

Culture in Lawmaking: A Chicano Perspective

Carlos Villarreal*

TABLE OF CONTENTS

INTRODUCTION	1194
I. HARMFUL WAYS OF LIFE	1195
A. <i>Assimilation</i>	1196
1. The Psychological Effect	1198
2. Sociological — The Harm From the Educational System	1200
3. Economic — The Harm to Everyone's Pocketbook	1205
B. <i>Fragmentation</i>	1206
1. Home vs. School	1207
2. Alienation of the Family	1208
C. <i>Separatism</i>	1211
1. Gangs	1212
2. Political Separatists	1214
D. <i>Heterogeneity and the Search for a Chicano Identity</i>	1216
II. TORT LAW AND PLURALISM	1218
A. <i>The Scope of Recoverable Damages — Causation and Harm</i>	1224
B. <i>Cultural Factors Affecting Liability</i>	1228
1. Duty	1228
a. <i>Disparate Impact and Respect for Identity Traits</i>	1229
b. <i>The Duty to Refrain from Discrimination</i>	1232
c. <i>Intragroup Conflicts</i>	1235

* B.S., University of Texas at El Paso, 1983; J.D., University of Texas School of Law, 1986; LL.M., Harvard Law School, 1990; The author gratefully acknowledges the help of his friends and colleagues in the preparation of this paper. The author wishes to express his gratitude to Regina Austin and Maria Elena Villarreal for their patience and guidance and consistent help in the preparation of this article. Further, the author would like to thank Joseph Ktendis, Michael Kinglsey-Ninja, and Daria Hughes.

2. Standard of Care — Breach	1238
CONCLUSION	1242

INTRODUCTION

As the complexion of America changes and its population no longer is composed of individuals who can trace their roots to non-Hispanic Europe, the issue of how to accommodate groups with ethnic cultures that clash with the Eurocentric civic culture becomes paramount.¹ The growing pains of pluralism are evident every day. For example, the Texas Legislature was recently called in to special session as a result of two federal district court rulings that Texas' method for electing judges unconstitutionally discriminated against Chicanos.² The special session also faced the Texas Supreme Court's decision that Texas' method of financing its school districts violated the state constitution.³ These examples illustrate the increasingly important role of the courts in protecting individual rights as minorities seek a more open form of pluralism, and accentuate the need for an appreciation of the role of culture in judicial lawmaking.

Broadly generalizing, Chicanos face a conflict between their own ethnic culture, the source of a legal-social psyche that believes that men, not laws, rule, and a civic culture founded on the rule of law. For example, the Hispanic history of viceroys dispensing the benefits and allocating the burdens of society contrasts sharply with the notion that the Magna Carta and the Constitution structure the society. Moreover, the historical for-

¹ See Henry, *Beyond the Melting Pot*, TIME, Apr. 9, 1990, at 28; *The Push for Power*, NEWSWEEK, Apr. 9, 1990, at 18.

² See *Rangel v. Mattox*, Civil A. No. B-88-053 (S.D. Tex. July 29, 1989); *League of United Latin Am. Citizens Council No. 4434 v. Clements*, No. 90-8014 (W.D. Tex. Nov. 8, 1989) (LEXIS, Genfed library, Dist file), *rev'd*, 902 F.2d 293 (5th Cir.), *reh'g granted*, 902 F.2d 322 (5th Cir.), *rev'd*, 914 F.2d (5th Cir. 1990) (7-6 decision) (holding states not required to fill judicial offices through representative elective process because judicial offices are not representative). In this article, "Chicano" identifies a person of Mexican descent living in the United States indefinitely, regardless of citizenship. See also A. MIRANDÉ, *GRINGO JUSTICE* 237 n.1 (1987) (using "Chicano" similarly).

³ *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). This ruling effectively nullified the United States Supreme Court's opinion in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), which upheld the financing scheme against the attack that it unconstitutionally discriminated against Chicanos.

malism of the North and the historical "law as choice" position of the South shape the culture of each region: the idea that "laws rule" produces a "bootstrap" mentality that glorifies a work ethic, while the belief that "men rule" spawns a frustrated, tragic fatalism (*valemadrismo*)⁴ that glorifies death.⁵

Part I of this Article explores the heterogeneity of Chicanos and the difficulty in identifying a Chicano identity. This section then discusses the sociological harms that result from rigid, normative pressures that conflict with nonmajoritarian, particularly Chicano, identities. Understanding the role of these pressures, which command that "this is the right way to be," is essential to understanding the broad influence courts can wield over individuals who are not parties to a particular case. The critical role of the courts in deciding what is "right" when different ethnic cultures have their own views on the question illustrates how pluralism is defined in the United States. Hence, Part II looks at some court decisions which struggle to accommodate Chicano culture.

I. HARMFUL WAYS OF LIFE

Non-Hispanic, European Americans have long believed that their own ethnic culture defined the civic culture of the United States. Their ethnocentric imposition of a foreign culture on Chicanos has led to some Chicano acceptance of and assimilation into that culture. This situation, however, has also fostered tension, both personal and communal, among Chicanos that has

⁴ *Valemadrismo* describes a common state of mind in Latin cultures which can roughly be translated as a combination of disinterest ("I don't care") and resignation ("there's nothing I can do about it").

⁵ Cf. PLATO, THE REPUBLIC 18-19, 338c-339a, 433a-434c (F. Comfort trans. 1945) (discussion of "What is justice?" between Thrasymachus and Socrates). Of course, there is an abundance of formalism in the civil law tradition of Latin American legal systems. Likewise the politicization involved in judicial selection, such as the Robert Bork nomination, suggests that there is an understanding in the North that ultimately men (and less often women) rule. The appearance of these traits, however, may be characterized as merely "recessive" elements within the overall prevailing social psyche. The dominant psyche of individuals in the North roughly fits the stereotype of "law rules," and correspondingly the individualistic "bootstrap" culture predominates in North America. The dominant psyche of individuals in the South believes that "men rule," and correspondingly the tragic fatalism of the South permeates the culture. Thus the people in the middle, like Chicanos, are faced with the dilemma of a fundamental conflict between their civic and ethnic cultures.

manifested itself in three distinct ways of life through which Chicanos relate to the society as a whole: assimilation, fragmentation, and separatism.⁶ The harm caused by these three ways of life is the problem that this Part addresses.

A. Assimilation

Implicit in the American "melting pot myth" is the notion that immigrant or foreign cultures should blend into the fabric of American society.⁷ This attitude belligerently insists that assimilation⁸ and "Americanization" should be the goal, and salvation,

⁶ See Ramirez, *Assessing and Understanding Biculturalism—Multiculturalism in Mexican-American Adults*, in CHICANO PSYCHOLOGY 77, 79 (J. Martinez & R. Mendoza 2d ed. 1984) (identifying three Chicano responses to cultural conflict in United States as nationalism, intermediation, and assimilation); see also D. ABALOS, LATINOS IN THE UNITED STATES 15 (1986) (identifying four choices by which Latinas shape their personal and political lives: emanation, fragmentation, assimilation, and transformation); E. STODDARD, MEXICAN AMERICANS 108-09 (describing three educational models used as alternatives to English-only formula education: integration, pluralism, and segregation).

⁷ If one considers the Chicanos as victims of colonial conquest historical reality does not warrant classifying them as either foreign or immigrant. See generally A. MIRANDÉ, *supra* note 2 (depicting Chicano experience before American Legal and judicial system in its historical context).

⁸ It is important to first define the term "assimilation." Even the legal literature reflects that there are both "exclusivist" and "permissive" models of assimilation. See Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503, 507 (1986); see also Karst, *Paths To Belonging: The Constitution And Cultural Identity*, 64 N.C.L. REV. 303, 362 (1986) (explaining "contrary to the assumptions of the proponents of the Americanization movement, assimilation does not imply a thorough conformity with the cultural mainstream. Rather, assimilation is consistent with a great many 'varieties of ethnic experience'"). The "exclusivist" model requires that the assimilated group take on the traits of the society into which it has assimilated. See G. CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 28-30, 57 (1985); Moran, *supra*, at 507. The "permissive" model contemplates a new culture that is "dynamic and creative, continually evolving as it weaves threads of various immigrant cultures into its fabric." Comment, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1301 (1986); see also Moran, *supra*, at 507. This permissive model has also been described as acculturation and pluralism. See *id.* at 507-10; C. OVANDO & V. COLLIER, BILINGUAL AND ESL CLASSROOMS 108-10 (1985); Ramirez, *supra* note 6, at 78; E. STODDARD, *supra* note 6, at 109; Comment, *supra* at 1301. The exclusivist model, however, is a more realistic version of the experience of Chicanos. See López, *The Idea of a Constitution in the Chicano Tradition*, 37 J. LEGAL EDUC. 162, 164 (1987); Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV.

of immigrants.⁹ The underlying assumption is that white Anglo-Saxon Protestant values define the identity of the United States.¹⁰

This assumption, however, negates the identity of Americans that do not belong to the majoritarian group, and ignores the his-

1043, 1067, 1068 n.121 (1988) (defining assimilation as "the wholesale adoption of the dominant norms," and assailing "'mere equality' . . . as the opportunity to be just like the dominant group").

If the United States utilized a permissive model of assimilation for Chicanos, then much of the harm discussed below would not result. This assumption that the exclusivist model should be used in discussing the experience of Chicanos is based on historical reality and the degree to which Chicano culture clashes with the white Anglo-Saxon Protestant norm. *See generally* A. MIRANDÉ, *supra* note 2 (depicting Chicano experience before American legal and judicial system in its historical context). The permissive model has indeed been used to assimilate immigrant groups that were more similar to the white Anglo-Saxon Protestant norm. For example, Irish and other European immigrants have redefined the civic culture of this country as evidenced by the repeal of temperance legislation and the election of a Catholic president. *See* Karst, *supra*, at 312 (noting that "Anglo conformity" redefined qualifications for successful assimilation). This pattern of assimilation was also aided by the fervent emotional desire of many European immigrants to become American. *See, e.g.*, N. WOLFSON, *PERSPECTIVES: SOCIOLINGUISTICS AND TESOL* 277 (1989) (discussing desire of some European immigrants to abandon their own languages and learn English in hopes of obtaining upward mobility in America). The voluntary nature of this "Americanization" contrasts sharply with the violent conquest that created the first Chicanos. *See* A. MIRANDÉ, *supra* note 2 (noting how Mexicans remaining in territories ceded to United States by Mexico after Mexican-American War in 1848 were, by treaty, considered Americans). Thus, for purposes of discussing the harm related to an assimilationist way of life, the exclusivist model is a more appropriate definition of "assimilation."

⁹ *See* Karst, *supra* note 8, at 311-15.

¹⁰ *See, e.g.*, Geyer, *Americans Must Cling to their Own Culture*, *Corpus Christi Caller Times*, Oct. 22, 1989, at A13, col. 1. Geyer, quoting Professor Author Schlesinger, Jr., observes:

For better or for worse, we inherit an American experience, as America inherits a Western experience; and solid learning must begin with our own origins and traditions. The bonds of cohesion in our society are sufficiently fragile, or so it seems to me, that we should not strain them by excessive worship at the artificial shrines of ethnicity, bilingualism, global cultural base-touching and the like.

