RACE MATTERED: RACIAL FORMATION AND THE POLITICS OF CRIME IN TERRITORIAL NEW MEXICO

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In this Article, Professor Gómez elaborates on Michael Omi and Howard Winant's theory of racial formation. First, she provides an empirical application of the theory to a particular legal context: criminal litigation in late-nineteenth-century New Mexico. Second, while Omi and Winant emphasize the theory's fit with mid- and late-twentieth-century racial politics in the United States, she extends the theory to explain racial dynamics almost one hundred years earlier. She identifies four distinct racial projects in San Miguel County, New Mexico, each of which played a substantial role in the criminal justice system: (1) racial pragmatism by elite European Americans; (2) racial respectability by elite Mexicans; (3) racial self-determination by middle-status Mexicans; and (4) race-baiting by lower-status European Americans. After describing and empirically illustrating each racial project, Gómez concludes by briefly reflecting on the links between the racial politics of this corner of territorial New Mexico and the racial dynamics in the larger American society.

INTRODUCTION

In their landmark work of 1986 (published in a second edition in 1994), Michael Omi and Howard Winant introduce a theory of "racial for-

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mation" based on the dialectical relationship between the state and race-based social movements. According to Omi and Winant, American society is suffused with race and race-consciousness, which, in turn, has both ideological and structural dimensions:

> This racial "subjection" is quintessentially *ideological*. Everybody learns some combination, some version, of the rules of racial classification, and of her own racial identity, often without obvious teaching or conscious inculcation. Thus are we inserted in a comprehensively racialized *social structure*. Race becomes "common sense"—a way of comprehending, explaining, and acting in the world. A vast web of racial projects mediates between the discursive or representational means in which race is identified and signified on the one hand, and the institutional and organizational forms in which it is routinized and standardized on the other.[1]

Fundamental to their theory is the notion that the state plays a major role in structuring both race and racism. Omi and Winant conceptualize the state broadly to include state institutions (such as the U.S. Supreme Court or the courts generally), state actors, government agencies, and government policies. Racialized social movements interact with the state, attempting to influence state policies, state actors, or state institutions. They explain the twentieth-century civil rights movement as involving a dialectical relationship with the state, interactions among state institutions, and, ultimately, backlash from conservative social movements opposed to the expansion of civil rights for racial minorities. Omi and Winant argue that this back-and-forth between the state and race-based social movements (both pro– and anti– civil rights) has characterized the United States since World War II.[2]

This theory has been tremendously influential across a wide array of disciplines, including sociology, ethnic studies, history, anthropology, and law. In law periodicals alone, *Racial Formation* has been cited in more than two hundred articles.[3] Many, though not all, of these articles fall within a still-emergent genre of legal scholarship known as Critical Race Theory.[4] It is not surprising that Omi and Winant's theory of racial formation has taken

1. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 60 (2d ed. 1994) (emphasis added).

2. *Id.* at 78–79 (footnote omitted).

3. Westlaw and LexisNexis searches conducted on Feb. 20, 2002, yielded 206 and 199 citations, respectively.

4. For an introduction to Critical Race Theory, see generally DERRICK BELL, RACE, RACISM AND AMERICAN LAW (3d ed. 1992); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2000).

root among critical race scholars, since both embrace a conception of race that is social constructionist and material.

Under this conception, race is viewed as socially constructed and historically contingent (rather than fixed and immutable).[5] At the same time, race is viewed as affecting the structure of social relations at the macro level and the shape of day-to-day interactions at the individual, micro level. Both aspects of this way of conceiving race conflict with how race is currently conceived in much legal doctrine.[6] Often, in Supreme Court jurisprudence, race is seen as or presumed to be fixed and immutable. At the same time, racial classification and racism often are assumed to be rare and fundamentally aberrational, rather than fundamental to the structure of society. In contrast, Omi and Winant and many Critical Race Theory scholars view race as socially constructed and yet still playing an important role in shaping today's society:

> [R]ace is a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies. Although the concept of race invokes biologically based human characteristics (so-called "phenotypes"), selection of these particular human features for purposes of racial signification is always and necessarily a social and historical process. . . .
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> [D]espite its [socially constructed nature], the concept of race continues to play a fundamental role in structuring and representing the social world. The task for theory is to explain this situation. It is to avoid both the utopian framework which sees race as an illusion we can somehow "get beyond," and also the essentialist formulation which sees race as something objective and fixed, a biological datum.[7]

The racial formation theory presents a compelling analysis of the politics of race and racism in America. In this brief Article, I seek to elaborate the theory in two respects. First, I will build upon Omi and Winant's emphasis on the state by more systematically applying the racial formation theory to the legal sphere. While the law looms large in any discussion of state institutions and policies, Critical Race Theory scholars have been slow to systematically apply the theory of racial formation to legal settings. In part, this may be due to a more general reluctance within the genre to empirically

5. For a summary of the social constructionist view, see IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

6. See generally the following sources describing race as fixed and immutable in legal doctrine: HANEY LÓPEZ, *id.*; RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE (2001); Barbara J. Flagg, *"Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

7. OMI & WINANT, *supra* note 1, at 54–55.

ground theory. My aim in this Article is to sketch a model for empirically applying the racial formation theory to a legal context. The execution is tentative, in that I have not yet fully worked out all the implications of systematically applying the racial formation theory to legal contexts, but I hope that it suggests an approach that might be emulated. I have chosen the criminal justice system in nineteenth-century New Mexico as a site for exploring the relationship between the state and racial projects—as a site for racial formation.[8] Through this examination, I hope to provide an illustration, more generally, of how Critical Race Theory can benefit from an empirically based analysis (whether qualitative or quantitative).

In addition, I seek to elaborate the racial formation theory in a second way, by extending Omi and Winant's analysis to an earlier time period. In some respects, this setting may strike as odd someone familiar with Omi and Winant's work, since their preoccupation is squarely with recent and contemporary U.S. history and politics (1945–1993).[9] They go so far as to claim that racial formations of the kind they discuss have become possible only relatively recently:

> Indeed, the existence of political channels for the expression of racial conflict is a relatively recent phenomenon. The broad sweep of U.S. history is characterized not by racial democracy, but by racial despotism, not by trajectories of reform, but by implacable denial of political rights, dehumanization, extreme exploitation, and policies of minority extirpation. Democracy has never been in abundant supply where race is concerned. *The very emergence of political channels through which reform can at times be achieved is an immense political victory for minorities . . . .*[10]

Certainly, Omi and Winant are correct in characterizing the American state—as long as it has existed and even in its early formation as a collection of British colonies—as largely brutal and authoritarian in its response to non-White racial minorities. The various American Indian peoples who were obliterated by British and American soldiers and settlers attest to this, the Africans who died en route to the Americas, those who were sold upon reaching the Americas, who were tortured by slave owners and overseers, and their ancestors who were victims to ongoing physical and psychological

8. This brief Article is part of a larger, ongoing research agenda that explores race and the law in the context of nineteenth-century New Mexico. For an introduction, see Laura E. Gómez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 LAW & SOC'Y REV. 1129 (2000).

