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The Legal Construction of Race: Mexican-Americans and Whiteness

by George A. Martinez
Southern Methodist University

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The Julian Samora Research Institute is the Midwest's premier policy research and outreach center to the Hispanic community. The Institute's mission includes:

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The Legal Construction of Race: Mexican-Americans and Whiteness

Introduction

Critical race theorists have sought to provide counter accounts of social reality.[2] In particular, they have sought to create new, oppositionist accounts of race.[3] In this regard, critical race theory has evolved into several projects.

One project has sought to uncover how law is a constitutive element of race itself.[4] Put another way, this project has sought to identify how law constructed race.[5] Another important project has focused on the way "Whiteness" functions as a social organizing principle.[6] Thus, critical theorists have begun to examine how the privilege of being White works in our society.[7]

As to this second project, critical theorists have recognized that traditionally, White identity has been a source of privilege and protection.[8] Indeed, during the time of slavery in this country, because Whites could not be enslaved, the racial divide between Black and White became a line of protection from the threat of commodification: Whiteness protected one against being an object of property.[9] The status of being White was therefore a valuable asset and carried with it a set of assumptions, privileges and benefits.[10] Given this, it is hardly surprising that minorities have often sought to "pass" as White – i.e., present themselves as White persons.[11] They did so because they thought that becoming White insured greater economic, political, and social security.[12] Becoming White, they thought, meant gaining access to a whole set of public and private privileges, and was a way to avoid being the object of others' domination.[13] Whiteness, therefore, constituted a privileged identity.

In light of the privileged status of Whiteness and these important critical race projects, this essay seeks to examine a number of issues concerning Mexican-Americans and Whiteness. In particular, this essay seeks to examine how legal actors – courts and others – constructed the race of Mexican-Americans. In this regard, the essay seeks to examine whether the law constructed Mexican-Americans as White and whether they received the benefits traditionally associated with Whiteness. The essay also explores the importance of group definition. The article also considers how the legally defined race of Mexican-Americans contrasted with the colonial discourses that developed in the American southwest and which characterized Mexican-Americans as racial "Other." In addition, the essay seeks to explain why Mexican-Americans were legally classified as White.

Part of this essay describes how the courts and other legal actors constructed the race of Mexican-Americans. It concludes that for the most part legal actors constructed the race of Mexican-Americans as "White." Another part discusses the importance of legal definition – *e.g.*, defining a group as White or in some other way – for historically oppressed groups. It analyzes how dominant-group-controlled institutions may use power over minority group identity to reinforce group oppression. The essay also notes that although Mexican-Americans were legally defined as "White," they did not receive the benefits traditionally associated with Whiteness. This illustrates a principle developed by critical theorists – the principle of marginality – which holds that legal rules and doctrines often fail to impact on society. Part of the essay argues that the legal construction of Mexican-Americans as White is ironic. It is at odds with the colonial discourses that developed in the American Southwest. Such discourses characterized Mexican-Americans as a racial "Other." In light of their discursive production as racial "Other," it is puzzling that Mexican-Americans were legally constructed as White. Parts of this paper seek to explain why Mexican-Americans were legally classified as "White."

The Social Construction of the Race of Mexican-Americans

Critical theory has recognized that race is a social or legal construction.[14] Racial categories are constructed through the give and take of politics or social interaction.[15] Thus, race is not a prelegal phenomenon or an independent given on which the law acts.[16] Race is, instead, a social construction at least in part fashioned by law.[17] How did the courts and other legal actors construct the race of Mexican-Americans?

