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“The Caucasian Cloak”:

Mexican Americans and the Politics of Whiteness in the 20th-Century Southwest

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Abstract

The history of Mexican Americans and Jim Crow in the Southwest suggests the danger of allowing state actors or private entities to discriminate on the basis of language or cultural practice. Race in the Southwest was produced through the practices of Jim Crow, which were not based explicitly on race, but rather on language and culture inextricably tied to race. This Article looks at three sets of encounters between Mexican Americans and the state in mid-twentieth century Texas and California – trials involving miscegenation, school desegregation, and jury exclusion – to see the way state actors used Mexican Americans’ nominal white identity under the law to create and protect Jim Crow practices. First, it argues that whiteness operated primarily as a “Caucasian cloak” to obscure the practices of Jim Crow and to make them appear benign, whether in the jury or school contexts. If Mexican Americans were white, then they were represented so long as whites were represented. Second, it demonstrates that Mexican American civil rights leaders as well as ordinary individuals in the courtroom did not simply identify as white; some showed a more complex understanding of “Mexican” as a mestizo race, and others pointed to the idea of race as a status produced by racist practice – Mexicans were non-white if they were treated as non-white under Jim Crow. Finally, it argues that, at least in twentieth-century Texas and California, cultural discrimination *was* racial discrimination, and that continuing discrimination on the basis of language ability and other cultural attributes should be scrutinized carefully under anti-discrimination law.

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Part I. Introduction

In 1954, two weeks before the U.S. Supreme Court handed down its famous decision in *Brown v. Board of Education*, it decided the case of *Hernandez v. Texas*, striking down Pete Hernandez's murder conviction because Mexican Americans had been systematically excluded from the Texas jury that tried him.¹ The Court held that Mexican Americans, whether or not they were legally white, had been treated as a "separate class in Jackson County, distinct from 'whites.'" ² Decades later, in the 1991 case of *Hernandez v. New York*, the Supreme Court approved a prosecutor's use of peremptory challenges to strike Latinos from the jury, based on the "race-neutral" explanation that Spanish speakers would not accept the translator's version of the trial testimony.³ By one view, the story of these two *Hernandez* cases makes perfect sense: the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution prohibits discrimination on the basis of race or national origin, but allows discrimination on other rational bases, such as language or culture.

A growing body of commentators defends cultural discrimination and distinguishes it from discrimination on the basis of race. In an important new book, legal

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

² *Id.* at 479.

³ *Hernandez v. New York*, 500 U.S. 352 (1991). The Supreme Court did not reach the question of whether "language ability without more" would have sufficed as a "race-neutral" basis for the peremptory strikes, however, later courts have extended *Hernandez* to that situation. In *Pemberthy v. Beyer*, 800 F. Supp. 144 (1992), the District Court held that language ability was a proxy for race in the prosecutor's use of peremptory strikes against Latinos; the Third Circuit, in an opinion by Samuel Alito, overturned the decision, finding that the prosecutor *could have* been concerned about translation issues in striking Spanish speakers from the jury. *Pemberthy v. Beyer*, 19 F.3d 857 (1994). See also *Garcia v. Gloor*, 618 F.2d 264 (1980) and *Garcia v. Spun Steak*, 998 F.2d 1480 (1993), upholding English-only policies in the workplace; Drucilla Cornell & William W. Bratton, Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish, 84 CORNELL L. REV. 595 (1999); Christopher David Ruiz Cameron, How The Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy, 85 CALIF. L. REV. 1347 (1997).

scholar Richard Ford argues that the law should disaggregate race from culture, allowing employers to draw distinctions based on Spanish speaking, or corn-rowed hair style, or other cultural attributes, even if they correlate closely to racial identity. He suggests that “law reform proposals that would attempt to apply civil rights protections to ‘cultural difference’ . . . [will] canonize a narrow, parochial, and contestable set of ideas about appropriate group culture and . . . discredit more cosmopolitan lifestyles, commitments, and values.” Ford is particularly concerned that applying antidiscrimination law to cultural discrimination may undesirably coerce people into acting out their identities in stereotypic ways, or send a state-sanctioned message that race means that people will conform to particular stereotypes.⁴ While aspects of this cosmopolitan project offer an important corrective to identity politics that assume a “different voice” for racial groups (as do some, but not all, “diversity” based arguments for affirmative action), extending its reach to anti-discrimination law is a mistake. I bring up Ford not to engage every aspect of his compelling argument, but to offer an historical perspective that should make us skeptical about the race-neutrality of cultural and language discrimination.

The history of race and racism in the United States should make us very cautious about an effort to disaggregate race from culture in anti-discrimination law. We should be as concerned about prosecutors’ and employers’ ability to coerce individuals to perform their identities in particular ways – to conform to white or Anglo standards – as we are about courts’ ability to do so. In particular, the history of Mexican Americans and Jim Crow in the Southwest suggests the danger of allowing state actors or private entities to discriminate on the basis of language or cultural practice. Simply put, race in the Southwest was produced through the practices of Jim Crow—segregation,

⁴ Richard Ford, *Racial Culture: A Critique* (2004).

disfranchisement, isolation at the bottom of the labor market, and exclusion from public life--which were not based explicitly on race, but rather on language and culture inextricably tied to race. Employers, schools, social institutions, and government actors tied race to culture; they used presumed language ability as an excuse for segregation, and threw a “Caucasian cloak” over discrimination, arguing that Mexican Americans were white and therefore were represented so long as whites were represented.⁵ The phrase “Caucasian cloak” was first used by the plaintiff in *Hernandez v. Texas*, pointing out that Texas Mexicans were “covered with the Caucasian cloak” only when they were being excluded from jury service, and otherwise treated as non-white.¹

Mexican Americans occupy a unique position in the history of race in the United States. Because of the anomaly that the first Mexicans became American through American conquest, and gained U.S. citizenship by treaty, Mexican Americans won an unusual nominal whiteness in immigration and naturalization law, which carried over into other areas of the law. Under American law after the Civil War, only “free white persons” and Africans could become naturalized citizens, therefore most immigrant groups seeking citizenship had to litigate their whiteness in Federal court in order to decide whether they could become citizens. By contrast, Mexican Americans won citizenship first, by the terms of the treaty that ended the Mexican-American War, and

⁵ In arguing against discrimination on the basis of culture or performance of identity, I am building on my own earlier work, Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 *YALE L.J.* 109 (1998). In that article, I argued that racial categories in the nineteenth century South were defined not only by “blood” but by and through the performance of moral and civic virtues, which were then to determine one’s place in the social, political and economic hierarchy. There are important continuities between this racial ideology and the cultural determinism at work in twentieth-century Texas, and still alive today. In calling attention to the need for antidiscrimination law to focus on performances of identity, I join a growing group of scholars of contemporary antidiscrimination law, including Kenji Yoshino, *Covering: The Hidden Assault on Civil Rights* (2005); Devon Carbado and Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259 (2000), and Camille Gear Rich, “Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII,” 79 *NYU L. REV.* 1134 (2004).

then a presumption of whiteness followed.⁶ While some Mexican American organizations and individuals pressed state institutions for civil rights based on this presumption of white identity, whiteness was more often used against Mexican Americans than by them.

Groundbreaking new work in the last several years, in particular by historian Neil Foley and legal scholar Ian Haney Lopez, has focused scholarly attention on the question of Mexican Americans' fraught relation to white identity. Often this new scholarship has indicted civil rights leaders for their "Faustian pact with whiteness."⁷ According to this narrative, mid-twentieth century Mexican American organizations and their lawyers claimed whiteness as a political and legal strategy, culminating in *Hernandez v. Texas*, until they finally abandoned it in the 1970 case of *Cisneros v. Corpus Christi*.⁸ Some scholars portray whiteness claims as primarily strategic, others see them as a deeper

¹ Appellant's Brief, *Hernandez v. Texas*, No. 25, 816 at 17.

⁶ See Ian Haney Lopez, *White By Law: The Legal Construction of Race* (1996), for a discussion of the naturalization cases involving whiteness.

⁷ Neil Foley, *Becoming Hispanic: Mexican Americans and The Faustian Pact with Whiteness*, in *Reflexiones 1997: New Directions in Mexican American Studies* (Neil Foley ed., 1997); Ian Haney Lopez, *White Latinos*, 6 HARV. LATINO L. REV. 1 (2003) ("Why does it matter that Mexican American leaders insisted that they were white? After all, they took pride in their origins, were politically active, and sought to improve their communities' social, economic, and political standing. We should acknowledge the politically progressive efforts of many Mexican Americans and eschew judgments that do not take into account changed historical circumstances. Nevertheless, we must also be clear that those who claimed a white identity also held a corollary belief that certain categories of persons lived beyond the realm of social concern or responsibility. Those beyond care included non-citizens and non-whites, in particular blacks, but also many Mexicans." Id. at 3); Neil Foley, *Over The Rainbow: Hernandez v. Texas, Brown v. Board of Education, and Black v. Brown*, 25 CHICANO-LATINO L. REV. 139 (2005) ("... Mexican American commitment to a Caucasian racial identity in the 1930s and 1950s complicated, and in some ways compromised, what at first appeared to be a promising start to interracial cooperation." Id. at 140).

⁸ See George A. Martinez, *Panel: Teaching, Scholarship and Service: Practicing Latcrit Theory: The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997); Foley, *supra* note 7. But see Ian Haney Lopez, *Race and Colorblindness After Hernandez and Brown*, 25 CHICANO-LATINO L. REV. 61 (2005) and *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, CALIFORNIA LAW REVIEW 85 (1997); Steven Harmon Wilson, *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*, 25 CHICANO-LATINO L. REV. 201 (2005).

impulse towards assimilation and rejection of other people of color. In either case, the critics have to some extent adopted the perspective of the 1970s Chicano movement, taking the previous generation to task for its lack of racial pride and refusal to join coalitions with African Americans.⁹

This Article takes up the subject of Mexican Americans and whiteness in the twentieth-century Southwest. But it seeks to shift the perspective away from apportioning blame to Mexican American civil rights litigators and political advocates for their strategic choices, and away from the unanswerable question of whether Mexican Americans were or are “really” white. Instead, it looks at three sets of encounters between Mexican Americans and the state in mid-twentieth century Texas and California – trials involving miscegenation, school desegregation, and jury exclusion – to see the way state actors used Mexican American whiteness to create and protect Jim Crow practices. In each of these cases, it became an issue in court whether an individual Mexican American was – or all Mexican Americans were – white, because if they were not white, they could legally be barred from marrying, attending schools, or sitting on juries with white people. By looking at manuscript trial records as well as the public writings and private correspondence of litigators and political advocates, it is possible to gain a deeper understanding of the intersection of law and culture at the ground level.¹⁰ I have chosen to concentrate primarily on the two states with the largest Mexican-American populations, Texas and California, which were also the battlegrounds for the

⁹ Thomas A. Guglielmo, in a wonderful recent article on the transnational struggle for Mexican and Mexican-American civil rights, acknowledges that many activists eschewed whiteness claims, but nevertheless concludes that “the struggle was rooted in and dependent upon a limited and racialized sense of rights, justice and equality.” Thomas A. Guglielmo, *Fighting for Caucasian Rights: Mexicans, Mexican Americans and the Transnational Struggle for Civil Rights in World War II Texas*, 92 J. AM. HIST. 1212, 1236 (2006).

major Mexican American civil rights struggles and the sites of most of the litigation regarding Mexican American whiteness in the twentieth century.

Mexican American laypeople in the courtroom consistently presented themselves as “Mexican,” and resisted efforts to identify as either white or non-white. While American eugenicists disparaged Mexicans as a “mongrel race,” courtroom practice in racial-identity cases concerning Mexican American individuals involved an effort to separate out the “Spanish” (white) and “Indian” (non-white) components of Mexican identity. Because most Mexican Americans in the courtroom identified simply as “Mexican,” these trial confrontations have an air of absurdity. While commentators have puzzled over Latinos’ continuing resistance to the Census categories in which “Hispanic” is the only “ethnic” category, with large numbers checking the “Other race” box and writing in a national identity (such as “Mexican”), trial testimony suggests two possibilities for this self-identification. One is that most Latinos have a conception of identity that is more cultural than racial, either understanding race as culture, or believing the two distinct, but cultural identity to be primary. The other possibility—and the two are not mutually exclusive—is that they exhibit an understanding of race as produced by practices of subordination. This is what the litigators tried to get across in *Hernandez v. Texas*, and, as Ian Haney Lopez has eloquently argued, what made the opinion in that case the “single most insightful Supreme Court opinion on race ever handed down.” Haney Lopez points us to the central issue in the case, not “whether Mexican Americans

¹⁰ For an elaboration of this approach, see Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUMBIA L. REV. 640 (2001).

did or did not constitute a race,” but whether “social practices subordinate groups based upon ideas of racial difference.”¹²

For most of the twentieth century, Mexican American whiteness was not a successful strategy but a “Caucasian cloak” thrown over systematic discrimination, as the plaintiffs in *Hernandez v. Texas* contended. State courts pronounced Mexican Americans white most often as a way of denying that they were victims of racial discrimination in jury selection. As Gus Garcia, a civil rights litigator explained it, “Caucasians were on the jury. Mexicans are Caucasian. So what’s all the fussing about?”¹¹ Mexican Americans’ nominal legal status as white did not prevent their treatment as an inferior race in a de facto Jim Crow regime. Racial discrimination masqueraded as discrimination on the basis of language or culture. “Spanish speakers” were excluded from juries and schools, not “Mexicans.” This thinly veiled cultural racism made the effort to use whiteness strategically a double-edged sword. While at times, Mexican American activists and litigators were able to use legal whiteness as a tool in their civil rights struggles, especially in the effort to desegregate schools, whiteness was used against them more often than on their behalf. By the time Mexican Americans won in *Hernandez v. Texas*, the tide was already turning in the courts against race discrimination, and in the wider culture, in favor of race consciousness.

Furthermore, many Mexican American civil rights leaders throughout the twentieth century exhibited a more complex understanding of racial identity, working within the constraints of the legal doctrine. Texas Mexican plaintiffs brought *racial*

¹² Haney Lopez *supra* note 8, at 75-76.

discrimination lawsuits throughout the 1930s and 1940s at the same time they sought to be redefined as “white” on the U.S. Census and all state classification forms. While some Mexican American organizations throughout the period from 1930 to 1970 sought to distance themselves from African Americans and from Mexican nationals, others cooperated with African American activists. In short, even strategic uses of whiteness were self-conscious and contested among civil rights lawyers and activists.

Despite the institutional similarities between the forms of discrimination experienced by Mexican Americans and African Americans under Jim Crow, what was at stake for Mexican Americans turned out to be quite different. Identified as a nationality rather than a race, their most challenging obstacle to equality was “cultural discrimination.” By the 1930s, courts had defined race as “only” physical and biological, so that discrimination based on language or culture was not racial discrimination. Yet despite Mexican American litigators’ instrumental uses of legal whiteness, from the early twentieth century onward, many ordinary Mexican Americans (and the litigators in their private correspondence) exhibited a more complex understanding of racial identity as produced by racist practice. The notion of *mestizaje*, or racial mixture, also created a sense of the fluidity among groups and the importance of culture in defining identity.