Let us take pride in our own distinctive inheritance as other countries take pride in their distinctive inheritances; and let us understand that no culture can hope to ingest other cultures all at once, certainly not before it ingests its own.

Id.; *see also* Karst, *supra* note 8, at 312-13.

torical reality of the diversity of cultures defining the true American identity. "It is no wonder that the members of some ethnic groups today bristle at the very word 'assimilation' and take it as an affront."¹¹

1. The Psychological Effect

This "Anglo-identity" attitude implicitly accepts the tenets of a "conflict-replacement" model of acculturation that:

values-belief systems and life-styles of the ethnic culture will be replaced with those of the mainstream culture and [that] as the individual becomes more assimilated into the mainstream culture he or she experiences less conflict, more success, and demonstrates greater psychological health.¹²

This "conflict-replacement" model implies that the only healthy resolution for diverse ethnics is assimilation into the dominant culture.

One psychologist has observed, however, that efforts to assimilate Mexican Americans can draw individuals "away from the rewarding experiences and constructive values of traditional Mexican-American culture,"¹³ leaving them stranded without the socio-cultural skills to cope effectively with either the Mexican or the Anglo cultural worlds.¹⁴ Others agree that assimilation causes low self-esteem and problems with self identity, and note that assimilation "is a form of self-hatred and the deprecation of [one's] ethnic and racial heritage" because it "strips [one of her] selfhood."¹⁵ Assimilation denies Chicanos' personal and cultural uniqueness. Chicanos are not allowed to be both American and Mexican but instead must be a marginalized outsider or an assimilated individualist.¹⁶ As even a sympathetic law professor explains, "no one can be at once wholly embedded in both a

¹¹ Karst, *supra* note 8, at 313.

¹² Ramirez, *supra* note 6, at 78.

¹³ Buriel, *Integration with Traditional Mexican-American Culture and Sociocultural Adjustment*, in CHICANO PSYCHOLOGY 95, 125 (J. Martinez & R. Mendoza 2d ed. 1984).

¹⁴ *Id.* Buriel also believes that true assimilation is impossible and "delusions of assimilation are likely to be accompanied by anxiety and confusion over one's identity." *Id.* at 126. Thus, he concludes that the adoption of a bicultural identity is a realistic and psychologically healthier solution to conflicting societal demands. *Id.* at 126.

¹⁵ D. ABALOS, *supra* note 6, at 14-15.

¹⁶ *Id.* at 140.

minority culture and the culture of the larger society."¹⁷

In this situation, the established white Anglo-Saxon Protestant culture has a great effect on the way Chicanos adapt. Psychologically, Chicanos may experience "acculturative stress," commonly called an "identity crisis," caused by the conflicting norms and expectations of the different cultures.¹⁸ The psychological damage resulting from acculturation is placed in perspective by Richard Rodriguez:

One night when I was eleven or twelve years old, I locked myself in the bathroom and carefully regarded my reflection in the mirror over the sink. Without any pleasure I studied my skin. I turned on the faucet. (In my mind I heard the swirling voices of aunts, and even my mother's voice, whispering, whispering incessantly about lemon juice solutions and dark, *feo* [ugly] children.) With a bar of soap, I fashioned a thick ball of lather. I began soaping my arms. I took my father's straight razor out of the medicine cabinet. Slowly, with steady deliberateness, I put the blade against my flesh, pressed it as close as I could without cutting, and moved it up and down across my skin to see if I could get out, some how lessen, the dark. All I succeeded in doing, however, was in shaving my arms bare of their hair. For as I noted with disappointment, the dark would not come out. It remained. Trapped. Deep in the cells of my skin.¹⁹

The internalization of America's ethnocentrism thus leads to pathological self-hatred which ultimately hurts individual Chicanos. While the harm to the individual is self-evident, assimilation also harms Chicanos as a group. This harm arises from the stigma that the group as a whole feels and is accentuated by publication of assimilationist rhetoric.²⁰ The harm to the entire society is the loss of creative, self-confident participants in the civic culture.

¹⁷ Karst, *supra* note 8, at 374. Some Chicanos, however, resist this conclusion and insist on the freedom to be both Latino and American. See D. ABALOS, *supra* note 6, at 140. This insistence is not unreasonable if the society adheres to its pluralistic principles and accommodates all ethnic identities into the civic identity.

¹⁸ Born, *Psychological Adaptation & Development Under Acculturative Stress: Towards a General Model*, 3 SOC. SCI. & MED. 529, 529-47 (1970); Spindler & Spindler, *Psychology in Anthropology: Applications to Culture Change*, in 6 PSYCHOLOGY: A STUDY OF A SCIENCE 510, 515-16 (S. Koch ed. 1963); A. WALLACE, CULTURE AND PERSONALITY 229-32 (2d ed. 1970).

¹⁹ R. RODRIGUEZ, HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ 124-25 (1981) (emphasis in original).

²⁰ See, e.g., *id.*

2. Sociology — The Harm from the Educational System

Schools are among the most important socializing institutions of any society.²¹ Their effect on Chicano children may vary, however, depending on the approach to socialization schools take. For example, they may pursue a positive, pluralistic approach that provides a supportive, healthy environment for Chicano youth. All too often, however, they adopt a destructive, assimilation approach.²²

The assimilationist bias in education has a long history. In 1923 Annie Webb Blanton, Texas' superintendent of public instruction, stated that Chicanos were not welcome in the public

²¹ D. ABALOS, *supra* note 6, at 141; *see also* A. MIRANDÉ, *THE CHICANO EXPERIENCE* 91 (1985) (asserting that “[n]o institution has done more to effect the cultural control of Chicanos or attempted to obviate the impact of Chicano cultural and familial values than the school”); J. VIGIL, *BARRIO GANGS: STREET LIFE AND IDENTITY IN SOUTHERN CALIFORNIA* 56 (1988) (noting that “the Mexican American history of prejudicial treatment, language and ethnic identity problems, and difficulties in acculturation often is focussed on educational institutions”); *cf.* A. GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* 260 (Q. Hoare & G. Smith trans. eds. 1971) (“The bourgeois class poses itself as an organism in continuous movement, capable of absorbing the entire society, assimilating it to its own cultural and economic level. The entire function of the State has been transformed; the State has become an ‘educator,’ etc.”); Althusser, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127, 142-43 (B. Brewster trans. 1971).

²² The choice between these approaches has haunted the bilingual education debate. *See* Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249, 1263, 1278, 1294 (1988). While the federal government has given some attention to bilingual education, this program has been plagued with the same assimilationist bias of prior educational programs. Consider that, “Joseph Califano, then Secretary of Health, Education, and Welfare, was eager to dismantle the *Lau* regime because it no longer reflected the goals of English-acquisition and rapid assimilation. . . . [H]e believed that federally sponsored programs had ‘become captive[s] of the professional Hispanic and other ethnic groups, with their understandably emotional but often exaggerated political rhetoric of biculturalism.’” *Id.* at 1294 (quoting J. CALIFANO, *GOVERNING AMERICA* 313 (1981)) (alterations in Moran).

While Americans could rationalize that bilingual education was worthy because of its assimilationist goals, there continues to be general contempt for government support programs to develop children’s knowledge of minority languages and cultures. *See, e.g.*, J. CRAWFORD, *BILINGUAL EDUCATION: HISTORY, POLITICS, THEORY, AND PRACTICE* 40 (1989) (quoting President Jimmy Carter as telling his cabinet “I want English taught, not ethnic culture”); Moran, *supra*, at 1294 n.197.

education system.²³ Chicanos could either learn English and American customs or, as Blanton chastised, "go back to the country which you prize so highly and rear your children there."²⁴

Decades later one teacher, still insisting on assimilation, noted that, while the Mexicans are good people, their "handicap is the bag full of superstitions and silly notions they inherited from Mexico."²⁵ The teacher declared that the schools would provide the greatest help in ridding the people of their superstitions by getting them to switch from Spanish to English, thereby getting them to "think and act like Americans."²⁶

Bilingual education programs carried this assimilationist bias against Spanish into the seventies, and eventually into the eighties.²⁷ Moreover, teachers took these attitudes into the classroom as they blamed the children rather than themselves for the failures in the classroom.²⁸ In addition to the children, teachers tend

²³ Blanton explained, "If your desire is to be one with us, stay, and we welcome you; but if you wish to preserve, in our state, the language and the customs of another land, you have no right to do this." See G. SAN MIGUEL, "LET ALL OF THEM TAKE HEED" — MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981, at 32 (1987) (quoting A. BLANTON, A HANDBOOK OF INFORMATION AS TO EDUCATION IN TEXAS, 1918-1922, at 22-23).

²⁴ *Id.*

²⁵ W. MADSEN, THE MEXICAN-AMERICAN OF SOUTH TEXAS 106 (1964) (quoting teacher of Mexican Americans in South Texas).

²⁶ *Id.* The teacher went on to say that

A lot depends on whether we can get them to switch from Spanish to English. . . . When the day comes that they speak English at home like the rest of us they will be part of the American way of life. I just don't understand why they are so insistent about using Spanish. They should realize that it's not the American tongue.

Id.

²⁷ Moran, *supra* note 8, at 1294. For example, Professor Moran cites a newspaper account of Texas school teachers seeking parents' help to punish their children for speaking Spanish at school. *Id.* at 1336 n.369; see also J. CRAWFORD, *supra* note 22, at 31-49.

Educators have also used other methods of assimilating Chicanos, such as the educational programs for Chicanos that have emphasized vocational and agricultural training, English, health and cleanliness, and the learning of American values. See T. CARTER, MEXICAN AMERICANS IN SCHOOLS: A HISTORY OF EDUCATIONAL NEGLECT 10-11, 15-16 (1970).

²⁸ One teacher declared, "I am a good teacher, I think. And if I had a normal bunch of kids I could teach. But this certainly is not a normal bunch of kids." U.S. COMM'N ON CIVIL RIGHTS, REPORT V: MEXICAN AMERICAN EDUCATION STUDY—TEACHERS AND STUDENTS 22-23 (1973) [hereafter U.S.

to blame the children's culture for the educational failures.²⁹

The sociological damage due to the educational system's ethnocentric, assimilationist bias is expressed by one of the products of this system, Rosalind Mendez, a graduate of an East Los Angeles high school:

From the time we first begin attending school, we hear about how great and wonderful our United States is, about our democratic American heritage, but little about our splendid and magnificent Mexican heritage and culture. What little we do learn about Mexicans is how they mercilessly slaughtered the brave Texans at the Alamo, but we never hear about the child heroes of Mexico who courageously threw themselves from the heights

COMM'N ON CIVIL RIGHTS, TEACHERS AND STUDENTS] (quoting teacher of Mexican Americans in South Texas). A Chicano gang member offers his perspective on the education system: "The schools weren't teaching me anything. The teachers just saw me as a trouble maker, and their prejudices kept them from seeing if I had any potential at all.'" J. VIGIL, *supra* note 21, at 60; see also Trueba, *Peer Socialization among Minority Students: A High School Dropout Prevention Program*, in SCHOOL & SOCIETY 201 (H. Trueba & C. Delgado-Gartan eds. 1988).

