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## **“Light But Not White”: A Race/Plus Model of Latina/o Subordination**

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Alfredo Mirandé\*

### I. INTRODUCTION

This paper grew out of the LatCrit Conference held in Chicago, Illinois, on October 3rd through 5th in 2013, the theme of which was “Resistance Rising: Theorizing and Building Cross-Sector Movements.” The subject of the paper, however, extends well beyond the conference theme and falls within the first of five standing guideposts for LatCrit scholarship, which focuses on “the multiple dimensionality of Latina/o identity and its relationship to current legal, political, and cultural regimes or practices.”<sup>1</sup>

“Light but Not White” is based on data derived from a larger study of transnational migration between Jalostotitlán (“Jalos”) in Jalisco, México, and Turlock, California, that seeks to integrate the study of race and immigration. While a detailed discussion of the findings of the larger study is beyond the scope of this paper, my goal here is to offer a critique of the prevailing Black/White racial binary in law and sociology and propose a new race/plus theoretical paradigm for understanding not only the experiences of Jalos migrants, but also Latina/o<sup>2</sup> identity, Equal Protection

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<sup>1</sup> *LatCrit 2013 Call for Papers*, LATCRIT <http://www.latcrit.org/content/conferences/latcrit-biennial-conferences/latcrit-2013/> (last visited Apr. 20, 2014).

<sup>2</sup> I will be using the terms, Mexican, Latina/o, and Chicana/o throughout the paper. Mexican obviously refers to persons of Mexican descent and the focus of the larger study was on Mexican migration to the United States. Latina/o is a more inclusive term used to refer to Mexicanos and other persons from Latino América. While my focus is on Mexican migration, the findings have important implications for other Spanish-speaking communities in the United States. Finally, the word Chicana/o is a more political term that is used to refer to people of Mexican descent who are residing in the United States on

doctrine, and the anti-subordination principle. This new race/plus paradigm proposes that, while Jalos migrants and other Latinas/os are subjected to race-based discrimination and subordination, they also experience discrimination based on language, culture, and real or putative alienage status.

Consistent with the underlying principles of Latino Critical Race (“LatCrit”) scholarship and Critical Race Theory (“CRT”), I seek to put the study of race at the center of both legal analysis and sociological theory while at the same time challenging the prevailing Black/White racial binary. Although there has been a strong interest in the study of race in sociology, much of the past sociological research has adopted a Black/White racial binary model that ignores the experiences of Latinos, Asians, and other groups that do not fit the binary model.<sup>3</sup> Within law, on the other hand, because of the plenary power of Congress over immigration, the study of race and Equal Protection and the study of alienage have been doctrinally bifurcated. As a result, both within sociology and law, there is a dire need to integrate the study of race and the study of immigration/alienage, and to adopt multidisciplinary perspectives that eschew simplistic binary views and recognize the complexity of race and ethnicity in contemporary society.

Finally, this study of transnational migration between Jalos and Turlock examines an important and relatively neglected question regarding the role that race, or skin color and complexion, may play in explaining the relative success of some Latino immigrants in the United States. In addition to their social, human, and cultural capital, which includes their strong work ethic,

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a relatively permanent basis and who have been denied basic cultural and citizenship rights.

<sup>3</sup> See, e.g., NATALIA MOLINA, *HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS* (2013); Robert S. Chang & Neil Gotanda, *The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012, 1014–15 (2007); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213, 1215 (1997).

people from Jalos and the Los Altos de Jalisco region tend to be relatively fair and light complexioned. It is, therefore, important to examine the possible advantages of being light-skinned as a form of social capital that might facilitate their success.

The paper begins with a discussion of the racial binary and the antidiscrimination principle, and then presents a brief overview of the sample, data, and qualitative methods used in the underlying study. The paper then turns to an examination of some of the factors that might help to promote the relative labor market success of Jalos migrants and their strong identification with their community of origin. I then turn to a discussion of prevailing conceptions of race in law and sociology, the social construction of Whiteness, and White privilege in the United States. I conclude by introducing the race/plus model and noting that, while people from Jalos are relatively light in complexion, they are not accepted as White and are subjected not only to racial discrimination but to discrimination based on language, culture, and real or perceived immigration status. The final section applies the race/plus model to relevant case law in various areas, including jury exclusion, language-based employment discrimination, educational segregation, and racial profiling and Fourth Amendment search and seizure border stops.

## II. THE RACIAL BINARY AND THE ANTIDISCRIMINATION PRINCIPLE IN HISTORICAL PERSPECTIVE

The Fourteenth Amendment, the Equal Protection doctrine, and antidiscrimination principles in American jurisprudence are derived largely from the history of slavery and the attempt to eliminate the vestiges of slavery and racial animus that had been directed against African Americans during reconstruction.<sup>4</sup> In what was to become a classic statement on Civil Rights and the Equal Protection doctrine, Paul Brest describes the

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<sup>4</sup> See generally Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

antidiscrimination principle as a “general principle disfavoring classifications and other decisions and practices that depend on race (or ethnic origin) of the parties affected.”<sup>5</sup> The historical and doctrinal development of the “antidiscrimination principle” can be traced to the post-Civil War Amendments to the Constitution.<sup>6</sup> A century after the Civil War, our nation was committed to the antidiscrimination principle. Of the Reconstruction Amendments, only the Fifteenth explicitly embodied this commitment. In the Civil Rights Act of 1866, however, Congress read the antidiscrimination principle into the Thirteenth Amendment, and the Supreme Court has constructed the amorphous language of the Equal Protection Clause of the Fourteenth Amendment to hold that racial classifications are “constitutionally suspect” and subject to “the most rigid scrutiny.”<sup>7</sup>

Brest argues, moreover, that doctrinal acceptance of the antidiscrimination principle is difficult, given that “the text and history of the [Equal Protection C]lause are vague and ambiguous and cannot, in any event, infuse the antidiscrimination principle with the moral force or justify its extension to novel circumstances or new beneficiaries.”<sup>8</sup> He believes we should adopt the principle disfavoring racial or ethnic classifications, irrespective of the actual intent of the framers, because it is derived from widely accepted notions of equality, which are generally accepted in the society.<sup>9</sup> Although Brest uses the word “race” as shorthand for race and ethnic origin, he notes that the antidiscrimination principle can be extended to include a variety of other traits, such as alienage, illegitimacy, and sex.<sup>10</sup>

In this paper, I seek to follow Brest’s lead by extending the antidiscrimination principle and Equal Protection doctrine to “novel

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (citations omitted).

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

circumstances and new beneficiaries” by applying the principle to the Latina/o experience in contemporary society with not only racial discrimination, but also discrimination based on language, culture, and real or putative alienage and immigration status.

### III. BACKGROUND OF THE STUDY

The underlying research for this article began nearly a decade ago, after I obtained a UC Mexus–CONACYT grant to study transnational migration to the United States and its impact on gender, community, and identity.<sup>11</sup> I selected the city of Jalostotitlán (“Jalos”) as the final research site in Mexico because it is in a region, Los Altos de Jalisco, which has a long history of migration to the United States, dating to the beginning of the nineteenth century. Most men and a plurality of women from Jalos migrate to the United States at some point in their lives—some as early as ages 14 or 15.

Turlock, California was selected as the point of destination for Jalos migrants and the counterpart research site on the US side of the border. Migrants from Jalos are concentrated in several communities in California, including Anaheim, Oakland, Sacramento, and Los Angeles. Turlock seemed like an ideal comparison site because there is a great deal of migration from Jalos there and because it is an agricultural community roughly the same size as Jalos. Finally, more than a decade ago Turlock sought to extend the Jalos custom of honoring the town’s Patron Saint, *La Virgen de la Asunción* (Virgin of the Assumption), on August 15th by establishing their own celebration for the *Virgen*.

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<sup>11</sup> A special thanks to UC Mexus (the University of California Institute for Mexico and the United States) and Mexico’s CONACYT (Consejo Nacional de Ciencia y Tecnología) for providing the funding that made this study possible. In the initial phases of the research in Jalostotitlán, Mexico, I benefited greatly from a productive collaboration with Dr. Nelson Minello, a sociologist who was my Mexican counterpart on the UC Mexus and the CONACYT grants.