This Article will begin by exploring Mexican American whiteness before 1930. Part II will discuss the 1898 naturalization case, *In re Rodriguez*, that established Mexican Americans as “white by treaty,” and go on to examine miscegenation cases from the early decades of the twentieth century, when a massive influx of Mexican immigration and expansion of Southwestern agriculture transformed race relations in

¹¹ Gustavo Garcia, *An Informal Report to the People, in A Cotton Picker Finds Justice!: The Saga of the Hernandez Case* (1954).

Texas and California. Part III will describe Jim Crow practices in the two states as well as the efforts of Mexican American organizations to combat those practices, sometimes through whiteness claims, and sometimes through claims of race discrimination. Part IV will discuss two forms of litigation in detail—school desegregation lawsuits, and jury discrimination cases—during the 1930s and 1940s, showing the way whiteness was used against Mexican Americans in court. The final substantive section, Part V, will examine the aftermath of *Hernandez v. Texas* in conjunction with the rise of the Chicano Movement and the idea of “la raza cosmica” in the 1960s.

Part II. Mexican-American whiteness before 1930

Before the 1930s, there were no Mexican-American advocacy organizations self-consciously strategizing about the issue of Mexican American whiteness in court. But that does not mean that state officials and even courts did not address the question of whether Mexican Americans were white in the years preceding. Instead, we can think of the era 1848-1930 in three stages: during the nineteenth century, whether Mexican Americans were white or not was a matter of local practice; a Federal district court decision in 1898 decreed Mexican Americans to be white for the purposes of naturalization to citizenship; and in a series of miscegenation cases decided in the first decades of the twentieth century, Mexican American identity was established as formally white, but emerged as considerably more ambiguous in courtroom testimony.

A. The nineteenth century

Whether Mexican Americans were white or a distinct race depended on class and geography in Spanish Texas and California. In the debates over the annexation of Texas in the 1840s, Anglo politicians referred often to the inferiority of the “Mexican race,” using metaphors of dirt, as well as the epithet “greaser,” which probably derives from the work some Mexicans performed greasing the axles of mule carts.¹³ Yet during the years of the Texas Republic, some Texas Mexicans were able to purchase and hold onto their land by claiming whiteness through pure “Spanish blood.” Anglos who married Mexican women “whitened” their spouses by calling them Spanish. And many of the new immigrants from Mexico in the years between 1890 and 1910 had “learned whiteness and ‘whitening’ before coming to the United States.” In those instances and many others, racial distinctions to some extent tracked class and landholding. In Texas, patterns of Mexican-white segregation map onto the divisions between “ranch counties” where Mexicans continued to be landholders, and “farm counties” in which commercial farming took over in the first decades of the twentieth century, and Mexicans were sharecroppers for white landholders. Simply put, where Mexicans held land, they were far less likely to be excluded from schools and other public accommodations, and “Mexican” was less likely to be a racialized identity.¹⁴

Mexicans’ racial identity according to government classification was almost equally ambiguous. The 1848 Treaty of Guadalupe-Hidalgo guaranteed U.S. citizenship to all Mexican citizens in the Mexican Cession without reference to racial identity.

¹³ Neil Foley, *The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture* (1997); David Montejano, *Anglos and Mexicans in the Making of Texas, 1836-1986* 252 (1987); Richard Griswold del Castillo, *The Los Angeles Barrio, 1850-1890: A Social History* (1980).

Before the Federal courts considered the matter of Mexican whiteness, U.S.-Mexico border officials made their own racial determinations, placing some Mexicans in the category “Spanish race,” and others, usually darker-skinned people, in the category of “Mexican race.” As historian David Gutierrez explains, “It was understood that ‘Spanish’ was a marker of whiteness and that ‘Mexican’ meant ‘mixed-blood’ or Indian.”¹⁵ It was fifty years before a U.S. court considered whether Mexicans could be eligible for naturalization based on identification as “white” or some other basis.

B. *White by Treaty* – *In re Rodriguez*

When the Fifth Circuit Court finally took up the matter of Mexican American citizenship, in the case of *In re Rodriguez*, it decided to treat Mexican Americans as white, while avoiding the issues raised at trial, and in the briefs on appeal, about Mexicans’ “mixed blood.”¹⁶

In 1896, Ricardo Rodriguez filed an application for naturalization papers in San Antonio, Texas. According to the Circuit Court’s statement of the case, “As to color he may be classed with the copper-colored or red men. He has dark eyes, straight black hair, and high cheek bones.” The lawyers at trial tried to elicit testimony from Rodriguez to place him in either a “Spanish” (white) or “Indian” racial category, but Rodriguez resisted this dichotomy. When Rodriguez was asked, “Do you not believe that you

¹⁴ Foley, *supra* note 13 at 19, 24, 42, 61; David Montejano, *Anglos and Mexicans in the Making of Texas, 1836- 1986* 235-52 (1987),.

¹⁵ David G. Gutierrez, *Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity* 32-33 (1995).

¹⁶ Neil Foley, *Straddling the Color Line: The Legal Construction of Hispanic Identity in Texas, in Not Just Black and White: Historical and Contemporary Perspectives on Immigration, Race, and Ethnicity in the United States* (Nancy Foner & George M. Fredrickson, eds. 2004) 342-43; *In re Rodriguez*, 81 F. 337 (1897).

belong to the original Aztec race in Mexico?” he answered, “No, sir.” Counsel then asked, “Do you belong to the aborigines or original races of Mexico?” Again Rodriguez answered, “No, sir.” “Where did your race come from? Spain?” asked the lawyer. Answer: “No, sir.” Finally: “Where did your race come from?” Answer: “I do not know where they came from.” Rodriguez insisted that he was a “pure-blooded Mexican,” and neither Indian nor Spanish. He resisted the idea that “Spanish” and “Indian” represented two distinct streams of blood in the Mexican’s veins.¹⁷

Several San Antonio politicians submitted amicus briefs to the Court regarding Rodriguez’s racial identity and eligibility for naturalization on the basis of whiteness. One based his discussion on Rodriguez’s “appearance” as well as scientific experts, who, he claimed, placed the “aborigines of this continent” outside the white race. He therefore concluded that Rodriguez was not white, whether “by the scientific classification” or “in the sense in which these words are commonly used and understood in the every-day life of our people,” and therefore, should be denied the right of citizenship.¹⁸ Another amicus brief also relied on scientific expertise, quoting Dana’s American Encyclopedia about the population of Mexico, more than half of which it said were “Indians of unmixed blood”; since Rodriguez was obviously one of these, he was neither white nor eligible for citizenship.¹⁹

Despite the trial testimony and briefs’ focus on Rodriguez’s whiteness, however, the Fifth Circuit Court decided the question based on the Treaty of Guadalupe Hidalgo. Although the court agreed with the amicus briefs that Rodriguez was probably not white

¹⁷ 81 F. 337 at 337-38.

¹⁸ 81 F. 337 at 344-45.

¹⁹ 81 F. 337 at 346-47.

according to anthropologists, nor perhaps even to laypeople, they concluded that the Treaty required the U.S. to bestow citizenship on Mexicans regardless of their race. The court avoided reaching a conclusion about whether Mexicans *were* white, but treated them legally *as though* they were white.

C. Sex across Racial Borders: Popular and Legal Ideas of the “Mexican Race”

Rodriguez provided the backdrop for all future litigation involving Mexican Americans in state courts. The bracketing of *Rodriguez*’s racial identity was treated by later courts as a presumption that Mexicans were Spanish (white) unless proven otherwise; in court, this led to an effort to tease out individuals’ Spanish and Indian ancestry, an effort most Mexicans stubbornly resisted. In miscegenation cases, state courts began with the presumption that Mexican Americans were white for the purposes of statutes criminalizing white-black marriage. The following section discusses the three cases regarding interracial marriage that reached the high courts of the Southwestern states for which trial transcripts were available. It is likely that many more such cases went to trial but were never appealed; however, the records of these trials give us a sense of the way popular understandings of Mexican American racial identity clashed with the legal binary of “Spanish”/“Indian.”

In 1910, Francisco Flores was convicted of “unlawfully marrying a negro within the third degree” and sentenced to two years in the penitentiary. According to the court, Flores was Mexican or “[at least] (crossed out) of Spanish extraction,” whereas his wife, Ellen Dukes was identified as having “negro blood in her veins,” a Mexican mother and a

father with “some negro blood.”²⁰ The testimony at trial revolved around the physical appearance, reputation, and social associations of both husband and wife.

At trial, the Deputy Constable at Nacogdoches testified that he had warned Flores that he could not marry a negro woman. The constable reported that Flores had denied having “a drop of negro blood in me” but explained that Ellen Dukes’ mother was a Mexican woman. Flores apparently considered his fiancée to be Mexican because of her mother’s identity.

When the lawyer for the state asked the constable to testify about Dukes’ race, Flores’ lawyer objected: “...unless he knows her antecedents, he can’t say unless he qualifies himself.” In other words, Flores’ lawyer argued that the basis for testimony about racial identity had to be either personal knowledge of an individual’s ancestry, or scientific expertise. The Court, however, ruled that the witness could “describe her physical features.” He did so: “She has the physical appearance of a negro, she is kinky headed and very dark, what we would call a dark yellow color.” He was then asked, “Any other physical appearances of a negro?” and answered, “Well just a plain old fat negro woman is all,” which was stricken from the testimony at Flores’ objection.

On cross-examination he elaborated, “It is not a fact that she favors a Mexican greazer more so than she does a negro; her skin is a different color from that of a black negro; I suppose her skin is more of the color of a Mexican than it is a negro of that peculiar hue or type, it is a copper color, Mexicans most of them have a copper color. . . . I would determine the quantity of negro blood in her by her kinky hair.” Similarly, another state

²⁰ Flores v. State, No. 727, slip op. at 1(Crim. App., 1910) *available at* Texas State Archives, Austin, Texas [TSA].

witness judged Ellen Dukes “from her personal appearance . . . at least half negro,” but could not say “what extent of negro blood she has in her, I am not a negro geologist.”²¹

The state also called as a witness a woman who identified as “colored,” who testified that Ellen Dukes “married a Mexican” at her house, and that Ellen stayed over at her house “with negroes” and “she eat at our table.” On cross-examination, she admitted that she didn’t “know of my own knowledge whether she is a negro or not but she looks like one to me; she is a little brighter color than I is.” The Sheriff of Angelina County testified that “during the years I have known [Ellen Dukes] I have never known her to associate with white people in a social way, she has always associated with negroes.” Yet on cross-examination he admitted that association with “negroes” did not necessarily mean whiteness (if Mexicans were defined as white) because, “Mexicans, such as this defendant here, that we commonly term as greasers generally associate with negroes. I would not undertake to say whether these greasers have any negro blood in them or not, I was not there at the beginning.”²²

Ellen Dukes Flores, in her own testimony, not only evinced the fluidity of her own identity, but uncertainty about her husband’s: “My mother was a Mexican; my father had some negro blood in him; I do not know just how much . . . my father’s color was very bright, he was a great deal brighter color than I am; my father’s hair was not kinky or nappy like the ordinary negro, his hair was not as bad as my hair, it was straighter . . . Flores always associated with negroes and not with white people . . .when I was at home I always associated with the Mexicans; since I have been in Angelina or Nacogdoches Counties I have not associated with the white people or white race.” Ellen

²¹ Trial transcript at 14, *State v. Flores*, (D. Tex.), *available at* Texas State Archives, Austin, Texas [TSA]..

²² Trial transcript, *Id.* at 9-11.

appeared to consider Mexicans to be white, but her own identity to be somewhere in-between, associating at times with Mexicans and at times with negroes; likewise, her husband, who was Mexican, associated only with negro people.²³

The trial judge charged the jury only about the definitions of “negro” and “white person” under the state miscegenation statute, including the fact that “Mexicans . . . shall be deemed a ‘white person’ within the meaning of this law.” Flores moved for a new trial, arguing that the state had failed to prove both that Flores was white, and that Dukes was black. Flores’ motion complained that “at best, the witnesses stated that ‘he (defendant) looked like a Mexican,’ . . . on the other hand, the testimony disclosed that the defendant associated with and commingled with negroes all the time, and did not associate with white people at all, which was a circumstance of his being part negro,” and that “none of the witnesses in this case testified as to knowing of the antecedents [sic] of the women, and knew none of her ancestors [sic], and testified only to ‘her appearances as being of mixed blood and appearing to have negro blood.’” On appeal, the judge accepted this argument, reversing the lower court decision and remanding for a new trial.²⁴

Flores v. State reveals something about popular and legal understandings of Mexican and “negro” identity in Texas. On the one hand, it was fairly clear from the testimony that many Mexicans and blacks associated with one another socially, and that some intermarried. On the other hand, the law defined Mexicans as “white,” and proscribed Mexican/black marriage. While the state attempted to demonstrate Dukes’ “negro” identity by her associations, this proved difficult because of the evidence that

²³ Trial transcript, Id. at 11.

Mexicans associated at times with both whites and blacks. And although the trial judge allowed, as in most racial identity trials, testimony about appearance, associations, reputation and performance, the Fifth Circuit accepted the defendant's argument that the state had not met its burden of proof in showing the couple's ancestry.

Another miscegenation case from the same era also suggests the fluidity of popular understandings of Mexican racial identity in a confrontation with state efforts to create and police a single racial boundary between black and white. *Kirby v. Kirby* was a 1921 Arizona case, in which Joe Kirby sued his wife Mayellen for an annulment rather than a divorce, on the ground that their marriage had violated the state's antimiscegenation law because he was "a person of Caucasian blood" whereas she was "a person of negro blood."

The trial immediately ran into complications regarding Joe Kirby's white status when his mother, Tula Kirby, took the witness stand, testifying in Spanish with an interpreter. Joe's lawyer asked, "To what race do you belong?" and Tula answered, "Mexican." He pressed: "Are you white or have you Indian blood?" and she answered, "I have no Indian blood." On cross-examination, Mayellen's lawyer asked about Tula's father, "Was he a Spaniard?" She answered, "Yes, a Mexican." That was not what the lawyer meant; when he asked whether Tula's father was born in Spain, Tula told her he was born in Sonora. To the question "who was your mother?" Tula answered, "Also in Sonora." Tula explained that her mother was a Spaniard on her father's side, and Mexican on her mother's side. Mayellen's lawyer asked, "What do you mean by Mexican, Indian a native." Tula answered, "I don't know what is meant by Mexican."

²⁴ Charge of the Court Filed Nov. 24, 1909, p.7; Defendant's Original Motion for a new Trial Filed Nov. 26, 1909, Id. at 25.

The lawyer, still equating “Mexican” with “Indian,” asked, “A native of Mexico?” But Tula, who understood “Mexican” as an identity in itself, answered, “Yes, Sonora, all of us.”²⁵

The lawyer then asked Tula about each of her grandparents, all of whom she described as “Mexican,” save her father’s father, a Spaniard named Ignacio Quevas. The lawyer then prodded her, “as a matter of fact, you don’t know what your blood is at all?” Tula answered, “I do know that my mother is Mexican and my father is Mexican, half Spaniard.” The lawyer then turned to the issue of her daughter-in-law’s identity, asking Tula what she knew about “Mrs. Kirby’s family.” Tula replied that she “distinguish[ed] her by her color and the hair; that is all I do know.” The cross-examination ended with this final exchange: Mayellen’s lawyer: “And you call yourself white, is that because you are colored too?” Tula Kirby: “We have no such description as white, we are called Mexicans.”²⁶

In Tula Kirby’s testimony, we see evidence of a popular counter-narrative of Mexican identity that defies racial categorization. While Tula appeared to draw some distinction between “Spaniard” and “Mexican,” it was elusive. When Mayellen’s lawyer tried to pin her down to a non-white identity for “Mexican,” such as “Indian” or “native,” she resisted. Yet neither did she identify herself as white or Caucasian. She apparently considered “Mexican” to be her racial identity, or at least identified strongly as Mexican and considered that to be her primary source of identification, with “race” perhaps less important. Ultimately, she tried to explain, “we have no such description as white.”