²⁹ One teacher stated:

I don't think [the children] see the value in going to school. Many times they look at their own parents or someone in their own family who has never been to school and they are getting along okay. They are living, and so I don't think they think that it is important for them to learn. They know they have to be in school—this is something for them to do and some place for them to go, just to hang out. They get to visit with their friends, they get a free meal, and it's better than staying home and doing nothing.

Deyhle, *Learning Failure: Tests as Gatekeepers and the Culturally Different Child*, in SUCCESS OR FAILURE? 85, 97 (H. Trueba ed. 1987) (quoting second-grade teacher expressing opinion of major problem plaguing student achievement); see also Buriel, *Integration with Traditional Mexican-American Culture and Sociocultural Adjustment*, in CHICANO PSYCHOLOGY 95 (J. Martinez & R. Mendoza 2d ed. 1984) (challenging damaging-culture view of Mexican Americans); A. MIRANDÉ, *supra* note 21, at 99; cf. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379 (1988) (noting one commentator's characterization of "underclass Blacks as victims of self-imposed ignorance, lack of direction, and poor work attitudes"). There is much literature indicating the interest and involvement of Chicano parents in the education of their children. See, e.g., Delgado-Gaitan, *Parent Perceptions of School: Supportive Environments for Children*, in SUCCESS OR FAILURE? 131 (H. Trueba ed. 1987); Warren, *Cooperation and Conflict between Parents and Teachers: A Comparative Study of Three Elementary Schools*, in SCHOOL & SOCIETY 137 (H. Trueba & C. Delgado-Gaitan eds. 1988).

of Chapultepec rather than allow themselves and their flag to be captured by the attacking Americans.

We look for others like ourselves in these history books, for something to be proud of for being a Mexican and all we see in books, magazines, films, and television shows are stereotypes of a dark, dirty, smelly man with a tequila bottle in one hand, a dripping taco in the other, a serape wrapped around him and a big sombrero.

But we are not the dirty, stinking winos that the Anglo world would like to point out as Mexican. We begin to think that maybe the Anglo teacher is right, that maybe we are inferior, that we do not belong in this world, that — as some teachers actually tell students to their face — we should go back to Mexico and quit causing problems for America.³⁰

Mendez's description of a discriminatory system with a white Anglo-Saxon Protestant assimilationist bias was echoed by the United States Commission on Civil Rights in 1973:

The schools of the Southwest are failing to involve Mexican American children as active participants in the classroom to the same extent as Anglo children. . . .

. . . .
 . . . The omission of their culture, values, and familiar experiences from the design of the educational program causes many Mexican American pupils to feel that the school is an alien environment with little relevance to them. These early school experiences of Chicanos thus set in motion the cycle of lowered interest, decreased participation, poor academic performance, and lowered self-esteem which is so difficult to break in the later school years.³¹

³⁰ Erickson, *Uprising in the Barrios*, in *MEXICAN-AMERICANS IN THE UNITED STATES: A READER* 289, 291-92 (J. Burma ed. 1970). For similar, first-hand perspectives, see Anonymous, *Who Am I?*, *EDUCATING THE MEXICAN AMERICAN* 17 (H. Johnson & W. Hernández-M. eds. 1970); R. CARPENTER, *THE MISFORTUNES OF A CHICANO* (1977).

³¹ U.S. COMM'N ON CIVIL RIGHTS, *TEACHERS AND STUDENTS*, *supra* note 28, at 43-44. The report detailed some ways in which the schools disadvantage Mexican-American students:

On most of the measures of verbal interaction between teacher and student, there are gross disparities in favor of Anglos. . . . [T]eachers praise or encourage Anglo children 36 percent more often than Mexican Americans. . . . Combining all types of approving or accepting teacher behavior, the teachers respond positively to Anglos about 40 percent more than they do to Chicano students. Teachers also direct questions to Anglo students 21 percent more often than [sic] they direct them to Mexican Americans. . . . Mexican American children participate less in class than do Anglos; [speaking] less

Thus, the schools offer an opportunity to see how emphasis on an assimilationist bias leads to discrimination.

The school system's second class treatment of Chicanos is reflected in the high Chicano dropout rate.³² A 1960 study evaluating the educational level of the Spanish surnamed, primarily Chicano, population in California showed that only about half of the population had gone beyond eighth grade, and that less than ten percent had completed any college work.³³ The study concluded that a four-year schooling gap exists between Mexican Americans over fourteen and the rest of the population.³⁴

These statistics had not changed in studies investigating the Chicano dropout rates in Texas in the 1980s despite the Commission on Civil Rights study documenting the disparate treatment of Chicano pupils in the early 1970s.³⁵ The Texas studies consist-

frequently both in response to the teacher and on their own initiative. The total picture that emerges is [that] Mexican American students are ignored compared to their Anglo counterparts.

. . . [A]ll elements of this interaction, taken together, create a climate of learning which directly affects educational opportunity. Consequently, the discovered disparities in teacher behavior toward Mexican Americans and Anglos are likely to hinder seriously the educational opportunities and achievement of Chicano pupils. . . .

Id. at 43.

³² Guerra, *The Mexican-American Child: Problems or Talents?*, in EDUCATING THE MEXICAN AMERICAN, *supra* note 30, at 64, 69-70.

³³ Cordova, *The Relationship of Acculturation, Achievement, and Alienation Among Spanish-American Sixth Grade Students*, in EDUCATING THE MEXICAN AMERICAN, *supra* note 30, at 160, 163.

³⁴ *Id.*

³⁵ U.S. COMM'N ON CIVIL RIGHTS, TEACHER AND STUDENT, *supra* note 28. In 1978 the U.S. Bureau of the Census presented statistical information on persons of Spanish origin in the United States. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P.20, No. 328, PERSONS OF SPANISH ORIGIN IN THE UNITED STATES: MARCH 1978 (1978). The report included statistics on years of school completed by persons 25 years and older. The data showed that 67.1% of white persons had completed at least four years of high school, while only 40.8% of persons of Spanish-origin had completed that much school. The numbers for persons of Mexican origin were even worse. While 34.3% had completed four years of high school, another 23.1% of this group had completed less than five years of school altogether. *Id.* Table 5, at 7; A. MIRANDÉ, *supra* note 21, at 92.

Another study noted that the younger the age group, the less the educational disparity between Chicana and white women levels, suggesting there may be some improvement. See Waldman, *Profile of the Chicana: A*

ently report a dropout rate of between forty and fifty percent.³⁶ Thus, the institution entrusted with “the awesome responsibility of developing America’s most precious resource — the minds of our youth,”³⁷ is failing in its socialization task.

3. Economic — The Harm to Everyone’s Pocketbook

Chicano dropout figures certainly translate into economic losses for the society in a variety of ways. For example, one study considered the lower income earned by dropouts and projects that the total taxable earning loss over the lifetime of one year of dropouts in Texas is over sixteen billion dollars.³⁸ This same study estimated that the costs attributable to inadequate education include: \$253.7 million for Aid to Families with Dependent Children (AFDC) and Food Stamps annually; \$12.9 million for adult education and jobs training programs annually; \$367.77 million for incarceration, judicial, property loss, and police protection; and \$17.63 million in unemployment insurance and placement services annually.³⁹ “If a social institution is ineffi-

Statistical Fact Sheet, in MEXICAN WOMEN IN THE UNITED STATES: STRUGGLES PAST AND PRESENT 195 (M. Mora & A. Del Castillo eds. 1980).

³⁶ Cárdenas, *Texas Dropouts Revisited: 1989*, INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION NEWSLETTER, Apr. 1989, at 1, 3 & Table 1, Figure 1 [hereafter IDRA NEWSLETTER] (reporting 50% dropout rate for Texas Chicanos in 1987-88 using Texas Education Agency figures, and repeating 45% dropout rate found for Hispanics in 1986); Waggoner, *Undereducated Youth in Texas: A Study of Macro-Community Dropout Rates*, IDRA NEWSLETTER, Mar. 1987, at 1, 4 (reporting 13 of 34 service delivery areas established in Texas for the Job Training Partnership Act program with Chicano dropout rates over 40%); Cárdenas, Robledo, & Cortez, *School Attrition Rates in Bexar County, Texas*, IDRA NEWSLETTER, June 1986, at 1, 5 (reporting 43% attrition rate for Hispanic population for high schools in Bexar County, i.e., San Antonio).

³⁷ Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE LAW J. 995, 995 (1984).

³⁸ Ramirez & Robledo, *The Economic Impact of the Dropout Problem*, IDRA NEWSLETTER, Apr. 1987, at 1, 3 Table 1 (estimating loss at \$16.8 billion total gross earnings lost in Texas due to dropout rate). The economic impact due to Chicano dropouts is less than the total figures discussed because Chicanos make up 40% of the total number of dropouts. Waggoner, *supra* note 36, at 4.

³⁹ Ramirez & Robledo, *supra* note 38, at 4-6, 8 Table 2. The study suggests that these losses may be avoided by expending \$1.9 billion. *Id.* at 7, 8 Table 2. Thus, the study concludes that for every dollar expended on dropout prevention and education, the society would recoup eight dollars. *Id.* at 7. At least one San Antonio businessman agrees with these figures.

cient, someone to whom efficiency is an important value may want to change it."⁴⁰ Hence, these economic considerations strongly encourage reconsideration of the assimilationist approach to education.

B. Fragmentation

Fragmentation is another way through which Chicanos relate to society as a whole. Fragmentation is characterized by Chicanos attempting to live in two different worlds. Chicanos leading this type of life act out differing roles depending on the situation in which they find themselves. While at work or at school they behave consistently with the norms of the majoritarian culture and are rewarded with power and money. When they return home, however, they return to the comfort of their "stable environment, the remnant of a golden age that [they] can live within to find security in a world of discontinuity."⁴¹

The conflicting norms of these different environments leave many Chicanos confused about their identity. In other words, the role played in each setting denies the individual's sense of a consistent self. The harm from this fragmentation is not only that a Chicano may not take her ethnic culture into the realm of the civic culture, but that the norms of the ethnic culture do not permit change into a new way of life defined by pluralism.⁴²

Adherence to the mandates of distinct settings fosters stratification consistent with the beliefs of whoever controls those settings. For example, in the area of domestic services, one study revealed the "masking" by domestic workers, mostly black women, to sat-

See Rust, Dropping Out, IDRA NEWSLETTER, Aug. 1987, at 1 (reprinting Rust's editorial in San Antonio Light newspaper). These damages are even greater if we consider the intangible benefits of preventing dropouts such as psychological well being, and better parenting.

⁴⁰ Posner, *Observation: The Economic Approach to Law*, 53 TEX. L. REV. 757, 776 (1975).

⁴¹ D. ABALOS, *supra* note 6, at 175-76.

⁴² Abalos reasons:

To continue to deny aspects of oneself is to invite more and more conscious suppression of what we know to be true. Sooner or later this kind of conscious suppression, because it cannot become repression, or an unconscious denial of self, will explode into confrontation. These explosions for the sake of maintaining two false worlds will continue to take place with no resolution because there is no ultimate meaning in [this way of life.]

Id. at 177.

isfy the preconceived notions of their employers.⁴³ The harm Chicanos suffer as a result of switching between different roles extends beyond the harm to the individual. By accepting and adhering to these disparate norms the individual who is "masking" her identity is also legitimating the norms, which harms the next person who is supposed to fit the norm.

