DEPARTMENT OF STATE

Washington, D.C. 20520

Aug. 23, 1972

Dear Dr. GArcia:

I am enclosing a couple of snapshots which I thought you might like to have. Many years have passed since the tragic incident in Three Rivers, but you and I know that the racism and the cultural intolerance which existed then is still prevalent today in many sectors of our society. I admire you for your efforts in combatting this social disease; I only hope that I will be able to make my contribution in the years ahead.

My wife, Guadalupe, has left for Cambridge, because she had to report for her teaching assignment. I will be leaving the office on Sept. 1, 1972, at which time I will immediately leave for Massachusetts. Please keep me informed of any developments in the school case. Give my regards to Rosita, Bernie, and Amador.

Sinceramente

Jorge C. Rangel

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PROJECT REPORT: DE JURE SEGREGATION OF CHICANOS IN TEXAS SCHOOLS

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"They are an inferior race, that is all"[1] was the justification asserted by Nueces County, Texas, school officials for segregating Chicanos[2] in 1929.[3] Such remarks and practices are not merely reflections of society's past indiscretions. Public officials continue to inveigh against Mexican Americans.[4]

*This Comment is dedicated to Dr. Hector P. Garcia, founder of the American G.I. Forum and former member of the United States Commission on Civil Rights, in recognition of his relentless efforts, spanning twenty-five years, to eradicate Chicano school segregation in Texas. Acknowledgement is also extended to the Institute of Politics of the John F. Kennedy School of Government at Harvard University and the New World Foundation in New York for the research grants which made this study possible.

[1] P. Taylor, AN AMERICAN MEXICAN FRONTIER 219 (1934) [hereinafter cited as *Taylor*].

[2] The term Chicano derives from *Mejicano*, the Spanish term for Mexican. Chicano is herein used interchangeably with Mexican American, Spanish American, Latin American, and Spanish-surnamed individual. It refers to persons born in Mexico and now United States citizens or whose parents or ancestors immigrated to the United States from Mexico. It also refers to persons who legitimately trace their lineage to Hispanic or Indo-Hispanic forebears who resided in Spanish or Mexican territory now part of the Southwestern United States. *See* U.S. Comm'n on Civil Rights, MEXICAN-AMERICAN EDUCATION STUDY, REPORT 1: ETHNIC ISOLATION OF MEXICAN AMERICANS IN THE PUBLIC SCHOOLS IN THE SOUTHWEST 7 n.1 (1971) [hereinafter cited as ETHNIC ISOLATION]. The term Anglo refers to white persons not Mexican American or members of other Spanish-surnamed groups. *Id.*

[3] Segregated schools in a Nueces County district occasioned a recent landmark decision holding that Chicanos are an identifiable minority victimized by *de jure* segregation. Cisneros v. Corpus Christi Ind. School Dist., 324 F. Supp. 599 (S.D. Tex. 1970), *appeal docketed*, No. 71–2397 (5th Cir., filed July 16, 1971), *noted in* 49 TEX. L. REV. 337 (1971).

[4] Judge Chargin of the California Superior Court, at the sentencing of a 17-year-old juvenile charged with incest, recently stated: "Mexican people after thirteen years of age, think it is perfectly all right to go out and act like an animal . . . . We ought to send you out of the country—send you back to Mexico . . . . You ought to commit suicide. That's what I think of people of this kind. You are lower than animals . . . just miserable, lousy, rotten people . . . . Maybe Hitler was right. The animals in our society probably ought to be destroyed because they have no right to live among human beings." 115 CONG. REC. 32358 (1969). For a discussion of the prejudice shown by Los Angeles

Chicanos have suffered from invidious discrimination at all levels of interaction with the dominant society.[5] The west Texas city of Ozona is illustrative. Drugstores were closed to Mexican Americans until the late 1940's. Chicanos were not served in restaurants or allowed into movie theaters until the early 1950's. Hotels were exclusive until about 1958. Residents complain that barber and beauty shops were segregated until late 1969, and have advised the Office for Civil Rights of the Department of Health, Education, and Welfare that the bowling alley, cemeteries and swimming pools remain segregated even today.[6]

Chicanos have also received prejudicial treatment in the administration of justice.[7] Although early efforts to litigate the issue were unsuccessful,[8] the Supreme Court ruled such discrimination unconstitutional in 1954.[9]

Housing reflects similar discrimination. Overcrowding among Chicanos in the Southwest[10] in 1960 was more than four times that among Anglos.[11] Nearly 875,000 Chicanos lived in overcrowded housing.[12] An estimated thirty percent of all housing units occupied by Chicanos in 1960 were dilapidated, but only seven and a half percent of Anglo units were so classified.[13]

Superior Court Judges, particularly in Grand Jury selections, *see* Note, *El Chicano Y The Constitution: The Legacy of Hernandez v. Texas: Grand Jury Discrimination*, 6 U. SAN FRAN. L. REV. 129, 142–45 (1971) [hereinafter cited as *El Chicano*].

[5] *See generally* U.S. Comm'n on Civil Rights, MEXICAN-AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (1970).

[6] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Ozona ISD 7 (Mar. 1970).

[7] The discrimination is of course not limited to Texas. *See El Chicano, supra* note 4.

[8] Sanchez v. State, 156 Tex. Crim. 468, 243 S.W.2d 700 (1951); Bustillos v. State, 152 Tex. Crim. 275, 213 S.W.2d 837 (1948); Salazar v. State, 149 Tex. Crim. 260, 193 S.W.2d 211 (1946); Sanchez v. State, 147 Tex. Crim. 436, 181 S.W.2d 87 (1944). *But see* Carter v. Texas, 177 U.S. 442 (1900) (where exclusion of Blacks from Texas juries was held unconstitutional).

[9] Hernandez v. Texas, 347 U.S. 475 (1954) (finding exclusion of Chicanos from juries in Jackson County, Texas, unlawful).

[10] Arizona, California, Colorado, New Mexico and Texas.

[11] L. Grebler, J. Moore, & R. Guzman, THE MEXICAN AMERICAN PEOPLE 250 (1970) [hereinafter cited as *Grebler, Moore, & Guzman*]. Of Chicano families, 34.6% lived in overcrowded housing, compared to 21.8% of nonwhite families and only 7.7% of Anglo families. In Texas, conditions were even worse. A study shows that 46.5% of Chicano families, 25.9% of nonwhite families, and only 9.4% of Anglo families occupied overcrowded housing. F. Mittelbach & G. Marshall, THE BURDEN OF POVERTY, MEXICAN AMERICAN STUDY PROJECT, UCLA Advance Report 5, at 44 (July, 1966) [hereinafter cited as *Mittlebach & Marshall*].

[12] *Grebler, Moore, & Guzman* 250.

[13] *Id.* at 251–52. *See also Mittelbach & Marshall, supra* note 11, at 45 (9% of Chicano housing, 7.9% of nonwhite housing, and only 1.3% of Anglo housing in Southwestern metropolitan areas was found to be in a dilapidated condition).

Again a particular city illustrates the problem. A 1967 study of El Paso, Texas revealed

The employment picture is just as dismal.[14] Unemployment among Chicanos is over fifty percent higher than among Anglos.[15] Forty-seven percent are unemployed, underemployed or earning less than $3,200 per year.[16] Among United States cities whose populations exceed 100,000, the three poorest are San Antonio, El Paso, and Corpus Christi, Texas, each approximately forty percent Chicano.[17]

While there are many causes of Mexican-American unemployment and resulting poverty, discrimination is the root. It is embodied in many forms, both explicit and subtle, ranging from irrelevant test requirements to unnecessary height and weight specifications.[18] Such discriminatory practices pervade all institutions with which Mexican Americans must contend. It is against this background that Chicano school segregation in Texas must be assessed.

Historically, Texas educators have viewed public education as a vehicle for "Americanizing" the "foreign element".[19] Their efforts to eliminate Chicano culture,[20] however, have met tenacious resistance

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that 10,500 of the 21,000 residents in a Chicano *barrio* (neighborhood) lived in 238 tenements, only eight of which were of quality comparable to public housing. Only twenty-four of the tenements had hot and cold running water; 101 had no indoor water. Still more disheartening, only 18 of the 238 tenements had inside toilets. The combined total of showers and bathtubs was 120. El Paso Dep't of Planning, SOUTH EL PASO 3 – 5 (1969).

[14] *See* Comment, *Mexican-Americans and the Desegregation of Schools in the Southwest*, 8 HOUS. L. REV. 929, 933 – 35 (1971) [hereinafter cited as *Houston*]. A good description of employment discrimination in the metropolitan area of Houston is found in Equal Empl. Oppor. Comm'n, AN EQUAL EMPLOYMENT OPPORTUNITY REPORT—HOUSTON HEARINGS (1970).

[15] Mexican American Leg. Def. and Educ. Fund, THE FORGOTTEN MINORITY (1971).

[16] *Id.* More than half the rural Chicano families in the Southwest (54%) and about one third of urban Chicano families (31%) have annual incomes less than $3,000, a figure below the poverty line. U.S. Comm'n on Civil Rights, MEXICAN-AMERICANS AND THE ADMINISTRATION OF JUSTICE-SUMMARY 2 (1970).

[17] OEO, U.S. CITIES WITH THE HIGHEST POVERTY INCIDENCE 1965 (1966).

[18] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971), where the Court held unlawful the requirement of either a high school diploma or passage of a battery of tests for employment when each had an adverse effect on employment opportunities of minority workers and neither was relevant to job performance. *See also Houston, supra* note 14, at 933 – 35.

[19] The general philosophy was expressed by a former Texas State Superintendent of Public Instruction in a chapter entitled "Foreign Problems in Texas". A. Blanton, A HANDBOOK OF INFORMATION: EDUCATION IN TEXAS—SCHOLASTIC YEARS 1918 – 1922, at 22 (1923). As late as 1946 the Abilene Independent School District (ISD) reported the existence of an "Americanization School". State Dep't of Educ., PUBLIC SCHOOL DIRECTORY, NO. 472, at 13 (1947).

[20] Illustrative of this prevalent attitude is the sworn statement of a young Chicano student: "A Mexican-American boy who used to raise the American flag each morning was told by Mr. Neil, the English teacher and assistant principal, that he couldn't raise

from the Mexican-American community.[21] In the resulting conflict, public school officials and Chicano students have rejected each other, with education the major casualty. The Chicano dropout rate is eighty-nine percent.[22] Median education for Chicanos twenty-five and over is 4.8 years.[23] Institutional rejection has resulted in a pattern of historically segregated schools.

This Comment reports the findings of a ten-month study of Mexican-American educational discrimination in Texas. It will show that the contemporary pattern of Chicano school segregation is a vestige of *de jure* segregation necessitating *de jure* relief. Examination of school officials' activities will demonstrate that separate schools resulted from state action.[24] A survey of judicial decisions will reveal an inadequate response to such segregation. Review of federal executive responses, primarily those of the Department of Health, Education and Welfare, will show similar inadequacy. The Comment concludes with a discussion of remedies needed to attain the dual objectives of integration and education meeting the unique needs of Chicano students.

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the flag anymore because he wasn't an American." Affidavit of Juventino Dominquez, Jr., March 26, 1970. Filed in Perez v. Sonora Ind. School Dist., Civil No. 6–224 (N.D. Tex., Nov. 5, 1970).

This attitude helps to explain the strict application of rules against speaking Spanish on school grounds. The rules apparently derived from Tex. Laws 1933, ch. 125, § 1, at 325 (repealed 1969), which required all school business, except courses in foreign languages, to be conducted in English. Even today, some schools in Texas have what is referred to as Spanish detention, whereby a child caught speaking Spanish is usually held after school. Persistence by the child in using his native language may result in a spanking from the principal or even expulsion. T. Carter, MEXICAN AMERICANS IN SCHOOL: A HISTORY OF EDUCATIONAL NEGLECT 98 (1970).

[21] *See* C. Heller, MEXICAN-AMERICAN YOUTH: A FORGOTTEN YOUTH AT THE CROSSROADS 84 (1966).

[22] S. Steiner, LA RAZA: THE MEXICAN AMERICANS 215 (1970). *See also El Chicano*, *supra* note 4, at 132–33. The Director of Migrant Education for the Southwest Educational Development Laboratory has estimated the dropout rate for migrant children, who are predominantly Chicano, to be about 90%. More shocking is the fact that 20% of those eligible never enroll in school at all. R. Salazar, STRANGER IN ONE'S LAND 28 (U.S. Comm'n on Civil Rights, Pub. No. 19, May, 1970) [hereinafter cited as *Salazar*].

[23] *Grebler, Moore & Guzman, supra* note 11, at 152. In Texas, median education in 1960 for persons 25 years or older was 11.5 years for Anglos, 8.1 years for nonwhites, and 4.8 years for Chicanos. Similar figures for the entire Southwest were 12.1, 9.0, and 7.1, respectively. *Id.* at 150. Testimony before the U.S. Commission on Civil Rights, meeting in Texas in 1968, indicated that persons of Spanish surnames, 17 years and older, averaged 4.7 years in school, while Blacks averaged 8.1 and the figure for the entire population was over 10. *Salazar* at 23.

[24] Thus, the statement from a recent law review note that "Mexican-Americans never had the benefit of *de jure* separate but equal education, only of substandard education" is, at least in Texas, incorrect in its first assumption. But it is a dubious "benefit" in any case. *El Chicano*, *supra* note 4, at 132, citing *Houston*, *supra* note 14, at 929. In fact, the

I. SEGREGATION OF CHICANO STUDENTS BY OFFICIAL DESIGN

In assessing the constitutionality of school officials' actions, the terms *de jure* and *de facto* have progressively blurred, sometimes signifying little more than legal conclusions.[25] School officials cannot avoid making decisions regarding school boundaries, school construction, and transfer policies, which increase or decrease racial and ethnic separation. The modern trend in what may be termed the Northern cases is that courts find the necessary state action if these decisions increase segregation.[26] Even in the context of Southern Black school segregation, courts have not distinguished racial separation mandated by state law from that resulting from a series of actions by school officials.[27] Nonetheless, although school authorities are accountable for the natural, foreseeable, and probable segregative impact of their recurring operational decisions,[28] courts are more receptive to school desegregation suits based on official intentions and explicit policy statements favoring segregation. This is particularly true in the application of broad-ranging remedies, including busing and redistricting of school attendance zones, sanctioned by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*.[29] The situation of Chicanos in Texas is a hybrid: while statutory segregation as in the traditional Southern case cannot be shown, it is possible, unlike the usual Northern situation, to show official intent to segregate.

Evidence from widely separated parts of the state indicates that some districts did not originally provide public education for Chicanos.[30] When they did admit Chicanos to public schools, local authorities

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latter specifically says that "the segregation was de jure since sufficient State action was involved." *Id.* at 940.

[25] *See* Comment, *The Evolution of Equal Protection-Education, Municipal Services, and Wealth*, 7 HARV. CIV. RTS.-CIV. LIB. L. REV. 103, 139 (1972) ("*de facto* and *de jure* are less than helpful") [hereinafter cited as *Evolution-Equal Protection*]. *See generally*, Dimond, *School Segregation in the North: There Is But One Constitution*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1972); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965).

[26] *See* cases cited in note 441, *infra*. *But see* Keyes v. School Dist. No. 1, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 40 U.S.L.W. 3329 (U.S. Jan. 17, 1972).

[27] *See* note 25 *supra*.

[28] *See* Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 706 (1971).

[29] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[30] One author has implicitly stated that this was the case in El Paso. E. Morrel, THE RISE AND GROWTH OF PUBLIC EDUCATION IN EL PASO 39, 40 (1936). In his study of Nueces County, Paul Taylor states that Mexican Americans first entered the schools in 1891, even though public schools were founded in the early seventies. P. Taylor, AN AMERICAN MEXICAN FRONTIER 192 (1934).

charged with policy-making responsibilities established separate "Mexican" schools,[31] encouraged by the explicit sanction of racial school segregation in the 1876 State Constitution: "Separate schools shall be provided for the white and colored children and impartial provision shall be made for both."[32] Not until 1930 was this provision held not to authorize segregation of Mexican Americans,[33] and not before a 1948 federal district court order[34] did state authorities repudiate segregation of Chicano students as an expression of official policy.[35] No affirmative effort to minimize or eliminate segregation of Chicanos has yet been made.[36]

Public school policy is entrusted to officials at both state and local levels in Texas. State administrative officials are granted general supervisory duties and powers,[37] and are charged with policy formation and planning for the public school system, subject to legislative mandates and prohibitions. The State Board of Education, the principal executive body, often carries out its planning function without explicit legislative directive. In such cases, the legislature's role is merely negative: to check

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[31] *See generally* W. Little, SPANISH SPEAKING CHILDREN IN TEXAS (1944) [hereinafter cited as *Little*]. *See also* E. Clinchy, Jr., Equality of Opportunity for Latin-Americans in Texas (1954) (unpublished Ph.D. thesis in Columbia University Library); G. Sanchez, CONCERNING SEGREGATION OF SPANISH-SPEAKING CHILDREN IN THE PUBLIC SCHOOLS (Inter-American Educ. Occasional Papers No. IX, 1951) [hereinafter cited as *Sanchez*]. Describing segregated schools in Texas, one Chicano authority stated that "the public school system in Texas was not established to meet the needs of our people; it has only served to rape us of our culture and to permanently maim the minds of our children." Interview with Dr. Hector P. Garcia, founder of the American G.I. Forum and former member of the U.S. Commission on Civil Rights, in Corpus Christi, Texas, Aug. 10, 1971.

[32] Tex. Const. art. 7, § 7 (1876). *Cf.* Free Schools, ch. 124, §§ 93–96 (1905) Tex. Laws (repealed by Acts 1969, 61st Leg., ch. 129, § 1). The 1876 provision was a compromise between the constitutions of 1866 and 1869. The 1866 constitution limited the use of public funds to white schools only, with a separate provision for the taxation of "Africans" to maintain African schools. The Reconstruction constitution of 1869 provided for equal distribution of funds among all school districts, without providing for separate schools.

[33] Independent School Dist. v. Salvatierra, 33 S.W.2d 790 (Tex. Civ. App., 4th Dt. 1930), *cert. denied*, 284 U.S. 580 (1931). The court struck down only the practice of segregating Chicanos regardless of their English language proficiencies, while sanctioning separate schools where language barriers precluded a uniform curriculum.

[34] Delgado v. Bastrop Ind. School Dist., Civil No. 388 (W.D. Tex., June 15, 1948); *accord*, Gonzales v. Sheely, 96 F. Supp. 1004 (D. Ariz. 1951); Mendez v. Westminister School Dist., 64 F. Supp. 544 (C.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947).

[35] Sup't of Pub. Instr., Instructions to Regulations (1948): "[T]here has never been any requirement or authority for segregation of Latin American children . . . ." The Instructions do not enunciate a policy of integrating Chicano and Anglo students; they merely deny the existence of any legislative sanction for a segregative policy.

[36] *See* pp. 339–41 *infra*.

[37] Tex. Educ. Code Ann. §§ 11.23–11.35 (1971).

abuses or practices that contravene the duty to provide a meaningful education. General management and control of schools is delegated to local officials, either elected county school boards[38] or boards of trustees for "common"[39] and "independent"[40] school districts. At both state and local levels, the assignment of pupils, creation of school attendance zones, construction of school facilities, and employment and retention of teaching staff have been conducted so as to deny educational opportunities to Mexican-American children, stamping them with a badge of inferiority by unreasonable segregation.

Local school trustees instigated the phenomenon of the "Mexican" school as early as 1902 in the Seguin Independent School District (ISD).[41] As the practice spread, the "tri-ethnic" school system with separate institutions for Anglo, Black and Chicano school children became dominant across the state.[42] By the twenties, operating Mexican

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[38] *Id.* at §§ 17.01–17.02, 17.21–17.31.

[39] *Id.* at §§ 22.01–22.12.

[40] *Id.* at §§ 23.25–23.31.

[41] Seguin ISD, BOARD MINUTES, vol. 1, at 111 (June 9, 1902). *See also* McAllen ISD, BOARD MINUTES, vol. 2, at 11 (Feb. 18, 1919) (discussing the building of a new Mexican School). School board trustees generally provided funds for the construction of such separate facilities. Pharr-San Juan-Alamo ISD, BOARD MINUTES, vol. 1, at 54 (July 14, 1919)(where a committee was appointed to approve architect's plan for a Mexican School in Pharr and San Juan). Anglo hostility to any such expenditure of funds for Chicanos was never lacking, and often had a telling impact on trustees' decisions. For example, in 1919, after several citizens in the Pharr district objected to the presence of Mexican-American students in the district's brick school building, the Pharr Board accepted a proposal to transfer these students to a nearby Mexican church. The citizens had arranged to secure its use as a Mexican School. Pharr-San Juan-Alamo ISD, BOARD MINUTES, vol. 1, at 59 (Sept. 8, 1919). Such practices distinguish Chicano school segregation from both "Southern" Black segregation, which was mandated by state statute, and "Northern" Black segregation, which resulted from administrative decisions. Uniquely, Chicanos were usually relegated to Mexican schools by rules and regulations which *required* them to attend separate schools. For example, an HEW review of the Kingsville ISD includes school board minutes for December 29, 1929 where a "[m]otion was made and carried not to allow any Mexican to attend Flato School, but to attend Stephen F. Austin School where special arrangements had been made for teaching." U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Kingsville ISD, June 23–24, 1971.

[42] In 1923, the following cities reported one or more Mexican elementary schools: Amarillo, Bishop, Kennedy, Kerrville, Kingsville, Lockhart, New Braunfels, Pharr-San Juan, Rio Hondo, Robstown, Runge, San Marcos, Sonora, Taft, Taylor, Temple, and Weslaco. State Dep't of Educ., PUBLIC SCHOOL DIRECTORY, NO. 158 (1923). Chicanos and Blacks were often relegated to inferior facilities but not always treated identically. For example, in Pharr, Texas, when there were not enough Blacks to merit a separate school, they were bussed to another city. But Mexican-Americans, when few in number above fourth grade (due to dropout rate), were grudgingly placed in classes on the same campus with Anglos: "The Mexican students of the Alamo Mexican School in the fifth and sixth grades are to be permitted and may attend the Alamo American School, as there are not sufficient number of such students in the fifth and sixth grades in the Alamo

Ward Schools existed in North, Central, West, and South Texas.[43] The state school directory for 1931—32 evidences a wide-spread pattern of locally established Mexican schools wherever Mexican Americans were a part of the school age population.[44] The number of Mexican Ward Schools in independent school districts alone doubled between 1922—23 and 1931—32, to a total of forty.[45] By 1942—43, separate schools for Mexican Americans were maintained by at least 122 districts in fifty-nine widely distributed and representative counties across the state.[46] Under the tri-ethnic system, during the formative period of the Mexican school (the decades from 1920 to 1940), Chicano pupils were often required to register at the Mexican school regardless of residential proximity.[47]

Explicit segregation of Chicano students by local authorities during this initial period was limited to the elementary grades. This was not due to laudable or benign motives. Local policy often limited Chicano

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Mexican School at the present time to warrant the addition of an extra teacher, and with the proviso that this resolution shall and will be effective for the remainder of the scholastic year only." Pharr-San Juan-Alamo ISD, Board Minutes, vol. 1 at 226, 230 (Feb. 2, 19, 1925). *See also* notes 48 and 50 *infra*.

[43] State Dep't of Educ., Public School Directory Bulletin 158 (1923). In 1929, Nueces County in South Texas alone had twelve school districts providing separate schools for Mexican children. *Taylor, supra* note 1, at 215.

[44] State Dep't of Educ., PUBLIC SCHOOL DIRECTORY, NO. 296, at 7 (1931).

[45] *Id.* at 12—57. The listings in the Directory represented only those in Independent school districts, not those in Common school districts, which were administered by county-wide boards and were generally in rural areas. In addition some independent districts failed to report the existence of Mexican schools. *See* Harlingen ISD, BOARD MINUTES, vol. 3, at 46 (Aug. 14, 1928) (referring to a "Mexican Ward School building" not listed in the 1931—32 Directory). Finally, some districts like the Kingsville ISD, listed in the 1922—23 Directory as having a Mexican school, renamed the facility so that it did not appear as Mexican in the 1932—33 figures. An HEW review of the Kingsville ISD refers to the district's Board Minutes of April 5, 1927, recording that the "Mexican Ward School" was thereafter to be referred to as the Stephen F. Austin School.

[46] *Little, supra* note 31, at 59—60. A clear example of the dual system is reflected in the following entry of total salaries for each of the schools in the Pharr San Juan Alamo district:

Pharr Grammar Sch.	$9165.00
San Juan Gr. Sch.	5310.00
Alamo Gr. Sch.	3105.00
Pharr Mexican Sch.	8635.00
San Juan Mexican Sch.	4185.00
Alamo Mexican Sch.	1035.00

Pharr San Juan Alamo ISD, BOARD MINUTES, vol. 1, at 80 (Sept. 14, 1927).

[47] *E.g.*, U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Uvalde ISD (June, 1970). Harlingen ISD, BOARD MINUTES, vol. B, at 115 (Sept. 14, 1920) (All Chicanos below fifth grade had to attend the Mexican School). Alice ISD, BOARD MINUTES, vol. 5, at 197 (Aug. 24, 1939) (In 1939 the Board of Trustees required that "all Latin Americans attend Nayer School through the elementary grades and Anglo Saxons attend the Hobbes Strickland school through the elementary grades.") References to the Mexican

children to elementary education.[48] Pressures were put on Mexican-American students not to go beyond the elementary level. And where local officials opened secondary schools to Chicanos, so few progressed beyond the elementary level[49] that it was impractical to establish separate high schools. However, when significant numbers did enroll in secondary schools during the mid-1940's, local officials expanded the concept of the Mexican school to include high schools.[50]

State authorities have compounded local segregation of Mexican-American children in two ways. First, they have failed to restrain local authorities, to whom substantial policy-making powers have been delegated, from ignoring their constitutional responsibilities. Second, they have undertaken several actions that in themselves contributed to increased segregation of Chicano students.

A state court recognized the arbitrary nature of Chicano segregation as early as 1930.[51] Holding that only "rational" segregation based on educational (primarily linguistic) needs of Mexican-American students was permissible, it ruled that the constitutional mandate of 1876 for separate schools did not authorize local authorities to segregate for any

school in the Alice District can be found as far back as 1915. *Id.*, vol. 1, at 8 (May 8, 1915).

[48] In the Pecos ISD: "Prior to 1938, no Mexican-American had attended junior or senior high school. . . . According to reliable community contacts, before this time there was a policy of not permitting Mexican-Americans to go beyond the sixth grade." U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Pecos ISD, at 5 (June, 1969). Prior to 1941, no Chicano had graduated from high school in the Pecos district. Only four did so between 1941 and 1944 when fifty-six percent of school age children in Reeves County, where the Pecos district is located, were Mexican-American. *Id.*

Exclusion of Chicanos from the high school in the Sonora ISD prior to 1948 was a finding of fact in Perez v. Sonora Ind. School Dist., Civil No. 6–224 (N.D. Tex., Nov. 5, 1970). In the Bishop district, Chicanos were forced to attend high schools in neighboring districts or not at all. U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Bishop ISD, at 2–3 (Jan. 1970).

[49] During 1942–43, over ninety percent of the Mexican-American school population was enrolled at the elementary level. *Little*, *supra* note 31, at 37 (Table 15), 41 (Table 16). Little reached this figure by counting the number of Spanish-surnamed school age children on the State Department of Education census rolls for that year. The census itself made no such ethnic breakdown, since Mexican-American children were included in the "White" category. *Id.* at 5. In 1955–56, this proportion had only dropped to seventy-seven percent. H. Manuel, SPANISH SPEAKING CHILDREN OF THE SOUTHWEST 57 (1965). Throughout this period, the first three grade levels contained more than half of all Chicano school children. *Little* 64–65.

[50] In 1942–43, four districts provided separate, segregated high school facilities. *Little*, *supra* note 31, at 8. In the Ozona ISD, eleven students attended the Mexican high school. That school graduated its first Chicano in 1944, with three more in 1945, one in 1946, and three in 1948, when the Chicano High School closed. The local paper then headlined: "Latin American High School to be Discontinued." Ozona Stockman, July 15, 1948. U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Ozona ISD, 3 (Mar. 1970).

[51] Independent School Dist. v. Salvatierra, 33 S.W.2d 790 (Tex. Civ. App., 4th Dt.

other purpose. Yet the state took no steps to implement the decision beyond the facts of the case.

Arbitrary segregation was later held to violate the fourteenth amendment in the 1948 case of *Delgado v. Bastrop Independent School District*,[52] which should have put an end to the tri-ethnic system. But the response of the State Department of Education muffled its impact. Instructions and regulations promulgated by the Superintendent of Public Instruction[53] were inadequate to cope with the problem of dismantling the deeply entrenched tri-ethnic school system. While declaring a policy of desegregation, they neither established machinery to secure compliance nor provided guidelines for "necessary steps" by local officials to desegregate. Consequently, these regulations were not implemented by local officials.[54] A 1950 Texas Education Agency policy statement[55] appears to have been similarly ignored.[56] Furthermore it appears that the state's decrees were not even communicated to all affected districts.[57]

1930), *cert. denied*, 284 U.S. 580 (1931).