The Case Law

A number of courts have construed the race of Mexican-Americans.[18] A few examples will suffice to make the relevant points. In *Inland Steel Co. v. Barcena*,[19] an Indiana appellate court addressed the question of whether Mexicans were White. The court noted that the *Encyclopedia Britannica* stated that approximately one-fifth of the inhabitants of Mexico were Whites, approximately two-fifths were Indians, and the balance was made up of mixed bloods, Blacks, Japanese, and Chinese. Given this, the court held that a "Mexican" should not necessarily be construed to be a White person.[20]

The Texas courts also considered the race of Mexican-Americans. In *In re Rodriquez*,[21] a Texas federal court addressed in an immigration context the question of whether Mexicans were White. At that time, the federal naturalization laws required that an alien be White in order to become a United States citizen.[22] The court stated that Mexicans would probably be considered non-White from an anthropological perspective.[23] The court noted, however, that the United States had entered into certain treaties with Mexico which expressly allowed Mexicans to become U.S. citizens.[24] Under these circumstances, the court concluded that Congress intended that Mexicans were entitled to become citizens. Thus, the court held that Mexicans were White within the meaning of the naturalization laws.[25]

In re Rodriquez is an important case. It clearly reveals how racial categories can be constructed through the political process. Through the give and take of treaty making, Mexicans became "White."

That politics operated to turn Mexicans into Whites is revealed in analogous cases which considered whether mixed race persons were White under the immigration laws. In general, mixed race applicants failed to establish their Whiteness.[26] For example, in *In re Camille*,[27] the court held that the son of a White Canadian father and an Indian mother was non-White, and therefore, was denied the right of naturalization. Similarly, in *In re Young*,[28] the son of a German father and a Japanese mother was not a White person within the meaning of the immigration laws.[29] It seems plausible to read these cases to stand for the proposition that mixed race persons are not considered White. Given this, it appears that Mexicans – a mixture of Spanish and Indian – should not have counted as White. The treaties nevertheless operated to turn them into Whites.

The issue of the race of Mexican-Americans also arose in the context of school segregation. In *Independent School District v. Salvatierra*,[30] plaintiffs sought to enjoin segregation of Mexican-Americans in the city of Del Rio, Texas. There, the court treated Mexican-Americans as White, holding that Mexican-Americans could not be segregated from children of "other White races, merely or solely because they are Mexicans."[31] Significantly, the court did permit segregation of Mexican-Americans on the basis of linguistic difficulties and migrant farming patterns.[32]

Mexican-American participation on juries also involved the construction of the race of Mexican-Americans. For example, in *Hernandez v. State*,[33] a Mexican-American was convicted of murder and sought to reverse his conviction on the grounds that Mexican-Americans had been excluded from the grand jury and the petit jury. He relied on cases holding that the exclusion of Blacks from jury service constituted a violation of due process and equal protection.[34] The court recognized only two classes as falling within the guarantee of the 14th Amendment: the White race and the Black race.[35] The court held that Mexican-Americans are White people, and therefore, fall within the classification of the White race for purposes of the 14th Amendment.[36] The court reasoned that to say that the members of the various groups comprising the White race must be represented on grand and petit juries would destroy the jury system.[37] Since the juries that indicted and convicted the defendant were composed of members of his race – White persons – he had not been denied the equal protection of the laws.[38]

The Census Bureau

Federal agencies also constructed the race of Mexican-Americans. The federal government compiled census data on persons of Mexican descent.[39] In 1930, the Census Bureau made the first effort to identify Mexican-Americans.[40] The Bureau used the term "Mexican" to classify Mexican-Americans and it was placed under the rubric of "Other" races which also included Indians, Blacks,

and Asians.[41] According to this definition, Mexican-Americans were not considered "Whites."[42] Interestingly, the Mexican government and the United States Department of State both objected to the 1930 census definition of Mexican.[43] Thus, in the 1950 census Mexican-Americans were classified as "Whites."[44] The Census Bureau experience is significant in that it presents another example of how politics or social interaction have influenced the construction of the race of Mexican-Americans.

The Office of Management and Budget

The Office of Management and Budget (OMB) has set forth the current federal law of racial classification.[45] In particular, Statistical Directive No. 15 deals with Mexican-Americans.[46] It governs the collection of federal statistics regarding the implementation of a number of civil rights laws.[47] According to Directive No. 15, Mexican-Americans are classified as White.[48]

The record shows, then, that for the most part the courts and other legal actors constructed the race of Mexican-Americans as "White."[49] That conclusion is interesting in and of itself. But is there anything else that is significant about group definition? Why is legal definition of a group significant?