A Mexican colleague provided the name and contact information of an anthropologist, Professor Xavier Glass,<sup>12</sup> who was not only thoroughly acquainted with the history, political-economy, and culture of the area, but also well respected, connected to many people in the community, and willing and eager to talk and to support the research. Initial contacts in Jalos were made through “social notables,” such as Dr. Glass, the assistant mayor of Jalostotitlán, and Elvira, a young woman who worked at a local electronics and souvenir shop in the center of town.

An important source for establishing networks and making contacts with people in Turlock were social notables identified by Elvira, as well as the Catholic Parish of *El Sagrado Corazón* (Sacred Heart). I was able to meet and interview not only several of the parish priests, but also parishioners, including Lola Olmedo, the woman largely responsible for establishing the Turlock celebration for the *Virgen*.<sup>13</sup>

The findings of the larger study were based on a wide range of qualitative research methods, including participant observation, ethnographic field research, archival research, and in-depth personal interviews conducted on both sides of the border in Jalos and Turlock. Interviewees included ordinary citizens, as well as priests, school principals, psychologists, and social service providers. Finally, focus group interviews were carried out with youth in the respective communities, one in Turlock and three in Jalos. The Turlock focus group consisted of 15 to 17 year-old youth. One of the Jalos focus groups involved students at CONALEP, a technical high school that prepares its students for work in trades, such as auto mechanics, electrical maintenance, and welding. The second consisted of students at the

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<sup>12</sup> I have opted to use pseudonyms to protect the privacy and to maintain the confidentiality of my respondents, most of whom came to the United States “*sin papeles*” (without papers).

<sup>13</sup> Interview with Xavier Glass, professor, Jalostotitlán, Jalisco, Mex., Aug. 12, 2006. Interview with Father Patricio, priest, Jalostotitlán, Jalisco, Mex., Feb. 18, 2007. Interview with Father Rogelio, priest, Jalostotitlán, Jalisco, Mex., Feb. 18, 2007. Interview with Father Marcos, priest, Jalostotitlán, Jalisco, Mex., Feb. 20, 2007.

*Prepa*, or college preparatory school in Jalos, who came from more middle and upper class families. A final focus group was conducted with a class of kindergarten children in Jalos.<sup>14</sup> The total sample for the study included approximately 40 persons in Jalos and 45 in Turlock.

The interviews were open-ended and consisted of several broad questions, including where the person was born and raised, his or her background, and demographic information such as parents' level of education and occupation, number of siblings, and birth order in the family. There were also questions about how his or her parents got along and who exercised the most control in the family. Other topics included *noviazago* (courtship) and other dating rituals, decision-making in the family, concepts of masculinity, gender roles, attitudes toward child-rearing, perceptions of the major problems facing the community and/or youth, and relations between *ausentes* (migrants) and Jalos residents.

When interviewing the Turlock sample, a great deal of attention was devoted to the migration process, social networks, and how life changes in the United States for migrants from Jalos and their families. The Turlock youth focus group was conducted bilingually. All of the other interviews and focus groups were conducted exclusively in Spanish and then translated. I also translated passages from Spanish language publications as needed.

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<sup>14</sup> The group was made up of approximately eight children. After the session ended, the teacher led the children into a room that had different work or learning cubicles and activities for various vocations, such as grocery, carpentry, science, and beauty salon. Caesar, a boy that dominated the focus group, went to the grocery store and immediately took charge of the cash register and play money, whereas other children took shopping carts and started shopping for food. Not surprisingly, virtually all of the girls rushed to the beauty salon center and started playing with wigs, putting on make-up, and using toy hair dryers. This suggests that even at an early age, children's occupational choices and predispositions are clearly structured along traditional gender lines. It also reinforces the common belief that Jalos girls are "girlie" and feminine. Sadly, none of the children were drawn into the science center with play microscopes and other scientific paraphernalia.



Although most Jalos migrants had little or no education and limited proficiency in English, one of the major findings of the study is that many, particularly members of the older or pioneering generation, had a very strong work ethic and were remarkably successful in the United States. Although not the focus of this paper, one of the goals of the larger study was to isolate factors, such as social or cultural capital, that might help to explain or account for this relative success.

#### IV. FACTORS PROMOTING JALOS MIGRANTS LABOR MARKET SUCCESS: AN OVERVIEW

One of the most salient factors found to promote the labor market success of people from Jalos in the United States, as well as their strong Jalos identity, was their affiliation with religion and the Catholic Church, which constitutes social, cultural, and human capital for residents. Two religious-based Jalos fiestas, the celebration for *La Virgen de la Asunción* in August and Carnival on the eve of Lent in late February or early March, contain important ceremonies and rituals that unite people in the community and reinforce a collective consciousness and pride in “being from Jalos.” In other words, the fiestas reinforce identification with the community and the sense of a collective origin, awareness, and pride.<sup>15</sup> Significantly, one of the days in the Jalos fiestas and a special mass are devoted to *los ausentes*. *Ausentes*, as opposed to *presentes*, are people who have left the community and whose children and descendants are now in the United States. The fiestas also provide an important opportunity for *ausentes* to display their visible symbols of material success such as shiny new pick-up trucks, sports utility vehicles (SUVs), electronic devices, and other manifestations of their purchasing and consumption patterns.

These rituals also reinforce the success stories of the numerous migrants who have traveled to the United States, and they serve as network-creating

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<sup>15</sup> Alfredo Mirandé, *Toribio Romo, el Padre Pollero*, 38 AZTLÁN: J. OF CHICANO STUD. 95, 95–96 (2013).

and network-maintaining mechanisms for people who wish to migrate to the United States. In addition, even after people migrate to a foreign country and are exposed to a new culture and language, the Catholic Church continues to serve as a constant source of stability and support for new arrivals.

Identification with the Church is greatly facilitated by the presence of Latino priests and by Spanish-language masses and catechism classes, together with the fact that the majority of the parishioners in the Sacred Heart Parish in Turlock are Spanish speakers and most are from Jalos. Additionally, with the inauguration of the celebration for the *Virgen de La Asunción* in Turlock, the community members have come full circle in bringing a little bit of Jalos to Turlock and transforming *La Virgen* into a transnational icon in Mexico and the United States, so that Jalos identity can be maintained and reinforced in both countries, or in a unique third space.<sup>16</sup> Even more pronounced is the emergence of *El Padre Toribio*<sup>17</sup> as a transnational icon who performs many miracles for migrants and undocumented workers, without borders or limits.

Family, friendship, church social networks, and social capital are all important factors in promoting identification with Jalos and the labor market success of the Jalos community. One of the unique features of the study is that it examined the creation and maintenance of a transnational identity and community among persons who self-identify as being "from Jalos," regardless of their birthplace, citizenship, or residence.<sup>18</sup> I contend

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<sup>16</sup> See Roger Rouse, *Mexican Migration and the Social Space of Postmodernism*, in *BETWEEN TWO WORLDS: MEXICAN IMMIGRANTS IN THE UNITED STATES* 247–259 (David G. Gutiérrez ed., 1996).

<sup>17</sup> Toribio Romo, a young Mexican priest and Saint born outside of Jalos, was killed by the Mexican government during the Cristero War and became one of the Cristero Martyrs in the 1920s. In recent years, he has emerged in Mexican border folklore as a mysterious stranger who miraculously appears at or near the border and helps people in distress, sometimes not only giving them food and water but even helping them across the border into the United States. Mirandé, *supra* note 15, at 95.

<sup>18</sup> *Id.* at 96.

