

The Black/White Binary Paradigm of Race

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American society has no social technique for handling partly colored races. We have a place for the Negro and a place for the white man: The Mexican is not a Negro, and the white man refuses him an equal status.¹

CONSIDER how we are taught to think about race. I believe that most such thinking is structured by a paradigm that is widely-held but rarely recognized for what it is and does. It is crucial, therefore, to identify and describe this paradigm and to demonstrate how it binds and organizes racial discourse, limiting both the scope and the range of legitimate viewpoints in that discourse.

Thomas Kuhn, in *The Structure of Scientific Revolutions*,² describes the properties of paradigms and their power in structuring scientific research and knowledge. While Kuhn writes in connection with scientific knowledge, many of his insights are useful in understanding paradigms and their effects more generally. A paradigm is a shared set of understandings or premises which permits the definition, elaboration, and solution of a set of problems defined within the paradigm. An accepted model or pattern, it resembles "an accepted judicial decision in the common law . . . [that] is an object for further articulation and specification under new or more stringent conditions."³

Thus, a paradigm is the set of shared understandings that permits us to distinguish which facts matter in the solution of a problem and which don't. As Kuhn writes,

In the absence of a paradigm or some candidate for paradigm, all of the facts that could possibly pertain to the development of a given science are likely to seem equally relevant. As a result, early fact-gathering is a far more nearly random activity than the one that subsequent scientific development makes familiar.⁴

Paradigms thus define relevancy. In so doing, they control fact-gathering and investigation. Data-gathering efforts and research are focused on understanding the facts and circumstances that the relevant paradigm has taught us are important.

Paradigms are crucial in the development of science and knowledge because,

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by setting boundaries within which problems can be understood, they permit detailed inquiry into these problems. In Kuhn's words, a "paradigm forces scientists to investigate some part of nature in a detail and depth that would otherwise be unimaginable."⁵ Indeed, it is this depth of research that eventually yields anomalies and discontinuities and, ultimately, the necessity to develop new paradigms. However, as a paradigm becomes the widely accepted way of thinking and of producing knowledge on a subject, it tends to exclude or ignore alternative facts or theories that do not fit the scientist's expectations.

Kuhn uses the term "normal science" to describe the elaboration and further articulation of the paradigm, and the solution of problems that are perceivable because of the paradigm. Scientists and researchers spend almost all of their time engaged in normal science, conducting their research under the rules prescribed by the paradigm and attempting to solve problems cognizable and derivable within its structure. However, normal science "often suppresses fundamental novelties because they are necessarily subversive of its basic commitments."⁶ As Kuhn puts it, normal science "seems an attempt to force nature into the performed and relatively inflexible box that the paradigm supplies. No part of the aim of normal science is to call forth new sorts of phenomena; indeed those that will not fit the box are often not seen at all."⁷ As research progresses in depth and detail within a paradigm, unexpected discoveries come to light, yielding anomalies not adequately explained by the current paradigm. In time, and in the face of problems not adequately explained by the paradigm, scientists are forced to replace it with some new understanding that explains better the observed anomalies.

Literature and textbooks play an important role in producing and reproducing paradigms. Kuhn identifies textbooks and popularizations, conveying scientific knowledge in a language accessible to the general public, as authoritative sources of established paradigms. Although Kuhn suggests that science is more vulnerable to textbook distortions of history than other disciplines because of the assumed objectivity of scientific inquiry,⁸ I believe his insights regarding paradigms, normal science, and textbooks are extremely useful in explaining the persistent focus of race scholarship on Blacks and Whites, and the resulting omission of Latinos/as, Asian Americans, Native Americans, and other racialized groups from such scholarship. If science as a discipline is more vulnerable to textbook distortions of history, I believe this is only a matter of degree as law, through its reliance on precedent, is also highly dependent on paradigms. Kuhn recognized as much when he used judicial precedent as an example of paradigm elaboration.⁹ Although Kuhn felt that the extent to which the social sciences had developed paradigms was an open question,¹⁰ race scholarship both inside and outside of law is dominated by a binary paradigm of race.

The Binary Paradigm of Race

Paradigms of race shape our understanding and definition of racial problems. The most pervasive and powerful paradigm of race in the United States

is the Black/White binary. I define this paradigm as the conception that race in America consists, either exclusively or primarily, of only two constituent racial groups, the Black and the White. Many scholars of race reproduce this paradigm when they write and act as though only the Black and the White races matter for purposes of discussing race and social policy. The current fashion of mentioning "other people of color" without careful attention to their voices, histories, and presence, is merely a reassertion of the Black/White paradigm. If one conceives of race as primarily of concern only to Blacks and Whites, and understands "other people of color" only through some unclear analogy to the "real" races, this just restates the binary paradigm with a slight concession to demographics.

In addition, the paradigm dictates that all other racial identities and groups in the United States are best understood through the Black/White binary paradigm. Only a few writers even recognize that they use a Black/White paradigm as the frame of reference through which to understand all racial relations. Most simply assume the importance and correctness of the paradigm, and leave the reader grasping for whatever significance descriptions of the Black/White relationship have for other people of color. Because the Black/White binary paradigm is so widely accepted, other racialized groups like Latinos/as, Asian Americans, and Native Americans are often marginalized or ignored altogether. As Kuhn wrote, "those that will not fit the box are often not seen at all."¹¹

Andrew Hacker and Two Nations

Andrew Hacker's otherwise excellent book, *Two Nations: Black and White, Separate, Hostile, Unequal*, provides a stark example.¹² Its title, proclaiming two nations, Black and White, boldly professes the Black/White binary paradigm. Although Hacker recognizes explicitly that a full perspective on race in America requires inclusion of Latinos/as and Asians, this recognition is, in the context of the entire book, insignificant and underdeveloped. His almost exclusive focus on Blacks and Whites is clearly intentional: "*Two Nations* will adhere to its title by giving central attention to black and white Americans."¹³

Hacker's justification is that "[i]n many respects, other groups find themselves sitting as spectators, while the two prominent players try to work out how or whether they can co-exist with one another."¹⁴ This justifies marginalization with marginalization. What Hacker, and so many other writers on race fail, or decline, to understand is that, by focusing only on Blacks and Whites, they both produce and replicate the belief that only "two prominent players," Black and White, count in debates about race. Other non-White groups, rendered invisible by these writers, can thus be characterized as passive, voluntary spectators.

Hacker describes in detail only conditions experienced by White or Black Americans. He first characterizes the White nature of the nation and its culture:

America is inherently a "white" country: in character, in structure, in culture. Needless to say, black Americans create lives of their own. Yet, as a people, they

face boundaries and constrictions set by the white majority. America's version of *apartheid*, while lacking overt legal sanction, comes closest to the system even now being reformed in the land of its invention.¹⁵

Of course, Latinos/as, Asian Americans, Native Americans, Gypsies, and all non-White Americans face "boundaries and constrictions set by the white majority," but the vision Hacker advances counts only Blacks as significantly disadvantaged by White racism.