The Importance of Legal Self-Definition

Dominant-group-controlled institutions have determined the legal meaning of minority group identity.[50] The law recognizes racial group identity when such identity was a basis for exclusion and subordination.[51] The law, however, often refuses to recognize group identity when asserted by racially oppressed groups as a basis for affirming rights and resisting subordination.[52] Thus, dominant-group-controlled institutions often have defined racial groups and have imposed those definitions on those groups as a way to maintain the status quo – i.e., racial subordination.

We have witnessed this phenomenon in the cases dealing with Mexican-Americans. As discussed in *Hernandez*, the Texas court controlled the legal meaning of the identity of Mexican-Americans. There, Mexican-Americans sought to assert a group identity – the status of being a distinct group – in an effort to resist oppression – *i.e.*, being excluded from grand and petit juries. The Texas court refused to recognize their group identity. Instead, the Texas court imposed a definition of "White" on Mexican-Americans so as to maintain the status quo – *i.e.*, exclusion from juries.

Subsequently, on review, the United States Supreme Court also imposed a group definition on Mexican-Americans. The Court held in *Hernandez v. Texas*[53] that "persons of Mexican descent" are a cognizable group for equal protection purposes in areas where they were subject to local discrimination.[54] Thus, in areas where Mexican-Americans are unable to prove the existence of discriminatory treatment, they lack sufficient definitional clarity as a class to warrant 14th Amendment protection.[55] Defining Mexican-Americans in terms of the existence of local discrimination hinders them in asserting their rights.[56] The *Hernandez* approach operates to impose artificially high standards on Mexican-American plaintiffs in that not every plaintiff can afford the expense of obtaining expert testimony to prove the required local prejudice.[57] Thus, the Supreme Court's definition of Mexican-Americans, in terms of local prejudice, is another example of imposing a group definition on Mexican-Americans which has the potential effect of subordinating Mexican-Americans.

Similarly, in *Lopez Tijerina v. Henry*,[58] the court refused to allow Mexican-Americans to define themselves as a group. Plaintiffs sought to bring a class action suit on behalf of the class of "Mexican-Americans" in order to secure equal educational opportunity for Mexican-Americans. The court rejected the claim for class representation, holding that the term "Mexican-American" was too vague and failed to adequately define a class within the meaning of Rule 23 of the federal rules of civil procedure, governing class actions.[59] Since the class was not adequately defined, the court dismissed the class action complaint.[60]

Class actions permit a lawsuit to be brought by large numbers of persons whose interests are sufficiently related so that it is more efficient to adjudicate their rights in a single action.[61] Significantly, the class action device may represent the only viable procedure for people with small claims to vindicate their rights or for important social issues to be litigated.[62] Thus, the court's refusal to

permit the class action may have meant that the Mexican-Americans would not have been able to pursue the important social issues raised by the complaint. Given this, the *Lopez Tijerina* case seems to be an example of a court refusing to allow Mexican-Americans to define themselves so as to resist oppression.

Subsequently, other courts permitted Mexican-Americans to sue as a class under Rule 23 by distinguishing *Tijerina* under the *Hernandez* rationale that local prejudice rendered the class sufficiently identifiable.[63] Thus, the courts defined Mexican-Americans in terms of local prejudice, a definition which, for the reasons discussed above, operated to the disadvantage of Mexican-Americans in their efforts to assert their rights under Rule 23.[64]

The Marginality of Law

Classical legal theory holds, among other things, that social action reflects norms generated by the legal system.[65] That older tradition has been challenged in recent years.[66] According to the critique of legal order,[67] even under those circumstances in which a consensus can be formed about the norms of the law, there is no reason to believe that law is a decisive factor in social behavior.[68] Legal rules often are only of marginal impact in daily life. This is called the principle of marginality.[69] The principle of marginality holds, then, that legal rules, doctrines, and institutions often fail to impact on society.[70]

This essay began with the observation that White identity traditionally has been a source of privilege and protection. For the most part, the courts and federal government constructed the race of Mexican-Americans as White. Since the law recognized them as White, one might have expected, if classical legal theory were correct, that social action would have reflected the Mexican-American's privileged legal status as White. That, however, was not the case. Consistent with the critique of legal order, legal recognition of the Mexican-American as White had only a marginal impact on conduct.