Jalos is a community that originated in the town of Jalostotitlán, Jalisco, but has become an international community without borders.<sup>19</sup> It is a community, “unified by religion, language, customs, rituals, tastes, and the like” and “integrated at the micro-level by kinship systems and primordial loyalties.”<sup>20</sup>

The findings of the larger study are consistent with other research pointing to the importance of social networks and social capital in explaining a continuous pattern of migration. James Coleman, for example, maintains that “social capital is created when the relations among persons change in ways that facilitate action.”<sup>21</sup> Although social ties of friendship and kinship in and of themselves provide few advantages to people seeking to migrate, once a person from one’s social network has migrated, these ties become a resource that can be drawn upon to gain access to foreign employment and all that is associated with such employment.<sup>22</sup> Most migrants from Jalos to Turlock have family or friends in the area who greatly facilitate not only finding employment, housing, places to shop for food, and schools, but also making the transition in general to a new country and culture.<sup>23</sup> Social networks with family and friends reinforce not only a strong identification with Jalos but also a worldview that includes a belief in the American Dream. However, rather than focusing on individual success, the American Dream is viewed as a collective enterprise.

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<sup>19</sup> Other studies have pointed to the existence of transnational communities without borders. See, e.g., MANUEL BARAJAS, *THE XARIPU COMMUNITY ACROSS BORDERS: LABOR MIGRATION, COMMUNITY, AND FAMILY* (2009); ROBERT COURTNEY SMITH, *MEXICAN NEW YORK: TRANSNATIONAL LIVES OF NEW IMMIGRANTS* (2006).

<sup>20</sup> See generally RUBEN GOWRICH, *CARIBBEAN TRANSNATIONALISM: MIGRATION, PLURALIZATION, AND SOCIAL COHESION* (2006).

<sup>21</sup> JAMES COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 304 (1990).

<sup>22</sup> Marcela Cerrutti & Douglas S. Massey, *Trends in Mexican Migration to the United States, 1965 to 1995*, in *CROSSING THE BORDER: RESEARCH FROM THE MEXICAN MIGRATION 19* (Jorge Durand & Douglas S. Massey eds., 2004).

<sup>23</sup> Mirandé, *supra* note 15, at 96.

The first generation of Jalos migrants to Turlock and other communities in the United States set the stage for and facilitated the migration of subsequent migrants.<sup>24</sup> Most people who migrate to Turlock already had family and/or friends in the community, and these social networks greatly facilitated their integration into the new culture and language, providing help and support in finding housing, schools, grocery shopping, and employment.

According to Alejandro Portes and Rubén G. Rumbaut, once certain members of a community migrate, migration becomes self-sustaining, as migrants are successful in transmitting new information about economic opportunities and the migration process that facilitates the migration of others.<sup>25</sup> In a study of 822 adult, male Mexican immigrants who arrived at two Texas ports of entry on the border, Portes and Robert Bach found that over 90 percent of the respondents had obtained legal residence through family and employee connections.<sup>26</sup> Douglas S. Massey and his associates also found that social networks accounted for the migration patterns of 19 Mexican communities where migration was classified as normative.<sup>27</sup> They noted that “the act of migration not only induces changes within individual migrants that make further movement more likely, it also initiates changes in social structures that spread migration through the community.”<sup>28</sup>

Pedro López, one of the Turlock social notables I interviewed, commented on the importance of social networks.<sup>29</sup> He said that people from Jalos got together at the Church of the Sacred Heart in Turlock and

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<sup>24</sup> SMITH, *supra* note 19, at 21.

<sup>25</sup> ALEJANDRO PORTES & RUBÉN G. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* 356–57 (3rd ed. 2006).

<sup>26</sup> *See generally* ALEJANDRO PORTES & ROBERT L. BACH, *LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES* (1985).

<sup>27</sup> *See* Douglas S. Massey, et al., *Continuities in Transnational Migration: An Analysis of Nineteen Mexican Communities*, 99 *AM. J. SOC.* 1492 (1994).

<sup>28</sup> *Id.* at 1500.

<sup>29</sup> In person interview with Pedro López, a community member in Turlock, Turlock, Cal. (June 14, 2007).

that the Church was “flooded” with people from Jalos.<sup>30</sup> Pedro added that people like his father and other persons from Jalos who first settled in Turlock “gave a lot of support to many of their fellow countrymen, people from the town [of Jalos], they established family bases here, and this is how a large community is established.”<sup>31</sup>

Other factors facilitating the economic success of Jalos migrants to Turlock are the labor skills and social and human capital that they bring with them. As noted, Jalos and Turlock are similar in the sense that they are both small, but rapidly growing, relatively isolated, rural communities dominated by agriculture and dairy farming.<sup>32</sup> Many Jalos residents bring marketable skills and knowledge with them, which helps them find employment and succeed. Juan Pérez, for example, grew up on a ranch near Jalos and has always worked in agriculture. Although dairy farming is much more mechanized in the United States, Juan got his job as a *fiador* (feeder) on a local dairy farm outside of Turlock because of the skills and experience that he had working in dairies.<sup>33</sup> Rosa Fuentes’s husband is a *fiador* at the same farm, but he worked as a bricklayer and in construction in Mexico. He got his job at the dairy through friends from Jalos who showed him how to do the work a little bit at a time and ultimately recommended him for the job.<sup>34</sup>

In order to contextualize the major findings of the larger study, in the next section I will provide a brief overview of the existing literature on immigration and race. As previously noted, most of the existing literature on race has emanated from a Black/White binary model. Studies of immigration, on the other hand, have historically tended to either ignore or

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Mirandé, *supra* note 15, at 96.

<sup>33</sup> In person interview with Juan Pérez a *fiador* who worked at a dairy outside Turlock, Turlock, Cal. (June 12, 2007).

<sup>34</sup> In person Interview with Rosa Fuentes, Turlock, Cal. (June 14, 2007).

neglect race. In this article, I seek to address this void by integrating the study of immigration and race.

#### V. "BRINGING RACE BACK IN": INTEGRATING THEORIES OF IMMIGRATION AND RACE

Immigration and alienage has been of considerable interest within not only law, but also anthropology, economics, political science, and sociology. In law, the focus has been largely on case law and constitutional issues surrounding alienage, as well as race and equal protection. Until recently, there has been little interest in studying how race impacts immigration and citizenship status. Similarly, there has been a void in the social sciences between scholars who study race and those who study immigration.

Although there is strong interest in the study of race in sociology, much of the past sociological research adopted a Black/White racial binary model that ignored or neglected the experiences of Latinos, Asians, and other groups that do not fit the binary model.<sup>35</sup> The study of alienage and the plenary power of Congress over immigration, on the one hand, and the study of race and Equal Protection doctrine, on the other, have been doctrinally bifurcated.<sup>36</sup> As a result, both within sociology and within law, there is a dire need to integrate the study of race and the study of immigration/alienage, and to adopt multidisciplinary perspectives that eschew simplistic binary views and recognize the complexity of race and ethnicity in contemporary society.

Perhaps the most significant and challenging development in the study of race and ethnicity over the past 30 years has been the emergence of many new theoretical paradigms and perspectives. In addition to postmodernism

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<sup>35</sup> See Perea, *supra* note 3.

<sup>36</sup> *Id.*

and cultural studies theory, new paradigms and perspectives include CRT and LatCrit<sup>37</sup> as well as cultural citizenship perspectives.<sup>38</sup>

CRT, for example, is a movement in law that emerged in the 1980s that puts race at the center of legal analysis. It has been appropriated and applied in education, sociology, and other social sciences. Francisco Valdés, Jerome McCristal Culp, and Angela P. Harris, for example, have pointed out that CRT challenges three basic beliefs about racial justice in the United States.<sup>39</sup> The first and most persistent of these beliefs is that “race blindness” will eventually eliminate racism.<sup>40</sup> The second belief, identified by Valdés, Culp, and Harris as being challenged by CRT, is that race is a matter of individual prejudice rather than of systemic racism.<sup>41</sup> The third and final belief challenged by CRT, according to these authors, is that one can fight racism while at the same time ignoring sexism, homophobia, and other forms of oppression.<sup>42</sup> In sum, CRT puts race at the center of legal analysis, rejects the color-blind approach to legal scholarship, and sees racism as systemic and endemic in contemporary society. It concludes that one cannot hope to eliminate racism without simultaneously addressing sexism, homophobia, and other forms of oppression.<sup>43</sup>

Within sociology, Eduardo Bonilla-Silva, a Puerto Rican sociologist and leading theorist in the field, has similarly been critical of prevailing, simplistic sociological theories of race and racism that are based on

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<sup>37</sup> See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000). See *supra* notes 1–2.