9. OMI & WINANT, *supra* note 1, at 56, 58, 61, 78. *But cf. id.* at viii (claiming that concepts of race were always politically centered).

10. *Id.* at 79 (emphasis added).

brutality—all can attest to this.[11] To acknowledge that this has been the dominant response by the American state to non-White peoples, however, is not to say that it has been the only response. In this Article, I take issue with the claim that politicized racial conflict is an exclusively late-twentieth-century phenomenon. In at least one substantially earlier time and place, late-nineteenth-century New Mexico, a great deal of social conflict had a racial character, and this conflict regularly surfaced in the realm of politics and the operation of the state. Omi and Winant's theory of racial formation and, in particular, their concept of racial projects can be fruitfully applied to this context.

Applying their theory to the racial politics of territorial New Mexico yields several other benefits as well. First, examining the southwestern United States draws us away from the typical focus on African Americans as the paradigmatic American racial minority group.[12] A second benefit of examining a *multi*racial setting is that it invites consideration of how the presence of at least three sizable racial groups (Indians, Mexicans, and European Americans) affected the state's construction of a racial order that perpetuated White supremacy.[13] In particular, racial conflict between Mexicans and European Americans may have become politicized precisely because the population was multiracial and specifically because it included a sizable additional racial grouping (Indians from many diverse tribes) that was marked, relative to Whites, as more inferior than Mexicans.

A third advantage of centering racial politics in territorial New Mexico is to emphasize America's legacy as a colonial power. Typically discussions of race ignore the centrality of colonialism in understanding Mexican, Puerto Rican, Native American, Filipino, Native Hawaiian, and other now-American racial minority groups. As in other colonial contexts, Americans colonizers in northern Mexico had both a material and representational need for racial distinctions and racism: Americans needed race in order to justify their brutal conquest of Mexicans and Indians.[14] American imperial-

11. *See generally* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES (rev. & updated ed. 1995).

12. *See* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 LA RAZA L.J. 127 (1998), 85 CAL. L. REV. 1213 (1997); *cf.* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002) (arguing that the critique of the Black/White paradigm risks obscuring important differences among non-White racial minority groups).

13. The nineteenth-century South typically is viewed as a biracial, Black/White setting when, in fact, it too had a more complex multiracial character that has been insufficiently studied. *See, e.g.*, KAREN I. BLU, THE LUMBEE PROBLEM: THE MAKING OF AN AMERICAN INDIAN PEOPLE 169–99 (1980).

14. The United States negotiated the Louisiana Purchase in 1803. American settlers, with Mexicans in the region, formed the Texas Republic in 1836, and Texas became a U.S. state nine years later in 1845. The United States declared war on Mexico in 1846, and proceeded to claim territory in New Mexico and California.

ism in its most classic form—as overseas land-grabbing—occurred at the end of the nineteenth century, with formal U.S. acquisition of Puerto Rico, the Philippines, and Hawaii. But Americans had been moving westward on the mainland for some one hundred years before then, and this was no less an imperial project—to take land and resources and to decimate or subjugate non-White peoples.[15]

Finally, a focus on New Mexico reveals how politics and racism were inextricably intertwined in the Southwest. An American general declared U.S. rule over New Mexico in the summer of 1846 and the war with Mexico ended in 1848, with the land being formally ceded to the United States as part of the war spoils. In 1850, the U.S. Congress declared New Mexico a federal territory, but there were explicit debates in Congress and the press about the desirability of annexing a region populated with Mexican and Indian peoples marked as racially inferior within the nineteenth-century American racial order.[16] Despite various political initiatives for statehood from both within and outside the region, New Mexico remained a federal territory for sixty-two years. And even in 1912, when New Mexico was admitted to the Union, there was strong opposition to admitting a state where the majority of the population was viewed as racially inferior to Whites.[17]

The empirical data for my analysis comes from a review of court records in nearly six hundred criminal prosecutions in the New Mexico Territory's largest county during the late 1870s and early 1880s.[18] San Miguel County had a population of twenty thousand in 1880. Mexicans far outnumbered European Americans in the overall population (by a 9:1 ratio), but European American men were 20 percent of the county's enfranchised citizens.[19] I

15. For a discussion of how race and racism played a part in this territorial expansion, see generally REGINALD HORSMAN, RACE AND MANIFEST DESTINY (1981).

16. There are plentiful primary sources from congressional debates and newspapers that support this claim; for a more complete discussion of this, see Gómez, *supra* note 8, at 1140–41; *see also* PEREA ET AL., *supra* note 4, at 253–66 (discussing the U.S. war with Mexico and the Treaty of Guadalupe Hidalgo). The interested reader might welcome, as well, secondary sources that document the point. *See generally id.*; FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS (David J. Weber ed., 1973).

17. An important primary source for this claim is the transcript from the 1902 congressional hearings on New Mexico statehood. *See New Statehood Bill: Hearing on H. R. B. 12,543 Before the Senate Subcomm. of the Comm. on Territories*, 57th Cong., 2d Sess. 9 (1902) (revealing repeated interrogations of New Mexican political and judicial officials about their own use of Spanish and the use of Spanish in their communities); *see also* ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD 1846–1912, at 154–55 (1968).

18. San Miguel County District Court Records, 1876–1882, New Mexico State Archives and Records Center.

19. I use the term "Mexican" to refer to all Mexican-origin persons in New Mexico, regardless of their federal citizenship under the Treaty of Guadalupe Hidalgo (1848). Likewise, I use the term "European American" to refer to persons who were not Mexican, Indian, African American or Asian, without regard to the citizenship status of these persons. While they are not ideal, these terms have the benefit of being similar to the ethnic labels most frequently encountered in the

specifically examine the state apparatus that administered the formal criminal justice system: the district court (which operated at the county level), the territorial supreme court (the only appellate court in New Mexico), the professional actors who administered the criminal court (including judges, sheriffs, court clerks, court interpreters, prosecutors, and defense lawyers), laypersons central to the criminal court's functioning (grand jurors, petit jurors, and witnesses), and governmental officials who, though not directly part of the courts, interacted heavily with them (territorial legislators, the territorial governor [appointed by the President], and elected officials at the county level).