²⁵ Appellant’s Abstract of Record at 13-15, *Kirby v. Kirby*, (Sup. Ct. Ariz. No. 1970), *available at* Arizona State Archives. *See also* Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of “Race” in Twentieth-Century America*, in *Sex, Love, Race* (Hodes, ed., 1999), 464-90, at 464-65.

²⁶ *Kirby v. Kirby*, trial transcript, at 14-15.

When Joe Kirby took the stand, his lawyer asked him the same question he asked his mother: “What race do you belong to?” Mayellen’s lawyer objected, “I think, if Your Honor please, that calls for a conclusion.” But the judge disagreed: “Oh, no, that is a matter of pedigree.” In other words, racial identity (pedigree) was always a matter of fact to which witnesses could testify. Joe answered, less than emphatically, “I belong to the white race I suppose.” On cross-examination, Mayellen’s lawyer asked, “Joe, haven’t you repeatedly told Mrs. Kirby that you didn’t claim to be a white man, that you were not a white man, that you were a Mexican?” Joe denied this, and also denied the notion that his father had been raised by Indians, insisting that his father was an Irishman.²⁷

At the end of the testimony, Joe’s lawyer claimed to have established Joe’s “Caucasian” identity. Mayellen’s lawyer “scoffed, claiming that Joe had ‘failed utterly to prove his case’ and arguing that ‘[Joe’s] mother has admitted that. She has [testified] that she only claims a quarter Spanish blood; the rest of it is native blood.’ At this point the court intervened. ‘I know,’ said the judge, ‘but that does not signify anything.’” In ruling for Joe, the judge’s opinion explained that “Mexicans are classed as of the Caucasian Race. They are descendants, supposed to be, at least of the Spanish conquerors of that country, and unless it can be shown that they are mixed up with some other races, why the presumption is that they are descendants of the Caucasian race.”²⁸

Here was a case where a popular narrative of Mexican racial identity clashed with the legal presumption of Mexican whiteness, in this case to the disadvantage of Joe Kirby’s “negro” wife, whose racial identity was seen as literally facially self-evident. As in the *Flores* case, people who claimed “Mexican” identity were equivocal about what

²⁷ Kirby v. Kirby, *Id.* at 16-17.

²⁸ Kirby v. Kirby, *Id.* at 19; Pascoe, *supra* note 25 at 468.

that meant in racial terms, but in this case, the court ended its inquiry with the presumption of whiteness, rather than concluding that identity had not been proven.

Twenty years later, the Supreme Court of Arizona again considered a marriage involving a defendant identified as part-Mexican, but in this case, both husband and wife had some Mexican ancestry. Frank Pass was found guilty of murder in 1941, over his invocation of the spousal privilege to exclude the testimony against him of Ruby Contreras Pass; the lower court overruled his objection on the ground that Frank and Ruby's marriage violated the state's miscegenation statute, because "a descendant of an Indian may not marry a member of the Caucasian race." Who was who in this case? Frank testified that his mother was half-English and half Paiute Indian; his father was Mexican. The Arizona Supreme Court therefore concluded that Frank was "a descendant of three races, to-wit, Caucasian, Indian and Mexican." Ruby testified that her father was Spanish, and her mother was half French and half Mexican. She was then asked, "Do you have any Indian blood in you?" and answered, "Not that I know of." That was enough for the lower court, as well as the Supreme Court of Arizona, to conclude that Ruby was "Caucasian," "Spanish and French." Frank's lawyer tried, without success, to argue that Mexicans were not white: "It is, I believe, common knowledge that the Mexican people have back from some distant relative Indian blood. The Mexican people are derived from some cross between Indian and other races or between an intermixture of people . . ." The lower court judge, however, refused to "take judicial knowledge of that fact at all"; so long as Ruby testified that she did not have "Indian blood" and no evidence was presented of "Indian blood," she was presumed white. The Supreme Court also found, "In her veins nothing but Caucasian blood flowed," although it urged the

legislature to set a more precise blood-quantum into the law, so that people of mixed blood would be able to marry somebody.²⁹

Thus, in cases involving interracial marriage, in which Southwestern courts were drawing the line between black and white, they placed “Mexicans” on the white side of the line, following the *Rodriguez* precedent. Courts presumed that Mexican Americans were white unless there was clear evidence of either Indian or black ancestry. Often, lawyers drew on a dichotomy between “Spanish” Mexicans and “Indian” Mexicans that did not appear to be shared by the people they were questioning. The legal classification as white persisted even when trial testimony revealed a considerable amount of Mexican/black social interaction and distance from other “whites,” as well as the refusal of both “Mexicans” and other “whites” to identify Mexican Americans as white socially. By the 1930s and 1940s, this social distance was exhibited in every aspect of life in the Southwestern United States. The clash between the varied social realities of Mexican Americans and their legal classification in the courts thus became even more problematic with the spread of Jim Crow practices.

III. The Politics of Whiteness in the 1930s and 1940s

In the 1930s and 1940s, Mexican Americans in the Southwest began to organize in response to the increasing antagonism they experienced from their Anglo neighbors. During this period, exclusionary practices – from deportation to segregation – spread, and Mexican Americans responded through political advocacy. One of the strategies they employed was to claim the rights of white citizens. But this was never the only strategy,

²⁹ Trial Transcript at 289, *State v. Pass*, (Sup. Ct. Ariz. May 22, 1941) (No. 16267) available at Arizona State Archives; *State v. Pass*, 59 Ariz. 16, 17 (1942); Trial Transcript, Direct Examination of Ruby

and it often co-existed with appeals to race pride and solidarity with other victims of racism.

A. Jim Crow in the Southwest

We tend to think of segregation as a Southern problem, associating “Jim Crow” with the exclusion of African Americans from private and public institutions in the Southeastern United States. But Mexican Americans also suffered under a Jim Crow regime, not only in Texas, but across the Southwest. And in California, not only Mexican Americans but Asian Americans, Indians, and blacks were excluded from white schools. James Loewen has recently chronicled the history of thousands of all-white “sundown” towns and suburbs across the West and North, that kept out not only African Americans but Asian Americans and Mexican Americans; they were known as “sundown towns” because people of color were warned not to let the sun set on them within the town limits.

In California and Texas, as discussed earlier, discrimination against Mexicans had varied according to class and geography in the second half of the nineteenth century. But massive immigration from Mexico, as well as the economic effects of the Great Depression, led to the expansion of Jim Crow beyond the agricultural regions that had been its core in earlier years.

From 1890 to 1930, between one and 1.5 million Mexicans immigrated to the United States, especially in the aftermath of the Mexican Revolution in 1910. In the 1920s alone, the Mexican population of California doubled from 121,000 to 368,000. The Southwest was transformed by this massive influx of people, which fed an enormous

Contreras Pass, at 286; *Id.* at 293-94; 59 Ariz. at 20.

expansion of agriculture. In 1880, there were only 7436 miles of railroad track in the Southwest; by 1920, that number had increased nearly fivefold to 36,000. In 1890, there were 1.5 million acres of irrigated land in California, Nevada, Utah and Arizona combined; by 1909, there were 14 million irrigated acres in the Southwest. The expansion of railroads and irrigation enabled massive increases in agricultural production.³⁰

Despite (and perhaps because of) the dependence of Southwestern agriculture on Mexican workers, there had been little opposition to Mexican immigration before the 1920s. The first national immigration restriction to affect Mexicans was the imposition of a literacy test in 1917. In 1924, the year that Congress passed the Immigration Restriction Act setting quotas limiting immigration from Europe, attention turned to Mexicans, especially the “wetbacks” who crossed the Rio Grande River without documentation. One Congressman from Indiana complained in April 1924, “What is the use of closing the front door to keep out undesirables from Europe when you permit Mexicans to come in here by the back door by the thousands and thousands?” In response, the Bureau of Immigration established the Border Patrol that year to monitor illegal immigration. Until the Depression, little sustained effort was made to restrict Mexican immigration, but the rising anti-Mexican sentiment expressed itself in a tightening of Jim Crow.³¹ Beginning in the 1930s, nearly half a million Mexican immigrants were repatriated to Mexico, some voluntarily, but the majority against their will. Those who remained found themselves second-class citizens.

³⁰ Gutierrez, *supra* note 15 at 40-41.

³¹ *Id.* at 52-53, 69.

In Texas in the 1930s and 1940s, as in much of the Southwest and California, most Mexican American children attended separate schools; by 1930, 90% of South Texas schools were segregated. In agricultural areas, many Mexican Americans lived in “company towns” like Taft Ranch with all separate institutions. Mexican Americans were discriminated against in jury selection and in voting, and in many places, were shut out of public accommodations like swimming pools, theaters, and restaurants, or segregated into the “colored” section, together with African Americans.³² For example, Manuel C. Gonzales, lawyer for the leading Mexican American advocacy group in the 1940s, the League of United Latin American Citizens, compiled a “list of segregatory incidents” in 1940-41.² These included:

Incident 1, Corpus Christi, Texas, March 10, 1941, a real estate covenant with a clause requiring that “[n]o lot or any part thereof shall be sold to any Mexican, Ethiopian, Malayan or Mongolian or any person having an appreciable admixture of Mexican, Ethiopian, Malayan or Mongolian blood.” ...

Incident 3. The Hitchcock Grill – no service to Mexicans.

Incident 4. Dallas, Texas, February 6, 1941, relative to imprisonment of Mexicans with persons belonging to the colored race....

Incident 7. Galveston, Texas, March 26, 1941, relative to the exclusion of all persons of “Mexican Indian descent” from serving on grand juries in Galveston County....

Incident 27: Kennedy, Texas, November 16, 1940, relative to a report . . . stating that Mexican school children had been taken to eat in the dining room for Negro school children.³³

In California, there were similar levels of segregation and discrimination against Mexican Americans. Manuel Ruiz, secretary of the Coordinating Council for Latin American Youth, reported to the Los Angeles authorities a police officer in Watts, “shouting that he was going to ‘kill any son of a bitch Mexican,’” in 1944. He

³² Montejano, *Anglos and Mexicans*, at 160; Foley, *supra* note 14 at 122.

² For more about LULAC, see p. 29 *infra*.

complained to the Office of War Information that local newspapers “stir[ed] up feelings against juvenile delinquency of Mexican extraction,” by always referring to criminals as “Mexican.” Ruiz collected and appealed police brutality cases involving Mexican American victims, as well as cases in which the judge discriminated against Mexican American defendants.³⁴

Anglos in Texas who supported segregation of Texas Mexicans reported in a 1950 survey that they viewed Mexicans as a different race. According to the American-Statesman, “Most of those who approve segregation make no attempt to cover up their prejudice against Latin-Americans. They say Latin-Americans are ‘a different race,’ ‘socially inferior,’ ‘not clean,’ ‘we don’t believe in mixing races.’” One-third of all Texans favored separate schools based explicitly on the fear of race-mixing. Nearly half cited other reasons relating to culture or social performance for preferring separation, including language differences and not “act[ing] like whites.” The Good Neighbor Commission also received and collected letters expressing virulent racism aimed at Texas Mexicans. One Texan wrote to Governor Shivers in 1953 that most “all white AMERICAN GOD FEARING CITIZENS . . . are strongly in favor of a continuation of racial discrimination in order to protect the sanctity of our homes, safeguard our children . . . keep Texas and the U.S. HOLY, sacred and pure, and keep AMERICA AMERICAN.” He backed up his argument for racism with a theory of polygenesis, that God created “the Negro, the Indian and THE WHITE MAN,” just as he made “deer,

³³ M.C. Gonzales Papers, Index to Segregatory Incidents, at 1-6, F. 2, Benson Latin American Collection, University of Texas [BLAC-UT].

³⁴ Letter to Office of War Information, (July 19, 1944) (Manuel Ruiz Papers, Box 2, F. 15); letter to Capt. Harry Lawrenson, (May 9, 1945); (City Hall Box 3, F. 12), *People v. Whipple*, 100 Cal. App. 261 (1929); **FIND juvenile case**; at Stanford University Libraries, Special Collections [SUL-SC].

antelope, goat and sheep,” and ended with a warning that LULAC and the G.I. Forum “should be *carefully watched*.”³⁸

Most segregation of Mexican Americans was *de facto* rather than *de jure*, set in place by custom and local administration rather than state statute. In Texas, school segregation was left up to the discretion of local officials, who insisted that all separation was for educational purposes. In California, Sec. 8003 of the state school code provided that separate schools be established for “Indian children and for children of Chinese, Japanese or Mongolian parentage.” In 1931, a bill was proposed in the state legislature to add the phrase “whether born in the United States or not” immediately after the words “Indian children” in that statute. As the New York Times noted, this addition “could only apply to Mexican children, for there are in California no other youngsters of Indian blood in sufficient numbers to be segregated, and not born in this country.”³⁵

Although this effort to enshrine segregation of Mexican Americans in state statute failed, most California school districts simply interpreted the existing statute to include them already in the category “Indian.” In 1945, Manuel Ruiz “declared that many school districts have used this section to segregate Latin American pupils ‘on the ground that they may have some Indian blood.’” Mexican American groups helped introduce an anti-segregation bill in that year to repeal Section 8003 of the school law, but it died in committee in the state senate. As leading journalist and sociologist Carey McWilliams explained, the “common practice has been simply to assign all children with Spanish or

³⁸ Joe Belden, *Minority of Texans Favors Separation For Latin Students*, AMERICAN-STATESMAN, June 4, 1950, in Box 1989/59-18, available at Good Neighbor Commission Archives, Texas State Archives; Letter from J. G. Riser to Gov. Shivers (Aug. 24, 1953) (GNC Archives, TSA Folder marked Disc. – Comal County – New Braunfels).

³⁵ NY Times III. 6:2 April 19, 1931; Hegira of Mexicans Bothers California, in Source Material Gathered by the Federal Writers Project on Migratory Labor, Carton 16, F. 704, Bancroft Library, UC Berkeley.

Mexican names to a separate school. Occasionally, the school authorities inspect the children so that the offspring of a Mexican mother whose name may be O'Shaugnessy will not slip into the wrong school.”³⁶

Both state and national government agencies explicitly counted Mexican Americans as a separate racial category. The first efforts to count Mexicans in the U.S. Census, in 1930, counted them among “people of other races,” with “Mexican” being one of the other races. Whereas the 1930 Census counted 686,260 “people of other races” in Texas, it counted only 3692 “white people born in Mexico.” Because of the vigorous opposition to this racialization of “Mexican” by the League of United Latin American Citizens (LULAC) as well as by the Mexican government, the Census in 1940 categorized Mexicans as white unless “definitely Indian or of other non-white race.” In subsequent decades, the Census used a variety of methods to count people of Mexican origin in the five southwestern states, including lists of Spanish surnames and the categories “Spanish Mother Tongue,” “Spanish Language,” “Spanish Heritage,” and “Spanish Origin.” Beginning in 1980, the general term “Hispanic” was introduced as an ethnicity category following the “race” question on the Census form.