[52] Civil No. 388 (W.D. Tex., June 15, 1948). The court enjoined several defendant school districts from segregating Chicanos from facilities available to Anglo students. First graders who demonstrated a lack of functional familiarity with English were excepted from this order. The state superintendent was enjoined from "directly or indirectly" participating in these segregative practices. The judgment is remarkable for its lack of specificity, failure to retain jurisdiction to assure compliance, and ambiguity.

[53] Sup't of Pub. Instr., Instructions to Regulations (1948).

[54] The Corpus Christi Chapter of the American G.I. Forum, under the leadership of Dr. Hector P. Garcia, asserted in 1949 that segregation was still the rule in fourteen school districts around Corpus Christi. These findings were included in a report of investigations at the following schools: Rio Hondo, Del Rio, Encinal, Beeville, Robstown, George West, Mathis, Orange Grove, Bishop, Driscoll, Sinton, Taft, Three Rivers and Edcouch Elsa. Am. G.I. Forum, SCHOOL INSPECTION REPORT (1949). Similarly, in a sworn affidavit dated April 13, 1950, which Dr. Garcia sent to the Commissioner of Education, he alleged that segregation existed in ten cities which he had personally surveyed: Robstown, Driscoll, Bishop, Banquete, Mathis, George West, Gonzalez, Sinton, Rivera and Taft. The letter included a list of twelve other cities reported to be segregated by other chapters of the G.I. Forum: Alpine, McAllen, Edinburg, Nixon, Seguin, Beeville, Edcouch, Lubbock, Sonora, Marathon, Pecos, and Rockspring. These investigations may have prompted the statement of policy issued by the Texas Education Agency on May 8, 1950. *See* note 55 *infra*.

[55] Texas Bd. of Educ., Statement of Policy Pertaining to Segregation of Latin-American Children (May 8, 1950) (on file with the authors).

[56] *See* pp. 344–46 *infra*.

[57] *E.g.*, Kingsville ISD, BOARD MINUTES, vol. 5, pt. 2, at 478 (Sept. 2, 1954) (wherein the school trustees professed ignorance of the *Delgado* decision, in response to protests over a proposed attendance zoning plan). The incipient state of the law regarding the powers and duties of lower federal courts to assure implementation of desegregation orders may have added to the ineffectiveness of *Delgado*. One apparent consequence of the decision and the state response is that local school officials ceased designating schools as Mexican for purposes of the PUBLIC SCHOOL DIRECTORY. The 1948–49

These omissions by state officials gain added meaning in light of their thorough awareness and approval of separate local schools. State officials long considered the Mexican school and resulting tri-ethnic system of education symbols of progress. Development of public education was premised upon their continued existence and improvement.[58] Efforts to improve their physical facilities reflected the desire of state school officials to nurture the growth of separate systems.

Awareness by state officials of local segregation is further evidenced by work of the Texas Educational Survey Commission between 1921 and 1925.[59] Its final report to the Governor and Legislature devoted an entire chapter to non-English-speaking children and public schools.[60] The Commission detailed some of the local officials' discriminatory abuses, such as misallocating their appropriated state funds to provide disproportionate amounts of money to "American schools."[61] Thus, while the existence of the Mexican school was the pretext for additional funds, these funds were not spent to educate Mexican pupils. Not only does the state's toleration of this abuse reflect intent to encourage denial of equal educational opportunities, but its acceptance of the tri-ethnic premise was itself the construction of an "inherently unequal"[62] system. The sin of omission is present at two levels: failure to eliminate such an unconstitutional system, and failure to correct abuses of that very system.[63]

Involvement of state officials transcended acquiescence to and support of local segregative policies. State responsibility—"that somewhere, somehow, to some extent, there be an infusion of conduct by officials panoplied with state power . . ."[64]—existed in the past and

DIRECTORY included only one district, Midland, with a Mexican School. State Dept. of Educ., PUBLIC SCHOOL DIRECTORY, Bulletin 499, at 48 (1949).

[58] *See, e.g.*, A. Blanton, A HANDBOOK OF INFORMATION: EDUCATION IN TEXAS, 1918–1922, at 69 (1923)(where the State Superintendent of Public Instruction declared that "schools for Mexicans and Negroes have greatly improved").

[59] The Commission was created to survey the public educational system, including all schools supported in whole or part by public tax moneys. Tex. Rev. Civ. Stat. Ann. arts. 2675a-2675f (1965).

[60] Tex. Educ. Survey Comm., TEXAS EDUCATIONAL SURVEY REPORT VIII: GENERAL REPORT 207 (1925).

[61] *Id.* at 125.

[62] Brown v. Board of Educ., 347 U.S. 483, 495 (1954). *See also* Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967); Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303, 328 (1958).

[63] *Cf.* Davis v. School Dist., 309 F. Supp. 734, 741 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 92 S. Ct. 233 (1971) ("When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to achieve that situation.").

[64] Terry v. Adams, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring).

continues today. Officials of the State Board periodically review the facilities of all public schools, in order to accredit their status as meeting the Board's educational standards.[65] These reviews have encouraged the development of separate (and supposedly equal) facilities for Mexican-American children. State authorities have directed their efforts to alleviate such problems as overcrowding and half-day sessions, praising local authorities whose operation of Mexican schools approached that of Anglo schools.[66] There is also evidence that state reviewers defined quality education for Chicanos by reference only to other Mexican schools.[67] Little effort was made to assure facilities equal to those of comparable Anglo schools. Accreditation policies therefore sanctioned the existence of tri-ethnic discrimination,[68] while failing to assure that the three separate groups of schools equally fulfilled the goal of quality education.

A second set of discriminatory state practices derives from the process for approving bond proposals. The state attorney general is required by law to "carefully inspect and examine" any proposal for school financing, to assess its "validity."[69] The concept of "validity" has long permitted approval of construction funds for separate school facilities for Anglos, Blacks and Chicanos. The attorney general has approved local issues of construction bonds both explicitly to finance Mexican schools[70] and in cases where school board minutes reveal that

[65] Tex. Educ. Code, § 11.26 (1971).

[66] For instance, state officials praised the Harlingen district's high school, and its efforts to structure the Mexican (elementary) schools so that "no crowded condition" existed and that there were no "half-day sessions." Harlingen ISD, BOARD MINUTES, vol. 6 (Oct. 8, 1935). Letters from the State Department of Education to other districts revealed a similar attitude. For example, in 1921, the Chief Supervisor of the public high schools wrote the Alice school board, that he "was very glad that immediate steps will be taken to bring the laboratory up to standard and to increase the teaching force in the Mexican School." Alice ISD, BOARD MINUTES, vol. 1, at 186 (May 14, 1921).

[67] A 1946 Report by the State Department of Education on the Beeville schools concluded that "[p]rovisions for the Latin-American school building and equipment measure up favorably with the best the supervisor has found in twenty-four counties." Corpus Christi Caller Times, Oct. 5, 1947, at 12, col. 1.

[68] *See* Texas State Dep't of Educ., BULLETIN NO. 428: SUPPLEMENT TO STANDARDS AND ACTIVITIES NO. 416 OF THE DIVISION OF SUPERVISION 1942–43, at 5 (instructing the Director of Supervision to consider the standards and efficiency of the elementary, junior and senior high schools of all *"Anglo-American, Latin-American,* and *Negro* institutions") (emphasis added).

[69] Tex. Rev. Civ. Stat. Ann. art. 2670, § 1 (1965) (renumbered as Art. 709d by Acts, 1969, 61st Leg. Ch. 889, § 2).

[70] Thus, in 1925 the Harlingen district issued an election order calling for the issuance of construction bonds which included "building and equipping an addition to the Mexican School Building." Harlingen ISD, BOARD MINUTES, vol. B, at 277–78 (March 3, 1925). The bond election was successful and the Attorney General approved it on May

bonds were for the purpose of constructing or repairing Mexican schools.[71]

Even after the 1948 disavowal of "required or authorized" separate schools for Chicanos, public monies were used to construct separate schools, since neither state law nor State Board policy contained any prohibition of segregation. Thus, school location and construction reflected a policy of ethnic separation and was "a potent weapon for creating and maintaining a state segregated system."[72] The intentions of state and local officials, throughout the history of public education in Texas, explicitly embraced the concept of segregation with its concomitant deleterious effects upon school children of all ages.

II. THE SURVIVAL OF A SEGREGATED SYSTEM

A. Vestiges of De Jure Segregation

Segregation of Chicano pupils in Texas has harmed not only the students, but the educational system itself. Despite growing judicial, educational, and social awareness of the indelibility of these harms, the tradition of separate schools for Chicanos has continued in full force since *Brown*.

1. Mexican School Revisited. The most obvious reminder of the past is the now institutionalized Mexican school. Although school officials have resorted to more benign appellations, such as J. Luz Saenz, Juan Seguin, and Lorenzo de Zavala, they have not eliminated the most distinctive characteristic of Mexican schools—a predominantly Chicano enrollment.[73] As of 1968, over sixty-six percent of all Texas Chicanos

27, 1925. Texas Att'y Gen'l, BIENNIAL REPORT: SEPT. 1, 1924-AUG. 31, 1926, at 89 (1927).

[71] The Seguin ISD is a noteworthy example. In 1916, the Board conducted a bond election to provide funds for various projects, among which was the construction and equipping of a public school with the "building to be used as a school house for Mexican children." Seguin ISD, BOARD MINUTES vol. 2, at 12–14 (March 22, 1916). The bond election was later defeated. *Id.*, (May 15, 1916). However, the next year the Board ordered another election. This time the language did not refer to the Mexican school. It stated merely that the funds were for the purpose of constructing a ward school and for additions to the Negro school. *Id.* at 31, 32 (April 11, 1917). The intention of the school board became apparent at a meeting later called to receive "bids for building the Mexican and Negro schools." *Id.* at 39 (July 27, 1917). *See also* McAllen ISD, BOARD MINUTES, vol. 3, at 27 (Sept. 18, 1926) and 55 (July 15, 1927).

[72] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971).

[73] Kingsville, McAllen, Harlingen, Sequin, Pecos, Alice, and Midland are only a few of the cities whose original Mexican or Latin-American schools are still predominantly Chicano.

attended predominantly Chicano schools.[74] Of these, forty percent are in schools 80—100 percent Chicano and nearly twenty-one percent attend schools 95—100 percent Chicano.[75] Such general ethnic imbalance is greatest in the elementary grades. This is primarily because the Mexican school concept was initially developed for elementary children,[76] although there are other contributing factors.[77]

A second indicator, "school district" imbalance, connotes an even more invidious official policy. This figure compares the ethnic constituency of each school with that of the entire district. As one would expect, nearly seventy-nine percent of Chicano students attending predominantly Mexican-American schools reside in predominantly Chicano districts.[78] Over thirty-four percent of all Chicano students in Texas, or nearly 173,051 pupils, however, attend schools in ethnic imbalance with the constituency of the district.[79] The pervasiveness of this imbalance removes the segregation from the realm of chance.

Moreover, statistics indicate that identifiable Mexican schools are no longer restricted to elementary grades. Some districts have succeeded in developing Chicano intermediate and secondary schools. In 1969 over eighty-six percent of Anglo high school students in the El Paso district attended predominantly Anglo schools and over eighty-one percent of Chicano high school students were enrolled at predominantly Chicano schools. These figures closely approximated those for comparable elementary grades.[80] At least three choices of educational policy have

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[74] ETHNIC ISOLATION, *supra* note 2, at 26. For the five Southwestern states of Arizona, California, Colorado, New Mexico, and Texas, this figure is forty-five percent. *Id.* at 26. In 1968, of the eight million public school pupils in the Southwest, seventy-one percent were Anglo, seventeen percent were Chicano, ten percent were Black, and two percent were Asian or Native American. Thirty-six percent of all Southwestern Spanish-surnamed students are in Texas. *Id.* at 16—17. Student enrollment in Texas by ethnic group in 1968 was 64.4 percent Anglo, 20.1 percent Chicano, 15.1 percent Black and 0.3 percent Native American or Asian. *Id.* at 17 (rounded figures).

[75] *Id.*

[76] *See* pp. 314—15 *supra*.

[77] Notable are the disincentive effects upon pupils created by a failure of the educational process at these early age levels. Vestiges of this high level of elementary segregation are reflected in statistics for Texas which reveal that in 1968, while 69.9 percent of Chicano elementary students were in predominantly Chicano schools, 59.6 percent of Chicano intermediate students and 61.5 percent of Chicano secondary pupils were similarly segregated. ETHNIC ISOLATION, *supra* note 2, at 28.

[78] *Id.* at 29. Again we refer to 1968 statistics, assuming no significant change since then.

[79] *Id.* at 30. A school is ethnically imbalanced under this definition when the ethnic composition of the group deviates by 15 percent or more from the composition of the district.

[80] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of El Paso ISD, at 24 (April 1970). The figures for elementary grade levels were 81.8 percent (Anglo) and 85.8 percent (Chicano).

assisted this spread of segregation. Implementation of the "feeder" school plan has channeled isolation from the elementary to the secondary level. New schools have been located to conform to increasing patterns of residential separation. Finally, freedom-of-choice plans have encouraged whites to transfer out of schools with large proportions of Chicanos.[81]

2. Chicano Achievement. The history of Chicanos in the segregated educational facilities of Texas has been one of "educational neglect."[82] Segregated schools have provided Chicano students with sub-standard facilities[83] and stamped them with a badge of inferiority.[84] Achievement statistics demonstrate that segregation has not provided an educational setting conducive to success.

In Texas, Chicanos have been one of the groups most estranged from the public schools.[85] A recent study has shown that Chicanos drop out

[81] For example, because of the construction of neighborhood schools and the adoption of a freedom-of-choice plan, four of the seven elementary schools in the Alice district were at least ninety-seven percent Chicano in 1970. This enrollment accounted for ninety-five percent of the entire population of Chicano students. U.S. Dep't of Health, Educ. & Welfare, Elementary and Secondary School Civil Rights Survey, Form OSCCR-102 (1970). *Cf.* U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Bishop ISD, at 49 (Jan. 1970).

[82] *See generally* T. Carter, MEXICAN AMERICANS IN SCHOOL: A HISTORY OF EDUCATIONAL NEGLECT (1970).

[83] In a 1947 survey of ten school systems, it was found that "[t]he physical facilities, equipment, and instructional materials in the schools for Spanish-name children were found to be generally inferior and inadequate as compared with those existing in the Anglo schools." Strickland & Sanchez, *Spanish Name Spells Discrimination*, THE NATION'S SCHOOLS, at 22–24 (Jan. 1948). Substandard facilities for Chicanos are not altogether a thing of the past. In 1971 Dr. Garcia complained to the State Department of Health about conditions at three predominantly Chicano schools. In a post-inspection letter, the Commissioner of Health stated that "major overall repair and improvement including outside and inside painting, replacement of all broken windows, roof repair, etc., is needed at all three schools." Letter from V.E. Peavy to Dr. Hector P. Garcia, June 29, 1971. Compare this with a 1951 letter to the State Department of Health in which Dr. Garcia complained of the health and safety hazards at the Sonora Mexican school. Letter from Dr. Hector P. Garcia to Dr. George W. Cox, May 2, 1951, on file with the authors.

[84] In Mendez v. Westminister School Dist., 64 F. Supp. 544, 559 (N.D. Cal. 1946), the court found that "the methods of segregation prevalent in the defendant school district foster antagonisms in the children and suggests inferiority among them where none exists." *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

[85] One authority has described the estrangement in these terms: "The high dropout rate among Spanish-American students, the high degree of overageness in grade placement, the low academic achievement, the un-motivated and disinterested students, and the low educational attainment among the Spanish-surnamed population suggests that some degree of educational alienation exists among members of this subculture." Cordova, *The Relationship of Acculturation, Achievement, and Alienation Among Spanish-American*

before completing high school at a rate 3.2 times greater than that of Anglo students.[86] The proportion of Chicano high school graduates enrolling in institutions of higher education (30.7 percent) is also dismally low in comparison to that for Anglos (62.2 percent).[87]

A clearer indication that ethnically segregated schools have been ineffective is found in reading ability statistics. By the end of the twelfth grade, 64.7 percent of Chicanos are deficient in their reading ability as compared with twenty-one percent of Anglo students.[88] Verbal ability statistics for Chicanos are equally inferior.[89] Segregated schools which isolate Chicanos from their English-speaking peers have a harmful effect on the Spanish-speaking child's verbal ability in English. Any diminution of the opportunity to improve oral language skills has a parallel effect on reading ability. In spite of this educational system's appalling performance, segregation persists.

3. Instructional and Administrative Staff. Another vestige of the segregated school in Texas is the distribution of Chicano professional staff.[90] The Table titled "Teacher Distribution" includes figures for twenty school districts of varying size and geographical location, and is illustrative of present disparities. The table reveals that the percentage of Chicano teachers in a school district is never equal to the percentage of Chicano students.[91] More significantly, some districts with substantial numbers of Chicano students have not hired a single Chicano teacher.[92] A third troubling statistic reveals that Anglos have a substantially lower

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Sixth Grade Students, in EDUCATING THE MEXICAN AMERICAN 163 (H. Johnson & W. Hernandez eds. 1971).

[86] U.S. Comm'n on Civil Rights, MEXICAN-AMERICAN EDUCATIONAL SERIES, REP. II: THE UNFINISHED EDUCATION 20 (1971) [hereinafter cited as UNFINISHED EDUCATION].

[87] *Id.* at 22.

[88] *Id.* at 25.

[89] *Id.* at 89. The two statistics are interrelated. *See generally* J. Moffett, A STUDENT-CENTERED LANGUAGE ARTS CURRICULUM, GRADES K-13: A HANDBOOK FOR TEACHERS (1968).

[90] ETHNIC ISOLATION, *supra* note 2, at 42.

[91] Additional support for this conclusion is found in a letter which Dr. Garcia sent to J. Stanley Pottinger, Director of the Office for Civil Rights of the U.S. Dep't of Health, Educ. & Welfare. Dr. Garcia included a list of 224 school districts in Texas which had a Chicano enrollment. In none of the districts was the percentage of Chicano teachers equal to or greater than the corresponding percentage of Chicano students. Letter from Dr. Hector P. Garcia to J. Stanley Pottinger, October 2, 1970, on file with Dr. Garcia in Corpus Christi.

[92] The list which accompanied Dr. Garcia's letter to Mr. Pottinger included the following districts which have a majority of Chicano enrollments, but no Chicano teachers: Hondo, Fort Hancock, O'Donnell, Ozona, and Karnes Independent School Districts.

student-teacher ratio than Chicanos in each of the districts,[93] regardless of the district's ethnic character.

The underrepresentation of Chicanos in the teaching profession is due to many factors, but the history of ineffective education of Chicanos must bear primary responsibility. There are simply too few Chicanos who meet the educational prerequisites for state authorization to teach, because segregated schools in Texas have provided Chicanos with an inadequate education.[94]

Chicano teachers in Texas are segregated even more than are Chicano pupils. Eighty percent of the teachers, compared to two-thirds of the students, are in predominantly Chicano schools.[95] Non-teaching, professional staff are similarly segregated.[96] For example, prior to 1969, Chicanos had never been hired as counselors or librarians in the Pecos district.[97] Similarly, as of 1970 one Crockett County Common School District had not hired a single Mexican-American principal or teacher's aide in its history.[98]

These policies exacerbate segregation in public schools by making possible, and encouraging, ethnic identification of schools on the basis of staff composition. Moreover, they do not comply with the dictates

[93] The figures for pupil-teacher ratios in the state as a whole are 1 to 98 (Chicano), 1 to 31 (Black), and 1 to 19 (Anglo). ETHNIC ISOLATION, *supra* note 2, at 42.

[94] Other factors contributing to the scarcity of Chicano teachers reflect deeper alienation of the Chicano from the entire educational system. These include a lack of junior colleges and Chicano colleges that may provide a bridge to professional education and careers, and a near 100 percent dropout rate from high school until the late 1940's. Interview with Carlos Vela, former staff member, Office of Civil Rights, U.S. Dep't of Health, Educ. & Welfare, in Brownsville, Tex., Aug. 9, 1971. *See also* UNFINISHED EDUCATION *supra* note 86, at 22.

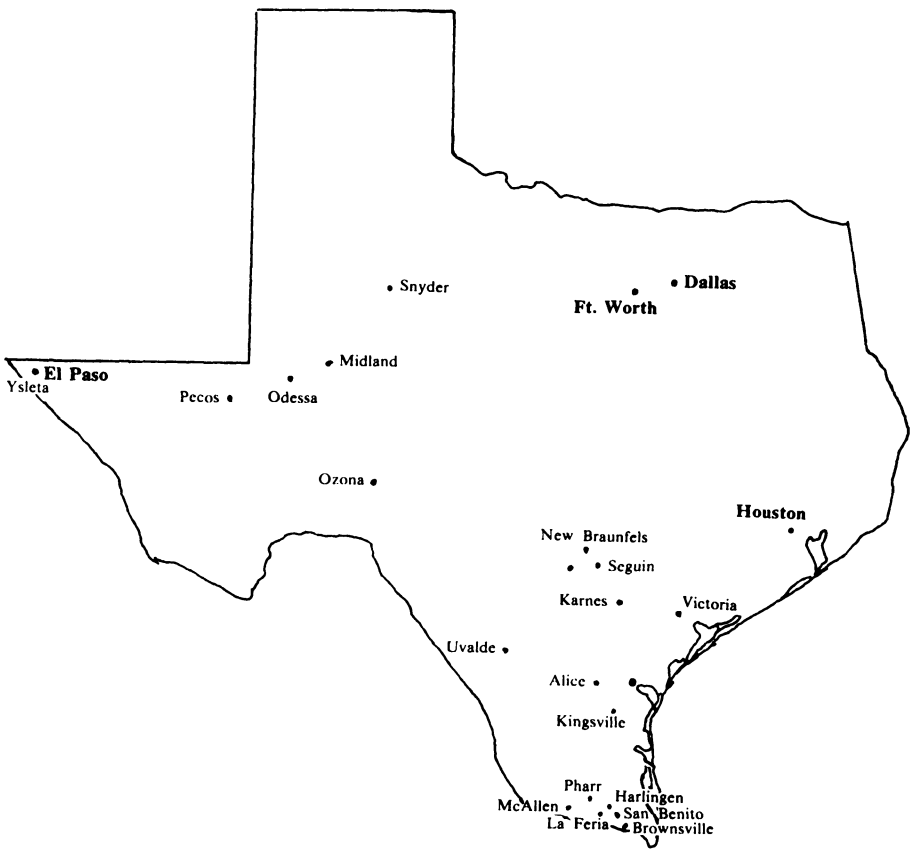
[95] ETHNIC ISOLATION, *supra* note 2, at 44–45. The situation in the Alice district is illustrative. In 1970, 94.7 percent of the Chicano elementary teachers were assigned to schools with at least ninety-seven percent Chicano enrollments. Similarly, the four Chicano principals are at schools which are at least ninety-seven percent Mexican-American. U.S. Dept. of Health, Educ. & Welfare, Fall 1970 Elementary and Secondary School Civil Rights Survey.

[96] A study of Texas districts with ten percent or more Chicanos showed that all Chicano professional librarians and about eighty percent of the counselors and assistant principals are assigned to predominantly Mexican-American schools. ETHNIC ISOLATION, *supra* note 2, at 50. A 1970 review of the Uvalde district has shown that the district employed no Chicano principals and no Chicano counselors. In addition, none of the Chicano elementary teachers were assigned to the predominantly Anglo school; all (except for the Head Start and special education teachers) were given positions at the Chicano elementary schools. U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Uvalde ISD, SS d, f, and g of findings (June 1970).

[97] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Pecos ISD, § II of findings (June 1969).

[98] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Crockett County Cons. School Dist. (Ozona), at 27 (Jan. 1970).

SEGREGATED TEXAS SCHOOL DISTRICTS



TEACHER DISTRIBUTION*

School District	Teachers				Students				Teacher-Student Ratio		
	M/A†	A/A††	Other	Total	M/A	A/A	Other	Total	M/A	A/A	Other
Alice	99 *30.8%*	221 *68.8%*	1 *.40%*	321	4458 *66.2%*	2226 *33.0%*	50 *.80%*	6734	1:45	1:10	1:50
Brownsville	365 *53.9%*	299 *44.2%*	12 *1.9%*	676	15611 *87.3%*	2255 *12.5%*	17 *.20%*	17933	1:43	1:7	1:1
El Paso	562 *21.3%*	1967 *74.8$*	99 *3.9%*	2628	35215 *57.4%*	23840 *38.8%*	2273 *3.8%*	61328	1:63	1:12	1:23
Harlingen	127 *27.8%*	323 *70.8%*	6 *1.4%*	456	7527 *70.9%*	2957 *27.8%*	123 *1.3%*	10607	1:59	1:9	1:20
Karnes City	0	72 *100%*	0	72	595 *43.2%*	699 *50.8%*	83 *6.0%*	1377	0	1:9	0
Kingsville	119 *33.6%*	225 *63.5%*	10 *2.9%*	354	3670 *56.2%*	2601 *39.8%*	257 *4.0%*	6528	1:31	1:11	1:26
La Feria	8 *12.1%*	58 *87.9%*	0	66	1245 *76.6%*	371 *22.8%*	10 *.60%*	1626	1:55	1:6	0
McAllen	155 *33.2%*	311 *66.8%*	0	466	8482 *74.7%*	2838 *25.0%*	22 *.30%*	11342	1:74	1:9	0
Midland	22 *2.9%*	676 *89.7%*	55 *7.3%*	753	2343 *13.5%*	12785 *74.1%*	2128 *12.3%*	17247	1:106	1:19	1:39
New Braunfels	7 *4.0%*	164 *95.3%*	1 *.7%*	172	1707 *42.8%*	2168 *54.4%*	105 *2.8%*	3980	1:244	1:13	1:105
Odessa	28 *2.4%*	1018 *90.8%*	75 *6.6%*	1121	4059 *17.0%*	18128 *76.1%*	1627 *6.8%*	23814	1:145	1:18	1:22
Ozona	0	60 *100%*	0	60	553 *53.0%*	472 *45.3%*	15 *1.7%*	1042	0	1:7	0
Pecos	14 *6.8%*	187 *91.2%*	4 *2.0%*	205	2755 *61.1%*	1590 *35.2%*	162 *3.7%*	4507	1:197	1:8	1:40
Pharr-San Juan-Alamo	218 *51.2%*	206 *48.4%*	1 *.40%*	425	7208 *85.8%*	1183 *14.0%*	5 *.20%*	8396	1:33	1:6	1:5
San Benito	76 *31.1%*	165 *67.6%*	3 *1.3%*	244	5053 *86.6%*	738 *12.8%*	40 *.60%*	5831	1:66	1:4	1:13
Seguin	13 *5.2%*	212 *85.8%*	22 *9.0%*	247	2083 *40.6%*	2316 *45.2%*	723 *14.2%*	5122	1:160	1:11	1:33
Snyder	1 *.40%*	214 *96.8%*	6 *2.7%*	221	780 *20.5%*	2817 *74.1%*	204 *5.3%*	3801	1:780	1:13	1:34
Uvalde	18 *9.2%*	175 *90.2%*	1 *.50%*	194	2468 *63.3%*	1415 *36.3%*	12 *.30%*	3895	1:137	1:8	1:12
Victoria	26 *4.7%*	496 *89.6%*	31 *5.6%*	553	4292 *34.9%*	6933 *56.4%*	1060 *8.6%*	12285	1:165	1:14	1:34
Ysleta	206 *15.2%*	1120 *82.7%*	28 *2.1%*	1354	22005 *62.2%*	12097 *34.2%*	1250 *3.6%*	35352	1:107	1:11	1:45

* With the following exceptions, all figures have been compiled from the U.S. Dep't of Health, Educ. & Welfare, Fall 1971 Elementary and Secondary School Civil Rights Survey, Form OS/CR 101 – 1:

Figrues for Alice—Fall 1970 Survey, Form OS/CR101 – 1;

Figures for La Feria and Karmes City—Fall 1969 Survey, Form OS/CR 101 – 1;

Figures for Ozona—U.S. Dep't. of Health, Educ. & Welfare, On-Site Review of Crockett County Consol. Common School Dist., at 1 (March 9, 1970);

Figures for Pecos—U.S. Dep't. of Health, Educ., & Welfare, On-Site Review of Pecos ISD, at 4 – 5 (June 3 – 5, 1969).

† M/A = Mexican American

†† A/A = Anglo American

of *Swann* that administrative choices result in schools of similar quality and staff.[99] By superimposing segregation of professional personnel on the existing pattern of separate schools for Anglo and Chicano students, school officials reveal their calculated efforts to maintain a wall between communities.

B. Perpetuation of a Dual School System

Segregation of Chicano students is as prevalent today, twenty-four years after *Delgado*, as it was during the 1940's. Freedom-of-choice plans,[100] gerrymandered zones,[101] option zones,[102] transfer policies,[103] construction of neighborhood schools[104] and public transportation plans[105] are utilized by school officials to perpetuate separation. These arrangements have been condemned as "calculted to . . . maintain and promote a dual school system,"[106] both in Northern school systems[107] and in situtations involving Chicanos.[108]

1. School Construction. Segregation was initially achieved by constructing identifiable Mexican school buildings. It was maintained simply by repairing and expanding these schools to accommodate increasing Chicano enrollment.[109] Improvements of dilapidated facilities were made to satisfy the pressing need for space. When these failed, more extensive repairs or alterations of physical plant were undertaken. Only when schools became grossly overcrowded was new construction undertaken.[110]

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[99] Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 19 (1971). *See also* Dimond, *supra* note 25, at 3.

