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Mexican Americans as a Legally Cognizable Class under Rule 23 and the Equal Protection Clause

Vicky Palacios
author1868709@ssrn.com

Richard Delgado
University of Alabama - School of Law, rdelgado@law.ua.edu

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*Richard Delgado**

*Vicky Palacios***

I. Introduction

Long inured to their status as "the forgotten minority,"[1] few Chicanos find it surprising that, even after a decade of intensive civil rights activity on behalf of Blacks, the status of Chicanos as a legally cognizable minority is still in doubt. Indeed, the law's failure strikes a familiar chord; almost every Chicano has experienced at some point in his life having the following reasoning applied against him: (1) Our firm (agency, school district) regards Chicanos as white; (2) we do not discriminate against whites; and (3) therefore, we do not discriminate against Chicanos. This argument rests, of course, on the premise that Chicanos are indistinguishable from members of the majority culture and race and are simply not a minority group for purpose of remedial action.

What is surprising is that in certain areas of civil rights litigation this same argument, albeit in a somewhat more sophisticated form, receives judicial approval.[2] This article examines two of these areas: the status of Chicanos under equal protection doctrine and their status under Rule 23[3] governing class actions.

Inability to avail themselves of "class" status severely limits the effectiveness of attempts to redress Chicano grievances through litigation. Class actions enable a single plaintiff or group of plaintiffs to sue on behalf of an entire class.[4] This procedural device possesses the substantial advantages of economy[5] and res judicata effect[6] as well as considerable political and psychological impact.[7] Access to equal protection coverage enables a plaintiff to give his complaint constitu-

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* Assistant Professor of Law, Arizona State University.

** Third-year student, University of Utah Law School.

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1 *See, e.g.,* UNITED STATES COMMISSION ON CIVIL RIGHTS, STRANGER IN ONE'S LAND (1970); Reynoso, *et al., La Raza, the Law, and the Law Schools,* 1970 U. TOLEDO L. REV. 809, 815-16 (1970).

2 *See, e.g.,* notes 43-44 *infra* and accompanying text.

3 FED. R. CIV. P. 23.

4 FED. R. CIV. P. 23(a). The rules, of course, also permit an action to be brought against a defendant or group of defendants as representatives of a larger class. *Id.* Civil rights actions involving Chicanos almost invariably find Chicanos in the position of a plaintiff class, however, and the latter position alone will be discussed in this article.

5 *E.g.,* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1),* 81 HARV. L. REV. 356, 386 *et seq.* (1967); Note, 22 U. FLA. L. REV. 631, 648-49 (1969); *see* Hansberry v. Lee, 311 U.S. 32, 41-42 (1940).

6 The res judicata effect of a direct holding in a successful class suit will always be preferable to reliance on individual holdings under the doctrine of *stare decisis,* since the latter have only persuasive effect and are susceptible to being distinguished on minor factual variances. Hansberry v. Lee, 311 U.S. 32, 42 (1940).

7 Note, 22 U. FLA. L. REV. 631, 648 (1969).

tional dimensions[8] and thus, in certain circumstances, to secure a stricter standard of judicial review.[9]

This article first reviews the status of Chicanos as a class under current decisional law. This will reveal that the law, particularly in the area of class actions, has permitted a fundamental incongruity: those who discriminate against Chicanos are perfectly capable of telling who a Chicano is, but courts and judges are not. As a result, many wrongs go unremedied or, more accurately, can only be remedied by more cumbersome and less effective means than those available to other classes of plaintiffs. The second section addresses the difficulty courts have had in perceiving a Chicano class and reviews a number of characteristics that can be used to delineate the class in appropriate cases. It concludes that the attributes that characterize the Chicano class, when used in combination with certain narrowing techniques available under Rule 23, are sufficiently distinct to enable courts to certify appropriate subclasses of the group for litigation purposes.

II. Chicanos as a Legal Class: The State of the Law

Two types of cases have affected the status of Chicanos as a class: those dealing with their status for equal protection purposes and those dealing with their eligibility to file class actions. Although frequently confused by the courts,[10] these two issues are analytically distinct. The confusion perhaps stems from the fact that equal protection cases are frequently brought as class actions and also that suits challenging discriminatory treatment comprise a major share of the class actions brought on behalf of minority groups. Since racial discrimination is by its nature class discrimination,[11] some courts have permitted a plaintiff to proceed with a class action upon meeting the requirements of a class for equal protection purposes without subjecting the class to separate review under the principles governing traditional class actions.[12]

8 The intense interest on the part of feminists in obtaining a Supreme Court ruling that sex is a suspect classification or, alternatively, in securing passage of the Equal Rights Amendment, is a current example of the way in which achieving constitutional recognition can acquire great symbolic significance for groups pressing for social equality. Of course, such recognition has practical consequences as well. *See* note 9 *infra*.

9 *See, e.g., Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1126-27 (1969) for a discussion of the various criteria courts have adopted for determination of suspect categories, together with a discussion of the effect of such classification. For an analysis of the possibility of obtaining suspect classification treatment for Chicanos, *see Project Report: De Jure Segregation of Chicanos in Texas Schools,* 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 307, 348 *et seq.* (1972).

10 *See, e.g.,* United States v. Texas, 342 F. Supp. 24, 26 (E.D. Tex. 1971):

> This court is convinced that the characteristics of Mexican-American students bind them into a cognizable "national origin" group and has, in the case at bar, ruled accordingly. If it may be argued . . . that the nature of the Mexican-American heritage is too vague and elusive a ground upon which to base a belief that the people sharing that heritage are an identifiable ethnic entity [citing *Tijerina*], nevertheless, the Mexican-American students in this case may be considered as a separate and distinct group cognizable under the Fourteenth Amendment and Rule 23 of the Federal Rules of Civil Procedure.

See also cases cited notes 11-12 *infra*.

11 Harris v. Louisiana State Supreme Court, 334 F. Supp. 1289 (E.D. La. 1971); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966); *see* Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971).

12 *See* Cisneros v. Corpus Christi Independent School Dist., 324 F. Supp. 599 (S.D. Tex. 1970), *supplemented,* 330 F. Supp. 1377 (S.D. Tex. 1971), *application for reinstatement of stay granted,* 414 U.S. 1211 (1971), *aff'd in part, modified in part and remanded,* 467 F.2d

A. *The Status of Chicanos as a Class for Equal Protection Purposes*

In *Hernandez v. Texas*,[13] the Supreme Court faced a challenge to the Texas system of selecting jury commissioners, grand jurors, and petit jurors, which had resulted in the nearly total exclusion of Chicanos from these offices.[14] The State asserted that the equal protection clause prohibits discrimination only where two distinct classes exist and that Mexican-American people are not a distinct class.[15] Declaring that "persons of Mexican descent" are a cognizable minority group for equal protection purposes in areas where they are subject to local discrimination,[16] the Court found systematic exclusion of the members of the class from jury service.[17] Thus, in areas where Chicanos can show they are the victims of discriminatory attitudes, they are a class entitled to judicial relief from specific acts of governmental discrimination.[18] In locales where they are unable to prove the existence of discriminatory treatment at the hands of the majority race, they lack sufficient definitional clarity as a class to warrant fourteenth amendment protection.

The Court's failure to take judicial notice in the *Hernandez* case of the existence of Chicanos as a national class and its reliance instead on a limited factual finding resulted in a solidification of the "other white" strategy.[19] This strategy involves proof that Chicanos are white and thus not appropriate subjects of discriminatory treatment since state law does not recognize discrimination directed against persons of the white race.[20] This approach is unsatisfactory on its face: it demeans the litigant, divides the civil rights movement,[21] and runs counter to the growth of ethnic awareness on the part of Chicano people. Nevertheless, this approach has succeeded due in large part to readily available precedent and the unwillingness of litigators to take on the costly and time-consuming task of proving local prejudice on a case by case basis.

The few opinions subsequent to *Hernandez* that have examined the equal protection question have done little to expand the holding of *Hernandez*. However, cases involving a claim of local discrimination have rarely failed to find it. *White v. Regester*,[22] a recent Supreme Court opinion, involved a challenge by Mexican Americans and Blacks to a legislative apportionment scheme. The

142 (5th Cir. 1972); Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972), *affirmed*, 499 F.2d 1147 (10th Cir. 1974).

13 347 U.S. 475 (1954).

14 *Id.* at 476-77.

15 *Id.* at 477-78.

16 *Id.* at 477-79.

17 *Id.* at 481-82.

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact.

Id. at 478. *See also* Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972), which suggests that the conduct complained of is the best guide for determining whether or not a class exists.

18 347 U.S. 475, 479-80 (1954).

19 For an excellent description of the development of this strategy, see *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 307, 333 *et seq.* (1972).

20 *Id.* at 334-39.

21 *Cf. id.* at 342.

22 412 U.S. 755 (1973).

Supreme Court approved the lower court's finding that Chicanos are an identifiable class for purposes of the fourteenth amendment,[23] but the opinion was grounded, as was *Hernandez,* on a successful showing by the Mexican-American plaintiffs of the existence of local discrimination.[24] The Black plaintiffs, of course, were not required to make this showing.

Keyes v. School District Number One,[25] a 1973 Supreme Court decision involving public school desegregation, found that persons of "Hispano, Mexican, or Cuban heritage" are a separate and cognizable class within the intent of the equal protection clause[26] in language that has been hailed by some as general enough to imply the existence of a national class.[27] This optimistic view is probably unwarranted in view of the Court's citation of *Hernandez* as the sole case directly supporting its conclusion,[28] and the Court's recitation in the opinion of the details of local discrimination.[29] Even after *Keyes,* therefore, it appears that the status of Chicanos as a cognizable group for purposes of equal protection analysis is at best dependent on extrinsic attitudinal factors that require demonstration in each case.