Yet state officials continued to classify “Mexicans” or “Latin Americans” as a non-white race well after 1940. For example, on July 10, 1941, a citizen of San Angelo, Texas, complained to LULAC that “the Vital Statistics Department of said city is classifying births of the Latin Americans as of the Mexican race instead of the white race

³⁶ Newswire, (April 30, 1945), (Manuel Ruiz Papers, M295, Box 16, F. 3, SUL-SC). See also Letter to Senator Slater from National Origins Council of America, May 15, 1945 (“We feel that segregation of children of Mexican extraction, on the theory that many of them may have some Indian blood, and as it has been practiced in many communities of California has been inimicable [sic] to the process of intigration [sic] of this segment into the American community”), *id.*; Carey McWilliams, *Is Your Name Gonzales?*, THE NATION, March 15, 1947, at 302.

as has been recommended by the Federal Government.” As late as 1954, the Texas State Department of Health used forms with the categories “W,” “M,” and “C,” for “White, Mexican and colored,” or “AA LA C” for “Anglo American, Latin American, Colored.” After LULAC complained, the State Health Officer instructed officials to change the forms, as he “agree[d] that Latin American citizens should be treated as white.”³⁷

Thus, in Texas and California, Mexican Americans suffered many of the same Jim Crow practices as African Americans. Not only were they excluded from many public accommodations, like swimming pools, theatres, and restaurants, but more importantly, from the key institutions of public life: schools and political institutions. Like blacks, they responded to racial injustice by organizing, petitioning and litigating.

B. Mexican American Organizations and Politics

In the 1930s and 1940s, Mexican Americans formed organizations to battle Jim Crow. These groups often enlisted claims of whiteness in the battle for civil rights, and urged fellow Mexicans towards cultural assimilation and “100% Americanism,” drawing a connection between whiteness and citizenship that would have been familiar to most Americans. Yet at the same time, these organizations also emphasized “racial pride” and Mexican cultural heritage. As Ian Haney Lopez has written, activists “resolved the tension between seeking both difference and sameness by pursuing these on distinct planes: difference in terms of culture and heritage, but sameness regarding civil rights and civic participation.” While some have characterized the Mexican American

³⁷ Index to Segregatory Incidents at 9, (MC Gonzales Papers, F. 2, , BLAC-UT); Letter from Albert Armendariz to Henry Holle, (Aug. 26, 1954), and Letter from Holle to Armendariz, (Sept. 3, 1954), (Good Neighbor Commission Archives, Texas State Archives.,Box 1989/59-42, folder marked “LULAC’s 1955-56”).

organizations of the '30s and '40s as unequivocal promoters of assimilation and white identity, in fact their ambivalence ran deep.³⁹

The most important organization advocating on behalf of Mexican Americans was the League of United Latin-American Citizens, known as LULAC, formed in 1929 to unite a number of Mexican American fraternal organizations in Texas. LULAC consciously promoted both “race pride” and “100% Americanism. Among the “Objects and Aims of the United Latin American Citizens” were

2. To assume complete responsibility of educating our children in the knowledge of all their duties and rights, language and customs of this country as far as there is good in them. We declare for once and forever that we will maintain a respectful and sincere worship for our racial origin and be proud of it.
3. Secretly and openly, by all right means, we will aid the culture and orientation of Mexican-Americans and we will govern our life as a citizen to protect and defend their life and interests in so far as is necessary.⁴⁰

These aims included both pride in racial and cultural origins as well as Americanization. Early LULAC leader Alonso Perales described the goals of LULAC in terms of the development among “the members of our race the better, more pure and perfect type of true and loyal citizens of the United States of America,” as well as the attack on all discrimination based on “race, religion, or social position,” and an emphasis on “the acquisition of the English language.” The application for membership asked the applicant, “Are you a native born American citizen? Are you a naturalized American Citizen? If so, when and where were you naturalized? Are you legally qualified to vote in this County and State?” After seven years, LULAC resolved to strike out the hyphen

³⁹ Ian Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1165 (1997).

⁴⁰ Objects and Aims of the United Latin American Citizens, at 6, (*available at* Weeks Collection, Box 1, F. 5, BLAC-UT).

in “Latin-American,” because “the word Latin should be used as descriptive of the legally and technically accurate phrase, American Citizens.”⁴¹

LULAC officials insisted that Americanism and exclusion of non-citizens was the right policy. Alonso Perales, writing in *La Prensa* to answer the charge that “all persons of Mexican blood ought to be united in a single society,” explained that because LULAC was “Americanistic,” therefore “only American citizens can belong to it, but nevertheless, the League can...cooperate with purely Mexican societies in all that tends to the dignification and well being of our race in Texas.” LULAC leaders lent their support as early as 1930 to Congressional legislation to restrict immigration from Mexico.⁴²

During this period, LULAC officials generally referred to “the Mexican Race, as a Race,” and talked about the need for an organization to promote understanding “[w]here two races are brought together under one flag.” At the same time, LULAC used claims of whiteness to push for Mexican American civil rights: in 1941, 1943, and again in 1945, LULAC pushed unsuccessfully for a bill in the Texas legislature guaranteeing “equal privileges” to “all persons of the Caucasian race.” While the bill never passed, a toothless resolution declaring that “all persons of the Caucasian Race...are entitled to the full and equal accommodations, advantages, facilities, and privileges of all public places of business or amusement” did go through the Texas state

⁴¹ Alonso S. Perales, The Unification of the Mexican-Americans , (Sept. 4, 1929) (Weeks Collection, Box 1, F. 13, BLAC-UT); LULAC: Fifty Years of Serving Hispanics, Golden Anniversary, 1929-1979 (Weeks Collection, Box 1, F. 3);, Resolution June 6, 1936, On The Question of The Hyphen, (LULAC Papers, Publications, BLAC-UT). .

⁴² Perales *supra* note 41; The Mexican Youth (Weeks Collection, Box 1, F. 13); Quoted in *Latin-U.S. Group Form Service Body; Organization’s purpose is to gain Equal Rights for All Citizens Here*, BROWNSVILLE HERALD, (Sept. 22, 1929)) (Weeks Collection, Box 1, F. 11, BLAC, UT); Gutierrez, *supra* note 15 at 85.

legislature in 1941; LULAC leaders M.C. Gonzales, George Sanchez, Alonso Perales, and the Mexican government all lobbied for it.⁴³

One of the earliest actions of a LULAC chapter took place in 1931, when El Paso city officials began classifying Mexican Americans as “colored” rather than “white” in birth and death registries, which conveniently lowered the “white” infant mortality rate for the city.³ When the local LULAC chapter filed an injunction against the city, its local leader argued that Mexicans “as a race are red if they are Indians and white if they are not Indians.” Alonso Perales wrote to “congratulate him for his ‘virile stance’ on the classification issue, explained that he never protested the fact that Mexicans had their own category in San Antonio because ‘we are very proud of our racial origins and we do not wish to give the impression that we are ashamed of being called “Mexicans.” ‘Nevertheless,’ he continued, ‘we have always resented the inference that we are not whites.’”⁴⁴

In 1949, Hector Garcia, a physician and military veteran, founded another important Mexican American organization, the American G.I. Forum (AGIF). Despite the fact that the AGIF, like LULAC, worked to combat discrimination and segregation, in 1954 Garcia insisted that “we are not and have never been a civil rights organization,” presumably to avoid any association with black groups. “Making any distinction between Latin Americans and whites, he wrote, was a ‘slur,’ an insult to all Latin Americans of Spanish descent.” AGIF also connected its whiteness claims to

⁴³ Guglielmo, *supra* note 9, at 1212, 1221.

³ Apparently, a high white infant mortality rate had been an object of public concern, whereas high rates for people of color did not garner the same attention.

⁴⁴ Neil Foley, *Partly Colored or Other White: Mexican Americans and Their Problems with the Color Line*, in *BEYOND BLACK AND WHITE: RACE, ETHNICITY, AND GENDER IN THE U.S. SOUTH AND SOUTHWEST* 123-144, 131 (Stephanie Cole & Alison M. Parker eds., 2004).

aggressively Americanist anti-immigrationism. In 1951, the AGIF passed resolutions urging restriction of the “wetback tide,” although by 1954, Operation Wetback had led to such egregious violations of Mexicans’ civil rights that even AGIF and LULAC protested.⁴⁹

Many of the complaints by Mexican Americans to LULAC and other activist organizations relied on a claim of whiteness, in essence diagnosing the problem of discrimination as one of misapprehension: we are being treated as though we are not white, but we are. Citizens also brought their complaints directly to the Good Neighbor Commission of Texas (GNC), a state agency designed to promote good relations between Texas and Mexico. One Mexican American activist wrote to the GNC in 1945 to request an investigation of “the latest case of racial discrimination of which we have knowledge in our city, with a view to eradicate from the minds of ignorant Texans of Anglo-American descent the erroneous and pernicious idea that we, the Mexicans or descendants of Mexicans, do not belong to the Caucasian race.” Another wrote to the Coordinator of Inter-American Affairs to complain about a “No Mexicans Allowed” sign at the Toasty Tasty Café in San Angelo Café, asserting that “such discrimination is un-American and breeds a bad feeling between the people of Mexican blood and others,” and at the same time noting that “[t]he laws of Texas and the United States provide for no segregation of Mexicans and other white Americans.” Such interchangeable discussion of “people of Mexican blood” and Mexicans as white was common.⁵⁴

⁴⁹ Foley, *supra* note 44 at 136; Gutierrez, *supra* note 15 at 164.

⁵⁴ Letter from Joe A. Real, Chairman Civic Affairs Committee, Federacion Regional de Sociedades Mexicanas y Latinoamericanas, to Mrs. Pauline Kibee, exec sec’y, GNC (March 6, 1945) (Box 1989/59-42, folder marked: GI Forum, general, 1945-48, Good Neighbor Commission Archives, TSA); Letter from Jose Rodriguez, to Coordinator of Inter-American Affairs, (June 5, 1944) (Box 1989/59-42, folder marked: GI Forum, general, 1945-48, Good Neighbor Commission Archives, TSA). *See also* Letters from John F.

Some of the letter-writers insisted that Mexicans should not be subject to Jim Crow because state law only sanctioned the segregation of “negroes” or “colored” people. And some took this even further, expressing outright hostility to African Americans: “Let us tell these Negroes,” LULAC member Gregory Salinas urged in 1936, “that we are not going to permit our manhood and womanhood to mingle with them on an equal social basis.”⁵⁰

Well into the 1950s and 1960s, activists continued to bring claims based on whiteness to state officials. LULAC monitored the use of state forms that categorized “Mexican” or “Latin” as a race separate from white, as well as the categories in the United States Census. In 1950, Hector Garcia of LULAC sent the acting director of the U.S. Census a copy of a State of Texas, Dept. of Public Welfare form, with a “race-nationality” of “Latin”; he responded by reassuring Garcia that “the plans for this Census, like the plans for the Census of 1940, provide for persons of Mexican origin to be included under the race classification of white.” In 1958, a Mexican-American citizen complained to the General Consul of Mexico (who forwarded the complaint to the Good Neighbor Commission) that she was refused service by a carhop at Tunie’s Drive Inn, Number 2, in San Antonio. When told that “she was sorry but that the Tunie’s Drive Inns did not cater to negroes or Mexicans,” she “showed the waitress her drivers license pointing out that the race of the bearer, hers, is ‘white’...” Similarly, in 1963, LULAC complained to the Good Neighbor Commission that a camp in rural Texas advertised “No Latin Americans or Colored People accepted.” The GNC director, wrote to the camp, explaining that “when men of high position in Mexico and in our own State are

Mendez to Manuel Ruiz (Nov., 1943) (regarding exclusions from theatres an “insult to the entire Mexican race,”) (Box 2, F. 16, Manuel Ruiz Papers, SUL-SC).

discriminated against solely because they are of Latin descent, it is hard for them to understand. Unfortunately, it is true that it gives the idea that they are not of the white race, which is untrue. The Latin race is a purely white race.”⁵⁶

Good Neighbor Commission officials also responded to complaints about Jim Crow practices involving Mexican Americans, as did state prosecutors and judges, by drawing the distinctions between state discrimination against Mexicans and “Negro” or “colored” people, insisting that the two were extremely different. For example, when towns found themselves on the Mexican consulate “black list” for incidents of discrimination against Mexican nationals or Mexican Americans, they often wrote to the GNC to protest. The School Superintendent of Monahans, Texas, wrote to the GNC in defense of state segregation practices that “our Mexican friends . . . misinterpret our motives in the arrangements which we make for the education of our Spanish-speaking citizens.” He blamed this on the “furor over segregation of the Negro population,” but warned that “it will do a serious injury to the Mexican-American to confuse his problem with that of the Negro. These are two distinct ethnic groups and their problems, with one or two exceptions, are about as different as they can be. It would be about as sensible to try to lump them together as it would to hitch up a Percheron and a Shetland pony to the same plow with the same harness.”⁵³

⁵⁰ Quoted in Johnson, *supra* note 45 at 193-94.

⁵⁶ Letter from Philip M. Hauser, acting director, to Hector Garcia, (Feb. 23, 1950) (Box 1989/59-18, Discrimination Files, folder marked: Discrimination, correspondence, 1949-50, GNC Archives, TSA); Letter from William D. Bonilla, LULAC to Frank Kelley, GNC, (May 1, 1963) (Box 1989/59-17 Discrimination Files, folder marked: Discrimination – General File, 1961-1968); Letter from Frank Kelley to Ritchey’s River Bend Camp, (May 23, 1963) (Box 1989/59-17 Discrimination Files, folder marked: Discrimination – General File, 1961-1968).

⁵³ Letter from school supt, Monahans, Texas, J. Conrad Dunagan to Glenn E. Garrett, Exec. Dir. Good Neighbor Comm’n of Texas (Feb. 15, 1960) (Texas State Archives – Good Neighbor Commission Archives, Box 1989/59-16 Discrimination Files, Folder marked: Black-list and discrimination, 1958-61).

Ironically, despite Mexican American emphasis on Americanism, one of the most powerful tools that Mexican American activists had was the advocacy of the Mexican government. The Mexican government maintained a “black list” of towns in Texas that discriminated against Mexican nationals and Mexican Americans, and it wielded the black list to refuse *bracero* (guest-worker) labor to towns on the list. Much of the work of the Good Neighbor Commission involved mediating between blacklisted towns and businesses on the one hand, and the Mexican consul on the other. Indeed, the very existence of the Good Neighbor Commission in Texas was a testament to the U.S. foreign policy interest in good relations with Latin America and its immigrants to the U.S.⁵⁷

Yet in spite of the prevalence of whiteness claims, many Mexican American scholars and activists consistently recognized the problems facing Mexican Americans as problems of racial discrimination, saw the connections between their plight and that of blacks, and drew the contrast between American ideals and racism, which they associated with Nazism. In this way, they turned on its head the equation between Americanism and whiteness, instead claiming Americanism and anti-racism.

