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Some are Born White, Some Achieve Whiteness, and Some Have Whiteness Thrust upon Them: Mexican Americans and the Politics of Racial Classification in the Federal Judicial Bureaucracy, Twenty-Five Years after *Hernandez v. Texas*

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**SOME ARE BORN WHITE, SOME ACHIEVE
WHITENESS, AND SOME HAVE
WHITENESS THRUST UPON THEM:
MEXICAN AMERICANS AND THE
POLITICS OF RACIAL CLASSIFICATION IN
THE FEDERAL JUDICIAL BUREAUCRACY,
TWENTY-FIVE YEARS AFTER
*HERNANDEZ V. TEXAS***

*STEVEN HARMON WILSON, PH.D.**

This paper examines the problem of the racial and ethnic classification of Mexican Americans, and later, Hispanics, in terms of both self- and official identification, during the quarter-century after *Hernandez v. Texas*. The *Hernandez* case was the landmark 1954 decision in which the U.S. Supreme Court condemned the “systematic exclusion of persons of Mexican descent” from state jury pools.¹ Instead of reviewing the judicial rulings in civil rights cases, what follows focuses on efforts by federal judges in the Southern District of Texas to justify their jury selection practices to administrators charged with monitoring the application of various equal protection rules coming into force in the late 1970s.

This topic arises from two curious coincidences. First, in the spring of 1979, James DeAnda — who had helped prepare the *Hernandez* case, and who was plaintiffs’ attorney in another landmark to be described below, *Cisneros v. Corpus Christi Independent School District* — was nominated to a judgeship in the Southern District of Texas. He was confirmed by the U.S. Senate twenty-five years and one-week after the Court issued its ruling in *Hernandez*. Progress had been slow, as DeAnda became only the nation’s second Mexican American federal trial judge. He was sworn in by the first, Chief Judge Reynaldo Garza, who had served since 1961. Judge Garza would soon accept an appointment to the U.S. Court of Appeals for the Fifth Circuit, where he would also be breaking new ground for Mexican Americans.

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1. *Hernandez v. Texas*, 347 U.S. 475, 475 (1954).

Second, Judge DeAnda joined the court at a time when Judge Garza was embroiled in a struggle — fought via administrative memorandum — with a judicial bureaucracy in Washington, D.C., worried about the racial composition of the district's jury pools. The federal Jury Act called for random selection of names, usually derived from local voter registration lists, or from combined voters and drivers lists. Discrimination in juror selection was prohibited under section 1862, which states that, “[n]o citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status.”²

The trouble arose from a conflict regarding the application of this act to Mexican Americans: namely, were they “white” or “non-white,” for the purposes of the Southern District's jury wheel (as the tabulation was still known, even after the list was computer-generated)? The references — statutory, scientific, and cultural — were contradictory. This paper will explore this practical quandary through an analysis of the various memoranda exchanged by the concerned parties.

Before discussing these issues, however, it is important to consider the context of the judicial confusion that defined race, color and origin. Throughout the twentieth-century, Mexican Americans saw civil rights claims repeatedly obscured by their muddled position in the black-or-white regime of Jim Crow. This reality continues to bedevil the study of Mexican American civil rights. For example, for fifty years, *Hernandez v. Texas* has been seen as a landmark; yet, until quite recently, there has been little scholarly analysis of the decision, its winning and losing arguments, or its ultimate constitutional legacy.³

The *Hernandez* at 50 conference seeks to amend this situation by looking back and taking stock. The initial question to pose is, why the half-century of neglect? One answer might begin this way: perhaps the neglect is only apparent, in that the case has been consistently cited as precedent in subsequent cases. Yes, cited but passed over quickly. Or, this answer: perhaps the silence is proper. This is a milestone erected by pioneers, who left it behind them as they continued the momentous journey towards perfected social justice. However satisfying the image, this answer would be a romantic spin, not analysis. There are at least three other answers, less satisfying, but more revealing.

2. 28 U.S.C. § 1862 (2004).

3. As Clare Sheridan notes, her *Law and History Review* contribution was the first article to focus attention on *Hernandez*. See Clare Sheridan, “Another White Race”: Mexican Americans and the Paradox of Whiteness in Jury Selection, 21 *LAW & HIST. REV.* 109, 122 n.52 (2003).

First, most discussions of the case, including the caption announcement for this conference, will note that *Hernandez v. Texas* has not been given the prominence that it deserves because it arrived in the shadow of a more famous case. The *Hernandez* decision was handed down by the Supreme Court on May 3, 1954, just two weeks before the Court ruled in *Brown v. Board of Education*. The *Hernandez* decision immediately precedes *Brown* in the published U.S. Reports.⁴

Although the Court did not explicitly link *Hernandez* and *Brown*, the Justices' embrace of an expanded understanding of the equal protection clause in both opinions invites the logical association and constitutional comparison.⁵ Yet, it is *Brown* that compelled notice then, riveted attention in the decades since, and continues to be the subject of much analysis during this joint fiftieth anniversary year, during which *Brown* is not necessarily being celebrated.⁶

There are concrete reasons for *Brown's* greater prominence in law, history, and culture. The upheaval associated with court-directed racial desegregation of schools — promising to bring about racial-mixing of children, no less — picked at the oldest

4. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The timing of the cases was coincidental. The *Brown* decision joined various "School Cases" from Kansas, South Carolina, Virginia, and Delaware. A federal judge found in 1952 that black schools in the segregated Topeka district were substantially equal to the white schools, and therefore were permissible under the "separate but equal" doctrine established by *Plessy v. Ferguson*, 163 U.S. 537 (1896). The plaintiffs appealed on the grounds that separation rendered facilities unequal. The Justices heard arguments in the case twice. NAACP attorneys, specifically chief counsel (and future Associate Justice of the U.S. Supreme Court) Thurgood Marshall, first argued the case on December 9, 1952. A re-argument on December 8, 1953, was generally concerned with the historical context of the passage and ratification of the Fourteenth Amendment. In another companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court declared the segregated schools in the federal enclave of the District of Columbia to be unconstitutional. See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (2d ed. 1977).

5. Ian Haney López, *Hernandez v. Brown*, N.Y. TIMES, May 22, 2004, at A17.

6. *Brown* has been rightly treated as a landmark case, but recent books about the case have begun to question its long-term benefit to African Americans. For evidence of this revisioning of *Brown* as a limited victory in a long and continuing struggle against inequality see ROBERT J. COTTROL, ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001); see also KLUGER, *supra* note 4. The legal histories of Mexican Americans and African Americans are linked at an earlier point, since challenges to the segregation of Mexican students laid some of the groundwork for *Brown v. Board of Education*. In California, for example, *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) came seven years before *Brown*, and its progress was followed by the NAACP legal team. Yet, this proves the fact of the divide: this case represents the only mention Klarman makes of a Mexican American civil rights tradition (and that mention comes in a footnote). See generally KLARMAN, *supra*, 190 & n.49.

scars in American society, while *Hernandez's* declaration that Mexican Americans as a class should not be barred from juries because of their "ancestry or national origin" paled by comparison. The one was fundamental, the other merely administrative, or, it must have seemed that way to the white and black families living under Jim Crow.

Mentioning this fact is not to complain about class being trumped by race in the scholarly literature. Rather, it brings me to a second point about *Hernandez's* half-century of neglect. It must be noted that both the lawyers arguing for Texas and those arguing for Pete Hernández understood that Mexican Americans were white under the laws of Texas, albeit members of a non-Anglo "other white race." *Hernandez* seemed to prove the efficacy of the so-called "other white" legal strategy. This had significant ramifications on the decision's impact and legacy.

Within a very few years, in part because *Brown* sparked a legal and cultural revolution, *Hernandez's* failure even to question the racist basis of the Jim Crow system appeared short-sighted, perhaps even embarrassing. The "other white" victories committed Mexican American civil rights advocates to an unfruitful constitutional trajectory, based as it was on receiving due process under Jim Crow. In time, it became clear that success in those terms delayed Mexican Americans benefiting from *Brown's* equal protection arguments, which had sought to abolish Jim Crow. Yet, it was more than fifteen years before Mexican American lawyers (notably James DeAnda) successfully litigated *Cisneros v. Corpus Christi Independent School District*, the case that established (at least in the Southern District of Texas) that Mexican Americans were an "identifiable ethnic minority."⁷ This new landmark revived the forgotten heart of *Hernandez*, and extended it by establishing that Mexican Americans ought to be accorded judicial protection under that other landmark of May 1954: *Brown*.⁸

Mexican Americans had not missed much in the way of court-ordered racial or ethnic progress during the fifteen years

7. *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142, 149 (5th Cir. 1972).