1. Home vs. School

While school is one of the most significant socialization forces in a child's life, the institution most important for maintaining culture is the family structure.⁴⁴ The problems fragmentation causes are thus usually manifested in conflicts between the home and school cultures.⁴⁵

In the Chicano experience, fragmentation is most easily seen by considering the different languages used in the home and school. Learning a second language requires learning another culture. As a consequence of the learning process, however, the student may become alienated from his original culture. This alienation is likely if the teacher is not aware of this possible consequence.

Educators have historically prohibited the use of Spanish in schools,⁴⁶ and this harsh practice continues through whatever means teachers can employ to punish the use of Spanish in school.⁴⁷ A seventh grader, upon being caught speaking Spanish in school, illustrated the confusion and anguish this practice causes in his life when he wrote:

I speack spanich because my Mother Can't speack English. I forget how to speack English because We always speack spanich in May Home. But I have forgot that I was in school. . . . My

⁴³ J. ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* 155-203 (1985) (noting how for some domestics practiced ingratiating had become part of their personalities).

⁴⁴ M. SANCHEZ-JANKOWSKI, *CITY BOUND: URBAN LIFE AND POLITICAL ATTITUDES AMONG CHICANO YOUTH* 25 (1986).

⁴⁵ R. GRISWOLD DEL CASTILLO, *LA FAMILIA: CHICANO FAMILIES IN THE URBAN SOUTHWEST, 1848 TO THE PRESENT* 79 (1984).

⁴⁶ U.S. COMM'N ON CIVIL RIGHTS, *REPORT III: MEXICAN AMERICAN EDUCATION STUDY—THE EXCLUDED STUDENT* 14-20 (1972) [hereafter U.S. COMM'N ON CIVIL RIGHTS, *THE EXCLUDED STUDENT*].

⁴⁷ *Id.* (describing harsh application of "No Spanish" rules during late 1960s including incidents of suspension, hitting, and slapping); Moran, *supra* note 22, at 1336 n.369 (describing newspaper account of Texas teachers encouraging parents to punish their children for speaking Spanish in school).

father no how to speack English. But we speack spanich because my Mother don't Understand. When we have visiter We Always speack spanich. My big sister Always speack English. But I speack spanich because my Mother don't no. My brother speack spanich With her. And When my Grandmother come to see use she speack spanich with Us she can't speack English with us so that why I forget how to speack English. When I am speack English my friend speack with me they speack spanich with me And I have to speack spanich with them. . . . But I promise I won't speack spanich no more. Am sorry I catch speack spanich. Hope I won't do it Again.⁴⁸

2. Alienation of the Family

The conflict between home and school leads to the individual's alienation from her family.⁴⁹ Richard Rodriguez offers a glimpse of the profound anguish over this alienation:

One Saturday morning I entered the kitchen where my parents were talking in Spanish. I did not realize that they were talking in Spanish however until, at the moment they saw me, I heard their voices change to speak English. Those *gringo* sounds they uttered startled me. Pushed me away. In that moment of trivial misunderstanding and profound insight, I felt my throat twisted by unsounded grief. I turned quickly and left the room. But I

⁴⁸ "Why I speack spanich", 5 BULLETIN, Dec. 1963, at 1 (reproducing seventh-grader's punishment essay for speaking Spanish in school).

⁴⁹ The assimilationist bias of schools is a source of conflict and fragmentation within individuals, leading to conflict among family members. The schools discourage student identification with the ethnic group.

The fear that continued identification with the ethnic group will lead to feelings of nationalism is evident in curriculum, personnel attitudes, and the classroom environments of most schools. The Mexican American child is encouraged to discard those values related to pride in his ethnic origins and, when asked about his ethnic background, is prompted to respond that he is *American*.

M. RAMIREZ III & A. CASTANEDA, CULTURAL DEMOCRACY, BICOGNITIVE DEVELOPMENT, AND EDUCATION 44 (1974) (emphasis in original). For more accounts of majoritarian fear of nationalism among Chicanos see Moran, *supra* note 22, at 1301-02; Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 299-300, 322-25 (1989).

For an argument that fragmentation by adoption of varying identities aids desirable assimilation, see Karst, *supra* note 8, at 332-36. For a study reporting the breakdown in communication between grandchildren and grandparents and the grandparents' perception that their grandchildren failed to respect them see Acosta-Cooper, *Perceptions of the Grandparental Role By Three Generations in Two Chicano Families: A Pilot Study* (Oct. 1986) (Harvard Graduate Sch. of Educ. Qualifying Paper).

had no place to escape to with Spanish. . . . My brother and sisters were speaking English in another part of the house.⁵⁰

Rodriguez explained the breakdown in communications with his parents,⁵¹ his confusion over how to address his parents,⁵² and his shame due to his parent's inept use of English in public.⁵³

[T]he special feeling of closeness at home was diminished Gone was the desperate, urgent, intense feeling of being at home; rare was the experience of feeling myself individualized by family intimates. We remained a loving family, but one greatly changed. No longer so close; no longer bound tight by the pleasing and troubling knowledge of our public separateness.⁵⁴

⁵⁰ R. RODRIGUEZ, *supra* note 19, at 21-22 (1981) (emphasis in original).

⁵¹ *Id.* at 23.

⁵² *Id.* at 23-24.

⁵³ *Id.* at 15, 25; *see also* D. ABALOS, *supra* note 6, at 143 ("At times the real pain of the memory of being called a dirty Mexican, greaser, or spic keeps us from integrating. At other times it is the legacy of struggle of our mothers and fathers and the generations before us. At such times of realization we are overcome with sadness that we have been ashamed of our own color, blood, language, heritage, and of our Spanish-speaking, poorly educated parents.").

⁵⁴ R. RODRIGUEZ, *supra* note 19, at 22-23; *cf.* Gabel, *Dukakis's Defeat and the Transformative Possibilities of Legal Culture*, 4 *Tikkun*, Mar.-Apr. 1989, at 13. Gabel noted that:

"misrecognition," a process by which the parent, instead of confirming the infant in his or her being, "throws" the infant and later the child into a series of roles that to a significant degree alienate the child, in his or her social identity, from the centered desire that is the social dimension of the child's soul. The child experiences the parent as denying his or her own desire for full recognition and confirmation and as conditioning the child's recognition and acceptance on becoming the uncentered, role-based "good child" that the parent seeks. Once this distance between the child's desire and his or her social self has been installed in the child's heart and mind, the child will then tend to reproduce this split in others with whom he or she comes in contact, including his or her own children. To the degree that we are all fundamentally animated by the desire for true confirmation, the child will continue to strive for this confirmation for the rest of his or her life — but to the degree that the child has internalized the sense that this desire must not be manifested because it will lead to the loss of what recognition and sense of self the child did receive, the child will repeatedly disown the movement of this desire and short-circuit its aim, returning to the safety of the earlier, validated forms of social connection.

Id. at 16.

Regardless of his pain Rodriguez praises assimilation and offers a fragmentationist model:

[T]he bilingualists simplistically scorn the value and necessity of assimilation. They do not seem to realize that there are *two* ways a person is individualized. So they do not realize that while one suffers a diminished sense of *private* individuality by becoming assimilated into public society, such assimilation makes possible the achievement of *public* individuality.⁵⁵

This rationalization, however, offers no remedy for the damage caused to the family relationship. Furthermore, this model ignores the fact that assimilationist pressures obliterate all of the private individuality. In other words, while a multicultural model for defining a person's identity may be a healthy compromise,⁵⁶ the environment must be genuinely multicultural so as to allow the individual to be herself. This is the fundamental distinction between fragmentation and pluralism. The "public individuality" that Mr. Rodriguez praises is not genuine pluralism; rather, this identity is merely the mask one wears to comply with the norms of the environment. This hypocrisy of fragmentation will eventually cause one to realize that, by conforming, she has stumbled through life without ever finding or defining her own self. At that moment the realization that one is an empty container with a mirror exterior will be marked by the sadness of self-abuse and the guilt for having harmed others. Often the realization of our acceptance and internalization of Anglo identities leads to guilt.⁵⁷ This guilt is the manifestation that we are denying ourselves to ourselves.⁵⁸

⁵⁵ R. RODRIGUEZ, *supra* note 19, at 26 (emphasis in original); cf. Karst, *supra* note 8, at 332 (noting dual identities in assimilated individuals—"from ethnic identity to occupational identity").

⁵⁶ See Ramirez, *supra* note 6, at 91-92.

⁵⁷ D. ABALOS, *supra* note 6, at 143. Rodriguez, describing this guilt, writes, "For my part, I felt that I had somehow committed a sin of betrayal by learning English. . . . [O]nce I spoke English with ease, I came to feel guilty." R. RODRIGUEZ, *supra* note 19, at 30 (emphasis in original).

⁵⁸ The idea of insecurity associated with hypocrisy is also a characteristic of people leading fragmented lives. Octavio Paz offered the following description of *pachucos* — Chicano youths and likely gang members: "What distinguishes them, I think, is their furtive, restless air: they act like persons who are wearing disguises, who are afraid of a stranger's look because it could strip them and leave them stark naked. When you talk with them, you observe that their sensibilities are like a pendulum, but a pendulum that has lost its reason and swings violently and erratically back and forth." O. PAZ, *Labyrinth of Solitude* 13 (1961).

On the opposite end of the assimilation-separation spectrum, Rodolfo "Corky" Gonzales urged separatism and searched for a Chicano identity in his poem *I Am Joaquin*.⁵⁹ He related the alienation caused by fragmentation:

I look at myself
and see part of me
who rejects my father and my mother
and dissolves into the melting pot
to disappear in shame.
I sometimes
sell my brother out
and reclaim him
for my own when society gives me
token leadership
in society's own name.⁶⁰

Gonzales served as the director of the War on Poverty program in Denver under the Johnson administration, but in 1965 he resigned his position as well as his party membership, stating that the position was costing him his soul and dignity.⁶¹ Frustrated and unable to cope with the fragmentationist life that denied him his identity, Gonzales rejected the role the civic culture had prescribed for him and became a separatist.⁶²

C. Separatism

In response to pressures to assimilate and the conflicting discriminatory exclusion of Chicanos from full participation in American society, some Chicanos have isolated themselves from the majoritarian culture.⁶³ These separatists include those who

⁵⁹ R. GONZALES, *I AM JOAQUIN* (1972).

⁶⁰ *Id.* at 52.

⁶¹ Gonzales explained that:

The individual who makes his way through the political muck of today's world, and more so the minority representatives, suffers from such immense loss of soul and dignity that the end results are as rewarding as a heart attack, castration, or cancer. . . . I can only visualize your goal as complete emasculation of manhood, sterilization of human dignity, and that you not only consciously but purposely are creating a world of lackeys, political boot-lickers and prostitutes.

C. MUÑOZ, *YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT* 57 (1989) (quoting Gonzales upon his resignation as director of War on Poverty program in Denver).

⁶² *Id.*; see also Part (I)(C)(2) *infra* (discussing political separatists).

⁶³ In other words, separatist movements originate among the victims of

are isolated into distorted versions of Chicano culture, such as gang members, as well as members of political organizations calling for the recognition of a Chicano nation.