In this Article, I will argue that the racial formation theory as devised by Omi and Winant accurately describes the racial politics of territorial New Mexico. Specifically, the framework they present provides a useful means to analyze the interplay between competing racial projects and the state in the context of the criminal justice system. The next part presents an overview of the criminal process and criminal litigation in San Miguel County, New Mexico, and describes the larger empirical data set. The heart of the Article is the next part, in which I describe San Miguel County's criminal justice system as a site for contesting racial ideology and racial inequality. In this setting, four distinct racial projects emerged: "racial pragmatism," embraced by European American elites; "racial respectability," advocated by Mexican elites; "racial self-determination," endorsed by middle-status Mexicans; and "race-baiting," employed by lower-status European Americans.

I. CRIME AND PUNISHMENT IN SAN MIGUEL COUNTY, NEW MEXICO

In 1880, San Miguel County was economically important as one of the first railroad stops in New Mexico for travelers from the East.[20] European Americans, as noted above, were 10 percent of the general population but 20 percent of male citizens. With the entrance of the railroad in 1879, the county quickly became an economic focal point, drawing merchants, distrib-

primary sources of the period (court documents, newspapers). In those documents, the labels "Mexicans" or "mexicanos" and "Americans" or "americanos" appeared most frequently (despite their inaccuracy in terms of nationality and/or ethnicity). I have avoided applying contemporary terms (such as Chicano, Hispanic, or Latino) to the Mexican-origin residents of territorial New Mexico because there is no evidence that these terms were used at this time and because they are politically charged. For a detailed discussion of the question of ethnic labels in this context and the source of the population and electorate estimates by racial category, see Gómez, *supra* note 8, at 1130 n.1, 1137 n.12.

20. WARREN A. BECK & YNEZ D. HAASE, HISTORICAL ATLAS OF NEW MEXICO illus.58 (map) (1969).

utors, bankers, and land speculators, as well as a host of migrant laborers.[21] The presence of a sizable non-native population, coupled with that population's control of the local and regional economy, generated pressure for a functioning court system to handle disputes of all kinds, but especially those involving commerce.[22] The data analyzed here cover seven years of criminal litigation, beginning three years before the railroad's arrival and continuing for four years after its entrance.

The Americans established a district circuit court, created county-level probate courts, and also substantially weakened the power of the local justices of the peace.[23] San Miguel County was part of the First Judicial District, whose presiding judge was the Chief Justice of the Territorial Supreme Court.[24] Each year, the district court held two 5–10 day sessions in each county, at the county seat.[25] In addition to the presiding judge, the court clerk, court interpreter, and some dozen lawyers rode circuit, holding court in each of the six counties of the First Judicial District. When the district court came to town every March and August, Las Vegas went into full gear. The town's several hotels, boarding houses, eateries, and saloons were busy catering to court officials, jurors, witnesses, reporters, and litigants from around the county (and sometimes further afield). Criminal trials were a

21. DAVID REICHARD, COLONIALISM AND THE COURTS IN TERRITORIAL NEW MEXICO 121–23 (forthcoming 2003) (on file with author); Anselmo F. Arellano, Through Thick and Thin: Evolutionary Transitions of Las Vegas Grandes and Its Pobladores, 248–261 (1990) (unpublished Ph.D. dissertation, University of New Mexico) (on file with author).

22. For a study focusing on commercial disputes, see REICHARD, *supra* note 21.

23. The American occupation heralded tremendous changes in New Mexico's legal system, although there remain questions about the degree to which formal changes in the legal system seeped down to influence daily life. American military officials declared American control of several New Mexican villages during the summer of 1846, at the outset of its hostilities against Mexico. Although they were later deemed to have acted without authority, they attempted to implement an American legal system based upon an amalgam of state law and procedure from Missouri and Kentucky. Four years later, in 1850, Congress officially declared New Mexico (then joined with present-day Arizona) a federal territory and in the same act instituted a legal system modeled after the states' systems. Only a handful of studies have explored whether and how these colonial legal systems actually functioned, and my own research suggests that as late as 1870—more than twenty years after the American conquest—many New Mexico counties continued to function with little or no activity in the American district courts. For a more thorough discussion of the issues raised here, see Gómez, *supra* note 8, at 1145–58.

24. During this era, it was not uncommon in American jurisdictions for appellate judges to serve also as trial judges, *see generally* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 255–58 (1993), but it nonetheless suggests that the ordinary assumptions about judicial review may not apply.

25. Importantly, the district courts actually functioned as two courts in one, or one court with two layers of jurisdiction, each operating at the county level: The district court was the federal trial court and also the territorial-level trial court. The two courts essentially were run by the same personnel and held consecutive terms in each county, with the presiding judge riding circuit. The presiding judge and court clerk were the same for the two courts, as were the members of the bar. The prosecutor differed, however, as either the U.S. Attorney for New Mexico or the New Mexico Attorney General. My analysis consists only of the territorial-level criminal trial court cases.

focal point of community interest. A murder trial typically drew a packed audience in the courtroom, and sometimes even dozens of spectators on the courthouse steps. Newspapers in Las Vegas, Santa Fe, and Albuquerque covered civil and criminal trials in San Miguel County, as well as the more mundane happenings of the district court, extending the courtroom audience still further and making the criminal court an important site for social conflict.

In thirteen sessions held in San Miguel County between 1876 and 1882, the district court disposed of 598 criminal cases.[26] There was a very steep rise in prosecutions in 1879, the year preceding the entrance of the railroad, and this upward trend continued throughout the period observed. Overall, between 1876 and 1882, there was a fivefold increase in the district court's criminal caseload. Moreover, the most frequently prosecuted crimes suggest the increase in the population of single, male, European Americans in a community that was rapidly changing from a subsistence agriculture to a market-oriented economy.[27] The single largest category of prosecutions was for gambling crimes ("permitting gaming"—that is, running a gambling table in one's bar or other place of business—or playing cards). Gambling offenses accounted for 40 percent of all prosecutions. Gambling was a typical vice crime: a victimless crime that lots of people were committing, and so an easy way for the sheriff and prosecutors to arrest and to discipline a wayward community of young, single men.