8. Steven H. Wilson, *Brown Over "Other White": Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 *LAW & HIST. REV.* 145 (2003). The article in *Law & History Review* distills the relevant chapters and argument from my book, STEVEN HARMON WILSON, *THE RISE OF JUDICIAL MANAGEMENT IN THE U.S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, 1955-2000* (2003). See, e.g., *Cisneros*, 467 F.2d 142. For contemporary legal analysis see Gerald M. Birnberg, Note, *Brown v. Board of Education Applies to Mexican-American Students and Any Other Readily Identifiable Ethnic-Minority Group or Class*, 49 *TEX. L. REV.* 337, 339 (1971); Betsy Levin & Philip Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 *LAW & CONTEMP. PROBS.* 50, 76-80 (1975).

since the spring of 1954. This suggests a third explanation for the comparative lack of attention that *Hernandez* has received during the past fifty years. What *Brown* had, and *Hernandez* did not have, was follow-up litigation. The *Brown* decision of 1954 simply marked the beginning of a new phase of litigation, not the end of segregation. Chief Justice Earl Warren set out the basic rationale for the Court's decision — "separate was inherently unequal" — but he declined to broach the contentious question regarding the remedial actions that would be required to restore rights.⁹

In 1955's *Brown II*, the Justices gave local authorities "primary responsibility for elucidating, assessing, and solving" problems of administration that could be expected to delay desegregation. But the Court did not completely leave enforcement to the uncertain consciences of local, usually elected, school boards. In addition to directing (famously or infamously) the administrators to desegregate schools with "all deliberate speed," the Justices charged federal district judges with overseeing the progress of that desegregation. The decision directed judges to bring about "systematic and effective" compliance.¹⁰

School desegregation did not come deliberately, speedily, systematically, or effectively, because *Brown II* was vague with regard to timing and manner of desegregation. Instead, the Court all but guaranteed that African Americans would not gain the full benefits of the court victory unless and until they had filed and prevailed in many more lawsuits. These *Brown II* lawsuits occupied plaintiffs, lawyers, and federal district judges for decades to come. Progress was much too slow, but, at least the parties were engaged.¹¹

9. See generally LUCAS A. POWE JR., *THE WARREN COURT AND AMERICAN POLITICS* 50-57 (2000); KLUGER, *supra* note 4.

10. *Brown v. Bd. of Educ.*, 349 U.S. 294, 299-301 (1955).

11. Scholars have pondered the rationale underpinning the Supreme Court's decision to support desegregation in principle, but to abandon it in fact by ordering that segregation be dismantled through individual lawsuits in the district courts. Many critics argue that the timid Court simply passed the buck. Peter Hoffer has argued that *Brown II* was not, as is frequently contended, an instance of cynical compromise of principle in a difficult case. Hoffer noted that, if *Brown* was not "good constitutional law," the compromises it contained were "very good constitutional equity." The *Brown II* order was an equitable solution appropriate to the case. It was misinterpreted, often deliberately, by judges and local school boards choosing to read "all deliberate speed" as permission to delay. But, Hoffer concluded, the Justice's decision to remand to the district courts was not a nod to federalism, a capitulation to states' rights, or a failure of nerve; rather, Hoffer believes, the Court sought to achieve a fair decision that would respect the rights of all, even the segregationists. PETER CHARLES HOFFER, *THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* XII, 180-91 (1990). Another scholar has argued, however, that the Justices were concerned that a more "activist" decision would threaten the Court's prestige, already at risk, and that they decided that the federal district courts could "take the heat" of the ruling without undermining faith in the system. STE-

There was no *Hernandez II*, which might have required the nation's federal judges to bear the burden of implementing more equitable jury selection rules. As a result, *Hernandez* languished until it was revived briefly and superseded by *Cisneros v. Corpus Christi Independent School District*, which perhaps is the closest thing to a *Hernandez II*. And this point brings us to the main theme.

Even after *Cisneros*, principles of equal protection have been applied very erratically to this "identifiable ethnic minority," mostly because the ethnic identity of Mexican Americans has ever been in the eye of the beholder. Their ethnic identity was rather more fluid than many observers wished to recognize. *Hernandez II* might have clarified the key issues (despite the failure of *Brown II* and its progeny to clarify some issues for African Americans — desegregation or integration, for example). In the absence of follow-up litigation, Mexican American ethnic identity has remained fluid, and, as a result, slippery.

How did this come about? In United States law, history, and culture, race has always been a simple matter of black and white. In 1790, the U.S. Congress limited naturalization to "white" persons. The Founders and Framers left no criteria for "whiteness," and, as F. James Davis reminds us in his book, this begged the basic question: *Who Is Black?* In the South, under the "one-drop rule," the answer was that any "black blood" at all makes a person black.¹² However, in America's multi-racial, multi-ethnic society, it did not always follow that the absence of "black blood" defined a person as "white." Instead, as Professor Haney López has shown, many people could and did claim to be *White by Law*. Haney López tells us that the criteria used to determine whiteness included skin color, facial features, national origin, language, culture, scientific opinion, and popular opinion. These criteria were usually arbitrarily applied, which is taken as proof that "race" is a social construct, reinforced by law.¹³ More to the point, this history shows that racial identity was simply in the eye of the beholder.

Throughout the twentieth-century, the beholders included not only judges in courtrooms, but also representatives of varied administrative agencies, all seeking to apply their own interpretation of the latest official racial policy. Often, bureaucrats were forced to contend with individuals about the latter's racial self-identity. In particular, Mexican Americans accepted, and even

PHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 74 (1995).

12. F. JAMES DAVIS, *WHO IS BLACK? ONE NATION'S DEFINITION* 5 (1991).

13. See generally IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

defended the color line, by staking out legal claims to “whiteness.” It was these debates that brought the question before the judges.¹⁴

These bureaucratic controversies are rooted in a long, familiar history. In a well-known early example, federal District Judge Thomas Maxey took an opportunity to indulge in anthropological speculation, in the 1897 naturalization case *In re Rodriguez*. Maxey noted that “as to color, [the plaintiff] may be classed with the copper-colored or red men. He has dark eyes, straight black hair, and high cheek bones.” Judge Maxey noted that, “[I]f the strict scientific classification of the anthropologist should be adopted, he would probably not be classed as white.” Yet, despite his doubts, the judge bowed to Rodriguez’s self-identification, namely, that he was not Indian, Spanish, or African, but just “pure blooded Mexican.”¹⁵

The inclusion of Mexican-descended persons (but only if pure-blooded?) in the white race had practical consequences under the Jim Crow regime, which extended beyond the South. The federal Immigration Act of 1924 categorized national or ethnic groups around notions of whiteness, invoking current anthropological theories, contemporary scientific racism known as eugenics, and plain secular bigotry to create new immigration restrictions linked to national origin.¹⁶ Still, this failed to solve the problem of self-identification. Note the conflation and confusion of personal opinion (that is, self-knowledge), with scientific opinion in the letter Secretary of Labor James Davis (a key player in immigration policy) wrote in 1929 to a concerned Congressman:

[T]he Mexican people are of such a mixed stock and individuals have such a limited knowledge of their racial composition that it would be impossible for the most learned and experienced ethnologist or anthropologist to classify or determine their racial origin. Thus, making an effort to exclude them from admission or citizenship because of their racial status is practically impossible.¹⁷

Practically impossible, perhaps, but not impossible in practice? Civil servants tried to develop categories that were at once national, geographical, and racial, but which also blurred the personal with scientific opinion. In 1930, the Census Bureau listed Mexicans as a separate race, under an imprecise definition of persons born in Mexico, or with parents born in Mexico, and who

14. *Id.*; see also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1753 (1993).

15. *In re Rodriguez*, 81 F. 337, 349 (W.D. Tex 1897).

16. Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, J. AM. HIST. 86, 93 (1999).