B. *The Status of Chicanos as a Class for Class Action Purposes*

1. General Requirements

Rule 23 of the Federal Rules of Civil Procedure requires that a party desiring to bring a class action demonstrate that his cause of action satisfies four general requirements. First, the class must be so numerous that joinder of all the members is impracticable.[30] Second, there must be questions of law or fact that are common to the class.[31] Third, the claims or defenses of the representatives must be typical of those of the class members.[32] Finally, the representative must be one who will fairly and adequately protect the interests of the class.[33] In addition to these requirements, the action must fall into one of several categories specified in Rule 23(b).[34] For purposes of civil rights actions, the most important of these is Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class,

23 *Id.* at 767.
24 *Id.* at 767-69.
25 413 U.S. 189 (1973).
26 *Id.* at 197.
27 *See, e.g.,* Note, 4 N. M. L. Rev. 215, 218-19 (1974).
28 413 U.S. at 197.
29 *Id.* at 197-98.
30 Fed. R. Civ. P. 23(a)(1).
31 Fed. R. Civ. P. 23(a)(2).
32 Fed. R. Civ. P. 23(a)(3).
33 Fed. R. Civ. P. 23(a)(4).
34 These are cases where:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a

thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[35]

From these general requirements, judicial decisions have distilled a requirement that the class be one that is capable of relatively precise definition.[36] The term most frequently employed when talking about this requirement is "ascertainability." To be acceptable for class action purposes, the individual members of a class must be ascertainable with reasonable certainty.[37] It is useful to compare ascertainability with the requirement in equal protection cases that the class be "identifiable."[38] Judicial treatment suggests that ascertainability may well be a stricter requirement than mere identifiability, and at least one opinion has flatly so stated.[39] Equal protection apparently operates from a principle of class inclusion; a plaintiff need establish only *his own* membership in the class. Class actions, on the other hand, involve an exclusionary requirement; the plaintiff must delineate the contours of the *entire* class with sufficient particularity. Equal protection thus requires that the court "know one when it sees one." In class actions, what appears to be needed is a way of knowing that what is before

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practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted of refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

FED. R. CIV. P. 23(b)(1)-(b)(3).

35 FED. R. CIV. P. 23(b)(2).

36 *E.g.*, Williams v. Page, 60 F.R.D. 29, 34-35 (N.D. Ill. 1973); Thomas v. Clarke, 54 F.R.D. 245, 248-249 (D. Minn. 1971); Dolgow v. Anderson, 43 F.R.D. 472, 491 *et seq.* (E.D.N.Y. 1968); Zachman v. Erwin, 186 F. Supp. 691, 698 (S.D. Tex. 1960). It is evidently not necessary that the class members be so clearly identified that any one can be ascertained at the commencement of the suit. Carpenter v. Davis, 424 F.2d 257, 260 (5th Cir. 1970).

One court has stated that a class must be capable of identification at least to the extent that one may determine whether an individual is or is not included within the class. Eisman v. Pan Am. World Airlines, 336 F. Supp. 543 (E.D. Pa. 1971). Other courts speak in terms of definitions which may not be too vague to be meaningful, Tijerina v. Henry, 48 F.R.D. 274 (D.N.M. 1969). Most courts hold it is incumbent upon the plaintiff to bring with his suit criteria which delineate the parameters of the group he purports to represent in the class action, Miller v. Mackey Internat'l, Inc., 452 F.2d 424 (5th Cir. 1971); *in re* Yarn Processing Patent Litigation, 56 F.R.D. 648 (S.D. Fla. 1972). Class actions have been held to be appropriate even where the identification or location of many class members is unknown and the total number of members constituting the class cannot be determined at the institution of the suit. Davy v. Sullivan, 354 F. Supp. 1320 (M.D. Ala. 1973). Although failure to enumerate and identify class members with precision is not required, mere speculation as to the existence of the class is not sufficient. Tolbert v. Western Electric Co., 56 F.R.D. 108 (N.D. Ga. 1972). And, of course, each individual member of the class must have a right against the defendant. *E.g.*, Pacific Inter-Club Yacht Ass'n v. Morris, 197 F. Supp. 218, 223 (N.D. Cal. 1960); Barret v. Kunzig, 331 F. Supp. 266 (M.D. Tenn. 1971); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.04 (1974).

At least one liberal court has suggested, in a housing discrimination case, that the bounds of the class need not be precisely drawn at the start of the action, since discovery procedures may be used to delineate the boundaries of the class later. Young v. AAA Realty Co., 350 F. Supp. 1382 (M.D. N.C. 1972). *See generally* Fitzgerald, *When Is a Class a Class?* 28 BUS. LAWYER 95 (1972). *See also* J. MOORE, FEDERAL PRACTICE ¶ 23.04, at 23-251 (1974).

37 *E.g.*, Arnesen v. The Raymond Lee Organization, Inc., 59 F.R.D. 145, 147 (C.D. Cal. 1973); Gregory v. Hershey, 51 F.R.D. 188 (E.D. Mich. 1970).

38 *See* notes 13-22 *supra* and accompanying text.

39 *See* Kinsey v. Legg, Mason & Co., 60 F.R.D. 91, 99-100 (D.D.C. 1973).

the court is *not* a member of the class. The need for precision in the class definition would appear to be somewhat less in Rule 23(b)(2) actions than in suits filed under other sections of Rule 23; Rule 23(b)(2) suits are normally for injunctive or declaratory relief rather than money damages,[40] and there are no statutory notice or "opting out" provisions.[41] If the only object of a civil rights action is to compel the defendant to stop doing something, the precise size of the class benefited becomes relatively unimportant.[42]

2. Chicanos as an Ascertainable Class under Rule 23

Although a number of Texas intermediate appellate courts have rejected characterization of Chicanos as a class other than white,[43] the first and only modern case to explore comprehensively the possible bases on which such class representation claims rest is *Tijerina v. Henry*,[44] a United States district court case arising from a New Mexico lawsuit. A leading Chicano activist[45] sought to compel the state's school systems to take certain measures designed to provide equal educational opportunity for Chicano children.[46] Alleging a violation of constitutional rights[47] as well as rights guaranteed by the treaty of Guadalupe Hidalgo,[48] Tijerina sought to represent two classes of plaintiffs, one of which consisted of all "Indo-Hispano, also called Mexican-American and Spanish-American" persons residing in the state.[49] Without discussing possible measures to limit the class along functional, geographic, or numerical lines[50]—measures

40 *See* note 32 *supra; Notes of Advisory Committee on the Federal Rules of Civil Procedure,* at Subdivision (b)(2).

41 *See* FED. R. CIV. P. 23(c)(2).

42 *See, e.g.,* Gregory v. Hershey, 51 F.R.D. 188, 188-89 (E.D. Mich. 1970); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 354 F. Supp. 778, 782-83 (D. Conn. 1973).

43 *E.g.,* Sanchez v. State, 243 S.W.2d 700 (Ct. Crim. App. Texas 1951); Sanchez v. State, 181 S.W.2d 87, 90 (Ct. Crim. App. Texas 1944); *see* Salazar v. State, 193 S.W.2d 211 (Ct. Crim. App. Texas 1946). That these, as well as many other cases cited herein, antedate the 1966 amendments to the Federal Rules of Civil Procedure, is not especially significant, since both sets of rules are similar in their general, or threshold, requirements. Consequently, cases dealing with class definition under the "old" rules should still be viable. *E.g.,* Wright, *Class Actions,* 47 F.R.D. 169, 171 (1970).

44 48 F.R.D. 274 (D.N.M. 1969), *appeal dismissed,* 398 U.S. 922 (1970).

45 Reies Lopez Tijerina is the leading figure in the Southwest land-grant revolt. For an excellent account of the evolution of the controversy *see* Knowlton, *Violence in New Mexico: A Sociological Perspective,* 58 CAL. L. REV. 1054 (1970).

46 Plaintiffs sought to compel the school systems in the state of New Mexico to offer all classes in both English and Spanish, 48 F.R.D. at 278, and to reapportion the school boards, *id.* at 279.

47 *Id.* at 275.

48 *Id.* at 275, 278-79.

49 *Id.* at 275. The other class consisted of the poor. *Id.*

50 *See* Carr v. Conoco Plastics, Inc., 423 F.2d 57 (5th Cir. 1970); Koelfgen v. Jackson, 355 F. Supp. 243 (D. Minn. 1972); Jentes, *Defining and Notifying the Class,* 41 ANTITRUST L.J. 232 (1971). In cases involving Chicano litigants, geographic categories were employed successfully in White v. Regester, 412 U.S. 755 (1973) (Mexican Americans in Baxter County held an identifiable class for fourteenth amendment purposes), and Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972), *affirmed,* 499 F.2d 1147 (10th Cir. 1974) (Chicanos attending schools within Portales school district held cognizable class). Frequently, functional and geographical categories are used together. *Serna,* for example, was an action on behalf of Chicano children who attended (functional category) a certain school district (geographic category). *See also* Vaughns v. Bd. of Educ., 355 F. Supp. 1034 (D. Md. 1972).

which courts are empowered to take under Rule 23[51]—the court, in an extended opinion, rejected the claim for class representation on grounds of simple unintelligibility. The designations "Chicano," "Mexican American," "Hispano," and so on, the court held, simply fail to delineate a class with sufficient clarity.[52] The court rejected the plaintiff's first identifying criterion of Spanish surname as unreliable since an unknown number of persons have lost or gained a Spanish surname through intermarriage.[53] The court also rejected Mexican, Indian, and Spanish ancestry as a defining characteristic on the ground that "pure" representatives of such mixtures are difficult to find as a result of intermarriage with members of other races and nationalities.[54] The court similarly rejected the attribute of Spanish as the primary or maternal language since in many cases residents of the Southwest are bilingual and it is impossible to tell which language is primary.[55] Because none of the plaintiff's proposed identifiers delineated the Chicano class with sufficient precision, the court refused to proceed with the action as a class suit.[56]

On its logic alone, the *Tijerina* opinion is susceptible to attack on a number of fronts. First, the opinion confused two senses of class identification that can be involved in certifying a class for class treatment. In the first of these, the plaintiff simply supplies a verbal formula which, if it denotes anyone at all, gives the content of his class. The plaintiff's proffered formula is thus little more than a definition and can be challenged only on grounds of internal inconsistency or possibly on grounds that the formula denotes a set having no members.[57] In a second sense, however, plaintiffs may indicate that they intend to sue on behalf of an existing and objectively agreed upon class of persons. If so, the only issue is the adequacy of their proposed method of identifying the members of this group.