Similarly, Hacker describes Blackness as uniquely functional for Whites:

As James Baldwin has pointed out, white people need the presence of black people as a reminder of what providence has spared them from becoming. . . . In the eyes of white Americans, being black encapsulates your identity. No other racial or national origin is seen as having so pervasive a personality or character.¹⁶

According to Hacker, then, Blackness serves a crucial function in enabling Whites to define themselves as privileged and superior, while racial attributes of other minorities do not serve this function.

Hacker's chapter titles largely tell the story of the binary paradigm. Chapter two, on "Race and Racism," discusses only White and Black perceptions of each other. Chapter three, "Being Black in America," is followed by one on "White Responses." Hacker's omission of non-Black minority groups in his discussion of specific topics similarly suggests these groups' experiences do not exist. Chapter nine, on segregated schooling, describes only the segregation of Blacks, making no reference to the extensive history of segregation in education suffered by Latinos/as. Chapter ten asks, "What's Best for Black Children?" with no commensurate concern for other children. Similarly, Chapter eleven, on crime, discusses only perceptions of Black criminality and their interpretation. In discussing police brutality, Hacker describes only White police brutality against Blacks; one finds not a single word about the similar brutality suffered by Latinos/as, Native Americans, or Asian Americans at the hands of White police officers.

The greatest danger in Hacker's vision is the implication that non-White groups other than Blacks are not really subject to racism. Hacker seems to adopt the deservedly criticized ethnicity theory, which posits that non-White immigrant ethnics are essentially Whites-in-waiting who will be permitted to assimilate and become White. This is illustrated best in Chapter eight, "On Education: Ethnicity and Achievement," which offers the book's only significant discussion of non-White groups other than blacks. Asians are described in "model minority" terms, because of high standardized test scores (on a group basis). Latinos/as are portrayed both as below standard, because of low test scores, and as aspiring immigrants. Describing Asian Americans, Latinos/as, and other immigrant groups, Hacker writes that:

Members of all these "intermediate groups" have been allowed to put a visible distance between themselves and black Americans. Put most simply, none of the presumptions of inferiority associated with Africa and slavery are imposed on these other ethnicities.¹⁷

While a full rebuttal of this quotation must wait for another time, its inaccuracy can be quickly demonstrated. Consider, for instance, the observations of historian David Weber, who described early Anglo perceptions of Mexican people: "American visitors to the Mexican frontier were nearly unanimous in commenting on the dark skin of Mexican mestizos who, it was generally agreed, had inherited the worst qualities of Spaniards and Indians to produce a 'race' still more despicable than that of either parent."¹⁸ Rufus B. Sage expressed the common view of Mexicans in 1846:

There are no people on the continent of America, whether civilized or uncivilized, with one or two exceptions, more miserable in condition or despicable in morals than the mongrel race inhabiting New Mexico. . . . To manage them successfully, they must needs be held in continual restraint, and kept in their place by force, if necessary—else they will become haughty and insolent. As servants, they are excellent, when properly trained, but are worse than useless if left to themselves.¹⁹

More briefly, the common perception of Mexican Americans was that "they are an inferior race, that is all."²⁰

Incredibly, and without any supporting evidence, Hacker writes that "[m]ost Central and South Americans can claim a strong European heritage, which eases their absorption into the 'white' middle class."²¹ He continues, "[w]hile immigrants from Colombia and Cyprus may have to work their way up the social ladder, they are still allowed as valid a claim to being 'white' as persons of Puritan or Pilgrim stock."²² Hacker's comments are simply beyond belief. While some Latinos/as may look White and may act Anglo (the phenomenon of passing for White is not limited to Blacks), Hacker's statement is certainly false for millions of Latinos/as. Current anti-immigrant initiatives targeted at Latinos/as and Asians, such as California's Proposition 187 and similar federal legislation targeting legal and illegal immigrants, California's Proposition 209, and the unprecedented proposal to deny birthright citizenship to the U.S.-born children of undocumented persons debunk any notion that the presence of Latino/a or Asian people will be accepted or tolerated easily by the White majority.

Hacker seems determined to adhere to the binary paradigm of race and to ignore the complexity introduced by other non-White groups, because it is convenient. In other words, "real" race is only Black or White. Other groups only render this framework "incoherent." This is why the Black/White paradigm of race must be expanded: It causes writers like Hacker to ignore other non-White Americans, which in turn encourages others to ignore us as well.

Cornel West and the Black/White Binary Paradigm

Cornel West is one of the nation's most well-known and well-regarded philosophers and commentators on race. While West writes with much more insight than Hacker, his recent book, *Race Matters*, is also limited by and reproduces the Black/White binary paradigm of race.²³ A collection of essays West

wrote on race and race relations, its principal subject is the relationship of Blackness to Whiteness and the exploration of avenues to alter the unsatisfactory state of that relationship. And while this focus is of course worthy of his attention, he overlooks and ignores relevant subject matter that lies outside the paradigm. West describes the binary nature of our public discourse about race:

We confine discussions about race in America to the "problems" black people pose for whites rather than consider what this way of viewing black people reveals about us as a nation. . . . Both [liberals and conservatives] fail to see that the presence and predicaments of black people are neither additions to nor defections from American life, but rather *constitutive elements of that life*.²⁴

This statement is accurate, and I would only fault West for not recognizing that exactly the same statement is true of Latinas/as, Asians and Native Americans as well as Blacks: We are all constitutive of American life and identity to a degree that has not been fully recognized, and which is in fact actively resisted.

West's near-exclusive focus on Blacks and Whites, and thus his reproduction of the Black/White binary paradigm, is apparent throughout the book. Chapter two, entitled "The Pitfalls of Racial Reasoning," presents a powerful critique of racial reasoning within the Black community that immobilized Black leaders, who were generally unable to criticize Clarence Thomas when he was appointed to the Supreme Court. West's binary conception of the nation emerges when he describes the "deep cultural conservatism in white and black America. In white America, cultural conservatism takes the form of a chronic racism, sexism, and homophobia. . . . In black America, cultural conservatism takes the form of an inchoate xenophobia (e.g., against whites, Jews, and Asians), systemic sexism, and homophobia."²⁵ Like Hacker's "two nations," West sees binary Americas, one White, one Black. In addition, West's reference to Black xenophobia, directed at Whites, Jews, and Asians, sets the stage for his later description of Black distrust of Latinas/as as well.

West also describes the binary paradigm from a Black point of view, referring to the "black bourgeois preoccupation with white peer approval and black nationalist obsession with white racism."²⁶ Blacks, in their way, are as preoccupied with Whites as Whites are with Blacks.