17. *Id.* at 89.

were “not definitely white, Negro, Indian, Chinese, or Japanese.”¹⁸ Persons of Mexican-descent, and the Mexican government, vigorously protested the creation of this separate racial classification. To lessen international tension, the 1940 Census classified persons of Mexican-descent as “white,” if they were “not definitely Indian or of other nonwhite race”¹⁹

To be on the safe side, the Census Bureau began to compile statistics on “Spanish speaking persons.” In addition, the selective service created the category, “Mexican,” during World War II. Such official designations, appealing in some cases to the latest science and in others to plain common knowledge, guided the courts in determinations of whether individuals did or did not belong to the “white” race.²⁰

Recognizing that the official and community distinctions on lines of ethnicity, language, and even surname watered down the value of Mexican American “whiteness,” the *Hernandez* lawyers appended a report, entitled “Status of Persons of Mexican Descent in Texas,” to their brief to the Supreme Court. This documented how many “natio-racial distinctions” differentiated Mexican Americans from other whites.²¹

In *Hernandez*, the Justices agreed that such distinctions were evidence that, despite the binary (black-versus-white) Jim Crow laws, Anglo Texans considered Mexican Americans to be a class apart from real “whites.” Making a distinction of its own, however, the Court maintained that existence of prejudice did not necessarily require judges to consider Mexican descent as a protected status.²² Follow-up lawsuits might have clarified this point, but, as previously noted, there was to be no *Hernandez II* until *Cisneros*. During the fifteen years prior to *Cisneros*, clarifications

18. *Id.* at 91.

19. Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to Lat-Crit Theory*, 85 CAL. L. REV. 1143, 1148 n.20, 1170-71, 1179 n.115 (1997). For a more detailed account of the fight by Mexican-descended persons to have the separate category eliminated, and thus be reclassified as white see Mario T. García, *Mexican Americans and the Politics of Citizenship: The Case of El Paso, 1936*, 59 N. M. HIST. REV. 187 (1984).

20. LÓPEZ, *supra* note 13, at 205-07.

21. See Sheridan, *supra* note 3, at 125. Under Texas “Jim Crow” laws, Mexican Americans were members of the “white” race. The terms ‘colored race’ and ‘colored children’ encompassed all persons of mixed blood descended from Negro ancestry. TEX. REV. CIV. STAT. ANN., ch. 19, § 2900 (combining former arts. 2897-2898), which provided: “All available public school funds of this state shall be appropriated in each county for the education alike of white and colored children, and impartial provision shall be made for both races. No white child shall attend schools supported for colored children, nor shall colored children attend schools supported for white children.” See C. H. JENKINS, 1 THE REVISED CIVIL STATUTES OF TEXAS, 1925, ANNOTATED 1036 (1925).

22. See *Hernandez v. Texas*, 347 U.S. 475, 478-79, esp. n.9 (1954).

came only from political and bureaucratic efforts. These attempted clarifications left much to be desired.²³

The civil rights consciousness of the 1960s, sparked in part by *Brown*, produced a variety of new tools that proved useful for refashioning Mexican Americans' bureaucratically approved ethnic identity. The Civil Rights Act (CRA) of 1964, for example, authorized federal officials to withhold funds from states that continued to countenance racial discrimination. Among other things, the 1964 CRA authorized the Department of Health, Education, and Welfare (HEW) to issue goals and guidelines for school desegregation.²⁴

Yet, despite the fact that the Act extended its protections to "national origin" minorities, HEW's own Office of Civil Rights (OCR) blocked the value of the 1964 CRA for Mexican Americans. OCR investigated alleged discrimination, but initially gathered statistics using only black and white categories. HEW began to collect data on Mexican Americans only after physician Hector P. Garcia, the founder of the American G.I. Forum (AGIF) and the first Mexican American member of the U.S. Civil Rights Commission, rebuked OCR for failing to examine Mexican Americans' complaints.²⁵

23. In general, Mexican American civil rights advocates were inactive in the courts during the 1960s, in part because lawsuits were costly to undertake. Instead, politics consumed the older, established organizations like the League of United Latin American Citizens (LULAC) and the American GI Forum (AGIF), and inspired newer upstarts such as the Political Association of Spanish Speaking Organizations (PASSO). If asked, these organizations continued to maintain that their constituencies represented the "other white." Guadalupe Salinas, Comment, *Mexican-Americans and the Desegregation of Schools in the Southwest*, 8 HOUS. L. REV. 929, 941 (1971); Guadalupe San Miguel, Jr., *Mexican American Organizations and the Changing Politics of School Desegregation in Texas, 1945 to 1980*, 63 SOC. SCI. Q. 701, 708-09 (1982). For the older organization see BENJAMIN MARQUEZ, LULAC: THE EVOLUTION OF A MEXICAN AMERICAN POLITICAL ORGANIZATION (1993); CARL ALLSUP, THE AMERICAN G.I. FORUM: ORIGINS AND EVOLUTION (1982); HENRY A.J. RAMOS, THE AMERICAN GI FORUM: IN PURSUIT OF THE DREAM, 1948-1983, at 22, 58-63 (1998). PASSO (or PASO) was founded around 1960, led the campaign in 1962 that resulted in the brief Mexican American domination of the municipal government in Crystal City, Texas. ARMANDO NAVARRO, THE CRISTAL EXPERIMENT: A CHICANO STRUGGLE FOR COMMUNITY CONTROL 17-51 (1998). For later political developments in the same city, in years after the Chicano movement emerged see ARMANDO L. TRUJILLO, CHICANO EMPOWERMENT AND BILINGUAL EDUCATION: MOVIMIENTO POLITICS IN CRYSTAL CITY, TEXAS (1998). See also DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986, at 282-84 (1987).

24. 42 U.S.C. § 2000(a). See Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321 (1967); see also Louis Fisher, *The Judge As Manager*, 25 PUB. MANAGER 7 (1996); J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 102-07 (1979).

25. See Salinas, *supra* note 23, at 939; GUADALUPE SAN MIGUEL, JR., "LET ALL OF THEM TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981, at 175-77 (1987).

HEW began to publish data on black, white, and "other" in 1967. The "others" now included "any racial or national origin group for which separate schools have in the past been maintained or which are recognized as significant 'minority groups' in the community." Examples HEW offered included: "Indian American, Oriental, Eskimo, Mexican-American, Puerto Rican, Latin, Cuban, etc." Later, HEW published statistics on "Spanish Surnamed Americans," and issued a series of "Mexican-American Studies."²⁶

The shift to a newly official "other minority" status, as opposed to the old "other white" status, was resisted by some of those persons affected. Carlos Guerra, a Spanish-surnamed and presumably Mexican-descended student at Texas A&I (now Texas A&M University-Kingsville), wrote a column for the October 1967 issue of the *Texas Observer*, entitled *Discourse by An Other*. Mr. Guerra complained specifically about Washington's misguided attempts — or perhaps it was a too clever ploy — to declare "the second largest minority group in the country non-White."²⁷ This response suggests that, in addition to complaining about official statements that were effectively setting aside Mexican Americans as a distinct group, Mr. Guerra was at the same time resistant to Chicano activism, which was emerging at Texas A&I around this time. Chicanos rejected the very "white" status fought for by their elders. Instead, Chicanos celebrated a "brown" identity they had constructed for themselves.²⁸

Clearly, social forces were seeking to change the terms of the traditional racial and ethnic discourse. Yet, opposed to the Chicano movement's politics, and HEW's bureaucracy, there were still the old-style armchair racial theorists.²⁹

26. Jorge C. Rangel & Carlos M. Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 365-66 n.359-60, 366 (1972). See also Testimony of Jerold D. Ward (Dec. 11, 1968) in U.S. COMM'N ON CIVIL RIGHTS, HEARING HELD IN SAN ANTONIO, TEXAS 331-39 (1968).

27. Carlos Guerra, *Discourse By An Other*, TEX. OBSERVER, Oct. 27, 1967 at 7, 14.

28. The literature on the rise of Chicanismo as a political and cultural force is increasing in recent years. The following older sources are still a good place to begin. See MATT S. MEIER & FELICIANO RIBERA, MEXICAN AMERICANS/AMERICAN MEXICANS: FROM CONQUISTADORS TO CHICANOS 211 (rev. ed. 1993); see also MONTEJANO, *supra* note 23, at 262-87 (1987); Walter Elwood Smith, Jr., *Mexicano Resistance to Schooled Ethnicity: Ethnic Student Power in South Texas, 1930-1970*, at 288-97 (1978) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with the University of Texas at Austin Library); U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATIONAL STUDY, REPORT I: ETHNIC ISOLATION OF MEXICAN AMERICAN IN THE PUBLIC SCHOOLS OF THE SOUTHWEST 26 (1971).