The next two largest crime categories were also related to a rapidly changing economy and to the presence of many new migrants. Property crimes were 20 percent of all prosecuted crimes, while violent crimes (murder, assault with intent to kill, and a handful of rape cases) were 16 percent. One of the most interesting general trends is that European American men, who comprised 20 percent of adult males, were *over*represented in each of

26. The typical path of a criminal trial was not unlike that of today. First, a crime was reported to the county sheriff, and after investigation by law enforcement officials, the district judge or a justice of the peace issued a warrant for an arrest. Next, the attorney general decided whether or not to file charges in the form of an information (for a small class of less serious offenses) or indictment. Then, a seventeen-man grand jury certified or rejected each proposed indictment. If the grand jury certified the indictment (rejected indictments were rare), the defendant was arrested (if he was not in custody already), and sometimes posted bail. Finally, the defendant entered a plea of "guilty" or "not guilty," and the case made its way through the criminal litigation process. If the offense occurred while the court was in session, the entire proceeding (from arrest to sentencing) might be completed within two weeks. More typically, cases that began out of session and that went to trial took twelve to eighteen months to resolve. My distillation of criminal case processing in San Miguel County in the late nineteenth century, is based, first, on consultation of the statutory guidelines for criminal practice in New Mexico Territory, and, second, on my review of more than six hundred criminal case files from this period. *See* Revised Statutes and Laws of the Territory of New Mexico in force at the close of the session of the Legislative Assembly Ending February 2, 1865 (R.P. Studley & Co. 1865); *id.* (1859).

27. For an elaboration of this claim, see Gómez, *supra* note 8, 1158–68.

the major crime categories, relative to Mexican men, who comprised 80 percent of adult males. European Americans were 75 percent of gambling defendants, 50 percent of violent crime defendants, and 40 percent of property crime defendants.

TABLE 1. CRIMINAL PROSECUTIONS BY CATEGORY AND RACE. (SAN MIGUEL COUNTY, 1876–1882). SOURCE: SAN MIGUEL COUNTY DISTRICT COURT RECORDS, NEW MEXICO STATE ARCHIVES AND RECORDS CENTER.

Crime Category	% (rounded) of Crimes Prosecuted	% (rounded) of European American Defendants	% (rounded) of Mexican Defendants
Gambling Offenses	40	75	25
Property Crimes	20	40	60
Violent Crimes	16	50	50

How were these six hundred criminal cases processed? Fifteen percent, or ninety-three cases, went to trial. In nearly 20 percent of the cases prosecuted in San Miguel County, defendants pled guilty to the original charge or to a lesser offense. One-third of the defendants charged with gambling crimes pled guilty. Although direct evidence of plea bargaining is difficult to find, indirect evidence exists: In some cases, defendants pled guilty to one charge and the prosecutor dropped remaining criminal charges against them, and in other cases defendants pled guilty to a lesser offense. These cases suggest that prosecutors engaged in plea bargaining, especially with repeat-offenders in the gambling area.[28] For those gambling defendants repeatedly indicted over the course of the seven years examined, especially those charged with permitting gaming, costs and fines likely came to be viewed simply as part of the cost of doing business.

The great majority of criminal cases, nearly 70 percent, were dismissed either by the trial judge (16 cases) or by the prosecutor (383 cases). Court records reveal that prosecutors exercised three different types of dismissals, each of which may have implications for how the four racial projects attempted to use the criminal justice system to influence the racial ideology

28. For a discussion of the issues associated with identifying plea bargaining in a historical context, see FRIEDMAN, *supra* note 24; LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870–1910 (1981); ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA 1800–1880 (1989); Albert W. Alschuler, *Plea Bargaining*, 2 ENCYCLOPEDIA OF CRIME & JUST. 829–36 (1983); Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211 (1979); Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830–1860*, 33 LAW & SOC'Y REV. 161 (1999).

and state policies. The most common type of prosecutorial dismissal was the *nolle prosequi* (literally, "not wishing to proceed"); in these cases, the prosecutor changed his mind about pursuing the case and, importantly, did not have to justify his decision to the court or to the public. Perhaps as many as one-third of dismissed cases (including eighty-seven prosecutions for property crimes and fifty prosecutions for violent crimes) were dismissed via the notation "stricken with leave to reinstate," which was used when the defendant had eluded capture by law enforcement officials (a frequent occurrence in a sparsely populated, geographically large area with few law enforcement officers). The remaining cases dismissed by the prosecutor were "dismissed with costs to the defendant." These dismissals arose almost exclusively with respect to gambling charges. They suggest that gambling offenses were viewed as relatively minor and that the dismissal with costs may have provided a win-win situation for both repeat-defendants (who avoid conviction) and prosecutors and other court personnel (who recouped court fees without full-blown litigation). Nearly two-thirds of all gambling cases were dismissed, almost all in this way.

II. Racial Formation in Territorial New Mexico

Omi and Winant describe race as having both structural and ideological dimensions.[29] Race is structural in that it influences the building blocks of the social structure—organizations and institutions. These entities in turn produce racial inequality in the form of unequal outcomes. Race is ideological in that it exerts a powerful influence on cultural representation and discourse generally. It is through such ideological channels that people internalize and naturalize racial difference and hierarchy.

Likewise, Omi and Winant suggest that racial projects—the agendas put forward by racialized social movements—have both structural and ideological components to them:

> A racial project is simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines. Racial projects connect what race means in a particular discursive practice and the ways in which both social structures and everyday experiences are racially organized, based upon that meaning.[30]

Thus understood, a racial project seeks to disrupt the current racial order in two ways. First, each racial project has an ideological component: It involves an effort to interpret (or reinterpret) or present (or re-present) race, racial identity, or racial dynamics. Second, each racial project has a struc-

29. *See* Omi & Winant, *supra* note 1, at 56.
30. *Id.* (emphasis omitted).

tural dimension: It involves an effort to redistribute resources or affect outcomes along racial lines.

Racial projects, thus, have both a descriptive and a normative component. They describe their world in racial terms, and they seek to change that world in a normative sense. Racial projects can be big or small, may occur at the micro or the macro level, and can come from any point on the political spectrum (that is, there can be rightist racial projects as well as leftist racial projects). Larger, more developed racial projects are the work of social movements—people organized for the purpose of promoting one or more racial projects. Of course, these social movements may exist for other reasons (the racial project may be only one part of a larger agenda), but their work around a racial project is a central part of their political agenda.