[100] *E.g.*, Alice district. Interview with Lewis Davis, Director Pupil Personnel and Services, in Alice, June 8, 1971).

[101] *E.g.*, Pecos district. U.S. Dept. of Health, Educ. & Welfare, On-Site Review of Pecos ISD, at S Ib (June 1969).

[102] *E.g.*, Seguin district. Seguin ISD, BOARD MINUTES (Sept. 8, 1959).

[103] *E.g.*, El Paso district. U.S. Dep't of Health, Educ. & Welfare, On-Site Review of El Paso ISD, at 23 (Apr. 1970).

[104] *E.g.*, Harlingen district. Harlingen ISD, BOARD MINUTES, vol. I (Feb. 22, 1962).

[105] *E.g.*, El Paso district. *See* U.S. Dep't of Health, Educ. & Welfare, On-Site Review of El Paso ISD, at 23 (Apr. 1970).

[106] Cisneros v. Corpus Christi Ind. School Dist., 324 F. Supp. 599, 620 (S.D. Tex. 1970).

[107] *See* Dimond, *supra* note 25, at 3.

[108] Cisneros v. Corpus Christi Ind. School Dist., 324 F. Supp. 559 (S.D. Tex. 1970). *Cf.* Keyes v. School Dist. 1, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 40 U.S.L.W. 3329 (U.S. Jan. 17, 1972).

[109] *E.g.*, McAllen ISD, BOARD MINUTES, vol. 2, at 21 (Oct. 4, 1919). The entry reveals that the Board was concerned with conducting a bond election for the purpose of erecting school buildings, especially one in the Mexican part of town.

[110] *Eg.*, Harlingen ISD, BOARD MINUTES, vol. 14, at 2. (Oct. 2, 1945). Attendance

By creating Mexican schools, local Boards established the foundation for a pattern of segregation that continues to the present. These initial decisions also had an impact in determining the composition of neighborhoods, because people gravitate toward the schools to which their children are assigned.[111] The original segregation has been maintained by repairing and constructing schools in Mexican *barrios*, contravening the local board's duty to eliminate a dual school system.[112] The El Paso district is a good example. Beginning with the erection of two high schools in 1930, the effect of new construction has consistently been to further isolate Mexican-American students.[113] Similarly, the Alice district purposefully perpetuated a dual school system when it built two elementary schools in 1963: one on the "Mexican" side of town with an exclusively Chicano opening enrollment and a completely Chicano staff, the other predominantly Anglo.[114] Such construction activity is unconstitutional because it impedes the creation of a unitary system.[115]

2. Freedom-of-Choice Plans. Freedom-of-choice plans have merited close scrutiny in situations involving Black segregation.[116] Such plans are even less workable where Chicanos are involved. Fear of the Anglo-dominated environment outside the barrio, additional transportation burdens placed upon already meager budgets, and administrative failure to make any choice available are compounded by an additional obstacle: the language barrier. These pressures, combined with a policy of encouraging Anglos to exercise their choice, augment ethnic segregation. Only three times have such plans worked to integrate Anglo and Chicano

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at the Mexican elementary school had swollen to an average of 1186. Figures for Anglo elementary schools were 500, 210, 150, and 195 pupils respectively. The Harlingen Board decided to remodel the Mexican school and to build a new "Latin-American" school. *See* Alice ISD, BOARD MINUTES, vol. 6, at 11 (Sept. 17, 1946) (plans to build another Latin-American school in the Mexican part of town).

[111] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20 (1971) ("the location of schools may . . . influence the patterns of residential development").

[112] *E.g.*, Carter v. West Feliciana Parish School Bd., 396 U.S. 290, 292 (1970) (per curiam) (mem.) ("extirpate any lingering vestiges of a constitutionally prohibited dual school system") (Harlan, J., concurring); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam) ("the obligation . . . is to terminate dual systems at once and to operate now and hereafter only unitary schools"); Green v. County School Bd., 391 U.S. 430, 437–38 (1968) ("affirmative duty to take whatever steps might be necessary to convert to a unitary system").

[113] U.S. Dep't of Health, Educ. & Welfare, Compliance Review of El Paso ISD, at 18 (Mar. 1971).

[114] Alice ISD, BOARD MINUTES, vol. 11, at 7, 67 (July 9, 1963).

[115] *Cf.* Bradley v. School Bd., 324 F. Supp. 456, 462 (E.D. Va. 1971) (patterns of new school construction must affirmatively promote the creation of a unitary school system).

[116] Green v. County School Bd., 391 U.S. 430 (1968); *cf.* Raney v. Board of Educ., 391 U.S. 443 (1968).

school children, and then only after a strong community-wide effort by Chicano parents.[117]

The freedom-of-choice policy was not established to benefit the entire community. Recent litigation involving the Sonora district has exposed instances where school officials have thwarted efforts by Chicano parents to exercise options.[118] The policy has evidently been designed to allow Anglo children residing near a predominantly Mexican-American school to choose to attend an Anglo school. Examples of this segregative result are legion. In the Bishop district, students at the predominantly Anglo elementary school were sent "choice forms" in the spring preceding the applicable school year, while students at the Mexican elementary school were never given the opportunity to exercise a choice.[119] Another discriminatory application of the policy was found in Ozona. When freedom-of-choice was implemented, there was no publication of the plan in either the board minutes or newspapers. There was only the Anglo superintendent's insistence that he had told "everybody in town" about it.[120] Finally, there exist situations like Abilene, where a geographic zoning policy was grafted onto the freedom-of-choice plan. There the ninety-nine percent Black school and the ninety-five percent Mexican-American school were located in the same zone, just six blocks apart, and their pupils' choice was limited to one or the other of the two schools.[121]

"Choice" plans rarely encourage Anglo children to attend predomi-

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[117] In 1970, parents of Chicano pupils in the Alpine district joined together to exercise their choice to transfer their elementary-age children to the school which contained over eighty-five percent Anglo children. They were leaving a school that was 98.9 percent Chicano. School officials responded by converting one school into a junior high school, housing all elementary pupils in the other. Interview with Mr. Pete Gallegos, Board Member, Alpine ISD, in Alpine, Tex., July 6, 1971. *See Sanchez, supra* note 31, at 20–21 (mass exercise of choice by Chicano parents in Del Rio district in 1949 resulted in termination of plan and consolidation of schools). Chicano parents in Cotulla, Texas, integrated the Mexican school (Welhausen) where Lyndon B. Johnson held his first teaching job when they exercised their freedom of choice. When all Chicanos chose the Anglo school in September, 1970, the district was forced to pair. Integration resulted in better equipment and facilities for the former Mexican school. Telephone interview with Alfredo Zamora, former mayor of Cotulla, Texas, Apr. 3, 1972.

[118] *See* Affidavit of V.C. Chavez, Perez v. Sonora Ind. School Dist., Civil No. 6–224 (N.D. Tex., Nov. 5, 1970). When Ms. Chavez attempted to enroll her child at the Anglo Central Elementary School, she was told by the Superintendent that the only people who have freedom-of-choice are those who live in ranches and must ride a school bus. Few Mexican Americans are able to meet this criterion.

[119] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Bishop ISD, at 25 (Jan. 1970).

[120] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Crockett County Cons. Common School Dist., at 5 (May 1970).

[121] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Abilene ISD, at 2 (Feb. 1969).

nantly Mexican-American schools. On the contrary, they encourage Anglo children to flee predominantly Chicano "neighborhood schools."[122] This "white flight" and the homogeneity of identifiable Chicano schools will persist so long as local officials utilize freedom-of-choice schemes to maintain segregation.

3. Transfer Policies. Permissive transfer plans have results similar to those achieved by freedom-of-choice plans, but with little pretense that anyone is offered a choice. An excellent example of a "free transfer" plan that served to segregate is that which existed in Seguin, Texas. The 1960 school board minutes reveal the thoughts of local officials:

> The crux of the problem is this, the Latin-Americans look upon Juan Seguin as a segregated school because we have in the past permitted Anglos to transfer out of that area while at the same time we have been trying to insist on Latins going to Juan Seguin School. Sooner or later the Latins will force our hand on it and I know what the State Commissioner of Education will do. He will order the School Board to zone school areas.[123]

A variation of this technique is the "inter-district transfer." Under this plan, students are allowed to transfer to schools in neighboring districts if overcrowding is thereby alleviated. The Texas Commissioner of Education has complied with a court order enjoining his approval of such inter-district transfers when they perpetuate or increase ethnic segregation by resulting in transfer only of Anglos out of predominantly Black or Chicano schools.[124] The primary abusers of "inter-district" transfer plans have been school officials of districts with enclaves of United States military personnel (predominantly Anglo),[125] and there is evidence that they and other local authorities are managing to evade the

[122] *E.g.*, Alice District has a freedom-of-choice policy for seven elementary schools. A school official stated that he knew of no case where an Anglo child had decided to attend one of the four predominantly (97–100 percent) Mexican-American schools. Interview with Lewis Davis, Director Pupil Personnel and Services, in Alice, June 8, 1971.

[123] Seguin ISD, BOARD MINUTES, at 2 (June 14, 1960).

[124] Order of Aug. 13, 1971, in Del Rio ISD intervention in United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), *modified*, Civil No. 5281 (E.D. Tex., July 16, 1971).

[125] *Id.* The case involved a plan creating racially segregated schools. Two contiguous districts (San Felipe and Del Rio) collaborated to transfer over 800 children who were dependents of personnel at Laughlin Air Force Base. Most of the children were Anglo. In 1956 the Texas Education Agency approved the transfer, and thereafter assisted in paying for necessary transportation. Because of the transfer to the Del Rio district, additional federal funds were received by that district, which were used to construct a new high school. The federal district court ordered the districts consolidated as of August 7, 1971.

Commissioner's order.[126]

4. Attendance Zones. School trustees rely on varied schemes for the necessary task of drawing boundary lines to distribute the student population. However, this discretionary tool has historically been utilized to isolate Mexican-American students in many Texas communities. The zoning policies of the Uvalde district illustrate the abuse. A recent re-drawing of attendance zones when a new elementary school opened in the "Chicano area" raised the proportion of Chicanos attending Mexican schools from sixty-three to seventy-four percent of total Chicano enrollment.[127]

Because demarcation of school zones is a complicated procedure dependent upon balancing many interests, one should not too readily infer discriminatory intention from such statistics. However, since trustees must select one plan which reflects their evaluation of the relative importance of interests, their plan reveals the weight attributed to integrated education. When school authorities choose the one zoning plan from among four admitted to be pedagogically sound which maximizes resulting ethnic and racial segregation, one infers they value integration least of all.[128] That such a value choice is intolerable is now abundantly clear.[129] In particular, the purity of motive professed by many local school authorities, who stress devotion to the neighborhood school concept,[130] cannot be accepted in light of their current transportation

[126] On July 21, 1971, the San Antonio district was cautioned against accepting 316 transfers from the Kelly Air Force Base, located within the neighboring Edgewood district. The Commissioner of Education warned that continued acceptance would result in a loss of state funds and a loss of accreditation. San Antonio Express, July 22, 1971, at 8, col. 1. However, the practice of accepting transfers persists. Telephone interview with Mauro Reyna, Deputy Superintendent of Edgewood ISD, November 5, 1971.

Districts surrounding the Crystal City district are impeding integration by accepting such inter-district transfers. After Board elections in which La Raza Unida (the Chicano party) swept into office, Anglo parents sought to transfer their children elsewhere. Three school districts agreed to accept the transferees: Uvalde, La Pryor, and Carrizo Springs. These three districts have also been warned by the state Commissioner. San Antonio Express, July 22, 1971, at 18, col. 1. But the warnings have been unsuccessful in arresting the practice. Telephone interview with Amanzio Cantu, Assistant Superintendent of Crystal City ISD, November 5, 1971.

[127] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Uvalde ISD, at 5–6 (June 1970).

[128] This is exactly what happened in Kingsville in 1954. Kingsville ISD, BOARD MINUTES, vol. 5, pt. 2, at 478 (Sept. 2, 1954). *See also* Harlingen ISD, BOARD MINUTES, vol. 1, (Feb. 22, 1962) (where a similar controversy ensued when the Board decided to zone the two junior high schools).

[129] *See, e.g.*, Bradley v. School Bd., 40 U.S.L.W. 1105 (E.D. Va., Jan. 5, 1972); *cf.* Dimond, *supra* note 25, at 27.

[130] In the Kingsville situation, note 128 *supra*, school officials insisted they were drawing boundary lines to make it more convenient for students to attend their neighborhood

policies.

5. Busing. School officials' transportation programs have perpetuated the identifiability of Mexican-American schools. One of the most frequent situations involves busing Anglo children across town to predominantly Anglo schools. A special irony results when the bus carrying Anglo students makes several stops at schools which are identifiably Mexican-American.[131] Here again, school officials use their discretionary powers to transport Anglo students out of neighborhoods in which they are an ethnic minority.

The desire to bus is so strong in some districts that local authorities insist upon it even when state assistance is not provided.[132] For instance, in El Paso, elementary schools have been zoned to establish a "feeder" pattern for intermediate and high schools. Predominantly Chicano Jones elementary school is zoned to feed predominantly Chicano El Paso High School. Students in the Jones attendance zone are actually closer to an elementary, intermediate, and high school now predominantly Anglo. Because of this and the availability of public transportation, state assistance to bus Mexican Americans to the Chicano High School is unavailable. Nevertheless, local authorities do so with district funds. They adamantly insist on the fairness of their policies, arguing that Mexican-American students are not the only ones bused at local expense. In fact, they point out, Anglo students who reside near Chicano schools are similarly bused to predominantly Anglo elementary and intermediate schools.[133] Thus, local officials combine liberal transfer policies and a busing scheme to further isolate Chicano students.

6. Remedial Classes (Tracking). In many instances, tracking continues to separate Chicanos from Anglos on the same campus. Separate classrooms, operated without regard for linguistic abilities of students, were often introduced in response to abolition of the Mexican school.[134]

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schools. Reliance on the composition of neighborhoods to justify zoning plans was untenable, however, because the officials, by establishing Mexican schools, had been intimately involved in the forging of the ethnic composition of those neighborhoods. *See* U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Kingsville ISD (June 23–24, 1971).

[131] *See* U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Alice ISD, at 6 (Sept. 1968), reporting the busing of a substantial number of Anglo students past Mary Garcia School (99% Mexican-American) to Noonan Elementary School which had a significantly larger number of Anglo students.

[132] Tex. Educ. Code §§ 16.51–16.61 (1971) (provision of state aid for busing).

[133] U.S. Dep't of Health, Educ. & Welfare, Compliance Review of El Paso ISD, at 10 (Mar. 1971) (affidavit of Carlos F. Vela).

[134] *E.g.*, Wharton ISD historically operated a separate school for Chicanos. The

This segregation has been perpetuated by so-called ability-grouping, which produces over-representation of Chicanos in lower-achieving sections.[135] For example, during the 1970 school year, the fourth grade remedial class at Bishop District's Eastside elementary was composed solely of Blacks and Chicanos, while the fifth grade remedial class was entirely Chicano. This was the case even though there were Anglos in both grades with lower test scores.[136]

Intentional segregation is also evident where "lower ability" Chicanos are housed in separate facilities. The process involves the administration of a general achievement test, and utilizing the resulting scores as the basis for selecting students for the "special" facilities. In some instances, tests are given only to Chicanos.[137] Ability grouping, or tracking, perpetuates any ethnic imbalance that may exist in the lower grades. It "locks-in" those classed as "low achievers" by systematically destroying their self-image and expectation of academic success.[138]

The purposeful segregation becomes more apparent where Chicanos are classified as "educationally mentally retarded" (EMR) partially on the basis of intelligence tests given in English.[139] Recent studies have cast doubt on the validity of these intelligence tests, especially with respect to Chicanos.[140] However, blind adherence to IQ tests by school officials reveals that their interest is not in effectively measuring intelligence, but

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evidence indicates that when the Mexican School was abandoned in 1948 the district contemporaneously initiated an ability grouping program. U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Wharton ISD, at 12 (June 1970). In the 1969–70 school year, fifty-two percent of Anglo and four percent of Chicano first grade students were in "accelerated" classes.

[135] The extent of segregation in the Wharton district is demonstrated by the fact that ninety-three percent of Chicano first graders were in predominantly Chicano classes and sixty-three percent of Anglos were in predominantly Anglo classes. Segregation was even greater in the second and third grades. A sampling of upper grades indicated that grouping continued to promote segregation. *Id.* at 3–11. *See* Zamora v. New Braunfels Ind. School Dist., Civil Action No. 68–205-SA (W.D. Tex., filed Aug. 28, 1968) (alleging discrimination against Chicanos in the use of a system of ability grouping).

[136] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Bishop ISD, at 52–53 (Jan. 21–23, 1970).

[137] *See* Statement of Liberal Club of the United Citizens of Donna Educ. Comm., at 3, 1962 (condemning practice of giving the general achievement test only to Chicanos), on file with the authors.

[138] *See* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). *See also* Chapa v. Odem Ind. School Dist., Civil No. 66-C-72 (S.D. Tex., July 28, 1967), (high school classes were divided into two divisions, college and terminal, with the preponderance of the latter group being Chicano).

[139] *See* pp. 360–61 *infra*.

[140] A study by the California State Department of Education concluded that Chicanos have been placed in educationally mentally retarded classes solely on the basis of their performance on an invalid IQ test. The test was deemed invalid because Chicanos did not

rather in purposefully segregating Chicanos.[141] By relying on this allegedly "objective" instrument, educators attempt to exonerate themselves from any intentional culpability. The invalidity of tracking schemes resulting in discriminatory segregation of minority children has been established,[142] but school officials in Texas have chosen segregation as their guide.

These types of official actions have played a primary role in continued Chicano school segregation. The historical inadequacy of legal and administrative responses also bear a significant part of the responsibility.

III. JUDICIAL AND QUASI-JUDICIAL RESPONSE

A. Early Decisions: 1930—1954

Early civil rights strategem sought treatment of Chicanos as part of the "white race." Theory conformed to the jurisprudence of the times[143] and took advantage of the Texas Constitution[144] which provided for

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have the facility and understanding of English required by the test. *Hearings on Mexican-American Education before the Senate Select Committee on Equal Educational Opportunity*, 91st Cong., 2nd Sess., pt. 4, at 2504 (1970) [hereinafter cited as *Hearings*].

[141] Illustrative of the success of this technique is the El Paso district, where EMR classes are eighty-one percent Chicano although Chicanos comprise only fifty-six percent of the student population. U.S. Dep't of Health, Educ. & Welfare, On-Site Review of the El Paso ISD: Special Education, at 3—4 (1969). *See also* Covarrubias v. San Diego Unified School Dist., Civil Action No. 70—394-T (S.D. Cal., filed Dec. 1, 1970) (challenging the testing methods which result in disproportionate representation of Chicanos in EMR classes). One possible explanation for this practice, aside from the desire to segregate, is that there are financial incentives for having a large number of EMR students. *Hearings, supra* note 140, at 2394. School districts then utilize the funds to provide EMR curriculum to students who find the program stultifying.

[142] *See* Hobson v. Hansen, 269 F. Supp. 401, 484—85 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[143] *See* Gong Lum v. Rice, 275 U.S. 78, 80 (1927). The Court upheld the state court interpretation of § 207 of the 1890 Mississippi Constitution ("[s]eparate schools shall be maintained for children of the white and colored races") which found § 207 "divided the educable children into those of the pure white or Caucasian race, on the one hand, and the brown, yellow, and black races, on the other hand, and therefore Martha Lum of the Mongolian or yellow race could not insist on being classed with the whites under this constitutional division." *Cf.* Wong Him v. Callahan, 119 F. 381 (C.C.N.D. Cal. 1902)(upholding separate schools in San Francisco for children of Mongolian descent); C. Vose, CAUCASIANS ONLY 83—84, 129—131 (1967). Vose describes the Black strategy in restrictive covenant cases of the late 1940's, arguing that covenants against colored people could not validly be enforced as there was no constant characteristic by which to identify Negro people. *See also* note 265 *infra*. *But see* Westminister School Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947) (statute providing for segregation of Asiatics and Indians could not be applied to Chicanos).

[144] Article VII, § 7 of the Texas Constitution reads as follows: "Separate schools shall

segregation only of "colored children."

In 1930, the first Chicano desegregation case set the pattern for the next forty years. In *Independent School District v. Salvatierra*,[145] plaintiffs sought to prove that actions of Del Rio, Texas school authorities were designed to effect, and did accomplish, "the complete segregation of the school children of Mexican and Spanish descent (in certain elementary grades) from the school children of *all other white races* in the same grade."[146] The trial court granted an injunction which prohibited "segregating the children of plaintiffs . . . from children of Anglo-Saxon parentage of like ages and educational attainments within the school district."[147] The Texas Court of Civil Appeals agreed in theory: "school authorities have no power to arbitrarily segregate Mexican children, assign them to separate schools, and exclude them from schools maintained for children of *other white races*, merely or solely because they are Mexicans."[148] But the judgment was reversed and the injunction dissolved.

The appellate court referred to plaintiffs' "constitutional or statutory rights, privileges, or immunities"[149] and agreed with Chicano attorneys that absent a statute allowing segregation of Chicanos, any attempt by local officials to do so exceeded their powers.[150] But where there was no proof of intent to discriminate, the court held, segregation of the first three grades on wholly separate campuses was a reasonable exercise of the board's discretionary powers,[151] justified by the Del Rio Superintendent's judgment that an overwhelming majority of Chicano children needed special training because of language difficulties.[152] In dictum the court recognized that such separation would have to be applied with equal force to both white and "Mexican race" students.[153] But if so applied, separation to meet individual needs was permissible[154] and the

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be provided for white and colored children and impartial provision shall be made for both."

[145] 33 S.W.2d 790 (Tex. Civ. App., 4th Dt. 1930), *cert. denied*, 284 U.S. 580 (1931).

[146] 33 S.W.2d at 794 (emphasis added).

[147] *Id.* at 793–94.

[148] *Id.* at 795 (emphasis added).

[149] *Id.* at 794, 796.

[150] *Id.* at 795. Ironically, it was this argument on which the state later relied in an attempt to show the absence of *de jure* segregation of Chicanos. *See* p. 349 *infra*. Thus, "[t]he hardest thing in a [Chicano education] suit is establishing *de jure* segregation." Interview with John Serna, staff attorney for the Mexican-American Legal Defense and Education Fund (MALDEF), in San Antonio, Texas, July 19, 1971.

[151] 33 S.W.2d at 795.

[152] *Id.* at 792. The school district also argued that Chicanos were segregated to avoid disrupting classes several months into the school year when large numbers of migratory workers returned to the district. This rationale was rejected because English-speaking children who entered late were not segregated. *Id.* at 795.

[153] *Id.* at 795.

[154] *Id.* at 794. Later courts have noted that meeting individual need based on language

pedagogical wisdom of local administrators, rather than tests, was held to be adequate to identify children with language problems.[155]

It appears that no Chicano school integration suits were filed between 1930 and 1948. The situation in Pearland, Texas in 1942 illustrates the reason for this. Bishop Patrick Flores of the San Antonio diocese recalls that in his childhood he was compelled to attend the segregated Mexican school outside the Pearland limits. He was not allowed to ride the school bus carrying Anglos to the white school even though it passed in front of his house. Instead, he was restricted to the one-room, one-teacher, seven-grade building outside the city limits. When the school district considered building a new Mexican school the bishop and all his classmates began an eighteen month school boycott. After two years the superintendent compromised by moving the Mexican school next to the Anglo school.[156] Primarily because the Mexican building was an eyesore, the children were eventually integrated to avoid embarrassment to the district. Attorneys in Pearland never went to court because the environment was not conducive to integration, and because no funds were available for such litigation.[157]

The *Salvatierra* doctrine was emphasized in 1947 by an Attorney General's Opinion forbidding segregation Of Latin Americans.[158] In response, the late Gus Garcia inquired of Attorney-General Price Daniel whether the opinion forbade segregation except that based on scientific tests "equally applied to all students regardless of racial ancestry," and whether it forbade inferior facilities.[159] Daniel responded unequivocally: "I am certainly pleased to know that your interpretation of this opinion agrees with ours. We meant that the law prohibits discrimination against or segregation of Latin Americans on account of race or descent, and

handicap may be a euphemism for segregation. Hernandez v. Texas, 347 U.S. 475, 479 (1954).

[155] 33 S.W.2d at 794–96.

[156] Telephone interview with Bishop Patrick Flores, Mar. 3, 1972.

[157] Telephone interview with John Herrera, counsel for Pearland, Texas citizens, Mar. 3, 1972.

[158] The text of the opinion, dated April 8, 1947, reads as follows: "The Cuero Independent School District [DeWitt County] may not segregate Latin-American pupils, as such. Based solely on language deficiencies or other individual needs or aptitudes, separate classes or schools may be maintained for pupils who, after examinations equally applied, come within such classifications. No part of such classification or segregation may be based solely upon Latin-American or Mexican descent. Independent School District v. Salvatierra, 33 S.W.2d 790, *cert. denied*, 284 U.S. 580 (*See* opinion for additional authorities)." DIGEST OF OPINIONS OF THE ATTORNEY GENERAL OF TEXAS, V-128, at 39 (1947) [hereinafter cited as OP. ATT'Y GEN. TEXAS].

[159] Letter from Gus C. Garcia to Price Daniel, Aug. 18, 1947, *quoted in* G. Sanchez & V. Strickland, STUDY OF THE EDUCATIONAL OPPORTUNITIES PROVIDED SPANISH-NAME CHILDREN IN THE TEXAS SCHOOL SYSTEMS 7 (1947).

that the law permits no subterfuge to accomplish such discrimination."[160] Yet scholars continued to document extensive *de jure* segregation and lack of enforcement.[161]

In a 1947 California case, *Westminister School District v. Mendez*,[162] the Ninth Circuit added a theoretical dimension to the problem of Chicano segregation. It found that defendant school districts were segregating under color of law even though segregation of Chicanos was not provided for by state law.[163] Segregation, it said, was allowed in California only as to children of "one or another of the great races of mankind;"[164] it was not permitted within one of the great races. Chicanos were part of the white race.[165] Yet the court did not hold that segregation of Mexican-American children violated the fourteenth amendment *per se*. On the contrary, California could pass a law to segregate Mexican-American children. But absent such a law, Chicano segregation was unconstitutional.[166]

The combination of the *Mendez* decision and the Attorney General's Opinion generated a major suit in Texas. Like California, Texas had no *state* law requiring segregation of Mexican children, although the practice remained prevalent.[167] Gus Garcia combined these elements in 1948 in *Delgado v. Bastrop Independent School District*.[168] The complaint alleged that four Texas school districts[169] segregated Mexican children from "other white children,"[170] without sanction of state law[171] and contrary to the Attorney-General's Opinion.[172] The argument suc-

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[160] Letter from Price Daniel to Gus. C. Garcia, Aug. 21, 1947, *in* Sanchez & Strickland, *supra*.

[161] *Id.* at 7. "It seems clear, then, that the segregation of Spanish-name children, as practiced in eight of the ten school systems surveyed in this study, is contrary to the laws of Texas." Sanchez & Strickland, *supra*.

[162] 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947).

[163] 161 F.2d at 778. *Cf.* Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

[164] 161 F.2d at 780. The "three great races" generally recognized are mongoloid, caucasoid, and negroid.

[165] *Id.* at 780.

[166] *Id.* at 781. The court distinguished the segregation cases, Cumming v. Board of Educ., 175 U.S. 528 (1899); Plessy v. Ferguson, 163 U.S. 537 (1896); Ward v. Flood, 48 Cal. 36, 17 Am. R. 405 (1874); Roberts v. City of Boston, 59 Mass. 198, 5 Cush. 198 (1849), on the ground that they applied only to segregation of "the great races of man." 161 F.2d at 780.

[167] *Little, supra* note 31.

[168] Civil No. 388 (W.D. Tex., June 15, 1948) (*semble*); *accord*, Gonzales v. Sheely, 96 F. Supp. 1004 (D. Ariz. 1951).

[169] Bastrop ISD of Bastrop County, Elgin ISD of Bastrop County, Martindale ISD of Caldwell County, and Travis County Schools of Travis County.

[170] Civil No. 388 (W.D. Tex. June 15, 1948). Findings of fact and conclusions of law were waived by stipulation of the parties. The court recognized the suit as a proper class

ceeded. The district court permanently enjoined each district from segregating pupils of Mexican descent, ordering districts to comply, if necessary, through new construction or relocation of buildings "in no event beyond *September 1949*."[173] However, a proviso permitted segregation in the first grade "solely for educational purposes" if on the same campus and only "as a result of scientific and standardized tests."[174]

To comply with the order,[175] Superintendent of Public Instruction L.A. Woods issued regulations forbidding segregation of Chicanos in separate classes, schools, or extra-curricular activities with the *Delgado* first grade proviso.[176] Woods' original order stated: "The above reference to colored children has been interpreted by the Texas courts and the Texas Legislature as including only members of the Negro race or persons of Negro ancestry. The courts have held that it does not apply to members of any other race."[177] Subsequent publications omitted these sentences but stated categorically that there was no support in Texas law

action. *See also* Alvarado v. El Paso Ind. School Dist., 445 F.2d 1011 (5th Cir. 1971) (class action for Mexican-American students found permissible); Romero v. Weakly, 226 F.2d 399 (9th Cir. 1955); Gonzales v. Sheely, 96 F. Supp. 1004 (D. Arix. 1951); Westminister School Dist. v. Mendez, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd* 161 F.2d 774 (9th Cir. 1947) (sustained class action on behalf of Mexican children). *Cf.* Independent School Dist. v. Salvatierra, 33 S.W.2d 790, 796 (Tex. Civ. App., 4th Dt. 1930). *Contra*, Tijerina v. Henry, 398 U.S. 922 (1970) (dismissing an appeal from the District Court of New Mexico which had found that the class "designated as Indo-Hispano, also called Mexican, Mexican-American, and Spanish-American, [which is] generally characterized by Spanish surnames, mixed Indian and Spanish ancestry and . . . Spanish as a primary or maternal language" was "too vague to be meaningful.").