1. Gangs

The pressures to assimilate have left many Chicano youth in a state of deculturation,⁶⁴ which “is characterized by striking out against the larger society and by feelings of alienation [and] loss of identity”⁶⁵ This leaves these youths “out of cultural and psychological contact with either their traditional culture or the larger society.”⁶⁶ This ethnocide leads to the creation of a new ethnic identity that is harmful to both the individuals engaged in this way of life and society as a whole.⁶⁷

domination. See Karst, *supra* note 8, at 324, 327. The domination is fueled by fear, such as the fear of “English-Only” advocates that the high fertility rate of Hispanics threatens America. See C. MUÑOZ, *supra* note 61, at 22; Califa, *supra* note 49, at 326-27. Thus, the anger of Chicano separatists is generated by the racist fears of some members of the majoritarian culture. Karst, *supra* note 8, at 329. Each side is suspicious of the other and hostilities escalate to the point where separation is the only solution. Ironically, “English-Only” advocates argue that use of another language in society is divisive, while their movement itself is the source of so much discord. See Califa, *supra*, note 49, at 322-25; Moran, *supra* note 22, at 1301-02.

⁶⁴ See *supra* notes 13-17 and accompanying text (describing “deculturation” as lack of sociocultural skills resulting in incompetence in both Chicano and Anglo cultures).

⁶⁵ Berry, *Acculturation as Varieties of Adaptation*, in ACCULTURATION: THEORY, MODELS AND SOME NEW FINDINGS 9, 14-15 (A. Amado ed. 1980); see also J. VIGIL, *supra* note 21, at 39, 42, 150.

⁶⁶ Berry, *supra* note 65, at 15.

⁶⁷ One commentator stated:

Although individuals do not voluntarily decide to become deculturated, over time this unique lifestyle may become a source of pride and ethnic identity for some Mexican Americans, which leads to highly stabilized forms of behavior that are resistant to change and often self-perpetuating. This situation is characteristic of some young adolescents who aspire to become members of a longstanding barrio gang in order to prove their “Mexicanness.” Their participation in the gang confers status, reinforces their identity, extends the longevity of the group, provides a role model for other adolescents, and lends spurious validity to the claim that Mexican-American culture spawns gangs.

Buriel, *supra* note 13, at 125; see also M. BARRERA, BEYOND AZTLAN: ETHNIC AUTONOMY IN COMPARATIVE PERSPECTIVE 68 (1988) (noting that institution-

Chicano gangs are made up of youth who live in barrios physically separated from the greater community. They have been rejected by that community.⁶⁸ One gang member summarized his alienation from society by relating racist victimization in elementary school:⁶⁹

I think I'd rather have gotten a beating every day than to go to school. . . . I didn't like it, 'cause [my elementary school had] only five or six Chicanos . . . besides my sister and I. The rest were gabachos [pejorative for white Americans]. They used to kind of make me feel bad 'cause they came to school with nice clothes. They always had plenty to eat for lunch or they had money to buy their hot lunch. I guess nothing would've changed my race. Well, I would be harassed by all the white kids. They'd call me "dirty Mexican," "greaser," "beaner," "nigger," and names like that. . . . At times I wished I was a white man. I thought I was being punished for being born a Mexican. Thank God, as years rolled by, I understood more and more why all the stereotype calling. One morning my sister and I were called to the nurse's office. . . . She said they had a report of a couple of

alized discrimination against Mexican Americans has created alternative Chicano identities such as pachuco, zootsuiter, cholo, and lowrider); A. MIRANDÉ, *supra* note 2, at 192, 233-34.

⁶⁸ See J. VIGIL, *supra* note 21, at 52. (quoting Veto, temporary gang member, who explained, "All the families were similar to ours as we were separated from the rest of the community").

⁶⁹ The focus on conflict in educational institutions has led to a separatist's solution. Specifically, "Chicano schools" have been established to educate Chicano children without the assimilationist bias of public education and with due regard for the development of a positive self-image among the pupils. See generally SOUTHWEST NETWORK, STUDY COMM'N ON UNDERGRADUATE EDUC. & EDUC. OF TEACHERS, CHICANO ALTERNATIVE EDUCATION (1974) (describing fledgling Chicano alternative schools). It is noteworthy, however, that in *Alvarez v. Lemon Grove School District*, a California state district court issued a desegregation order to prevent implementation of a separate public school for Chicano children in 1931. See Alvarez, *National Politics and Local Responses: The Nation's First Successful School Desegregation Court Case*, in SCHOOL & SOCIETY, at 37 (H. Trueba & C. Delgado-Gaitan eds. 1988); cf. T. CARTER, *supra* note 27 (presenting study of American society's failure to educate Mexican Americans). Carter observed that "Just so surely as Booker T. Washington is right in saying that Tuskegee and similar institutions are the ultimate solution of the Negro problem, so surely is the same kind of education the necessary basis upon which to build a thorough and complete solution of the Mexican problem." *Id.* at 10. For further study see R. ALVAREZ, *FAMILIA: MIGRATION AND ADAPTATION IN BAJA AND ALTA CALIFORNIA, 1800-1975* (1987) (identifying sociocultural patterns of migration and adaptation of group of Mexican families settling in California).

kids who had lice on the bus the day before. We were sent home for it. I said to myself, I would never go back to school 'cause everybody knew about what had happened.⁷⁰

Thus, society sends Chicanos conflicting messages that they should assimilate, yet they are not welcome to participate fully in American life. Under these circumstances it should not be surprising that some Chicanos have defined their own identity by associating with barrio gangs.

2. Political Separatists

The same factors that foster gangs — physical isolation in barrios and antiassimilationist attitudes⁷¹ — motivate political separatists. In 1969 Corky Gonzalez proposed *El Plan Espiritual de Aztlan*:

In the spirit of a new people that is conscious not only of the proud historical heritage but also of the brutal "gringo" invasion of our territories, we, the Chicano inhabitants and civilizers of the northern land of Aztlan from whence came our forefathers, reclaiming the land of their birth and consecrating the determination of our people of the sun, declare that the call of our blood is our power, our responsibility, and our inevitable destiny

Brotherhood unites us, and love for our brothers makes us a people whose time has come and who struggles against the foreigner "gabacho" who exploits our riches and destroys our culture. With our heart in our hands and our hands in the soil, we declare the independence of our mestizo nation. We are a bronze people with a bronze culture. Before the world, before all of North America, before all our brothers in the bronze continent, we are a nation, we are a union of free pueblos, we are Aztlan. . . .

. . . .
Nationalism as the key of organization transcends all religious, political, class, and economic factions or boundaries. Nationalism is the common denominator that all members of La Raza can agree upon.⁷²

A nationalistic tone permeated the platforms of such groups as the Brown Berets, the Mexican American Youth Organization, *La*

⁷⁰ J. VIGIL, *supra* note 21, at 59. For another personal account by a seventh-grade student who complains of both the majoritarian society's deprecation of Chicano culture and history and the exclusion of Chicanos from the activities of society, see Anonymous, *supra* note 30.

⁷¹ See J. VIGIL, *supra* note 21, at 35-64.

⁷² M. BARRERA, *supra* note 67, at 37-38 (quoting Rodolfo Gonzales' presentation of plan at 1969 Chicano Youth Conference).

Raza Unida Party,⁷³ and the *Movimiento Estudiantil Chicano de Aztlan*.⁷⁴ These groups, among others, constituted the "Chicano Movement" which reached its peak from 1968 to 1973.⁷⁵ The movement declined with the development of "ideological fragmentation, [and] dilution of the communitarian emphasis, and a resurgence of traditional Chicano organizations."⁷⁶ Nevertheless, political intellectuals still advocate this separatist way of life.⁷⁷

⁷³ While *La Raza Unida* was based on the ideology of Chicano nationalism, its goal was to take control of power and not secession. See C. MUÑOZ, *supra* note 61, at 117.

⁷⁴ M. BARRERA, *supra* note 67, at 43, 45-47.

⁷⁵ Villarreal, *The Politics of Mexican-American Empowerment*, in *LATINO EMPOWERMENT: PROGRESS, PROBLEMS, AND PROSPECTS* 1, 5-6 (R. Villarreal, N. Hernandez & H. Neighbor eds. 1988); see also M. BARRERA, *supra* note 67, at 45. This was not the first nationalistic Chicano movement. See A. MIRANDÉ, *supra* note 2, at 89-93 (describing Cortina War to liberate part of south Texas in 1859). Consider also the separatism expressed in the "*Plan of San Diego*." See M. BARRERA, *supra* note 67, at 18-20.

⁷⁶ M. BARRERA, *supra* note 67, at 45. These traditional Chicano organizations include the League of United Latin American Citizens, and the American G.I. Forum. *Id.* at 22-26, 27-28.

⁷⁷ For example, Professor Barrera's comparative evaluation of regional autonomy for ethnic minorities in Switzerland, Canada, Nicaragua, and China offers a separatist solution: "Regional autonomy is clearly a kind of in-between solution to ethnic and nationalist demands, poised between separatism and secession on the one hand and assimilation without choice on the other." *Id.* at 160. While Professor Barrera denies that his proposal is separatist, the call for an ethnically defined autonomous region is clearly separatist. Although Professor Barrera's frustration with the slow implementation of pluralistic ideals is warranted, his solution is currently a political reality within the current ideal framework of semiautonomous local, county, and state governments. Furthermore, advocating separatist solutions undermines the attainment of pluralism insofar as Chicanos who are pursuing pluralistic alternatives, like bilingual education, are seen as a threat to national security and as separatists. See Moran, *supra* note 22, at 1296, 1301. Indeed, Senator S.I. Hayakawa, who immigrated from Canada, was motivated to cofound the U.S. English organization because of the developments in Quebec that Professor Barrera lauds. *Id.* at 1301 & n.231; Califa, *supra* note 49, at 300. Some of the very nations that Professor Barrera cites, Canada and Switzerland, are utilized by proponents of the English-Only movement to escalate their racist rhetoric by appealing to nationalistic paranoia. See *id.* at 322-23. Finally, Professor Barrera's proposal would abandon many Chicanos who do not reside within the "autonomous region." Instead of isolating Chicanos onto reservations, perhaps insisting on the implementation of the true pluralistic principles on

D. Heterogeneity and the Search for a Chicano Identity

While groups and individuals have agonized in their search for a Chicano identity, the heterogeneity of the Chicano identity is obvious. Each of the ways of life evident in Chicano society is a distinct result of the pursuit of identity by a people in transition from Mexico to the United States. Any distinct identity is clearly based on Mexican values and culture, though the Chicano movement also accepted the "deculturated" identity of gang members and ex-convicts.⁷⁸ The members of this movement reject the identity fostered by Chicanos in the 1930s and 1940s, whom they brand as assimilationist, to create a new identity emphasizing Chicanos' indigenous roots.⁷⁹

The diversity of Chicano identities can be seen by considering the changes in the life of one of these separatists. In the 1960s Luis Valdez was one of the leaders of the Chicano movement and founded the *Teatro Campesino*.⁸⁰ He left the farmworkers' union because Cesar Chavez did not agree with the nationalistic ideology of the Chicano movement. Two decades later, after the box office success of the movie *La Bamba*, which Valdez directed, Valdez was criticized for the movie's failure to "address the legacy of the Chicano movement."⁸¹ He now speaks about "budgeting," "cash flow," "profit and loss," "paying wages," "pensions," "workmen's compensation," "social security," and "union wages."⁸² The once separatist has changed, but his transformation has not meant assimilation, as suggested by intellectual separatists.⁸³ Valdez has not assimilated, but rather has blended his reality into the matrix of the civic culture.⁸⁴ Valdez's contributions to the arts have changed the civic culture to reflect its Chicano elements.