LULAC in 1937 supported Texas legislation to withhold government funds from “any school district which fails to provide equal educational facilities to all children of school age residing therein,” including blacks as well as Mexicans. The Mexican-American National Association, an advocacy organization founded in 1949 that did not grow to national prominence, chronicled among its early activities “the first Mexican observance of Negro History Week” in the Maravilla Mexican community of Los

⁵⁷ Texas State Archives – Good Neighbor Commission Archives, Box 1989/59-16 Discrimination Files, Folder marked: Black-list and discrimination, 1958-61.

Angeles. In its founding document, MANA declared, “We have pledged ourselves to eradicating the force and violence so repeatedly used against Mexican, Negro, and other minority peoples by local police and lynch-minded racists.”⁵¹

This sentiment was not limited to leaders; the American G.I. Forum’s News Bulletin reported in 1955 the results of a survey showing that “Mexican-Americans Favor Negro School Integration.” The article commented that Mexican American support for black civil rights could stem from two sources: “because they know what segregation of their own children means or because traditionally people of Mexican and Spanish descent do not share in the so-called doctrines of white supremacy and racial prejudice.” This article, however, provoked an angry letter from national AGIF leader Hector Garcia to the Texas AGIF Chairman, complaining, “Anybody reading it can only come to the conclusion [that] we are ready to fight the Negroes’ battles . . . for sooner or later we are going to have to say which side of the fence we’re on, are we white or not. If we are white, why do we ally with the Negro?”⁵²

Mexican American activists as well as private individuals also drew the contrast between American ideals of equality and Nazi racism. Manuel Ruiz wrote to the Mayor of Delano, California, that “[w]hen local officials condone community segregation of Latin Americans, our professed victory in Europe against the ideology of a super race, is looked upon with suspicion.”⁵⁵

Jose de la Luz Saenz was an early Progressive leader in Texas, a schoolteacher and co-author of LULAC’s constitution. Fighting side by side with whites of many

⁵¹ *Id*; Johnson *supra* note 46 at 8; Carey McWilliams Papers, Bancroft Library, Carton 21, F. 6, “A General Statement on the Founding and Perspectives of the Mexican-American National Association,” at 2-3.

⁵² Forum News Bulletin, Austin, TX, (Sept-Oct. 1955) (Good Neighbor Commission Archives, Texas State Archives, Box 1989/59-42, Folder Marked: American GI Forum); Quoted in Foley, *supra* note 44, at 137.

ethnicities during World War II made him optimistic about the opportunities for Mexican Americans in the United States; he emphasized that Americanism was opposed to racism. Luz consistently opposed all racial discrimination, denouncing the treatment of blacks in no uncertain terms: “The colored people has been subjected to accept, by brutal force, the mandates of the unfair Jim Crow Law promulgated by snobbish legislators.”

In a speech to education students at Sul Ross State College in Texas, entitled, “How to Designate People of Mexican Extraction,” in 1949, Luz blamed the problems of Mexican Americans on “a few thoughtless narrowminded persons . . . that insist[] to perpetuate the old historical political, archaic, and insulting European national feud here within the confines of our nation today.” He urged the distinction between “Mexican” and “Mexican American”: “Mexican should mean Mexican citizens . . . Spanish-Americans are American citizens of Spanish descent. Again to be more clear, we will say that Mexican race is the mixture of the Spanish persons and aboriginal people found here in what is now called Mexico. Mexican-Americans, again, are citizens of Mexico, which is a part of America⁴⁵ Luz insisted that whatever they were to be called, Mexican Americans suffered discrimination as a race, and he linked their struggle to the world struggle against racism and nativism. In an essay called “I Am an American,” he argued against “supporters of the skin deep theory of Americanism, that is, those who base Americanism on the color of the skin. . . . I firmly believe that the Nordic element is not an essential factor in ‘I am an American,’ and that those who use the Nordic skin theory to foster racial discrimination are un-Americans in the first degree.” He signed the essay

⁵⁵ Letter from Manuel Ruiz to Jack Busch, Manuel Ruiz Papers, Box 2, F. 16, SUL-SC.

⁴⁵ For background on J. Luz Saenz, see Benjamin Heber Johnson, REVOLUTION IN TEXAS: HOW A FORGOTTEN REBELLION AND ITS BLOODY SUPPRESSION TURNED MEXICANS INTO AMERICANS 161-62 (2003).; Jose de la Luz Saenz Papers, Box 3, F. 3, BLAC-UT.

“J. Luz Saenz, Veteran of foreign wars.” He also described himself as “an Aztec” in some of his early writings and referred to Texas Mexicans as “the Indians of Texas.”⁴⁶

Americo Paredes, the folklorist and educator who founded the Mexican American Studies Program at the University of Texas, emphasized in all of his writings the cultural aspects of Mexican American identity. He wrote in 1960, “In reviewing the causes for conflict between the English-speaking and the Spanish-speaking peoples, it has been my purpose to show the part that was played by differences in culture, rather than differences in origin or race.” Paredes called the Texas-Mexican “Texas’ Third Man,” who suffered more than blacks in legal status, health, jobs and education although “paradoxically he has long ago achieved the more obvious benefits of integration which the Negro is still fighting to attain: official acceptance into restaurants, hotels, bars and even swimming pools.” Paredes argued that “prejudice against the Mexican is based on cultural factors, though it is expressed as a question of race. Hitler’s classic blond barbarian could register at Austin’s Brackenridge Hospital tomorrow, but if he gave his name as Juan Garcia the attendant in charge would put down ‘Latin American’ instead of ‘white’ in the space reserved for race. ‘Latin American,’ incidentally, is the local euphemism for ‘Mexican’ which is too denigrating a term to use to a Mexican’s face.”⁴⁷

⁴⁶ *Id.*, May, 1941; Benjamin Heber Johnson, *THE COSMIC RACE IN TEXAS: INTERMARRIAGE, WHITE SUPREMACY, AND CIVIL RIGHTS POLITICS* 7, (2005), (unpublished manuscript in possession of author)

⁴⁷ Americo Paredes Papers, Box 25, Folder 6 “Clips, Texas Observer,” Aug. 19, 1960, at 6 “The Mexican Contribution to Our Culture,” BLAC-UT. *See also* The Problem of Identity in a Changing Culture: Popular Expressions of Culture Conflict Along the Lower Rio Grande Border,” pp. 84-85, Box 26, F. 2. (“In recent years anthropologists, sociologists, and even cultural geographers have been interested in the Mexican American’s self-image as it is expressed in the names he uses in reference to himself. The results of such studies have been less than satisfactory, mainly because two important variables have either been ignored or not given their due weight. One of these variables is the Mexican American’s bilingual/bicultural makeup, which allows (or forces) him to occupy somewhat different viewpoints at different times, depending on the language he happens to be using as an instrument to calibrate his experience. The other is the influence exerted on the Mexican American’s (and even the Mexican’s) self-awareness by the derogatory ethnic labels discussed above. In Spanish, border Mexicans use terms like *mexicano*, *raza*, and

By contrast, George I. Sanchez, who was both a leading civil rights advocate as well as an internationally renowned historian and educator who went on to chair the History Department at the University of Texas for a decade, insisted that it was a political and anthropological error to focus on cultural difference, rather than racial oppression. In an article called “‘Anglo’-‘Latin’ Tensions in The Southwest,” he wrote, “It is my belief that much time is wasted, and much damage done, when problems or tensions that really arise out of particular and immediate circumstantial factors are attributed to complex, and somewhat mysterious, ‘cultural characteristics.’”⁴⁸

Not only academics, but many other Mexican Americans rejected whiteness claims. Numerous historians have argued that working-class Mexicans, both immigrants and U.S.-born, were far less likely to identify as white or Spanish than the middle-class people who joined organizations like LULAC and AGIF. Neil Foley comments, “For the masses of working-class Mexicanos . . . many of them first generation, the idea that they were members of the white race would have struck them as somewhat absurd. Anglos were white; mexicanos were, well, mexicanos—*raza*, and later, *chicanos*.” Progressive Mexican American leaders in Texas “displayed little interest in the whiteness strategy. They did not seem to think of themselves as white, or even to aspire to such a status.” For example, the newspaper *La Cronica* noted that in the United States “the problem of race is a question of color” and referred to Mexicans as a “latin multicolor race.”⁵⁸

chicano in reference to themselves, these being ingroup terms for the most part, to be used only among other *mexicanos*. . . . When speaking in English, he may refer to himself as Latin, Spanish, or perhaps Mexican American. Only rarely will he call himself a Mexican, in English, especially if he is talking to an Anglo.”); Paredes Papers, Box 25, Folder 8, reprint from RACE, The Journal of the Institute of Race Relations, Vol. 4, May 1963, “Texas’ Third Man: The Texas-Mexican,” at 50-51, BLAC-UT.

⁴⁸ George I. Sanchez, “Anglo”-“Latin” Tensions in the Southwest, 4.(Sanchez Papers, Box 70, F. 5).

⁵⁸ Neil Foley, *supra* note 44 at 138; Johnson, *supra* note 45, 51.

There was also a much greater diversity of opinion among Mexicans and Mexican Americans regarding immigration and Americanism. A team of researchers interviewed Mexican residents of the colonia of Hick's Camp, Calif. Why hadn't one immigrant become a citizen after years in the U.S.? "I'll tell you why. [Mexicans] feel that Americans don't trust them and treat them equal. . . . When I go to a show they don't ask if I'm a citizen or not, but if I'm dark they put me on one side. The same with work. . . . That's why we don't want to be citizens." As early as the 1930s, labor unions organizing Mexican American and Mexican agricultural workers had taken a more welcoming attitude to Mexican immigrants than that of LULAC and AGIF, including the important United Cannery, Agricultural, Packing & Allied Workers of America (UCAPAWA) and the Congress of Spanish-Speaking Peoples (*El Congreso*), founded in 1937 and 1938, which became the training ground for a generation of activists, including George Sanchez, Eduardo Quevedo and Luisa Moreno.⁵⁹

In sum, claiming whiteness was *one* of the strategies Mexican American individuals and organizations drew on when making demands for civil rights of state and national government officials, along with other strategies, compatible as well as contradictory – 100% Americanism, appeal to the Mexican government and “good neighbor policy,” race pride, solidarity with other oppressed groups, and comparisons of racism to Nazism.

IV. Litigating Mexican American Whiteness

While Mexican Americans' status as white had been articulated by the *Rodriguez* court in the context of naturalization to citizenship, and this status had been accepted in

⁵⁹ Quoted in Gutierrez *supra* note 15 at 89; Johnson, *supra* note 46 at 110-11.

miscegenation cases in state courts, whiteness claims had never been raised directly in challenges to discrimination in U.S. courts before 1930. Beginning in 1930, LULAC enlisted lawyers to bring suit in Texas state courts against segregation of Mexican American children in schools, as well as against the exclusion of Mexican Americans from juries. Throughout the 1930s, these claims were framed in terms of racial discrimination. But in the 1940s, state courts began to dismiss claims by covering Mexican Americans with the Caucasian cloak, and to chastise civil rights litigators for presenting their “white” clients as victims of racial discrimination. In response, litigators turned to a more explicit whiteness strategy, arguing that Mexican Americans were white, but were treated as non-white in Texas and California.

A. *The 1930s School and Jury Cases*

Although some Mexican American leaders had begun as early as 1930 to stake claims to whiteness before government agencies, they did not push a whiteness strategy in court. For most of the 1930s, litigating Mexican American whiteness played little role in either school segregation or jury discrimination cases.

Beginning with the *Del Rio ISD v. Salvatierra* case in 1930, M.C. Gonzales, attorney for LULAC, inaugurated efforts to integrate racially segregated school systems, arguing racial discrimination against Texas Mexicans. The court in that case explained that the plaintiffs were “designated, for convenience of expression in the opinion, as the Mexican race, as distinguished from . . . all other white races,” and beyond that, there was no discussion of “Mexican” racial identity. At least initially, Mexican Americans

perceived the case to be a victory, because the court ruled that school districts could not segregate indiscriminately against “Mexican” children.⁶⁰

Yet in fact the case was a setback. The court dissolved the temporary injunction against the school district, and approved segregation based on language and migrant worker status. This “cultural discrimination” became the template for future state-sanctioned racial inequities. In that sense, *Salvatierra* was a harbinger of modern racial discrimination cases, in which courts recognize only facial race-based classifications, or individual intentional bias, as true discrimination, whereas classifications based on supposed cultural or linguistic differences, even those highly correlated with race, are given little scrutiny. In that case, the court accepted the testimony of the school superintendent that “people of Spanish or Mexican extraction” or “descent” had different talents from those of “Anglo Saxon parentage,” including abilities in math, music, and handicrafts, yet denied any “motive of segregation by reason of race or color.” The ascription of different characteristics based on Mexican ancestry did not count as “race”-based differentiation.

On appeal, the school district insisted that “segregation” of children “of Spanish or Mexican descent” from “children of Anglo-Saxon parents . . . had been for educational purposes only.” The Mexican American plaintiffs insisted that they had shown that their children belong to and were part of the white race, and do not belong to nor are they Negroes or belong to the colored race.” In their motion for rehearing, the plaintiffs explained, “Segregation not being a discretionary matter, we are simply insisting upon the plain application of CONSTITUTIONAL AND STATUTORY RIGHTS as they now

⁶⁰ ISD v. Salvatierra, 33 S.W.2d 790, 792-93; Del Rio Segregating Case Up to High Court (Oliver Douglas Weeks Collection, Box 1, F. 19, BLAC-UT). My discussion of these cases draws on my Comment, *Texas*

exist. Being white folks, we claim to be immune, and in fact are immune, under their solemn pronouncements, just the same as if we were arraigned before the Court for trial on a charge of Felony without a Jury.” The court’s decision, allowing school officials discretionary authority to segregate for educational purposes, they argued “operates as a ‘white wash’ for Appellants,” and allowed them to racially discriminate “under the guise or subterfuge” of “the best educational interest of such children so segregated.”⁶¹

It is instructive to compare *Salvatierra* to *Ramirez vs. State*, the Texas jury discrimination case of the following year. In *Ramirez*, the appellant (represented by an Anglo attorney) “charged that there had been an unjust discrimination against the Mexican race” because the jury that convicted him contained no one “of the Mexican race and Mexican descent known as Mexican.” Joe Flack, the County Attorney, testified that Mexicans “in the County do not know the English Language well enough and are otherwise ignorant,” but averred that there was no “special discrimination against Mexicans as a race.” Cecil Walston, Sheriff and Tax Collector, explained that he did not “think the Mexicans in this County are intelligent enough and speak English well enough and know enough about the law to make good jurors. Besides, their customs and ways are different to ours and I do not consider them, for that reason, to be well enough qualified as Jurors.” While there might be a few Mexicans as well “as some of the white jurors who we have upon our juries . . . I do not consider those white Jurors well qualified.” Nevertheless, Walston and other county officials were adamant that there was “no discrimination on the basis of race or color” in jury selection. The court simply

Mexicans and the Politics of Whiteness, 21 LAW & HISTORY REV. 195 (2003).