[171] Complaint § 1, Delgado v. Bastrop Ind. School Dist., Civil No. 388 (W.D. Tex., June 15, 1948).

[172] *Id.* S 2.

[173] Civil No. 388 (W.D.Tex., June 15, 1948) (emphasis added); *cf.* Singleton v. Jackson Municipal Separate School Dist., 426 F.2d 1364 (5th Cir. 1970) (ordering immediate integration to take effect by Fall, 1970); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (immediate relief).

[174] Civil No. 388 (W.D. Tex., June 15, 1948).

[175] *Delgado* permanently enjoined the Superintendent from participating in segregation of pupils of Mexican descent. *Cf.* United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), *modified*, 330 F. Supp. 235 (E.D. Tex. 1971), *aff'd in part*, 447 F.2d 441 (5th Cir. 1971), *stay denied*, 92 S. Ct. 8 (Black, Circuit Justice, 1971), *cert. denied*, 40 U.S.L.W. 3313 (Jan. 11, 1972), where the Texas Education Agency (TEA) was enjoined from participating in segregation and ordered to aid integration efforts. *See also* pp. 375–83 *infra*.

[176] Texas State Dep't of Educ., STANDARDS AND ACTIVITIES OF THE DIVISION OF SUPERVISION AND ACCREDITATION OF SCHOOL SYSTEMS, Bulletin No. 507, at 45–6 (1948–49) [hereinafter cited as TEXAS EDUCATION STANDARDS].

[177] The original text of the order as mailed can be found in G. Sanchez, CONCERNING SEGREGATION OF SPANISH SPEAKING CHILDREN IN THE PUBLIC SCHOOLS 74–75 (1951).

for segregation of children of Mexican or other Latin-American descent.[178] Several contemporaneous Texas decisions assaulted other strongholds of Chicano segregation—restrictive covenants,[179] restricted public swimming pools,[180] and exclusive juries.[181] Similar thrusts were made in other states.[182]

Following *Delgado*, civil rights attorneys moved to enforce court-ordered desegregation by seeking disaccreditation of segregated school districts. The approach was novel and effective. In January of 1949, a complaint[183] was filed against the particularly obdurate district in Del Rio, Texas.[184] Less than a month later, a report by the Assistant State Superintendent recommended that accreditation be withheld because students were segregated and Latin-American teachers were "unacceptable" in the Anglo school. The report indicated that "elementary children of the two races were, by board regulation, not permitted to mix."[185] Superintendent Woods cancelled Del Rio's accreditation on February 12, 1949.[186]

After granting Del Rio's request for reconsideration, the Super-

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[178] TEXAS EDUCATION STANDARDS, *supra* note 176, at 45.

[179] Clifton v. Puente, 218 S.W.2d 272 (Tex. Civ. App. 1948) (invalidated restrictive covenants in the sale or lease of property to "persons of Mexican descent"); *accord*, Matthews v. Andrade, 87 Cal. App. 2d 906, 198 P.2d 66 (Dist. Ct. App. 1948); *cf.* Shelley v. Kraemer, 334 U.S. 1 (1948)(restrictive covenants against Blacks held unenforceable).

[180] "A lease by the Board of Directors of Pecos County Water Improvement District No. 1 and Pecos County for bathing, swimming, and other purposes of like kind by the public may not lawfully carry a provision that no person or persons of Latin-American race shall be permitted to use said property for swimming, bathing, drinking, or for any other purpose." OP. ATT'Y GEN. TEXAS, V-150, *supra* note 158 at 45 (1947); *accord*, Valle v. Stengel, 176 F.2d 697 (3rd Cir. 1949); Lopez v. Seccombe, 71 F. Supp. 769 (S.D. Cal. 1944) (holding exclusion of Chicanos from public swimming pools unconstitutional).

[181] Hernandez v. Texas, 347 U.S. 475 (1954); *cf.* Patton v. Mississippi, 332 U.S. 463 (1947) (racial discrimination in jury selection a denial to both Negro defendants and potential Negro jurors of the equal protection of the laws).

[182] *E.g.*, Gonzalez v. Sheely, 96 F. Supp. 1004 (D. Ariz. 1951). Finding separate schools for Anglos and Chicanos, with unequal physical plants, a denial of equal protection, the court took a path independent from the "white" versus "colored" distinction. Suggesting a principle later to become law in *Brown*, the district judge reasoned that "segregation suggests inferiority where none exists." *Id.* at 1007.

[183] Cristobal P. Aldrete, a Del Rio citizen, made the complaint on January 7, 1949. Del Rio Decision of L.A. Woods, State Supt. of Pub. Instr., at 1 (April 23, 1949), on file with Dr. H. Garcia in Corpus Christi, Texas.

[184] Del Rio had been the defendant in Independent School Dist. v. Salvatierra, 33 S.W.2d 790 (Tex. Civ. App., 4th Dt. 1930).

[185] Del Rio Decision, *supra* note 183, at 3—4. (Assistant Superintendent Trimble personally inspected Del Rio on January 21, 1949).

[186] *Id.* Woods had, first, unsuccessfully attempted to sidestep the controversy by reopening *Delgado*. *Id.* The cancelling of accreditation also meant that teachers would have

intendent reaffirmed his decision to withdraw accreditation and made specific findings:[187]

> 1. The children were segregated to separate the two groups.
> 2. Latin-American teachers were confined to the Chicano school.
> 3. Freedom-of-choice did not solve the segregation problem because only Chicano children were given a choice and schools that had been all Chicano remained so.[188]

Success was short-lived. On June 1, 1949, the Texas legislature transferred the powers of the State Superintendent of Public Instruction to the newly created position of Commissioner of Education.[189] Woods, an elected official,[190] was continued as adviser to the new Commissioner for the remainder of his term, when both the Superintendent's position and the advisory position were abolished.[191] Declaring the act an emergency measure, the legislature rendered it effective as of July 7, 1949[192] (two months before Del Rio would start its school year). Del Rio then appealed to the State Board of Education which reversed the Woods decision.[193] The man selected to replace Woods is the current Commissioner of Education, J. W. Edgar.

Chicano leaders continued to complain of segregation.[194] In less than nine months complaints against at least twenty-two cities were sent to the new commissioner.[195] But state educational authorities became decidedly less cooperative after the Legislature's 1949 "emergency

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their certificates cancelled if they taught in Del Rio in 1949–1950.

[187] Del Rio Decision, *supra* note 183, at 4–5.

[188] *See also* Green v. County School Bd., 391 U.S. 430 (1968) (finding freedom-of-choice plans unlawful if they perpetuate segregation).

[189] Public Free Schools Administration Act, ch. 299, art. V, Texas Laws (1949) *as amended* Tex. Educ. Code §§ 11.25, 11.51, 11.52 (Vernon Supp. 1971).

[190] Free Schools, ch. 124, § 24, Texas Laws (1905)[*repealed* Public Free Schools Administration Act, ch. 199, art. VII (1949)] *as amended* Tex. Educ. Code § 11.25 (Vernon Supp. 1971).

[191] Public Free Schools Administration Act, ch. 299, art. VII, Tex. Laws (1949) *as amended* Tex. Educ. Code §§ 11.13, 11.14, 11.25(f) (Vernon Supp. 1971).

[192] State Board of Education-Members Act, General and Special Laws, Texas ch. 546, § 12 (1949).

[193] Letter to the authors from Cristobal Alderete, Del Rio attorney, February 3, 1972. Mr. Alderete helped the Chicanos of Del Rio short-circuit the freedom-of-choice scheme. When school opened in September, over a thousand Chicano children were at Central Elementary (Anglo) to greet the principal. The resulting crisis ended in a pairing of schools. *Id. See also* The Daily Texan (Austin, Texas), March 1, 1949.

[194] Letter from Dr. Hector Garcia, M.D., to the Commissioner of Education, J.W. Edgar, and the State Board of Education, April 13, 1950, on file with Dr. H. Garcia in Corpus Christi, Texas.

[195] *Id.* A partial list of these cities appears in note 54 *supra*.

measure"—a fact that was to assume special significance because civil rights attorneys now felt it necessary to exhaust administrative remedies prior to filing federal suit.[196]

This uncooperative attitude was exemplified by the state's response to segregation in the Hondo school district. The district had supposedly ended segregation in grades two through eight in 1952—53, but Chicano parents complained that the schools reverted to segregation in these grades in separate classes and continued to segregate first graders on a separate campus. The Commissioner admitted the school had changed from sectioning alphabetically to sectioning by achievement test, but held the change not arbitrary because there was neither sufficient evidence of intent to segregate nor of segregation itself.[197] He held that the district was illegally segregating Chicano first graders because they were on separate campuses, rather than in separate classrooms on the same campus. As of September 8, 1953, Hondo agreed to segregate as specified by the Commissioner. In a cease and desist order Edgar additionally required Hondo to test all first graders.[198]

The Commissioner reacted similarly to a protest by Chicano parents

[196] The change of strategy was not entirely voluntary. According to Albert Armendariz, co-counsel in *Barraza v. Pecos*, note 199 *infra*, they were required to exhaust administrative remedies before going to federal court. Telephone interview with Albert Armendariz in El Paso, Texas, October 19, 1971; *accord*, telephone interview with Cristobal Alderete, counsel in Perez v. Terrell County Common School Dist., Jan. 31, 1972. *Cf.* Texas Law provided a free right of appeal to the Commissioner of Education in disputes arising with school boards, Public Free Schools Administration Act, ch. 299, art. VII S 1, Tex. Laws (1949) *as amended* Tex. Educ. Code § 11.13 (Vernon Supp. 1971); Salinas v. Kingsville Ind. School Dist., Civil No. 1309 (S.D. Tex., filed Feb. 25, 1956) (memorandum opinion of September 19, 1955 staying federal court action until State Commissioner ruled on the case). *But see* Romero v. Weakley, 226 F.2d 399 (9th Cir.), *rev'ing* 131 F. Supp. 818 (S.D. Cal. 1955).

[197] Orta v. Hondo Ind. School Dist., decided by Commissioner of Education, J.W. Edgar, September, 1953, at 2, on file with Dr. H. Garcia in Corpus Christi, Texas. A similar situation was found in Sanderson, Texas. Plaintiffs charged that first graders were segregated and grades two through six were divided into homogenous achievement groups which had the same segregative effect. Petition in Perez v. Terrell County Common School Dist. to J.W. Edgar, Texas Commissioner of Education, reprinted in The Sanderson Times (Sanderson, Texas), June 26, 1953, at 1. Although the school superintendent testified that Chicanos were usually average, The Austin Statesman (Austin, Texas), July 8, 1953, at 1, col. 2, Commissioner Edgar nonetheless approved a grouping plan based on chronological age although he stated it would probably result in segregation. Perez v. Terrell County Common School Dist. No. 1, decided by J.W. Edgar, Texas Commissioner of Education, July 10, 1953 on file with Cristobal Alderete in Washington, D.C.

[198] Orta v. Hondo Ind. School Dist., *supra* note 197 at 3. At least as late as 1968, Hondo maintained an identifiable Mexican school. Although 58% of the student body was Chicano there was not a single Chicano faculty member. U.S. Dep't of Health, Educ. & Welfare, DIRECTORY OF PUBLIC AND SECONDARY SCHOOLS IN SELECTED DISTRICTS—ENROLLMENT AND STAFF BY RACIAL/ETHNIC GROUP-FALL 1474 (1968).

of a 1953 zoning plan in Pecos. The parents contended that the school board's construction of East Pecos Junior High in the Latin-American section of the city was intended to, and did effect, segregation of Chicano children from "other white" children.[199] The zoning plan placed the Mexican section in the East Pecos Junior High district, but created no other zone, simply declaring that all other students, in and out of the city limits, would attend Pecos Junior High.[200] East Pecos Junior High was to be 96% Latin American and Pecos Junior High 77% Anglo.[201] The school board's reaction to the complaint was to propose a zoning plan in which three of the four elementary schools were to become even more segregated than before the complaint.[202] Giving the school board's actions a presumption of legality despite *Delgado*, Edgar failed to find sufficient evidence of intent to segregate.[203]

Time proved Chicano parents in Pecos correct.[204] In 1968–69, East Pecos Junior High was 100% Chicano.[205] Eight of the nine Chicano teachers were in schools 99.6–100% minority.[206] Though arguably the state had no standard by which to judge the Pecos plan, the plan upheld

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[199] Barraza v. Pecos Ind. School Dist., decided by J.W. Edgar, Commissioner of Education, Nov. 25, 1953, on file with the Texas Education Agency.

[200] *Id.* at 2.

[201] The Latin American Junior High school was much more overcrowded, *id.* at 2, and the Anglo Junior High had an attendance area three times larger than the Mexican-American school. U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Pecos ISD, at 1, June 12, 1969. The junior high school zones have never been changed. *Id.* at 12. Geographic zoning appears to have been particularly unfair because Mexican-American housing in Pecos was segregated. *Id.* at 8; *cf.* Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969) (a district may not use geographic zoning to freeze past discrimination patterns).

[202] Barraza v. Pecos Ind. School Dist., *supra* note 199, at 46. For example, Earl Bell Elementary, which was to be 94% Latin American under the old plan, became 96% Latin American under the new plan.

[203] *Id.* at 45. *But see* United States v. Board of Instr., 395 F.2d 66 (5th Cir. 1968).

[204] A 1969 HEW review revealed that: "Prior to 1953 the district operated at the elementary level, 3 elementary schools on a completely segregated basis—Pecos Elementary, Earl Bell (Mexican-American) Elementary, and Carver (Negro) Elementary," and that "[t]he geographic attendance zone method of assignment has been ineffective in removing the identifiability of the Mexican-American schools." U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Pecos ISD, at 6, June 12, 1969. Although the school board argued in *Barraza* that Chicanos had segregated themselves, the HEW review team found that Mexican Americans were historically segregated in a community around the Santa Rosa Catholic Church within the Earl Bell-East Pecos Junior High zones. According to the Superintendent, all other areas within the city were restricted for Anglos. In 1953–54, Mexican-Americans began to spread to the area zoned for the North Pecos Elementary School. This school is now 87% Mexican-American and 13% Anglo. The other areas of town did not open to Mexican-Americans until 1965. *Id.* at 8.

[205] *Id.* at 6–7.

[206] *Id.* at 4–5.

was blatantly discriminatory and even more segregationist than the prior school board proposal.

With separate-but-equal still the law, early Chicano attorneys sought acceptance of the mestizo race as white. Chicano cases, therefore, stressed fourteenth amendment due process and statutory violations, emphasizing segregation in the *absence* of state law, while Black cases were stressing the fourteenth amendment equal protection, arguing that segregation in the *presence* of state law was inherently unequal.

B. Strategies After Brown

Brown v. Board of Education[207] should have changed the strategy of Chicano attorneys. With the segregation cases overruled, their efforts could have been directed solely at showing *de jure* segregation and seeking fourteenth amendment relief. However, as late as 1970[208] attorneys argued the old and proven "other white" theory.

Strategy did not change after *Brown* because of the peculiarities of *Hernandez v. Texas* in 1954.[209] In that case a Chicano was sentenced to life imprisonment upon conviction of murder by an all-white jury. No Chicano had served on a jury for at least the previous twenty-five years.[210] Texas courts had repeatedly held that nationality and race were not identical under the fourteenth amendment and would not so decide in the absence of a Supreme Court ruling.[211] They reasoned that since Chicanos were white and the Constitution forbids only racial discrimination, Chicanos were not within the aegis of the fourteenth amendment.[212]

In *Hernandez*, the only Mexican-American discrimination case ever

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[207] 347 U.S. 483 (1954).

[208] *See* Complaint, Cisneros v. Corpus Christi Ind. School Dist., 324 F. Supp. 599 (S.D. Tex. 1970), *appeal docketed*, No. 71—1297 (5th Cir., filed June 16, 1971).

[209] 347 U.S. 475 (1954). The opinion of the Texas appellate court, 251 S.W.2d 531 (Tex. Crim. App. 1952), was critically analyzed in 31 TEX. L. REV. 581 (1953).

[210] 347 U.S. at 481. This was true even though 14% of the population, 11% of the males over 21, and 6% or 7% of free holders on county tax rolls were Chicano. *Id.* at 480—81.

[211] Sanchez v. State, 147 Tex. Crim. 436, 181 S.W.2d 87, 90 (1944). A blind, nineteen-year-old, retarded youth with the mind of a five-year-old was convicted by an all-white jury of the murder of an Anglo farmer he heard attack his aging father. Although 50% of Hudspeth county was Chicano, there had been no Chicano on a jury for at least six years. The Texas court refused to reverse the conviction on the basis of Chicano exclusion from juries. *Accord*, Bustillos v. State, 152 Tex. Crim. 275, 213, 213 S.W.2d 837 (1948); Salazar v. State, 149 Tex. Crim. 260, 193 S.W.2d 211 (1946).

[212] Sanchez v. State, 156 Tex. Crim. 468, 243 S.W.2d 700 (1951). *But cf.* Clifton v. Puente, 218 S.W.2d 272 (Tex. Civ. App. 1948), where the Texas court refused to enforce restrictive covenants on the sale of land to persons of Mexican descent.

decided by the Supreme Court,[213] Chicanos were held to be among those protected by the fourteenth amendment:

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. *Whether such a group exists within a community is a question of fact.* When the existence of a distinct class is demonstrated, and it is further shown that the laws as written or as applied single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white and Negro."[214]

Although the defendant established that Chicanos comprised "a separate class in Jackson County",[215] the Court refused to reach the broader question of whether Chicanos are generally to be recognized as an identifiable ethnic minority group.[216] However, only once since *Hernandez* has a court refused to recognize Mexican Americans as a distinct class on the particular facts before it,[217] although discrimination has not always been found.

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[213] 347 U.S. 475 (1954). But the Court has granted *certiorari* in Keyes v. School Dist. 1, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 40 U.S.L.W. 3335 (U.S. Jan. 18, 1972), involving segregation of both Blacks and Chicanos. *See also* Tijerina v. Henry, 48 F.R.D. 274 (D.N.M.), *appeal dismissed*, 398 U.S. 922 (1970) (Douglas, J., dissenting).

[214] 347 U.S. at 478 (emphasis added); *accord*, Montoya v. People, 141 Colo. Rep. 9, 345 P.2d 1062 (1959).

[215] 347 U.S. at 479–80. The finding was based on such community practices as segregated schools; segregated courthouse toilets for white, colored, and Mexican; and at least one restaurant which did not serve Mexicans.

[216] As emphasized *supra*, the Court stated that "[w]hether such a group exists within a community is a question of fact," *id.* at 478, and that "[t]he petitioner's initial burden . . . was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites'.[9]" *Id.* at 479. Footnote 9 specifically says that "[w]e do not have before us the question whether or not the Court might take judicial notice that persons of Mexican descent are there [Jackson County?] considered as a separate class." *Id. Contra Houston, supra* note 14, at 938.

[217] *See, e.g.*, Muniz v. Beto, 434 F.2d 697 (5th Cir. 1970) (reversal of a 1942 conviction by an all-white jury because Chicanos had been excluded from juries in El Paso County, Texas); United States v. Hunt, 265 F. Supp. 178, 188 (W.D. Tex. 1967): "It appears and the court so finds that there is in Bexar County an identifiable ethnic group referred to as Mexican Americans, which group must be taken into consideration in connection with jury selection." One exception is the recent Houston case of Ross v. Eckels, Civil No. 10444

Defendant Hernandez relied upon statistical inferences rather than direct evidence of discrimination. Texas courts had previously required direct proof of discrimination to show a denial of equal protection to Chicanos.[218] But the United States Supreme Court had long accepted systematic exclusion of qualified Blacks from Texas juries as sufficient evidence of discrimination.[219] Thus the Texas courts were drawing a fictitious line between the type of proof required to show discrimination against Blacks, and what was needed to show the same thing in Chicano cases.[220] Chief Justice Warren disposed of the evidentiary problem, stating that "it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years."[221]

While winning the evidentiary point, Chicanos recognized that the main reason for the fifty-four-year delay between the opening of Texas juries to Blacks[222] and the inclusion of Chicanos was reluctance to recognize Chicanos as a separate class. The Supreme Court's equivocation on this point, refusing to take judicial notice and instead making a limited factual determination,[223] led civil rights attorneys in the late fifties to return to the *Salvatierra* "other white" strategy and the *Delgado* case.[224] These were readily available precedents requiring no proof of a separate class and seemed to afford relief as adequate as *Brown*.

Thus in the cases argued immediately after *Brown*, Chicano civil rights attorneys did not change the "other white"—"no state law" strategy.[225] With the exception of *Hernandez v. Driscoll Consolidated*

(S.D. Tex., May 24, 1971). *But see* Tijerina v. Henry, 48 F.R.D. 274 (D.N.M.), *appeal dismissed*, 398 U.S. 922 (1970).

[218] *See* Bustillos v. State, 152 Tex. Crim. 275, 213 S.W.2d 837 (1948); Sanchez v. State, 147 Tex. Crim. 436, 181 S.W.2d 87 (1944); Carasco v. State, 130 Tex. Crim. 659, 95 S.W.2d 433 (1936); Ramirez v. State, 119 Tex. Crim. 362; 40 S.W.2d 138 (1931).

[219] Ross v. Texas, 341 U.S. 918 (1951); Cassell v. Texas, 339 U.S. 282 (1950); Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940); *accord*, Patton v. Mississippi, 332 U.S. 463 (1947); Norris v. Alabama, 294 U.S. 587 (1935).

[220] *See* Note, 31 Tex. L. Rev. 581, 583 (1953). *Compare* the Texas double standard *with* the Justice Department's position in its Brief to the Fifth Circuit in *Cisneros v. Corpus Christi Ind. School Dist., appeal docketed* No. 71—2397 (5th Cir., filed July 16, 1971), where the government requested immediate relief for segregated Black children but remand for more evidence concerning segregated Chicano children.

[221] Hernandez v. Texas, 347 U.S. 475, 482 (1954).

[222] Carter v. Texas, 177 U.S. 442 (1900).

[223] *See* note 216 *supra*.

[224] Added support for the proposition that courts would be reluctant to apply *Brown* to Chicano segregation not sanctioned by state law can be found in recent cases discussed at pp. 348—49 *infra*.

[225] *See* Complaint in Salinas v. Kingsville Ind. School Dist., Civil No. 1309 (S.D. Tex., February 25, 1956)(dismissed without prejudice), on file with Dr. Hector Garcia, Corpus Christi, Texas. Gus Garcia stressed Mexican descent, but nevertheless used the "other

Independent School District[226] in 1957, which made unlawful the segregation of Chicanos in the first grade in the absence of standardized tests,[227] no significant Chicano school cases were filed in the decade following *Brown*.[228]

The sparsity of Chicano desegregation cases following *Brown* might be explained on the basis that the law became so settled that school boards capitulated.[229] More plausible is that Chicano attorneys saw litigation as futile because there were so many subterfuges available to bar effective relief. Through 1957 Chicanos were able only to desegregate

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white" strategy, arguing that no state law allowed segregation of Chicanos. This may be the first case in which school board minutes were used as the complaint cited segregation policies dating back to 1914. *See also* Cortez v. Carrizo Springs Ind. School Dist., Civil No. 832 (W.D.Tex., filed April 20, 1955). Despite *Brown*, the complaint continues the "other white"—"no state law" strategy. *Cortez* was dismissed on June 13, 1955, on plaintiff's motion after the board agreed to cooperate in every respect. Letter from Cristobal P. Alderete, attorney in *Cortez*, to Anastacio Soliz, August 1, 1955, on file in Mr. Alderete's office in Washington, D.C.

[226] 2 Race Rel. L. Rep. 329 (S.D. Tex., Jan. 11, 1957).

[227] *Id.* at 333. Defendant school district's claim that Latin children were segregated for four years in the first two grades because of language handicap was rejected after plaintiffs produced a little girl, Linda Perez, who had been segregated in a non-English speaking classroom even though she could speak only English. *Id.* at 331.

[228] *See* Villareal v. Mathis Ind. School Dist., Civil No. 1385 (S.D. Tex., May 2, 1957). This case was filed on the same day as Hernandez v. Driscoll Consol. Ind. School Dist., 2 Race Rel. L. Rep. 329 (S.D. Tex. 1957), by the same attorney—James DeAnda. *Villareal* was dismissed and an agreed order entered because the expert witness was afraid to testify. Mr. DeAnda did not pursue the suit because at the time there was no requirement for balancing and no law on tracking. Telephone interview with James DeAnda, Oct. 20, 1971. Shortly thereafter, the Mexican school was closed, but the Chicano children were put in segregated classes. The cause of the change was apparently a Texas Education Agency threat to take away the Mathis district's accreditation, rather than the *Villareal* filing. Commissioner Edgar ordered the district to cease its arbitrary retention and segregation of Chicano pupils for two years in the first grade. They were also ordered to comply with *Delgado* in the upper grades. Guerrero v. Mathis Ind. School Dist., decided by J.W. Edgar, Texas Commissioner of Education, May 11, 1955. The district was slow to comply with the first two parts of the Commissioner's order and ignored the third. Only after suit was threatened against TEA did it revoke the Mathis district's accreditation. In order to regain accreditation, the West Side school (Mexican) was closed and some classes were matched: half Anglo and half Chicano. But, because the school was 80% Chicano, 60% of the Chicano children remained completely segregated. Chicano migrants were restricted to Mexican classes. Telephone interview with Mr. James DeAnda, Oct. 20, 1971.

[229] For example, Chicano parents in Crystal City, Texas, packed a school board meeting in 1960 demanding an end to two segregated elementary schools. Zavala County Sentinel (Crystal City, Texas), July 15, 1960, at 1, col. 6. As a result the grade schools were paired. *Id.* July 22, 1960, at 1, col. 5. However, the school board refused to adopt rules dealing with the discriminatory treatment of migrants. Letter from R.C. Tate, Crystal City ISD Superintendent, to Cristobal Alderete, August 9, 1960, on file in Mr. Alderete's offices in Washington, D.C.

Anglo schools, not to integrate Chicano schools.[230] Such evasions of integration as "freedom-of-choice" were not struck down until 1968 in *Green v. Board of Education*.[231] Many school districts with large numbers of Chicanos operated with gerrymandered zoning and freedom-of-choice plans well past 1968.[232] Some such plans are currently in effect.[233] While faculty segregation has long been unlawful,[234] not until *Singleton*[235] was it clear that the teaching staff in each school should reflect the composition of the teaching staff in the district as a whole.

A parallel hiatus in change was evident for Blacks. Though they brought a significantly greater number of desegregation cases following *Brown*,[236] results were disheartening—only 2.3 percent of Southern Black children were in desegregated schools ten years after *Brown*.[237] It was the Civil Rights Act of 1964[238] that served as catalyst for major

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[230] One partial exception is the shortlived pairing of schools in Del Rio in 1949 by Supt. L.A. Woods. *See* note 183 *supra*. *Cf.* Pate v. County School Bd., 434 F.2d 1151 (5th Cir. 1970); Allen v. Board of Pub. Instr., 432 F.2d 362 (5th Cir. 1970); Bradley v. Board of Pub. Instr., 431 F.2d 1377 (5th Cir. 1970); Manning v. Board of Pub. Instr., 427 F.2d 874 (5th Cir. 1970) (all holding that pairing is a permissive tool of affirmative action to dismantle a dual system).

[231] 391 U.S. 430 (1968) (freedom-of-choice plan found unacceptable where it does not convert a dual system to a unitary system—immediately.). *See* Raney v. Board of Educ., 391 U.S. 443 (1968). Earlier decisions had not disturbed such plans. United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *noted in* 2 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 328 (1967). *Cf.* Youngblood v. Board of Pub. Instr., 430 F.2d 625 (5th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971), holding that zone lines must affirmatively promote desegregation.

[232] *E.g.*, El Paso, Texas, eliminated its freedom-of-choice plan between Chicano and Anglo High Schools on Dec. 4, 1970. The announcement came four days after a suit was filed. Defendant's Answer in Alvarado v. El Paso Ind. School Dist., 326 F. Supp. 674 (W.D. Tex.), *rev'd and remanded* 445 F.2d 1011 (5th Cir. 1971).

[233] La Feria, Texas, currently operates with freedom-of-choice zones between its elementary schools. Interview with Mr. Vail, Superintendent La Feria ISD, in La Feria, Texas, Aug. 7, 1971. One of these two schools, Sam Houston Elementary, was 99% Chicano in the 1969—70 school year. The other elementary school contained 97—100% of all Anglo students in the same grades. U.S. Dep't of Health, Educ. & Welfare, Office for Civil Rights, Individual School Campus Report, Fall, 1969, Form OSCR-102, La Feria ISD, Sam Houston Elementary.

[234] *See* United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); Bradley v. School Bd., 382 U.S. 103 (1965); Wheeler v. Board of Educ., 363 F.2d 738, 740 (4th Cir. 1966); Betts v. County School Bd., 269 F. Supp. 593, 602 (W.D. Va. 1967).