Similarly, the "centrist" positions of successful politicians like

which this country's civic culture is founded would remedy the torment between assimilation and preservation of identity.

⁷⁸ C. Muñoz, *supra* note 61, at 76-77.

⁷⁹ *Id.* at 12, 16, 63.

⁸⁰ *Id.* at 7, 53. Teatro Campesino is a theater group presenting works by Chicanos about the Chicano identity. *Id.* at 53.

⁸¹ *Id.* at 185.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Karst, *supra* note 8, at 362; cf. Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 576-77 (noting Aretha Franklin's message to the civic culture: "R-E-S-P-E-C-T").

Henry Cisneros⁸⁵ do not signal the wholesale adoption of an assimilationist way of life.⁸⁶ Cisneros, as a member of the Kissinger Commission on Central America, dissented from the commission's recommendations.⁸⁷ Cisneros is merely doing what pluralists would ask of the majoritarian culture; that is, not confusing the civic culture with any single ethnic culture and making his own Chicano mark on that civic culture. These two examples are role models for appreciating the alternative way of life of pluralism.

This critique of the separatist Chicano movement is not meant as an endorsement of the other ways of life, but rather as recognition of the fact that the group which has searched most vehemently for *the* Chicano identity has failed to define that identity. Chicanos have different identities depending on their geographical location.⁸⁸ Furthermore, the Chicano identity is different depending on whether the individual lives in a rural or urban environment.⁸⁹ The values of different Chicanos are clearly affected by their economic status⁹⁰ and the generations their family has lived in the United States.⁹¹ As in any culture, the identity is distinct based on the sex of the individual.⁹² Each of these factors make it impossible to describe *the* Chicano identity, but there

⁸⁵ Henry Cisneros is a leading Mexican-American politician who served as a Reagan-appointed member of the Kissinger Commission on Central America. C. MUÑOZ, *supra* note 61, at 181.

⁸⁶ This concern is implicit in Mr. Muñoz's critique of the centrist orientation of most politicians, and political groups. *See id.* at 47, 181-82.

⁸⁷ *Id.* at 181.

⁸⁸ Chicanos in the northern part of border states are less Mexican than Chicanos in the southern part of these states. *Id.* at 9. Texas Chicanos have more connections with Mexico and therefore have less identity problems when compared to California Chicanos. *Id.* at 9-10. Chicanos in the Midwest identify with the Puerto Rican populations, *id.* at 96, and Chicanos in the San Francisco Bay Area identified with the Central American groups there. *Id.* at 117-18. Higher Mexican-American population concentrations in South Texas not only help secure a more stable sense of Mexican identity for Chicanos but also make political organization and victories more likely. *Id.* at 56, 101, 118; *see also* M. BARRERA, *supra* note 67, at 163-76; J. MOORE, MEXICAN AMERICANS 130-38 (2d ed. 1976) (examining behavior and values of Mexican-American populations in Albuquerque, Los Angeles, and San Antonio).

⁸⁹ C. MUÑOZ, *supra* note 61, at 9.

⁹⁰ J. MOORE, *supra* note 88, at 130-38.

⁹¹ M. BARRERA, *supra* note 67, at 68-83; *see also* C. MUÑOZ, *supra* note 61, at 25-26; Karst, *supra* note 8, at 352.

⁹² C. MUÑOZ, *supra* note 61, at 160.

is nevertheless, a distinct identity that each Chicano personally maintains.

Part II of this Article discusses the role of culture in tort law-making. As the preceding discussion reveals, the disparity in cultural values of Chicanos from the majoritarian culture depends on the degree to which the individual Chicano's identity is defined by Mexican culture and values. The proposal to consider culture in tort law decisionmaking is made for the purpose of allowing Chicanos the option of choosing their identity. The proposal does not recommend institutionalization of any particular way of life, but instead promotes pluralism by adopting a permissive scheme that respects the dignity of each individual's distinct ethnicity. As the American judicial system is founded upon individualized justice, individual factual determinations which consider the culture of the litigants is a viable method to accommodate the diverse people who define the American civic culture.

II. TORT LAW AND PLURALISM

Pluralism in practice defies easy definition. Consider the discussion of Henry Cisneros⁹³ and Luis Valdez.⁹⁴ Their acculturation into American civic culture is often confused with assimilation. Can they be considered pluralists? By adopting one of the three ways of life discussed above — assimilation, fragmentation, and separatism — Chicanos often fail to realize a fundamental ideology of the United States that is "committed to equality despite ostensible differences between individuals and groups."⁹⁵ For example, assimilationist Linda Chavez, former president of the U.S. English organization,⁹⁶ rejected pluralism as an option by championing a cause which exemplified this country's intolerance to diversity and insistence on assimilation.⁹⁷ Similarly, the fragmented way of life offered by Richard Rodri-

⁹³ See *supra* notes 85-87 and accompanying text.

⁹⁴ See *supra* notes 80-84 and accompanying text.

⁹⁵ Moran, *supra* note 8, at 510.

⁹⁶ U.S. English (USE) is a prominent advocate of the English-Only movement. Senator S.I. Hayakawa cofounded USE with Dr. John Tanton, a strong proponent of stricter immigration policy, in 1983. In 1981 Senator Hayakawa introduced legislation making English the official language of the United States. Califa, *supra* note 49, at 299-300.

⁹⁷ To her credit, Chavez resigned when Dr. Tanton, cofounder of USE, expressed his racist motivations in a conference paper not intended for

guez⁹⁸ may be considered multicultural, but it is multicultural in a fragmented, as opposed to pluralistic, way. Finally, in their quest for respect of a Chicano identity, separatists like Corky Gonzales cynically shun pluralism in preference for their more extreme solution to this quest for respect. The harms from each of these ways of life suggest that another option should be explored. The self-hatred of assimilation, the hypocrisy of fragmentation, and the isolation of separatism signal their inadequacy as ways of life. The American civic culture has long embraced the ideology of pluralism. Thus, Chicanos have an avenue to attain respect for diversity within the framework of the current civic culture.

Pluralism as a way of life for society consists of first recognizing the autonomous cultural heritage that defines Chicanos as a group. The majoritarian culture has sought to repress this heritage by imposing pressures to assimilate which have led many Chicanos to adopt harmful ways of life. Nevertheless, this cultural heritage persists, primarily due to the proximity of Mexico and the continued immigration of new Chicanos. Thus, there is a discernable culture defined by the use of Spanish, familism,⁹⁹ machismo,¹⁰⁰ respect for the elderly,¹⁰¹ and communal Catholicism influenced by idolatry.¹⁰² While each of these cultural traits also influences the American civic identity, they are considered to be "recessive traits."¹⁰³ Thus, this distinct Chicano cultural background conflicts with the dominant majoritarian culture in the United States.¹⁰⁴ Therefore, pluralism as a way of life requires

publication. Ms. Chavez called this paper "anti-Hispanic and anti-Catholic." *Id.* at 326 & n.215.

⁹⁸ See *supra* notes 50-58 and accompanying text.

⁹⁹ R. ALVAREZ, *supra* note 69; (1987); R. GRISWOLD DEL CASTILLO, *supra* note 45; A. MIRANDÉ, *supra* note 21, at 146-64.

¹⁰⁰ A. MIRANDÉ, *supra* note 21, at 165-81.

¹⁰¹ See *infra* notes 190-92 and accompanying text.

¹⁰² A. MIRANDÉ, *supra* note 21, at 113-45.

¹⁰³ O. PAZ, *supra* note 58, at 9-28.

¹⁰⁴ See A. MIRANDÉ, *supra* note 2, at 226-27 (noting that "Mexican culture, after all, was Catholic, feudal, traditional, communal, and person-oriented, whereas Anglo-American culture was Protestant, capitalistic, modern, individualistic, and materialistic") These differences made for some interesting legal conflicts. See, e.g., G. BAKKEN, *THE DEVELOPMENT OF LAW IN FRONTIER CALIFORNIA* (1985) (examining legal history of California from 1850-1890); D. LANGUM, *LAW AND COMMUNITY ON THE MEXICAN CALIFORNIA FRONTIER* (1987) (discussing evolution of law on California frontier as common law displaced Mexican law). Bakken quotes the following passage from a court's opinion that eliminated Mexican *conciliacion*

Chicanos to insist stoically that the majoritarian culture allow them to participate in and develop Chicano culture.

Though American legal culture extols the virtues of pluralism, individuals with dual obligations are often suspect.¹⁰⁵ Professor Sanford Levinson recently offered significant insight into the tensions of a pluralistic society by examining the conflicting obligations of the civic religion defined by the Constitution and one's religion, family, or dual citizenship:¹⁰⁶

All political states . . . face the problem of multiple loyalties of their citizenry; this is the price of a pluralist culture. Sometimes the competing loyalty is to other political entities [and sometimes to] other institutions within the society [such as] family or religious community. Generally speaking, we do not treat these competitors equally. Thus we presumably find understandable — and endorse — the demand made by the United States that its new citizens repudiate their previous primary loyalties to other countries. Yet I am quite sure that most of us would condemn as

procedures that had previously governed people's conduct: "since the acquisition of California by the Americans, the proceeding of conciliation has, in all cases, been deemed a useless formality by the greater portion of the members of the bar, by the courts and by the people; that it has, in fact, passed into disuse and become obsolete." *Id.* at 21 (quoting *Von Schmidt v. Huntington*, 1 Cal. 55, 64 (1850)). The court went on to explain that it had offered a lengthy opinion "in order that the profession may understand, that the objection for the want of conciliatory measures, is . . . disposed of now, and, as we sincerely hope, forever." *Id.* Are conciliatory measures appealing to one's communal values in conflict with individualistic Anglo values? Could a pluralistic approach have served the society better? In other words, would not incorporation of conciliatory procedures into the common law foster efficiency? *Cf.* *Twin Coast Newspapers, Inc. v. Superior Court*, 208 Cal. App. 3d 656, 256 Cal. Rptr. 310 (1989) (finding defendant newspaper's retraction adequate as matter of law and directing lower court to grant summary judgment for defendant); *Schepps v. Presbyterian Hosp.*, 652 S.W. 2d 934 (Tex. 1983) (abating medical malpractice suit because plaintiff failed to give defendant required notice prior to filing suit); CAL. CIV. CODE § 48a (West 1982) requiring written demand for retraction prior to filing libel suit against newspaper); TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01 (Vernon Supp. 1991) (requiring claim letter in medical malpractice cases in hopes of settling cases before they are filed).

¹⁰⁵ Consider the following quote: "What is not acceptable is tolerating religious groups who refuse to recognize the moral and political sovereignty of the secular community by, for example, refusing to salute the flag." Capaldi, *Explication Versus Exploration: The Nature of Constitutional Interpretation: Morgan's Disabling America*, 1987 AM. B. FOUND. RES. J. 233, 245; *cf. supra* text accompanying notes 23-24 (noting school official's comment comments about who was welcome in Texas).