⁶¹ Brief for Appellants at 10-11, *ISD v. Salvatierra*, No. 8515 (Civ. App.) available at Texas State Archives; Appellees’ Motion for Rehearing at 5, 7, 21, *ISD v. Salvatierra*, No. 8515 (Civ. App.) available at Texas State Archive.

reported this testimony in its opinion, and accepted it without discussion, apparently finding it self-evidently sound.⁶²

The question of whether or not Mexicans *were* a “race” did not arise before 1946, as there was not yet any credible basis for a civil rights claim in Texas in either case – as a “race” or as a “nationality.” Again, in *Carrasco v. Texas* (1936), the court found “no evidence of discrimination solely because of race” in jury selection, using “Mexican race” and “Mexican nationality” interchangeably in the opinion. In *Lugo v. Texas* (1939), the court again found that jury commissioners had excluded members of the “Mexican race” on the basis of language qualifications, without intentional discrimination.⁶⁴

Thus, efforts by Texas Mexican plaintiffs in the 1930s to raise claims of race discrimination, whether in the jury context or the school context, fell victim to courts’ willingness to accept almost any justification for exclusion or differentiation that did not explicitly refer to “race or color.” In other words, for the purposes of anti-discrimination law, “race” meant “skin color,” and only discrimination based explicitly and intentionally on color counted as racial discrimination. Thus, Mexican Americans were effectively excluded from juries on the pretext of language or cultural difference.

Ramirez’s appellate lawyers, on the other hand, considered that the jury commissioner’s statements about Mexicans’ intelligence proved that race discrimination had taken place. In their motion for rehearing, they argued that “it is not the province of the Jury Commission to pass upon the Mexican race in Menard County as a whole as to their intelligence . . . this Jury Commission also in passing, showed some of the race arrogance and haughtiness that is too common, especially in matters of court procedure

⁶² Petition for Writ of Certiorari, *Ramirez v. State* No. 13,789, (Crim. App.) available at Texas State Archives; Statement of Facts 10-11; *Ramirez v. State*, 40 S.W.2d 138, 139.

that is characteristic probably of all races when dealing with different races, but especially with the white race.”⁶³

In both *Salvatierra* and *Ramirez*, the Mexican American plaintiffs argued that discrimination had taken place on the basis of race; Mexicans were a race because of this racist practice. The courts instead used a narrow notion of racial discrimination to deny that anything was amiss.

B. *The 1940s School and Jury Cases*

In the 1940s, for the first time, courts began to counter claims of racial discrimination in jury selection by covering Mexican Americans with the “Caucasian cloak.” What changed in the 1940s? Why did the racial identity of Mexicans become an issue in court? A few explanations are possible. First, the 1940 Census re-classified Mexicans as white unless clearly a member of an Indian nation or other non-white group. This made available to the courts the argument that Mexicans were in fact white, rather than one of the “other races,” as they had been classified in the 1930 Census. Second, the case of *Norris v. Alabama*, decided by the U.S. Supreme Court in 1935, held that racial discrimination in jury selection violated the Fourteenth Amendment.⁶⁵ Courts now had an instrumental reason to hold that Mexicans were white, for if Mexicans were a non-white race, the new precedent of *Norris v. Alabama* might apply to them in jury selection cases.

⁶⁴ *Carrasco v. Texas*, 95 S.W.2d 433 (1936); *Lugo v. State*, 124 S.W.2d 344 (1939).

⁶³ *Id.*, Appellants’ Motion for Rehearing. Geronimo Ramirez had been convicted for the castration of Lucio Arevalo, who had slept with his daughter Josephine. At trial, Arevalo gave a graphic account of the castration, and reported that “[a]fter [Ramirez] hung me up to that post he said that he was going to show me how he treated Mexicans.” Trial Transcript, 7.

⁶⁵ *Norris v. Alabama*, 294 U.S. 587 (1935).

In 1944, civil rights litigators challenged jury discrimination in the Texas *Sanchez* case. At trial, there was some discussion about the proper terminology for Mexican Americans. Sanchez's attorney explained to the jury: "for the sake of the record. When I refer to the Mexican race I am referring to the Spanish and American descent." The judge then clarified, "People of the Mexican descent." The attorney then asked the witness, "Do you have an opinion as to what the ratio is as between the so-called Spanish-American citizenship of the County and what they call American citizenship?" and the witness replied that "the Spanish-American citizens number about 40 per cent."⁶⁹

There was also testimony about racial discrimination. When asked whether he thought Sanchez could get a fair trial in that county, the same witness answered that "there is a certain amount of prejudice against the Mexican race whether we like it or oppose it or not, the evidence of that is that we do not associate with them nor class them with ourselves." The state's attorney then cross examined; despite his efforts to dismiss evidence of discrimination, the witness suggested that Mexicans were treated significantly different than white ethnic groups:

Q. Do you feel there is any more prejudice against the Mexican race than there is against people of the negro race or Italian race or Greek?

A. No sir.

Q. What you mean is that people of the so-called American race do not associate socially with the people of the Mexican race?

A. Yes sir. That is correct.

Q. Do you think that is because we don't want to associate with them any more than they don't want to associate with us or prefer to associate with those of their own race and their own language?

A. No, I don't.

⁶⁹ Trial Transcript at 54-55, *State v. Sanchez* No. 117, (D. Tex. 1944)..

Q. There has never been any incident so far as you know that has brought up any racial issue between the people of the so-called Mexican race and the American race?

A. I know of several instances that came up in the schools . . .⁷⁰

Despite the efforts of the prosecutor to portray relations among Anglos and Mexican Americans as amicable, with any segregation being self-imposed, the witness consistently answered that there were “racial issues” involving the “Mexican race.” And although the prosecutor at times tried to downplay race, he also referred to the defendant and his father as “these Mexicans” in his argument to the jury, which Sanchez’s attorney argued on appeal “ was calculated to prejudice the minds of the jury against the Defendant,” by reminding the jury that “the Defendant was a Mexican, a member of the Mexican race, a person of Mexican descent, and he was charged with and was being tried for the killing of one George A. Cox, a member of the American race . . .”⁶⁸

While the witnesses and lawyers at trial continued to refer to Mexicans as a race and discuss racial discrimination, the Texas Court of Criminal Appeals used Mexican Americans’ nominal status as whites to deny that anything was wrong with all-Anglo juries. On appeal, Sanchez argued discrimination against the Mexican *race*, but this time the Texas Court of Criminal Appeals held that “Mexican” was a nationality, not a race; hence, Mexicans were not discriminated against because whites were on the jury. *Norris* did not apply. The judge wrote that “[in] the absence of a holding by the Supreme Court of the united States that nationality and race bear the same relation, within the meaning of the [Fourteenth Amendment],” he would not apply the *Norris* rule to “members of

⁷⁰ Id. at 56-57.

⁶⁸ Bill of Exception No. 6, State v. Sanchez No. 117, (D. Tex. 1944).

different nationalities.”⁶⁶ He appeared to adopt the logic of the El Paso District Attorneys’ brief, which contrasted Mexicans to blacks, seeking to minimize discrimination against Mexican Americans:

The differences between the position of negro and the Mexican are multiple. The negro is of an entirely different race to that of the members of the jury commission, to wit: the black race, whereas, the Mexican is of the white race.

Negroes were formerly in slavery under the white race, the Mexicans were not.

Negroes are practically all citizens of the United States, whereas, the record will disclose that most of the Mexicans are not.

The negroes speak English, whereas most of the Mexicans do not.

There is a feeling in the South about the negro, which is evidenced by our Jim Crow Law, and their exclusion from our Democratic Primary Election, that does not exist toward the Mexican. If any prejudice exists against the Mexican, it is of a different kind.⁶⁷

Ironically, the point of this elevation of “the Mexican” above “the negroes” was to sanction forms of discrimination against Mexican Americans that were now at least formally prohibited against African Americans.

The same thing happened in the next three challenges brought by civil rights litigators to jury exclusion in Texas: *Salazar v. State* in 1946, *Bustillos v. State* in 1948, and *Rogers v. State* in 1951.⁷¹ LULAC lawyer M.C. Gonzales was hopeful that *Salazar* might be different, but his hopes were dashed. He wrote to George Sanchez in May, 1946, “This is the case that I have selected as the best to use as a test to determine if it is lawful to deny the right to citizens of the United States of Mexican descent sit on juries. Bee County is exceptionally good for this test because at no time during the past 100 years has a Mexican served on the jury on a criminal case and about one third of the

⁶⁶ *Sanchez v. State*, 181 S.W. 2d 87 (1944); Trial Transcript No. 22, 856, Opinion on Appellant’s Motion for Rehearing, 1944, at Texas State Archives, Austin, TX.

⁶⁷ Brief for Appellees at 8, *Sanchez v. State*, No. 22,856 (Crim. App. Tex. 1944).

population is Latin and we have about one thousand who have paid their poll taxes and about 500 who are able to read and write and speak the English language sufficiently well.” Although the lower court had “held that Mexicans belong to the same race as that of the jury which tried him, although they are of different nationality,” Gonzales hoped to disprove this through the testimony of Sanchez and another expert. He asked Sanchez to “explain to [the other expert] how important this point is not only to Lulac but to the Latin-American generally and I would like very much to know if you two gentlemen can come to Beeville and help me establish the fact that the Mexicans are not only a different nationality from the Anglos, as the court has held, but that in theory and in practice the Mexicans belong to a different race to such an extent that they are being denied the federal constitutional right to serve on juries...”⁷² In 1946, even the lawyer for LULAC was trying to establish in court that Mexican Americans were victims of *racial* discrimination; that whether or not they were “really” white, in *practice* they belonged to a different race.

In the 1951 jury selection case of *Sanchez v. State*, civil rights litigators John Herrera and James DeAnda complained of “discrimination against Mexican-Americans as a race and people of Mexican extraction and ancestry as a class.” In their brief on appeal, they argued that “although a person of Mexican descent is a member of the White race, from a practical standpoint this segment of our population is not so considered in this State.” They pointed out that “[t]his court has, on numerous occasions, recognized this fact,” citing *Carrasco* and other jury cases, and quoting *Ramirez* judge drawing a

⁷¹ *Salazar v. State*, 193 S.W. 2d 211 (1946); *Bustillos v. State*, 213 S.W. 2d 837 (1948); *Rogers v. State*, 236 S.W. 2d 141 (1951).

⁷² Letter from M.C. Gonzales to George I. Sanchez (May 21, 1946) (Sanchez Papers, Box 28, F. 5, BLAC, UT).

contrast between the “Mexican race” and the “white race.” The court in its opinion berated them for their “exhaustive brief . . . citing cases which, either intentionally or loosely, refer to Mexican people as a different race. They are not a separate race, but are white people of Spanish descent.”⁷³

Local officials appear to have learned the lesson about referring to Mexican Americans as a different nationality rather than race as well: The Grand Jury Commissioner testified, “We did not pick any American citizens of Mexican descent as Grand Jurors . . . A lot of these Mexicans are not citizens, and we just don’t know them. I wouldn’t say that I don’t know of any Mexicans that were qualified for Grand Jury service. I will say we just didn’t select them.” Upon cross-examination, he elaborated, “I don’t think we put any man on the Grand Jury of French descent. I did not refrain from putting anybody on the Grand jury of French descent . . . I did not put anybody on the Grand Jury, that I know of, of English descent. Of the men that we put on the Grand Jury, we did not go back to their ancestors to see what country they originally came from.” And when pressed again by DeAnda, he insisted that he had “never made any differentiation between people of Mexican descent in this County and all other white Americans.” All of the jury commissioners answered the same way: there was no discrimination against any nationality in jury service, and Mexican Americans were just like any other nationality of the white race.⁷⁴

Meanwhile, Mexican American leaders were still trying to make headway against continuing school segregation. George Sanchez wrote to M.C. Gonzales in 1945 that “at

⁷³ Brief for Appellant at 8-9, *Sanchez v. Texas* No. 25, 496, (Crim. App. Tex.) (Texas State Archives); *Sanchez v. State*, 243 S.W.2d 700, 701 (1951).

⁷⁴ Defendant’s Motion to Quash and Statement of Facts at 5-7, *State v. Sanchez* No. 7103 (D. Tex. 1951).

the time has come to go after the segregated school.” He proposed to Gonzales that they bring a test case arguing the illegality of segregation based on three claims: “a) The fundamental law of the states has not specifically condoned the segregation of ‘Mexicans.’ b) The state has not provided for the guarantee-of-equality-of-treatment-under-segregation of ‘Mexicans’ and c) The state has not (and probably could not) specifically delegated this function to school boards.” Sanchez explained that he had formulated these arguments in conversation with a “lawyer friend.” Gonzales replied in a more sanguine voice, asking gently whether “the lawyer friend to whom you refer is familiar with the Salvatierra case.” He continued: “The other formidable obstacle that we have to overcome is the leeway which the courts of this State have given the school authorities on that rather elastic situation that in a given community children of the same race and mentality can be segregated for pedagogical reasons up to the third grade, in others up to the sixth and in others higher. If we can break this down so as to at least leave it up to the third grade, like the Supreme Court says, we will have accomplished a great deal...”⁷⁵

In fact, Gonzales did pursue a similar line of argument in the unreported *Delgado v. Bastrop ISD* case in 1948. LULAC officials inspected the Bastrop schools and filed detailed reports on the inequality of conditions between the “Latin” and the “Anglo” schools, with regard to building, transportation, lunch room, plumbing, etc. The plaintiffs argued both that they were being denied equal protection of the laws “solely because of their ancestry,” and that they were deprived of “benefits accorded . . . to other white children.” Citing the recent California case of *Mendez v. Westminster*, as well as *Salazar*

⁷⁵ Letter from Geo. Sanchez to M.C. Gonzales (April 25, 1945) (Sanchez Papers, Box 48, F. 10 BLAC-UT); Letter M.C. Gonzales to Geo. Sanchez, (April 26, 1945) (Sanchez Papers, Box 48, F. 10 BLAC-UT).

for the proposition that Mexicans were “of the white race,” the plaintiffs “conceded . . . that ‘there is no question of race discrimination in this case.’” The plaintiffs won, as the district court confirmed its condemnation of “arbitrary and discriminatory” language discrimination. The State Superintendent of Public Instruction then issued “Instructions and Regulations To All School Officers of County, City, Town and School Districts” providing that segregation “applies only to persons of Negro ancestry” and not to “members of any other race. . . . There has never been any requirement or authority for segregation of children of Latin American descent, and attempts at segregation of pupils of Mexican or other Latin American ancestry on account of race or descent have been held unconstitutional by the State courts of Texas and by the recent United States District Court decision in the case of Delgado v. Bastrop ISD.” The Good Neighbor Commission’s executive secretary also sent letters to thirty segregated schools, “request[ing] that the schools reduce the number of grades in which children are segregated or eliminate segregation altogether.”⁷⁶

Yet despite the favorable pronouncements of courts and the Texas State Superintendent of Public Instruction, most school districts continued their traditional practices of segregation. Hector Garcia of the G.I. Forum inspected fourteen schools in the late 1940s, and reported, “It is the consensus of opinion of the Latin leaders in their