In his chapter on "Malcolm X and Black Rage," West describes Malcolm X's fear of cultural hybridity, the blurring of racial boundaries that occurs because of racial mixture. Malcolm X saw such hybridity, exemplified by mulattos, as [a] "symbol . . . of weakness and confusion."²⁷ West's commentary on Malcolm X's views gives us another statement of the binary paradigm: "The very idea of not 'fitting in' the U.S. discourse of positively valued whiteness and negatively debased blackness meant one was subject to exclusion and marginalization by whites and blacks."²⁸ Although the context of this quotation is about Black/White mulattos, West's observation is crucial to an understanding of why Latinas/as, neither White nor Black, are perpetually excluded and marginalized. The reified binary structure of discourse on race leaves no room for people of color who do not

fit the rigid Black and White boxes supplied by the paradigm. Furthermore most Latinos/as are mixed race mestizos or mulattos, therefore embodying the kind of racial mixture that Malcolm X, and I, would argue, society generally tends to reject. West's observation about mixed-race people who do not fit within traditional U.S. discourse about race applies in full measure to Latinos/as.

When West writes about the struggle for Black civil rights in shaping the future of equality in America, he recognizes the need for Blacks to repudiate anti-Semitism and other racisms in order to sustain the moral position garnered through the struggle for civil rights. However, he makes ambivalent comments about the possibilities for coalition with other groups:

[A] prophetic framework encourages a coalition strategy that solicits genuine solidarity with those deeply committed to antiracist struggle. . . . [B]lack suspicions of whites, Latinos, Jews, and Asians runs deep for historical reasons. Yet there are slight though significant antiracist traditions among whites, Asians, and especially Latinos, Jews, and indigenous people that must not be cast aside. Such coalitions are important precisely because they not only enhance the plight of black people but also because they enrich the quality of life in America.²⁹

This paragraph warrants probing. Given America's history of racism, Black suspicions of every group may seem well-founded. For example, with respect to Latinos/as, during the nineteenth century as during the present, upper-class Mexicans' identification with Anglos meant becoming more racist and disparaging toward lower-class and darker-skinned Mexicans and Blacks. However, West's characterization of Latino/a, Asian, and Native American resistance to Anglo domination and racism as "slight though significant"³⁰ seems belittling, ill-informed, and marginalizing of Latino/a, Asian, and indigenous people. This comment can be understood as the kind of "inchoate xenophobia" West himself finds in the black community.

Another possible reason for this distrust of Latinos/as may stem from a widespread sense that Blacks are being displaced by immigrant Latinos/as. Toni Morrison writes specifically about this distrust. In her essay "On the Backs of Blacks," Morrison describes the hatred of Blacks as the defining, final, necessary step in the Americanization of immigrants. "It is the act of racial contempt [banishing a competing black shoe-shiner] that transforms this charming Greek into an entitled white."³¹ Morrison sees Blacks as persistently victimized by Americanizing processes, always forced to "the lowest level of the racial hierarchy."³² The struggles of immigrants, according to Morrison,

are persistently framed as struggles between recent arrivals and blacks. In race talk the move into mainstream America always means buying into the notion of American blacks as the real aliens. Whatever the ethnicity or nationality of the immigrant, his nemesis is understood to be African American.³³

Morrison is right that American "Whiteness" is often achieved through distancing from Blacks. Latinos/as participate in the paradigm by engaging in racism against blacks or darker skinned members of Latino/a communities. Current

events belie, however, Morrison's notion of American Blacks as "the real aliens." Mexican and other Latino/a and Asian aliens have become targets of state and federal legislation denying them medical and educational resources. The legal attack on entitlement programs and affirmative action programs is an attack on Blacks, Latinos/as, and Asians.

In Cornel West's writing, we see the influence of the Black/White binary paradigm from the point of view of a leading Black writer on race. His view shares points in common with Andrew Hacker. Both agree on the concepts of White and Black Americas (the "two nations"), and both focus exclusive attention on the relationship between Blacks and Whites, although they describe the nature of this relationship in very different terms. Both writers seem indifferent towards the history and conditions experienced by other non-White, non-Black groups. Hacker considers, unrealistically, all non-Blacks as aspiring immigrants on the path to assimilation with Whites. West, like Morrison, views non-Black groups with great suspicion. Morrison, in particular, seems to accept Hacker's view that all non-Blacks are (or will be) the enemies of Blacks as they Americanize and assimilate.

Taken together, these views pose serious problems for Latinos/as. First, Mexican Americans and Puerto Ricans, like all U.S.-born Latinos/as, are not immigrants. Mexicans occupied the Southwest long before the United States ever found them. Second, this utopian view of immigrant assimilation takes no account of the systemic racism which afflicts Mexican Americans and Puerto Ricans. It serves White writers like Hacker because they can perpetuate the view that the United States has only a single race problem—the traditional binary problem of the White relationship with Blacks—rather than a more complex set of racisms that, if recognized, would demonstrate that racism is much more systemic and pervasive than is usually admitted.

One can thus discern how the binary paradigm interferes with liberation and equality. If Latinos/as and Asian Americans are presumed to be White by both White writers and Black writers (a presumption not borne out in the lived experience of most Latinos/as and Asians), then our claims to justice will not be heard nor acknowledged. Our claims can be ignored by Whites, since we are not Black and therefore are not subject to real racism. And our claims can be ignored by Blacks, since we are presumed to be not Black and becoming White, and therefore we are not subject to real racism. Latinos/as do not fit the boxes supplied by the paradigm.

The "normal science" of race scholarship specifies inquiry into the relationship between Blacks and Whites as the exclusive aspect of race relations that needs to be explored and elaborated. As a result, much relevant legal history and information concerning Latinos/as and other racialized groups end up omitted from books on race and constitutional law. Omission of this history is extraordinarily damaging to Mexican Americans and other Latinos/as. Students get no understanding that Mexican Americans have long struggled for equality. The absence of Latinos/as from histories of racism and the struggle against it enables people to maintain existing stereotypes of Mexican Americans. These stereotypes are per-

petuated even by America's leading thinkers on race. Paradigmatic descriptions and study of White racism against Blacks, with only cursory mention of "other people of color," marginalizes all people of color by grouping them, without particularity, as somehow analogous to Blacks. "Other people of color" are deemed to exist only as unexplained analogies to Blacks. Uncritical readers are encouraged to continue assuming the paradigmatic importance of the Black/White relationship, while ignoring the experiences of other Americans who also are subject to racism in profound ways.

It is time to ask hard questions of our leading writers on race. It is also time to demand better answers to these questions about inclusion, exclusion, and racial presence than perfunctory references to "other people of color." In the midst of profound demographic changes, it is time to question whether the Black/White binary paradigm of race fits our highly variegated current and future population. Our "normal science" of writing on race, at odds with both history and demographic reality, needs reworking.

[Eds. The author goes on to present the history of Mexican-American struggles against segregation that occurred contemporaneously with black struggles for civil rights and that are routinely omitted from standard accounts.]

NOTES

1. Max Handman, *quoted in* DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986*, at 158 (1987).
2. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).
3. *Id.* at 23.
4. *Id.* at 15.
5. *Id.* at 24.
6. *Id.* at 5.
7. *Id.* at 24.
8. *See, e.g., id.* at 138.
9. *See id.* at 23.
10. *See id.* at 15.
11. *Id.* at 24; *also* Juan F. Perea, *Los Olvidados: On the Making of Invisible People* 70 N.Y.U. L. Rev. 965 (1995); Anne Sutherland, *GYPSIES: THE HIDDEN AMERICANS* (1986).
12. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992).
13. *Id.* at xii.
14. *Id.*
15. *Id.* at 4.
16. *Id.* at 30, 32.
17. *Id.* at 16.
18. DAVID J. WEBER, *FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS* 59 (1973).