These two approaches, corresponding roughly to the difference between denoting and naming in linguistic theory,[58] are used interchangeably in the *Tijerina* opinion and may even have been at war with each other.[59] The plaintiff, as initiator of the action, should be able to define the class he represents in any way that makes sense and operationally identifies individual cases. The court in *Tijerina,* however, appears to impose a more difficult task upon the class representative, akin to saying: "We have a class in mind; you try to tell us what it is. If you fail, you are obviously not the person to bring suit on behalf of

51 *See* note 51 *supra;* FED. R. CIV. P. 23(c)(4).
52 "Their definition of the class is . . . too vague to be meaningful." Tijerina v. Henry, 48 F.R.D. 274, 276 (D.N.M. 1969).
53 *Id.* at 276.
54 *Id.* at 277. The opinion evidently also found fault with the plaintiffs' failure to specify whether an admixture of other extractions, such as French, English, or Danish would affect class membership. *See* note 202 *infra* and accompanying text.
55 *Id.*
56 *Id.* at 277-78.
57 *See* P. ALEXANDER, AN INTRODUCTION TO LOGIC 69-70 (1969).
58 *See generally* B. RUSSELL, ON DENOTING, in ESSAYS IN ANALYSIS 103 (1973).
59 *Compare* the court's dismissal on grounds of intelligibility, *see* notes 51-52 *supra* and accompanying text, *with* the court's treatment of the objective criteria for class identification offered by the plaintiff, *see* notes 53-56 *supra* and accompanying text.

the class."[60] The answer to this, of course, is that it is the plaintiff's action, not the court's, and thus he should have the opportunity to define his own class free from any judicial preconceptions about what his class ought to be.[61]

The opinion's structure is questionable on a second, more fundamental, ground. In rejecting each of defendant's proffered criteria *seriatim,* the court imposed artificially high standards on plaintiffs seeking to begin litigation on behalf of complex but nonetheless identifiable classes. The court's divide-and-conquer approach to class qualification treated the plaintiff's criteria as though they were intended to define a conjunctive category, that is, a category of individuals each of whom fulfilled all of the offered descriptions.[62] A more natural interpretation would have been to assume that plaintiff's proffered criteria were intended to define a *disjunctive* category, that is, one composed of all those individuals who fulfill requirement A *or* B *or* C.[63] Such an interpretation corresponds more closely to the picture Chicanos have of themselves as a class.[64]

A conjunctive class is numerically smaller than a disjunctive class,[65] but the former's requirements make the problem of class definition much more difficult. By choosing to interpret the plaintiff's class as conjunctive in nature and requiring it to correspond to some intuitive parameters in the minds of the members of the court, *Tijerina* created a standard under which many classes capable of determination would be rejected.

In 1972 the Supreme Court rejected an appeal in *Tijerina.*[66] Only Justice Douglas dissented, urging that the issues presented were of sufficient social importance to warrant a hearing before the Court.[67] He observed that those who discriminate have no difficulty in discerning their victims, and found it ironic that courts would reject a plea for relief on grounds that the class was not "clear enough."[68] He further noted that class actions are appropriate vehicles for suits to redress discrimination against Mexican Americans, since there is little doubt that "in many parts of the Southwestern United States, persons of Indian and Mexican or Spanish descent" are subject to discriminatory treatment.[69] Justice Douglas thereby suggested a first step toward recognition of Chicanos as a minority group of at least regional, if not national, scope. He cited the notes of

60 *See* the court's rejection of plaintiff's three proffered criteria in a fashion that seems to suggest that it was measuring the adequacy of these criteria against a pre-existing notion of its own of what the class "really" is, or ought to be. 48 F.R.D. at 276-77.

61 This is not to suggest that, once the plaintiff has specified his proposed class, the court may not judge the adequacy of that class by reference to certain *formal* requirements. The latter is always appropriate. *See* notes 36-37 *supra* and accompanying text.

62 R. JEFFREY, FORMAL LOGIC: ITS SCOPE AND LIMITS 7-11 (1967); P. ALEXANDER, AN INTRODUCTION TO LOGIC 90-100, 160-63 (1969).

63 R. JEFFREY, *supra* note 62.

64 In general, Chicanos are not overly preoccupied about the requirements of class inclusion. So long as a given individual identifies with the group and its values, almost any tangible indicia of Chicanoness will be enough to cause him to be accepted as a member. These include the ability to speak Spanish, physical characteristics, Spanish surname, and Mexican or Spanish ancestry. Other less essential characteristics are Catholicism, certain mannerisms of speech and dress, and loyalty to Mexico. *See generally* UNITED STATES CABINET COMMITTEE ON MEXICAN-AMERICAN AFFAIRS, THE MEXICAN-AMERICAN (1968).

65 The difference is that between the size of the intersection of several sets and the size of their union.

66 Tijerina v. Henry, 398 U.S. 922 (1970).

67 *Id.*

68 *Id.* at 923-24.

69 *Id.* at 924.

the Advisory Committee to the 1966 Amendment of Rule 23[70] as illustrative of the intention that Rule 23 serve as a vehicle for civil rights actions.[71]

Mexican-American class actions following *Tijerina* present a peculiar history. Numerous courts have permitted Chicanos to sue as a class, but have either done so without discussing the appropriateness of permitting such an action,[72] or by distinguishing *Tijerina* under the *Hernandez* rationale that local prejudice renders the class sufficiently identifiable.[73] For example, *Cisneros v. Independent School District*[74] was an equal protection suit brought on behalf of Mexican-American, Spanish-surnamed or Latin-American[75] residents of Corpus Christi to compel application of post-*Brown* remedies to the local school district. The court held Chicanos to be an identifiable "ethnic-minority group" in Corpus Christi, because they were targets of long-standing discrimination.[76] When the court enumerated the factors that define Chicanos, however, it listed physical appearance, surname, language, and distinct culture[77]—factors that would appear to have adequately defined the class under Rule 23 without need of the additional element of local prejudice. *United States v. Texas*[78] was a school desegregation suit under the fourteenth amendment and Title VI of the Civil Rights Act of 1964 filed on behalf of Mexican-American students. The court held that Mexican Americans are a cognizable "national origin" group for purposes of the equal protection clause and also for purposes of the rule relating to class actions. The court distinguished *Tijerina* by finding that in the case before it Chicanos were a definable group because they were the objects of local prejudice.[79] Expert testimony, official state and federal documents, and the reports of governmental commissions were all cited to prove that Chicanos were perceived by the mainstream culture as identifiably different.[80]

3. Overruling or Avoiding *Tijerina*

Courts may undercut the holding of *Tijerina* and the Texas cases as they continue to find a class based on local discrimination.[81] In terms of litigation strategy, however, such a result is purchased at considerable cost, since not every plaintiff, particularly in a class suit, can afford the expense of obtaining expert testimony to prove the requisite local prejudice. A better approach would

70 398 U.S. at 925. *See Notes of Advisory Committee on the Federal Rules of Civil Procedure,* at Subdivision 23(b)(2).

71 398 U.S. at 924. *See also* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the FRCP(I),* 81 HARV. L. REV. 356, 389 (1967).

72 *E.g.,* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Alvarado v. El Paso Independent School Dist., 445 F.2d 1011 (5th Cir. 1971); Gutierrez v. Quinn & Co., 55 F.R.D. 395, 396 (D. N.M. 1972); *see also* Gonzales v. Sheely, 96 F. Supp. 1004, 1008 (D. Ariz. 1951).

73 *E.g.,* United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972); United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd,* 466 F.2d 518 (5th Cir. 1972).

74 324 F. Supp. 599 (S.D. Tex. 1970), *supplemented,* 330 F. Supp. 1377 (S.D. Tex. 1971), *application for reinstatement of stay granted,* 414 U.S. 1211 (1971), *aff'd in part, modified in part and remanded,* 467 F.2d 142 (5th Cir. 1972).

75 *Id.* at 606-07.

76 *Id.* at 606-15.

77 *Id.* at 608.

78 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd,* 466 F.2d 518 (5th Cir. 1972).

79 *Id.* at 26.

80 *Id.* at 26-28.

81 *See* notes 72-80 *supra* and accompanying text.

be to have the Supreme Court rule that as a historical fact discrimination against Chicanos is so widespread as to warrant a presumption of its existence in each case sufficient to support the class. The result would be to place Chicanos on a par with Blacks for class action purposes.[82] An alternative approach would be a ruling that Chicanos, by virtue of their class characteristics and internal cohesiveness, are an ascertainable and definable class even without proof of local discrimination. How likely is either of these prospects?

The factual underpinnings necessary to convince a court to take either of these approaches appear well within reach. Proof of both proposed court findings essentially involves canvassing the social science literature now in existence. The second section of this article attempts this task.[83]

On policy grounds, a holding that Chicanos are a legally cognizable class would not strain the judicial system. The requirement of a definite class derives from the threshold requirements of Rule 23[84] which are couched in such general language that certification of almost any plausible class ought to be within the realm of judicial discretion.[85] Moreover, the policies supporting these general requirements reach their most attenuated form in 23(b)(2) actions, where requirements such as notice, commonality of issues, and selective access to recovery are at best minimally applicable.[86] Class actions have been historically regarded as labor-saving remedial devices which ought to be liberally available.[87] Although in recent years there has been a movement to curb some of the "abuses" of class actions, the criticisms leveled at the class action device have focused on problems such as the difficulty and cost of giving notice,[88] the tendency to involve attorneys in stirring up litigation,[89] and the unfair aspects of "strike" suits[90]—criticisms seldom applicable in civil rights litigation under Rule 23(b)(2). Recognition of Chicanos as a legally cognizable class thus encounters relatively few conceptual or procedural obstacles. From an administrative standpoint the case is even stronger. Requiring a class to press its claims on a case-by-case basis diminishes the precedent value of individual holdings,[91] requires multiple

82 The standing of Blacks as a class appears not to have been challenged by any court in recent history. For cases that have permitted Blacks to bring an action as a class, *see, e.g.,* Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir. 1957), *cert. denied,* 354 U.S. 921 (1957); Young v. AAA Realty Co., 350 F. Supp. 1382 (M.D.N.C. 1972); Boles v. Union Camp Corp., 57 F.R.D. 46 (S.D. Ga. 1972); Hairston v. Hutzler, 334 F. Supp. 251 (W.D. Pa. 1971); James v. Beaufort County Bd. of Educ., 348 F. Supp. 711 (E.D.N.C. 1971); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966); Coke v. City of Atlanta, 184 F. Supp. 579 (N.D. Ga. 1960). *See also* text accompanying note 25 *supra;* Castro v. Beecher, 459 F.2d 725, 730-31 (1st Cir. 1972), which appears to suggest in dictum that a class, including the Chicano class, might be more easily recognized by the courts if it can show its claims have broad historical or decisional support.