⁷⁶ Sanchez Papers, Box 48, F. 4, “7. In Bastrop, the condition of the Latin building is definitely _poor_, and that of the Anglo building is excellent.” On transportation, lunch room, plumbing, etc., see also. Plaintiffs’ Memorandum in Opposition to Motion to Dismiss of Defendant State Board of Education, Delgado v. Bastrop (Sanchez Papers, Box 48, F. 5) (“The Plaintiffs...were deprived of their rights under the Constitution of the US and the Laws of the US to be free from discrimination solely because of their ancestry...deprived by said Ds from securing the educ’l recreational and health benefits accorded by said Ds to other white children...” Id. at 12); Memorandum of Points and Authorities in Support of Plaintiffs Application for Injunction Pendente Lite, Delgado v. Bastrop (Sanchez Papers, Box 48, F. 5.); Sanchez Papers, Box 47, F. 6; *A Discussion of the Problem of Education of Latin-American Children in Texas*, TRENDS: A MONTHLY SUMMARY OF SIGNIFICANT EVENTS PERTAINING TO ANGLO-LATIN

community that the school officials and especially the School Boards are not trying to abide by the spirit of the decree given by Judge Ben Rice.”⁷⁷

For example, when Mexican American parents met with the School Board to discuss the desegregation of Edcouch-Elsa High School, on Jan. 10, 1949, officials expressed reluctance to move:

Mr. B. Zamora: They are not ready. The time is coming that they will come in.
Mr. J. Gonzalez: I know all those tips. If you are willing to do the best, and pass your resolution with the orders of the Superintendent, we can go ahead and work together.
Mr. M. Lomas: The meaning of all this is to have all the children together in school. The anglos with the latins.
Mr. P. Jones: How are you going to do it?
Mr. M. Lomas: That's all we ask for.
Mr. J. Gonzalez: It's just a question whether or not you're going to do it. Let's not go any farther.
Mr. Kelly: The anglos will have to think about that.
Mr. J. Gonzales: It's up to the school board.
Mr. Kelly: The Americans are not going to like that.
Mr. E. Garcia: What do you mean 'the Americans are not going to like that'? That's another mistake. If those army barracks are good enough for our children, they are for your children, also.
Mr. P. Jones:...If you boys can tell me how to raise money; we've been broke every year. Just barely get by.
Mr. E. Garcia: And you'll straighten this matter. Can I quote you on that for '49?
Mr. P. Jones: I am not saying. I've never told anyone to go where. Besides, there are latins going to the South school.
Mr. Guitierrez: Yes, there are, but through what did they have to go in order to enter that school? Have Mr. Zamora stand up before the board and tell us what he had to do to get his girl in that school?
Mr. P. Jones: He wrote the state superintendent.
Mr. J. Gonzalez: He did not do a thing. I did everything for him, and to think of his attitude now!⁷⁸

RELATIONS IN TEXAS (April 1948), Vol. 1, in Carton 21, F. 4, Carey McWilliams Papers, Bancroft Library.

⁷⁷ Hector Garcia, School Inspection Report of Fourteen Schools (Box 1989/59-16, Folder marked: Discrim. Gen. [general file, 1946-51], TSLA.1)

⁷⁸ Meeting with School Board, Edcouch-Elsa High School, (Jan. 10, 1949), (2, Box 1989/59-16, Folder marked Discrim. Gen. [general file, 1946-51], TSLA.)

Likewise, the Del Rio school district itself had not acted to desegregate the schools in the aftermath of the *Salvatierra* case, and LULAC continued to press for changes. Maria Luisa Camarillo, a Del Rio high school student, complained to State Supt. L.A. Woods about continuing segregation of “Latin-Americans.”⁷⁹ In 1948, a LULAC investigator, C. P. Aldrete, interviewed Del Rio School Board President Wallace, who seemed remarkably complacent about continuing segregation in the wake of litigation:

Aldrete: Mr. Wallace, I come to see you on a question concerning our schools; specifically the segregation of “Mexican” children in West End and Garfield.

Wallace: Nobody has ever complained before...--I would think they were satisfied. Is somebody complaining?

Aldrete: Do you remember the *Salvatierra* case, or are you acquainted with it?

Wallace: Not exactly, but I seem to recall something about it.

Aldrete: Ever since the *Salvatierra* case the ‘Mexican’ people have been complaining about segregation...I represent a significant number of those parents...

Wallace: Who is behind you? Who is stirring up all this trouble?

Aldrete: ...Suppose that I, as a Latin American, bring a Latin American child to Central whom I wish to register there—would you refuse him admittance?

Wallace: Yes, we would send him over to West End.

Aldrete: Why?

Wallace: Oh, custom; that’s our policy—maybe because of language difficulties, I would say...

Aldrete: How do you arbitrarily decide that the child has language difficulties?...By the Attorney General’s opinion, citing the *Salvatierra* case, you should give the students a language test to determine their deficiencies....

Mr. Wallace, do you think there will be a change of policy any time in the near future?

Wallace: As far as I’m concerned, no. That’s the way it has been and that’s the way it’ll be unless we are ordered to change.⁸⁰

⁷⁹ Letter to State Supt. L.A. Woods, (Sanchez Papers, Box 24, F. 3).

⁸⁰ Interviews with Del Rio School Officials, (May-Dec. 1948) (Sanchez Papers, Box 24, Folder 3, BLAC, UT.)

In California, Mexican Americans won a major victory with the Ninth Circuit case of *Mendez v. Westminster* in 1947. This class action on behalf of all students of Mexican descent in Orange County drew national attention to the segregation of Mexican American school children, and attracted national civil rights organizations to join in the appeal as *amici curiae*, including the National Association for the Advancement of Colored People (NAACP) and the American Jewish Congress.

The *Mendez* litigation centered on four school districts in Orange County: Westminster, El Modena, Garden Grove, and Santa Ana. Although Mexican American parental pressure in 1929 had forced the California Attorney General to issue an advisory opinion that California law did not support the segregation of Mexican children, school districts had steadfastly ignored the ruling.

In 1991, Christopher Arriola interviewed Mexican Americans in El Modena who remembered the *Mendez* litigation. Dan Gomez described how segregation took place.

Arriola: How did they decide before the case, who would go, I know they didn't give any tests, did they, did they say you have a Spanish surname, or how did they decide?

Gomez: Oh, just from appearance.

Arriola: I know they had some Mexicans in Roosevelt [the white school] before.

Gomez: Yeah I'm sure there must have been some over there. Yeah I'm sure that happened, although we wouldn't really know, because we didn't associate with them.

Arriola: I heard the story of two sisters, and one had blue eyes, and was really fair, and the other was dark, but they were Mexican, and they automatically put the light skinned one in Roosevelt and the dark skinned one in Lincoln [the "Mexican" school].

Gomez: Yeah that's what I said, I think most of the segregation was done by appearance, if you were dark skinned, the more Hispanic, we didn't really have a lot of races at that time.

Arriola: A lot of Indians? Mexican Indians?

Gomez: Yeah some of them, had more of the features of Indians, darker skin.⁸¹

Before desegregation, Orange County was a bastion of Jim Crow. Two Anglo residents of El Modena, remembered in an interview with Arriola that Mondays were “Mexican day” at the local swimming pool, and that the pool would be drained and refilled on Tuesdays, so that the “white kids” could swim there Wednesday through Sunday. Another Anglo couple recalled “holding their noses” to avoid the “Mexican odor” when they went into the “Mexican school” or other places where Mexican Americans congregated. Mexican Americans had begun to organize in the years leading up to the *Mendez* litigation, participating in citrus labor strikes in 1936, and forming the Latin American Organization in Santa Ana in 1943 to fight school segregation.⁸²

At trial, several witnesses referred to themselves as “Mexican,” as opposed to “white,” but the court reminded them of Mexican whiteness. One young high school student, Carol Torres, was asked “Do you have any neighbors in that same district, in the El Modeno School District, who are children of your own age that are not of Mexican descent?” She replied, “Yes, there are plenty of white children, Americans, as they say there.” When asked to clarify her statement, she said, “Americans, as they say they are. They don’t consider us--” and the Court interrupted, “You are pretty white yourself, Carol. You don’t mean white people, do you?” Carol was trying to point out that Anglo students claimed whiteness and Americanness for themselves; but the Court insisted on the nominal whiteness of “people of Mexican descent.” The plaintiffs’ lawyer, however,

⁸¹ Arriola interview with Dan Gomez at 8, (Stanford Libraries, SUL-SC),. See Christopher Arriola, *Knocking on the Schoolhouse Door: Mendez v. Westminster: Equal Protection, Public Education and Mexican Americans in the 1940s*, 8 LA RAZA L. J. 166 (1995).

continued to refer to students as “American” or “of the Mexican race,” more in line with the way the lay witnesses used the terms.⁸³

The school superintendent testified, similarly to the officials in the Del Rio case, that the policy of segregation was a matter of custom that existed before he took his job, that it was in the best interests of Mexican children because of their language deficiencies, and that no tests were administered to determine language ability. He also testified that Mexican children had “lice, impetigo, dirty hands, face, neck, and ears; that they were generally inferior to the white children in personal hygiene.”⁸⁴

In their appeal, the petitioners conceded that “this case does not involve any issue of race discrimination—for Mexicans are of the ‘white’ race” but they nevertheless claimed that “[a]ppellants’ acts have clearly fallen into ‘the ugly abyss of racism’ . . .” The appeal was argued by an African American civil rights lawyer from Los Angeles, drawing heavily on rhetoric about the “four freedoms” and the “War for Freedom.” Segregating Mexican American children on the basis of “color and ancestry,” he proclaimed, was “utterly inconsistent with our traditions and ideals . . . at variance with the principles for which we are now waging war. . . To say that any group cannot be assimilated is to admit that the great American experiment has failed.” The district court’s opinion was similarly vague on the question of Mexican American racial identity. As Christopher Arriola contends, “the Court never ruled on whether Mexicans are a group, an ethnicity, or a race, merely stating that Mexican American school children had been discriminated against and their Fourteenth Amendment rights had been violated.”

⁸² Arriola interview with Marge and JD Gobbel 10; Esther and Ralph Danker, 5; Arriola, *supra* note 81 at 182-83.

⁸³ Trial Transcript, at 267, Nat’l Archives, Pacific Southwest Region.

⁸⁴ McWilliams *supra* note 36 at 303.

The opinion emphasized that segregation “foster[ed] antagonisms in the children and suggest[ed] inferiority among them where none exists,” and that any separation would have to be based “wholly upon indiscriminate foreign language impediments in the individual child, regardless of his ethnic traits or ancestry.”⁸⁵

The amicus briefs submitted on appeal by the NAACP, American Jewish Congress (AJC), and ACLU were some of the first to brief the argument that separate could never be equal, preceding *Brown v. Board of Education* by six years. The AJC’s brief, written by a young African American attorney, Pauli Murray, was particularly forceful in arguing that “when a ‘dominant’ group segregates an ‘inferior’ group it can never be equal,” and that “any racial distinction is immediately suspect.” The Ninth Circuit, however, declared that “[w]e are not tempted by the siren who calls to us” to confront segregation head on, and instead decided on the narrow grounds that segregation on the basis of “Mexican blood,” segregation “of children within one of the great races,” was not supported by California law.⁸⁶

The aftermath of the *Mendez* victory was similarly disappointing to the denouement of Texas school desegregation cases. In the fall of 1947, the County Board of Education allowed an all-Anglo section of the El Modena school district to secede from El Modena, and transfer into the all-white Tustin School District, costing El Modena nearly \$600,000 in property taxes. In 1953, a number of school districts in Orange County were “unified,” diluting Mexican American political power, and new

⁸⁵ Appellee’s Reply Brief at 32-35, *Mendez v. Westminster* M938, (SUL-DSC, Box 4, F. 8); Arriola, at 193, 21; 64 F. Supp 544, at 549, 550.

⁸⁶ 161 F.2d 774, 780 (1947).

schools were built in segregated neighborhoods, to insure continued separation of schoolchildren. Across the state, the practice of segregation continued.⁸⁷

V. After *Hernandez v. Texas*: Lifting The Caucasian Cloak

A. From Hernandez v. Texas to Cisneros

In both the jury selection and school desegregation contexts, Mexicans' status as "white" had won them no particular gains in Texas courts in the 1930s and 1940s. The first case in which Mexican Americans won a clear victory using the "other white" strategy was the *Hernandez v. Texas* jury selection case, decided two weeks before *Brown v. Board of Education*. The litigation team of James DeAnda, Carlos Cadena, and John Herrera had argued on behalf of Pete Hernandez that the exclusion of Mexican Americans violated the Fourteenth Amendment, and the lower court had rejected their Fourteenth Amendment claim, pointing out as it had so many times before that white people sat on the jury. The plaintiffs' lawyers responded: "for all practical purposes, about the only time that so-called Mexicans—many of them Texans for seven generations—are covered with the Caucasian cloak is when the use of that protective mantle serves the ends of those who would shamelessly deny to this large segment of the Texas population the fundamental right to serve as jury commissioners, grand jurors, or petit jurors."⁸⁸

⁸⁷ Arriola, at 201; see W. Henry Cooke, *The Segregation of Mexican-American School Children in Southern California*, SCHOOL AND SOCIETY (June 5, 1948), in Carey McWilliams Papers, Carton 21, F. 4, Bancroft Library.

⁸⁸ Appellant's Brief, *Hernandez*, No. 25, 816 at 17; see Neil Foley, *Straddling the Color Line*, at 347.

The breakthrough in *Hernandez* was the court's acceptance of Cadena's argument that Mexicans were *treated as* non-white by Anglos despite the fact that they were actually white. Particularly poignant was the testimony of John Herrera – as a witness in the case, not an attorney – about the bathrooms in the Jackson County Courthouse, one unmarked and the other with two signs, “Colored Men” and “Hombres Aqui.” With such telling evidence, the litigation team was able to show that “persons of Mexican descent were actually treated as a ‘race,’ class, or group apart from all other persons.”⁸⁹

Hernandez should be seen as the beginning and not the culmination of Mexican American litigators' strategic use of whiteness claims to fight Jim Crow. Although the “other white” argument already sounded old in 1954, it was new as a litigation strategy. Before 1954, Mexican whiteness was a cynical trump used by courts to dismiss discrimination claims. From that date onward, the litigation team of DeAnda, Herrera, and Cadena went on to successfully invoke Mexican whiteness in a series of school desegregation cases, building on the *Hernandez v. Texas* precedent. For example, in the 1957 case of *Hernandez v. Driscoll*, DeAnda and several other lawyers prepared a pre-trial memorandum arguing, based on *Mendez* and *Hernandez v. Texas* that “Mexicans, being members of the Caucasian or Caucasoid race . . . even before the U.S Sup Ct held (e.g. *Brown v. Bd.*) that segregation of children based on race . . . violated the Amendment. . . . Thus, the instant cases do not raise the problems present in the Negro cases. There is present in these cases no question of segregation because of *race*.”⁹⁰

Mexican American lawyers also proceeded cautiously with regard to alliances with other civil rights organizations. Despite the enormous help they had received from

⁸⁹ Garcia, *supra* note 11.

amicus organizations in the *Mendez* case, they were wary of any perceived “common cause.” When Jack Greenberg of the NAACP Legal Defense Fund wrote to Pete Tijerina, a Mexican American civil rights litigator, in January, 1967, offering to “extend its services to Mexican-Americans who are experiencing the same kind of discrimination problems which Negroes have experienced in the South,” Tijerina opted instead to form a parallel organization, which became the Mexican American Legal Defense and Education Fund (MALDEF), the leading legal organization advocating on behalf of Latinos in the U.S..⁹¹ George Sanchez commended Tijerina on his “efforts to form a council of Mexican-American lawyers,” but warned that he was “lukewarm” about “contacts with the NAACP Legal Defense Fund.” Sanchez explained:

. . . though we should make common cause with the Negroes from time to time, we should not blend their issues with ours. Don’t misunderstand, I was a pioneer among the champions for Negro rights – and I am still on their side. However, while the effects of discrimination against Negro and “Mexican” are essentially the same, the causes, the history, and the remedies differ broadly. Put bluntly, the Negro is mistreated because he is black and was a slave. The bases for mistreatment of the *Mexicano* are much more varied and very different. Their blanket cases are based on “race,” ours on “class apart” (See the *Mendez*, *Delgado*, *Driscoll*, and *Pete Hernandez* cases – in all of which I had a hand).