19. *Id.* at 72, 74 (quoting 2 RUFUS B. SAGE: HIS LETTERS AND PAPERS, 1836-1847 [LeRoy R. & Ann W. Hafen eds. 1956]).

20. This was the justification offered by Texas school officials for segregating Mexican Americans in 1929. See Jorge C. Rangel & Carlos M. Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 307 (1972) (quoting PAUL SCHUSTER TAYLOR, AN AMERICAN MEXICAN FRONTIER 219 (1934)).

21. HACKER, *supra* 12, at 10.

22. *Id.* at 12.

23. CORNEL WEST, RACE MATTERS (1993).

24. *Id.* at 2-3.

25. *Id.* at 27.

26. *Id.* at 66.

27. *Id.* It is interesting to note the similarity between Malcolm X's sense that mixed-race people introduced "confusion" into the otherwise clear structures of Black and White, and Andrew Hacker's sense that Hispanics introduce "incoherence" into the otherwise "clear" vision of Black and White races that Hacker describes in such depth. These observations suggest one reason for the continued adherence to a Black/White paradigm despite its inadequacy: The paradigm does simplify and makes racial problems more readily understood than if we began to grapple with them in their full complexity.

28. *Id.*

29. *Id.* at 28-29.

30. *Id.* at 28.

31. Toni Morrison, *On the Backs of Blacks*, in ARGUING IMMIGRATION 97 (Nicolaus Mills ed. 1994).

32. *Id.*

33. *Id.* at 98.

34 Race and Erasure: The Salience of Race to Latinos/as

IAN F. HANEY LÓPEZ

ON SEPTEMBER 20, 1951, an all-White grand jury in Jackson County, Texas, indicted twenty-six-year-old Pete Hernández for the murder of another farm worker, Joe Espinosa. The League of United Latin American Citizens (LULAC), a Mexican-American civil rights organization, took up Hernández's case, hoping to use it to attack the systematic exclusion of Mexican Americans from jury service in Texas.¹ LULAC lawyers Gus García and John Herrera quickly moved to quash Hernández's indictment, arguing that people of Mexican descent were purposefully excluded from the indicting grand jury in violation of the Fourteenth Amendment's guarantee of equal protection of the laws. They pointed out, and the State of Texas stipulated, that while 15 percent of Jackson County's almost thirteen thousand residents were Mexican American, no such person had served on any jury commission, grand jury, or petit jury in Jackson County in the previous quarter century. Despite this stipulation, the trial court denied the motion. After two days of trial and three and a half hours of deliberation, the jury convicted Hernández and sentenced him to life in prison.

On appeal, García and Herrera renewed the Fourteenth Amendment challenge. It again failed. The Texas Court of Criminal Appeals held that "in so far as the question of discrimination in the organization of juries in state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other class."² Categorizing Mexican Americans as White, and hence incapable of being racially discriminated against by other Whites, the Texas court held in effect that the Fourteenth Amendment did not cover Mexican Americans in cases of jury discrimination.

With the assistance of Carlos Cadena, a law professor at St. Mary's University, the LULAC attorneys took the case to the United States Supreme Court. On

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May 3, 1954, Chief Justice Earl Warren delivered the unanimous opinion of the Court in *Hernandez v. Texas*, extending the reach of the Fourteenth Amendment to Pete Hernández and reversing his conviction. The Court did not do so, however, on the ground that Mexican Americans constituted a protected racial group. Rather, the Court held that Hernández merited Fourteenth Amendment protection because he belonged to a class, distinguishable on some basis "other than race or color," that nevertheless suffered discrimination in Jackson County, Texas.³

Hernandez is a central case—the first Supreme Court decision to extend the protections of the Fourteenth Amendment to Latinos/as, it is among the great early triumphs in the Latino/a struggle for civil rights. *Hernandez* attains increased significance, however, because it is also the principal case in which the Supreme Court addresses the racial identity of a Latino/a group, namely Mexican Americans. No Supreme Court case has dealt so squarely with this question, before or since. This point is all the more striking, and *Hernandez* all the more exceptional, because at least on the surface the Court refused to consider Mexican Americans as a group defined by race or color. If theorists intend, as I believe we should, to use race as a lens and language through which to assess the Latino/a experience in the United States, we must come to terms with the elision of race in *Hernandez*.

Race and Erasure

In the *United States Reports*, *Hernandez* immediately precedes another leading Fourteenth Amendment case, *Brown v. Board of Education*, having been decided just two weeks before that watershed case. Despite extending the reach of the Fourteenth Amendment by unanimous votes, the two cases differ dramatically. In *Brown*, the Court grappled with the harm done through segregation, but considered the applicability of the Equal Protection Clause to African Americans a foregone conclusion. In *Hernandez*, the reverse was true. The Court took for granted that the Equal Protection Clause would prohibit the state conduct in question, but wrestled with whether the Fourteenth Amendment protected Mexican Americans. Nevertheless, as in *Brown*, stark evidence of racism permeates *Hernandez*.

As catalogued by the Court, the evidence in the case revealed the following: First, residents of Jackson County, Texas, routinely distinguished between "White" and "Mexican" persons. Second, business and community groups largely excluded Mexican Americans from participation. Third, until just a few years earlier, children of Mexican descent were required to attend a segregated school for the first four grades, and most children of Mexican descent left school a few years later. Fourth, at least one restaurant in the county seat prominently displayed a sign announcing "No Mexicans Served." Fifth, on the Jackson County courthouse grounds at the time of the underlying trial stood two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aquí"

("Men Here"). Finally, "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County," a county 15 percent Mexican American.⁴

In their brief to the Court, Hernández's lawyers placed heavy emphasis on this history of discrimination:

While the Texas court elaborates its "two classes" theory, in Jackson County, and in other areas in Texas, persons of Mexican descent are treated as a third class—a notch above the Negroes, perhaps, but several notches below the rest of the population. They are segregated in schools, they are denied service in public places, they are discouraged from using non-Negro rest rooms. . . . They are told that they are assured of a fair trial at the hands of persons who do not want to go to school with them, who do not want to give them service in public places, who do not want to sit on juries with them, and who would prefer not to share rest room facilities with them, not even at the Jackson County court house.⁵

"The blunt truth," Hernández's lawyers insisted, "is that in Texas, persons of Mexican descent occupy a definite minority status."⁶ The Court relied on the evidence enumerated above to support its conclusion that Hernández qualified for equal protection under the Fourteenth Amendment.