29. The same year, 1967, the Supreme Court ruled in the famous interracial marriage case, *Loving v. Virginia*, effectively overturning the trial judge, who had stated in his original opinion that: "Almighty God created the races white, black, yellow, malay and red The fact that he separated the races shows that he did not intend for the races to mix." *Loving v. Virginia*, 388 U.S. 1, 3 (1967). Note that there

Seventy years after *In re Rodriguez*, a dozen years after *Hernandez*, and in the midst of a civil rights revolution, Mexican Americans still struggled with official confusion and community division regarding color, race, nationality, ethnicity, or some other construct. These were not academic debates, because Mexican Americans — however ill-defined by judges, bureaucrats, or themselves — continued to suffer from the widespread discrimination that had motivated *Hernandez*.

In October 1967, during hearings in El Paso of the newly established “Inter-Agency Committee on Mexican American Affairs,” James DeAnda, the long-time legal advisor to the G.I. Forum (AGIF), testified to lingering discrimination in jury selection, voting, and school enrollment. Because the lack of private resources prevented large-scale private litigation, DeAnda proposed that the federal government increase public legal assistance. Noting that the 1964 CRA provided for the judicial award of plaintiffs’ attorneys’ fees in certain employment discrimination cases, DeAnda suggested that a similar compensation scheme would be very appropriate in some voting, jury, and school lawsuits. In addition, DeAnda challenged the U.S. Justice Department to recognize and begin fighting discrimination against Mexican Americans with the same vigor it finally was beginning to demonstrate in African Americans’ cases.³⁰

is not a “brown” category, nor is there an indication that various white races fit this judge’s bill.

30. James DeAnda, *Civil Rights-Need for Executive Branch To Take Positive Steps To Rectify Discrimination in Jury Selection, Voting Eligibility and School Enrollment*, in INTER-AGENCY COMMITTEE ON MEXICAN AMERICAN AFFAIRS, *THE MEXICAN AMERICAN: A NEW FOCUS ON OPPORTUNITY* 217, 217-21 (1968). President Lyndon B. Johnson created the Inter-Agency Committee in response to Mexican American complaints that his administration had ignored their community’s problems. The El Paso meetings became yet another point of contention, however, when the Committee excluded the “militant” Mexican American leaders. See ALL-SUP, *supra* note 23, at 136-41; RAMOS, *supra* note 23, at 99-106. Fees for counsel were provided in some employment discrimination cases under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(k) (1964). Congress later enacted provisions similar to those DeAnda suggested. These statutes authorize and even encourage the award of attorney’s fees to the prevailing parties in school desegregation cases. The case for court-ordered imposition of attorney’s fees is particularly strong where the plaintiffs have incurred substantial expense due to the obstinate refusal of a school board to recognize and comply with its legal obligations. See Emergency School Aid Act, 20 U.S.C. § 1617 (1972). On Oct. 19, 1976, Congress enacted the Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. § 1988 (1976). This provided for prevailing plaintiffs to recover reasonable attorney’s fees in § 1983 actions. The trial judge has discretion to decide what is a “reasonable” fee. 42 U.S.C. § 1988(b) (1976), *amended by* Pub.L. 104-317, Tit. III, § 309(b), 110 Stat. 3853 (119) (describing “attorney’s fees.”). See *generally* ALAN HIRSCH & DIANE SHEEHY, *AWARDING ATTORNEYS’ FEES AND MANAGING FEE LITIGATION* (1994) (pamphlet by Federal Judicial Center). In 1969, Congress established the Committee on Opportunities for Spanish Speaking People to Succeed the Inter Agency Committee. 91 Pub.L. 181, 83 Stat. 838 (1969).

DeAnda's recommendations ultimately were acted upon, but only after several years of official dithering.³¹ In the meantime, he and other Mexican Americans resumed their own privately funded civil rights litigation. In that momentous year 1967, for example, San Antonio attorney Pete Tijerina obtained a multi-million, multi-year grant from the Ford Foundation, and founded the Mexican American Legal Defense and Education Fund (originally MALD, but now MALDEF). When the Civil Rights Commission held its December 1968 hearings in San Antonio, Dr. Garcia invited Tijerina to describe his reasons for establishing MALDEF. Tijerina answered that his experience in defending Mexican Americans before all-Anglo juries, more than a decade after *Hernandez*, convinced him that a dedicated legal defense organization was necessary.³²

By the late-1960s, the most pressing issue for Mexican American civil rights attorneys seemed to be the need to reframe the judicial responses to *Brown's* mandates. Mexican Americans maintained their hard-won "white" status as late as 1966, when DeAnda sought to enjoin "ability tracking," a common high school practice which established two "tracks," one for college-bound student and another for "terminal" high school students. DeAnda argued, successfully, that an arbitrary testing system ensured that students of Mexican-descent dominated the latter category.³³ As in *Hernandez*, DeAnda argued that the arbitrariness of the method denied the due process guaranteed in the Fourteenth Amendment.³⁴

But, DeAnda was at last ready to abandon the "other white" strategy and base a Mexican American civil rights complaint on an equal protection rationale. If successful, this might yield the expansive court-ordered remedies that *Brown* had made availa-

31. The U.S. Attorney General waited until late 1969 to join in a Mexican American lawsuit. The unreported case was *Perez v. Sonora Indep. Sch. Dist.*, Civ. No. 6-224 (N.D.Tex. 1969) cited in Birnberg, *supra* note 8, at 339 n.10.

32. Tijerina modeled the new organization on the NAACP's incorporated litigation arm, the Legal Defense Fund (LDF, or the "Inc. Fund"), and intended to imitate LDF's strategy of undertaking "planned" litigation. Karen O'Connor & Lee Epstein, *A Legal Voice for the Chicano Community: The Activities of the Mexican American Legal Defense and Educational Fund, 1968-1982*, in *THE MEXICAN AMERICAN EXPERIENCE: AN INTERDISCIPLINARY ANTHOLOGY* 281, 284-85 (Rodolfo O. de la Garza et al. eds., 1985). In time, MALDEF supported DeAnda's suit against the Corpus Christi Independent School District as *amicus curiae*.

33. For the practice of "tracking" see Rangel & Alcala, *supra* note 26, at 331-33, esp. n.139 (1972). See ALLSUP, *supra* note 23, at 94-97 (1982); RAMOS, *supra* note 23, at 22, 58-63.

34. See e.g., *Chapa v. Odem Indep. Sch. Dist.*, Civ. No. 66-C-72 (S.D. Tex 1967) (on file in appellate case files for *Cisneros v. Corpus Christi Indep. Sch. Dist.*, Civ. A. No. 68-C-95). However, Judge Woodrow Seals requested additional evidence to support the validity of the ability testing in general. See Rangel & Alcala, *supra* note 26, at 347-48 & nn.241-45 (1972).

ble to African Americans fifteen years earlier. In the path-breaking *Cisneros* case, DeAnda complained that Corpus Christi Independent School District, like many Texas districts, had turned the “other white” notion to its own illegitimate purposes. In order to delay the court-ordered desegregation, while at the same time obscuring its slow pace, district officials frequently assigned African and Mexican Americans to the same schools, rather than to white schools, a practice often facilitated by the close proximity of the ghettos to the barrios. The administrators maintained that, because Mexican Americans were “white,” the barrio-ghetto schools had been desegregated. Federal judges and HEW — continuing to operate under Jim Crow’s black-white binary — accepted this logic.³⁵ Although DeAnda hedged his bets a bit by referring briefly to the “other white” strategy, he focused most on the novel contention that *Brown* should apply to, and so condemn, this systematic segregation of Mexican Americans.³⁶

DeAnda marshaled evidence from history, sociology, and demography (that is, he used arguments rooted in both scientific opinion and common knowledge) to show that, despite being “white,” many Mexican Texans still suffered widespread discrimination at the hands of the Anglos in the majority. DeAnda persuaded Southern District Judge Woodrow Seals, who declared that, for the purposes of desegregating public schools, Mexican Americans formed an “identifiable ethnic minority” which deserved, but had been denied, the equal protection of the laws.³⁷

Judge Seals’ ruling pleased many Mexican Americans, but it remained to be seen whether the court could devise a “tri-ethnic” remedy to desegregate the white, black, and brown schools.³⁸ There was no guarantee that Seals’ judicial colleagues and superiors would accept the ruling. In 1969, for example, Judge Ben C. Connally opened what he called “another chapter” in the long Houston desegregation saga, *Ross v. Houston Independent School District*. Houston Independent School District enrolled 240,000 students of which two-thirds were designated white and one-third black. HEW estimated that 36,000 of these students were “Spanish-surnamed Americans,” approximately fifteen percent of the student population. According to standard practice, Judge Connally included the Spanish-surnamed students in the “white” figures, and approved a district plan to combine Mexican

35. *Id.* at 342-43, n.216, 348-49; Birnberg, *supra* note 8, at 339; Levin & Moise, *supra* note 8, at 76-80 (1975); SAN MIGUEL, *supra* note 25.