¹⁰⁶ S. LEVINSON, *CONSTITUTIONAL FAITH* (1988).

totalitarian an explicit requirement by the United States . . . that one affirm primary loyalty to *it* over the competing loyalties of family and religion.¹⁰⁷

The cultural commitments of Chicanos are not unlike the diverse obligations discussed by Professor Levinson. Hence, the task for Chicanos is to convince American society that they owe no allegiance to Mexico,¹⁰⁸ and that their adherence to Chicano culture should be respected as obligations owing to the family and religion.¹⁰⁹

The balance of this Article will discuss the role of culture in tort law decisionmaking and how that role may be utilized to further the dual goals of diversity and equality in a genuinely pluralistic society.¹¹⁰ The discussion will consider the role of culture in

¹⁰⁷ *Id.* at 119 (emphasis in original).

¹⁰⁸ Separatism including separatist incidents such as the *El Plan de San Diego*, which called for an uprising seeking independence from "Yankee tyranny" hinders this task. See A. MIRANDÉ, *supra* note 2, at 95-97 (discussing *El Plan de San Diego* call for general uprising in 1915); see also M. BARRERA, *supra* note 67, at 18-20 (same). Attacks on Chicano loyalties to the United States have recently been revived with the "English Only" movement's position that ethnic loyalty displaces national loyalty. See Moran, *supra* note 22, at 1330. Chicanos' allegiance to the United States, however, is self evident from the residence and participation of Chicanos in this country. It is clear that the children of immigrants lose any loyalty to Mexico and that such loyalty is thought to harm the self betterment of Chicanos. See C. MUÑOZ, *supra* note 61, at 26, 34. Furthermore, Chicano leaders have criticized the position of the Mexican consul that Chicanos should be loyal to Mexico. *Id.* at 32. As many minority groups cite their military service to show their loyalty to their country, Chicanos repeatedly profess their allegiance to the United States by citing their service in the armed forces. See, e.g., R. BENAVIDEZ & O. GRIFFIN, *THE THREE WARS OF ROY BENAVIDEZ* (1986).

¹⁰⁹ See *supra* notes 44-62 and accompanying text (discussing damages to family relationship caused by assimilationist pressures).

¹¹⁰ While I am expressing my "socially transformative aspirations into a disembodied way of being and a technical-rational way of thinking, talking, and writing" (*i.e.*, legal reasoning), the reader should keep in mind that the limitations of legal reasoning do not allow an adequate manner of communicating my fervent emotional subjective need to see society change. Gabel, *supra* note 54, at 110. When considering the deficiencies in the argument below, keep in mind the deficiencies of the forum. For example, "that legal discourse is unstable and relatively indeterminate" — consider the male Anglo Saxon Protestant bias of the common law. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1366 (1988). While using legal argument legitimates its validity, success in the courts could reap political gains.

deciding tort issues such as the scope of recoverable damages, the standard of care, and the existence of a duty.

The proposition that different people should be treated differently does not strike this writer as particularly wrong, and indeed, this thought has a certain logical appeal.¹¹¹ In the area of civil rights, however, debate rages over the propriety of race conscious decisionmaking.¹¹² Advocates of "equal opportunity" argue that "[h]aving found support in the Constitution for equality, [proponents of affirmative action] now claim support for inequality under the same Constitution."¹¹³ This argument is of the view that equality of treatment is the test for whether someone is being discriminated against. In other words, so long as the treatment given to white males is the same as the treatment given to all others then there has been no discrimination.¹¹⁴

There is an alternative standard by which to judge whether discrimination has occurred. Specifically, one may inquire whether applying a rule or test in decisionmaking causes a disparate impact upon minorities.¹¹⁵ If such an impact exists, there is a bias in the criteria. In other words, the white norm continues to rule; it has merely been absorbed within popular consciousness. White norms prevail, but in an unspoken form. Instead, they are charac-

"Attempts to harness the power of the state through the appropriate rhetorical/legal incantations should be appreciated as intensely powerful and calculated political acts." *Id.* at 1382; cf. Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 528 (1986) (observing that "if I wish to achieve my goals, the only way or the obviously best way is to try legal argument").

¹¹¹ Consider for example the distinct treatment given to children and to plaintiff's with "egg-shell" skulls. See, e.g., *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891) (holding child liable for serious, unforeseen consequences resulting from slight touch to fellow student's shin).

¹¹² See Crenshaw, *supra* note 110; Jaff, *The Difference That Difference Makes*, 19 CUMB. L. REV. 467 (1989); Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities,"* 93 YALE L.J. 1006 (1984); Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984).

¹¹³ A. BICKEL, *THE MORALITY OF CONSENT* 133 (1975).

¹¹⁴ See Marshall, *supra* note 112, at 1007.

¹¹⁵ See Note, *Civil Rights—Employment Discrimination—Disparate Impact Analysis May Be Applied In Title VII Employment Discrimination Suite to Review Hiring On Promotion Decisions Based In Subjective Criteria*, 19 CUMBERLAND L. REV. 631 (1989) (discussing *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988)); but see *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (holding employer's selection mechanism does not have disparate impact if percentage of selected nonwhite applicants not significantly less than percentage of nonwhite applicants).

terized as positive social norms, thereby legitimating the hegemony.¹¹⁶

Under these circumstances, race conscious decisionmaking may be required to include¹¹⁷ minorities in the workforce or to allow them the protection and benefits of tort law. As the discussion to follow will show, there is a white male Protestant bias built into the tort doctrines that determine the scope of protection afforded. The law need not promote this bias by clothing it in meritocratic rhetoric. Law creates the illusion of certain necessary societal structures because it represents and legitimates those structures. People accept the existing structures as natural and perhaps unchangeable. They plan their lives, and develop their self-identities with reference to the law.¹¹⁸

The application of norms that ignore Chicano cultural values has a disparate impact upon Chicanos insofar as they are not protected from harms that the white Anglo-Saxon Protestant value system has not recognized. Thus, though they may be treated equally, the impact of applying the alleged meritocratic norms of tort law disproportionately impacts Chicanos. Under these circumstances, it makes sense to treat different people differently by recognizing diverse cultural values in decisionmaking.

Insofar as Chicanos cannot truly be equal unless they are allowed to be themselves, the recognition of their distinct character in tort decisionmaking serves the egalitarian goals of pluralism. Even more importantly, however, recognizing culture in tort lawmaking will reconcile the diverse interests of people who make up American society.

The question of whether liability exists under a set of circumstances and the scope of that liability are necessarily value laden choices.¹¹⁹ These choices are made when courts decide the scope of recoverable damage, the standard of care, and whether a duty exists. Some courts have considered Chicano cultural values in addressing these issues, but they have not expressed the relevance of Chicano or Mexican cultural values in deciding such issues. The failure of courts to candidly address the role of culture in their decisionmaking has undermined the legitimacy of making the cultural inquiry. By failing to articulate the relevance

¹¹⁶ Crenshaw, *supra* note 110, at 1379.

¹¹⁷ Marshall, *supra* note 112, at 1011-12.

¹¹⁸ See Crenshaw, *supra* note 110, at 1351-52.

¹¹⁹ Keeton, *Entitlement and Obligation*, 46 U. CIN. LAW REV. 1 (1977).

of culture in tort law decisionmaking, the courts have failed to develop a general norm to guide future determinations.

A. *The Scope of Recoverable Damages — Causation and Harm*

Familism, machismo, and the Catholic religion are three primary elements defining Chicano culture.¹²⁰ These three elements may become particularly important in evaluating the harm suffered due to a tortfeasor's wrongful act. For instance, consider a chaste Catholic Chicana who is raped and forced to commit oral sodomy while her infant daughters are present.¹²¹ Because of her husband's machismo, he abandons the family.¹²² Should the measure of damages be affected by the plaintiffs' cultural values that affect the actual harm done? Should her susceptibility to injury due to cultural background give rise to a legal doctrine accommodating said culture just as a pre-existing physical condition has led to the adoption of the egg-shell skull rule?¹²³

In *Salinas v. Fort Worth Cab & Baggage Co.*, the special issues submitted to the jury instructed them to consider the impairment of the relationship with the plaintiffs' husband/father as an element of recoverable damages.¹²⁴ The jury returned a verdict in favor of the plaintiffs for \$5 million. The court of appeals reversed the judgment and remanded the case for a new trial on the grounds that "there is no evidence regarding Maria's and the children's impairment of their relationship with the husband/father."¹²⁵

¹²⁰ See *supra* notes 99-104 and accompanying text.

¹²¹ *Salinas v. Fort Worth Cab & Baggage Co.*, 725 S.W.2d 701 (Tex. 1987) (seeking damages for emotional harm caused by defendant's employee and for resulting injury to family relationships). Maria Salinas and her two infant daughters were passengers in one of the defendant's cabs. The defendant's employee threatened to kill Salinas and her daughters if she did not submit to sexual intercourse and commit oral sodomy. *Id.* at 702.

¹²² *Id.* at 703.

¹²³ See, e.g., *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891) (holding defendant liable for plaintiff's loss of leg where defendant's touch inflamed prior injury leading to amputation); see also Bahr & Graham, *The Thin Skull Plaintiff Concept: Evasive or Persuasive*, 15 LOY. L.A.L. REV. 409 (1982).

¹²⁴ *Salinas*, 725 S.W.2d at 703-04.

¹²⁵ *Id.* at 703. Such a "no evidence" determination may actually involve a review of the evidence to determine whether there is some evidence of this element of damages, but the words "no evidence" usually mean that the court has made an "as a matter of law" or judicial determination that the damages were not legally recoverable.

The appeal to the Texas Supreme Court thus left that court faced with the question of the scope of recoverable damages. The court of appeal had found that "impairment of the familial relationship" or "parental consortium" was not a recoverable element of damages. The supreme court reversed the court of appeals. It did not take the opportunity to address the lawmaking choice with which it was presented, but rather found that there was "some evidence that the incident was a proximate cause of impairment of the familial relationships in question."¹²⁶ The evidence included a reference to the fact that Mrs. Salinas came from a traditional family in Mexico.¹²⁷ Whether the plaintiff's culture should be relevant to a court's lawmaking choice, cannot be explicitly discerned from the opinion as the court assumed that "parental consortium" damages are recoverable. Nevertheless, the court's emphasis on Mexican culture in outlining the evidence on an element of damages¹²⁸ for impairment of familial relation-

¹²⁶ *Id.* at 704.

¹²⁷ *Id.*; Fort Worth Cab & Baggage Co. v. Salinas, 735 S.W.2d 303, 305 (Tex. Ct. App. 1987). In deciding that there was "some evidence" of impairment to the family relationship, the supreme court, in an opinion authored by Justice Gonzales, the first Chicano on the Texas Supreme Court, made the following observations:

[A psychologist] testified about Maria's prior marital relationship and the effect this incident had on her marriage. . . . Maria came from a traditional family in Mexico with a conservative religious background. . . . Maria's husband was the only man with whom she had ever had sexual relations; prior to this incident they had a normal, stable family life; as a result of the rape, . . . the marriage relationship suffered because of this incident. . . . [A]lthough Maria's husband was supportive at first, he did not seem to be emotionally equipped to handle the stress from problems that emerged over a long period of time. . . . [T]he relationship deteriorated after Maria was forced in the criminal trial to reveal that oral sodomy had occurred, of which up to that time, her husband had been unaware and which was not acceptable in her culture.