In this part of the Article, I will argue that the patterns of crime and punishment in territorial New Mexico reveal several different, often competing racial projects. Significantly, the four racial projects come from diverse combinations of race and class locations.[31] I will explore racial projects undertaken by European American elites, Mexican elites, middle-status Mexicans, and lower-status European Americans. These projects reveal that race was highly contested in late-nineteenth-century New Mexico and that these politicized contests revolved around state institutions and actors, including the courts and criminal justice system officials. The picture that emerges is, after all, not so different from the one we have seen in the late-twentieth-century United States. In both periods, racial projects attempt to influence state actors and policies and, when they succeed, spur countermovements or political backlash. In this way, racial ideology and racial inequality take different forms in response to these contests. The racial formation theory thus highlights the dynamic, constantly changing nature of racial ideology and racial inequality in both historical periods.

The politics of crime in territorial New Mexico provided a state-controlled arena in which the four distinct racial projects could assert their structural and ideological agendas. The first racial project—what I will call "racial pragmatism"—was an effort by European American elites to entrench their power by legitimizing the criminal justice system through the partial incorporation of Mexicans as jury commissioners, grand jurors, petit jurors, and bailiffs. Importantly, the most powerful positions in the system re-

31. Very likely, a number of other important categories (such as gender) interact with these four race/class combinations in ways that produced noteworthy racial projects in territorial New Mexico. The nature of the data utilized here, however, privilege men's voices for two reasons: one, because women were formally excluded from the jury box (since citizenship was limited to males and jurors had to be citizens) and two, because men made up the overwhelming majority of criminal defendants (among the nearly six hundred cases examined, fewer than 1 percent involved female defendants).

mained under the control of European American elites: judges, prosecutors, and defense lawyers. A second racial project—that I will call "racial respectability"—was animated by Mexican elites' efforts to refute claims of Mexican inferiority by emphasizing Mexicans' equality with Whites. Within the context of the politics of crime, this racial project defended the Mexican-dominated jury system against racist attacks by European Americans. Middle-status Mexican men pursued a third racial project—what I will call "racial self-determination"—in their capacities as the bulk of petit jurors in the county. In this role, they sought race-based alliances and greater power vis-à-vis elite Mexican men and European Americans of all social classes. The fourth racial project—what I have labeled "race-baiting"—consists of lower-status European American men engaged in race-conscious litigation strategies that exploited racial fissures in the society. These men were strangers to New Mexico and disproportionately accused of crimes, and their racial project sought to reconcile New Mexico's racial landscape within the larger context of antebellum White supremacy.

A. Racial Pragmatism

For European American elites who occupied prominent appointed political positions, from the governor to the three justices of the territorial supreme court, New Mexico's demographics presented particular problems of legitimacy. In the earliest phase of the American conquest of the region, the role of the criminal justice system was simply to function as a rubber stamp for the motto "might makes right." Rule by force was the goal, with little thought given to rule by consent.[32] Later, however, Mexicans' continuing demographic dominance (in the general population and, most importantly, among voters) made it necessary for European American elites to attempt to legitimize their conquest of and continuing presence in New Mexico, and the law proved a powerful tool.

32. A brief examination of the first criminal court proceedings in New Mexico, held in 1847, less than one year after the American takeover and a year before the Treaty of Guadalupe Hidalgo was signed, is revealing. One commentator called the it "a Trader's and Trapper's court" because of the prominence of European American merchants in the court, including a French Canadian trader who served as presiding judge despite the fact that he possessed no legal training. Francis T. Cheetham, *The First Term of the American Court in Taos, New Mexico* 1 N.M. HIST. REV. 23, 23–41 (1926). The only trained lawyer in the courtroom was the U.S. Attorney. The most significant cases on the docket were several stemming from armed Mexican and Pueblo Indian resistance to the American occupation that culminated in a midnight raid on the American governor's house in December 1846. The assassinated governor's brother served as foreman of the grand jury that handed down indictments for murder and treason in these cases. Fifteen Mexican and Taos Pueblo men were summarily hanged within a few days of their conviction, after being tried without legal representation. *See id*; *see also* LEWIS H. GARRARD, WAH-TO-YAH AND THE TAOS TRAIL (1955).

Instead of using the courts to justify rule by force, by the 1870s, European American elites sought to use the courts to justify American rule by consent. This racial pragmatist approach fully recognized the racial divide between Mexicans and European Americans, and yet it sought to suppress Mexican resistance by incorporating Mexicans into the political system. In the criminal justice context, strategies for incorporating Mexicans included inducing Mexicans to bring their disputes to the district court,[33] making the courts accessible to Mexicans by conducting a fully bilingual court, utilizing Mexican personnel in positions like court bailiffs, and, most centrally, drawing Mexican men into court as grand and petit jurors.[34]

What is more, this strategy had to be explicit, given that other segments of the European American community steadfastly resisted Mexicans' incorporation. An opinion by Chief Justice Prince (who was both chief justice of the Territorial Supreme Court and the presiding trial judge in San Miguel County and other counties of the first district) vividly illustrates this project at work.[35] The defendant, Richard Romine, was a European American miner who argued that his conviction for first-degree murder was invalid because he was tried by an all-Mexican jury that had no English-speaking jurors.[36] In a decision that in several respects went further than it had to,[37] Prince ultimately defended the right of monolingual Spanish-speaking citizens to serve as jurors in New Mexico. This outcome was by no means inevitable. Less than a decade earlier, the Texas Supreme Court ruled that English literacy was an implicit requirement for jury service, declaring that monolingual Spanish-speakers could not serve as jurors even when they met the facial requirements for jury service.[38] The chief difference between the Texas and New Mexico contexts was that Mexicans were a minority of the electorate in the former and a majority in the latter. Such demographics made governance by consent far preferable to governance by coercion, and the criminal justice system proved a useful vehicle for legitimizing the larger system of American control in New Mexico.

The presence of Mexican jurors, then, gave Mexicans a large stake in the system despite its external, initially violent imposition. The impact was to enhance the authority and functioning of the courts. This in turn allowed the still nascent American state to root itself and to expand, and also provided New Mexico with a "real" court system, itself an implicit require-

33. *See* Gómez, *supra* note 8, at 1152–58.

34. *See id.* at 1164–76.

35. *See* Territory v. Romine, 2 N.M. 114 (1881).

36. *Id.* at 116.

37. *See* Gómez, *supra* note 8, at 1186–87 (analyzing the substance and rhetoric of the opinion).