36. Rangel & Alcalá, *supra* note 26, at 342, 359 (1972).

37. *See e.g.*, *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 324 F.Supp. 599, 607 (S.D. Tex. 1970).

38. Salinas, *supra* note 23, at 951. For the rest of this story see WILSON, *supra* note 8, at chap. 5.

Americans with African Americans. In Houston, it was the African American plaintiffs who appealed.³⁹

In their August 1970 majority opinion, Fifth Circuit Judges Homer Thornberry and Lewis Morgan affirmed Judge Connally's ruling, in part, praising his "learned, thorough, detailed consideration" of the legal and practical issues.⁴⁰ Judge Charles Clark, a usually conservative Nixon appointee and the third member of the Circuit panel,⁴¹ alone voiced any concern that the Spanish-surnamed students were officially ignored in integration plans, yet Mexican American majority schools were to be paired with black schools in order to "integrate" them. Referring to Seals' *Cisneros* ruling, the judge asserted that "it is a mock justice when we 'force' the numbers by pairing disadvantaged Negro students into schools with members of this equally disadvantaged ethnic group." Clark then declared:

We seem to have forgotten that the equal protection right enforced is a right to education, not statistical integration. Why, on this kind of a theory, we could end our problems by the simple expedient of requiring that in compiling statistics every student in every school be alternately labeled white and Negro! Then, you see, everything would come out 50-50 and could get our seal of approval once and for all.⁴²

39. *Ross v. Eckels*, 317 F.Supp. 512, 513-14 (S.D. Tex. 1970), *aff'd in part, rev'd in part*, 434 F.2d 1140, 1141 (5th Cir. 1970).

40. *Ross v. Eckels*, 434 F.2d 1140, 1146-48 (5th Cir. 1970).

41. As Nixon's first appointee to the Fifth Circuit, Clark harbored at least some of the President's reservations regarding the pace and direction of recent integration decisions. But Clark was a conservative judge, who argued for caution, not a reactionary who called for the rollback of civil rights. For example, he had also written a dissent in the latest en banc rehearing of the *Singleton* case. See *Singleton v. Jackson Mun. Separate Sch. Dist.*, 425 F.2d 1211, 1217-24 (5th Cir. 1970). Clark was already well-known to his new Fifth Circuit colleagues. And, despite having defended Governor Ross Barnett before the Fifth Circuit during the 1962 desegregation showdown over James Meredith's registration for classes at "Ole Miss," he was well-respected. See *Meredith v. Fair*, 305 F.2d 345 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962). FRANK T. READ & LUCY S. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* 228-32, 346-47, 453-58 (1978). See also JACK BASS, *UNLIKELY HEROES* 176-77, 312-13, 331 (1990).

42. *Ross v. Eckels*, 434 F.2d at 1150-51. For contemporary comments on Judge Clark's dissent see Salinas, *supra* note 23, at 943, 949-50. No one in Houston was happy with the Ross plan. In late August 1970, the Houston Independent School District board reluctantly prepared to implement the zoning and pairing ordered by the Fifth Circuit. The African American plaintiffs contemplated appealing to the Supreme Court. Several Mexican American civic, political, and religious groups formed an umbrella organization, the Mexican American Education Council (MAEC), to coordinate responses to Ross, including a school boycott. The group encouraged parents to keep students out of class on opening-day of the new term. More than 3500 Mexican American students stayed home. The group also roused the Mexican American parents to picket elementary schools, bus stops, and the Houston Independent School District administration building. MAEC organized more than two dozen huelga ("strike") schools staffed by volunteer teachers. Leonel Castillo, who would be named director of the federal Immigration and Naturalization Service (INS) by President Jimmy Carter, was a MAEC leader. He was em-

After delivering this taunt, Clark “respectfully” dissented. This had no effect on the ruling, but Clark’s pointed remarks reflected his, and probably the minority community’s, growing frustration with the course of desegregation.

In early 1971, MALDEF attempted to keep the question open, and sought Judge Connally’s permission to intervene in the *Ross* litigation. In a brief memorandum opinion denying the motion, Connally noted that the Houston Independent School District and other school districts “always treated Latin-Americans as of the Anglo or White race.” In a reference to MALDEF’s reliance on the *Cisneros* ruling, Connally declared that, even if Mexican Americans were an identifiable minority group, that did not entitle them “to escape the effects of integration” with African Americans. The judge stood among the many policy-makers of the period who failed to recognize the effect of Mexican Americans’ evolving consciousness. Indeed, as suggested by Mr. Guerra’s 1967 column, acceptance of this portentous political shift was far from universal, even among younger Mexican Americans. Incredibly, in denying MALDEF’s motion, the judge contended that Mexican Americans had never been subject to “state-imposed segregation.”⁴³

Judge Connally wrestled further with the ambiguities of Mexican American self-identification when he grappled with the old problem of equitable jury selection. In a March 1969 note to Fifth Circuit Judge Walter Gewin, for example, he had to explain the recently reported racial imbalance of the jury pools in the

ployed as the community relations director for the Roman Catholic diocese of Galveston and Houston. GUADALUPE SAN MIGUEL, JR., BROWN, NOT WHITE: SCHOOL INTEGRATION AND THE CHICANO MOVEMENT IN HOUSTON 98–103 (2001). Castillo entered mainstream politics in Houston in 1971 and was elected the city controller. See Leonel Castillo, *The Growth of Hispanic Political Power in the Houston Area*, in *HISPANICS IN HOUSTON AND HARRIS COUNTY, 1519–1986*, at 186–87, 192–93, 198 (Dorothy F. Caram et al. eds., 1989); ARNOLDO DE LEÓN, ETHNICITY IN THE SUNBELT: A HISTORY OF MEXICAN AMERICANS IN HOUSTON 186–87, 192–93 (2001); SAN MIGUEL, *supra* note 25, at 179; WILLIAM HENRY KELLAR, MAKE HASTE SLOWLY: MODERATES, CONSERVATIVES, AND SCHOOL DESEGREGATION IN HOUSTON 158 (1999). For other attempts in Houston to form multi-ethnic or multi-racial solutions see Ann Dee Quiroz, *Black, White, and Brown: The Houston Council on Human Relations and Tri-Racial Relations in Houston 66–82* (1998) (unpublished M.A. thesis, University of Houston) (on file with the University of Houston at Austin Library). At a school board meeting during this period, fourteen people were arrested for inciting a riot. Most of those arrested were not members of MAEC, but members of two militant groups, the Mexican-American Youth Organization and the Chicano Student Committee. Guadalupe San Miguel, Jr., *A Struggle In Vain; Ignoring Ethnicity is a Slap in the Face Of All Colors by HISD*, HOUS. CHRON., Sept. 28, 1997, at Outlook 1. As originally published this article indicated that 1400 people were arrested at the board meeting. The editors printed a correction changing the number to fourteen arrested protesters two days later. See HOUS. CHRON., Sept. 30, 1997.