[235] Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211, 1217—18 (5th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971). An earlier Fifth Circuit opinion in the same case was *noted in* 1 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 171 (1966).

[236] *See generally* Comment, *The Courts, HEW and Southern School Desegregation*, 77 YALE L.J. 321 (1967).

[237] N.Y. Times, May 23, 1966, at 16, col. 4.

[238] 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1970).

change by injecting administrative action into desegregation efforts.[239] HEW enforcement pushed the figure to six percent in 1965–66.[240] However, HEW did not aid in Chicano cases until 1969.

In 1967 the evolution of school integration law coupled with renewed fervor in the Mexican-American community brought inequities in Chicano education back to court. James deAnda,[241] the attorney in the *Driscoll* case, filed *Chapa v. Odem Independent School District*,[242] the first Chicano suit to test subterfuges adopted by school districts in the milieu of sophisticated civil rights law. The complaint used both "other white" and equal protection language without clearly invoking either.[243] The school board defense was the familiar combination of language handicap and achievement tests.[244] But for the first time, a court refused to accept unquestioningly a classification system based on properly administered achievement tests. Instead, while accepting an agreed

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[239] Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 322 (1967). *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966), where Judge Wisdom states: "A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. *The Courts acting alone have failed.*" (emphasis by court). HEW had accepted freedom-of-choice plans prior to *Green*, necessitating the holding in *Green* because of the weight courts in the Fifth Circuit gave to the HEW position. "[W]e hold again in determining whether school desegregation plans meet the standard of *Brown* and other decisions of the Supreme Court, the courts of this circuit should give great weight to HEW Guidelines." *Id.*

[240] N.Y. Times, May 23, 1966, at 16, col. 4.

[241] Mr. James deAnda of Corpus Christi, Texas, has a long history of litigation on behalf of Chicano civil rights. He was an attorney in 1954 in *Hernandez v. Texas*, and is presently an attorney in Cisneros v. Corpus Christi Ind. School Dist., 324 F. Supp. 599 (S.D. Tex. 1970), *appeal docketed*, No. 71–2397 (5th Cir., filed July 16, 1971).

[242] Civil No. 66-C-72 (S.D. Tex., July 28, 1967).

[243] *Id.* The language of the order is what might be expected from a due process decision, placing it in the line of "other white" cases. *Brown* was not cited in the briefs, although Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), was cited in plaintiffs' memorandum of law regarding remedies.

[244] Complainants' Memorandum Brief in Motion for Summary Judgement of June 30, 1967, at 2, in Chapa v. Odem Ind. School Dist., Civil No. 66-C-72 (S.D. Tex., July 28, 1967). First, plaintiffs presented evidence to show that language handicap separation was a mere sham: no teacher or principal had special training to deal with the problem; two of the three first grade teachers at the Mexican school had neither college degrees nor teaching certificates; and the same books and materials were used at both schools. *Id.* at 4. Second, the Superintendent admitted that most children were sectioned without achievement tests and when tests were given in 1965 and 1966 only Mexican-American children were tested, and even then only after sectioning. *Id.* at 3. When Anglos were finally tested, the superintendent did not send those scoring in the lower range to the Mexican school because of a custom and policy of keeping Anglo children together. *Id.* at 3–4.

order, the court expressed a desire for additional evidence on the question of testing.[245]

Despite such apparent progress, the "other white" strategy continued in *Odem* has recently come to haunt Chicano civil rights attorneys. Now local school boards, rather than plaintiff Chicanos, avail themselves of the argument that no state law has ever sanctioned segregation,[246] in their attempt to disprove the *de jure* segregation prerequisite to *Brown* relief.[247] But while the bare absence of such a state law once sufficed for Chicano attorneys to prove that segregation of Chicanos exceeded school officials' statutory powers, it is no defense to an equal protection suit. All such a suit need show is that past segregation by school officials was under "color of law." "Color of law" extends to action by officials under guise of state authority regardless of statutory powers, even action which is malevolent abuse of power.[248] Yet other, more serious questions arise from Chicano equal protection strategy. These questions are considered in the next section.

IV. THE DEVELOPING EQUAL PROTECTION ARGUMENTS

A. Suspect Classification Treatment for Chicanos

To avail themselves of the equal protection clause and *Brown v. Board of Education*, Chicanos must win judicial recognition as an *identifiable minority group*.[249] There has been no Supreme Court ruling that they constitute such a class throughout the Southwest, despite overwhelming evidence that they do.[250] *Hernandez v. Texas*,[251] often cited

[245] Civil No. 66-C-72 (S.D. Tex., July 28, 1967).

[246] United States v. Texas (Austin ISD), Civil No. A-70-CA-80 (W.D. Tex., June 28, 1971), where the court, in ruling against Mexican American relief, took notice of the fact that "Texas has never required by law that Mexican-American children be segregated."

[247] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970).

[248] Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945).

[249] A group may be classified as an identifiable minority because of unalterable congenital traits, political impotence, and the attachment of a stigma of inferiority. *See Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065, 1126–1127 (1969) [hereinafter cited as *Developments-Equal Protection*]. The Supreme Court has accepted evidence of community prejudice in school segregation of Chicanos as proof that they are an identifiable minority group in regard to juries in Jackson County, Texas. Hernandez v. Texas, 347 U.S. 475, 479 (1954).

[250] *See* Alvarado v. El Paso Ind. School Dist., 445 F.2d 1011 (5th Cir. 1971), where the court found Chicanos a proper class. Though initially the fourteenth amendment was judicially limited to Blacks in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873), by 1886 the Court in Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886), extended fourteenth amendment protection to Chinese, and even to a corporation. County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886).

[251] 347 U.S. 475 (1954).

as declaring Mexican Americans a separate class,[252] reserved the question.[253] Although some hastily adjudicated post-*Brown* decisions ruled that *la raza* did not constitute a separate class,[254] Chicanos have recently been declared an identifiable minority group in *Cisneros v. Corpus Christi Independent School District*.[255] While not the first post-*Brown* finding of *de jure* segregation of Chicanos,[256] it was the first case to apply *Brown* to Chicanos. With the notable exception of court-ordered "integration" of Chicanos and Blacks in Houston,[257] most decisions have rejected arguments that Chicanos are simply other whites,[258] and agreed with the *Cisneros* finding of an identifiable minority group.[259]

The *Cisneros* court premised its finding on their distinctive physical, cultural, linguistic, religious and Spanish-surname characteristics.[260] The

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[252] *See, e.g., Houston, supra* note 14, at 938; Brief for the United States at 8, Cisneros v. Corpus Christi Ind. School Dist., No. 71–2397 (5th Cir., filed July 16, 1971).

[253] *See* pp. 343–44 *supra*.

[254] *See* Memorandum on motion to intervene in Ross v. Eckels, Civil No. 10444 (S.D. Tex., May 24, 1971): "The Houston Independent School District (as I believe has been true generally for school purposes throughout this state) has always treated Latin-Americans as of the Anglo or White race." Although that premise appears to be clearly wrong, Judge Connally went on to conclude that even if Chicanos were an identifiable minority group they were not entitled "to escape the effects of integration [with blacks]" because they had not been subjected to "*state-imposed segregation*." *Id.*

In a previous appeal to the Fifth Circuit, Judge Clark stated in dissent that: "Approximately 36,000 students in the Houston, Texas system are Spanish surnamed Americans. They have been adjudicated to be statistically white. As the majority states, we know they live in the very areas required to be paired with all or predominantly Negro schools. I say it is mock justice when we 'force' the numbers by pairing disadvantaged Negro students into schools with numbers of this equally disadvantaged ethnic group." 434 F.2d 1140, 1150 (5th Cir. 1970).

[255] 324 F. Supp. 599, 606 (S.D. Tex. 1970); *cf.* Alvarado v. El Paso Ind. School Dist., 445 F.2d 1011 (5th Cir. 1971); United States v. Austin Ind. School Dist., Civil No. A-70-CA-80 (W.D. Tex., June 28, 1971); Tasby v. Estes, Civil No. CA-3–4211 (N.D. Tex., July 16, 1971).

[256] *See* Chapa v. Odem Ind. School Dist., Civil No. 66-C-92 (S.D. Tex., July 29, 1967).

[257] Ross v. Eckels, 317 F. Supp. 512 (S.D.Tex.), *aff'd*, 434 F.2d 1140 (5th Cir. 1970) (which included Chicanos as white for purposes of integration).

[258] *Contra*, Ross v. Eckels, 434 F.2d 1140 (5th Cir. 1970).

[259] *See* United States v. Austin Ind. School Dist., Civil No. A-70-CA-80 (W.D. Tex., June 28, 1971); Tasby v. Estes, Civil No. CA-3–4211 (N.D. Tex., July 16, 1971); *cf.* Romero v. Weakley, 131 F. Supp. 818 (S.D. Cal. 1955). (Plaintiffs had alleged segregation of Chicano and Black children in El Centro, California. The case was settled out of court.); Keyes v. School Dist. 1, 313 F. Supp. 61 (D. Colo. 1970), *rev'd*, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 40 U.S.L.W. 3335 (U.S. Jan. 18, 1972)(The district court found that overwhelmingly Hispano schools might be considered segregated, but was puzzled by Hispano-Black schools. This bewilderment was needless, for a standard which can apply to them severally must also apply to them jointly. The Tenth Circuit did not consider this issue).

[260] 324 F. Supp. at 608.

same characteristics that render Chicanos an identifiable minority group render classifications discriminating against them "suspect," subject to "strict scrutiny," and justifiable only by a showing that they are necessary to promote a compelling state interest.

One argument that Chicanos constitute an identifiable minority group is simply that they are a separate race. Because the Chicano gene pool is eighty percent Native American with the remaining twenty percent about equally divided between European and Black,[261] it has been argued that Chicanos should be considered as Indian.[262] So considered, Chicanos would correspond to a Black of one-eighth or one-sixteenth Anglo ancestry.[263] The high percentage of Native American blood in most Chicanos has produced a people characteristically having an easily identifiable brown skin color, black hair, and brown eyes.[264] However, the difficulty[265] and nonessentiality of the argument outweigh its value. Although racial classifications are accorded the strictest scrutiny,[266] classifications based on national ancestry[267] or alienage[268] are also suspect. A court could apply a suspect classification test without reaching the race issue.

Chicanos are also readily identifiable because they retain many

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[261] H. Driver, INDIANS OF NORTH AMERICA 602 (1961). The possibility that any given Chicano is a descendent of "pure Spanish ancestors" is extremely tenuous since "[a]bout 90 percent of the Spanish immigrants were men who came over single or cohabited with Indian women." Moreover the bulk of European and Black immigration took place prior to 1810.

[262] Forbes, *Race and Color in Mexican-American Problems*, 16 J. HUM. REL. 57 (1968) [hereinafter cited as *Forbes*]. *But cf.* Westminster School Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1937) (school districts erred in separating Chicanos on the basis of a statute allowing segregation of Indians and Asiatics).

[263] *Forbes* at 57.

[264] At least one author has attributed much of the discrimination against Chicanos to their color characteristics. *See generally Forbes, supra* note 262.

Indeed "Mexicans" were a racial category in the 1930 census. U.S. Bureau of the Census, U.S. Census of Population: 1960, Subject Reports, Persons of Spanish Surname at viii (Final Report PC [2]-1B, 1963).

[265] *See* C. Vose, CAUCASIANS ONLY 83–84, 87, 129–31 (1967), where the author relates the strategy of Black civil rights attorneys. They sought to prove that there was no constant characteristic by which Black people could be positively identified as a separate race for purposes of restrictive covenants. Neither hair texture, nor skin color, nor head size, nor blood type was constant for all Black people. Much the same is true of Chicanos. Like Black people their physical characteristics defy an inviolable stereotypic description.

[266] *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1969); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Strauder v. West Virginia, 100 U.S. 303 (1880).

[267] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

[268] *See, e.g.*, Takahishi v. Fish and Game Comm'n, 334 U.S. 410 (1938); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).

customs inherited from their Indian and Spanish ancestors.[269] Most importantly, Chicanos characteristically speak Spanish as a mother tongue. Although language classifications are not themselves suspect, at least one state court has applied strict scrutiny to strike down language classifications burdening the right to vote.[270] Where Californians, literate in Spanish but not English, were denied the right to vote on the basis of English literacy tests, the California Supreme Court applied the strict test. It is unclear whether its basis was a suspect racial classification, the fundamental interest in the franchise, or both.[271]

Chicanos are particularly susceptible to exclusion based on English literacy testing. Although Congress has suspended literacy test requirements for voting in any federal, state or local election until August 6, 1975,[272] temporarily unenforceable English tests remain on the books in fifteen states.[273] Specifically mentioning discrimination against "Spanish-Americans," the Supreme Court has unanimously upheld the

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[269] *See generally* A. Paredes, WITH HIS PISTOL IN HIS HAND (1958).

[270] Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970) (*semble*).

[271] *Id.*, 2 Cal.3d at 229, 232–33, 466 P.2d at 247, 250, 85 Cal. Rptr. at 23, 26.

[272] Voting Rights Act, 42 U.S.C. § 1973aa (1970).

[273] Ala. Const. amend. 223, § 1 (suspended by § 4c of the Voting Rights Act of 1965, United States v. Alabama, 252 F. Supp. 95 (M.D. Ala. 1966)); Ariz. Rev. Stat. Ann. § 16–101 (1956); Conn. Gen. Stat. Ann. § 9–12 (1958); Del. Const. art. 5, § 2; Ga. Const. art. 2, § 704; Miss. Const. art. 12, § 244 (suspended by § 4c of the Voting Rights Act of 1965, United States v. Mississippi, 256 F. Supp. 344 (S.D. Miss. 1966)); Miss. Code Ann. §§ 3212, 3235 (1942)(also suspended); N.H. Rev. Stat. Ann. §§ 55:10, :12 (1955); N.Y. Const. art. 2, § 1(provision seriously limited in its discriminatory effect on Puerto Ricans by § 4(e) of the 1965 Voting Rights Act, Katzenbach v. Morgan, 384 U.S. 641 (1966)); N.Y. Election Law § 168 (McKinney Supp. 1968) (also limited); N.C. Const. art. VI § 4 (suspended as to a county where court applied § 4(c) of Voting Rights Act of 1965, Gaston County v. United States, 395 U.S. 285 (1969); N.C. Gen. Stat. § 163–58 (1964) (also limited); Ore. Const. art. II, § 2 (Oregon voters will vote in 1972 on whether to delete this section, 5 Ore. Rev. Stat. 1146); Ore. Const. art. VIII, § 6 (school board elections) (also to be decided upon in 1972); S.C. Code Ann. § 23–62(4) (1962); Wash. Const. amend. 5; Wyo. Const. art. 6, §9. Curiously, Louisiana allows a literacy test to be taken in one's mother tongue in lieu of English. La. Const. art. § 1(c); La. Rev. Stat. § 18:31(3) (1969). *But see* Minn. Stat. Ann. §§ 204.13, 206.20 (1962), which requires aid for non-English speaking voters. The California law (Cal. Const. art. II, § 1) was ruled unconstitutional by the state Supreme Court in Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970). The constitutionality of the Washington law (Wash. Const. amend. 5) was upheld in Mexican-American Federation v. Naff, 299 F. Supp. 587 (E.D. Wash. 1969). However, the decision was vacated and remanded by the U.S. Supreme Court, 400 U.S. 986 (1971), citing the 1970 Voting Rights Act and Oregon v. Mitchell, 400 U.S. 112 (1970). Five states, Alaska, Hawaii, Maine, Massachusetts, and Oregon have repealed English literacy tests for voting since 1968. *See generally* Liebowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME LAW. 7 (1969). *See also* Garza v. Smith, Civil No. SA=70-CA-169 (May 17, 1971), *rev'd in part*, ___ F.2d ___ (5th Cir. 1971) (requiring aid for illiterate Chicano voters).

Congressional prohibition of literacy tests for voting.[274] Four states require English speaking ability to hold some state or local offices.[275] Three states restrict foreign language instruction,[276] and twenty-nine states and territories including Arizona, California, Colorado, New Mexico, New York and Illinois specify English as the main language of instruction in public and private schools, although some have added provisions permitting bilingual education.[277] Other states and territories require that legislative proceedings,[278] court proceedings,[279] official

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[274] Oregon v. Mitchell, 400 U.S. 112, 118, 131–34 (1970); *cf.* Katzenbach v. Morgan, 384 U.S. 641 (1966) (§ 4[e] of the Voting Rights Act of 1965 which enfranchised non-English-speaking citizens who had attended American flag schools upheld). *See also* NOTE, *The Impact of Katzenbach v. Morgan on Mexican-Americans* 7 HARV. J. LEGIS. 154 (1969). *But see* Camacho v. Rogers, 199 F. Supp. 155 (S.D.N.Y. 1961) (dicta to the effect that English literacy tests are valid).

[275] Ariz. Const. art. XX, § 8; Ariz. Rev. Stat. Ann. § 11–402 (1956); Cal. Elections Code § 1611 (West 1961); Ind. Ann. Stat. § 19–3201 (1969); Minn. Stat. Ann. § 203.22(4) (1962). *See also* Cal. Elections Code 14217 (West 1961)(requiring elections officials to speak only English); Iowa Code Ann. § 365.17 (1946) (restricting people illiterate in English from Civil Service positions).

[276] Conn. Gen. Stat. Ann. § 10–17 (1958); Minn. Stat. Ann. §§ 120.10(2), 126.07 (1960); Wis. Stat. Ann. § 118.01(1) (West 1970).

[277] Ariz. Const. art. XX, § 7; Ariz. Rev. Stat. Ann. § 15–202 (Supp. May, 1969); Ark. Stat. Ann. § 80–1605 (1947); Cal. Educ. Code § 71 (West 1969)(providing also for bilingual education); Colo. Rev. Stat. Ann. § 123–21–3 (1963); Conn. Gen. Stat. Ann. § 10–17 (1958); Del. Code Ann. tit. 14, § 122(b)(5)(1958); Guam Gov't Code § 11200 (1970); Idaho Code Ann. § 33–1601 (1949); Ill. Ann. Stat. ch. 122, § 27–2 (Smith-Hurd 1969); Iowa Code Ann. § 280.5 (1946); Kan. Stat. Ann. § 72–1101 (1963); La. Const. art. 12, § 12; Me. Rev. Stat. Ann. tit. 20, § 102 (1964) *as amended* (Supp. 1972); Mich. Stat. Ann. § 15.3360 (1968); Minn. Stat. Ann. §§ 120.10(2), 126.07 (1960); Mont. Rev. Codes Ann. § 75–7503 (1947); Neb. Const. art. I § 27; Nev. Rev. Stat. § 394.140 (1967); N.H. Rev. Stat. Ann. §§ 189:19–21 (1955) *as amended* (Supp. 1971)(proviso for bilingual education); N.M. Const. art. XXI, § 4; N.Y. Educ. Law § 3204 (1953); N.C. Gen. Stat. § 115–198 (1965) *as amended* (Supp. 1971); N.D. Cent. Code § 15–47–03 (1971); Okla. Stat. Ann. tit. 70, § 11–2 (1966); Ore. Rev. Stat. § 336.074 (1971)(proviso for bilingual education); Pa. Stat. Ann. tit. 24, § 15–1511 (1962) *as amended* (Supp. 1971); S.D. Comp. Laws § 13–33–11 (1968); Wash. Rev. Code Ann. § 28A.05.010 (1970)(providing also for bilingual education); W.Va. Code Ann. § 18–2–7 (1971); Wis. Stat. Ann. § 118.01(1) (West 1970).

[278] Neb. Const. art. 1, § 27.

[279] Ark. Stat. Ann. § 22–108 (1962); Cal. Civ. Pro. Code § 185 (West 1954); Colo. Rev. Stat. Ann. § 37–1–22 (1963); Idaho Code Ann. § 1–1620 (1947); Mo. Ann. Stat. § 476.050 (1949); Mont. Rev. Codes Ann. § 93–1104 (1947); Neb. Const. art. I, § 27; Nev. Rev. Stat. § 1.040 (1969); Utah Code Ann. 78–7–22 (1953); Vt. Stat. Ann. tit. 4, § 731 (1972); Wis. Stat. Ann. § 256.18 (1971). *But see* Tex. Rev. Civ. Stat. Ann. art. 3737d-1 (Supp. 1972).

records,[280] or legal notices[281] be in English. Finally, although the Supreme Court has held that one cannot be denied employment because of alienage,[282] three states require English entrance examinations to enter regulated occupations.[283] English literacy tests, having their origins in anti-immigrant feelings, are today used to discriminate against minorities that are readily identifiable by color: Chicanos, Blacks, Indians, and Boricuas (Puerto Ricans).[284]

A further identifying trait of Chicanos is that most are Catholic, albeit in past times attending segregated churches.[285] Religious classifications have of course been held suspect, requiring strict judicial review.[286]

Another common means of identifying Chicanos in Texas is by Spanish-surname. The United States Bureau of the Census has used this means to compile census statistics since 1950.[287] Spanish surname has at times been the principal means for segregation.[288]

These identifying characteristics fall into two categories: alterable—

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[280] Ark. Stat. Ann. § 22–108 (1962); Cal. Civ. Pro. Code § 185 (West 1954); C.Z. Code tit. 3, § 278 (1963); Guam Code Civ. Proc. § 185 (1953); Idaho Code Ann. § 1–1620 (1947); Ky. Rev. Stat. Ann. § 446.060(2) (1969); Mo. Ann. Stat. § 476.050 (1949); Mont. Rev. Codes Ann. § 93–1104 (1947); Neb. Const. art. I, § 27; N.J. Rev. Stat. Ann. § 52:36–4 (1955); Utah Code Ann. § 78–7–22 (1953); Vt. Stat. Ann. tit. 4, § 732 (1972); Wis. Stat. Ann. § 256.18 (1971).

[281] Ariz. Rev. Stat. Ann. § 39–204 (1956); Cal. Corp. Code § 8 (West 1955); Ind. Stat. Ann. Stat. §§ 2–4706 (1968); Iowa Code Ann. § 618.1 (1946); Ky. Rev. Stat. Ann. § 446.060 (1971); La. Rev. Stat. §§ 1:52, 43:201 to :202 (1950) *as amended* (Supp. 1972); Me. Rev. Stat. Ann. tit. 1, §§ 353, 601 (1964) *as amended* (Supp. 1972); Mass. Gen. Laws Ann. ch. 200A, § 8(b) (1955) *as amended* (Supp. 1972); N.J. Rev. Stat. § 35:1–2.1 (1968); N.D. Cent. Code § 46–06–02 (1960); Ohio Rev. Code Ann. § 3905.11 (1971); Wash. Rev. Code Ann. § 65.16.020 (1966); Wis. Stat. Ann. § 324.20 (1958) *as amended* (Supp. 1971). *But see* N.M. Stat. Ann. § 10–2–11 (1953); N.M. Stat. Ann. § 10–2–13 (1953) *as amended* (Supp. 1972).

[282] Truax v. Raich, 239 U.S. 33 (1915).

[283] Conn. Gen. Stat. Ann. §§ 20–108 (1958); Okla. Stat. Ann. tit. 59, § 806 (1971); Utah Code Ann. §§ 58–12–11, 58–5–3 (1953). *See also* N.Y. Gen. Bus. Law § 434.3 (McKinney 1968) *as amended* (Supp. 1971)(barbering test may now be translated on request and need into other languages); Tex. Educ. Code § 13.034 (Vernon Supp. 1971)(requiring teaching certificate applicants to demonstrate an ability to use English easily and readily) *formerly* Tex. Rev. Civ. Stat. Ann. art. 2880 (1965).

[284] Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME LAW. 7, 37, 50 (1969).

[285] For example, Catholic Churches in Alice, Texas were segregated until the 1950's. Interview with Fortino Trevino, Alice civil rights activist, in Alice, Texas, July 19, 1971.

[286] *See, e.g.*, Juarez v. State, 102 Tex. Cr. R. 297, 277 S.W. 1091 (1925) (exclusion of Roman Catholics from juries barred by the fourteenth amendment).

[287] U.S. Bureau of the Census, *supra* note 264. *See also* Little, *supra* note 31.

[288] *See* Hernandez v. Driscoll Consol. Ind. School Dist., 2 RACE REL. L. REP. 329 (S.D. Tex. 1957).

culture, language, religion, Spanish-surname; and unalterable, or "congenital,"—physical characteristics and national origin. Because one of the three primary rationales for applying the suspect criteria test is classification based on congenital traits,[289] discrimination against Chicanos deserves judicial treatment as "suspect."

The other two rationales of this doctrine of strict judicial review are the protection of politically disadvantaged minority groups[290] and the attachment of a stigma of inferiority to a classification.[291] Politically disadvantaged minority groups deserve special protection because state legislatures fail to represent them, often giving less than full consideration to their interests. Chief Justice Stone suggested this rationale in *United States v. Carolene Products Co.*:[292] "[P]rejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Since it is uncontrovertible that Chicanos in Texas are politically disadvantaged,[293] they deserve strict review under this second rationale also.

Finally, the stigma of opprobrium that attaches to Chicanos in Texas is much like that which attaches to Blacks in other parts of the South.[294] Based on the premise of white superiority, exclusion of Chicanos from jobs, housing, schools, restaurants, theaters, and swimming pools[295]

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[289] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

[290] *See* Hobson v. Hansen, 269 F. Supp. 401, 507–08 n. 198 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); *Evolution-Equal Protection, supra* note 25, at 132; *Developments-Equal Protection, supra* note 249, at 1125.

[291] *See, e.g.*, Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 424 (1960); *Evolution-Equal Protection* at 132–135; *Developments-Equal Protection, supra* note 249, at 1127.

[292] 304 U.S. 144, 153 n. 4 (1938). *See* Hobson v. Hansen, 269 F. Supp. 401, 503 (D.D.C. 1967) (the power structure "may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority.").

[293] *E.g.*, There are only 11 Chicanos in the 150-member Texas House of Representatives and of the 31 Texas Senators only one is Chicano. Their influence is so attenuated that a Bilingual Education Bill never reached the floor because of opposition from people who felt it to be un-American. Telephone interview with Paul Moreno, Texas State representative, December 17, 1971. *See also*, U.S. Comm'n on Civil Rights, MEXICAN-AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (1970).

[294] *Cf.* Local 53 of Int. Ass'n of Heat and Frost I. A. Wkrs. v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (The 5th Cir. affirmed a lower court finding that Blacks and Mexican Americans had been excluded from the Louisiana local).

[295] *E.g.*, Texas courts upheld a proprietor's right to refuse service to a Chicano in Terrel Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824 (Tex. Civ. App. 1944) *cf.* Lueras v. Town of Lafayette, 100 Colo. 124, 65 P.2d 1431 (1937). *But see*, Lopez v. Seecombe, 71 F. Supp. 769 (S.D. Cal. 1944); Beltran v. Patterson, Civil No. 68–59-W (W.D. Tex. 1968),

aggravated the stigma of inferiority,[296] a result concommitant with the general effect of segregation in America.[297] The Supreme Court seems to have accorded this rationale overriding importance. Even when a legislature meets the second test—majoritarian consideration of minority interests—by providing separate but equal facilities, the Court refuses to legitimize segregated schools because separation of some children "from others of similar age and qualifications solely because of their race generates a feeling of *inferiority as to their status* in the community that may affect their hearts and minds in a way unlikely ever to be undone."[298]

Chicanos in the Southwest have historically been viewed as inferior. As a result they have suffered much abuse, often at the hands of law enforcement personnel.[299] In the 1930's an Arizona newspaper referring to segregation of Mexicans reported them to be "both strangers belonging to an alien race of conquered Indians, and persons whose enforced status in the lowest economic levels make [sic] them less admirable than other people."[300] The stigma of inferiority can be traced to the pervasive stereotype of Chicanos as "lazy, dirty, and ignorant." One glaring manifestation of this stigma occurred as recently as 1971. In Seguin, Texas, Chicano children were being expelled[301] allegedly for having lice despite recurrent doctors' examinations showing the allegations to be greatly exaggerated. Local OEO workers were instructed by their superiors to use Gulf spray on the heads of those children

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cited in brief for MALDEF as *amicus curiae*, at 3, Ross v. Eckels, 434 F.2d 1140 (5th Cir. 1970), where the court enjoined the exclusion of Chicanos from a public swimming pool.

[296] A. Perales, ARE WE GOOD NEIGHBORS 139–227 (1948).

[297] *See* Black, *supra* note 291, at 425; *Developments-Equal Protection, supra* note 249, at 1127.

[298] Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (emphasis added); *cf.* McLaughlin v. Florida, 379 U.S. 184 (1964); Loving v. Virginia, 388 U.S. 1 (1967). A pre-*Brown* court reached this same conclusion regarding Chicanos who were segregated in schools solely and exclusively for them. Gonzalez v. Sheely, 96 F. Supp. 1004 (D. Ariz. 1951). *See Evolution-Equal Protection* at 31–42.

[299] *See, e.g.*, Cavazos v. State, 143 Tex. Crim. 564, 160 S.W.2d 260 (1942) (conviction reversed where Texas Rangers beat and tortured a Chicano prisoner to secure a confession). *See generally* A. Parades, *supra* note 269, at 7–32.

[300] Quoted in McWilliams, NORTH FROM MEXICO 41 (1948).