83 See especially text accompanying notes 108-90 *infra.*

84 *See* notes 29-36 *supra* and accompanying text.

85 *See* Note, *Parties Plaintiff in Civil Rights Litigation,* 68 COLUM. L. REV. 893, 904 (1968); *see also* Fitzgerald, *When Is a Class a Class?* 28 BUS. LAWYER 94, 108 (1972).

86 *See* notes 40-41 *supra* and accompanying text.

87 *E.g.,* Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969); Thomas v. Clarke, 54 F.R.D. 245 (D. Minn. 1971); *see* Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969).

88 *E.g.,* Weinstein, *Some Reflections on the "Abusiveness" of Class Actions,* 58 F.R.D. 299, 300 (1973).

89 *E.g., id.* at 301.

90 *E.g., id.* at 302.

91 *E.g., id.* at 304.

lawsuits in different locations,[92] and risks inconsistent results. Moreover, denying a class standing to sue as in *Tijerina* potentially creates resentment on the part of those denied access to the judicial system, and increases their sense of alienation from the mainstream of American life.[93]

Until one of the long-term solutions suggested above is adopted, litigators on behalf of the Chicano people are limited in the number of remedies at their disposal. First, they can attempt to press class actions in the hope that no objection to class certification will be raised.[94] In some portions of the Southwest, *Tijerina* objections are rarely raised; in other locales, defendants and judges routinely raise objections to class standing in Chicano cases.[95] In all such attempts, it may prove helpful to narrow the class as much as possible along geographic[96] or functional[97] lines in order to minimize the likelihood of rejection on grounds of unmanageability or lack of a common question.[98] Plaintiffs should clarify whether their definition of the Chicano class, based on such multiple characteristics as language, surname, or Mexican descent, is disjunctive or conjunctive in character.[99] If disjunctive, the plaintiff should not unnecessarily broaden his class by including more defining characteristics than necessary. For example, a suit to enjoin a school system from prohibiting the speaking of Spanish on the school grounds should be brought on behalf of a class consisting not of all Chicano schoolchildren but only those whose language of choice is Spanish. Addition of further criteria such as Spanish surname only blurs the lines of the class and unnecessarily raises such problems as standing, commonality of issues, and adequacy of representation.[100] To the maximum extent possible, plaintiffs and causes of action should be selected with an eye to political

92 *See* notes 17-20, 22-29, 69-70, 76-80 *supra* and accompanying text.

93 This sense that "the law" is an alien institution that serves primarily Anglo values is already firmly entrenched. *E.g.*, UNITED STATES COMMISSION ON CIVIL RIGHTS, STRANGER IN ONE'S LAND 41-42 (1970); UNITED STATES COMMISSION ON CIVIL RIGHTS, THE MEXICAN-AMERICAN 15-18 (1968); *see* S. STEINER, LA RAZA: THE MEXICAN-AMERICANS 161-72 (1969).

94 Interview with Sanford Rosen, Legal Director, Mexican-American Legal Defense and Educational Fund, in San Francisco, Sept. 12, 1974.

95 Interview with Chuck DuMars, attorney at law, Legal Aid Society of Albuquerque, Inc., in Albuquerque, New Mexico, Sept. 4, 1974.

96 *See* notes 50-51 *supra* and accompanying text. One way of accomplishing this in class suits on behalf of Chicanos, for example, would be to define the class as all Chicanos (defined in appropriate terms) who reside in a certain county or town. This procedure does not resolve the conceptual problem, of course, since "All Chicanos who live in Rio Arriba County" is not a more clearly defined category, but merely a smaller one.

97 *Id.* An example of a functional limitation might be: "All Chicanos who purchase appliances from the Rio Arriba branch of X department store." Temporal limitations can serve to narrow such a class even further: "All Chicanos who purchased appliances . . . between January 1, 1973 and January 1, 1974."

98 These two grounds are among the most frequent on which courts reject certification of class actions. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *affirmed*, 94 S. Ct. 2140 (1974); American Servicemen's Union v. Mitchell, 54 F.R.D. 14 (D.D.C. 1972); United Egg Producers v. Bauer Internat'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970); City of New York v. Internat'l Pipe & Ceramics Corp., 44 F.R.D. 584 (S.D.N.Y. 1968), *appeal dismissed*, 410 F.2d 295 (2d Cir. 1969); Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

99 Normally, Chicano litigants will prefer a disjunctive category, *see* note 63 *supra* and accompanying text.

100 Notes 30-35, 97-98 *supra*, 192-93 *infra* and accompanying text; *see also* DiJulio v. Digicon, Inc., 339 F. Supp. 1284 (D. Md. 1972).

impact and likelihood of success.[101] One partial explanation for the negative holding in *Tijerina* may well be the known political activism of the plaintiff and the global nature of his requests for relief. A more "respectable" plaintiff and a more limited objective might have helped facilitate obtaining a holding making subsequent actions easier to bring.

Moreover, attorneys should not overlook possible interaction between the substantive merit of claims and judicial willingness to certify a class. Although ideally class certification should be decided without reference to the plaintiff's chances of prevailing on the merits,[102] such reference, if only subliminal, may well take place and influence the class certification outcome. And, of course, in equal protection cases after *Hernandez,* the potential for confusion of class eligibility and substantive merit is great, since both involve proof of discrimination.[103] Thus, *Tijerina*'s attempt to press for rights under the Treaty of Guadalupe Hidalgo as well as under the fourteenth amendment may have been a tactical mistake, since the land grant question is a sore point with Chicanos and Anglo ranchers throughout the Southwest and the court may well have decided to deny class certification partly out of a reluctance to decide the legality of the treaty claim.[104]

III. The Chicano Class: Definition, Commonality of Interest, and Patterns of Discrimination

In assessing the class status of Chicanos, at least three questions are legally significant. First, what parameters or defining characteristics delimit the class reliably enough to meet the standards of Rule 23 and the equal protection clause?[105] Second, what evidence exists of an internal bond or commonality of interest among members of the Chicano class?[106] Third, to what extent do Chicanos manifest the effects of a historic pattern of regional or national discrimination, thereby becoming appropriate candidates for enhanced equal protection coverage under the rationale of *Hernandez* and *Keyes?*[107] This section reviews a number of the salient features of the Chicano class and their relationship to the problems of class standing. Finally, an attempt is made to assess the reli-

101 *Compare* Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy,* 29 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 320 (1974), which details the manner in which selection of key cases on behalf of the cause of Black liberation has proved effective.

102 *E.g.,* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); *see* Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184 (E.D. La. 1968). *See also* Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974); Note, 11 HOUSTON L. REV. 732 (1974) and cases cited therein.

103 *Compare* text accompanying notes 13-17 *supra with* text accompanying notes 72-73 *supra.*

104 Although, in an extraordinary move, the court in *Tijerina,* after dismissing plaintiff's class action, went on to discuss the merits of his case, its analysis of the treaty issue is cursory at best, 48 F.R.D. 274, 278-79, quite possibly out of reluctance to confront such a thorny issue fully.

105 *See* notes 13-18, 22-29, 30-56 *supra* and accompanying text.

106 The higher the commonality of interest, the less likely that the class will be rejected for reasons of internal divisions, *see* Giordano v. Radio Corp. of America, 183 F.2d 558 (3d Cir. 1950), lack of a common question, *see* Rule 23(a)(2), or because of the plaintiff's nonrepresentativeness, *see* Rule 23(a)(3)-(4).

107 *See* notes 13-18, 25-29 *supra* and accompanying text.

ability of some of these features in the light of the *Tijerina* holding and the requirement that the class be ascertainable as well as identifiable.[108]

A. *Characteristics of the Chicano Class*

Among the characteristics common to many Chicanos are: Spanish language as the mother tongue; Mexican ancestry; Spanish surname; a distinct culture and history; a genetic heritage that results in certain recurring physical traits; economic, educational, and political exclusion from the mainstream of American life; perception by Anglos, including many government agencies, as a minority; and perception by Chicanos themselves as a non-Anglo group.

The almost mystical significance given the Spanish language as the carrier of Chicano culture has been commented upon by a number of ethnologists and other social scientists.[109] A Chicano university professor has written:

> In the beginning was the Word, and the Word was made Flesh. It was so in the beginning, and it is so today. The language, the Word, carries within it the history, the culture, the traditions, the very life of [our] people. . . . We cannot even conceive of a people without a language, or a language without a people. The two are one and the same. To know one is to know the other.[110]

The refusal of Mexican Americans to surrender their native tongue has at times meant the forfeiture of substantial benefits. In schools, for example, bilingualism has often been suppressed,[111] and, if not suppressed, rarely recognized as an asset.[112] Some states require the ability to speak English as a condition of voting or holding political office.[113] Others require that court proceedings and

108 *See* text accompanying notes 36-39 *supra.*

109 *E.g.*, Cooke, *Segregation of Mexican-American School Children*, in A DOCUMENTARY HISTORY OF THE MEXICAN AMERICANS 421 (W. Moquin ed. 1971) [hereinafter cited as Cooke]; Sanchez, *History, Culture and Education*, in LA RAZA: FORGOTTEN AMERICANS 1 (J. Samora ed. 1966) [hereinafter cited as Sanchez].