<sup>38</sup> See, e.g. LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS (William V. Flores & Rina Benmayor eds., 1997).

<sup>39</sup> Francisco Valdes et al., *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millenium*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, 1 (Francisco Valdes et al. eds., 2002).

<sup>40</sup> *Id.* at 1.

<sup>41</sup> *Id.* at 1–2.

<sup>42</sup> *Id.* at 2.

<sup>43</sup> *Id.*

psychological or social-psychological conceptualizations and sees racism as endemic to society.<sup>44</sup> Contrary to such ideational approaches to race, Bonilla-Silva advances a structural theory of race, which, like CRT, posits that racism is inherent in social systems, rather than in the ideologies of the members of these social systems.<sup>45</sup> He also dismisses Marxist and neo-Marxist theories, such as Edna Bonacich's split labor market theory, which give primacy to the concept of class over race and interpret racism as an ideological product of class dynamics.<sup>46</sup> Although other theorists, such as Mario Barrera, Robert Blauner, Michael Omi, and Howard Winant, have proposed non-ideational conceptions of racism, Bonilla-Silva argues they fall short of developing a structural explanation.<sup>47</sup> In short, prevailing sociological theories of race tend to understand racism in terms of overt individual behavior and exclude racism that emanates from within the structure of the social system.<sup>48</sup> Bonilla-Silva concludes by noting that extant theories in the social sciences tend to view racism in a circular manner, so "racism is a belief that produces behavior, which is itself racism."<sup>49</sup> He believes social scientists should eschew social and social psychological views of racism and proposes an alternative framework that focuses on racialized social systems.<sup>50</sup>

#### VI. "LIGHT BUT NOT WHITE": A NEW RACE/PLUS PARADIGM

This study of transnational migration between Jalos and Turlock seeks to integrate race and alienage by addressing an important and neglected question: What role does race, or skin color and complexion, play in the

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<sup>44</sup> See generally Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465 (1996).

<sup>45</sup> *Id.* at 469.

<sup>46</sup> *Id.* at 466.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 467.

<sup>49</sup> *Id.* at 469.

<sup>50</sup> *Id.*



relative success of certain Jalos migrants? In addition to their social, human, and cultural capital, which includes a very strong work ethic, people from Los Altos de Jalisco tend to be relatively fair and light-complexioned. The possible advantages of being light-skinned need to be acknowledged as a potential form of social capital.<sup>51</sup> Although some respondents, including Father Gustavo, one of the priests at the Turlock parish,<sup>52</sup> thought that, although people from Jalos are on average not as light as most people from the larger region of Los Altos de Jalisco, they are unquestionably fairer than most Mexican migrants. However, I submit that it would be a mistake to conclude that people from Jalos are “White,” with all of the advantages of White privilege in the United States. Given the history of slavery and the prevailing rule of hypodescent<sup>53</sup> in defining race in the United States, I contend that it is one thing to be “light” and quite another to be accepted as “White” and accorded all of the rights and privileges associated with “Whiteness.”<sup>54</sup>

In *White by Law*, Ian Haney López examines how Whiteness has been defined and socially constructed by law. After looking at how the courts in the United States have historically defined “Whiteness” López identifies two dominant rationales or views of race: one that appeals to “common knowledge” and one that is based on “scientific evidence.”<sup>55</sup> Although courts initially used both views of race in their efforts to define Whiteness,

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<sup>51</sup> See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

<sup>52</sup> Interview with Father Gustavo León (pseudonym), Pastor, Sacred Heart of Jesus Parish, in Turlock, Cal. (June 12, 2007).

<sup>53</sup> See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 257 (Kimberlé Crenshaw et al. eds., 1995). The Rule of Hypodescent is also known as the “one-drop” rule, so that if a person is any part Black he or she is defined as Black, whereas in Latino América and the Caribbean, if a person is any part White, that person is likely to be considered White. *Id.* at 258.

<sup>54</sup> See, e.g., PAULA S. ROTHENBERG, *WHITE PRIVILEGE: ESSENTIAL READINGS ON THE OTHER SIDE OF RACISM* (2002); JEAN HALLEY ET AL., *SEEING WHITE: AN INTRODUCTION TO WHITE PRIVILEGE AND RACE* (2011).

<sup>55</sup> IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 3 (2006).

they became increasingly frustrated by scientific “manipulation” that ignored racial differences by reportedly including in the category of Caucasian “far more [people] than the unscientific mind suspects.”<sup>56</sup> As a result, the courts turned increasingly to so-called “common knowledge” as a justification for racial classifications. The Supreme Court concluded that “the words ‘free [W]hite persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man.”<sup>57</sup> Haney López concludes that the construction of a positive “White” identity is ultimately not a scientific category but a hierarchical conception that requires inferior minority identities.<sup>58</sup> He argues that what is called for to counter this conception of Whiteness is a deconstruction and rejection of White identity and White privilege.<sup>59</sup> López contends that White people must overcome “transparency” in order to fully appreciate the salience of race to their identity.<sup>60</sup> They should do so, however, with the intention of consciously repudiating “Whiteness” as it is currently constituted.<sup>61</sup>

What is clear from Haney López’s discussion of the social and legal construction of Whiteness is that, while light-skinned Mexicanas/os and Latinas/os may be favored over dark-skinned ones, they are not considered “White,” as that would entail their full acceptance into the in-group of privileged Whites. “Whiteness,” after all, is ultimately not a racial classification but a socially constructed one.<sup>62</sup> Haney López suggests that White identity is defined by the “othering” of non-Whites.<sup>63</sup> Whites exist as a category of people, subject to a double negative: They are those who are not non-White.<sup>64</sup>

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<sup>56</sup> *Id.* at 6.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 132–33.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 7.

<sup>63</sup> *Id.* at 19–20.

<sup>64</sup> *Id.* at 20.

Using data from the New Immigrant Survey, a major collaborative and long-running research study of new legal immigrants to the United States, Reanne Frank, Ilana Redstone Akresh, and Bo Lu found that Latino immigrants in the United States understand the privileges associated with a “White” racial designation, but they also understand that the larger society is not generally willing to grant them this designation.<sup>65</sup> Additionally, they found that darker-skinned Latino immigrants experienced increased color-based racial discrimination relative to their annual income.<sup>66</sup>

While we should continue to work toward developing a structural theory of racism, as suggested by CRT theorists and Bonilla-Silva, we must also recognize that in addition to overt racism, Latinos/as in the United States, including Jalos migrants, are subjected to a great deal of discrimination that is ostensibly race neutral and at the same time legally sanctioned. Therefore, it is important to develop what I term a “race/plus model,” which takes into account not only intentional, institutional, and “common sense” racism,<sup>67</sup> but also other forms of racism and discrimination that are not directly based on race. In the next section, I present a new race/plus theoretical model of discrimination, which recognizes that Latinos are subjected not only to racial discrimination, but also to discrimination based on language, culture, and real or perceived immigration status.

## VII. APPLICATION OF THE RACE/PLUS MODEL

The focus on race and the racial binary in the antidiscrimination principle and in Equal Protection jurisprudence is consistent with the prevailing liberal view of equality. This view contends that “discrete and insular minorities are those whose subordination is based on immutable

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<sup>65</sup> See generally Reanne Frank et al., *Latino Immigrants and the U.S. Racial Order: How and Where Do They Fit in?*, 75 AM. SOC. REV. 378 (2010).