The Paradox of Race

In light of the Court's heavy reliance on the overwhelming evidence of racial discrimination presented in the case, its insistence that Mexican Americans do not constitute a race seems surprising. It seems all the more so when one recalls that at the time the Court decided *Hernandez*, national hysteria regarding Mexican immigration was running high, and also in light of evidence of possible racist antipathies toward Mexican Americans on the Supreme Court itself.⁷ In part, the Court's reticence to acknowledge the cases may have stemmed from the fact that all parties characterized Mexican Americans as racially White.

Consider LULAC's position. Founded in 1929 in Texas by members of the small Mexican-American middle class, this organization stressed both cultural pride and assimilation. These twin goals were not without their tensions, however, particularly with respect to the question of racial identity. Emphasizing the former often led LULAC to identify Mexican Americans as a distinct race. For example, LULAC's first code admonished members to "[l]ove the men of your race, take pride in your origins and keep it immaculate; respect your glorious past and help to vindicate your people"; its constitution announced, "[w]e solemnly declare once and for all to maintain a sincere and respectful reverence for our racial origin of which we are proud."⁸ On the other hand, focusing on assimilation and the right to be free of widespread discrimination, LULAC often emphasized that Mexican Americans were White. "As descendants of Latins and Spaniards, LULACers also claimed 'whiteness,'" according to historian Mario García. "Mexican Americans as 'whites' believed no substantive racial factor existed to justify racial discrimi-

nation against them."⁹ To a certain extent, LULAC 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. However, this resolution could not be maintained neatly using the notion of race as then constituted. Race inseparably conflated biology, culture, heritage, civil rights, and civic participation. In racial terms, to be Mexican and different was irreconcilable with being White and the same.

This tension notwithstanding, the decision to defend Pete Hernández constituted part of LULAC's strategy of fighting discrimination against Mexican Americans through the Texas courts. This strategy dictated as well the decision of the lawyers for Hernández to argue that Mexican Americans were White. As Mario García writes: "In [its] antisegregation efforts, LULAC rejected any attempt to segregate Mexican Americans as a nonwhite population. . . . LULACers consistently argued that Mexicans were legally recognized members of the white race and that no legal or physical basis existed for legal discrimination."¹⁰ For Hernández's attorneys, the decision to cast Mexican Americans as White was a tactical one, in the sense that it reflected the legal and social terrain on which they sought to gain civil rights for their community. On this terrain, being White was strategically key. . . .

In addition, however, the Court's assessment of the evidence in *Hernandez* was no doubt informed by the contemporary conception of race as an immutable natural phenomenon and a matter of biology—Black, White, Yellow, or Red, races were considered natural, physically distinct groupings of persons. Races, the Court no doubt supposed, were stable and objective, their boundaries a matter of physical fact and common knowledge, consistent the world over and across history.

Proceeding from this understanding, the Court could not help but be perplexed by the picture of Mexican-American identity presented in *Hernandez*, an identity that at every turn seemed inconstant and contradictory. Though clearly the object of severe racial prejudice in Texas, all concerned parties agreed Mexican Americans were White; though officially so, the dark skin and features of many Mexican Americans seemingly demonstrated that they were non-White; though apparently non-White, Mexican Americans could not neatly be categorized as Red, Yellow, or Black. A biological view of race positing that each person possesses an obvious, immutable, and exclusive racial identity cannot account for, or accept, these contradictions. Under a biological view of race, the force of these contradictions must on some level have served as evidence that Mexican Americans did not constitute a racial group. Thus, the Court insisted in the face of viscerally moving evidence to the contrary that the exclusion of Mexican Americans from juries in Jackson County, Texas, turned neither on race nor color.

Nevertheless, *Hernandez* is virtually unintelligible except in racial terms—in terms, that is, of racial discrimination, of segregation, of Jim Crow facilities, of social and political prejudice, of exclusion, marginalization, devaluation. The Court's evasion of race notwithstanding, the facts of *Hernandez* insist that when Pete Hernández was indicted for murder in 1951, an inferior racial identity defined Mexican Americans in Texas.

That despised identity developed in Texas over the course of more than a century of Anglo-Mexican conflict. In the early years of the nineteenth century, White settlers from the United States moving westward into what was then Spain, and after 1821, Mexico, clashed with the local people, eventually giving rise to war between Mexico and the United States in 1846. During this period, Whites in Texas and across the nation elaborated a Mexican identity in terms of innate, insuperable racial inferiority. According to historian Reginald Horsman, "By the time of the Mexican War, America had placed the Mexicans firmly within the rapidly emerging hierarchy of superior and inferior races. While the Anglo-Saxons were depicted as the purest of the pure—the finest Caucasians—the Mexicans who stood in the way of southwestern expansion were depicted as a mongrel race, adulterated by extensive intermarriage with an inferior [Native American] race."¹¹ These views continued, and were institutionalized, over the remainder of the last century and well into this one. According to historian Arnoldo De León "in different parts of [Texas], and deep into the 1900s, Anglos were more or less still parroting the comments of their forbears. . . . They regarded Mexicans as a colored people, discerned the Indian ancestry in them, identified them socially with blacks. In principle and in fact, Mexicans were regarded not as a nationality related to whites, but as a race apart."¹²

Ironically, the solution to the racial paradox posed in *Hernandez* lies within the "community attitudes" test advanced by the Court. The Court propounded this test as a measure of whether Mexican Americans exist as a distinct, though non-racial group. In fact, no more accurate test could be fashioned to establish whether Mexican Americans, or any group, constitute a race. Race is not biological or fixed by nature; it is instead a question of social belief. Thus, albeit unwittingly, the *Hernandez* opinion offered a sophisticated insight into the nature of race: Whether a racial group exists is always a local question to be answered in terms of community attitudes. To be sure, race is constructed through the interactions of a range of overlapping discursive communities, from local to national, ensuring that divergent and conflicting conceptions of racial identity exist within and among communities. Nevertheless, understanding race as "a question of community attitude" emphasizes that race is not biological but social. Therein lies the irony of the Court's position: Avoiding a racial understanding of *Hernandez* in part due to a biological conception of race, the Court nevertheless correctly understood that the existence of Mexican Americans as a (racial) group in Jackson County turned, as race does, not on biology but on community attitudes.

The Experience of Race

[Are Latinos, then, a race?] To begin with, rejecting race as a basis for conceptualizing Latino/a lives risks obscuring central facets of our experiences. Reconsider the evidence of discriminatory treatment at the root of *Hernandez*. In Jackson County, Mexican Americans were barred from local restaurants, excluded

from social and business circles, relegated to inferior and segregated schooling, and subjected to the humiliation of Jim Crow facilities, including separate bathrooms in the halls of justice. Each of these aspects of social oppression substantially affected, although of course even in their totality they did not completely define, the experience of being Mexican American in Jackson County at mid-century.

To attempt to fathom the significance of such experiences, imagine being present at the moment that García called his co-counsel at trial, John Herrera, to testify about the segregated courthouse bathrooms. Keep in mind that Herrera's ties to Texas stretched back at least to the original 1836 Texas Declaration of Independence, which was signed by his great-, great-grandfather, Col. Francisco Ruiz, one of two Mexicans to sign that document. As excerpted from the trial court transcript, Herrera's testimony progressed like this:

Q. During the noon recess I will ask you if you had occasion to go back there to a public privy, right in back of the courthouse square?

