id.*

¹¹⁶LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).

¹¹⁷188 F.3d 394, (6th Cir. 1999).

¹¹⁸Miranda Massie, *A Student Voice and a Student Struggle: The Intervention in the University of Michigan Law School Case*, 12 LA RAZA L. J. 231, 232 (2001).

¹¹⁹Mark R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CALIF. L. REV. 1299, 1371-72 (1999) (discussing Justice O’Connor’s uncertain support of the diversity rationale).

¹²⁰Massie, *supra* note 118, at 232.

¹²¹Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 951-66 (2001).

action,¹²² constitutes a form of praxis, incorporating theoretical understandings of race and racism developed through critical race theory and other theoretical disciplines, and incorporates their underpinnings into how legal contestations will be shaped.

Perhaps most importantly, this counterhegemony is being used as a form of liberatory pedagogy, where the lived experiences of students shape and direct the movement.¹²³ This student participation develops a “critical awareness of their role as Subjects of the transformation.”¹²⁴ Proposition 21, instead of serving as a moment of defeat and dissolution, has been a rallying point for youth of color and their allies. In the San Francisco Bay Area, mobilized by the repugnancy of Proposition 21, organized a campaign to fight back against the burgeoning prison-industrial complex in Oakland that was gearing up to build a new, massive, juvenile detention center.¹²⁵ A critical consciousness is formed through the active struggle against a juvenile justice system that overwhelmingly disadvantages youth of color. “Through hip-hop and spoken word, smart media advocacy, art, traditional street outreach, student activism, multiracial alliances, and creative coalition building” youth of color utilize “sophisticated strategies that young activists of color have developed to use power-building as a means of winning transformative social change.”¹²⁶ Through this resistance, centered on a reconceptualization of existing power structures, the youth in this movement rename social relations by recognizing their own agency. Eschewing the rhetoric of colorblindness, they offered up contestations of racial relations that utilize race consciousness as a tool to overthrow white supremacy and racial hierarchy.¹²⁷

IV. CONCLUSION

So what do I tell my son?¹²⁸

What do we tell our daughters and sons, sisters and brothers, students and friends? Only that the reality now is not one we named. The rhetoric of colorblindness hollow in our ears, and its underlying rationales are subordinating us. Tell them, it is ok to say so, and say it to whoever will listen. We let them know that

¹²²Massie, *supra* note 118, at 234.

¹²³PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (1971).

¹²⁴*Id.* at 120-21.

¹²⁵Tricia Rose, moderator, symposium Proceedings: *Building A Multiracial Social Justice Movement: Session Three: Books Not Bars: Confronting Criminal Justice Issues Through Multiracial Action: Introduction: Stopping The “Super Jail” For Youth: Youth Of Color With A Power-Building Agenda Transform Local Incarceration Politics*, 27 N.Y.U. REV. L. & SOC. CHANGE 63, 67-8 (2001 / 2002).

¹²⁶*Id.*

¹²⁷John M. Glionna, *Teens Gain in Fight Against Jail; Alameda County: Using Nonviolent Tactics of the Civil Rights Movement, Minority Youths Win Reductions in the Size, Funding of Juvenile Hall*, L.A. TIMES, Nov. 13, 2001, at C2.

¹²⁸Kweli, *supra* note 2.

their experiences are valid, and that they have the tools to make sense of it all. Tell them: Name yourself.