<sup>66</sup> *Id.*

<sup>67</sup> IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 108 (2003).

characteristics like race and skin color.<sup>68</sup> But it is more difficult to address discrimination based on other traits like language, which are presumed to be more mutable than race.<sup>69</sup> I am not suggesting here that race and skin color are not important bases of discrimination for these groups; they are important. I am suggesting that, in addition to racial discrimination, Latinas/os and other non-English-speaking, immigrant groups are subjected to language and accent discrimination.<sup>70</sup> Also, regardless of their citizenship or immigration status, Mexicans are often perceived as "foreign" or alien, and discrimination based on so-called "Mexican appearance" is not only legally enforced, but also socially sanctioned.

Legal precedents in diverse areas such as jury selection, discrimination in employment, segregation of Mexican students, and the Fourth Amendment protection against unreasonable searches and seizures demonstrate the limitation of the extant binary model that prohibits racial discrimination, but directly and indirectly condones discrimination based on language and real or perceived immigration status.<sup>71</sup>

#### *A. Discrimination in Jury Selection*

One of the first cases where the US Supreme Court applied the antidiscrimination principle was in the 1879 case of *Strauder v. West Virginia*.<sup>72</sup> The Court held that a West Virginia statute barring colored citizens from jury service and limiting jury service to White males, 21 years of age and older was a violation of the Equal Protection Clause of the

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<sup>68</sup> Alfredo Mirandé, "Revenge of the Nerds," or Postmodern "Colored Folk"?: Critical Race Theory and the Chronicles of Rodrigo, 4 HARV. LATINO L. REV. 153, 193 (2000).

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.*, *Fragante v. City & Cnty. of Honolulu*, 888 F.2d 591 (9th Cir. 1989) (upholding the dismissal of Manuel Fragante's employment discrimination suit after he applied for a clerk's job and was not selected for the position despite scoring highest of 721 persons taking the civil service exam because of a perceived deficiency in relevant oral communication skills caused by his "heavy Filipino accent").

<sup>71</sup> Space limitations preclude an extended discussion of the relevant case law.

<sup>72</sup> *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

Fourteenth Amendment and, therefore, unconstitutional. In *Yick Wo v. Hopkins*,<sup>73</sup> the Supreme Court held that the Fourteenth Amendment is not confined to the protection of Black citizens and extended the constitutional protection to permanent or temporary residents from China.

While *Strauder* prohibited racial discrimination in the jury composition, it was not until nearly 75 years later, in *Hernandez v. Texas*,<sup>74</sup> in the same term as the historic *Brown v. Board of Education* desegregation decision, that the Court extended the protection of *Strauder* to Mexicans. For the first time, the Court challenged the racial binary in holding in *Hernandez v. Texas* that people of Mexican origin constituted a distinct, legally cognizable entity, separate and apart from Whites and Blacks and subject to the protection of the Fourteenth Amendment.<sup>75</sup> The Court ruled that it was a denial of the Fourteenth Amendment Equal Protection Clause to try a defendant, like Pete Hernandez before a jury where all persons of his race or ancestry have, because of that race or ethnicity, been excluded by the State.<sup>76</sup>

Almost 40 years later however, the Supreme Court in *Hernandez v. New York*<sup>77</sup> would turn *Hernandez v. Texas* on its head by upholding the use of peremptory challenges to exclude bilingual Spanish-speaking jurors from a jury pool during *voir dire* examination. These exclusions were ostensibly not based on race or language, but on the fact that the prosecution was not convinced that Spanish-speaking jurors could abide by the official translation provided by the court interpreters and thus offered a race-neutral explanation for dismissing the jurors.<sup>78</sup>

Dionisio Hernandez petitioned the Supreme Court for review of the New York State Supreme Court's rejection of his claim that the prosecutor in his

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<sup>73</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

<sup>74</sup> *Hernandez v. Texas*, 347 U.S. 475, 482 (1954).

<sup>75</sup> *Id.* at 480.

<sup>76</sup> *Id.* at 482.

<sup>77</sup> *Hernandez v. New York*, 500 U.S. 352 (1991).

<sup>78</sup> *Id.* at 360.

criminal trial exercised peremptory challenges to exclude Latinos<sup>79</sup> from the jury because of their ethnicity, arguing that the prosecutor's discriminatory use of peremptory strikes violated the Equal Protection Clause.<sup>80</sup> In *Batson v. Kentucky*, the Supreme Court held that the use of race to exclude jurors during *voir dire* was impermissible and a violation of the Equal Protection Clause.<sup>81</sup> Using *Batson's* three-step process for determining whether the prosecution had used peremptory challenges in a way that violated the Equal Protection Clause,<sup>82</sup> the Court had to determine whether the prosecutor offered a race-neutral basis for challenging Latino potential jurors and, if so, whether the state court's decision to accept the prosecutor's explanation should be sustained.<sup>83</sup>

Hernandez argued that Spanish-language ability is inextricably linked to ethnicity, and that, as a result, it is a violation of the Equal Protection Clause to exercise peremptory challenges to exclude Latino potential jurors on the grounds that they speak Spanish.<sup>84</sup> He also pointed to the high correlation between Spanish-language ability and ethnicity in New York.<sup>85</sup> The Court concluded, however, "we need not address that argument here, for the prosecutor did not rely on language ability without more but explained that the specific responses and the demeanor of the two individuals during *voir dire* caused him to doubt their ability to defer to the official translation of Spanish-language testimony."<sup>86</sup>

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<sup>79</sup> The Court noted that petitioner and respondent both used the term "Latino" in their briefs to the Court but that the *amicus* brief employed "Hispanic" and that the parties used that term to refer to the excluded jurors in the trial court, although no attempt was made to distinguish the terms by the parties. In deference to the terminology preferred by the parties, the Court opted to use Latino to refer to the excluded jurors. *Id.* at 355.

<sup>80</sup> *Id.*

<sup>81</sup> *Batson v. Kentucky*, 476 U.S. 79, 139 (1986).

<sup>82</sup> *Id.* at 96–98.

<sup>83</sup> *Hernandez*, 500 U.S. at 359.

<sup>84</sup> *Id.* at 360.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

In evaluating the race neutrality of the prosecution's explanation for the exclusion, the Court, relying on *Arlington Heights v. Metropolitan Housing Development Corporation*<sup>87</sup> and other relevant authority, held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."<sup>88</sup>

The Court upheld Hernandez's conviction, ruling that the state courts did not commit clear error and were correct in accepting the prosecutor's race-neutral explanation for his exercise of peremptory challenges to exclude prospective Latino jurors.<sup>89</sup> A critical implication of the *Hernandez v. New York* holding is that language can now serve as proxy for race in excluding Latinos from juries.

*B. "We Don't Allow No 'Misikan' Talk": Discrimination in Employment*

While employment discrimination based on race or national origin is prohibited under Title VII of the United States Civil Rights Act<sup>90</sup> and under most equivalent state statutes, including the California Fair Employment and Housing Act (FEHA),<sup>91</sup> language is not a protected category under current federal or state law. Because language discrimination is not prohibited, employers can reprimand and/or fire people for speaking Spanish on the job if they can simply articulate a bono fide business necessity for imposing an English-only rule, a low threshold, such as improving workplace safety and/or morale.<sup>92</sup> Again, as in jury selection, in

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<sup>87</sup> *Id.* at 359–60

<sup>88</sup> *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977).

<sup>89</sup> *Hernandez*, 500, U.S. at 372.

<sup>90</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1991).

<sup>91</sup> California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900–12996 (West 2011).

<sup>92</sup> *See, e.g.*, Alfredo Mirandé, "En la Tierra del Ciego, El Tuerto es Rey" ("In the Land of the Blind, the One-Eyed Person is King"): *Bilingualism as a Disability*, 26 N.M. L. REV. 75 (1996).

an employment context, discrimination on the basis of language becomes a proxy for racial discrimination.