38. *See* Lyles v. State, 41 Tex. 172, 176–80 (1874).

ment for statehood. In addition to these symbolic dimensions, the day-to-day functioning of the courts and the willingness of both newcomers and natives to take their disputes there and abide by judicial outcomes, had material implications. Merchants and capitalists seeking to finance mining companies and other enterprises needed to have a functioning civil and criminal system; they needed to be able to take wayward debtors to court and to sanction those who asserted different notions of property (as in disputes over who owned a horse or a piece of land). Most significantly, the racial pragmatist position accomplished these goals without giving up real power and authority which, after all, remained largely in the hands of the European American judiciary and bar.

B. Racial Respectability

Evidence of the reaction to the racial pragmatist project by Mexican elites is harder to come by because they were uniformly excluded from the judiciary and largely excluded from the bar—positions in the legal system that resulted in documentary evidence available for historical review. One important written source, however, consists of Spanish-language newspapers, which offer a glimpse into the racial project that some Mexican elites seem to have adopted.[39] Based on a review of fifteen years (1875–1889) of the earliest Spanish-language newspaper in San Miguel County, *La Revista Catolica*, I argue that its Mexican editors carved out a peculiar racial project vis-à-vis the American criminal justice system.

During the first four years of its publication, the newspaper offered relatively little coverage of criminal justice proceedings, but in 1879 it began to cover the criminal courts more fully. From its beginnings, *La Revista Catolica* had rebutted anti-Mexican statements by European American visitors to New Mexico or federally appointed territorial officials. The increased criminal justice coverage intersected with this material in a new way beginning in 1879. The editors began to treat the criminal justice system as a site for resistance to anti-Mexican sentiment; in other words, by defending the criminal justice system (in particular, the jury system), the Mexican press essentially was defending the honor of Mexican people more generally.

39. Both Gabriel Meléndez and Doris Meyer deal with New Mexico's Spanish language press in the 1890s and, especially, into the early 20th century. My interest in this Article is in exploring earlier Spanish-language newspapers from a period that neither of them treats in any detail. *See* A. GABRIEL MELÉNDEZ, SO ALL IS NOT LOST: THE POETICS OF PRINT IN NUEVOMEXICANO COMMUNITIES, 1834–1958 (1997); DORIS MEYER, SPEAKING FOR THEMSELVES: NEOMEXICO CULTURAL IDENTITY AND THE SPANISH-LANGUAGE PRESS, 1880–1920 (1996).

An interesting instance of how this impacted the editorial position of the newspaper comes from its stance on lynching.[40] Between 1877 and 1878, the newspaper took positions *in favor* of "la ley lynch" or "los de lynch" (Spanish phrases roughly equivalent to "Judge Lynch"). For instance, they called lynching a "fatal necessity" because of problems with the criminal justice system, ranging from ineffective prosecutors to corrupt jurors and defense lawyers.[41] But in 1879, the newspaper took its first anti-lynching position, criticizing lynch mobs as fundamentally anti-Mexican.[42] Its anti-lynch stance was wrapped up with its increasing defense of Mexicans' growing prominence in the criminal justice system, as grand jurors, petit jurors, crime victims, witnesses, and bailiffs. Over time, the Mexican editors of the newspaper came to view European American defenses of lynching as efforts to indict the criminal justice system in which Mexicans played so prominent a role.[43]

The racial respectability project had both material and symbolic effects. Materially, Mexicans gained in any number of ways. Mexicans accused of crimes might have lower chances of being lynched and, as a result, the opportunity for a fair trial on the charges against them. Mexican newspaper editors who advocated racial respectability also were constructing a partisan Mexican market share, one that may have been more open to the Spanish-language newspapers that would later originate and thrive in San Miguel County. Symbolically, Mexicans had a ready response to critics of Mexican-controlled juries. Ultimately, Mexican men were defending their equality with European American men. In this regard, the racial respectability and racial pragmatist projects worked in tandem to justify Mexicans' incorporation into the criminal justice system and, ultimately, to legitimize the still nascent American state.

40. Although newspaper reports indicate that some Mexicans were killed by mob violence on the part of European Americans and that some Mexican or Indian mobs killed members of all three groups, by and large, lynching in New Mexico appears to have occurred primarily within the European American community, as an intraracial phenomenon. I am somewhat tentative in drawing this conclusion, since it is entirely possible that the English-language press underreported lynchings of Mexicans and Indians. Additionally, racialized lynchings may have been more common in counties such as Colfax or Grant, where European Americans were a larger portion of the population. *See generally* PORTER A. STRATTON, THE TERRITORIAL PRESS OF NEW MEXICO 1834–1912, at 175–95 (1969).

41. *Noticias Territoriales*, REVISTA CATOLICA, May 19, 1877, at 229; *La República Mejicana y "El Tiempo,"* REVISTA CATOLICA, July 14, 1877, at 332–35; *Noticias Territoriales*, REVISTA CATOLICA, Sept. 29, 1877, at 457; *Noticias Territoriales*, REVISTA CATOLICA, Mar. 9, 1878, at 109; *Noticias Territoriales*, REVISTA CATOLICA, Apr. 27, 1878, at 193.

42. *Crónica General*, REVISTA CATOLICA, June 14, 1879, at 277; *Actualidades*, REVISTA CATOLICA, Feb. 14, 1880, at 77–78.

43. European American newspaper editors continued to embrace lynching well into the 1880s. *See* STRATTON, *supra* note 40, at 176.

C. Racial Self-Determination

One of the most striking findings of my empirical research was that Mexican jurors dominated San Miguel County criminal trials in the 1870s and 1880s. Roughly one-third of more than ninety criminal trials during this period involved *all*-Mexican juries, and another third involved *majority*-Mexican juries.[44] The phenomenon of majority-Mexican juries passing judgment on European Americans accused of crimes was especially dramatic given the colonial context, on the one hand, and the late-nineteenth-century American racial ideology toward Blacks, on the other hand. I have argued previously that, in San Miguel County, petit jurors were less elite than grand jurors, and that jury service generally provided a welcome source of income[45] and served political party elites as a form of patronage.[46] All of this together suggests that Mexican jurors (especially those who sat on petit juries) usually were not elites (nor were they likely at the very bottom of the social ladder). Thus, the racial self-determination project was one embraced by middle-status Mexicans.

Here I want to argue that Mexican jurors embraced their own racial project, in the context of their role within the colonial criminal justice system. While it is important to avoid romanticizing the role played by jurors (given that European Americans controlled the most powerful roles in the court system), petit jury service gave middle-status Mexicans the opportunity to enact a performance of racial equality that challenged the norm of White supremacy.[47] At both the symbolic and material levels, Mexican jurors decided the fate of European American defendants, challenging the traditional, racialized hierarchy of colonizer/native. Even when they exercised leniency, as they frequently did given the relatively high rates of acquittal (compared to today's standards), Mexicans were exercising their power to grant mercy.