[301] *E.g.*, The mother of one eight-year-old expelled from school for "lice" found none on her daughter. She reported: "The next day I took her to school. The nurse examined [the daughter] and claimed that she found one [lice] which she placed in an envelope but she refused to allow me to see it. I left.

That night [daughter] started complaining of stomach pains and has been sick for the last three weeks. [Daughter] says that she is reluctant to go back to school because she was afraid of being embarrassed or humiliated again by the teachers." Statement of [mother of expelled girl], February 25, 1971, taken by Alberto Huerta, MALDEF administrative assistant, in San Antonio, Texas.

suspected of having lice. Field workers questioned this order, calling the school nurse before proceeding. She explained that this spray was to be used in the homes.[302] Children reported ridicule by teachers, examination in front of class for examples of lice, examination only of Chicanos or in separate lines, public declarations of infestation, and, in at least one case, expulsion for three weeks for dandruff.[303]

Courts should be no less able than the Anglo citizens of Texas to recognize Chicanos as an identifiable ethnic minority. And because their identity is unalterable, stigmatized, and abused by the majority in Texas' political processes, classifications discriminating against Chicanos are suspect and courts must review them with strict scrutiny.

B. Proving Segregation Once "Suspect" Treatment Is Accorded

Once a suspect classification argument is accepted, a plaintiff could proceed to establish a *prima facie* case of discrimination based upon direct evidence of segregative state action and statistical evidence of an unconstitutional degree of segregation.[304] Plaintiffs in *Cisneros* made out a *prima facie* case of unconstitutional segregation by establishing that: (1) Mexican Americans are an identifiable minority group, (2) they are segregated, and (3) state action caused their present segregation.

Cisneros demonstrated the kind of direct evidence of segregative state action which may be presented. The school district had argued that there had never been a dual system since there was no history of a state law requiring segregation of Chicanos. Judge Seal found unconstitutional state action in school board decisions, which,

> in drawing boundaries, locating new schools, . . . renovating old schools in the predominantly Negro and Mexican parts of town, in providing an elastic and flexible subjective, transfer system that resulted in some Anglo children being allowed to avoid the ghetto, or 'Corridor' school, by bussing some students [to avoid Mexican and Negro schools], by providing one or more optional transfer zones which resulted in Anglos being able to avoid Negro and Mexican-American schools, not allowing Mexican-Americans or Negroes the option of going to Anglo schools, by spending extraordinarily large sums of money which resulted in

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[302] Interview with Alberto Huerta, MALDEF administrative assistant, in San Antonio, Texas, July 19, 1971.

[303] *See generally* Statements of parents and children from Seguin, Texas, taken in February, 1971 by MALDEF on file in MALDEF offices in San Antonio, Texas.

[304] *Cf.* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971). *See also* Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 441, 442–456 (1971).

> intensifying and perpetuating a segregated, dual school system, by assigning Negro and Mexican-American teachers in disparate ratios to these segregated schools, and further failing to employ a sufficient number of Negro and Mexican-American teachers and failing to provide a majority-to-minority transfer rule, were, regardless of all expressions of good intentions, calculated to, and did, maintain and promote a dual school system.[305]

Although these grounds have been held sufficient to support a finding of *de jure* segregation,[306] the school board's assertion of no constitutional requirement to affirmatively correct racial imbalance remained an arguable defense,[307] because the plaintiffs did not explore school board minutes for additional evidence of pre-1954 violations.[308] While the Justice Department, as plaintiff-intervenor, has not taken a position as strong as the school board's, it has nonetheless asked the Fifth Circuit to remand for more data on Chicano segregation.[309]

In previous cases relying on evidence from school board minutes courts have found historical *de jure* segregation of Mexican Americans.[310] This is especially persuasive when coupled with witnesses of that time, newspaper accounts, and other historical data. However, school board minutes have not universally sufficed. One difficulty is that board minutes are subject to the attrition[311] of time and may be lost or

[305] 324 F. Supp. at 617–20.

[306] *See* cases cited in notes 441–443 *infra*.

[307] Brief for Corpus Christi ISD at 18, in Cisneros v. Corpus Christi Ind. School Dist., No. 71–2397 (5th Cir., filed July 16, 1971).

[308] Telephone interview with James deAnda, counsel in *Cisneros*, Oct. 20, 1971.

[309] Brief for United States at 13, in Cisneros v. Corpus Christi Ind. School Dist., No. 71–2397 (5th Cir., filed July 16, 1971).

[310] Perez v. Sonora Ind. School Dist., Civil No. 6–224 (N.D. Tex., Nov. 5, 1970). The court found that by rules and regulations of the Sonora ISD formulated on August 4, 1938, "all Mexican children were to be enrolled in Mexican schools." *Id.* Pre-Trial Order of May 13, 1970, at 4. All Mexican children were required to attend the Mexican school until 1948 when *Delgado* forced the repeal of the resolution and zone lines were instituted. However, these were gerrymandered sufficiently to make one of the two elementary schools 100% Anglo and the other 100% Mexican. *Id.* at 6–7. Chicano high school students were not permitted onto the present Sonora High campus until 1948. *Id.* No Chicano or Black child attended the white school until 1964—although the two schools were only 1.2 miles apart. *Id.* at 7 and 10. *See also* United States v. Lubbock Independent School District, 316 F. Supp. 1310 (N.D. Tex. 1970). The court found that five of the thirty-eight elementary schools were vestiges of a *de jure* system of segregation toward Chicanos and Blacks. Two of these were predominantly Chicano. One was built in the pre-*Brown* era, the other in 1961. *Id.* at 1318. An additional thirteen of the remaining thirty-three elementary schools were racially identifiable. *Id.* at 1317. Although the court found *de jure* segregation in at least five elementary schools, the court did not disturb the composition of any elementary school. *Id.* at 1319.

[311] A school official in Kingsville, Texas, told the authors that the school board minutes

burned. Courts may fail to give probative value to ambiguous statements referring to "Mexican schools," interpreting them as schools located in Mexican neighborhoods.[312] But many egregious decisions holding that Chicanos have never been segregated appear contrary to evidence and unsupported by findings of fact.[313] To date *Cisneros* is the only contemporary Texas case finding *de jure* segregation of Chicanos absent

prior to 1940 had been destroyed by a fire a few years ago. Interview with Mr. Gillett, Superintendent Kingsville ISD, August 9, 1971. Subsequent to this interview the authors had access to a HEW document which referred to Kingsville Board Minutes dating back to May 16, 1908. The review was conducted on June 23–24, 1971. U.S. Dep't of Health, Educ. & Welfare, *On-Site Review of Kingsville ISD, Texas on June 23–24, 1971*, at 8, submitted to John Bell, Chief, Education Branch OCR, Aug. 5, 1971. The Superintendent of La Feria ISD informed the authors that he had no quarrel with the concept of school board minutes as public, but reasoned that this applied only to citizens of La Feria. Thus, the authors were denied access to these minutes. Interview with Clyde E. Vail, Superintendent of La Feria ISD, August 7, 1971. El Paso, Texas, is divided into two districts: El Paso ISD and Ysleta ISD. References to Mexican schools in the El Paso ISD were found prior to 1930. *See, e.g.*, El Paso ISD Board Minutes, March 25, 1924 (copied and read by Carlos Vela on file in Brownsville, Texas). *See generally* P. Horn, SURVEY OF THE CITY SCHOOLS OF EL PASO TEXAS (1922)(In this study for the El Paso Public Schools, Horn made much of the unequal education in the American and Mexican Districts). *See also El Paso City Schools*, THE SCHOOLS OF EL PASO 24 (1928)(Aoy elementary school described as "historic school for Mexican pupils."). When the authors asked to see the Ysleta ISD minutes prior to 1930, they were told that these were with the county recorder downtown. Interview with Dr. J.W. Hanks, Superintendent, Ysleta ISD, July 12, 1971. No one could locate them. Interview with Al Morales, El Paso County Clerk, July 13, 1971.

[312] United States v. Austin Ind. School Dist., Civil No. A-70-CA-80 (W.D. Tex., June 18, 11971) *appeal docketed*, No. 71–2508 (5th Cir., filed Aug. 3, 1971). There were board references to a Mexican school as early as 1916. A second Mexican school was built in 1924, a third in 1935. While separation was not rigidly enforced when children were distant from these schools, Chicano children in zones overlappling Anglo zones were required to attend the Mexican school. Mexican schools were built to accommodate Mexican children attending Anglo schools. The district did not attempt to segregate Chicano high school students because the extremely high dropout rate made this unnecessary. "Mexican" housing projects were located near the Mexican school. Zone lines, construction and transfer policies were designed to and did accomplish segregation of Chicano children. Chicano schools in Austin are so overcrowded that space per pupil is only about 40 percent of that in Anglo schools. Brief for United States as Appellant at 10–32, United States v. Austin Ind. School Dist., No. 71–2508 (5th Cir., filed Aug. 3, 1971).

[313] *E.g.*, United States v. Midland Ind. School Dist., Civil No. MO-70-CA-67 (W.D. Tex., Aug. 25, 1970), *vacated*, 443 F.2d 1180 (5th Cir. 1971), *rehearing*, 334 F. Supp. 147 (N.D. Tex. 1971), *appeal docketed*, No. 71–3271 (5th Cir., *filed* Nov. 5, 1971). Evidence showed that the school board provided a "separate school for Mexicans" as early as 1914. Until 1948, Chicanos in Midland were not permitted past eighth grade, and all schooling was in the Latin-American school. The first Chicano to attend an integrated junior high school did so in 1946. Six years later in 1952, the city had its first Chicano high school graduate. Brief for United States as Appellant at 6–9, United States v. Midland Ind. School Dist., *appeal docketed*, No. 71–3271 (5th Cir. *filed* Nov. 5, 1971). In spite of overwhelming evidence to the contrary, Judge Guinn found: "As Texas has never required

proof of historical educational segregation.[314]

Interestingly, the *Cisneros* complaint also used the "other white" argument.[315] This was an improvident inclusion, for it works against a showing of an identifiable minority group. Fortunately, the court chose to ignore the implications of the argument. A court unaware of the civil rights origins of the "other white" argument might have stretched it to include Chicanos as "other whites" for purposes of statistical integration. Instead, the *Cisneros* court, relying on *Brown*, held integration of Chicanos and Blacks not a constitutional means of eliminating dual school systems.[316] It ordered pairing and busing.[317]

Once a *prima facie* case of unconstitutional segregation is established, the burden of going forward shifts to the defendant. The defendant may then make one or all of three answers: (1) challenge the validity of the evidence, (2) concede the evidence and offer proof of a rationale for its existence which would override an inference of illegal discrimination, or (3) challenge the scope of the plaintiffs' mandate for equality.[318]

To preempt the first defense plaintiffs need only be cautious enough to use valid and sufficient evidence. To forestall the second, plaintiffs may offer proof of a previous dual system not sufficiently dismantled or a presumption to that effect. As to the third, the state would have to show a compelling state interest for continued segregation; and only war-time necessity has ever been found sufficiently "compelling" to justify invidious racial or national origin classification.[319]

C. State Interest in Chicano Segregation

Many arguments have been proferred for separating Mexican-

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by law that Mexican-American children be segregated and the Midland Independent School District has never enacted regulations to this effect and from the evidence, the Court finds that there has been no history of discriminary practices against Mexican-Americans by the school district." 334 F. Supp. 147, 150–51 (W.D. Tex. 1971).

[314] *See* Tasby v. Estes, Civil No. CA-3–4211 (N.D. Tex., July 16, 1971) (Dallas) (*de jure* segregation of Chicanos not found). Plaintiffs failed to explore school board minutes for the origins of Mexican schools. Interview with R. Surrat, counsel in *Tasby*, in Dallas, July 15, 1971; *cf.* Ross v. Eckels, Civil No. 10444 (S.D. Tex., May 24, 1971) (motion to intervene on behalf of Chicano plaintiffs denied in the absence of historical data such as school board minutes).

[315] Complaint at 4, Cisneros v. Corpus Christi Ind. School Dist., 324 F. Supp. 599 (S.D. Tex., 1970).

[316] 324 F. Supp. at 611.

[317] *Id.* at 618–24; *accord* Uresti v. School Bd., Civil No. 70-B-100 (S.D. Tex., Sept. 14, 1971) (busing may be used by a school board to integrate Mexican-American schools).

[318] *See* Fessler & Haar, *supra* note 304, at 447–48.

[319] *See* Korematsu v. United States, 323 U.S. 214, 216–18 (1944).

American school children from their Anglo peers.[320] For equal protection purposes, the validity of these reasons can be analyzed in terms of both strict[321] and permissive[322] standards of review.

1. Strict Standard

The justifications given for segregating Chicano students generally fall within one of four classifications.

Prejudice. Many of the articulated bases of segregation have been overtly racist. One study of Nueces County quoted school executives who stated that they "segregate for the same reason that the southerners segregate the Negro. They are an inferior race that is all."[323] Because racial or ethnic prejudice is not a legitimate governmental objective, a classification designed for its promotion is unconstitutional.[324]

Mexican-American Preference for Segregation. This assertion is based on an inference that silence and acceptance of a *fait accompli* by Chicano parents amounts to exercising a preference. The inference ignores the fact that very few people in the Chicano community have been in a position to mount effective opposition to the "Mexican School."[325] Furthermore, those outspoken Mexican Americans who did raise their voices expressed protest, not approval, of segregation, though few were able to change school board policy.[326] In proffering this rationale, the state fails to meet its burden of justification for a suspect classification.

Mexican Americans are Underachievers. The argument is that since Chicano students generally fall behind in class, integration would slow the progress of Anglos.[327] The notion that Chicanos are "slower" derives

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[320] *See* Little, *supra* note 31, at 60–61.

[321] Suspect classifications are subject to strict scrutiny and the state carries a heavy burden of justification. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). *See* pp. 348–56, *supra.*

[322] Under permissive or traditional review, a classification is not held invalid unless it is without any reasonable basis. Morey v. Doud, 354 U.S. 457 (1957).

[323] Taylor, *supra* note 1, at 219.

[324] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 223 (1944). *Cf.* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 374 (1949).

[325] Taylor, *supra* note 1, at 230–240.

[326] There were some efforts by organizations like the American G.I. Forum and the League of United Latin American Citizens (founded in 1929). There were also instances when members of the local Chicano community came before school officials and requested changes. *See, e.g.*, Alice ISD, BOARD MINUTES, vol. 7, at 74 (1948) (where Fortino Trevino led a delegation to discuss segregation).

[327] Significantly, the comprehensive Coleman Report has documented the achievement of white children to be less affected by characteristics of fellow students than are Blacks, Chicanos or Orientals. U.S. Dep't of Health, Educ. & Welfare, EQUALITY OF EDUCATIONAL OPPORTUNITY 303, 306 (1966).

from their lower scores on standardized intelligence tests.[328] However, most of these tests are culturally and linguistically biased, reflecting ethnicity rather than true ability.[329] It is doubtful whether "intelligence" can ever be meaningfully tested. It is too deeply enmeshed in the web of history and human relations to be isolated numerically with the accuracy needed to shape social policy. Moreover, to the extent Chicano underachievement is due to previous educational deprivation caused by psychological discrimination and inferior schools, segregation simply perpetuates the effect of past discrimination.[330] Finally, the justification fails because the classification of Mexican Americans as underachievers is both underinclusive and overinclusive. It excludes low achieving Anglos, but includes high achieving Chicanos. The underachievement argument therefore fails to meet its "heavy burden of justification."[331]

Language Problem. The justification meriting most serious attention is that Mexican-American children are segregated to learn English better. By not mixing them with English-speaking pupils until they are proficient in English, it is argued, Chicano students can avoid falling behind in other subjects.[332] But courts generally reject segregative classifications even when they promote legitimate governmental purposes, if substitute avenues are available.[333] Here, there are alternative means to accomplish the objective—if, indeed, it is better education—which are at least as feasible and, some educators argue, more beneficial to the learning process.[334]

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[328] *See Hearings Before the Senate Select Committee on Equal Educational Opportunity*, 91st Cong., 2d Sess. 2504 (1970) [hereinafter cited as *1970 Hearings*]. At least one recent study, conducted by Dr. Jane R. Mercer, associate professor of sociology at the University of California in Riverside, concluded that underachievement among white, Black and Chicano children is attributable to non-racial and nonhereditary causes. Boston Globe, Nov. 19, 1971, at 1, col. 2 [hereinafter cited as Mercer study]. It is also misleading to compare the achievement of Mexican-American students with their Anglo peers, because Chicanos have historically been relegated to school buildings where conditions have been less than ideal. *See, e.g.*, Harlingen ISD Board Minutes, vol. 4 (Oct. 25, 1932): "The worst conditions we have are in West Ward. In the beginners there, we have 108 enrolled. We are handling this at present by dividing the room into sections and by keeping one or two sections on the playground at all times."

[329] Mercer Study, *supra* note 328.

[330] United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *cert. denied* 389 U.S. 840 (1967).

[331] *See, e.g.* Loving v. Virginia, 388 U.S. 1, 9 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

[332] *E.g.*, San Benito ISD, BOARD MINUTES, vol. 2, at 71 (Sept. 20, 1915). "It was ordered on account of the widely different methods that must be used in teaching non-English speaking peoples and English-speaking people, that all pupils that do not speak English natively, be required to attend the First Ward until they have been promoted to the Fifth grade. . . ."

[333] *E.g.*, Carrington v. Rash, 380 U.S. 89 (1965).

[334] Educators argue that Chicano students can learn English better if they are mixed

segregating Chicano students, and the resulting classifications must have a rational relation to that purpose.[347] This formula immediately eliminates segregation based on prejudice, because the purpose underlying the classification is itself impermissible.[348]

Similarly, compliance with the wishes of the Mexican community does not legitimize state-imposed ethnic discrimination. Only if the ethnic classification were benign could it arguably be constitutional. Moreover, even if some Mexican parents did favor segregation, establishment of separate Mexican schools was not reasonably related to the purpose of meeting Chicano community preference.[349] There were also parents who did not want a Mexican school, yet their children were assigned to the separate school. Its overinclusiveness renders the classification unconstitutionally discriminatory.[350]

If the purpose of separation is to prevent Chicano students from retarding the progress of Anglo children, an admittedly legitimate purpose, the classification is similarly arbitrary, because of both over- and under-inclusiveness. The classification is underinclusive because some Anglo underachievers also hold back a class's progress. It is overinclusive because it includes Chicano high achievers who do not retard class progress.

Finally, the validity of segregation for purposes of improving English proficiency of Chicanos is also questionable under the permissive standard of review. Although this purpose is legitimate, classifications of Mexican-American students often have no reasonable relation to it. Blanket categorization of Chicanos, without considering the abilities of individuals, is arbitrary. The segregative classification is also irrational when Chicano schools do not have facilities to cope with the "language problem." If school officials assert this purpose without including specific programs to realize their alleged goal, the presumption of legitimate governmental purpose is overcome. As in *Hernandez v. Driscoll Consolidated Independent School District*,[351] a court should find that intentional segregation was not based on pedagogical considerations, but, rather, was "arbitrary and discriminatory."

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[347] *See* Shapiro v. Thompson, 394 U.S. 618, 658 (1969); Morey v. Doud, 354 U.S. 457, 464–465 (1947); *See also Developments-Equal Protection, supra* note 249, at 1077–1087.

[348] Yick Wo v. Hopkins, 118 U.S. 356 (1886) (racial hostility not permissible purpose).

[349] "[C]ourts must reach and determine the question of whether the classifications drawn in a statute are reasonable in light of its purpose." McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

[350] *Developments-Equal Protection, supra* note 249, at 1086.

[351] 2 Race Rel. L. Rep. 329, 333 (S.D. Tex., Jan. 11, 1957).

V. FEDERAL AGENCIES LOOK ELSEWHERE

A. Department of Health, Education, and Welfare

To contend with persisting segregation, Congress enacted Title VI of the Civil Rights Act of 1964,[352] which provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[353] Administrative action[354] was to be the catalyst for change; "[t]he courts acting alone [had] failed."[355] Responsibility for executive enforcement of the 1964 Act rests with the Office for Civil Rights of the Department of Health, Education and Welfare. Its Education division is charged with eliminating discrimination in public schools.[356]

The Office for Civil Rights has been severely criticized for neglect of Chicano integration problems.[357] Prior to the 1967–68 school year, HEW required racial school statistics only for Blacks and whites.[358] Only then was the category "other" added to its statistical forms and defined to include all "significant 'minority groups' in the community" and specifically Mexican Americans.[359] Not until 1968–69 were separate statistics collected for "Spanish Surnamed Americans."[360] It is not

[352] Civil Rights Act of 1964, §§ 601–05, 42 U.S.C. §§ 2000d to 2000d-4. (1970) [hereinafter cited as 1964 Act]. *See generally* Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967).

[353] 1964 Act, § 601, 42 U.S.C. § 2000d (1970).

[354] 1964 Act, § 602, 42 U.S.C. § 2000d-1 (1970): "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title . . . ." *See generally* Comment, *The Courts, HEW and Southern School Desegregation*, 77 YALE L. J. 321 (1967).

[355] United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

[356] 35 FED. REG. 10927 (1970).

[357] *See, e.g.*, Letter from Dr. Hector P. Garcia to Mr. Stanley Pottinger, Nat'l Director, Office for Civil Rights, U.S. Dep't of Health, Educ. & Welfare, in *1970 Hearings, supra* note 328, at 2581.

[358] *1970 Hearings, supra* note 328, at 2552 (statement of C. Vela).

[359] U.S. Dep't of Health, Educ. & Welfare, Fall 1967 Summary of Enrollment and Staff of School System, Form OE 7001: "Other—Should include any racial or national origin group for which separate schools have in the past been maintained or which are recognized as significant 'minority groups' in the community (such as Indian American, Oriental, Eskimo, Mexican-American, Puerto Rican, Latin, Cuban, etc.)"

[360] U.S. Dep't of Health, Educ. & Welfare, Fall 1968 Elementary and Secondary School Survey, Form OS/CR 101. This method is subject to criticism on two grounds: it is inexact,

surprising, then, that HEW found such districts as Pecos, Texas, in compliance with the 1964 Act when they had done no more than transfer Black students to Chicano schools.[361]

HEW's on-site review practices were as negligent and ineffective as its statistical oversight. Even where the Department had initiated its cumbersome administrative process, all too often real enforcement was left to others. There are indications, for example, that HEW reviewed New Braunfels, Texas, for Chicano segregation as early as 1965,[362] an anomaly in its custom of neglect; but the resulting relief was not so anomalous—nothing was done.[363] The Mexican American Legal Defense and Educational Fund (MALDEF)[364] recently filed suit against New Braunfels to compel integration.[365]

In 1968, HEW undertook "Mexican-American studies" of Chicano districts with migrant problems.[366] Pecos was reviewed in August 1968.[367] Significant violations were found in student assignment, facilities, tracking, and faculty assignment. Yet there followed no administrative actions or negotiations toward compliance. Oddly the report made no mention of migrant problems. Alice, Texas, was reviewed on August 21—22, 1968. The review found four of seven elementary schools at least ninety-seven percent Chicano,[368] and a freedom-of-choice scheme in use at the elementary level.[369] School Board minutes sanctioning the

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and it fails to differentiate among different Spanish surnamed groups. Anglo surnamed Chicanos are counted as Anglos and Spanish surnamed Anglos are counted as Chicanos for purposes of integration. Thus, for example, some districts that do not hire Chicanos may nonetheless indicate that they have Spanish surnamed employees. Secondly, in areas such as Chicago which have concentrations of Chicanos and Boricuas (Puerto Ricans), it is impossible to adequately meet the needs of either. At the higher education level, problems of differentiation are even more acute due to greater mobility of students and faculty.

[361] *See* U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Pecos ISD, at 8 (Sept. 1968). *See also*, U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Bishop ISD, at 49 (Jan. 1970).

[362] Letter from Aguinaldo Zamora to the Equal Employment Opportunity Commission, May 3, 1968, on file in Dr. Hector Garcia's office in Corpus Christi, Texas.

[363] Interview with anonymous HEW official.

[364] MALDEF was funded by a $2.2 million Ford Foundation grant in 1968. THE TEXAS OBSERVER, April 11, 1969, at 6, col. 1.

[365] Zamora v. New Braunfels Ind. School Dist., Civ. No. 68—205-SA (W.D. Tex., filed Aug. 28, 1968).

[366] There had been reviews in eight of ten districts originally chosen for "Mexican-American Studies," dealing with migrant problems and not Title VI compliance. Interview with Carlos Vela, former Texas Coordinator for HEW, Office for Civil Rights, in Brownsville, Texas, August 10, 1971.

[367] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Pecos ISD (Sept. 1968).

[368] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Alice ISD, at 2 (Sept. 1968).

[369] *Id.* at 3.

existence of a Mexican school as far back as 1915, and restricting Latin-American children to that school in 1939,[370] were ignored by HEW. Despite the Supreme Court's holding three months earlier that freedom-of-choice plans which do not eliminate segregation are unconstitutional,[371] the reviewers told the Superintendent that the district "appeared to be in compliance with the law."[372] HEW later commended the Board "for the leadership . . . taken in providing a quality education for all students in the Alice Independent School Districts."[373] HEW did request additional efforts to eliminate the identifiability of the four elementary schools. By the 1970–71 school year, all had enrollments at least ninety-seven percent Chicano. Despite additional complaints of segregation in Alice, nothing more has been done.[374]

After the HEW review of Alice, the Commission on Civil Rights held hearings in December, 1968, in San Antonio, and requested "prompt action" to alleviate educational disparities between Anglos and Chicanos in San Antonio and across the Southwest. Low achievement scores, ethnic isolation, and cultural discrimination were among problems highlighted for prompt HEW action.[375]

The Sonora review in February, 1969, demonstrated HEW's ominously slow response.[376] The Sonora district received a letter of noncompliance on May 5, 1969.[377] Following this, as is the general procedure, negotiations began in an attempt to achieve voluntary compliance. However, at a time when the negotiator felt school officials were about to capitulate,[378] HEW suspended negotiations. In spite of

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[370] *E.g.*, Alice ISD, BOARD MINUTES (May 8, 1915). *See also id.* for May 14, 1921, May 2, 1941, and Sept. 17, 1946. In the minutes for August 24, 1939 is a resolution: "Motion was duly made, seconded, and carried that all Latin Americans attend Nayer school through elementary grades and Anglo Saxons attend Hobbs-Strickland School . . . ." The Nayer school was ninety-nine percent Chicano in 1970–71. U.S. Dep't of Health, Educ. & Welfare, 1970 Individual School Campus Report, Form OS/CR 102–1.

[371] Green v. Board of Educ., 391 U.S. 430 (1968).

[372] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Alice ISD, at 6 (Sept. 1968).

[373] Letter from Jerald D. Ward, Chief, Dallas Education Branch, Office of Civil Rights. to Mr. Dewey G. Smith, Superintendent Alice ISD, September 9, 1968.

[374] Letter from Alfredo Arriola, Chairman, Alice G.I. Forum, to Mrs. Dorothy Stuck, Director, Region VII Office for Civil Rights, October 15, 1970.

[375] Letter from Howard A. Glickstein, Acting Staff Director, U.S. Comm'n on Civil Rights, to Robert H. Finch, Secretary of U.S. Dep't of HEW, Feb. 5, 1969, on file with Carlos Vela in Brownsville, Texas.

[376] U.S. Dep't of Health, Educ. & Welfare, On-Site Review of Sonora ISD (Feb. 1969). *See* p. 368 *infra*

[377] Letter from Roberto Gonzalez, Acting Chief Education Branch, Office for Civil Rights, to Ralph J. Finklin, Superintendent Sonora ISD, May 5, 1969.

[378] *1970 Hearings, supra* note 328, at 2253 (statement of C. Vela).

criteria by which performance toward elimination of discrimination against Chicanos would henceforth be judged:

> —Where there are sufficient language problems, school districts must make affirmative efforts to rectify the language deficiency.
> —Assignment to mentally retarded classes and exclusion from college preparatory courses must not be based on criteria which measure English language skills.
> —Tracking to meet the language deficiency should not constitute a permanent track.
> —Adequate notice of school activities should be given to national origin minority group parents in their own language if necessary.

To supplement the Memorandum, HEW proposed a timetable for implementation. Four phases of action were contemplated between spring 1970 and spring 1971.[402] HEW also scheduled reviews of ten more districts across the Southwest.[403]

The May 25 Memorandum is subject to two major criticisms. First, it was not mailed to all Texas districts that should have received it, namely those with Chicano student populations greater than five percent.[404] Second, the Memorandum is a watered-down version of a draft proposed before the resignation of Leon E. Panetta as Director of the Office for Civil Rights. The earlier draft had also included the following compliance standards:[405]

> —Failure to undertake affirmative recruitment and development through in-service programs of teachers, counselors and administrators who possess a sensitivity for and understanding of the cultural background of the minority pupils . . . .
> —Failure to include in the curriculum courses which recognize and illustrate the contributions made to the development of this country by the forbearers of the district's minority pupils . . . .
> —Failure to provide bi-lingual personnel in schools with

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to School Districts With More than Five Percent National Origin-Minority Group Children (May 25, 1970) (at *1970 Hearings, supra* note 328, at 2579—80) [hereinafter cited as May 25 Memorandum].

[402] U.S. Dep't of Health, Educ. & Welfare, Initial Report—Proposed Timetable, from the Task Force on Implementation of National Origin-Minority Group Policy Statement, to J. Stanley Pottinger, Director, Office for Civil Rights, May 28, 1970, on file with Carlos Vela in Brownsville, Texas.