110 A. RENDON, CHICANO MANIFESTO 29-30 (1971) [hereinafter cited as RENDON].

111 *Id.* at 210; UNITED STATES COMMISSION ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATION STUDY, REPORT 5: TEACHERS AND STUDENTS 43 (1973) [hereinafter cited as TEACHERS AND STUDENTS]; U.S. COMMISSION ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATION STUDY, REPORT 3: THE EXCLUDED STUDENT 48 (1972) [hereinafter cited as THE EXCLUDED STUDENT]; Sanchez, *supra* note 109, at 14. A Mexican American educator observed that because the Spanish-speaking child has not yet mastered the grammatical concepts of his own language before he is thrust into an all-English school system, he seldom learns either well. He adds: "The school districts of the Southwest have the unique honor of graduating students who are functionally illiterate in two languages." UNITED STATES COMMISSION ON CIVIL RIGHTS, THE MEXICAN AMERICAN 7 (1968) [hereinafter cited as THE MEXICAN AMERICAN]. *See generally* Rangel & Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 307, 384-91 (1972) [hereinafter cited as Rangel & Alcala]; Lambert & Peal, *The Relation of Bilingualism to Intelligence*, 76 PSYCHOLOGICAL MONOGRAPHS: GENERAL AND APPLIED (1962); and the testimony of Harold C. Brantley, Superintendent of the United Consolidated School District of Webb County, Texas, concerning the value of bilingual education, UNITED STATES COMMISSION ON CIVIL RIGHTS, STRANGER IN ONE'S LAND 28 (1970) [hereinafter cited as STRANGER IN ONE'S LAND].

112 This failure to recognize the Chicano's mother language as an asset is particularly anomalous in view of the fact that the dominant society considers the speaking of a foreign language highly sophisticated. Yet Mexican Americans are condemned for speaking Spanish. STRANGER IN ONE'S LAND, *supra* note 111 at 2, 7. *See also* Sanchez, *supra* note 109, at 2, 14.

113 English tests remain in fifteen states, despite congressional action to suspend literacy requirements. *See* Rangel & Alcala, *supra* note 111, at 351-52. Four states require English speaking ability to hold certain offices. *Id.* at 352.

legal notices be in English.[114] Chicano persistence in retaining the use of Spanish in the face of such pressures testifies to the likelihood that Spanish usage is, and will continue to be, a partial—but highly reliable—index of membership in the Chicano class.

Another characteristic held in common by Chicanos is their ancestry.[115] The precise characterization of this ancestry, however, has been the subject of controversy.[116] In a study on Mexican-American education, the United States Commission on Civil Rights, which used the terms "Mexican American" and "Chicano" interchangeably, declared:

> [T]he term Mexican American refers to persons who were born in Mexico and now reside in the United States or whose parents or more remote ancestors immigrated to the United States from Mexico. It also refers to persons who trace their lineage to Hispanic or Indo-Hispanic forebears who resided within Spanish or Mexican territory that is now part of the Southwestern United States.[117]

This definition suffers from overinclusiveness, since an individual of pure Scandinavian descent who was at one time a Mexican citizen but later immigrated to the United States would qualify as a Chicano. A more accurate definition of Chicanos in terms of ancestry would be "any individual residing in the United States who traces his lineage to Indo-Hispanic or Hispanic ancestors who are living or once lived in Mexico or the Southwestern United States." Such a definition excludes Mexican citizens still living in Mexico but includes those Mexican citizens who are registered aliens. The definition would also include descendents of the colonial Spaniards with little or no Indian blood who, like the Mexican alien, identify with the culture and social goals of the Mexican American.[118] At the same time the requirement that Hispanic forebears come from the Southwest excludes those of Spanish descent who settled on the East Coast of the United States, since they have generally been assimilated into the dominant society and rarely identify with the culture of the Mexican American.[119]

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114 Comment, *"Citado a Comparecer": Language Barriers And Due Process—Is Mailed Notice in English Constitutionally Sufficient?* 61 CALIF. L. REV. 1395 (1973).

115 *Tijerina* flatly rejected this criterion for indefiniteness. *See* note 54 *supra* and accompanying text. Other opinions, however, have permitted a Chicano plaintiff class to be defined, at least in part, in terms of their ancestry. These opinions rarely contain much discussion, thus it is dubious that acceptance of this criterion rises to the level of a holding. *E.g.*, Hernandez v. Texas, 347 U.S. 475 (1954) (persons "of Mexican descent"); Westminster School Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947) (persons of "Mexican and Latin descent").

116 *E.g.*, THE MEXICAN AMERICAN, *supra* note 111, at 7 (1968); Rangel and Alcala, *supra* note 111, at 350, suggesting that because of the predominance of Indian blood, Chicanos may well constitute a race other than white. *See generally* C. MCWILLIAMS, NORTH FROM MEXICO 7*et seq.* (1961).

117 UNITED STATES COMMISSION ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATION STUDY, REPORT 1: ETHNIC ISOLATION OF MEXICAN AMERICANS IN THE PUBLIC SCHOOLS IN THE SOUTHWEST 7 n.1 (1971).

118 Rivera, Introduction to A DOCUMENTARY HISTORY OF THE MEXICAN AMERICANS xvi (W. Moquin ed. 1971).

119 UNITED STATES COMMISSION ON CIVIL RIGHTS, TO KNOW OR NOT TO KNOW: COLLECTION AND USE OF RACIAL AND ETHNIC DATA IN FEDERAL ASSISTANCE PROGRAMS 32 (1973). As to the degree of requisite Hispanic or Indo-Hispanic ancestry an individual must have in order to be considered a member of the Chicano class, full blood should not, of course, be required. *See* note 206 *infra* and accompanying text.

An additional feature shared by many Chicanos is Spanish surname.[120] The cultural fusion of the native Meso-Americans and the Spanish was such that at one time virtually all residents of the American Southwest carried Spanish surnames. But today not all Chicanos bear Spanish surnames, nor are all persons bearing Spanish surnames Chicano. Because of the practice of women taking the husband's surname, those Chicanos who have married Anglos no longer bear Spanish names. Similarly, the Spanish surname of a Chicano husband is carried by his Anglo wife, who may have little attachment to the Chicano culture. This blurring effect obviously increases as generations pass. It is nonetheless true that most Chicanos still bear Spanish surnames.[121] This is due to the tendency of Chicanos, like most ethnic minorities, to limit social interaction to members of their own group. This ethnic closure results in a high incidence of ethnic intramarriage.[122]

The most important of the ties which bind Chicanos is their culture. Culture has been termed the very essence of an individual's social identity.[123] Marcos de Leon, a California educator, has characterized the function of the Chicano culture in the life of the individual member as "all encompassing." It comprises the group's ideas, habits, values, and institutions; it is the force that gives the group cohesion and direction. It supplies the system of beliefs that enables the group to establish social and political structures. Aesthetics also plays a part, since culture includes the group's preferences with regard to the graphic and plastic arts, folklore, music, drama, and dance.[124]

Culture, of course, manifests itself differently from community to community and even from individual to individual. Particularly in view of the geographic dispersion of Chicanos, it would be a mistake to assume that the existence of a common culture results in individuals who are carbon copies of each other. Nevertheless, the United States Commission on Civil Rights has found that "Mexican Americans share common traits, common values, and a common heritage which may be identified as components of a general Mexican American cultural pattern."[125] This cultural pattern, the Commission concludes, "sets them apart as a distinct and recognizable group."[126]

120 Although *Tijerina* rejected this criterion, other courts have accepted definitions of the Chicano class in terms of Spanish surname. *E.g.*, Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972), *affirmed*, 499 F.2d 1147 (10th Cir. 1974); United States v. Texas, 342 F. Supp. 24, 26 (E.D. Tex. 1971). *Compare* McGrath v. Tadayasu Abo, 186 F.2d 766 (9th Cir. 1951), *cert. denied*, 342 U.S. 832 (1951) (class action permitted on behalf of native-born individuals who had Japanese ancestry). *See also* Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973), *rev'd on other grounds*, 414 U.S. 563 (1974).

121 *See* Rangel & Alcala, *supra* note 114, at 353. Indeed, the Bureau of the Census has used this criterion for classification purposes since 1950. *Id.*

122 Caine, *Comparative Life-Styles of Anglos and Mexican-Americans*, in MINORITY PROBLEMS 290 (A. Rose & C. Rose eds. 1972) [hereinafter cited as Caine].

123 Their common culture was one of the factors enumerated by the court in *Cisneros* as defining the Chicano class. Cisneros v. Corpus Christi Independent School Dist., 324 F. Supp. 599, 606 n.30 (S.D. Tex. 1970). *See generally* Rangel & Alcala, *supra* note 111, at 351-53. *See also* Sabala v. Western Gillette, Inc., 362 F. Supp. 1142 (S.D. Tex. 1973), which characterized Mexican Americans as "discriminated against on the basis of their ethnic heritage." *Id.* at 1147.

124 RENDON, *supra* note 110, at 175.

125 THE EXCLUDED STUDENT, *supra* note 111, at 30.

126 *Id.*

Commentators generally agree that Chicanos possess a distinct culture.[127] The impact of this distinctiveness on Chicano-Anglo relations creates still another interest common to the Chicano people. The Anglo community has simply not recognized the value of the Chicano culture. Although lip service is paid to acceptance of some aspects of Mexican culture and its impact on the history of the Southwest, such acceptance "tends to stress only the superficial and exotic elements—the 'fantasy heritage' of the Southwest."[128] Picturesque pioneer celebrations are valued, but the substantive contributions of the Chicano people to the development of the Southwest are largely ignored.[129]

The unwillingness of the dominant society to recognize the rich culture of the Mexican American creates a tension in the lives of many Chicanos, who see themselves as forced to choose between retaining the traditions of their people and gaining the educational and economic benefits of participation in the dominant society. Most have chosen to keep their culture. However, they have had to do so at the price of being stereotyped as backward, inferior, or, at best, quaint.[130]

Chicanos and Anglos alike are beginning to understand that full acceptance of Chicanos into American society should not entail the eradication of cultural differences. Indeed, some observers report a growing feeling among Mexican-American groups that Anglicization is a legitimate goal only if the Anglo simultaneously recognizes the need to become "Mexicanized." The melting pot theory, to have any legitimacy, must involve reciprocal accommodation.[131] Until mutual acceptance of cultural differences becomes a reality, retention of their distinct culture will remain an interest common to Chicanos, giving them cohesion and direction.