At the same time, in cases involving European American defendants, and perhaps more so in cases of alleged Mexican-on-Mexican crime, Mexicans' practical control of juries functioned as a check on potential racial bias against Mexican interests. Majority-Mexican grand juries checked European

44. The remaining one-third of jury trials likely did not involve majority–European American juries, but instead reflect a large number of case files in which data or jury composition was missing. For a more detailed discussion of Mexican jurors, *see* Gómez, *supra* note 8, at 1164–68.

45. A juror earned $20–$25 for serving in a 10–12-day session, plus meals.

46. *See* Gómez, *supra* note 8, at 1170–71.

47. Here I embrace the usage of "performance" of racial identity utilized by such writers as Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2000); Devon W. Carbado & Mitu Gulati, *Working Identity*, CORNELL L. REV. 1259 (2000); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998). They use "performance" to describe the process by which members of minority groups enact or resist the identity that has been assigned to them by the majority culture.

American prosecutors, and majority-Mexican petit juries in essence checked European American judges. Finally, the fact that middle-status Mexican men gained access to the jury box allowed them to assert greater power relative to Mexican elites than they had in the Spanish-Mexican legal and political systems.[48] For this reason, middle-status Mexican men may well have favored the more democratic American power structure. In short, the institution of the jury served the unintended purpose of being a site for self-determination by a community that increasingly viewed itself in racial terms and in opposition to European Americans.

D. Race-Baiting

The real power of all- and majority-Mexican juries is evident from the fact that many European American criminal defendants sought to avoid trial by juries they knew were very likely to be dominated by Mexicans. While not a single Mexican defendant opted for a bench trial, a handful of European American defendants did. Similarly, European American defendants entered pre-trial guilty pleas at three times the rate of similarly situated Mexicans.[49] In what I interpret as another effort to avoid Mexican juries, European American defendants were twice as likely as Mexican defendants to seek a change of venue. These trends reflect a fourth racial project—a concerted effort by some European Americans to exploit existing racial tensions for their personal advantage. Whereas those European Americans in the racial pragmatist camp tried to downplay such tensions, European American criminal defendants and their lawyers sought to magnify them by playing the race card as part of their litigation strategies.[50]

Four change-of-venue cases, in particular, offer insight into the use of race-conscious litigation strategies by European American defendants and their lawyers.[51] In each, a European American defendant was accused of murdering a Mexican, and the trial judge granted the defendant's motion to transfer the case from San Miguel County to a nearby county within the First Judicial District. In these four cases and in the other change-of-venue cases, transfers were made to three counties: Colfax, Mora, and Santa Fe Counties. I have estimated that Colfax and Santa Fe Counties each had a larger proportion of European Americans than San Miguel County and, hence, likely a larger pool of potential European American jurors. However,

48. For a discussion of the Spanish-Mexican legal and political system, see Gómez, *supra* note 8, at 1145–46.

49. *See id.* at 1150 n.48.

50. *See id.* at 1176–81 (documenting race-conscious jury selection strategies).

51. *See* Territory v. Rudabaugh, No. 1021 (N.M. San Miguel County Dist. Ct. 1881); Territory v. Flummerfelt, No. 892 (N.M. San Miguel County Dist. Ct. 1879); Territory v. Hommel, No. 820 (N.M. San Miguel County Dist. Ct. 1876); Territory v. Haines & Sheehan, No. 781 (N.M. San Miguel County Dist. Ct. 1877).

adjacent Mora County had a smaller European American population than San Miguel County. Although the historical record makes it impossible to discern the defendants' (and their lawyers') motives for seeking a venue change, the racial demographics of the counties, coupled with specific details of these cases, support the inference that some European Americans embraced race-baiting tactics. On the other hand, the two cases transferred to Mora County provide less support for this claim. Even in those cases, however, race-baiting tactics on the part of the defense cannot be ruled out because, at the time he filed a defense motion, the defendant would not have known to which county his case might be transferred.

In the first case, David Rudabaugh, an outlaw with ties to Billy the Kid's crime gang, was charged with the murder of Deputy Sheriff Antonio Valdez during a jail break. One of the key prosecution witnesses was a European American wagon driver, whom Rudabaugh and his partner had enlisted in their escape from the crime scene. He testified that when he asked them what had happened in the jail, the defendants had said, "'That greaser [Valdez] wouldn't give us the keys and we killed the son of a bitch.'"[52] Rudabaugh won his change-of-venue motion, but he was eventually convicted and sentenced to die for Valdez's murder. The verdict was handed down by a Santa Fe jury of six European Americans and six Mexicans—a jury with far more European Americans than all but a handful of San Miguel County juries during this period. Clearly, moving the trial to Santa Fe did not change the outcome in this case; given the strength of the evidence in this case and the defendant's violent reputation, it is virtually unimaginable that Rudabaugh would have escaped a first-degree murder conviction, no matter where he was tried. And yet, Rudabaugh's defense team knew full well that they had no hopes for leniency with a likely all- or majority-Mexican jury in San Miguel County. On the other hand, perhaps a jury with more European American members (who would not be offended by the defendants' racist remarks) provided a glimmer of hope, and Rudabaugh's lawyers knew that a change of venue provided such an opportunity.

The second of four interracial change-of-venue cases also presented a strong element of racial tension. In it, two members of the U.S. Sixth Cavalry, then stationed at Fort Union just north of Las Vegas, were charged with killing Julio Romero, a sheepherder.[53] Charles Haines and Thomas Sheehan also were charged with assaulting Antonio and Rafael Romero in the same incident. This case is among the most racially charged criminal cases during this period, because it involved not only an interracial defendant/victim

52. *Id.*

53. *Haines & Sheehan*, No. 781; *see also* Territory v. Sheehan, No. 767 (N.M. San Miguel County Dist. Ct. 1877); Territory v. Haines & Sheehan, No. 777 (N.M. San Miguel County Dist. Ct. 1877).