[403] *1970 Hearings, supra* note 328, at 2556 (statement of C. Vela).

[404] *Id.* at 2579. It is reported that this oversight has since been rectified. Interview with anonymous HEW official.

[405] U.S. Dep't of Health, Educ. & Welfare, Memorandum from Leon E. Panetta, Director, Office for Civil Rights, to School District with More Than Five Per cent Spanish Surname or Other Disadvantaged National Origin Minority, (undated draft), on file with Carlos Vela in Brownsville, Texas.

significant Spanish-speaking enrollment and in other district contact positions.

Between May 25, 1970 and April, 1972, the Office for Civil Rights secured compliance plans in line with the May 25 Memorandum from at least fourteen districts.[406] In addition, HEW has reviewed twelve other districts for compliance with the May 25 memorandum but has not yet secured an acceptable plan.[407]

The plan for Beeville is an excellent model of the necessary relief. The HEW study showed that a substantial number of Chicano children in Beeville enter school with English deficiencies.[408] Because tests used to group or track students were based on criteria which measured English language skills, there was great underinclusion of Chicanos in advanced tracks and overinclusion in mentally retarded and lower tracks. As Chicano children progressed in years of attendance their performance on standardized tests actually declined, compared with both their *own prior performance* and that of their Anglo peers.[409] These factors prompted HEW to require bilingual and bicultural education.[410]

These efforts are but a small beginning. On September 25, 1970, HEW was sent a list of twelve cities which had been reviewed and not acted upon. Eighteen months later, HEW had accepted a plan in compliance with its standards from only one of these districts.[411] On October 2, 1970 the Office for Civil Rights was sent a list compiled from an HEW publication[412] of 224 districts with schools ninety to a hundred percent Mexican American which had a minimal number of Chicano

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[406] These districts are: Ozona-Crockett County, Bishop, Lyford, Rotan, Sierra Blanca, Los Fresnos, Lockhart, San Marcos, Beeville, Weslaco, and Carne. Additionally, the list should include the districts of Sonora and Del Rio-San Felipe which are under court order, the latter composed of two consolidated districts.

[407] *Id.* Reviews have been initiated in: El Paso, Karnes City, Uvalde, Fort Stockton, La Feria, South San Antonio, Santa Maria, Victoria, Harlingen, Pawnee, and Taft, Texas, as well as Hobbs, New Mexico.

[408] U.S. Dep't of Health, Educ. & Welfare, Letter of non-compliance from John Bell, Chief, Education Branch, Region VI, Office for Civil Rights to Archie A. Roberts, Superintendent of the Beeville ISD, Feb. 17, 1971.

[409] *Cultural Freedom, supra* note 394, at 9—14.

[410] For a history of the development of techniques to show a need for bilingual-bicultural education, see *id.*

[411] The districts listed were: Pecos, Wilson, Shallowater, El Paso, Wharton, Uvalde, Crystal City, and Beeville, Texas, and Hobbs, Las Cruces, Carlsbad, and Clovis, New Mexico. Letter from Dr. Hector Garcia to Elliot Richardson, Sec'y, U.S. Dep't of Health, Educ. & Welfare, September 25, 1970, on file with Dr. Garcia in Corpus Christi, Texas. Beeville is the only district for which a compliance plan has been accepted.

[412] U.S. Dep't of Health, Educ. & Welfare, Directory of Public and Secondary Schools in Selected Districts, "Enrollment and Staff by Racial/Ethnic Group, Fall, 1968."

teachers.[413] One hundred nine districts with Chicano students employed no Chicano teachers. In at least six districts hiring no Mexican-American teachers, Chicano pupils were more than fifty percent of enrollment.[414] As indicated above, the Department has since reviewed only a small proportion of these districts. HEW's "new era of sensitivity to Chicano problems" is not yet credible.

B. Department of Justice

The Department of Justice first intervened on behalf of Chicanos in Sonora, Texas in early 1970.[415] Although the district capitulated, the Department's intervention was a mixed blessing for the original plaintiffs. The Department submitted a plan, objectionable to the plaintiffs,[416] which was finally agreed upon by the defendant school district and the court.[417]

A desire to sensitize the Justice Department to Chicano problems prompted J. Stanley Pottinger, Director of HEW's Office for Civil Rights, to suggest that Justice Department negotiations for Black desegregation in forty-eight Texas school districts should also seek to desegregate Chicanos. A list of twenty-five of these districts apparently discriminating against Chicanos was sent to the Department.[418] Yet when Justice filed suit against thirteen of these districts in August of 1970,[419] it included allegations of discrimination against Chicanos in only five districts.[420] In a severed suit involving one of the districts, Midland, evidence of a Mexican school operating from 1914 to the present was

[413] Letter from Dr. Hector Garcia, former member, U.S. Comm'n on Civil Rights, to J. Stanley Pottinger, Director, Office for Civil Rights, October 2, 1970, on file with Dr. Garcia in Corpus Christi, Texas.

[414] *Id.* The predominantly Chicano districts hiring no Chicano teachers are listed at note 92 *supra*.

[415] Press Release from MALDEF, May 27, 1970, at 1, on file in MALDEF offices in San Antonio, Texas.

[416] Telegram from Pete Tijerina and Ed Idar, attorneys for plaintiffs, to John F. Conroy, attorney, Education Section, Justice Dep't, Nov. 10, 1970, on file in MALDEF offices in San Antonio, Texas.

[417] Supplemental Order of November 16, 1970, Perez v. Sonora Ind. School Dist., Civil No. 6–224 (N.D. Tex., Nov. 5, 1970).

[418] Letter from J. Stanley Pottinger to Jerris H. Leonard, Assistant Attorney General, (undated), on file with Carlos Vela, in Corpus Christi, Texas (twenty-five of the forty-eight districts were listed as having elements of Chicano discrimination).

[419] United States v. Texas Educ. Agency, Civil No. 3–4076-A (N.D. Tex., filed Aug. 7, 1970)(the six districts obtained separate hearing dates); United States v. Texas Educ. Agency, Civil No. A-70-CA-80 (N.D. Tex., filed Aug. 11, 1970)(the seven districts obtained separate hearing dates).

[420] Lubbock, San Angelo, Austin, Ector County and Midland. Discrimination in hiring of Chicano teachers in the other districts sued was not contested.

revealed, yet the court failed to find *de jure* segregation.[421]

Other actions illustrate the Department's insufficient efforts. It failed to appeal in *United States v. Lubbock Independent School District*, where vestiges of a dual system were left untouched, discriminatory optional zones remained in effect, and Chicano imbalances in a high school and junior high were reduced only from ninety-nine and ninety-eight to sixty-three and eighty-eight percent, respectively.[422] It also failed to appeal a San Angelo Case, in which it alleged segregation of Chicanos[423] but the court's order failed to provide any remedy, even though there was no trial on the merits and, as one government attorney said, the decision "did not significantly change segregation."[424] In a 1970 Odessa case,[425] the Department accepted an agreed order with no provisions for rezoning, busing, or pairing. As a result, four schools that were 99–100% minority in 1969 remained 97–100% minority in 1971–72.[426] Finally, in *United States v. Austin Independent School District*,[427] the Department did appeal a court ruling, contrary to overwhelming evidence, that Chicanos had not suffered *de jure* segregation. But on appeal, the Department disavowed[428] an HEW plan for system-wide dismantling of *de jure* Chicano segregation, adopting the position that not all predominantly Chicano schools were vestiges of *de jure* segregation. One administration critic has charged that the disavowal was politically inspired.[429]

The Justice Department's role as intervenor is even more disturbing than its losing record as plaintiff. In *Cisneros*, the Department was asked

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[421] United States v. Midland Ind. School Dist., 334 F. Supp. 147 (W.D. Tex. 1971), *appeal docketed*, No. 71–3271 (5th Cir., *filed* Nov. 5, 1971). Judge Guinn was reversed by the Fifth Circuit in a similar case. Alvarado v. El Paso Ind. School Dist., 445 F.2d 1011 (5th Cir. 1971). *See also* note 313 *supra*.

[422] 316 F. Supp. 1310 (N.D. Tex. 1970).

[423] Complaint at 4, United States v. Texas Educ. Agency, Civil No. 6–245 (N.D. Tex. Aug. 24, 1970).

[424] Telephone interview with anonymous staff attorney, Civil Rights Division, Justice Department, October 15, 1971.

[425] Order of August 26, 1970, United States v. Ector County Ind. School Dist., Civil No. MO-70-CA-64 (W.D. Tex., Aug. 26, 1970).

[426] Dep't of Health, Educ. & Welfare, Elementary and Secondary School Civil Rights Survey, Odessa ISD: Carver Elem., Hays Elem., Milam Elem., Blackshear Jr. H.S., Forms OS/CR 102–1, Fall 1971. Four other schools with overwhelmingly minority student populations in 1969 remained so. *Id.* (Ector Jr. Sr. H.S., Rusk Elem., Travis Elem., Zavala Elem.).

[427] Civil No. A-70-CA-80 (N.D. Tex., June 28, 1971), *appeal docketed*, No. 71–2508 (5th Cir. Aug. 3, 1971).

[428] Brief for Appellant at 50, United States v. Texas Educ. Agency, No. 71–2508 (5th Cir., filed Aug. 3, 1971).

[429] Brown, *"Busing: Leaving the Driving to U.S. . . ."* INEQUALITY IN EDUCATION, Dec. 1971, at 4–5.

to intervene after partial final judgement that Corpus Christi had imposed a *de jure* segregated system upon Chicanos as well as Blacks.[430] In its brief before the Fifth Circuit, the Department admitted that it intervened "after the basic evidentiary hearings had been entered; we are not in a position to provide a detailed analysis of the facts." Discussing only legal issues, it termed the case "basically a factual inquiry." After questioning the relief ordered by the district court, the Department concluded: "For these reasons we think that an appropriate disposition would be a remand by this Court for further findings and, if necessary, the taking of further evidence regarding discrimination against Mexican-Americans. However under the Supreme Court decision in *Alexander v. Holmes County Board of Education* 396 U.S. 19 (1969), immediate relief should be accorded to the students in the black schools."[431]

This was a startling recommendation for a plaintiff intervenor against the principal plaintiff, Cisneros.[432] Admitting incapacity to evaluate the findings of facts, Justice based its recommendation on conceded ignorance. It is difficult to understand why the government would remand for the district court to review more data only to reaffirm its *de jure* finding. The district court had heard evidence of segregative school construction and improvements, optional zones, free transfer, gerrymandered zoning, and failure to act, all of which have been held sufficient evidence of *de jure* segregation.[433] Both departments charged with enforcing Title VI have failed to make educational civil rights a reality for the Chicano community.

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[430] Cisneros v. Corpus Christi Ind. School Dist., 330 F. Supp. 1377 (S.D. Tex. 1971), *appeal docketed*, No. 71–2397, (5th Cir., filed July 16, 1971).

[431] Brief for United States as intervenor at 13, Cisneros v. Corpus Christi Ind. School Dist., No. 71–2397, (5th Cir., filed July 16, 1971).

[432] Justice Department intervention in opposition to comprehensive integration orders has not been limited to Chicanos. *See* The Washington Post, Feb. 2, 1972, § C, at 1, col. 1 (statements of then Attorney General Mitchell regarding possible intervention into the Richmond, Va., situation, to prevent cross-boundary busing).

[433] Cisneros v. Corpus Christi Ind. School Dist., 324 F. Supp. 599, (S.D. Tex. 1970). *See* Brewer v. School Bd., 397 F.2d 37 (4th Cir. 1968); United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971); Spangler v. Pasadena Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970). Since the government's own plan, that of HEW, provided for busing 15,000 students, including large numbers of Chicano students, the *Cisneros* court's plan hardly seems "extreme" and "an abuse of discretion." It was based on the HEW plan with some modifications to further minimize ethnic isolation. The court used HEW's estimation of the number of students to be bused. *See* 330 F. Supp. at 13.

VI. DILEMMA OF RELIEF

Both means and goals of relief in Chicano school integration suits are complex. A statewide suit against the Texas Education Agency would provide much of the necessary relief; it would not eliminate the need for local suits, although it would facilitate them. Integration may be the goal, but what is to be the scope of the decree? The needs of Chicano pupils for integrated experiences may conflict with their unique needs for bilingual-bicultural education. This section addresses first the strategy of a statewide suit, and second the need for bilingual-bicultural education.[434]

A. Statewide Suit

1. *General Objectives.* By compelling state education officials to exercise their powers to desegregate schools for Chicanos, a statewide suit would conserve time and legal resources which would otherwise be expended on district-by-district suits.[435] In addition, such a suit could facilitate local litigation. It is the best vehicle to secure a determination that Chicanos are an identifiable minority group on whose behalf the

[434] This Comment deals only with those questions of relief having special importance to Chicano desegregation efforts. Thus, no attempt is made to deal with many important problems such as the currently burning issue of busing. Recent writings regarding busing include: *Perspectives on Busing*, INEQUALITY IN EDUCATION, Mar. 1972; Fiss, *The Charlotte-Mecklenburg Case-Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971); Note, *Busing-A Permissable Tool of School Desegregation*, 49 J. URBAN L. 399 (1971); Note, *Swann v. Charlotte-Mecklenburg Board of Education: Roadblocks to the Implementation of Brown*, 12 WIL. AND MARY L. REV. 838 (1971); *See also* 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 488 (1970) (regarding one-way busing: minority to majority). It should, however, be noted that President Nixon's expressed desire to reduce busing has, in Texas, come at the expense of Mexican-American children. For example, in Corpus Christi, where a large percentage of the school population is Chicano, but a relatively small percentage is Black, the Government has opposed broad busing orders as to Chicanos but made no objection as to Blacks. *See* p. 374.

[435] *See* United States v. Texas, 447 F.2d 441 (5th Cir. 1971); Reeves v. Board of Educ., 430 F.2d 1334 (5th Cir. 1970); United States v. Georgia, 445 F.2d 303 (5th Cir. 1971); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.) (three-judge court), *aff'd mem.*, 389 U.S. 215 (1967). If Texas state and local officials proved particularly obstreporous, the statewide suit might eventually have to be dismembered into separate local suits. *See* Lee v. Macon County Bd. of Educ., Civ. No. 604-E (W.D. Ala., June 24, 1970)(three judge court); O. Fiss, INJUNCTIONS II-143 (rev. ed. 1971)(unpublished teaching materials, University of Chicago Law School).

suspect criteria test should be applied.[436] And establishing past[437] and present[438] state involvement in segregation would help local attorneys answer assertions that there has never been a state law permitting the segregation of Chicanos.[439] By creating a persuasive inference of previous *de jure* segregation, a statewide suit would overcome difficulties inherent in the evidentiary use of old school board minutes.[440] Aided by such an inference, local attorneys could establish a contemporary *de jure* segregated system by showing segregationist construction policies,[441] discriminatory busing, option zones and free transfer policies,[442] and gerrymandered zone lines.[443] A caveat to the statewide suit approach is that its utility lies in making law and precedent, rather than in integrating individual districts. It is not necessarily a talisman to district-by-district litigation.

2. *Specific Means.* Chicanos may secure the benefits of a statewide suit either by bringing an original action or by intervening in *United States v. Texas*,[444] in which much of the needed relief has already been

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[436] *See* pp. 348–64 *supra*.

[437] *See* pp. 311–19 *supra*.

[438] *See* pp. 319–33 *supra*.

[439] *See, e.g.*, United States v. Austin Ind. School Dist., Civil No. A-70-CA-80 (W.D. Tex., June 28, 1971).

[440] *See* pp. 356–59 and note 311 *supra*.

[441] United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968), *modified*, 432 F.2d 1147 (7th Cir. 1970), *cert denied*, 402 U.S. 943 (1971) (South Holland, Illinois); Spangler v. Pasadena Bd. of Educ., 311 F. Supp. 501 (C.D. Cal.), *intervention denied*, 427 F.2d 1352 (9th Cir. 1970) (Pasadena); Kelley v. Brown, Civil No. LV-1146 (D. Nev., Dec. 2, 1970)(Las Vegas); Davis v. School Dist., 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 92 S. Ct. 233 (1971) (Pontiac, Michigan); Johnson v. San Francisco Unified School Dist., Civil No. C-70–1331 SAW (N.D. Cal. 1971) (San Francisco); Soria v. Oxnard School Dist. Bd. of Trustees, 328 F. Supp. 155 (C.D. Cal. 1971) (involving Chicanos and Blacks in Oxnard, California); United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971) (Indianapolis); Bradley v. Milliken, Civil No. 35257 (E.D. Mich. 1971) (Detroit); Crawford v. Board of Educ., Civil No. 822854 (Sup. Ct. L.A. Cty., Feb. 11, 1970) (Los Angeles). *See generally* Dimond, *supra* note 25.

[442] *Id.*

[443] *See, e.g.*, Taylor v. Board of Educ., 294 F.2d 36 (2d Cir. 1961). A district may not use zone lines superimposed on residential segregation to accomplish a dual system. Brewer v. School Bd., 397 F.2d 37, 42 (4th Cir. 1968). Residential segregation may be inferred from restrictive covenants and refusal on the basis of race to sell. Dowell v. School Bd., 244 F. Supp. 971, 980 (N.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir. 1967).

[444] 321 F. Supp. 1043 (E.D. Tex. 1970), *modified*, 330 F. Supp. 235 (E.D. Tex.), *aff'd in part*, 447 F.2d 441 (5th Cir.), *stay denied* 92 S. Ct. 8 (1971) (Black, Circuit Justice), *cert. denied*, 40 U.S.L.W. 3313 (U.S. Jan. 11, 1972). Integration problems in Houston, Dallas, and Austin illustrate the fact that isolation of Chicanos and Blacks is so intertwined that any plan ordered for one group has substantial ramifications upon the other. This phenomenon necessitates a common suit whose relief will adequately meet the needs of each, and gravitates against separate suits and uncoordinated remedies.

granted. *Texas* was a Black desegregation suit against the Texas Education Agency and eleven school districts.[445] Nine districts were all Black, while the remaining two white districts were contiguous gerrymandered districts.[446] The district court granted broad relief against the TEA because of its failure to safeguard minority rights across the state. It also gave specific relief to the nine Black districts.[447] The Fifth Circuit affirmed with limited modifications.[448] The district court then entered a modified order, at least as broad as the original,[449] and retained jurisdiction over the matter for all purposes.[450]

[445] 321 F. Supp. at 1045–46.

[446] *Id.* at 1049.

[447] *Id.* at 1045–46, 1060–62.

[448] United States v. Texas, 447 F.2d 441 (5th Cir. 1971).

[449] Order of July 13, 1971, United States v. Texas, Civil No. 5281 (E.D. Tex. 1971).

[450] *Id.* The relief approved in *Texas* limited student transfers, changes in school district boundaries, school transportation, extra-curricular activities, faculty and staff, student assignment, curriculum and comprehensive education. 447 F.2d at 441–42. The modified order enjoined TEA from either accrediting or giving state funds to districts discriminating in any of these areas on the basis of "race, color, or national origin." Order of July 13, 1971, in United States v. Texas, Civil No. 5281 (E.D. Tex. 1971). It prohibits TEA from permitting, arranging or supporting transfers whose effect "will be to reduce or impede desegregation," and requires TEA to review all transfers, to notify districts of those found unlawful, and to deprive recalcitrant transferee districts of state funds. This is a significant threat in Texas because a substantial part of a school district's funds come from state sources.

TEA was further barred from permitting either extracurricular activities which result in segregation or discriminatory hiring, assigning, or treatment of faculty and staff "who work directly with children." Penalties for violations include loss of accreditation, state funds for salaries, and operating expenses, at the rate of ten percent for each semester the violations continue.

Most importantly, TEA is enjoined from supporting school and classroom segregation. As in other sections, the court provided extensive review provisions. All districts maintaining schools whose student enrollment is sixty-six percent or greater minority must be reviewed by TEA, which shall evaluate the school's compliance with Title VI of the Civil Rights Act. Additionally, TEA is required to review all districts of fewer than 250 students which are sixty-six percent or more minority and show cause why they should not be consolidated to eliminate their "existence as a racially or ethnically separate educational unit." TEA must file a report with the court each October 1, submitting findings and describing steps taken to eliminate identifiable minority schools. This automatic review requirement should significantly transform the state's role from investigator to initiator of complaints. Once a district is under review, the state must check for other violations. All complaints must be investigated.

Judge Justice ordered balanced curriculums including: "[S]pecific educational programs designed to compensate minority group children for unequal educational opportunities resulting from past or present racial *and ethnic isolation as well as programs and curriculum designed to meet the special educational needs of students whose primary language is other than English.*" Order of July 13, 1971, at 14, in United States v. Texas, Civil No. 5281 (E.D. Tex. 1971)(emphasis added). In ordering some form of bilingual-

Because the broad language of the *Texas* order covers segregation by "race, color or national origin,"[451] it bars the Texas Education Agency from complicity in local segregation of Chicanos. The order has already been applied to uphold TEA's refusal to approve inter-district transfers which segregate Chicanos.[452] However, there remains some question as to the decree's *res judicata* effect with regard to Chicanos, which determines whether it can be collaterally attacked. Close analysis indicates that it cannot be,[453] but, in any event, Chicano plaintiffs should intervene to insure enforcement and extend relief. They might move to clarify the

bicultural education as an element of equal educational opportunity, Judge Justice required TEA to develop sanctions for school districts that fail to participate in compensatory programs.

[451] 321 F. Supp. at 1060.

[452] Order of Aug. 13, 1971, Intervention of Del Rio Ind. Sch. Dist. in United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970).

[453] Apparently the complaint and all evidence in the trial proper referred only to Blacks, although there were a few Chicanos in some affected districts. Telephone interview with David Vanderhoof, attorney for the Civil Rights Division of the Justice Department in United States v. Texas, Washington, D.C., Mar. 24, 1972. Generally a judgment may be attacked in any court on the ground that it is void because entered by a court lacking jurisdiction over the subject matter. F. James, Jr., CIVIL PROCEDURE 534–35 (1965) [hereinafter cited as *James*]. The general rule is, however, subject to many qualifications and exceptions. *Id.* at 535. Fed. R. Civ. P. 60(b) provides that a motion to vacate a judgment as void must be "made within a reasonable time." However, where a judgment is void, this "must generally mean no time limit." 7 Moore, FEDERAL PRACTICE ¶ 60.25[4] (2d ed. 1955). *See also* Lichter v. Scher, 4 Ill. App. 2d 37, 123 N.E.2d 161 (1954); Langer v. Wiehl, 207 Misc. 826, 140 N.Y.S.2d 298 (Sup. Ct. 1955). In default cases, jurisdiction has been found lacking when the court has decided an issue which the parties did not put to it by pleadings or in any other way. *James* at 537. *See, e.g.*, Looper v. Looper, 34 Cal. Rptr. 912, 222 Cal. App. 2d 247 (1963). Professor James says at one point that this is because of an absence of jurisdiction over the subject matter, *James* at 537, but at another that, even if there is subject matter jurisdiction, the court lacks jurisdiction to enter judgment in the described situation. *Id.* at 614. While the Restatement of Judgments limits the rule to default cases, § 8, Comment c, Professor James argues that it should not be so limited, *James* at 614. The Restatement's position appears to be the sounder because, in non-default cases, the losing party still has the opportunity to directly appeal the point. Where, as here, the losing party fails to appeal, the need to conserve judicial resources indicates that he should be barred from making a collateral attack.

Even if a court were to apply the rule in question to non-default cases it should not apply to the *Texas* litigation. While in the trial proper no evidence regarding Chicanos was submitted, at the hearing on desegregation plans the basis for upholding the District Court's decree was laid. TEA Commissioner Edgar was asked, on the stand, whether he would apply the court's order equally to Chicanos as well as to Blacks, and he replied that the TEA would accept similar responsibilities toward them. Vanderhoof interview *supra*. This statement will support the applicability of Judge Justice's decree to Chicanos, because it must be interpreted either as a consent to the decree or as an admission that Chicanos are officially segregated just as Blacks, so that there is evidence of Chicano segregation which supports the judgment. *See generally Developments in the Law-Res Judicata*, 65 HARV. L. REV. 818 (1952).

judgment[454] and move for supplemental relief.[455] Chicano intervenors could then present further evidence of past and present segregation,[456] as well as the great need for additional bilingual-bicultural education.[457] When granted party status, Mexican Americans could initiate proceedings to enforce existing requirements of the decree upon TEA, rather than having to rely upon TEA self-enforcement or enforcement by the present plaintiff, the United States.[458]

Mexican Americans may apply for intervention either of right[459] or permissively.[460] In neither case would there be a problem of jurisdiction over the person of intervenors,[461] nor over any new defendant Texas school districts joined as defendants.[462] Neither would there be any prob-

[454] *See, e.g.*, Public Utilities Comm'n v. Gallop, 143 Me. 290, 299–300, 62 A.2d 166, 171 (1948).

[455] *See, e.g.*, United States v. Lynd, 349 F.2d 790 (5th Cir. 1965).

[456] *See* pp. 311–33 *supra*.

[457] Just as any district with an identifiable minority school must be investigated, *see* note 450 *supra*, a similar triggering mechanism should be provided for bilingual education. For example, the court might order a review of compensatory programs in any district with twenty or more children in need of bilingual education. *See generally* Massachusetts Bilingual Education Act, Advance Sheets Acts and Resolves of the General Court, ch. 1005, at 943 (1971), (requiring bilingual education in any district where 20 or more children are in need of such services). *See generally* pp. 384–91 *infra*.

[458] Enforcement could be sought by further motions for clarification or supplemental relief, or, in an extreme case, by a petition for contempt. *See, e.g.*, Williams v. Iberville Parish Sch. Bd., 273 F. Supp. 542 (E.D. La. 1967). Although civil contempt proceedings are usually commenced by a party to the suit, *see, e.g.*, Secor v. Singleton, 35 F. 376 (C.C. Mo. 1888), such an action could be brought by Chicanos even if they were not allowed to intervene, because civil contempt proceedings may be brought by a stranger to the action. The test to be applied is, first, whether the moving party has some right under the court order that is being violated. Annot., 61 A.L.R.2d 1086 (1958); *cf.* Middleton v. Tozer, 259 S.W.2d 80 (Ct. of App. Mo. 1953). Clearly Chicanos would have a legal right in the *Texas* order which forbids discrimination by TEA on the basis of "race, color, or national origin." The second prerequisite is that the movant has sustained an injury due to the alleged contemnor's violation of the order. Annot., 61 A.L.R.2d 1088 (1958); *cf.* Terminal R.R. Ass'n v. United States, 266 U.S. 17 (1924). The latter test is an easily surmountable hurdle for Chicano plaintiffs in Texas. And although the court could not itself initiate civil contempt proceedings, MacNeil v. United States, 236 F.2d 149 (1st Cir.), *cert. denied*, 352 U.S. 912 (1956), it could of its own accord initiate criminal contempt proceedings to vindicate its authority. *Id. See generally Developments in the Law-Multiparty Litigation in the Federal Courts*, 7 HARV. L. REV. 874 (1958) [hereinafter cited as *Developments-Multiparty Litigation*].

[459] Fed. R. Civ. P. 24(a). *See also Developments-Multiparty Litigation* at 898–903.

[460] Fed. R. Civ. P. 24(b); Atkins v. Board of Educ., 418 F.2d 874, 876 (4th Cir. 1969) ("Intervention in suits concerning public schools has been freely allowed."). *See also Developments-Multiparty Litigation* at 903–04.

[461] 6 FEDERAL PRACTICE MANUAL § 7369 (M. Volz ed., 2d ed. 1970). *See generally Developments-Multiparty Litigation, supra* note 358, at 905–06.

[462] 4 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1075

lem of service of process upon defendants within the territorial limits of Texas.[463] The individual school districts would not be indispensable parties, and thus inability to join them would not bar Chicano intervention.[464]

If intervention is of right, interveners need not satisfy independent requirements of venue;[465] and the intervention should be held timely.[466] But if the court were to allow only permissive intervention, Chicano plaintiffs might face problems both of venue[467] and timeliness.[468] Nonetheless, since exceptions to the venue requirement for intervenors are a matter of reasoned policy rather than binding rule,[469] and timeliness is a matter within the discretion of the court, neither hurdle should bar permissive intervention. The special judicial solicitude for school desegregation cases extends protection from ordinary procedural technicalities whenever possible.[470] Moreover, Chicano intervention in *Texas* meets the criteria for timeliness recently set out by the Fifth Circuit in *Diaz v. Southern Drilling Co.*.[471]

(1969). *See* Aftanase v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965); *cf.* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442–43 (1946). Permissive joinder could be sought under Fed. R. Civ. P. 20. It would entail no problems of jurisdiction over the persons of, or service upon, joined districts. *See* pp. 379-80 *supra.* However, if intervention were only permissive, venue might impede joinder unless there is a school district within the Marshall Division of the Eastern District of Texas, where *United States v. Texas* was litigated, that is segregating Chicanos. 28 U.S.C. §§ 1393(b). Even if no districts were joined, the suit might proceed against TEA because the threat of a cut-off of state funds is a very potent weapon in Texas. *See generally Developments-Multiparty Litigation, supra* note 358, at 879–97.

[463] Fed. R. Civ. P. 4(f).

[464] Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 479 (M.D. Ala. 1967)(local school districts held not indispensible where a statewide integration plan is sought).

[465] 3 B. Moore, FEDERAL PRACTICE ¶ 24.19 (2d ed. 1969) [hereinafter cited as *Moore*]; *cf.* International Ass'n of Machinists v. Smiley, 76 F. Supp. 800 (D. Pa. 1968).