An additional feature that binds Chicanos is their physical appearance. Anthropologists Ginsberg and Laughlin have written about ethnic populations and the effect of their isolation or mixture on their genetic pools.[132] Regardless of what other implications may follow from the existence of a distinct gene

127 *See generally* THE EXCLUDED STUDENT, *supra* note 111, at 30; STRANGER IN ONE'S LAND, *supra* note 111, at 7; TEACHERS AND STUDENTS, *supra* note 111, at 43; Cooke, *supra* note 109, at 421; Hernandez, *Mexican Americans,* in MINORITY PROBLEMS 60 (A. Rose & C. Rose eds. 1972) [hereinafter cited as Hernandez].

128 THE EXCLUDED STUDENT, *supra* note 111, at 49.

> The "fantasy heritage" exemplifies cultural selectivity in action. It embraces the mythical charm of early California: Spanish food, Spanish music, Spanish costumes, the rancheros, caballeros, and senoritas with gardenias behind their ears. The main trouble with this view of Mexican American life is that it bears no relation to reality, past or present.

Id. at 35. *See also* RENDON, *supra* note 110, at 170.

129 THE EXCLUDED STUDENT, *supra* note 111, at 49.

130 STRANGER IN ONE'S LAND, *supra* note 111, at 30. This conflict is at its most acute in Chicano youth. Salazar, a noted Chicano psychologist, has observed that the youth is torn by conflicting messages. There is one message that he hears from his family, his friends, and his community. They tell him that if he rejects Mexican American culture and identifies with the Anglo tradition, he will be a traitor to his ethnic group. The other message comes from his teachers, Anglo friends, and work supervisors, who tell him that the key to success lies in his rejecting the Mexican American culture and embracing of Anglo ways. *Id.* at 26. *See also* Hernandez, *supra* note 127, at 67.

131 STRANGER IN ONE'S LAND, *supra* note 111, at 49.

132 Ginsberg & Laughlin, *The Distribution of Genetic Differences in Behavioral Potential in the Human Species,* in SCIENCE AND THE CONCEPT OF RACE 34 (M. Mead et al., eds. 1968).

pool,[133] it is at least clear that there is a phenotype of physical characteristics shared by many Chicanos. This commonality in phenotype bolsters the identifiability of the Chicano class.[134] In writing of the history of the Chicano in this country, one author tells of the halt brought to the migration of Mexican laborers into this country by Depression unemployment. To alleviate the pressures created by unemployment, the Government simply deported Mexican laborers by the carload. Their legal rights ignored, thousands fell victim to a dragnet established and enforced by federal, state, and local agencies. Even Chicanos who were United States citizens were summarily deported. Merely looking "Mexican" sufficed. "Visual identification or stereotype"[135] was the criterion generally employed.

For centuries, Anglos have associated a combination of brown skin and certain other physical traits with people of Mexican ancestry. *Recopilación de Leyes de los Reinos de las Indias,* a 1680 compilation of nearly 200 years of law dealing with the Indians of Meso-America, expressly recognized the existence of a new "race," the mestizo of the Americas.[136] In more modern times, the United States Commission on Civil Rights has also noted the similarities in the appearance of Chicanos: "Many Mexican Americans exhibit physical characteristics of the indigenous Indian population that set them apart from typical Anglos. In fact, some Anglos have always regarded Mexican Americans as a separate racial group."[137]

In the popular mind, Mexicans have long appeared "different" from whites. One study of community attitudes toward Chicanos in Chicago in the 1940's cites a number of examples illustrating these perceptions. One resident of an Italian neighborhood, for example, was quoted as saying, "I don't want my kids to associate with the Mexicans. God made people white and black, and he meant there to be a difference."[138]

Though many of the references to the Chicano's brown color have in the past been negative, Chicanos have turned this derogatory reference into a source of pride and self-awareness, much the same way Negroes have done with the word "black." While this turnabout has done much to improve the Chicano's self-image and sensitize the Anglo to the feeling of pride Chicanos have about themselves, there remain those who equate dark skin with inferiority. So long as this negative attitude persists, physical characteristics will continue to be another source of commonality among Chicano people.

Economic and political disenfranchisement is another aspect of life shared by Chicanos. Chicanos consistently suffer from underparticipation and overparticipation in various social institutions. In public education, for example,

133 *See* Rangel & Alcala, *supra* note 111, at 350 for the suggestion that, because of a high proportion of Indian blood, Mexican Americans may constitute a race other than white.

134 *See* Cisneros v. Corpus Christi Independent School Dist., 324 F. Supp. 599 (S.D. Tex. 1970), which listed the Chicano's distinctive physical appearance as one of the factors that made him a ready target for discrimination. *Id.* at 607.

135 Hernandez, *supra* note 127, at 63. *See also* D. Gomez, Somos Chicanos—Strangers in Our Land 68 (1973) [hereinafter cited as Gomez].

136 Rendon, *supra* note 110, at 67. For pre-*Hernandez* opinions holding that Chicanos are not a race other than white, *see* note 43 *supra.*

137 The Excluded Student, *supra* note 111, at 11.

138 Rendon, *supra* note 110, at 24.

Chicanos have one of the highest dropout rates of any ethnic group.[139] Data compiled by the United State Commission on Civil Rights show that, if present trends continue, by the year 2000 only one-half of the Chicano school population will graduate from high school.[140]

The reasons for this educational gap are not hard to find: poverty, language handicap, migrancy, and cultural insensitivity on the part of teachers and school administrators.[141] Even when an individual Chicano manages to escape or surmount the effect of these factors and obtains a baccalaureate or graduate degree, his efforts are typically not rewarded to the same extent as the Anglo's. Because of demands within his group as well as constraints imposed by discriminatory attitudes in the larger society, success-oriented Chicanos have limited opportunities to take advantage of education and occupational opportunities.[142] Other studies show that minorities who attain a high level of education and enter the professions are likely to find their opinions are not as highly valued by their colleagues as are opinions of members of the dominant culture.[143]

Mexican Americans have also endured exclusion from the American mainstream in the employment area. The median family income of Spanish-surnamed Americans in 1970 was $7,117; for whites, it was $10,672.[144] In the Southwest, Chicanos have an overall unemployment rate about double that of whites.[145] Chicanos are markedly underrepresented in the more prestigious and high-paying professions and in many of the trades.[146] That unemployment in the Chicano sector is not merely a lingering residue of bygone discrimination is shown by the disproportionately high unemployment rate among Chicano teenagers.[147]

Regional data indicate that the poverty many Chicanos suffer is severe enough to affect their health and longevity. One Chicano community reported an infant mortality rate five to six times the national rate for white infants.[148] In many southwestern communities, Chicanos fall victim in disproportionate numbers to diseases associated with low socioeconomic conditions.[149]

The frustration many Chicanos feel as a result of these conditions at times

139 UNITED STATES COMMISSION ON CIVIL RIGHTS, STRANGER IN ONE'S LAND 23 (1970).
140 *Id.*, RENDON, *supra* note 110, at 198.
141 *See generally* THE MEXICAN AMERICAN, *supra* note 111, UNITED STATES COMMISSION ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATION STUDY, REPORT 1: ETHNIC ISOLATION OF MEXICAN AMERICANS IN THE PUBLIC SCHOOLS IN THE SOUTHWEST (1971). Measures of interaction between teachers and students, for example, revealed gross disparities between the attention received by Anglo and Chicano students in the same classrooms. TEACHERS AND STUDENTS, *supra* note 111, at 43. *See also* THE EXCLUDED STUDENT, *supra* note 111, at 48; STRANGER IN ONE'S LAND, *supra* note 111, at 26.
142 Shannon, *The Study of Migrants as Members of Social Systems*, in PROCEEDINGS OF 1968 ANNUAL SPRING MEETING, AMERICAN ETHNOGRAPHICAL SOCIETY, SPANISH-SPEAKING PEOPLE IN THE UNITED STATES 34 (J. Helm ed. 1968).
143 Hsu, *Prejudice and Its Intellectual Effect in American Anthropology: An Ethnographic Report*, 75 AM. ANTHROPOLOGIST 1 (1973).
144 UNITED STATES COMMISSION ON CIVIL RIGHTS, STATEMENT ON AFFIRMATIVE ACTION FOR EQUAL EMPLOYMENT OPPORTUNITIES 3 (1973) [hereinafter cited as STATEMENT].
145 THE MEXICAN AMERICAN, *supra* note 111, at 38.
146 RENDON, *supra* note 110, at 130; STRANGER IN ONE'S LAND *supra* note 111, at 30, 33.
147 STATEMENT, *supra* note 144, at 2.
148 RENDON, *supra* note 110, at 92.
149 THE MEXICAN AMERICAN, *supra* note 111, at 13.

approaches desperation. One Chicano testified before the Commission on Civil Rights:

> Last year in San Francisco after the Negro uprising, 700 positions were created to pacify and alleviate the problems of unemployment in the Negro community. The Civil Service exams were waived. . . . Yet, when the Mexican American organizations requested that the same be done for the Mexican American, the Administration refused to acknowledge that the Mexican American community was faced with the same problem in employment. *Will we have to burn some buildings to obtain justice from our Government?*[150]

This comment suggests a widespread sense of disenfranchisement among Chicano people, many of whom feel that federal programs ostensibly designed to alleviate their problems have been deliberately ineffectual. They point to the Department of Labor's resistance to the growth of farm labor unionism, seasonal seesawing by the Immigration and Naturalization Service with respect to enforcement of wetback laws, participation by HUD in the demolition of urban barrios where Chicano poor had sought final refuge—and their skepticism grows.[151] This skepticism and sense of exclusion form another element of commonality among the Chicano people.