Far from having a privileged status, Mexican-Americans faced discrimination very similar to that experienced by African-Americans.[71] Thus, Mexican-Americans were excluded from public facilities and neighborhoods, and were the targets of racial slurs.[72] Mexican-Americans typically lived in one section of town because they were not permitted to rent or own property anywhere except in the "Mexican Colony," regardless of their social, educational, or economic status.[73] Similarly, Mexican-Americans were segregated in public schools.[74] Mexican-Americans have also faced significant discrimination in the area of employment.[75] Mexican-Americans were earmarked for exclusive employment in the lowest brackets of employment.[76] They were paid less than Anglo-Americans for the same jobs.[77] Moreover, law enforcement officials have committed widespread discrimination against Mexican-Americans.[78] In this regard, Mexican-Americans have been subjected to unduly harsh treatment by police, have been frequently arrested on insufficient grounds, and have received harassment and penalties disproportionately severe compared to those imposed on Anglos for the same acts.[79] These facts seem to implicate the principle of marginality. Actual social behavior – *i.e.*, discrimination practiced against Mexican-Americans – failed to reflect the legal norms that defined Mexican-Americans as White. Although Mexican-Americans were White as a matter of law, that law failed to provide them with a privileged status. Their legal status as White persons had only a marginal impact in daily life.

Colonial Discourses and the Construction of Whiteness

The legal construction of Mexican-Americans as White is ironic. It is at odds with the colonial discourses – *i.e.*, the discursive repertoires associated with the process of colonial exploration and ruling[80] – that developed in the American Southwest. There are close ties in the United States between racist and colonial discourses as well as between constructions of Whiteness and Westernness.[81] Scholars of the era of West European colonial expansion have documented the centrality of the production of knowledge – *i.e.*, the discourses on the colonized that the colonizer produced – to the success of colonial rule.[82] The colonizers engaged in epistemic violence – *i.e.*, produced modes of knowing that enabled and rationalized colonial domination from the standpoint of the West, and produced ways of viewing "Other" societies and cultures whose legacies endure into the present.[83] Central to colonial discourses is the notion of the colonized subject irreducibly "Other" from the standpoint of a White self.[84]

One can view the history of Mexican-Americans in the United States as part of the larger history of western colonialism.[85] The Anglo colonizers in the American Southwest produced discourses regarding the Mexican-Americans. In sharp contrast to their legal construction as White, these discourses plainly construed Mexican-Americans as irreducibly "Other" from the standpoint of the White Anglo. A few examples will suffice. Historian David Weber wrote:

> *Anglo Americans found an additional element to despise in Mexicans: racial mixture. American visitors to the Mexican frontier were nearly unanimous in commenting on the dark skin of Mexican mestizos, who, it was generally agreed had inherited the worst qualities of Spaniards and Indians to produce a 'race' still more despicable than that of either parent.*[86]

Similarly, another commentator described how Anglo Americans drew a racial distinction between themselves and Mexican-Americans:

> *Racial myths about Mexicans appeared as soon as Mexicans began to meet Anglo American settlers in the early 19th Century. The differences in attitudes, temperament and behavior were supposed to be genetic. It is hard now to imagine the normal Mexican mixture of Spanish and Indian as constituting a distinct 'race,' but the Anglo Americans of the Southwest defined it as such.*[87]

Likewise, the dean of Texas historians, Walter Prescott Webb, wrote:

> *Without disparagement it may be said that there is a cruel streak in the Mexican nature, or so the history of Texas would lead one to believe. This cruelty may be a heritage from the Spanish of the Inquisition; it may, and doubtless should, be attributed partly to the Indian blood*.[88]

One effect of this colonial discourse was to generate a racial "Other" – the Mexican-American – in contrast to an unmarked White/Anglo self.[89]

Mexican-Americans as Racial "Other" and Legally White

Given the discursive production of Mexican-Americans as racial "Other," why were Mexican-Americans legally constructed as White? It seems that there were a number of reasons for this paradoxical result. First, politics operated to turn Mexican-Americans into Whites. As discussed, in *In re Rodriguez*, Mexican-Americans became White as a result of certain treaties involving the United States and Mexico.[90] In addition, as noted above, the government of Mexico and the United States Department of State also pressured the United States Census Bureau to reclassify Mexican-Americans as White.[91] Thus, Mexico exerted political pressure to classify Mexican-Americans as White.