43. Rangel & Alcala, *supra* note 26, at 349.

Southern District of Texas. His position was consistent with his declaration in the school case. "I reiterate," Connally wrote to his administrative superior, "that during my long and close association with the Laredo Division, and long though less close association with Brownsville, there is not and has never been any discrimination against Latins."⁴⁴

The report in question was part of a program established by the Judicial Conference Committee on the Operation of the Jury System, conceived for monitoring the compliance with the Jury Selection and Service Act of 1968, which required that jury pools reflect a 'fair cross section'⁴⁵ of the local community. Judge Connally argued that, especially in the Brownsville and Laredo Divisions, the large population of Mexican Americans complicated the statistics. Although the Administrative Office of the U.S. Courts, following the lead of many other federal agencies, admitted only the old binary racial categories, Mexican Americans often self-identified in ways that did not satisfy the Administrative Office. Connally wrote Gewin to present "an accurate tabulation."⁴⁶

The figures were based on questionnaires, Connally wrote, and some of the potential jurors were "of racially-mixed Anglo-Latin blood," and "simply refer to themselves as 'White' rather than as either Anglo or Latin." From his own observations, the judge estimated that juries were composed of "50 to 75% of persons bearing Latin surnames or who are obviously of Latin extraction in whole or in part."⁴⁷

As a result of the choice being left to the prospective jurors, there were varied and ambiguous answers to Question 16, which inquired into the "race" of prospective jurors.⁴⁸ Judge Connally suggested that the Administrative Office consider changing the questionnaire, so the juror should have only certain categories in which to answer, rather than a blank line to fill. The Southern District clerks saw 'Spanish,' 'German extraction,' and other idiosyncratic responses, which required them to exercise a discretion that the judge believed "should be avoided."⁴⁹

But, the data was in the report as it was tabulated, and Connally sought to allow the administrators "properly to understand [and] interpret it." As his example, the judge noted that in the

44. Memorandum from Chief Judge Connally, to Judge Walter Gewin (Mar. 7, 1969) (Clerk's files of Chief Judge Ben C. Connally, folder 2) (on file with the Office of the Clerk of the Court, U.S. District Court, Southern District of Texas).

45. Jury Selection and Service Act, 28 U.S.C.S. § 1861 (1968).

46. See Memorandum from Chief Judge Connally, *supra* note 44.

47. *Id.*

48. *Id.*

49. *Id.*

Laredo Division, of the 755 prospective jurors who answered Question 16, 725 answered "Anglo;" 30 answered "Latin;" and no one answered "Negro" or "Other."⁵⁰

This left the impression that the Laredo juries were disproportionately white. Not so, said Connally. "Whether of common knowledge or not," the judge wrote, "it is a fact by my personal knowledge and observation that there is no discrimination directed at those of Latin ancestry. There is a complete mixing and mingling of the races in all spheres of business and society. There is and always has been a high incidence of intermarriage between the races. There is scarcely a family which has lived in the area for a matter of several generations which is not of mixed Anglo-Latin blood." Bearing this in mind, the judge concluded, the report of "'Anglo . . . 725' and 'Latin . . . 30' [was] not a true reflection of the situation as it exists."⁵¹ Indeed, a recount of the questionnaires showed the following: "'White . . . 640,' 'Anglo . . . 13,' 'Caucasian . . . 72,' 'Latin' or 'Mexican . . . 30.'" It was apparent, to the judge, that a great majority of those prospective jurors of "Latin-Anglo extraction" answered "'White' or 'Caucasian.'"⁵²

To confirm this suspicion, Connally examined the lists of petit and grand jurors who appeared in Laredo during 1968. Of these, by his count, 111 had Latin surnames, and 168 had Anglo surnames. The judge contended that even this, however, was not an accurate reflection of the ratio of the races, "in that a great many of those with Anglo surnames are the product of a mixed marriage and are of Latin-Anglo blood."⁵³

With regard to the Brownsville Division, where the racial composition was essentially the same as in Laredo, the data showed that, of the 1687 prospective jurors who replied to Question 16 (and, it should be noted that 385 prospectives did not answer), there were reportedly "Anglo . . . 696, Latin . . . 987, Negro . . . 4, Other . . . 0."⁵⁴ On the surface, this would appear to be a reasonably accurate ratio, but a judicial recount showed the following: "Unanswered . . . 518, Anglo . . . 73, Latin . . . 63, Negro . . . 4, White . . . 1293, Caucasian . . . 121, Human . . . 2, \$1.60 per hour . . . 1."⁵⁵ The discrepancies between the second count and the first arose because the deputy clerk in Brownsville,

50. Memorandum from Chief Judge Connally, *Addendum to 'Tabulation by Race and Sex of Prospective Jurors*, to Judge Walter Gewin 1 (Mar. 7, 1969) (Clerk's files of Chief Judge Ben C. Connally, folder 2) (on file with the Office of the Clerk of the Court, U.S. District Court, Southern District of Texas).

51. *Id.* at 2.

52. *Id.*

53. *Id.*

54. *Id.* at 3.

55. *Id.*

misunderstanding the instructions, used her own judgment in classifying the prospective juror as either Latin or Anglo, based on surname, if Question 16 was left blank. Additionally, there were a number of cases where the answer was ambiguous. As had been done in Laredo, the judge surmised, a majority of those replying "White" were "entirely or partly of Latin blood."⁵⁶

Given these recurring mistaken tabulations, Judge Connally suggested that Question 16 should be eliminated from the questionnaire. In addition, he believed that some of these answers showed resentment on the part of several prospective jurors that the question had been asked, even though they were instructed that they could omit the answer if desired. The attitude seemed to be that, on the question of jury service in a federal court, "race should not matter and should not be inquired into." Perhaps the judge was projecting his own feelings. He closed his memorandum noting that, "Personally, I share those sentiments."⁵⁷

The questions continued, and the myriad ambiguities of the "Anglo-Latin," "Latin," or even "Spanish surname" continued as well. Within a few years, this was no longer Connally's concern. In December 1974, he reached the age of sixty-five years, and took semi-retirement as a "senior judge."⁵⁸ His replacement on the bench was Laredo attorney Robert O'Connor Jr., whose own background seemed to prove Connally's point about the ambiguities of ethnic identity. Although Judge O'Connor had a Mexican-descended grandmother, he was clearly an Anglo, not the newest Mexican American federal judge.⁵⁹

56. *Id.*

57. See *supra* note 44.

58. Judges were eligible for this status at seventy-years of age (after ten years of service), or sixty-five-years of age (after fifteen). Senior Judges retained their judgeship but carried a reduced docket, and continued to draw a salary. They could be called back to assist the court if the judge wished to serve temporarily. 28 U.S.C. § 371 (2004). Senior Judge Connally suffered a heart attack on December 2, 1975, while hunting on a ranch near Falfurrias, Texas. He was accompanied on the trip — and then to the Brooks County Hospital, where he died — by his wife, by Chief Judge Garza, and by Judge Cox. *Judge Ben Connally Dies of Heart Attack*, HOUS. POST, Dec. 3, 1975 at 1A, 19A; *Judge Ben C. Connally, Who Presided Over Houston's School Integration Battles*, N.Y. TIMES, Dec. 4, 1975, at 44.

59. President Gerald R. Ford appointed Robert O'Connor, Jr. in April 1975. O'Connor was born on June 22, 1934, in Los Angeles, California, where his Texas-born father worked as a stuntman and extra in westerns. Eventually, the family returned to Texas, where O'Connor attended UT as an undergraduate, earning his B.A. in 1956, and as a law student, earning his LL.B. in 1957. He entered private general legal practice in Laredo as soon as he graduated. O'Connor was the first Southern District judge in a generation to have missed service during wartime, but he was a U.S. Army Reserve Captain in the Judge Advocate General Corps from 1957 to 1964. O'Connor was not particularly active in local politics. Perhaps, in the aftermath of the Watergate crisis, the disgrace and resignation of President Nixon, and accession of President Ford, O'Connor's basic neutrality in partisan matters was a benefit. Interview with Robert J. O'Connor Jr., U.S. District Judge, Southern District of Texas, in Houston, Tex. (Jan. 2, 1998).

As Chief Judge, Connally was succeeded by Brownsville's own Reynaldo Garza, who was the first (and, until 1979, only) Mexican American federal judge in the Southern District. In the late 1970s, Judge Garza was still attempting to square self-identified racial status with the approved judicial-legislative-administrative distinctions.⁶⁰

In 1977, in response to policy requirements, the federal Office of Management and Budget (OMB) issued Statistical Policy Directive Number 15, *Race and Ethnic Standards for Federal Statistics and Administrative Reporting*. Now, four racial categories were established: (1) American Indian or Alaskan Native; (2) Asian or Pacific Islander; (3) Black; and (4) White. In addition, however, two ethnic categories were established: "Hispanic origin;" and "Not of Hispanic origin." Although the Census Bureau traditionally had used more categories than these for the decennial census, they now collapsed into the same four racial categories used by OMB, plus, of course, the category "some other race."⁶¹

The Census Bureau published the following to explain its latest attempts to clarify racial reporting, "The category 'white' includes persons who indicated their race as white, as well as persons who did not classify themselves in one of the specific race categories on the questionnaire[,] but entered Mexican, Puerto Rican, or a response suggesting Indo-European stock."⁶² Thus, "white" was to be the default designation in cases of questionable self-identification.