dyad, but also because the defendants were members of the colonizing military force that, in 1875, likely was seen very much as a hostile force by the majority of Mexicans in the region. *La Revista Catolica*, the only newspaper edited by Mexicans in the Territory at that time, reported that the killing "caused a lot of protest in Las Vegas" and that Sheehan and Haines were drunk and rough-housing when they killed Julio Romero and, by some accounts, looking to bother Mexicans when the violence occurred.[54] The soldiers were represented by an impressive defense team in Thomas Catron, who already had gained a name as the prosecutor in the Third Judicial District, and Joab Houghton, one of the original New Mexico Supreme Court justices appointed provisionally in 1846. The defense promptly and successfully moved for a change of venue to Santa Fe County. At the Santa Fe trial, the defense argued that the wrong men had been nabbed and portrayed the several eyewitnesses as vengeful relatives who were willing to hang the wrong men as long as someone paid for the crime. An all-Mexican jury could not agree on a verdict, and the prosecutor decided not to retry the case.[55] In this case, the transfer from San Miguel to Santa Fe County did not result in trial by a jury with a substantial European American presence; indeed, the Santa Fe jury was an all-Mexican jury. My argument here is not that the change of venue changed the outcome, but that racial tensions influenced the European American defendant and defense lawyers to seek a change of venue, gambling that their odds of getting European American jurors would be better (if still poor). In this instance, racial tensions were extremely charged—so charged that a change of venue probably was warranted.

The two remaining interracial murder cases in which European American defendants successfully sought to transfer their cases out of San Miguel County involved men of higher status and a longer tenure in the county, as well as cases transferred to Mora County, a district with a smaller European American population than San Miguel County.[56] John Flummerfelt was accused of the murder of Cornelio Flores; after his case was transferred to Mora County, a jury of nine Mexicans and three European Americans acquitted him. Although Flummerfelt was European American, his status as an out-

54. *Noticias Territoriales*, REVISTA CATOLICA, Mar. 3, 1877, at 97; *Noticias Territoriales*, REVISTA CATOLICA, Mar. 2, 1878, at 74. Similarly, the English-language *Acorn* reported that, immediately after the killing, a delegation of village leaders met with the military commander to demand a military investigation as well as full cooperation with civil authorities. THE ACORN (Las Vegas), June 8, 1875. My search in military records uncovered no evidence of a military investigation either before or after the criminal trial.

55. There is some question about the jury's ultimate position. The absence of a written verdict in the file and the clerk's notation indicate a hung jury, but *La Revista Catolica* reported that the jury acquitted the soldiers. *Noticias Territoriales*, REVISTA CATOLICA, Mar. 3, 1877, at 97.

56. *Flummerfelt*, No. 892; *Hommel*, No. 820.

sider, vis-à-vis Mexicans, may have been lessened because of his marriage to a Mexican woman and his adoption of a Spanish first name in some social contexts.[57]

Louis Hommel was not so lucky when his trial was transferred to Mora County in 1876—he was convicted by an all-Mexican jury and sentenced to die for killing Andres Duran.[58] Hommel was a German immigrant to the United States, who had come to New Mexico to found a newspaper in Las Vegas in the early 1880s; he married a Mexican woman and was fluent in Spanish.[59] Hommel's motion for a venue transfer may have been more compelling because one of the key eyewitnesses, Vidal Ortiz, frequently had served as a juror and very likely would have known those likely to serve as jurors.[60] Hommel's case also was notable in that he claimed to fear vengeance from a Mexican lynch mob.[61] In the end, despite his conviction and death sentence, Hommel was spared execution by the governor.[62] His wealth and political connections as a newspaper editor likely enhanced his appeal and ultimately illustrates the impotence of Mexican juries when European American governors chose to override their verdicts.

Together, these four racial projects suggest that the criminal justice system, as one site for influencing the American state, provided fertile ground for racialized political and social conflict. No less than today, the politics of race intersected with the politics of crime in a complex and nuanced way. While the elites advocating racial pragmatism and racial respectability sought to downplay overt racial fissures, middle-status Mexicans promoting a project of racial self-determination and lower-class European American defendants sought to magnify and to exploit these same racial divisions. In the end, these racial projects showed, collectively, that race mattered a great deal in territorial New Mexico.

CONCLUSION

In this Article, I have sought to draw our attention to territorial New Mexico for the purposes of empirically applying Omi and Winant's theory of racial formation to a specific legal context and refuting the claim that the theory applies only in the context of the post–World War II United States. I have suggested that racial politics in territorial New Mexico were robust

57. TENTH CENSUS OF THE U.S. (1880) (enumerating San Miguel County, including Juan Flummerfelt).

58. *Hommel*, No. 820.

59. STRATTON, *supra* note 40, at 211 n.12, 236 n.47.

60. Vidal Ortiz served as a grand or petit juror seven times between 1876 and 1882 in San Miguel County.

61. *Hommel*, No. 820.

62. STRATTON, *supra* note 40, at 211 n.12.

and complex and, in many respects, not as different from recent and contemporary racial politics as we might have assumed. Looking closely at a specific place and time has allowed us to see these complexities in sharp relief. At the same time, one of the weaknesses of a case study approach like this one often is the failure to situate the specific case in the larger context. Here I make an initial, incomplete effort to do so, seeking to place the racial politics of territorial New Mexico within the larger context of late-nineteenth-century American racial ideology.

Specifically, how do we reconcile the story I have told about New Mexico's racial politics with contemporaneous experiences of Mexicans in other places and of other racial groups, including African Americans, various Indian tribes, and Chinese immigrants? Jim Crow laws were at their apex during the period I have studied here, and they were to be legitimized and further entrenched with the Supreme Court's 1896 ruling in *Plessy v. Ferguson*.[63] New Mexico's Mexican men retained substantial political agency, partly as a result of the provisions of the Treaty of Guadalupe Hidalgo and partly because of demographics (Whites' disinterest in migrating, in substantial numbers, to New Mexico until well into the twentieth century). As a result, Mexicans were able to escape the fate of Blacks—they would never become victims of express subordination such as that evident in Jim Crow laws.

Yet European American newcomers to New Mexico needed to know how to make sense of the region's racial landscape: Where did Mexicans fit in the American racial order? In particular, where did they fit relative to Blacks? The relative spectacle of European American defendants' trials by Mexican juries must have been a powerful reminder that Mexicans were not in the same position as Blacks and that New Mexico was not the South. Ultimately, European American elites had to assert White supremacy in other ways: They blocked statehood until more European Americans populated the Territory; they held the most important positions (including, and always, those in the judiciary); and, Congress retained the right to overturn any law passed by the majority-Mexican territorial legislature. The competing racial projects that I have outlined here emerged to fill the void, the space between extreme racial subjugation (such as that experienced by Black Americans) and genuine racial equality.

63. Plessy v. Ferguson, 163 U.S. 537 (1896).