The *Pete Hernandez* case was on jury-selection discrimination. We have a unanimous decision in our favor from the Supreme Court (Warren writing) on the “class apart” contention. If argued on “race,” we would have lost – as we lost time and again in Texas (the Court of Criminal Appeals said, “You are white. White men were on the jury. What are you griping about?”) No, Pete, riding the coat tails of the NAACP is bad strategy. Cooperation, yes....Jimmy De Anda thinks this way also. Count on me.⁹²

This cautious approach to alliance with African Americans reflected Mexican American leaders’ recognition of the contradictions in the Court’s treatment of Mexicans

⁹⁰ Plaintiffs’ Pre-Trial Memorandum, by Richard Casillas, Albert Pena, Jr., James DeAnda, Hernandez v. Driscoll, (Sanchez Papers, Box 47, F. 8)

⁹¹ Jack Greenberg to Pete Tijerina (Jan. 23, 1967) (Sanchez Papers, Box 33, F. 1).

as a “class apart” but not a “race”; the objects of racial discrimination without being the subjects of racial difference. As Ian Haney Lopez has pointed out, “This contradictory approach follows from and highlights the Court’s conception of race as something biological and immutable.” Because courts saw “race” as a natural category rather than one produced by racist practice, they “could not help but be perplexed by Mexican American identity.”⁹³

Only in the aftermath of the 1964 Civil Rights Act, when schools began to use Mexicans’ “other white” status cynically to “desegregate” Black schools using Mexicans -- much as courts in the 1940s had cynically relied on Mexican whiteness to deny their civil rights claims -- did the litigators shift their focus, abandoning the “other white” strategy in *Cisneros v. Corpus Christi* (1970). In *Cisneros*, Mexican Americans were defined as a “disadvantaged minority group,” and the court ruled that Corpus Christi was operating a *de jure* segregated school system by separating Mexican Americans and blacks from Anglos.⁹⁴

Why did Mexican-Americans hold on to whiteness for as long as they did? Scholars suggest that the “other white” strategy can be explained by legal pragmatism, as well as the material and psychological benefits of distancing themselves from African Americans.⁹⁵ It is difficult to disentangle legal strategy from cultural trend, yet the fact

⁹² George Sanchez to Pete Tijerina (Feb. 28, 1967) (Sanchez Papers, Box 33, F. 1).

⁹³ Ian Haney Lopez, *Retaining Race: LatCrit Theory and Mexican American Identity in Hernandez v. Texas*, 1 HARV. LATINO LAW REV. 279, 291 (1997).

⁹⁴ 324 F. Supp. 599 (1970).

⁹⁵ Steven H. Wilson, *Brown over ‘Other White’: Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HISTORY REV. 145 (2003); Clare Sheridan, *‘Another White Race’: Mexican Americans and the Paradox of Whiteness in Jury Selection*, 21 LAW & HISTORY REV. 109 (2003); and my Comment, *Texas Mexicans and the Politics of Whiteness*, 21 LAW & HISTORY REV. 195 (2003).

that the “other white” strategy was itself relatively new in 1954 does suggest a more instrumental interpretation, rather than a deep psychological need to identify as white.

B. La Raza Cosmica

Can legal pragmatism explain the second shift, however, from “other white” to “Brown”? That transformation came about years after *Brown v. Board of Education*, during a time of cultural revolution in ethnic pride. The new identification of Mexican-Americans with other “minority groups” in litigation agendas coincided with the Chicano movement’s evocation of “La Raza” – Chicanos as a non-white mestizo race.

A plethora of new Chicano organizations re-oriented the discussion of Mexican American identity. CASA defined “La Raza” as “all people of LA RAZA, north, south, and/or Latin America and Antilles, and those individuals who feel culturally as LA RAZA.”⁹⁶ One young Chicano leader, describing the “program for Chicano political action” of MAPA and La Raza Unida Party, wrote, “One of the most pressing problems for a person of Mexican descent in the United States is that of identity . . . here is a person who is officially classified as white (Spanish surname) by the Census Bureau of this country, yet because the shade of his skin generally is darker than the Anglos’, he is effectively designated as a minority . . . [and] discriminated against because of his desire to retain the Spanish language and some of the customs and traditions of Mexico. . . . Every Mexican-American is a potential Chicano. The “Plan Espiritual de Aztlán” declared that “We are a Bronze People with a Bronze Culture.” Ruben Salazar, the

⁹⁶ Stanford University Libraries, M325, CASA Papers, Box 26, F. 6, “Political Strategy.”

Chicano journalist, asked in the Los Angeles Times, “Who Is A Chicano?” and answered, “A Chicano is a Mexican-American with a non-Anglo image of himself.”⁹⁷

The new emphasis on “La Raza” and Chicano identity rejected whiteness and affirmed “brown” and “mestizo” racial identity. The New York Times, in noting a “new Mexican-American militancy,” claimed that while some Mexican-Americans identified as Spanish, and others as Indians, “the vast majority describe themselves as mestizos.” In Del Rio, Texas, the site of the first school desegregation litigation, activists wrote the Del Rio Mexican-American Manifesto, extolling the spirit of La Raza: “However we define it, La Raza is a treasure house of spiritual decency and sanity. La Raza is the affirmation of the most basic ingredient of our personality, the brownhood of our Aztec and Mayan heritage. . . . As children of La Raza, we are heirs of a spiritual and biological miracle wherein family blood ties unite the darkest and the fairest.”⁹⁸

Thus, the public political position of Chicano activists by the late 1960s was of pride in a mestizo identity, and rejection of the whiteness strategy. But how did ordinary Mexican Americans in Texas and California perceive and present themselves? There is a considerable sociological literature on changing racial and ethnic identification, and in particular self-identification, among Mexican Americans and Latinos in the U.S. more generally. This literature suggests both that Mexican Americans have continued to be

⁹⁷ Ysidro Ramon Macias, *Evolution of the Mind and A Plan for Political Action* at 1, 3 (May, 1969) (SUL-SC, M325, CASA Papers, 26:8). See also M224, Ernesto Galarza Papers, Box 54, F. 3 *Mexicans in the U.S.: A Bibliography* 54: 9 George Azcarate Macias, “Mexican, Mexican-American, Chicano” (“Every Mexican-American is a potential Chicano...a chicano is a living representative of the concept of ‘La Raza.’”); Carey McWilliams Papers, Bancroft Library, Carton 21, F. 9, *El Plan Espiritual de Aztlán*, March, 1969; Ruben Salazar, *Who Is A Chicano? And What Is It The Chicanos Want?* L.A. TIMES, Feb. 5, 1970.

⁹⁸ *A New Mexican-American Militancy* (April 20, 1969), NYT, in Field Foundation Archives, 2S442, MALDEF, Fall 1969 (#1), Center for American History, UT Austin; quoted in *Sunday Express and News*, San Antonio, Texas, April 13, 1969, in Field Foundation Archives, *id.*.

divided about claiming a white identity, and that Mexican American understandings of race are more consciously political and cultural than biological.

For example, in New Mexico, where Spanish identification has been higher among Latinos than elsewhere in the United States, identification as “Spanish American” or “Hispano” in the first decades of the twentieth century gave way to “Chicano” in the 1960s as part of a radical political mobilization. “Hispanic” became popular in the late 1970s and 1980s in part as a way for ethnic political leaders to draw diverse groups together around a liberal political agenda while avoiding divisive questions of cultural heritage, as well as distancing them from “more confrontational, Chicano politics.” “Mexican American” never took hold because its connotations of foreign-ness were resisted by “New Mexican citizens” whose families’ residence predated statehood.⁹⁹

In the 1980 U.S. Census, when “Hispanic” became an ethnic category separate from the question of racial identity, 40% of Latino respondents checked “other” in response to the “race” question. Ethnographers suggest that they did so because they considered themselves to be non-white, based on a definition of whiteness that encompassed both “race” and “culture.” This understanding of racial identity likely came about in part in reaction to changes in legal classification, and in part because changing political sensibilities influenced legal transformations. As Neil Foley has argued, “The paradoxical nature of Mexican American identity, as an identifiable minority group and a separate class of whites, derives both from court rulings in the United States and from cultural notions in Mexico, like ‘mestizaje,’ in which mestizos comprise both white

⁹⁹ Margarita Melville, *Hispanics: Race, Class, or Ethnicity?*, JOURNAL OF ETHNIC STUDIES 16:1 67-83 (1988); Laura Gomez, *The Birth of the “Hispanic” Generation: Attitudes of Mexican-American Political Elites Toward the Hispanic Label*, LATIN AMERICAN PERSPECTIVES 19:4 (1992), 45-58, at

(Spanish) and nonwhite (primarily Indian) identities. The legal and cultural confusion over Mexican American identity stems in part from the fact that the United States has repudiated the idea of racial hybridity for most of its history and consequently has no cultural or legal context for understanding the racial place of mestizo peoples.” In other words, it is not so much that Latinos believe themselves to be a separate race or not, but that they do not share the Anglo understanding of what “race” means.¹⁰⁰

Much of the academic debate in the contemporary context has taken place under the assumption that Latinos, or Mexican Americans, do *in fact* have a status as a race or an ethnicity. Most sociologists have treated Latino identity as an ethnicity rather than a race. Other scholars urge us not to ignore the ways in which Latino identity has been racialized.¹⁰¹ The history of Mexican American whiteness in law and culture suggests some complexity in the way Mexican whiteness and *mestizaje* have been deployed for strategic ends – but also that calling attention to Mexican Americans’ *cultural* difference has historically been a way to disguise racism in acceptable terms.

55; Phillip B. Gonzales, *The Political Construction of Latino Nomenclatures in Twentieth-Century New Mexico*, 35 J. OF THE SOUTHWEST 158-85 (year?).

¹⁰⁰ Clara E. Rodriguez, *Race, Culture, and Latino “Otherness” in the 1980 Census*, SOCIAL SCIENCE QUARTERLY 73:4 (1992), 930-37. See also Clara E. Rodriguez et al., *Latino Racial Identity: In the Eye of the Beholder?*, LATINO STUDIES JOURNAL 2:3 (1991), 33-48 (in interviews with Latinos in New York and Midwest, found that some identified “ethnically” as Puerto Rican-American, “racially” as white; some identified primarily as “Hispanic,” with “race secondary to culture”; some had “rainbow identities,” identifying with a mestizo racial identity; and others were split between external and internal identities); **Foley, Straddling the Color Line, at 353.**

¹⁰¹ In legal scholarship, see, generally, Juan Perea, “Panel: Latina/o Identity and Pan-Ethnicity: Toward LatCrit Subjectivities: Five Axioms in Search of Equality,” 2 HARV. LATINO. L. REV. 231, 241 (1997) (“The breadth of the concept of ethnicity, which corresponds in large measure to the notion of the social construction of race, encompasses the breadth of varying Latino/a identities and the discrimination consequent. For example, introducing “ethnic traits” into our understanding of race makes Latino/a traits such as shared language, religion, history, color, culture, and accent relevant to discrimination analysis”). Haney Lopez *supra* note 8, at 5; Sheridan *supra* note 95 at 61..

VI. Conclusion

If, in fact, Mexicans' legal whiteness was used instrumentally by both advocates and judges (for different ends), did the legal regime of whiteness have any larger cultural significance? It certainly had lasting effects on the ability of Mexican Americans and African Americans to work together to combat Anglo racism, and it did little to undermine the equation of whiteness with moral and civic superiority. But the real tragedy of *Hernandez* and its aftermath has been the consistent refusal of state courts and the Supreme Court to acknowledge its central insight that race is produced by practices of subordination, and that racial discrimination can be disguised as discrimination on the basis of culture or language.

The history of the twentieth-century Southwest shows why we cannot prohibit racial discrimination while allowing cultural discrimination. Because racial subordination has historically been based on a blending of racial science with racial performance, racism in the U.S. has conflated race and culture. Because racism has expressed itself in cultural terms, race and culture cannot be disaggregated without ignoring the way cultural discrimination reinforces racial hierarchy. If employers banned the Spanish language out of concern for ease of communication, it might make sense to distinguish between racial and cultural discrimination as Richard Ford prescribes. But "English only" laws, language tracking in schools, and discrimination against Spanish speakers have been extremely effective mechanisms of racial discrimination against Mexican Americans in the Southwest.

This history should matter to us today not only as a matter of theoretical debate over the relationship of race to culture. In cases like *Hernandez v. New York* and its

progeny, contemporary courts have concluded that discrimination against Spanish speakers does not violate laws against racial discrimination. Although the Supreme Court in *Hernandez v. New York* did not reach the question of whether “language ability without more” would have sufficed as a “race-neutral” basis for peremptory strikes, later courts have extended *Hernandez* to the situation in which a prosecutor strikes jurors solely because they speak Spanish, without questioning them at all about their ability to follow the official court translation. In *Pemberthy v. Beyer*, a New Jersey district court held that language ability was a proxy for race in the prosecutor’s use of peremptory strikes against Latinos; the Third Circuit, in an opinion by Samuel Alito, overturned the decision, finding that the prosecutor *could have* been concerned about translation issues in striking Spanish speakers from the jury.¹⁰² Despite an important line of precedent from the 1970s and 1980s holding that “race” should be applied broadly, that Latinos are a cognizable group for equal protection purposes, and that language ability can be a proxy for race, courts are increasingly finding discrimination against Spanish speakers to be permissible, whether in the context of jury exclusion, tracking in school, or English-only policies in the workplace. All of these discriminatory practices have their origins in the Jim Crow regime of the twentieth-century Southwest.

What stands out most about the depressing series of pronouncements from Texas courts justifying the second-class treatment of Mexican American schoolchildren and criminal defendants based on a litany of unsubstantiated stereotypes is the continuing

¹⁰² *Pemberthy v. Beyer*, 800 F. Supp. 144 (1992), *rev’d*, 19 F.3d 857 (1994). See also *Garcia v. Gloor*, 618 F. 2d 264 (1980) and *Garcia v. Spun Steak*, 998 F.2d 1480 (1993), upholding English-only policies in the workplace; Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595 (1999); Christopher David Ruiz Cameron, *How The Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CALIF. L. REV. 1347 (1997).

respectability of cultural racism. For as long as we equate race with biology and racism with the crudest forms of racial pseudo-science, as American courts have done, discrimination on the basis of cultural and linguistic difference will appear neutral and respectable, and racial hierarchy will continue to flourish.