A. Yes, sir.

Q. The one designated for men?

A. Yes, sir.

Q. Now did you find one toilet there or more?

A. I found two.

Q. Did the one on the right have any lettering on it?

A. No, sir.

Q. Did the one on the left have any lettering on it?

A. Yes, it did.

Q. What did it have?

A. It had the lettering "Colored Men" and right under "Colored Men" it had two Spanish words.

Q. What were those words?

A. The first word was "Hombres."

Q. What does that mean?

A. That means "Men."

Q. And the second one?

A. "Aquí," meaning "Here."

Q. Right under the words "Colored Men" was "Hombres Aquí" in Spanish, which means "Men Here"?

A. Yes, sir.¹³

Under cross-examination by the district attorney, Herrera continued:

Q. There was not a lock on this unmarked door to the privy?

A. No, sir.

Q. It was open to the public?

A. They were both open to the public, yes, sir.

Q. And didn't have on it "For Americans Only," or "For English Only," or "For Whites Only"?

A. No, sir.

Q. Did you undertake to use either one of these toilets while you were down here?

A. I did feel like it, but the feeling went away when I saw the sign.

Q. So you did not?

A. No, sir, I did not.¹⁴

By themselves, on paper, the words are dry, disembodied, untethered. It is hard to envision the Jackson County courtroom, difficult to sense its feel and smell; we cannot hear García pose his questions; we do not register the emotion perhaps betrayed in Herrera's voice as he testified to his own exclusion; we cannot know if the courtroom was silent, solemn and attentive, or murmurous and indifferent. But perhaps we can imagine the deep mixture of anger, frustration, and sorrow that would fill our guts and our hearts if it were we—if it were we confronted by that accusatory bathroom lettering, we called to the stand to testify about the signs of our supposed inferiority, we serving as witnesses to our undesirability in order to prove we exist.

Imagining such a moment should not be understood as giving insight into the very worst damage done by racism in this country. Nor should it be taken to suggest that everyone constructed as non-White has come up against such abuse, or has experienced it the same way. Finally, it should not be taken to imply that those denigrated in non-racial terms do not also suffer significant, sometimes far greater harms. Imagining the moment described above cannot and does not pretend to afford insight into the full dynamics of racial oppression, or to provide a solid base from which to compare other forms of disadvantage.

What it does afford, however, is a sense of the experience of racial discrimination in the United States. In this country, the sort of group oppression documented in *Hernandez*, the sort manifest on the bathroom doors of the Jackson County courthouse, has traditionally been meted out to those characterized as racially different, not to those simply different in ethnic terms. It is on the basis of race—on the basis, that is, of presumably immutable difference, rather than because of ethnicity or culture—that groups in the United States have been subject to the deepest prejudices, to exclusion and denigration across the range of social interactions, to state-sanctioned segregation and humiliation. In comparison to ethnic antagonisms, the flames of racial hatred in the United States have been stoked higher and have seared deeper. They have been fueled to such levels by beliefs stressing the innateness, not simply the cultural significance, of superior and inferior identities. To eschew the language of race is to risk losing sight of these central racial experiences.

Race *should* be used as a lens through which to view Latinos/as in order to focus our attention on the experiences of racial oppression. However, it should also direct our attention to racial oppression's long-term effects on the day-to-day conditions encountered and endured by Latino/a communities. Consider in this vein the segregated school system noted in *Hernandez*. Jackson County's scholastic segregation of Whites and Mexican Americans typified the practices of Texas school boards: Although not mandated by state law, from the turn of the century, school boards in Texas customarily separated Mexican American and White stu-

dents. In his study of the Mexican-American struggle for educational equality in Texas, Guadalupe San Miguel writes:

School officials and board members, reflecting the specific desires of the general population, did not want Mexican students to attend school with Anglo children regardless of their social standing, economic status, language capabilities, or place of residence. . . . Wherever there were significant numbers of Mexican children in school, local officials tried to place them in facilities separate from the other white children.¹⁵

Though it should be obvious, it bears making explicit that racism drove this practice. A school superintendent explained it this way: "Some Mexicans are very bright, but you can't compare their brightest with the average white children. They are an inferior race."¹⁶ According to San Miguel, many Whites "simply felt that public education would not benefit [Mexican Americans] since they were intellectually inferior to Anglos."¹⁷ To be sure, as in Jackson County, school segregation in Texas was most pronounced in the lower grades. However, also as in that county, this fact reflects not a lack of concern with segregation at the higher grades, but rather the practice of forcing Mexican American children out of the educational system after only a few years of school. The segregated schooling noted in *Hernandez* constitutes but one instance in a rampant practice of educational discrimination against Mexican Americans in Texas and across the southwest.

Using the language of race forces us to look to the pronounced effects on minority communities of longstanding practices of racial discrimination. These effects can be devastating in their physical concreteness, as evidenced by the dilapidated schoolhouse for the Mexican-American children in Jackson County's Edna Independent School District. According to the testimony of one frustrated mother, the "Latin American school" consisted of a decaying one-room wooden building that flooded repeatedly during the rains, with only a wood stove for heat and outside bathroom facilities, and with but one teacher for the four grades taught there. Such effects may also be personal and intangible, though not for those reasons any less real, dire, or permanent. In Jackson County, as in the rest of Texas, the Mexican-American children subject to state-sanctioned segregation no doubt suffered grave harm to their sense of self-worth and belonging—feelings of inferiority embossed on their hearts and minds in ways unlikely ever to be undone, in the language of Chief Justice Warren.¹⁸ Of the 645 persons of Spanish surname in that county over the age of 24, the lawyers informed the Court, "245 have completed from 1 to 4 years of elementary schooling; 85 have completed the fifth and sixth years; 35 have completed 7 years of elementary schooling; 15 have completed 8 years; 60 have completed from 1 to 3 years of high school; 5 have completed 4 years of high school; and 5 are college graduates."¹⁹

In Jackson County, segregated schools were just one manifestation of racial discrimination, whose effects warrant close attention if we hope to understand the lives of persons oppressed because of supposed racial differences—people sys-

tematically relegated to society's bottom, not just through the operation of individual prejudices but by institutionalized cultural, political, and juridical practices. The impact on community members, such as widespread alienation and low levels of education, largely set the parameters of the lives of those within the community. None but the fewest and most fortunate Mexican Americans raised in the 1950s in Jackson County, Texas, could escape the grinding poverty dictated for them by the racial prejudices of Whites there. Because these conditions circumscribe the lives people can reasonably expect to live in this society, racial language remains a salient vocabulary for discussing socially constituted communities, never more so than when those communities have been severely subordinated in racial terms.