Other factors operating in the larger society may have contributed to the Mexican-American's legal classification as White. Social scientists have described the ways that European immigrants became "Whitened."[92] According to the social science account, by the 1920's, scientific racism promoted the idea that real Americans were White and real Whites came from northwest Europe.[93] Accordingly, the 1930 census distinguished immigrants (southern and eastern Europeans) from "native' Whites (northwestern Europeans).[94] Euroethnics became White in part because the war against fascism led to a more inclusive version of Whiteness.[95] Anti-European racism lost respectability.[96] Thus, the 1940 census did not distinguish Euroethnics from native Whites.[97] Euroethnics became White because of an expanded notion of Whiteness.[98] As noted above, during this time period, the Census Bureau also changed the race of Mexican-Americans to White.[99] Thus, this post-war expanded notion of Whiteness may have operated to reclassify Mexican-Americans as White.

Conclusion

This essay has sought to examine a number of issues concerning Mexican-Americans and Whiteness. In particular it has sought to explore how legal actors constructed the race of Mexican-Americans. The record indicates that the law generally constructed Mexican-Americans as White.

Drawing on critical theory, the essay explains why the legal definition of Mexican-Americans is important. It also demonstrates that legal recognition of Mexican-Americans as White failed to provide them with the benefits usually associated with Whiteness. The essay also has shown how the Mexican-American's legal construction as White contrasted with the colonial discourses of the American southwest which characterized Mexican-Americans as racial "Other." Despite these colonial discourses establishing the Mexican-American as a racial Other, the essay has argued that politics and other social forces nevertheless operated to turn Mexican-Americans into "Whites" as a matter of law.

Endnotes

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2. See *Critical Race Theroy: The Key Writings That Formed The Movement* xiii (Kimberle Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas eds., 1995). See also John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing An Authentic Intellectual Life in A Multicultural World*, 65 S. Cal. L. Rev. 2129 (1992). Calmore observes that critical race theorists are the "new interpreters" who contend that the large texts of law, society and culture must be subjected to fundamental criticism and reinterpretation. See id. at 2162-64.

3. See *Critical Race Theory: The Key Writings that Formed the Movement, supra* note 1, at xiii.

4. See *Critical Race Theory: The Key Writings that Formed the Movement, supra* note 1, at xxv.

5. See *Critical Race Theory: The Key Writings that Formed the Movement, supra* note 1, at xxv. See Martha Mahoney, *Segregation, Whiteness and Transformation*, 143 U.PA. L. REV. 1659, 1660 (1995). Critical scholarship has shown that race is a social construction. See id.

6. See Richard Delgado, *Critical Race Theory: The Cutting Edge*, 541 (1995).

7. See Delgado, *Critical Race Theory: The Cutting Edge, supra* note 5, at 541. See Mahoney, *supra* note 4, at 1663 ("Recently, social and legal theorists have begun to 'interrogate Whiteness'"). See also Bell Hooks, *Yearning: Race, Gender, and Cultural Politics* 54 (1990) (discussing the need to "interrogate Whiteness"); Ruth Frankenburg, *White Women, Race Matters: The Social Construction of Whiteness.* (1993) *(Examining the place of White women in the racial structure of the United States)*; Barbara J. Flagg, '*Was Blind But Now I* See*': White Race Consciousness and the Requirement of Discriminatory Intent*, 91 *Michigan Law Review* 953 (1993).

8. See Cheryl Harris, *Whiteness as Property*, 106 *Harvard Law Review* 1709, 1721 (1993).

9. See Harris, *supra* note 7, at 1721.

10. See Harris, *supra* note 7, at 1713. See also Stephanie M. Wildman and Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 Santa Clara L. Rev. 881, 894(1995) (defining White privilege as "an invisible package of unearned assets" which is "like an invisible weightless knapsack of special provisions, assurance, tools, maps, guides, code books, passports, visas, clothes, compass, emergency gear, and blank checks").