There are, however, areas in which the Chicano can claim the dubious distinction of overparticipation in American institutions. One such area is the courts and penal institutions; another, the military service. Chicano adults, in common with Blacks, form a disproportionate share of the nation's prison population,[152] and serve longer sentences for comparable crimes.[153] Reports of police brutality are much more frequent in barrio and ghetto neighborhoods,[154] and there are few Chicano and black patrolmen.[155] Chicano juveniles, like Chicano adults, fare poorly at the hands of the justice system. One New Mexico counselor testified before the Commission on Civil Rights that minor violations such as curfew offenses, stealing cantaloupes, and the like, were frequently overlooked in the case of Anglo children. When the violator was a Chicano youth, however, formal charges were frequently pressed and became part of the juvenile's official record.[156]

Another area of Chicano overrepresentation is the military service. The Mexican-American male has been an active participant in the military; the casualty rate for Chicanos in the Vietnam war was over 50 percent higher than their proportion to the total population.[157] This figure prompted Chicano observers to note that where government agencies have exercised diligence and sincerity in their search for minorities they have been met with success. Unlike jury commissioners and private employers, draft boards have had little difficulty

150 THE MEXICAN AMERICAN, *supra* note 111, at 40-41 (emphasis added).
151 *Id.* at 53.
152 *E.g.*, A. MORALES, ANDO SAGRANDO: A STUDY IN MEXICAN AMERICAN-POLICE CONFLICT 38, 64-65 (1972).
153 *Id.* at 33-46, 127.
154 *Id.* at 20-33.
155 *See id.* at 139.
156 STRANGER IN ONE'S LAND, *supra* note 111, at 41.
157 RENDON, *supra* note 110, at 245.

finding "qualified" people. In Nueces County alone, over 75 percent of the men killed in Vietnam bore Mexican-American names.[158]

In politics, despite a few isolated successes, the Chicano community as a whole remains largely voiceless.[159] Most Mexican Americans are native born and they comprise the second largest minority in the nation. Yet political participation by Chicanos remains low and there are still relatively few elected officials from the Chicano sector.[160] Among the reasons for this phenomenon are attempts by some to discourage Mexican-American voting. Chicanos in some areas have experienced such discouragement by means ranging from outright intimidation to laws which endeavor to make registration difficult.[161]

Another indicator of class distinctiveness is the way in which the government treats a particular group.[162] The United States government's first official dealing with the forebears of the Chicano people was the ratification of the Treaty of Guadalupe Hidalgo in 1848, which sought to protect the rights of Mexicans residing in the American Southwest.[163] Today the government routinely deals with Chicanos as a distinct ethnic group.[164] Equal Opportunity grants for higher education are distributed to eligible minority students, including Chicanos.[165] The Equal Employment Opportunity Commission, charged with administration of Title VII of the Civil Rights Act of 1964, aids employers in determining minority status for purposes of Title VII compliance. The Commission provides a fourfold procedure for identifying Chicanos. An employer may utilize (1) surname, (2) physical characteristics, (3) use of the Spanish language, and (4) "other indications" that an individual belongs to this group. In addition, "an employee may be included in the minority group to which he or she appears to belong, or is regarded as belonging."[166]

Another governmental department concerned with accurate identification of Chicanos is the Bureau of the Census. The Bureau employs four different identifiers: (1) place of birth of individuals and their parents, (2) Spanish

158 THE MEXICAN AMERICAN, *supra* note 111, at 65. Nueces County is located in Southeastern Texas.

159 Political impotence is another indicator of minority group standing under equal protection doctrine, *see generally Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1126-27 (1969).

160 *E.g.,* A. MORALES, ANDO SAGRANDO: A STUDY OF MEXICAN AMERICAN-POLICE CONFLICT 79-85 (1972).

161 THE MEXICAN AMERICAN, *supra* note 111, at 22; RENDON, *supra* note 110, at 249.

162 A number of opinions have cited government studies, reports, and documents as evidence that Chicanos are treated as an identifiable class. *E.g.,* Cisneros v. Corpus Christi Independent School Dist., 324 F. Supp. 599, 607-08 (S.D. Tex. 1970); United States v. Texas, 342 F. Supp. 24, 25-26 (E.D. Tex. 1971).

163 Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922, T.S. No. 207.

164 Indeed, there is evidence that the State Department of Education, appellee in *Tijerina v. Henry,* assumed Chicanos were a separate and definable class at the time suit was brought. A study prepared by the Guidance Service Division of the New Mexico Department of Education established four definable categories of students in New Mexico public schools—Anglo, Indo-Hispano, Black, and Indian for purposes of measuring achievement. Brief for Appellant at 5, Tijerina v. Henry, 398 U.S. 922 (1970).

165 A federally initiated program of more immediate relevance to law schools and legal educators is that of the Council on Legal Education Opportunity (CLEO), which sponsors summer institutes and fellowships for minority law students, including Chicanos. *See generally* Fulop, *The 1969 CLEO Summer Institute Reports: A Summary,* 1970 U. TOLEDO L. REV. 633 (1970).

166 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EMPLOYER INFORMATION REPORT EEO-1, at 7 (1970).

surname, (3) language spoken in the individual's home in early childhood, and (4) Spanish origin. An additional identifier used in the five Southwestern States is a list of approximately 8,000 Spanish surnames compiled by the Immigration and Naturalization Service. Using these identifying criteria the Bureau has reported statistical data which show certain common characteristics of the class, such as a median age of 20.8 years, an average family size of 4.4 persons, and income below the federal poverty level in about one-fourth of the class.[167] Although most of the government's data collecting and classification concerning Chicanos comes under the heading "Spanish surname," there is a growing recognition that problems and needs vary significantly among the various Spanish-surnamed groups, of which the largest are the Mexican American and the Puerto Rican.[168]

A related indicator of class separateness is the existence of community attitudes that emphasize the ways in which a group's members are unlike members of the dominant society.[169] Chicanos, like other minority groups, can recount a wide variety of personal experiences in which they have been the targets of prejudice. A California school principal told the Civil Rights Commission that he always seated the Chicano students behind the Anglo students at graduation ceremonies because he felt it made for a "better looking stage."[170] A California teacher explained that she asked an Anglo boy to lead a row of Chicano youngsters to an activity because his father was a rancher and the boy needed to get used to giving orders to Mexicans.[171] Another educator reported that she calls on Anglo children to assist Chicano children who hesitate in recitation because the "American" pupil is more likely to give a correct response and because it is good educational practice to draw out "American" children and give them a feeling of importance by having them help the "Mexicans."[172]

The mass media have also contributed to the formation of negative stereotypes of the Chicano people. Martinez has analyzed the way in which advertisers promote racism by portraying stereotypes such as the "Frito Bandito."[173] Television and newspaper commercials presenting "typical Mexican villages" or Mexican outlaws reinforce the belief that Mexicans are lazy, unambitious persons in need of underarm deodorant.[174] Such commercials, Martinez suggests, are not harmless jokes or portrayals of cartoon characters. They are caricatures, and their function is to reaffirm symbolically the inferior social status of Mexicans and

167 UNITED STATES DEPARTMENT OF COMMERCE, SOCIAL AND ECONOMIC STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: POPULATION CHARACTERISTICS—SELECTED CHARACTERISTICS OF PERSONS AND FAMILIES OF MEXICAN, PUERTO RICAN, AND OTHER SPANISH ORIGIN (1972).

168 UNITED STATES COMMISSION ON CIVIL RIGHTS, TO KNOW, OR NOT TO KNOW: COLLECTION AND USE OF RACIAL AND ETHNIC DATA IN FEDERAL ASSISTANCE PROGRAMS 86 (1973) [hereinafter cited as TO KNOW OR NOT TO KNOW].

169 *See id.* at 38; *Developments in the Law—Equal Protection,* 83 HARV. L. REV. 1065, 1126-27 (1962) for a discussion of the part community stigma plays in formation of a suspect class.

170 THE MEXICAN AMERICAN, *supra* note 111, at 29.

171 RENDON, *supra* note 110, at 141.

172 THE MEXICAN AMERICAN, *supra* note 111, at 30.

173 Martinez, *Advertising and Racism: The Case of the Mexican-American,* in VOICES: READINGS FROM EL GRITO 48 (O. Romano-V. ed. 1971).

174 *Id.*

Mexican Americans in the eyes of the American public.[175] In so doing, the advertisements suggest to the audience that such comical, lazy, and unkempt people want what Anglos have by virtue of their superior culture. The advertisements encourage the viewer to purchase the product because it is the duty of a member of the superior culture.[176]

When a dominant group stereotypes a minority, a gap is created between the two cultures, resulting in a we/they attitude in which the minority group is perceived as different and inferior. It is this experience of separateness that creates another of the ties uniting Chicanos.

The final index of the Chicano's separateness is the perception he has of himself and his people.[177] Much of what the Chicano feels about himself can be learned from the terms he chooses to identify his cultural group. One such term which has come into use relatively recently is "la Raza." Although literally translated "the race," the phrase more properly connotes the cultural and historical ties which unite Spanish-speaking people.[178] An early forerunner of this designation was "la Raza Cosmica," a phrase coined by the nineteenth-century philosopher Jose Vasconcelos, who believed that Mexicans would form the cosmic, ideal people because of their particular blood mixture. This theory is said to have been the Mexican response to Anglo-Nordic historians who considered the Mexicans inferior half-breeds.[179] Meier and Rivera write of the term "la Raza" that it connotes "not racial but ethnic solidarity, and a sense of common destiny."[180] Another commentator states: "La Raza has become more than a slogan: it has become a way of life for a people who seek to fully realize their personal and group identity and obtain equality of rights and treatment as citizens of the United States."[181] It is this sense of a common destiny which illustrates the feeling of community in the use of "la Raza."

More and more Mexican Americans are choosing to refer to themselves as "Chicano." The word itself is said to be a shortened version of "Mexicano" pronounced perhaps at one time by the Mexican Indians as "Meh-chee-cano."[182] This term has undergone a number of changes in meaning. Originally it was derogatory,[183] and many older Mexican Americans still consider it pejorative and refuse to use it. Later it came into popular usage among the more militant

175 *Id.*
176 *Id.*
177 Although internal cohesiveness undoubtedly helps a plaintiff class overcome possible objections predicated on nonrepresentativeness or lack of a common interest, *see* note 106 *supra*, the decisions are divided on the extent to which it can serve as an independent criterion for definitional purposes. A common attitude was deemed sufficient in Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972) (persons holding politically unpopular ideas); *see* Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941) (class must have a "community of interest," an "integral core," or class "'cohesion"). Other opinions, however, have held that a class cannot be defined by its own mental attitude. *E.g.*, Chaffee v. Johnson, 229 F. Supp. 445 (S.D. Miss. 1964); *see* Am. Servicemen's Union v. Mitchell, 54 F.R.D. 14 (D.D.C. 1972).
178 THE MEXICAN AMERICAN, *supra* note 111, at 67.
179 GOMEZ, *supra* note 135, at xiii.
180 M. MEIER & F. RIVERA, THE CHICANOS: A HISTORY OF MEXICAN AMERICANS xiv (1972) [hereinafter cited as MEIER & RIVERA].
181 THE MEXICAN AMERICAN, *supra* note 111, at 69.
182 GOMEZ, *supra* note 138, at xii; *see also* MEIER & RIVERA, *supra* note 180, at xiv.
183 GOMEZ, *supra* note 135, at xii.