One of the first cases to address English-only requirements in an employment context was *Saucedo v. Well Service, Inc.*<sup>93</sup> In this case, the United States District Court of the Southern District of Texas held that a Mexican employee had been subjected to employment discrimination when he was fired after speaking two words of Spanish, while his supervisor was retained despite the fact that he had engaged in fighting during the same incident.<sup>94</sup>

At the time he was terminated, Saucedo was working as a floorman for Brothers Well Service ("Brothers"), a small business operating "workover rigs" near Houston. Though Saucedo's employment history and work record were satisfactory and Brothers did not have an English-only employment rule, his immediate supervisor told him that as far as he was concerned he could speak any language he wanted to but that the supervisor on the rig, Doc Holliday, "didn't allow any 'Mesican' talk."<sup>95</sup>

After he was ordered to bring a large metal part to another Mexican-American worker, Saucedo uttered two words in Spanish. Holliday overheard the conversation and told Saucedo that he had just resigned, ordered him to put on his street clothes, and drove him into town.<sup>96</sup> The court held that the rule prohibiting Spanish clearly had an adverse impact on Mexican-American employees and that Brothers failed to prove that there was a credible, bona fide, necessity for the rule.<sup>97</sup>

In contrast, in another Texas case, *Garcia v. Gloor*, the Fifth Circuit Court of Appeals upheld the dismissal of a Mexican-American employee who was fired for speaking Spanish in the workplace in violation of his

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<sup>93</sup> *Saucedo v. Bros. Well. Serv., Inc.*, 464 F. Supp. 919 (S.D. Tex. 1979).

<sup>94</sup> *Id.* at 921.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 920–21.

<sup>97</sup> *Id.* at 922.



employer's English-only rule.<sup>98</sup> Although Hector Garcia was born in Texas, he was bilingual and Spanish was his first language.<sup>99</sup> Garcia was employed as a salesman by Gloor Lumber and Supply Company ("Gloor") in Brownsville, Texas. Despite the fact that seven of the eight salesmen were Hispanic and bilingual, and 75 percent of the population in the area of the business was Hispanic,<sup>100</sup> Gloor felt that the rule was justified for business reasons. Gloor had a rule prohibiting employees from speaking Spanish on the job unless they were speaking to a Spanish-speaking client.<sup>101</sup> Despite having a good work record, Garcia was fired after another employee asked him about an item requested by a client and he responded in Spanish. He was overheard by Alton Gloor, an officer and stockholder in the company, and let go.

The narrow issue addressed by the Fifth Circuit was "whether the English-only rule as applied to Mr. Garcia imposed a discriminatory condition of employment."<sup>102</sup> The Fifth Circuit affirmed the ruling by the lower court denying a class action suit because the class was too small to meet the requirement and also concluding that the rule did not discriminate on the basis of national origin.<sup>103</sup>

In seeking to interpret the statute, the court did so through a monolingual lens. It focused on Garcia's bilingual ability and concluded that, although he was able to speak English, "[h]e chose deliberately to speak Spanish instead of English while actually at work," and he "was permitted to speak the language he preferred during work breaks."<sup>104</sup>

In *Jurado v. Eleven-Fifty Corp.*, KIIS-FM (KISS) in Los Angeles similarly fired Valentine Jurado after he was instructed to broadcast only in

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<sup>98</sup> *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980), *cert denied*, 449 U.S. 1113 (1981).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 267.

<sup>101</sup> *Id.* at 266.

<sup>102</sup> *Id.* at 267.

<sup>103</sup> *Id.* at 266.

<sup>104</sup> *Id.* at 268.

English and allegedly refusing to abide by the request. Jurado was a radio announcer of Mexican and Native American descent and a bilingual English/Spanish speaker.<sup>105</sup> He began working as a disc jockey under the name of "Val Valentine" and broadcast in English until, at the request of the program director, he began using a few phrases of "street Spanish" in an effort to attract more Spanish-speaking listeners.<sup>106</sup> After a consultant concluded that the bilingual format actually hurt the radio station's ratings he was directed by the new program director to stop using Spanish on the air.<sup>107</sup> The parties disagreed as to what happened next, with Jurado claiming he was fired and the station saying he quit.<sup>108</sup> However, for the purposes of Summary Judgment, KIIS admitted Jurado was fired.<sup>109</sup>

Jurado's race and national origin discrimination claim under 42 U.S.C. § 1981<sup>110</sup> and Title VII of the Civil Rights Act of 1964 and his claims for breach of a collective bargaining agreement under Section 301 of the Labor Management Relations Act were denied by the Ninth Circuit Court of Appeals. The court affirmed a lower court Summary Judgment Motion on behalf of defendants.<sup>111</sup> The court held that the plaintiff had failed to make a prima facie disparate treatment case, given that the English-only rule was motivated by market conditions rather than racial considerations, and because he failed to show that he participated in any activity under Title VII that protected against retaliation by an employer.<sup>112</sup> Finally, the court rejected Jurado's only disparate treatment claim that the English-only rule somehow disadvantaged Hispanics because "[Jurado] was fully bilingual and could easily conform to the order."<sup>113</sup> The court, citing *Garcia v. Gloor*,

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<sup>105</sup> *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1408 (9th Cir. 1987).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> 42 U.S.C. § 1981 (2006).

<sup>111</sup> *Jurado*, 813 F.2d. at 1413.

<sup>112</sup> *Id.* at 1411.

<sup>113</sup> *Id.* at 1412.

concluded that “[a]n employer can properly enforce a limited, reasonable, and business-related English-only rule against an employee who can readily comply with the rule and who voluntarily chooses not to observe it . . . .”<sup>114</sup>

However, in *Gutierrez v. Municipal Court*, the Ninth Circuit held that the district court had not abused its discretion in entering a preliminary injunction enjoining enforcement of an English-only rule imposed by the Municipal Court of the Southeast Judicial District of Los Angeles.<sup>115</sup> Alva Gutierrez was one of several bilingual Latinas employed by the court as deputy clerks who were expected to translate for the non-English-speaking public.<sup>116</sup> However, the court enacted a new personnel rule that prohibited employees from using a language other than English outside of their capacity as interpreters for the public.<sup>117</sup> The rule was subsequently amended to exclude conversations held during employee breaks or lunch.<sup>118</sup> Gutierrez and the other bilingual clerks were upset with the English-only rule and Gutierrez filed a complaint with the United States Equal Opportunity Commission (EEOC). She then brought suit against the judges of the EEOC adjudication seeking money damages, injunctive relief, and attorney fees.<sup>119</sup> Gutierrez argued that the English-only rule (1) resulted in racial and national origin discrimination and was a violation of Title VII,<sup>120</sup> (2) denied her the right to enter into contracts with White persons in violation of 42 U.S.C. § 1981, and (3) denied her the equal protection of the law and infringed her First and Fourteenth Amendment rights.<sup>121</sup> Finally, Gutierrez sought damages under 42 U.S.C §§ 1983 and 1985(3).<sup>122</sup>

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<sup>114</sup> *Id.* at 1411 (citing *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980)).

<sup>115</sup> *Gutierrez v. Mun. Court*, 838 F.2d 1031, 1036 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

<sup>116</sup> *Id.* at 1036.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> 42 U.S.C. §§ 2000e-2(a) (1988).

<sup>121</sup> *Gutierrez*, 838 F.2d at 1036.

<sup>122</sup> *Id.* at 1037.

In addition to holding that Gutierrez was entitled to a preliminary injunction, the court held that the municipal judges were not entitled to absolute legislative immunity, that the district court had jurisdiction, and that qualified immunity was not a defense to a charge of intentional discrimination.<sup>123</sup> A Ninth Circuit panel voted to deny a petition for rehearing.<sup>124</sup> The dissenters objected and maintained that *Gutierrez* “cried out for an en banc consideration” because the panel opinion created a direct conflict with the Fifth Circuit opinion in *Garcia v. Gloor* and the Ninth Circuit holding in *Jurado*.<sup>125</sup>

The dissent in *Gutierrez* would ultimately prevail in *Garcia v. Spun Steak Co.*,<sup>126</sup> an opinion written by Ninth Circuit Court Judge Diarmuid O’Scannlain, one of the dissenting judges in *Gutierrez*.<sup>127</sup> Spun Steak Co., a small South San Francisco producer of frozen poultry and meat products offered for wholesale distribution,<sup>128</sup> had 24 out of a total of 33 workers who were Spanish speakers. Two of the workers spoke no English and the rest had “varying degrees of proficiency in English.”<sup>129</sup>

The plaintiffs, Priscilla Garcia and Maricela Buitrago, were reprimanded for speaking Spanish while working on the production line in violation of a recently enacted English-only rule, which prohibited workers from speaking Spanish except on their lunch or work breaks.<sup>130</sup> The English-only rule was implemented after the company received complaints that some workers

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<sup>123</sup> *Id.*

<sup>124</sup> *Gutierrez v. Mun. Court*, 861 F.2d 1187 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

<sup>125</sup> *Id.* at 1188–89.