11. See Harris, *supra* note 7, at 1710, 1713. For other discussions of the phenomenon of "passing," see 1 Gunnar Myrdal, *An American Dilemma* 683-86 (1994). Myrdal writes that "Passing" means that a Negro becomes a White man, that is, moves from the lower to the higher caste. In the American caste order, this can be accomplished only by the deception of White people with whom the passer comes to associate and by a conspiracy of silence on the part of other Negroes who might know about it." Myrdal, *supra* note 10, at 683-86. See also Marvin Harris, *Patterns of Race in the Americas* 39-40, 56-59 (1964).

12. See Harris, *supra* note 7, at 1713.

13. See Harris, *supra* note 7, at 1713.

14. See Ian F. Haney Lopez, *White By Law* 12 (1996); Mahoney, *supra* note 4, at 1661 ("Race is a social construction, not a 'a natural division of humankind'"). See also Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 Harv. C.R. - C.L.L. Rev. 1 (1994); Neil Gotanda, *A Critique of "Our Constitution Is Color Blind*," 44 Stan. L. Rev. 1 (1991).

15. See Luis Angel Toro, "A People Distinct From Others: Race and Identity In Federal Indian Law and the Hispanic Classification" in *OMB Directive No. 15*, 26 Texas Tech Law Rev. 1219, 1244 (1995).

16. See Haney Lopez, *White By Law, supra* note 13, at 13.

17. See Haney Lopez, *White By Law, supra* note 13, at 13.

18. *Cf*. Gary A. Greenfield and Don B. Kates, Jr., *Mexican-Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Cal. L. Rev. 662 (1975). Greenfield and Kates analyze the race of Mexican-Americans for purposes of the Civil Rights Act of 1866 and discuss some of the legal materials mentioned in this section. They, however, do not analyze the race of Mexican-Americans through the lens of social construction or critical theory – this essay seeks to do so.

19. 39 N.E. 2d 800 (Ind. 1942).

20. 39 N.E. 2d at 801.

21. 81 F. 337 (W.D. Tex. 1897).

22. See Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 *Berkeley Women's Law Journal* 142, 143 (1996) (from 1790 to 1952 only White immigrants could naturalize as citizens).

23. See *In re Rodriguez*, 81 F. at 349.

24. *Id.* at 350-52.

25. See *id*. at 354-55.

26. See Haney Lopez, *White By Law, supra* note 13, at 2.

27. 6 F. 256 (1880).

28. 198 F. 715 (1912).

29. See 198 F. at 716-717. The court observed: in the abstractions of higher mathematics, it may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it cannot be said that one who is half-White and half-brown or half-yellow is a White person, as commonly understood. 198 F. at 717.

30. 33 S.W.2d 790 (Texas Civ. App. 1930). *Salvatierra* was the first case to decide the issue of whether segregation of Mexican-Americans in public schools was permissible. See George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. Davis. L. Rev. 555, 574 (1994). For more discussion of the *Salvatierra* case, see Guadelupe San Miguel, Jr., "Let Them All Take Heed" 78-80 (1987).

31. 33 S.W.2d at 795.

32. See 33 S.W.2d at 795; Martinez, *supra* note 29, at 575-76.

33. 251 S.W.2d 531 (Tex. 1952).

34. See 251 S.W.2d at 532.

35. See 251 S.W.2d at 535.

36. See 251 S.W.2d at 535.

37. See 251 S.W.2d at 535.

38. See 251 S.W.2d at 536. In *Sanchez v. State*, 243 S.W.2d 700 (1951) a Mexican-American had been convicted of murder. He sought to challenge his conviction on the ground that his due process rights had been violated because the county had discriminated against Mexican-Americans in the selection of grand jurors. The Texas court held that Mexican-Americans are not a separate race, but are White people of Spanish descent. 243 S.W.2d at 701. Thus, the defendant's rights were not violated because Whites were not excluded from the grand juries.