[466] 3B *Moore* ¶ 24.13(1).

[467] *Id.*; 28 U.S.C. §§ 1391–93 (1970).

[468] *See* Fed. R. Civ. P. 24; 3B *Moore* ¶24.13(1). *See generally Developments-Multiparty Litigation, supra* note 358, at 904–05.

[469] 3B *Moore* ¶ 24.19.

[470] *Cf.* United States v. Georgia, 428 F.2d 377, 378 n.1 (5th Cir. 1970).

[471] 427 F.2d 1118, 1125–26 (5th Cir. 1970). Chicano intervention would meet the two tests of timeliness. The length of time the intervener has known about his interest in the suit without intervening should not bar Chicano intervenors because they have only recently elicited the extensive factual evidence and sophisticated legal understanding needed to realize and act upon their interest in *United States v. Texas.* More important, considerations of delay and concomitant harm to parties caused by intervention, *Id.* at 1126, should not bar intervenors who, like Chicanos, seek no delay in existing relief or litigation, but merely attempt to extend the scope of that relief. *See* Pate v. Dade County School Bd., 303 F. Supp. 1068 (S.D. Fla. 1969) (intervenors allowed to re-open school desegregation suit nine years after original court decree); United States v. Jefferson County

Even so, Chicano litigators should argue for intervention of right under which venue, timeliness and joinder problems are more easily overcome. Intervention of right requires an interest in the transaction involved in the suit, which may as a practical matter be impaired or impeded by denial of intervention, and which is not adequately represented by existing parties.[472] Chicano interest in the statewide school desegregation order is pronounced.[473] Without additional evidence regarding Chicanos, the decree may arguably be collaterally attacked. Further, their interest in bilingual-bicultural programs to provide equal educational opportunity[474] is impaired by the present inadequate relief. Although there are numerous school desegregation cases denying intervention of right, nearly all involve white or other parents seeking to intervene as defendants opposing integration, and nearly all deny intervention of right not on the ground of insufficient interest or impairment, but on the ground that existing party school boards adequately represent their interest.[475] Chicano intervenors in the instant case could hardly be considered to have received adequate representation by present plaintiff,

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Bd. of Educ., 372 F.2d 836, 896 (5th Cir. 1966) (intervention timely after school board submitted plan in compliance with court decree); *cf.* Robinson v. Shelby County Bd. of Ed., 330 F. Supp. 837 (W.D. Tenn. 1971)(dicta)(intervention would have been timely after two district court, and one appellate court, decisions); Atkins v. Board of Educ., 418 F.2d 874 (4th Cir. 1969) (intervention timely where delay due to lack of funds). *But see* United States v. Carroll County Bd. of Educ., 427 F.2d 141 (5th Cir. 1970)(intervention, five years after suit filed and five months after desegregation plan ordered into effect, held untimely).

[472] Fed. R. Civ. P. 24(a).

[473] This interest is even more pronounced than that of the national teachers organization which sought to intervene in *Bennett v. Madison County Bd. of Educ.*, 437 F.2d 554 (5th Cir. 1970). There, Judge Wisdom, in dissent, observed that the possibility of the *Bennett* suit affecting via *stare decisis* a second, later suit, was a sufficient interest to require intervention of right. *Id.* at 556, *citing*, Atlantis Development Corp. v. United States, 379 F.2d 818 (5th Cir. 1968). He continued: "[A] second separate suit . . . would be unsound for the court and the parties. The court should handle school cases as units. . . . The types of discrimination which a school board must abjure and undo are inherently interrelated. . . . The fundamental policy of Rule 24 to encourage simultaneous adjudication of related claims, is the same policy that underlies the practice of considering together all school desegregation issues." 437 F.2d at 556 (Wisdom, J., dissenting), *citing* Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969). *See* note 444 *supra*.

[474] *See* notes 450 & 457 *supra* and pp. 384–91 *infra*.

[475] *See, e.g.*, Hatton v. County Sch. Bd., 422 F.2d 457 (6th Cir. 1970); Hobson v. Hansen, 44 F.R.D. 18 (D.D.C. 1968). For these same reasons the Houston court's denial of intervention to Chicano plaintiffs, Tasby v. Estes, Civil No. 10444, at 5–10 (S.D. Tex., May 24, 1971), appears to be clearly wrong, especially in its reliance on previous cases of attempts by white parents to intervene and intervention attempts of the National Education Association, *see* note 473 *supra*. The court's reasoning that the intervention would not be timely, Tasby v. Estes, Civil No. 10444, at 10 (S.D. Tex., May 24, 1971), is just as erroneous. *See* p. 380 and note 471 *supra*.

the United States, which presented no evidence of need to protect Chicano interests. Government representation of Chicano interests has historically been less than adequate.[476] In the unlikely event that intervention was held to be only permissive and venue to bar intervention, proper disposition of the application would be to dismiss without prejudice to Chicanos' right to bring independent suit in another district against TEA and school districts, or simply to transfer intervenor's case to the district and division of proper venue.[477]

Either intervention or a separate statewide suit against TEA might force it to fill the administrative review gap left by HEW's insensitivity to Chicano educational problems.[478] Since court orders frequently request aid from HEW and Title IV personnel,[479] the suit might also bring HEW's active assistance. Sanctions provided in *United States v. Texas*, depriving non-complying districts of state funds and accreditation, are considerable. Once applied to Chicanos, future litigation would focus on the applicability of the order to particular districts. If these sanctions were energetically applied by TEA, only the most obdurate districts would have to be brought to court. Such an allocation of enforcement responsibility is just and efficient. Since TEA has considerably more manpower than private litigants, the burden of dismantling the vestiges of dual systems rightly falls on its shoulders. It must take care that state funds and policies do not perpetuate a dual educational system.[480]

The major flaw in the strategy is the doubtfulness that TEA will vigorously investigate charges of discrimination.[481] TEA's present director took office in the midst of a similar suit twenty-two years ago.[482] The propensities of TEA were demonstrated by its 1953 *Hondo*[483] and

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[476] *See* pp. 372–74.

[477] 28 U.S.C. § 1406(a) (1970).

[478] *See* pp. 365–72 *supra*.

[479] *See, e.g.*, Order of July 13, 1971, United States v. Texas, Civil No. 5281 (E.D. Tex., July 16, 1971) (ordering cooperation between TEA and Title IV personnel of the Office of Education); *cf.* Whittenberg v. Greenville County School Dist., 298 F. Supp. 784 (D.S.C. 1969) (3 judge court).

[480] *See* pp. 329–30 *supra* for a list of districts ordered by TEA to cease accepting transfers that impede integration of Chicanos and Anglos. The Chicano Community had been attempting to stop the transfers in Del Rio for several years. The TEA threat of a loss of accreditation for Del Rio schools precipitated a suit which resulted in substantial integration. *See* note 125 *supra*.

[481] One of the Government attorneys in the *Texas* case, however, reports that although he is no longer personally working on the case, he has been told that TEA is enforcing the judgment as to Chicanos. *See* Vanderhoof interview, note 453 *supra*. The Del Rio School District's intervention into the *Texas* case, *see* note 452 *supra*, came after TEA ordered the district to comply with the *Texas* order regarding Chicanos.

[482] *See* pp. 336–39 *supra*.

[483] Orta v. Hondo Ind. School Dist. was a decision of the State Commissioner of Education, J.W. Edgar, Sept., 1953, on file in Dr. Hector Garcia's office in Corpus Christi,

Pecos[484] decisions. If HEW has lagged, can one expect TEA to do better? There exists a partial check on the possibility of a recalcitrant TEA supervising recalcitrant districts. TEA has less lawful discretion than HEW[485] to ignore supervision of Chicano integration because it disperses state funds and grants state accreditation, and because its directors might be held in contempt of court for failure to supervise desegregation.[486] But the sobering influence of contempt charges, while deterring procrastination, could dictate neither eagerness nor favorable decisions. Each adverse ruling would then have to be relitigated in the context of judicial review. This difficulty, however, would not arise as to any local districts joined as defendants in the Chicano statewide suit.[487]

Chicano plaintiffs would not be barred by an adverse administrative judgment from bringing a separate action in federal court. A state administrative action would pit state authorities against local school boards so that plaintiffs' class would not be adequately represented. In any event, the administrative process is not the exclusive remedy.[488] Plaintiffs seeking relief from an adverse TEA judgment would still have the benefit of inferences arising from the wider suit.

A successful statewide suit via intervention or separate action would facilitate local suits. It would destroy "other white" and "no state law" defenses because they are premised on official noninvolvement. While providing for TEA enforcement, it would not limit a plaintiff's right to bring separate suit in federal court.[489] On the contrary, plaintiff's position would be enhanced by persuasive inferences established by the statewide suit, as well as the protection of suspect criteria review.[490]

Texas. The decision did little to alleviate discrimination. *See* pp. 339–40 *supra*.

[484] Barraza v. Pecos Ind. School Dist., decided by J.W. Edgar, Commissioner of Education, Nov. 25, 1953, on file in the offices of Albert Armendariz, Sr., in El Paso, Texas. Commissioner Edgar found no intent to segregate. *See* pp. 340–42 *supra*.

[485] Because it is a federal agency, HEW is afforded a great deal more administrative discretion than is TEA. TEA actions constitute state action in furtherance of a previous state policy of segregating Chicanos.

[486] Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967)(3 judge court), *aff'd sub nom.*, Wallace v. United States, 389 U.S. 215 (1967)(responsibility for insuring Title VI compliance placed on a state agency); *cf.* United States v. Georgia, 445 F.2d 303 (5th Cir. 1971).

[487] *See* note 462 *supra*.

[488] *See* Order of July 13, 1971, United States v. Texas, Civil No. 5281 (E.D. Tex. 1971).

[489] The order in *United States v. Texas* clearly stated that the decision would not foreclose relief otherwise available to plaintiffs. Order of July 13, 1971, Civil No. 5281 (E.D. Tex. 1971) (*passim*).

[490] If the statewide suit were to fail, it should have no worse effect than to leave the *status quo* untouched. Attorneys would be forced to continue on a district by district basis, unaided by TEA or inferences to be won from a statewide suit, and demonstrate that current segregation in each district is the vestige of a dual system.

B. Bilingual-Bicultural Education

Chicanos have historically denounced segregated schools in Texas for not providing them educational opportunities afforded Anglos. On finding *de jure* segregation of Mexican Americans, courts have recently ordered dismantling of dual and establishment of unitary systems.[491] Implicit in these orders is the assumption that integration furnishes Chicanos with equal educational opportunity. Integration without accompanying compensatory programs, however, does not provide equal opportunities because Chicanos have special educational needs impairing their ability to succeed in the English-language environment of public schools.[492] Since ability to learn is directly related to knowledge of English, the state is obliged to assure that all students have an equal opportunity to acquire this vital tool.

The Department of Health, Education and Welfare recognized the special needs of non-English speaking children in its landmark memorandum of May 25, 1970, specifically requiring that: "[w]here inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."[493]

Courts have also focused on particular needs of students with different backgrounds. For example, in *United States v. Jefferson County Board of Education*,[494] the Fifth Circuit ordered remedial education

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[491] *E.g.*, Cisneros v. Corpus Christi Ind. School Dist., 324 F. Supp. 599 (S.D. Tex. 1970), *appeal docketed*, No. 71—2397 (5th Cir., filed July 16, 1971).

[492] *See generally* V. John & V. Horner, EARLY CHILDHOOD BILINGUAL EDUCATION xxii, xxv (1971) [hereinafter cited as EARLY CHILDHOOD BILINGUAL EDUCATION]; U.S. Comm'n on Civil Rights, CIVIL RIGHTS DIGEST 13 (Dec. 1971); *Hearings on S. 428 Before the Special Subcomm. on Bilingual Educ. of the Senate Comm. on Labor and Pub. Welfare*, 90th Cong., 1st Sess. (1967). Consequences of neglecting these special needs were dramatically stated in a study by the National Education Association: "The harm done the [non-English-speaking] child linguistically is paralleled—perhaps even exceeded—by the harm done to him as a person. In telling him that he may not speak his native language, we are saying to him by implication that his language and culture which it represents are of no worth. Therefore [it follows] the people who speak [his language] are of no worth. It would come as no surprise to us, then, that he develops a negative self-concept—an inferiority complex. If he is no good, how can he succeed? And, if he can't succeed, why try?" Nat'l Educ. Ass'n, THE INVISIBLE MINORITY (1966), reprinted in *Hearings on H.R. 9840 and H.R. 10224 Before the Gen. Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 90th Cong., 1st Sess., 182 (1967).

[493] 35 Fed. Reg. 11595 (1970).

[494] 380 F.2d 385, 394 (5th Cir. 1967).

programs to help students who had attended segregated schools overcome inadequacies of their earlier educational environment. Similarly, *Hobson v. Hansen*[495] ordered implementation of a plan of "compensatory education sufficient to at least overcome the detriment of segregation, and thus provide, as nearly as possible, equal educational opportunity to all school children."

On the other hand, a federal district court recently decided that a school district had no obligation to provide compensatory language instruction (bilingual education) to non-English speaking Chinese students.[496] The opinion argued that:

> Chinese-speaking students—by receiving the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District—are legally receiving all their rights to an education and to equal educational opportunities. Their special needs, however acute, do not accord them special rights above those granted other students.[497]

The court recognized the need of Chinese children "to have special instruction in Chinese." But it concluded that this special need was not legally cognizable because it involved special privileges and not equal educational opportunity.

Seemingly neutral state action, however, can contravene the fourteenth amendment.[498] Under strict review courts have held that identical treatment of persons not similarly situated can violate the equal protection clause.[499] In a school utilizing the English language as the medium

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[495] 269 F. Supp. 401, 515 (D.D.C. 1967), *aff'd*, 408 F.2d 175 (D.C. Cir. 1969).

[496] Lau v. Nichols, Civil No. C-70 627 LHB (N.D. Cal., May 26, 1970). *But see* United States v. Texas, Civil No. 5281, at 14 (E.D. Tex., July 13, 1971) (requiring specific educational programs and curriculum designed to meet the special educational needs of students whose primary language is other than English). One factor leading to the California suit was fear in the Chinese community, which is achieving for the first time a significant voice in its schools, that it will be included in a black-white desegregation plan being submitted in Johnson v. San Francisco Unified School Dist., Civil No. C-70–1331 SAW (N.D. Cal. 1971), and that such inclusion will reduce existing bilingual-bicultural programs. Exelrod, *Chicano Education: In Swann's Way?*, INEQUALITY IN EDUCATION, Aug. 3, 1971, at 28.

[497] Lau v. Nichols, Civil No. C-70 627 LHB, at 3 (N.D. Cal., May 26, 1970).

[498] *See, e.g.*, Franklin v. Parker, 223 F. Supp. 724 (M.D. Ala. 1963), *opinion adopted and order aff'd as modified*, 331 F.2d 841 (5th Cir. 1964) (graduation from accredited college as prerequisite to admission to state graduate school where state maintained accredited colleges for Whites only); Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962) (alumni sponsorship as prerequisite to admission to university where Blacks had previously been excluded from attending).

[499] *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v.

of instruction, a child who cannot comprehend English is not in the same situation as one who can. Thus, strong arguments can be made that bilingual programs for Chicanos are not only permitted but required by the equal protection clause. Under an output standard of equality of education, bilingual programs provide Chicanos merely equal, not extra, education.[500] Similarly, if one measures equality of educational input by effective teaching resources rather than by dollars per pupil, bilingual programs provide Chicanos equal, not extra, educational resources.[501] Even an input standard does not necessarily foreclose the provision of greater educational resources to minority groups. Where, as in Texas, there is previous history of a dual school system, compensatory educational programs are constitutionally required to undo effects of past inferior education.[502]

Most educators contend that the special needs of Mexican-American students can be met through bilingual-bicultural programs.[503] Bilingual education, as envisioned in the federal Bilingual Education Act,[504] is "the

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California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[500] *See Evolution-Equal Protection, supra* note 290, at 174–77.

[501] *See* J. Silard & S. White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause*, 1970 WIS. L. REV. 7. *See also Evolution-Equal Protection, supra* note 290, at 174–80.

[502] *See* notes 494, 495, *supra*. At the very least, such programs when instituted by the state should be upheld as benign racial or ethnic classifications. *Evolution-Equal Protection, supra* note 290, at 180–84. Strict review of such non-stigmatizing, non-injurious racial programs are reasonable classifications constitutional under "rational basis" review. Even under strict review, bilingual programs may be upheld as necessary to attain the "compelling" state interest in education of Chicanos. *See also* Note, *Beyond The Law-To Equal Educational Opportunities For Chicanos and Indians*, 1 N. MEX. L. REV. 336, 345 (1971)("culture conscious programs and policies are not only constitutional, they may be constitutionally required").

[503] *See, e.g.*, A. Gaarder, *Teaching the Bilingual Child: Research, Development, and Policy* in EDUCATING THE MEXICAN AMERICAN 257 (H. Johnson & W. Hernandez, eds. 1971); Former U.S. Commissioner of Education Harold Howe stated that: "Bilingual education projects . . . show great promise in meeting the special needs of non-English-speaking children. These projects which use both English and the children's mother tongue to teach the entire curriculum, have been the subject of considerable research and experimentation in the United States, Puerto Rico, Canada, Mexico, and South America. It is generally agreed that bilingual projects tend to eliminate the handicap suffered by children whose native language is not the language of the school. Some of these experiments show that children in bilingual programs do better even than those taught in their mother tongue." Hawkins, *An Analysis of the Need for Bilingual Education*, in EDUCATING THE MEXICAN-AMERICAN 279 (H. Johnson & W. Hernandez eds. 1971) [hereinafter cited as HAWKINS].

[504] Bilingual Education Act, 20 U.S.C. § 880 (b)(1968). Under the Act, the Federal Government supplies funds for a limited number of pilot programs. Appropriations have been insufficient to meet the needs of Spanish-speaking children. Although about half of Mexican-American first graders do not speak English, only a small percentage are enrolled

use of two languages, one of which is English, as mediums of instruction,"[505] with a bicultural curriculum including "history and cultural heritage which reflect the value systems of speakers of both languages."[506] In the past, schools have often been more interested in assimilating the non-English speaking child than in educating him.[507] The bilingual approach views the child's native language as an asset to be developed. It nurtures a positive self-image in Spanish-speaking children, increasing their ability to achieve. Such compensatory programs are necessary if schools are to provide Chicanos the same opportunities presently afforded Anglos.[508]

Given the necessity of bilingual-bicultural programs, problems of implementation remain. School districts with significant numbers of migrant children, who are normally in the area for less than the entire school year, will encounter structural problems in devising a bilingual program.[509] Yet, such a program is, in general terms, required in plans financed under the Bilingual Education Act.[510] And the Texas Project for Education of Migrant Children has shown that administrative problems are not insuperable.[511] In that project, special curricula, including extended class hours, have been developed. Districts could include similar provisions in a bilingual program. Circumstances differ from district to district, and plans should reflect this diversity. But "[w]hatever plan is followed should be one that judges each . . . [child] on his individual merits by the same criteria and with the resultant same treatment as applied to the rest of the children of his age, grade, educational status,

in any type of bilingual education program. U.S. Comm'n on Civil Rights, CIVIL RIGHTS DIGEST 13 (Dec. 1971). Massachusetts has also enacted a statute requiring bilingual programs in all school districts having twenty or more non-English-speaking children. Massachusetts Bilingual Education Act, Advance Sheets Acts and Resolves of the General Court, ch. 1005, at 943 (1971).

[505] U.S. Dep't of Health, Educ. & Welfare, PROGRAMS UNDER BILINGUAL EDUCATION ACT 1, 3 (1971).

[506] *Id.* at 3.

[507] *See* Bernal, *I Am A Mexican-American* in A DOCUMENTARY HISTORY OF THE MEXICAN AMERICANS 367 (W. Moquin, C. Van Doren, F. Rivera, eds. 1971).

[508] Senator George Murphy, one of the co-sponsors of the federal Bilingual Education Act, stated that bilingual instruction "provides a solution to the educational problems of [non-English] speaking children who in fact do not have an equal opportunity, an equal chance because of their inability to speak English." 115 CONG. REC. 37, 830 (1969).

[509] Realities of the migrant's work require his children to enter school in late fall and leave in early spring. *See* p. 363 *supra*.

[510] U.S. Dep't of Health, Educ. & Welfare, PROGRAMS UNDER BILINGUAL EDUCATION ACT 9 (1971).

[511] The Texas Project for Education of Migrant Children administered by the Texas Education Agency is a special program for some 21,000 children of migrant agricultural workers in some 41 school districts in Texas. U.S. Dep't of Health, Educ. & Welfare, REPORT OF REVIEW-TEXAS PROJECT FOR MIGRANT EDUCATION 4 (1968).

or date of enrollment. . . . Therefore, even though these late entrants do present unusual difficulties to school authorities, they cannot be segregated or offered an education that is not substantially that offered other children."[512]

A bilingual program will be, at least initially, more expensive than present programs. But denial of equal educational opportunities resulting from failure to implement such programs must be balanced against any justifications offered. The state interest must be compelling, not only because a "fundamental interest"—education[513]—is involved, but because the discrimination is based on national origin, which makes the suspect criteria test applicable.[514] The argument that a state can deny equal educational opportunities to conserve public monies is unpersuasive. Although a state has a legitimate interest in limiting its expenses, it "may not accomplish such a purpose by invidious discrimination between classes of citizens."[515]

The most difficult question in devising a truly bilingual-bicultural program is the extent to which Anglo children are to participate. It is questionable whether a court can constitutionally require Anglo students to attend bilingual classes, even though courts have determined that Anglo children must attend integrated schools conducted in English. The burden imposed on Anglo students attending classes partially conducted in Spanish is much greater. There may also be Chicano parents who do not want their children to attend bilingual classes. Consequently, a workable bilingual program should include an element of free choice for both Anglos and Chicanos.[516]

Courts could avoid most administrative burdens by foregoing integration and ordering implementation of bilingual-bicultural programs only at predominantly Mexican-American schools. This position is espoused by some members of the Chicano community who wish to maintain control over their *barrio* schools.[517] Furthermore, some edu-

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[512] Sanchez, *supra* note 31, at 17. *See also* Cal. State Dept. of Educ., *The Educational Needs of Migrant Children*, in EDUCATING THE MEXICAN AMERICAN 333 (H. Johnson & W. Hernandez, eds. 1971).

[513] *See Evolution-Equal Protection, supra* note 290, at 115–130.

[514] *See* pp. 348–59 *supra*.

[515] Shapiro v. Thompson, 394 U.S. 618, 633 (1969); *cf.* Hosier v. Evans, Civil No. 322–1969 (D.V.I. June 20, 1970) (state cannot deny education to aliens simply because it requires spending public funds).

[516] Free choice may raise fears that Anglos will exercise it to separate themselves from classes conducted in Spanish—and thus from Chicanos. In part, such fears are justified; but even under a bilingual program, all schools and some classes are mandatorily integrated. *See* p. 390 *infra*.

[517] Exelrod, *Chicano Education: In Swann's Way?*, INEQUALITY IN EDUCATION, Aug. 3, 1971, at 28.

cators contend this is a pedagogically sound approach,[518] because it affords Chicano children a homogenous setting, avoiding the negative aspects of confrontation with the dominant group. They argue that the decrease in tension is conducive to higher motivation. Higher motivation coupled with the cultural emphasis of a bilingual experience creates a more positive self-image which prepares the child to face future conflicts.

Close scrutiny of these arguments reveals a plethora of weaknesses. Isolation of Chicano children would result in corresponding segregation of Anglo children who would continue to form attitudes toward Chicanos in situations devoid of interaction. Confrontation is not eliminated, only postponed. If the conflict is faced at an early age, before attitudes are fully formed, it will be more likely to produce positive results. The segregated situation has the additional disadvantage of limiting English input at school to that spoken in the classroom. There would be no peer group reinforcement.

> Isolation and segregation of children for the purposes of instruction deny interaction and exchanges among children of diverse backgrounds. They rob the child of the opportunity to see himself and his neighbor in a realistic environment in which social differences coexist and to respect one another in social harmony. This adultaretion of the classroom with its corresponding weakness and myopia penalizes all children: the Spanish-speaking child because it deprives him of making a contribution among his peers; the Anglo child because it deprives him of the benefits derived from exchanges with his Hispanic classmates.[519]

The most negative aspect of a segregated schools scheme is that it continues to inflict psychological damage on children.[520] Given the historically separate societies in Texas, the argument that schools should continue as the vehicle for separation is dubious. Chicanos in Texas are not unfamiliar with the "different instructional methods" rationale for separate educational facilities. The history of this justification should be carefully examined by those calling for separate schools.

Yet, the courts are confronted with a dilemma when the goal of integration is coupled with the necessity for bilingual-bicultural education. How can both objectives be maximized? A plausible solution is

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[518] Interview with Heidi Dulay, Teaching Fellow in Bilingual Education at Harvard University, in Cambridge, Massachusetts, Nov. 19, 1971. *But see* M. Guerra, *Language Instruction and Intergroup Relations*, in EDUCATING THE MEXICAN AMERICAN 247 (H. Johnson & W. Hernandez, eds., 1971) [hereinafter cited as Guerra].

[519] Guerra, *supra* note 518, at 247.

[520] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

found in the bilingual program of Dade County, Florida.[521] The program was developed in 1963 in response to the needs of Cuban refugee children. Admission to the program is voluntary. Cuban and Anglo parents are given the choice of enrolling their children in the program or in an English-only classroom. Parents also have the option of withdrawing their children from the program at any time.[522]

A bilingual program would focus on elementary grades. During the initial year, there would be an equal number of bilingual classes in each of the first three grades, in addition to the regular English-speaking classes. Half the classes would consist of English-speaking children and half of Spanish-speaking children. These bilingual classes, with varying degrees of integration after the third grade, would be extended to the fourth, fifth, and sixth grades during each of the next three years.

The curriculum at the elementary level would begin with basic instruction in the child's native tongue for all participating children. Morning sessions in language arts, social studies, math, and science would be taught in the student's primary language. Knowledge in these areas would then be reinforced in the second language during the afternoon. Music, art, and physical education would be required integrated activities from first to sixth grade. After the third grade, classes would be increasingly integrated. Subject matter would be presented in either language, depending on which best suits the lesson plan. Two teachers would be assigned to each classroom, one a native English speaker and one a native Spanish speaker.

The ultimate goal of such a program would be to equip each child, by the sixth grade, with sufficient linguistic knowledge of both English and Spanish to succeed in either language. In addition, use of Spanish as a medium of instruction and presentation of materials which reflect Chicanos' historical contributions and customs would elevate the Spanish-speaking child's culture to the same status as the dominant culture.[523] The ensuing positive impact on the child's self-image would be immeasurable.

Some school districts will encounter initial difficulties in attempting to implement such a program, because they have a dearth of Mexican-American teachers.[524] This will necessitate an effort to affirmatively re-

[521] EARLY CHILDHOOD BILINGUAL EDUCATION, *supra* note 492, at 28–9. *See also* A. Gaarder, *Teaching the Bilingual Child: Research, Development, and Policy*, in EDUCATING THE MEXICAN AMERICAN 262 (H. Johnson & W. Hernandez, eds. 1971).

[522] EARLY CHILDHOOD BILINGUAL EDUCATION, *supra* note 492, at 29.

[523] *See* Rodriguez, *Bilingual Education-Profile '70* in 116 CONG. REC. E1364 (daily ed. Feb. 26, 1970).

[524] *See* pp. 322–26 *supra*. A state educational official has recently stated that "[t]here aren't enough Mexican-American teachers . . . there is only one Mexican-American

cruit Chicano teachers. Teacher retraining programs would also be a component of an effective bilingual program. Districts should distribute personnel to maximize the operation of a bilingual program. The problems of teacher recruitment and training may mean that the number of classes in the program will initially be small, but a start has to be made. The burden should be on school officials to show that good faith efforts to employ Chicano teachers have been unsuccessful.

Bilingual-bicultural education is not a theoretical concept beyond the parameters of practical implementation. Difficulties exist but do not justify inaction. The continued absence of such systematic programs is causing Chicanos to view the Texas educational system as an institution having no relevance to them.

VII. CONCLUSION

Among grievances included in the 1836 Texas Declaration of Independence from Mexico was the failure of the Mexican government "to establish an adequate public system of education although possessed of almost boundless resources."[525] Thus, from its inception as a political entity, Texas pledged itself to provide all citizens with an adequate system of education. Yet the state has historically disregarded this pledge with respect to its citizens of Mexican ancestry, continuing to treat them as a vanquished people.

It is incumbent upon courts to vindicate the Chicano's right to equal educational opportunities by ordering eradication of segregated schools and implementation of bilingual-bicultural education. The public school system, which has perpetuated separate societies in Texas, must now aid in dismantling the wall between Anglos and Chicanos. Social justice can no longer tolerate treatment of the Chicano people as strangers in their own land.

—Jorge C. Rangel
—Carlos M. Alcala

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teacher for each 100 Mexican American children." Corpus Christi Caller-Times, Nov. 20, 1971, § A, at 10, col. 1. *See also* Rodriguez, *Speak Up, Chicano*, in EDUCATING THE MEXICAN AMERICAN 287 (H. Johnson & W. Hernandez, eds. 1971).

[525] J. Sayles, THE CONSTITUTIONS OF THE STATE OF TEXAS (ANN.) 152 (1888).