John Shapard, of the Research Division of the Federal Judicial Center (FJC), wrote to court clerks in February 1977, to instruct them how the evolution of the Census and OMB rules would affect their future tabulation of local jury composition, required by the Judicial Conference to be reported on Form JS-12. Shapard wrote that any prospective jurors whose questionnaires "show race as Mexican, Puerto Rican, or similar Latin or Spanish races, should be counted as WHITE." The reason for this "odd-seeming requirement," he added, was that the Census Bureau

60. Memorandum from Chief Judge Reynaldo Garza, to John Shapard (June 5, 1978) (Clerk's files of Chief Judge Reynaldo G. Garza, folder 4) (on file with the Office of the Clerk of the Court, U.S. District Court, Southern District of Texas).

61. U.S. CENSUS BUREAU, RACIAL AND ETHNIC CLASSIFICATIONS USED IN CENSUS 2000 AND BEYOND *available at* <http://www.census.gov/population/www/socdemo/race/racefactcb.html> (last revised Apr. 12, 2000).

62. Recall that in the 1930 Census reports, Mexicans were classified in the 'other' race category, the bureau also confirmed that the 1930 data had been revised to include Mexicans in the white population, as in the census reports in subsequent years. Memorandum from John Shapard, to "All Clerks of Court" (Feb. 4, 1977) (Clerk's files of Chief Judge Reynaldo G. Garza, folder 4) (on file with the Office of the Clerk of the Court, U.S. District Court, Southern District of Texas).

now classified race in the same fashion. That mattered because the purpose of the JS-12 (which also recorded sex) was to permit a comparison of jury wheels to the population eligible for jury service, and Census reporting was regarded as the only source of reliable population data. Shapard particularly worried that if JS-12 reports did not include "Indo-European" in "white" totals, statistical analysis "may falsely indicate racial imbalance in . . . jury wheels." Shapard invited the clerks to call him directly if they had questions.⁶³

In April 1978, Carl H. Imlay, the Administrative Office's General Counsel, wrote to all District Court Chief Judges. Imlay enclosed the most recent statistical reports derived from returned JS-12 forms. Noting that the report "involved complex data gathering that presented many opportunities for the introduction of error," Imlay sent the preliminary report in order to afford judges an opportunity to review the results prior to the submission to the Jury Committee. Imlay invited any judge suspecting erroneous or misleading results to share these concerns with the Research Division of the FJC, which analyzed the JS-12s.⁶⁴

The racial distribution reported among prospective jurors for Houston, and several others of the court's divisions, fell within the proportions suggested by the 1970 Census of population distribution. Some initially disturbing numbers could be explained away as computer errors. The report did raise several red flags, however, particularly with regard to Brownsville and Laredo, where the distribution indicated a disproportionate representation vis-à-vis the 1970 Census tally. Clearly, not everyone involved in the jury selection process had received, read, or understood the memorandum explaining the new rules. Some of the Southern District's clerks' continued to designate Mexican American jurors as "non-white," which, as Shapard feared would occur, resulted in the "drastic overrepresentation" of non-whites.⁶⁵

Roughly, the reported ratios were: Brownsville, 3 whites to 1 non-white; Laredo, 7 to 1; Corpus Christi, 30 to 1; Houston 4.5 to

63. Memorandum from John Shapard, to "All Clerks of Court" (Feb. 4, 1977) (Clerk's files of Chief Judge Reynaldo G. Garza, folder 4) (on file with the Office of the Clerk of the Court, U.S. District Court, Southern District of Texas).

64. Memorandum from Carl H. Imlay, to "Chief Judges, United States District Courts" (Apr. 12, 1978) (Clerk's files of Chief Judge Reynaldo G. Garza, folder 4) (on file with the Office of the Clerk of the Court, U.S. District Court, Southern District of Texas.)

65. Memorandum from David B. Coe, to Jesse Clark, Chief Deputy Clerk (May 3, 1978) (Clerk's files of Chief Judge Reynaldo G. Garza, folder 4) (on file with the Office of the Clerk of the Court, U.S. District Court, Southern District of Texas).

1; Galveston, 5.5 to 1; Victoria, more than 20 to 1.⁶⁶ Note how the grounds of the debate shifted: two decades after *Hernandez*, jury pools in Texas federal courts that feature a 3-to-1 ratio were not white enough, because the 1970 Census predicted much higher ratios.

No one involved in the analysis believed these numbers to reflect reality, although the “reality” one accepted would, naturally, be in the eye of the beholder. The problem, once again, arose from the perennial tension between the strict official rules and the vagaries of self-identification. The latest questionnaires mailed to prospective jurors had listed five racial categories, the four noted above plus “other.” There was no designated box for “Spanish” or “Mexican-American.” This apparently led some respondents to check the fifth box, labeled “other.” Next to the box, many respondents then wrote the phrase “Mexican-American.” Under JS-12 tabulation rules, people marking “other” were counted as non-whites, leading to the overrepresentation of “non-white” in the analysis.⁶⁷

David Coe, another judicial statistician in Washington, D.C., corresponded with Jesse E. Clark, then the Southern District’s chief deputy clerk (later to become chief clerk), seeking to resolve the concerns. Coe noted that the FJC analysis posed “several perplexing problems.” He realized that a certain percentage of registered voters in the Southern District were of “Spanish-Latin” origin, and that there was some debate whether “people with Spanish surnames” ought to be counted as white or non-white. That debate notwithstanding, Coe wrote, for the statistical purposes of the JS-12, the Judicial Research Jury Committee had concluded that people of “Spanish-Latin” descent were not a separate race, and should be counted as white.⁶⁸

The Southern District clerks were not resistant to change so much as confused by it. Clark had investigated and found that, even though they were aware that people with Spanish surnames were to be counted as white, some of the deputy clerks who

66. The reported ratio of white versus non-white prospective jurors, according to the court division, are as follows: Brownsville (255/70); Laredo (168/23); Corpus Christi (301/10); Houston (253/57); Galveston (174/32); and Victoria (143/6). Derived from: JS-12 [Jury Selection Form] for Southern District of Texas, submitted Nov. 29, 1977 from Brownsville Division, submitted Nov. 15, 1977 from Laredo Division, submitted Nov. 10, 1977 from Corpus Christi Division, submitted Oct. 18, 1977 from Houston Division, submitted Nov. 2, 1977 from Galveston Division, submitted Nov. 2, 1977 from Victoria Division, all attached with Memorandum from Jesse E. Clark, to Judge Reynaldo Garza (May 11, 1978) *enclosure to* Memorandum from Chief Judge Reynaldo Garza, to John Shapard (June 5, 1978) (Clerk’s files of Chief Judge Reynaldo G. Garza, folder 4) (on file with the Office of the Clerk of the Court, U.S. District Court, Southern District of Texas).

67. See Coe, *supra* note 65.

68. *Id.*

worked with the jury questionnaires invariably counted them as “non-white” when the “other” category was marked. This accidental mistake accounted for most of the discrepancies within the Laredo and Brownsville Divisions. Coe admitted that this was an error caused by the terminology, and that the Southern District should not be criticized for selecting disproportionately non-white juries in Laredo and Brownsville. He promised to send a letter to Chief Judge Garza reassuring him that these two divisions were not “disproportionately represented.”⁶⁹

Although Coe and Clark resolved this issue to their own satisfaction, John Shapard nevertheless wrote Chief Judge Garza, to offer his analysis of the JS-12 problems in the Southern District. Shapard admitted that his analysis was “based primarily on educated guesses, with the education being that derived from reviewing several hundred of these reports and discussing them with at least twenty-five of the ninety-four clerks of court.”⁷⁰ Like Coe, Shapard acknowledged the depiction of Brownsville and Laredo as suffering from a drastic over-representation of non-white juries. He stipulated that this was undoubtedly a problem with the data, not with the jury selection in those divisions. He assumed that the deputy clerks who prepared the JS-12s simply failed to follow the instructions that persons indicating their race as Mexican, Spanish, brown, Latin, and the like, should be counted as white. Shapard concluded that the substantial effort needed to correct the data—sending new questionnaires, for example—would yield little benefit. According to the 1970 Census, the non-white population of the border divisions represented only 0.5% of the population. The researcher simply worried that judiciary was left with no useful analysis of the race or ethnic balance of those juries.⁷¹

Chief Judge Garza replied to Shapard’s letter, and found himself defending his districts’ jury practices in terms only

69. *Id.* at 1, 3.