39. See Leo Grebler, Joan W. Moore, and Ralph C. Guzman, *The Mexican-American People* 601 (1970).

40. See Grebler, *supra* note 38, at 601.

41. See Grebler, *supra* note 38, at 601.

42. See Grebler, *supra* note 38, at 601.

43. See Grebler, *supra* note 38, at 601.

44. See Grebler, *supra* note 38, at 601-02.

45. See Toro, *supra* note 14, at 1221.

46. See *Directive No. 15*, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19, 260, 19,269 (Office of Management and Budget 1978).

47. See Toro, *supra* note 14, at 1225.

48. See Toro, *supra* note 14, at 1227.

49. *Cf.* Greenfield and Kates, *supra* note 17, at 687 (observing that the case law gives "some indication that Mexican-Americans were not officially to be treated as a non-White group").

50. See Harris, *supra* note 7, at 1761.

51. See Harris, *supra* note 7, at 1761.

52. See Harris, *supra* note 7, at 1761.

53. 347 U.S. 475 (1954).

54. 347 U.S. 475, 477-79 (1954).

55. See Richard Delgado and Vicky Palacios, "Mexican-Americans As A Legally Cognizable Class Under Rule 23 and the Equal Protection Clause" 50 *Notre Dame Law.* 393, 395 (1975).

56. See Delgado and Palacios, *supra* note 54, at 401.

57. See Delgado and Palacios, *supra* note 54, at 400-01.

58. 48 F.R.D. 274 (D.N.M. 1969).

59. See 48 F.R.D. at 276.

60. See 48 F.R.D. at 277. For additional discussion of the *Lopez Tijerina* case, see Delgado and Palacios, *supra* note 54.

61. See Jack H. Friedenthal, Mary Kay Kane, and Arthur R. Miller, Civil Procedure 721-22 (2nd.ed. 1993).

62. See Friedenthal, *supra* note 60, at 722.

63. See Delgado and Palacios, *supra* note 54, at 401.

64. See Delgado and Palacios, *supra* note 54, at 401.

65. See, e.g., David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 577 (1984). Classical legal theory or the idea of legal order also holds that (1) the law is in some sense a system that provides an answer to all questions about social behavior; (2) a form of reasoning exists that can be employed by specialists to generate necessary answers from doctrine; and (3) this doctrine reflects a coherent view about the basic relations between persons and about the nature of society. See Trubek, *supra* note 64, at 577.

66. See Trubek, *supra* note 64, at 577.

67. The critique of legal order challenges the idea that a legal order exists in any society. See Trubek, *supra* note 64, at 577. The critique is based on four principles: indeterminacy, antiformalism, contradiction and marginality. See Trubek, *supra* note 64, at 577-78.

68. See Trubek, *supra* note 64, at 578.

69. See Trubek, *supra* note 64, at 578.

70. See Trubek, *supra* note 64, at 615.

71. See generally Martinez, *supra* note 29. See also Brest and Oshige, *Affirmative Action For Whom?*, 47 *Stanford Law Review* 855, 888 (1995) ("Latinos have encountered prejudice and systematic discrimination in virtually all realms, including housing, employment and education").

72. See Martinez, *supra* note 29, at 573.

73. See P. Kibbe, *Latin Americans In Texas* 123-24 (1946).

74. See Martinez, *supra* note 29, at 584. See also San Miguel, *supra* note 29, at 55. ("School officials and board members, reflecting the specific desires of the general population, did not want Mexican students to attend school with Anglo children regardless of their social standing, economic status, language capability, or place of residence").

75. See, *e.g.*, C. McWilliams, *North From Mexico* 195-97 (1948); KIBBE, *supra* note 72, at 157.

76. See McWilliams, *supra* note 74, at 196.

77. See McWilliams, *supra* note 74, at 196.

78. See U.S. Commission On Civil Rights, *Mexican Americans And The Administration Of Justice In The Southwest* (Summary) 2 (1970).

79. See U.S. Commission On Civil Rights, *supra* note 96, at 2.

80. See Frankenburg, *supra* note 6, at 16.

81. See Frankenburg, *supra* note 6, at 16. See also Robert Young, *White Mythologies: Writing History And The West* 173 (1990) ("the creation of an object of analysis called 'colonial discourse,' has proved one of the most fruitful and significant areas of research… and the concept of colonial discourse… has been extended to other categories such as 'minority discourse,' and is increasingly being used to describe certain power structures within the hierarchies of the West itself, particularly the relation of minorities to the dominant group").