NOTES

1. Gustavo C. García, *An Informal Report to the People*, in A COTTON PICKER FINDS JUSTICE! THE SAGA OF THE HERNANDEZ CASE (Ruben Munguia ed. 1954).
2. *Hernandez v. State*, 251 S.W.2d 531, 535 (Tex. Crim. App. 1952).
3. *Hernandez v. Texas*, 347 U.S. 475, 477, 479–480 (1954). The Court suggested, but did not explicitly rule, that this "other basis" corresponded to ancestry or national origin. *Id.* at 479.
4. *Id.* at 481, 480.
5. Brief for Petitioner at 28–29, *Hernandez v. Texas* 347 U.S. 475 (No. 406).
6. *Id.* at 13.
7. Mark Tushnet brings to light revealing comments regarding Mexican Americans made by Justice Tom Clark during a 1952 conference discussion of the segregation decisions:

Clark, in a statement which, apart from its racism, is quite difficult to figure out, said that Texas "also has the Mexican problem" which was "more serious" because the Mexicans were "more retarded," and mentioned the problem of a "Mexican boy of 15 . . . in a class with a negro girl of 12," when "some negro girls [would] get in trouble."

MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 194 (1994). Tushnet adds: "These references capture the personal way the justices understood the problem they were confronting, and the unfocused quality suggests that they were attempting to reconcile themselves to the result they were about to reach." *Id.* Clark, formerly the Civil District Attorney for Texas and a Truman appointee to the Court in 1949, was replaced on the bench by Thurgood Marshall in 1967. WILLIAM LOCKHART ET AL., *CONSTITUTIONAL RIGHTS AND LIBERTIES: CASES, COMMENTS, QUESTIONS* 1433–35 (8th ed. 1996).

8. MARIO T. GARCÍA, *MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY, AND IDENTITY, 1930–1960*, at 30–31 (1989).
9. *Id.* at 43.
10. *Id.* at 48. The insistence by many in the Mexican-American community

that they be considered White was also fueled by prejudice harbored against Blacks.

11. REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* 210 (1981).

12. ARNOLDO DE LEÓN, *THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS 1821-1900*, at 104 (1983).

13. Transcript of Hearing on Motion to Quash Jury Panel and Motion to Quash the Indictment, *State v. Hernandez* (Dist. Ct. Jackson Co., Oct. 4, 1951) (No. 2091), Record at 74-75.

14. *Id.* at 76.

15. GUADALUPE SAN MIGUEL, JR., *LET THEM ALL TAKE HEED: MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981*, at 54-55 (1987).

16. *Id.* at 32, citing PAUL S. TAYLOR, *AN AMERICAN-MEXICAN FRONTIER: NUECES COUNTY, TEXAS* (1934) (specific page attribution not given).

17. *Id.* at 51.

18. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

19. Brief for Petitioner at 19, *Hernandez v. Texas*, 347 U.S. 475 (No. 406).

Mexican Americans and Whiteness

GEORGE A. MARTINEZ

DURING slavery, the racial divide between black and white became a source of protection for whites—it safeguarded them from the threat of commodification. Even after slavery ended, the status of being white continued to be a valuable asset, carrying with it a set of assumptions, privileges, and benefits. Given this, it is hardly surprising that minorities have often sought to “pass” as white—i.e., present themselves as white persons. They did so because they thought that becoming white insured greater economic, political, and social security. Becoming white, they thought, meant gaining access to a panoply of public and private privileges, while it insured that one would avoid being the object of others’ domination.

In light of the privileged status of whiteness, it is instructive to examine how legal actors—courts and others—constructed the race of Mexican Americans. In *Inland Steel Co. v. Barcelona*,¹ an Indiana appellate court addressed the question of whether Mexicans were white. The court noted that, according to the *Encyclopaedia Britannica*, approximately one-fifth of the inhabitants of Mexico are whites, approximately two-fifths Indians, and the balance made up of mixed bloods, blacks, Japanese, and Chinese. Given this, the court held that a “Mexican” should not necessarily be found to be a white person.²

The Texas courts also considered the same question. In *In re Rodriguez*,³ a Texas federal court addressed whether Mexicans were white for purposes of immigration. At that time, federal naturalization laws required that an alien be white to become a citizen of the United States. The court stated that Mexicans would probably be considered non-white from an anthropological perspective,⁴ but went on to note that the United States had entered into treaties with Mexico that expressly allowed citizens of that country to become citizens of the United States. Thus, the court held that Congress must have intended that Mexicans were white within the meaning of the naturalization laws. *In re Rodriguez* reveals how racial categories can be constructed through the political process. Through the give and take of treaty making, Mexicans became “white.”

Other cases show how politics operated to turn persons of mixed blood into whites or the opposite. In immigration cases, mixed race applicants often failed

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to establish their whiteness. For example, in one case,⁵ the court held that the son of a white Canadian father and an Indian mother was non-white, and therefore not eligible to naturalize. In another,⁶ the son of a German father and a Japanese mother was not a white person within the meaning of the immigration laws.⁷ If these cases stand for the proposition that mixed race persons were not white Mexicans—a mixture of Spanish and Indian—should not have counted as white. The treaties nevertheless operated to turn them into whites.

The issue of the race of Mexican Americans also arose in connection with school segregation. In *Independent School District v. Salvatierra*,⁸ plaintiffs sought to enjoin segregation of Mexican Americans in the city of Del Rio, Texas. There, the court treated Mexican Americans as white, holding that they could not be segregated from children of "other white races, merely or solely because they are Mexicans."⁹ Significantly, the court did permit segregation of Mexican Americans on the basis of linguistic difficulties and migrancy.

Mexican-American jury participation and exclusion cases also show how the race of Mexican Americans is constructed. For example, in *Hernandez v. State*, a Mexican American had been convicted of murder. Relying on cases holding that exclusion of blacks from jury service violated due process and equal protection, he sought to reverse his conviction on the ground that Mexican Americans had been excluded from the grand and the petit juries. The court recognized only two races as falling within the guarantee of the Fourteenth Amendment: the white and the black. It went on to hold that Mexican Americans are white for purposes of the Fourteenth Amendment. The court reasoned that to say that the members of the various groups comprising the white race must be represented on grand and petit juries would destroy the jury system.¹⁰ Since the juries that indicted and convicted the defendant were composed of members of his race—white persons—he had not been denied equal protection of the laws.¹¹

In *Hernandez*, the Texas court controlled the legal meaning of the identity of Mexican Americans. There, Mexican Americans sought to assert a group identity—the status of being a distinct group—in an effort to resist oppression; i.e., being excluded from grand and petit juries. The Texas court refused to recognize that identity. Instead, it imposed a definition of "white" on Mexican Americans so as to maintain the status quo—i.e., exclusion from juries.

On review, the United States Supreme Court also imposed a group definition on Mexican Americans. The court held in *Hernandez v. Texas*¹² that "persons of Mexican descent" are a cognizable group for equal protection purposes in parts of the country where they are subject to local discrimination—but not otherwise.¹³ While a start in the right direction, this ruling leaves much to be desired. Defining Mexican Americans in terms of the existence of local discrimination hinders Mexican Americans in asserting their rights because not every plaintiff can afford the expense of obtaining expert testimony to prove local prejudice.