<sup>126</sup> *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994).

<sup>127</sup> Mirandé, *supra* note 92, at 83.

<sup>128</sup> *Spun Steak Co.*, 998 F.2d at 1483.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

were allegedly using their “bilingual abilities” to harass and insult other workers.<sup>131</sup>

The district court held that the English-only policy had an adverse impact on Hispanic employees unjustified by a sufficient business necessity and was therefore a violation of Title VII.<sup>132</sup> Spun Steak Co. appealed and the Ninth Circuit reversed and remanded.<sup>133</sup> The Ninth Circuit held that the employees who spoke both English and Spanish had failed to show that the English-only requirement had a significant adverse impact on the terms, conditions, or privileges of their employment.<sup>134</sup> Incredibly, the court added that plaintiffs had failed to show that there was a genuine issue of material fact as to whether those employees who did not speak English were adversely impacted by the ruling.<sup>135</sup>

### *C. Educational Segregation and Discrimination*

The race/plus model is also relevant for education and for attempts to desegregate schools following the landmark decision in *Brown*.<sup>136</sup> Although *Brown* overturned the prevailing “separate but equal” doctrine established in *Plessy v. Ferguson*<sup>137</sup> and outlawed racial discrimination and segregation, holding that separate educational facilities were inherently unequal and in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, de jure segregation of Mexican students continued both before and after *Brown*. Such segregation was generally upheld on the grounds that it was based not on race per se, but on the fact

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1484.

<sup>133</sup> *Id.* at 1490.

<sup>134</sup> *Id.* at 1485–86.

<sup>135</sup> *Id.* at 1489.

<sup>136</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

<sup>137</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

that Mexican students had special language and other educational needs,<sup>138</sup> so that, once again, language became a proxy for race.

Although the legal segregation of Mexican students would be overturned in *Westminster School Dist. et al. v. Mendez*,<sup>139</sup> Mexican parents had fought against the segregation of Mexican children for decades prior to this historic decision, which laid the groundwork for *Brown*. These efforts were initiated in Texas and California in the 1930s.<sup>140</sup> One of the desegregation efforts occurred in 1930 when Mexican parents challenged the segregation of Mexican children in Del Rio, Texas.<sup>141</sup> The resulting case, *Independent School Dist. v. Salvatierra*, was therefore significant in challenging the racial binary in seeking to determine the constitutionality of the common practice of racially segregating Mexican children. The case was important for a number of reasons. First, it was significant because the Texas State Constitution of 1875, ratified in 1876, permitted the segregation of "colored" and "White" children.<sup>142</sup> Second, it provided legal precedent for subsequent challenges to the segregation of Mexican children.<sup>143</sup> Finally, the plaintiffs in the case were represented by attorneys representing The League of United Latin American Citizens (LULAC), a newly formed civil rights organization that advocated for the rights of Mexican citizens.<sup>144</sup>

The district court in *Salvatierra* held that the school district could not legally segregate Mexican children because they were deemed to be "members of the White race."<sup>145</sup> Although the trial court granted an

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<sup>138</sup> See generally *Hernandez v. Driscoll*, 2 Race Rel. L. Rep. 329 (1957); *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

<sup>139</sup> *Westminster Sch. Dist.*, 161 F.2d 774.

<sup>140</sup> RICHARD R. VALENCIA, *CHICANO SCHOOL FAILURE AND SUCCESS: PAST, PRESENT, AND FUTURE* 87 (2d ed. 2002).

<sup>141</sup> See generally *Independent Sch. Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930).

<sup>142</sup> VALENCIA, *supra* note 140.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

injunction preventing the district from segregating Mexican children, the Texas Court of Civil Appeals overturned the lower court, holding that the district did not intentionally and arbitrarily segregate Mexican children by race given that the children had special language needs and that the school district had the authority to segregate children on educational grounds.<sup>146</sup>

Although largely unknown, *Alvarez v. Lemon Grove* was the first successful desegregation case in the United States<sup>147</sup> and took place some 25 years before *Brown v. Board of Education*. On January 5, 1931, Principal Jerome Green, acting under instructions from Lemon Grove School trustees, literally turned away Mexican school children at the school house door and directed them to a new school. This school came to be known within the local Mexican community as *la caballeriza* (the stable).<sup>148</sup>

The parents refused to send their children to the new school and, since they were not admitted to the main schoolhouse, a boycott and lawsuit ensued. Mexican parents came together to form *El Comité de Vecinos de Lemon Grove* (The Lemon Grove Neighborhood Committee) and organized a successful boycott of the school, ordering their children not to attend the new school. Eventually, with the support of the Mexican Consul the parents brought a successful suit in the San Diego Superior Court.

Judge Claude Chambers of the San Diego Superior Court ruled that separate facilities impeded the language development of Spanish-speaking students. Additionally, he held that the school board did not have the right to segregate Mexican children because they were Caucasian and California law had no provision for their segregation, although state statutes allowed for the segregation of African American and Indian children.<sup>149</sup> Judge Chambers ruled against the Lemon Grove School District and ordered them

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 87–88.

<sup>149</sup> *Chapter 7: La Lucha: The Beginnings of the Struggle, 1920-1930s*, SAN DIEGO MEXICAN & CHICANO HISTORY, <http://aztlan.sdsu.edu/chicanohistory/chapter07/c07s02.html> (last visited Apr. 20, 2014).

to reinstate the children in the regular school.<sup>150</sup> Although *Lemon Grove* was an important ruling for Mexican Americans, it failed to challenge the racial binary and de jure racial segregation.<sup>151</sup> In fact, it “had no precedent-setting ruling affecting either the State of California or other situations of school segregation in the Southwest.”<sup>152</sup>

In the landmark case of *Westminster School Dist. of Orange County et al. v. Mendez et. al.*,<sup>153</sup> some seven years before *Brown*, the Ninth Circuit Court of Appeals overturned the segregation of Mexican children, ruling that such segregation violated the Equal Protection Clause. The court reasoned that Mexicans were “Caucasian” and the California statute at issue did not specifically permit the segregation of Mexican students. In *Mendez*, the parents in the Westminster School District brought suit alleging that a common plan had been adopted and put into effect by the School District and common rules and regulations had been adopted and implemented. The parents alleged that, as a result, “‘petitioners and all others of Mexican and Latin descent’” [we]re ‘barred, precluded and denied’ [from] ‘attending and using and receiving the benefits and education furnished to other children,’ and [we]re segregated in schools ‘attended solely by children of [M]exican and Latin descent.’”<sup>154</sup> Petitioners further argued that they “and others in the same situation have objected, and they have demanded and have been refused admission to schools within their respective districts which they would attend but for the practice of segregation.”<sup>155</sup>

The Ninth Circuit Court of Appeals upheld the lower court ruling and found that

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<sup>150</sup> *Id.*

<sup>151</sup> VALENCIA, *supra* note 140, at 88.

<sup>152</sup> Roberto Álvarez, Jr., *The Lemon Grove Incident: The Nation’s First Successful Desegregation Court Case*, 32 J. SAN DIEGO HIST., 116, 116–35 (1986), available at <http://www.sandiegohistory.org/journal/86spring/lemongrove.htm>.

<sup>153</sup> *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 774 (9th Cir. 1947).

<sup>154</sup> *Id.* at 776.