82. See Frankenburg, *supra* note 6, at 16. See also Young, *supra* note 80, at 127 (analysts of the colonial era have demonstrated the "deep complicity of academic forms of knowledge with institutions of power").

83. See Frankenburg, *supra* note 6, at 16. See also Young, *supra* note 80, at 158 ("analysis of colonial discourse… demonstrate that history is not simply the disinterested production of facts, but is rather a process of 'epistemic violence,' an interested construction of a particular representation of an object, which may… be entirely constructed with no existence or reality outside its representation").

84. See Frankenburg, *supra* note 6, at 16-17. See also Edward W. Said, *Orientalism* 228 (1978). Said writes: every statement made by Orientalists or White Men (who were usually interchangeable) conveyed a sense of the irreducible distance separating White from colored, or Occidental from Oriental; moreover, behind each statement there resonated the tradition of experience, learning and education that kept the Oriental-colored to his position of object studied by the Occidental-White, instead of vice versa. Said, *supra* note 83, at 228.

85. See Angela Harris, *Forward: The Jurisprudence of Reconstruction*, 82 *California Law Review* 741, 763 (1994) citing Benjamin B. Ringer and Elinor R. Lawless, *Race-Ethnicity And Society* (the United States should be considered a colonial society with respect to its racial minorities); Rodolpho Acuña, *Occupied America: The Chicano's Struggle Toward Liberation* iii (1972) (arguing that the experience of Mexican-Americans in the American Southwest parallels that of other Third World peoples who have suffered under the colonialism of technologically superior nations).

86. *Foreigners In Their Native Land: Historical Roots Of The Mexican Americans* 59-60 (David J. Weber ed., 1973).

87. J. Moore, *Mexican Americans* 1 (1970). See also Acuña, *supra* note 84, at 7 ("Anglo-Americans arriving in the Southwest believed that they were racially superior to the swarthy Mexicans, whom they considered a mongrel race of Indian halfbreeds").

88. Walter Prescott Webb, *The Texas Rangers: A Century Of Frontier Defense* xv (1965).

89. In their discourse, then, the Anglo colonizers took a very negative view of the mixed-race Mexican-American. Interestingly, Mexican thinkers developed a much more positive view of racial mixture. For example, the Mexican philosopher, Jose Vasconcelos, predicted that a "raza cosmica" or "cosmic race" would emerge to fulfill the divine mission of America. See Patrick Romanell, *The Making Of The Mexican Mind* 133 (1971). This raza cosmica would represent the synthesis of the various races. See Romanell, *supra* note 88, at 133. Vasconcelos also argued that North Americans act on the anti-human and anti-Christian principle of racial segregation. See Romanell, *supra* note 88, at 133. In contrast, Latin Americans act on the opposite principle of *mestizaje.* See Romanell, *supra* note 88, at 133. As a result, Vasconcelos concluded that the germ of the raza cosmica of the future is to be found in the hybrid peoples of Latin America. See Romanell, *supra* note 88, at 133.

90. See *supra* notes 20-28 and accompanying text.

91. See *supra* notes 42-43 and accompanying text.

92. See Karen Brodkin Sacks, "How Did Jews Become White Folks?," in *Race* 78-102 (Steven Gregory and Roger Sanjek, eds. 1994).

93. See Sacks, *supra* note 91, at 81.

94. See Sacks, *supra* note 91, at 82.

95. See Sacks, *supra* note 91, at 87. See also Elazar Barkan, *The Retreat Of Scientific Racism: Changing Concepts Of Race In Britain And The United States Between the World Wars* 1 (1992) ("After World War II the painful recognition of what had been inflicted in the name of race led to the discrediting of racism in international politics and contributed to the decline and repudiation of scientific racism in intellectual discourse").

96. See Sacks, *supra* note 91, at 87.

97. See Sacks, *supra* note 91, at 87.

98. See Sacks, *supra* note 91, at 87.

99. See *supra* notes 38-43 and accompanying text.