Chicanos and to some it still connotes militancy.[184] More recently, however, "Chicano" has been used by Mexican Americans as a symbol of awareness and pride in their ethnic identity.[185] In *Chicano Manifesto* Rendon writes:

> I am a Chicano. What that means to me may be entirely different from what meaning the word has for you. To be Chicano is to find out something about one's self which has lain dormant, subverted, and nearly detroyed.[186]

Although Chicano problems are not new, Mexican-American self-awareness, so long unvoiced, is perhaps best expressed by activists in the Chicano movement. Rendon characterizes the revolt as "primarily an internal conversion," involving an expansion of the individual's personality, background, and future as the individual Chicano perceives that all Chicanos have traveled the same paths, suffered the same indignities, and undergone the same deprivation. He then realizes that while some may have adjusted and survived better than others by adopting the Anglo's ways, all are bound by "a common birthplace; a common history, learned from books or by word of mouth; and a common culture much deeper than the shallow Anglo reservoir . . . ."[187] This growing realization increases the Chicano's sense of identity and unity with other Chicanos and strengthens his desire to work for the enhancement of equal opportunity for his people in every phase of American life.[188]

Chicanos have a word to express the kinship they feel—"carnalismo." The closest literal translation would be "brotherhood," but "carnalismo" expresses much more. Of "pachuco"[189] origin, "carnalismo" carries with it the unique frame of reference the Chicano's history has given him.

Taken together, the class characteristics discussed thus far demonstrate that the Chicano falls outside the mainstream of American life for many purposes. He is not in any sense an "average" American. His heritage and ancestry, his present welfare and future goals are at variance with those of the dominant society. It is these variances that make the Chicano a separate and identifiable class.

But this obvious reality is apparently not enough. Minorities must provide a definition of themselves that courts can utilize in determining class membership. The final section suggests a number of ways to approach the task of translating the reality of the Chicano's separateness into criteria that will define the class to the satisfaction of the courts.

B. *Suggestions on Ascertaining a Legal Class*

In any effort to frame a definition of a Chicano class, the first problem is to

184 P. BLAWIS, TIJERINA & THE LAND GRANTS: MEXICAN AMERICANS IN STRUGGLE FOR THEIR HERITAGE 8 (1971).
185 GOMEZ, *supra* note 135, at xii.
186 RENDON, *supra* note 110, at 319.
187 *Id.* at 113.
188 THE MEXICAN AMERICAN, *supra* note 111, at 66.
189 GOMEZ, *supra* note 135, at xii. "Pachucos" are members of barrio gangs formed during the 1930's and 1940's who dressed and spoke in a manner distinctly their own. *Id.* at xiv.

provide criteria consonant with the purpose for which the definition is required. To take an obvious example, a program seeking to provide public transportation for the blind would surely establish eligibility criteria based on eyesight rather than eye color.[190] In data collection cases, the United States Commission on Civil Rights believes that classifications of race, color, national origin, or ethnic group are justified only if the data resulting from the distinctions serves a legitimate purpose in combating discrimination.[191] Similarly, in Chicano class actions it is essential that the criteria selected for ascertaining membership in the class bear some relationship to the evil to be remedied. If that evil is a school district's refusal to offer language instruction for non-English-speaking children, for example, the definition of the plaintiff class should be in terms of language capacity.[192] On the other hand, if the harm is a public employer's refusal to promote eligible Chicano workers, the class definition could properly be broader and more inclusive. In each case, the criteria selected must be chosen so as to make their connection with the mechanism by which the class has been allegedly injured as direct and obvious as possible.

A second necessity is to seek no more certainty than is realistically available. It will simply never be possible to identify every minority group member with scientific precision. Indeed, the belief that every member of a group sharing ancestry or a common heritage will bear any single characteristic is the essence of class prejudice.[193] Although a particular trait such as skin color may be a prime contributor to the common experience of discrimination, there is nothing inherent in the trait itself that creates the minority's problems. On the contrary, it is the common experience of discrimination that creates the need to address the problem of class definition at all.[194]

There are volumes of material stating what is already known about the Chicano—that he is a disadvantaged member of our society. Relatively little material exists, however, that is both ethnographic and quantitatively descriptive. Two examples are illustrative.

The extent of use of the Spanish language among Chicanos has not been studied in depth. One report found that 16 percent of the group sampled did not speak Spanish at all. Nine percent spoke no English, while 75 percent spoke both Spanish and English.[195] By contrast, a survey of school principals by the United States Commission on Civil Rights revealed that nearly 50 percent of Chicano first-graders in five Southwestern States do not speak English proficiently.[196]

Tijerina rejected the criterion of Spanish as mother tongue,[197] but in doing

190 The latter attempt is so unrelated to the purpose of the classification that it would undoubtedly be declared violative of due process.

191 To KNOW OR NOT TO KNOW, *supra* note 168, at 38.

192 *See* notes 99-100 *supra* and accompanying text.

193 To KNOW OR NOT TO KNOW, *supra* note 168, at 38. *See also* Rangel & Alcala, *supra* note 111, at 354-56.

194 Proof of a broad historical pattern of discrimination may even in some sense "substitute" for the requirement of precision in class definition. *See* note 82 *supra* and accompanying text.

195 Caine, *supra* note 122, at 303.

196 THE EXCLUDED STUDENT, *supra* note 111, at 14.

197 Tijerina v. Henry, 48 F.R.D. 274, 276 (D.N.M. 1969). *But see* Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972), *affirmed*, 499 F.2d 1147 (1974), in which only a brief time after *Tijerina* a federal court in New Mexico accepted a class defined as

so it insisted on a demonstration of perfect reliability. This insistence was surely misplaced. While the extent of the language handicap may be critical in deciding cases concerning bilingual education on their *merits,* the precise extent need not be known for the preliminary task of certifying the plaintiff class. So long as there is some degree of reliability in saying that many Chicanos can be identified by their ability to speak Spanish, that characteristic, along with others, may serve as a useful criterion of identification.[198]

A second criterion cited in *Tijerina* is ancestry.[199] Most authorities believe this is an index of relatively high reliability.[200] Of most Chicanos, it can accurately be said that their ancestors migrated to the Southwest from Mexico or from Spain through Mexico. The court in *Tijerina,* however, read the proffered criterion to mean that Chicanos must have Spanish or Mexican blood as well as Indian blood.[201] The court found the measure inadequate because the plaintiff made no mention of whether a mixture of blood other than Spanish, Mexican, and Indian would negate membership in the Chicano class.[202]

It is unclear whether the court meant that the plaintiff's failure to resolve the mixed blood issue caused the criterion to be inadequate or that a mixture of blood in addition to the requisite combination caused the class criterion to be inadequate. If the former, then subsequent class actions by Chicanos might solve the inadequacy by taking a stand on the "mixed" (Spanish/Mexican/Indian) versus "very mixed" (Spanish/Mexican/Indian/other) issue. If, on the other hand, the court intended to set a "pure blood" standard, the result is anomalous indeed. In the case of the Black minority, neither the government nor the public at large views a mixture of white ancestry as placing an individual outside the classification of Black. Furthermore, with regard to the purpose for which the definition is required, it must be remembered that it is the social and economic situation of the Chicano that normally prompts the inquiry into his class status. Although a Chicano may have a mixture of Anglo ancestry, he may still share the language, culture, economic status, and identification of the Chicano community. Where a resident of the United States can trace his lineage to Hispanic or Indo-Hispanic ancestors who once lived in Mexico or the Southwest, there is a high probability that he shares the heritage, the present status and the interests of Chicanos generally.

IV. Conclusion

A review of the available social science literature, including the work of

Spanish-surnamed students attending the Portales Municipal School District. There is no specific mention in *Serna* of the language criterion, nor does the court distinguish *Tijerina* in its decision. Thus, the impact of *Serna,* if any, is uncertain. Other courts have accepted the language criterion in more unequivocal terms. *E.g.,* White v. Regester, 412 U.S. 755 (1973) listed language as among the criteria which define an appropriate class. "The typical Mexican American suffers a cultural and language barrier that makes his participation . . . extremely difficult . . . ." *Id.* at 768.

198 *See generally* Rangel & Alcala, *supra* note 111, at 351.

199 *See* notes 115-20 *supra* and accompanying text.

200 Interview with Clark S. Knowlton, Professor of Sociology, University of Utah, in Salt Lake City, Sept. 10, 1974.

201 Tijerina v. Henry, 48 F.R.D. 274, 276-77 (D.N.M. 1969).

202 *Id.* at 277.

leading Chicano writers, has suggested some recurring themes. Chicanos see themselves as different from the prevailing Anglo culture. They have relatively little difficulty in discerning who is Chicano and who is not. They recognize their underparticipation in the benefits of American society and are determined to rectify the situation.

There can be no litmus paper test for ascertaining members of the Chicano class, as there is no such test for any other minority group. This much, however, can be said about the Chicano people: They are more unlike the Anglo culture than like it; among themselves, they share a common cultural heritage. More importantly, members of the majority society generally know within a reasonable degree of certainty who is Chicano. Chicanos are identifiable enough to suffer social, economic, and educational disadvantages. There should be "no constitutional requirement that the Mexican Americans go through the decades of organization and heartache that preceded the black Civil Rights movement and the resulting increase in black participation in the political processes."[203]

To the extent that class actions can help Chicanos avoid such decades of heartache, that remedy should be made freely available to them. The law of class actions is sufficiently elastic, and the social science reality sufficiently persuasive, to warrant the finding that the Chicano class is both ascertainable enough and identifiable enough to warrant access to the courts for the purpose of redressing its grievances.

203 Graves v. Barnes, 343 F. Supp. 704, 733 (W. D. Tex. 1972).