Similarly, in *Lopez Tijerina v. Henry*,¹⁴ the court refused to allow Mexican Americans to define themselves as a group. Plaintiffs sought to bring a class action on behalf of a class of "Mexican Americans" in order to secure equal edu-

cational opportunity in local schools. The court rejected the claim for class representation, holding that the term "Mexican American" was too vague and failed to define a class within the meaning of Rule 23 of the Federal Rules of Civil Procedure, governing class actions. Since the class was not adequately defined, the court dismissed the complaint. Class actions permit large numbers of persons to sue if their interests are sufficiently related so that it is more efficient to adjudicate their rights in a single action. As such, it may represent the only viable procedure for people with small claims to vindicate their rights. The *Lopez Tijerina* case, then, seems to be an example of a court refusing to allow Mexican Americans to define themselves so as to resist oppression. Subsequently, other courts permitted Mexican Americans to sue as a class by distinguishing *Tijerina* under the *Hernandez* rationale that local prejudice rendered the class sufficiently identifiable.

Federal agencies also constructed the race of Mexican Americans. For example, in 1930, the Census Bureau made the first effort to identify Mexican Americans. The Bureau used the term "Mexican" to classify Mexican Americans, placing it under the rubric of "other races," which also included Indians, blacks, and Asians. According to this definition, Mexican Americans were not considered "whites." Interestingly, the Mexican government and the United States Department of State both objected to the 1930 definition. By the 1950 census Mexican Americans were classified as "whites." The Census Bureau experience presents yet another example of how politics have influenced the construction of a race. The Office of Management and Budget (OMB) has set forth the current federal law of racial classification. In particular, Statistical Directive No. 15, which governs the collection of federal statistics regarding the implementation of a number of civil rights laws, classifies Mexican Americans as white.

White identity traditionally has served as a source of privilege and protection. Since the law usually recognized Mexican Americans as white, one might have expected that social action would have reflected the Mexican American's privileged legal status as white. That, however, was not the case. Legal recognition of the Mexican American as white had only a slight impact on private conduct. Far from having a privileged status, Mexican Americans faced discrimination very similar to that experienced by African Americans. Excluded from public facilities and neighborhoods and the targets of racial slurs, Mexican Americans typically lived in one section of town because they were not permitted to rent or own property anywhere except in the "Mexican Colony." Segregated in public schools, they also faced significant discrimination in employment. Earmarked for exclusive employment in the lowest brackets of employment, Mexican Americans were paid less than Anglo Americans for the same jobs. Moreover, law enforcement officials have committed widespread discrimination against Mexican Americans, arresting them on pretexts and meting out harassment and penalties disproportionately severe compared to those imposed on Anglos for the same acts.¹⁵ In all these respects, actual social behavior failed to reflect the legal norms that defined Mexican Americans as white. Although white as a matter of law,

Mexican Americans did not earn anything like the bundle of privileges that Euro-Americans enjoyed on account of their race.

At one point, discrimination against Mexican Americans in Texas became so flagrant that the Mexican Ministry of Labor announced that Mexican citizens would not be allowed to go there. In response, the Texas legislature, on May 6, 1943, passed a resolution that established as a matter of Texas public policy that all Caucasians were entitled to equal accommodations. Subsequently, Mexican Americans attempted to rely on the resolution and sought to claim one of the traditional benefits of whiteness—freedom from exclusion from public places. In *Terrell Wells Swimming Pool v. Rodriguez*,¹⁶ Jacob Rodriguez sought an injunction requiring a swimming pool operator to offer equal accommodations to Mexican Americans. He argued that he could not be excluded from the pool on the basis of his Mexican ancestry because that would violate the resolution condemning discriminatory practices against all persons of the white race. The court refused to enforce the public policy on the ground that the resolution did not have the effect of law. Thus, Mexican Americans could not claim one of the most significant benefits of whiteness—freedom from exclusion from public places.

The legal construction of Mexican Americans as white thus stands as an irony—thoroughly at odds with the colonial discourses that developed in the American Southwest. As happened in other regions of the world, the colonizers engaged in epistemic violence—i.e., produced modes of knowing that enabled and rationalized colonial domination from the standpoint of the West. Through discourse on the Mexican American, Anglo Americans also reformulated their white selves. Anglo judges, as we have seen, did the same, ruling that Mexicans were co-whites when this suited the dominant group—and non-white when necessary to protect Anglo privilege and supremacy.

NOTES

1. 39 N.E.2d 800 (Ind. 1942).
2. *Id.* at 801.
3. 81 F. 337 (W.D. Tex. 1897).
4. *Id.* at 349.
5. *In re Camille*, 6 F. 256 (1880).
6. *In re Young*, 198 F. 715 (1912).
7. *Id.* at 716–17. The court observed:

In the abstractions of higher mathematics, it may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it cannot be said that one who is half white and half brown or yellow is a white person, as commonly understood.

198 at 717.

8. 33 S.W.2d 790 (Tex. Civ. App. 1930). *Salvatierra* was the first case to decide the issue of whether segregation of Mexican Americans in public schools was permissible.

9. *Id.* at 795.

10. 251 S.W.2d 531, 532, 535 (Tex. 1952).

11. *Id.* at 536. In *Sanchez v. State*, 243 S.W.2d 700 (1951), a Mexican American had been convicted of murder. He sought to challenge his conviction on the ground that his due process rights had been violated because the county had discriminated against Mexican Americans in the selection of grand jurors. The Texas court held that Mexican Americans are not a separate race, but are white people of Spanish descent. 243 S.W.2d at 701. Thus, the defendant's rights were not violated because whites were not excluded from the grand juries.

12. 347 U.S. 475 (1954).

13. *Id.* at 477-79.

14. 48 F.R.D. 274 (D.N.M. 1969).

15. U.S. COMMISSION ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (Summary) 2 (1970).

16. 182 S.W.2d 824 (Tex. Civ. App. 1944).

From the Editors: Issues and Comments

SHOULD Latinos, as Haney López argues, demand treatment as a separate race—or is this a case of me-tooism that is unfair to blacks, who have done all the work? (Or have they?) If the civil rights movement is led, at a given time in history, by people of one sort—say, blacks—should the others fall into line with good grace, and is it divisive to call attention to differences and varying needs and hopes? If an author writes a book—or a litigator decides to specialize—on the problems of a single minority group, what is wrong with that? Is it laziness? A natural desire for the familiar? An understandable, maybe commendable, effort? Does our paradigm of race need to be broadened to incorporate America's increasingly multiracial society, and will we all be the better for adopting the new paradigm? Or will this dilute attention and weaken the movement?

What about the case for African-American "exceptionalism" (see Part XII)—the notion that blacks have suffered more than other groups; contributed more blood, effort, and thought to civil rights movements; have a longer history; and are therefore rightly entitled to be considered the main, paradigmatic racial minority group today?

Suggested Readings

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- Hernández-Truyol, Berta Esperanza, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric, and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994).
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