70. Memorandum from John Shapard, to Judge Reynaldo Garza 1 (May 11, 1978) (Clerk’s files of Chief Judge Reynaldo G. Garza, folder 4) (on file with the Office of the Clerk of the Court, U.S. District Court, Southern District of Texas).

71. *Id.* Shapard was also concerned that the Brownsville, Corpus Christi, and Victoria juries showed some underrepresentation of females. He suggested that moderate underrepresentation of females was common in federal jury wheels, due to a lower incidence of voter registration, as well as a higher incidence of excuse of exemption from jury service, among females. The largest underrepresentation is probably attributable to two excuses: (a) the excuse for the persons responsible for the care of young children, and (b) the excuse for persons older than some specified age (Shapard noted that roughly sixty percent of those over seventy-years of age were female). Of course, correction of sex imbalance in the wheel would compete with the policy considerations behind the normal excuses, and Shapard concluded that he was “glad that resolution of such policy conflicts is [Garza’s] responsibility, and not mine.” *Id.* at 2.

slightly different from his predecessor Connally. Garza sought to reassure Shapard that the Southern District of Texas complied with the Jury Selection Act, and “there [was] no indication that any group is being discriminated against in the composition of our jury panels.” The judge attached the correspondence explaining the problems with the Southern District’s data, and said he would appreciate it if Shapard presented this along with his report to the Committee on the Operation of the Jury System.⁷²

Nearly twenty-five years after *Hernandez*, and almost ten years after *Cisneros*, the federal judicial bureaucracy and other institutions continued to fall into the trap of the black-white binary. But, change appeared to be in the wind.

James DeAnda’s legal career in the twenty-five years after *Hernandez* is among the legacies of that landmark decision. By the late 1970s, minority activists, including Mexican Americans, began to complain that President Carter had not fulfilled a campaign promise to appoint women and minorities to the judiciary.⁷³ Carter’s opportunity to make good on his pledge came when Congress resolved to increase the number of federal judgeships. The Omnibus Judgeship Act of 1978 opened 150 positions on the federal district and circuit benches. The growth was especially significant in the Southern District of Texas, because the Act increased the number of judges there from eight to thirteen.⁷⁴

The language of the 1978 Act explicitly invited the President to make a revolution in the judiciary. Section 8 of the Act, for example, stated that Congress: “(1) takes notice of the fact that only one percent of Federal judges are women and only four percent are blacks; and (2) suggests that the President, in selecting individuals for nomination to Federal judgeships created by this Act, give due consideration to qualified individuals regardless of race, color, sex, religion, or national origin.”⁷⁵ Carter seized the

72. Memorandum from Chief Judge Reynaldo Garza, to John Shapard 2 (June 5, 1978) enclosing Memorandum from Jesse E. Clark, to Judge Reynaldo Garza (May 11, 1978) (Clerk’s files of Chief Judge Reynaldo G. Garza, folder 4) (on file with the Office of the Clerk of the Court, U.S. District Court, Southern District of Texas).

73. Approximately ninety-percent of Mexican Americans in Texas who voted in 1976 voted for President Carter, which gave him his thin margin of victory in the state. *Swift Indictments in Torres Case Could Aid Carter-Hispanic Relations*, Hous. Post, Oct. 23, 1977, at D4.

74. The Omnibus Judgeship Act of 1978, Pub. L. 95-486, 92 Stat. 1629 (revising number of judgeships allocated in 28 U.S.C. § 133 (2004)). For the legislative history of this act see U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 3569 (1978). The Act also increased the number of federal appellate judges on the Fifth Circuit from fifteen to twenty-six judges. See also *House OKs More Courts, 12 in Texas*, Hous. Post, Feb. 8, 1978, at 7A.

75. *Id.*

opportunity. During his single term, more than fifteen percent of his judicial appointees were female, and more than twenty-one percent were minorities.⁷⁶

In due course, President Carter appointed James DeAnda to the Southern District of Texas, where he became the second Mexican American judge in its history. But, did that mean he was the new white, "other white," "Latin," "Spanish-surnamed," or "Hispanic" judge? By May 11, 1979, the day the Senate confirmed the judge, the answer was not yet clear.⁷⁷

Unfortunately, another twenty-five years have passed and the tension between administrative judgments regarding race and ethnicity, and self-identification by minority groups has yet to be resolved. Complicating the issue is the fact that the racial and ethnic makeup of the United States has changed greatly since 1977, when OMB established the definitions discussed above. The OMB initiated a review in the late 1990s, which included public hearings, references to the National Academy of Science, and an "Interagency Committee for the Review of Racial and Ethnic Standards."⁷⁸

Currently, the OMB's categories for race are: (1) American Indian or Alaska Native; (2) Asian; (3) Black or African American; (4) Native Hawaiian or Other Pacific Islander; and (5) White. With OMB's approval, the Census Bureau's 2000 questionnaires included a sixth racial category: "some other race." There are also two categories for ethnicity, namely, "Hispanic or Latino" and "not Hispanic or Latino." This accepts a consensus that Hispanics and Latinos may be of any race. Instead of a new "multiracial" category, as suggested in public and congressional hearings, the OMB adopted the Interagency Committee's recommendation that people be allowed to select more than one race when they self-identify. There were fifteen boxes to choose from, and three write-in blanks on the Census 2000 questionnaire (as compared with sixteen box categories and two write-in areas in

76. CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 113-14 (1993). President Carter was a proponent of reform by other means, as well. He created nominating committees to vet judicial candidates. On November 8, 1978, he signed Exec. Order No. 12,097. 43 Fed. Reg. 52,455 (Nov. 8, 1978), calling for the establishment of standards and guidelines for the merit selection of U.S. District Judges.

77. He was one of the five new federal district judges. All five were confirmed by the Senate on the same day. *Senate Confirms 5 Federal Judges for Southern District of Texas*, HOUS. POST, May 11, 1979, at A16; *Judge James DeAnda: Graduate Blazed Trails in Texas Civil Rights*, TOWNES HALL NOTES, Fall 2000, at 74-77. Barbara Brooker, *Bell to Take Part in Judicial Post Nominee Selection*, HOUS. POST, February 20, 1977, at 5B.

78. U.S. CENSUS BUREAU, RACIAL AND ETHNIC CLASSIFICATIONS USED IN CENSUS 2000 AND BEYOND available at <http://www.census.gov/population/www/socdemo/race/racefactcb.html> (last revised Apr. 12, 2000).

1990). Finally, there is the category “some other race,” which also has a write-in blank. This is intended to allow responses from people identifying as Mulatto, Creole, and Mestizo. Reportedly, there are sixty-three possible combinations of the six basic racial categories, including six categories for those who report exactly one race, and fifty-seven categories for those who report two or more races.⁷⁹

Still unresolved is the basic question, what race should Hispanics check on this form? Apparently to encourage more useful responses, the question on Hispanic origin appears immediately before the question on race, as if to remind the respondents that, in the federal statistical system, ethnic origin and race are separate concepts. This subtle point continues to run up against self-identification. The National Latino Political Survey, for example, found that three of four respondents preferred to be labeled by their country of origin rather than by “pan-ethnic” terms such as Hispanic or Latino. Indeed, on the 2000 Census, 47.9% of Hispanics identified their race as “white,” and 42.2% declined to provide any racial categorization at all.⁸⁰

And so the debate continues. Recently, the *New York Times* reported on the Census Bureau’s struggle to find a “racial” home for “ethnic” Hispanics. The major stumbling block is, as it always has been, the vagaries of self-identification. The large number of Hispanics checking “some other race” has made it the fastest growing racial category. Census officials are hoping to eliminate this option from the 2010 questionnaires, once more hoping to encourage Hispanics to choose one or more of the five standard racial categories.⁸¹ If the contested fifty year history of self-identification since *Hernandez v. Texas* is any guide at all, the keepers of the official categories will still not like the results.

79. *Id.*

80. Changes to the questions on race and Hispanic origin that have occurred for the Census 2000 conform to the revisions of the standards for the classification of federal data on race and ethnicity promulgated by the OMB in October 1997. *Id.*

81. Rachel L. Swarns, *Hispanics Debate Census Plan to Change Racial Groupings*, N.Y. TIMES, Oct. 24, 2004, §1, at 21.