<sup>155</sup> *Id.*



the acts of respondents were and are entirely without authority of California law, notwithstanding their performance has been and is under color or pretense of California law. Therefore, conceding for the argument that California could legally enact a law authorizing the segregation as practiced, the fact stands out unchallengeable that California has not done so but to the contrary has enacted laws wholly inconsistent with such practice. By enforcing the segregation of school children of Mexican descent against their will and contrary to the laws of California, respondents have violated the federal law as provided in the Fourteenth Amendment to the Federal Constitution by depriving them of liberty and property without due process of law and by denying to them the equal protection of the laws.<sup>156</sup>

Although not directly addressing segregation, in *San Antonio Independent School District v. Rodriguez*, the Supreme Court upheld the Texas system for financing public education based on local property taxes as constitutionally permitted and not a violation of the Equal Protection Clause because education, while important, was not a fundamental right.<sup>157</sup> It also held that even though over 90 percent of the school district at issue was made up of minorities and was about 86 percent Mexican, the distinction between levels of school funding was based on economic status and not directly on race.<sup>158</sup>

#### *D. Alienage: “The Mexican Exception” to the Fourth Amendment*

In an immigration context, the Supreme Court held in *United States v. Brignoni-Ponce*, that “Mexican appearance” or being “Mexican-looking” is one of a number of legitimate factors that can be used by law enforcement in stopping people, without intruding on the Fourth Amendment’s protection against unreasonable searches and seizures.<sup>159</sup> The issue before

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<sup>156</sup> *Id.* at 780-81.

<sup>157</sup> See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>158</sup> In another important Texas case, the Supreme Court held that the denial of a public education to the children of undocumented workers was unconstitutional and a violation of the Fourteenth Amendment. See *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>159</sup> See generally *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

the Supreme Court was whether a roving patrol may legally stop a vehicle and question its occupants when the only basis for the stop is that the occupants appear to be of Mexican ancestry.<sup>160</sup>

The decision in *Brignoni-Ponce* had the effect of limiting the authority of Border Patrol agents to question people in the vicinity of the border.<sup>161</sup> Except at the border or its functional equivalent, officers on a roving patrol may stop vehicles "only if they are aware of specific articulable facts, together with rational inferences from those facts that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."<sup>162</sup> A number of factors may be taken into account in deciding whether there is reasonable suspicion, such as information about recent illegal border crossings in the area, the driver's behavior, driving patterns, and obvious attempts to avoid detection.<sup>163</sup> The Court concluded, however, that "the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."<sup>164</sup> While the Court held that a stop could not be justified solely on the basis of Mexican appearance, it made "Mexican appearance" one of a number of factors that can constitutionally be used to establish reasonable suspicion for stopping a vehicle in a roving patrol.

In *United States v. Martinez-Fuerte et al.*, the Supreme Court distinguished between roving patrols and fixed checkpoints.<sup>165</sup> The Court held that the Border Patrol's routine stopping of a vehicle at a permanent checkpoint located on a major highway away from the Mexican border for brief questioning of the vehicle's occupants is consistent with the Fourth Amendment. Additionally, the Court held that immigration stops and questioning may be made at reasonably located checkpoints in the absence

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<sup>160</sup> *Id.* at 875.

<sup>161</sup> *Id.* at 884.

<sup>162</sup> *Id.* at 885.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 886–87.

<sup>165</sup> *See generally* *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

of any individualized suspicion that the particular vehicle contains illegal aliens, although such a stop is technically a *de minimis* intrusion of the Fourth Amendment protection against unreasonable searches and seizures.<sup>166</sup>

In his dissent, Justice Brennan noted that the decision virtually empties the Fourth Amendment of its reasonableness requirement,<sup>167</sup> adding that

[e]very American citizen of Mexican ancestry, and every Mexican alien lawfully in this country, must know after today's decision that he travels the fixed checkpoint highways at the risk of being subjected not only to a stop, but also to detention and interrogation, both prolonged and to an extent far more than for non-Mexican appearing motorists.<sup>168</sup>

Thus, both *Brignoni-Ponce* and *Martinez-Fuertes* had the effect of making “Mexican appearance” a constitutionally permissible basis for making an immigration stop to question the occupants of a vehicle both at fixed checkpoints and on roving patrols.

## VII. CONCLUSION

In applying the race/plus model to Jalos migrants, it is clear that despite the fact that they tend to be more fair-skinned than many Mexican migrants, Jalos migrants and Mexicanos and Latinas/os are still subjected to discrimination that is based not only on race or skin color, but also on other factors, such as language, real or perceived immigration status, or simply because they are deemed to be “Mexican looking” or “illegal.” Many people in the study commented on how they were disadvantaged because they were not fluent in English or because they entered the United States “*cruzando el cerro*” (without papers). Despite being extremely religious and tied to the Catholic Church, others shared that they had experienced discrimination against Spanish speakers in their local parish.

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<sup>166</sup> *Id.* at 556–64.

<sup>167</sup> *Id.* at 568.

<sup>168</sup> *Id.* at 573.

Because of the impact of CRT and cultural studies, the narratives of previously excluded groups are now being slowly incorporated into law and social science.<sup>169</sup> Any paradigm that seeks to understand the experience of Mexicans and Latinas/os in the United States must not only incorporate insider narratives, but also reject monolithic conceptions of Chicana/Latina culture and identity that fail to take into account nationality, gender, sexual orientation, and the regional and generational diversity of the Mexicans and other Latinas/os in the United States.

There has been a challenge to the traditional immigrant model, which treated people as either immigrants or natives, and a growing awareness of a multinational border culture with an emergent transnational experience and identity, or what some have identified as a unique third space between the sending and receiving nation states. A related need is full recognition of the diversity of the Latina/o population in terms of race, place of birth, citizenship, and immigration status. This increased interest in immigration and immigrant rights issues has been coupled with a growing realization that the fate of Chicanas/os and Latinas/os who are native-born or naturalized citizens is inextricably linked to the treatment of immigrants.<sup>170</sup>

The quest for civil rights has been expanded to include not only citizenship rights, but also cultural and linguistic rights, or what has been termed "cultural citizenship."<sup>171</sup> However, there is an interesting disjuncture between "cultural rights" and "citizenship rights." As Renato Rosaldo has

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<sup>169</sup> See generally AÍDA HURTADO, *THE COLOR OF PRIVILEGE: THREE BLASPHEMIES ON RACE AND FEMINISM* (1999).

<sup>170</sup> See, e.g., Adrian Burgos, Jr. & Frank A. Guridy, *Becoming Suspect in Usual Places: Latinos, Baseball, and Belonging in El Barrio del Bronx*, in *BEYOND EL BARRIO: EVERYDAY LIFE IN LATINA/O AMERICA* (Gina M. Pérez et al. eds., 2010); LEO R. CHAVEZ, *SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY* (George Spindler & Louise Spindler eds., 1st ed. 1991); Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 *LA RAZA L.J.* 42 (1995).

<sup>171</sup> Blanca G. Silvestrini, "The World We Enter When Claiming Rights": *Latinos and Their Quest for Culture*, in *LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS* 39, 39–53 (William V. Flores & Rina Benmayor eds., 1997).

observed, cultural rights and citizenship rights tend to be inversely related so that as one increases, the other decreases. In this sense, “[f]ull citizens lack culture, and those most culturally endowed lack full citizenship.”<sup>172</sup>

Finally, I submit that any adequate conception of race and racism must reject the prevailing Black/White binary model in law and the social sciences, and recognize not only the racial diversity of Chicanas/os and Latinas/os, but also that we are subjected to discrimination that is based not only on race, but on language, culture, and real or perceived alienage status. We must also call into question idealist and color-blind conceptions of race, which treat race either as an epiphenomenon, lacking any causal influence, or contend that we somehow promote racism by incorporating the analytical concept of race into our discourse. While we should move toward a structural view of race and racism, must simultaneously resist the temptation to adopt a concept of race that focuses exclusively on social structure and denies any sense of agency or control to the individual.

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<sup>172</sup> RENATO ROSALDO, *CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 198 (1989).