Id.

¹²⁸ See *Jannette v. Deprez*, 701 S.W.2d 56 (Tex. Ct. App. 1985) (holding no parent's cause of action for loss of companionship and mental anguish due to injury to child when parent did not witness child's injury), *reh'g denied*; *Bennight v. Western Auto Supply Co.*, 670 S.W.2d 373 (Tex. Ct. App. 1984) (refusing to recognize child's cause of action for damage to parental relationship where neither state legislature nor state supreme court had created new common law right of action), *reh'g denied*; see also Casenote, *Torts-Loss of Consortium—Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981), 60 U. DET. J. URB. L. 137 (1982).

ships cannot be ignored.

In this instance, the Texas Supreme Court was presented with a conflict between "the law" and how the court wanted the case to come out.¹²⁹ Because the court did not proceed with an assault on the rule that injury to the family relationship is not a recoverable element of damages, it did not accomplish any "law reform objective[s]".¹³⁰ By failing to engage in legal argument and explanation, the court failed to affect the outcomes of future cases and influence the civic consciousness about what kinds of causes of action are legitimate.¹³¹

¹²⁹ Cf. Kennedy, *supra* note 110 (describing imagined process of legal reasoning judge might employ when faced with conflict between "law" and personal sense of justice).

¹³⁰ *Id.* at 522. Indeed, it is clear that any reform objective has not been accomplished by the fact that two courts have rejected recovery for impairment of family relationships. See *Ramos v. Champlin Petroleum Co.*, 750 S.W.2d 873, 878 (Tex. Ct. App. 1988) (noting that "'loss of parental consortium' is not a recognized cause of action under the laws of [Texas]"); *In re Air Crash At Dallas/Fort Worth Airport on Aug. 2, 1985*, 856 F.2d 28 (5th Cir. 1988) (finding no cause of action for nonbystander family members of crash victim under Texas law). The Texas Supreme Court has recently held that "parental consortium" damages are recoverable but only where the injury is "serious, permanent and disabling." *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1990), *rev'g* 784 S.W.2d 89 (Tex. Ct. App. 1989).

¹³¹ Kennedy, *supra* note 110, at 528. Indeed, the Fifth Circuit recently faced the question of whether children should recover such "parental consortium" or "injury to the family relation" damages in a case where the children's mother was in a coma. The Fifth Circuit considered the *Salinas* opinion and explained:

If the state supreme court indeed decided in these cases to broaden the scope of tort liability to nonbystander relatives, it did so *sub silentio* and without discussing or expressly overruling the numerous recent intermediate appellate decisions to the contrary. Such silence prevents us from concluding with confidence that appellants have viable causes of action under Texas law.

In re Air Crash, 856 F.2d at 31 (cite omitted).

The Texas Supreme Court's failure to address the lawmaking choice was probably due to the criticism it was receiving from the bar that it was overly activist in favor of plaintiffs. This period in the Texas Supreme Court's history was also marked by media scrutiny regarding *ex parte* communications with attorneys who were substantial contributors of campaign funds. (Justice Gonzalez was not one of the judges being criticized, but he did have an election immediately before and shortly after the *Salinas* decision.)

Accusations of judicial activism force courts to emphasize derivative reasoning. Courts want to give the impression that some higher guiding principal compels a result, and therefore they neglect informative reasoning to

While Justice Gonzalez's¹³² opinion in *Salinas* provided individualized justice which took into consideration the plaintiff's culture, the opinion failed to offer a more direct explanation on the significance of the testimony regarding the effect of *Salinas*' culture on the scope of recoverable damages. Though Justice Gonzalez's opinion furthers the goal of pluralism by recognizing the culture of these individual plaintiffs, failure to articulate the general principle that culture is a valid factor to be considered in lawmaking choices allows future cases to ignore this factor. Thus, while the *Salinas* court's opinion implicitly sanctions consideration of cultural values in determining the scope of recoverable damages, the omission of a direct inquiry into the court's lawmaking choice and the bearing of culture on that choice is a lost opportu-

explain their decisions. These one-sided descriptions of the judicial decisionmaking process, however, are discredited along with the notion that judges only find law and never make it. Keeton, *supra* note 119, at 10. An honest consideration of the lawmaking function would allow judges to better evaluate the choices they are making. Courts should be allowed to consider the wisdom of selecting a position and the consequences of that choice. *Id.*; cf. L. GREEN, RATIONALE OF PROXIMATE CAUSE 199 n.3 (1927) (asking whether "our judges [must] continue to debase their intelligence by stoutly proclaiming their innocence of law 'making'"); see also J. FRANK, LAW AND THE MODERN MIND (1963). Frank observes:

Now, the task of judging calls for a clear head. But our judges, so far as they heed the basic myth, can exercise their power with only a muzzy comprehension of what they are doing. When they make "new rules," they often sneak them into the *corpus juris*, when they individualize their treatment of a controversy, they must act as if engaged in something disreputable and of which they themselves can not afford to be aware. But the power to individualize and to legislate judicially is of the very essence of their function. To treat judicial free adaptation and law-making as if they were bootlegging operations, renders the product unnecessarily impure and harmful.

Id. at 130.

¹³² Justice Raul A. Gonzalez was the first Chicano Justice to serve on the Texas Supreme Court in its 150-year history, and the first Chicano to win a statewide election (after having been appointed to the court in 1985, he ran successfully just a few months before the *Salinas* opinion) in Texas' history. Consider whether Justice Gonzalez's "racial background . . . should be seen as an intellectual credential because the experiences associated with it create a distinctive scholarly 'voice' that is of value insofar as we prize intellectual diversity." Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1801 (1989). He is, after all, the only Texas Supreme Court judge (to this writer's knowledge) to have cited cultural factors in deciding a case.

nity to further the goals of pluralism.¹³³

B. Cultural Factors Affecting Liability

Cultural factors can also come into play in establishing liability. To illustrate how these factors can affect the outcome, this section examines the elements of duty and breach.

1. Duty¹³⁴

“‘[D]uty’ is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff.”¹³⁵ The determination that there is a duty essentially establishes that a plaintiff’s interest is entitled to legal protection from the defendant’s conduct.¹³⁶ This determination involves a consideration of the relationship between the parties,¹³⁷ as well as policy considerations¹³⁸ or socioeconomic factors.¹³⁹ The effect of culture on the issue of duty will be discussed by considering: 1) the duty not

¹³³ This discussion of *Salinas* parallels the discussion of *Lange v. Hoyt*, 114 Conn. 590, 159 A. 575 (1932), by Dean Guido Calabresi in his book *IDEALS, BELIEFS, ATTITUDES, AND THE LAW*, *supra* note 8, *passim*. In *Lange* the plaintiff, because of her beliefs as a Christian Scientist, had failed to mitigate her damages by seeking immediate medical care for her shattered pelvis. Calabresi notes that the appellate court “ducked” the issue of accommodation of idiosyncratic beliefs and the analogy of the plaintiff’s beliefs with a “thin skull” for purposes of determining the plaintiff’s compensation. The Connecticut Supreme Court “affirmed the ducking . . . by sending the case to jury and charging the jury. . . : In deciding whether the victim acted with reasonable prudence in mitigating damages, you may consider that Christian Science is a widely held belief.” G. CALABRESI, *supra*, at 46-47. This instruction misses the point that majoritarian or “popular” norms are often in conflict with the norm of some minority group. Further, the very purpose of principle-based rules of law is to protect minorities (including individuals) from the state’s (majority’s) impositions. See Villarreal, *Limits on Lawmaking: A Chicano Perspective*, 10 ST. LOUIS U. PUB. L. REV. 65 (1991).

¹³⁴ The difference between “duty” and the standard of care owed “is one of convenience only, and it must be remembered that the two are correlative, and one cannot exist without the other.” W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* § 53, at 356 (5th ed. 1984).

¹³⁵ *Id.*

¹³⁶ *Id.* at 357.

¹³⁷ *Id.*

¹³⁸ *Id.* at 358.

¹³⁹ Crowe, *The Anatomy of a Tort—Greenian, as Interpreted by Crowe Who Has Been Influenced By Malone—A Primer*, 22 LOY. L. REV. 903, 906 (1976).

to exclude an individual when that exclusion is predicated on a standard that, though facially neutral, disproportionately impacts on minorities due to a trait of that minority, 2) the duty to refrain from racial discrimination, and 3) the duties existing within a heterogeneous minority group.

a. Disparate Impact and Respect for Identity Traits

The duty inquiry highlights the issue of the respect to be given distinct traits of minorities. In nondiscrimination cases the plaintiff might claim that a facially neutral standard has a disparate impact on minorities.¹⁴⁰ In other words, the standard has a secondary effect of discriminating, or excluding, minorities from some benefit or position because of inherent traits associated with the minority group.

Perhaps the clearest example of this type of case was encountered by the United States Supreme Court in deciding whether there is a duty to provide pregnancy benefits under health care plans, and whether denial of such benefits discriminates against women. In *General Electric Co. v. Gilbert*,¹⁴¹ the Court held that discrimination on the basis of pregnancy was not discrimination on the basis of sex¹⁴² because, though only women are pregnant, the exclusion of pregnancy from an employer's disability insurance plan did not disproportionately impact on women.¹⁴³ The Court found that "there is no risk from which men are protected and women are not."¹⁴⁴ Thus protection by the courts depends on women's comparability with men. Discrimination exists only when someone is treated different from the norm — in this case *the norm is male*.¹⁴⁵ The court does not candidly address the dif-

¹⁴⁰ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (alleging disparate impact of employer's hiring practices on nonwhites).

¹⁴¹ 429 U.S. 125 (1976).

¹⁴² *Id.* at 136.

¹⁴³ *Id.* at 137-39.

¹⁴⁴ *Id.* at 138 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)).

¹⁴⁵ Jaff, *supra* note 112, at 475. Congress recognized this as discrimination, but when rewriting the standard, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)), again described it according to a norm that continued to ignore the difference between men and women:

The PDA [Pregnancy Discrimination Act] states that pregnancy must be treated *like any other disability* for purposes of employment and fringe benefits. Displeased with the Court's decision in *Gilbert* that pregnancy discrimination was not sex

ferences of people (men and women) in making lawmaking choices.

This same problem extends to the treatment of Chicanos. While the goal of equal treatment sounds admirable, the "equality" that is being asserted is defined by white male Protestant values. This bias, however, leads to a failure to acknowledge duties that should be recognized based on a difference between a plaintiff and white male society. There are situations in which a plaintiff's culture warrants recognition of a duty. For example, Spanish is a trait of Chicano culture. If an employer terminated all employees speaking a language other than English, then this facially neutral standard would disproportionately impact Chicanos. While it may be argued that biological differences are immutable but a person's language may be changed, this argument ignores that denial of one's language may amount to denial of one's identity insofar as language is a proxy for the individual's customs, culture, and values.¹⁴⁶ In other words, it would be unduly draconian to require a plaintiff to change something about herself that fundamentally defines her.¹⁴⁷ For a court to approve of such a rule by an employer would legislate adoption of either an assimilationist or fragmentationist way of life. Chicanos should not be made to assimilate into a white male Protestant norm any more than women should have to assimilate into a male norm.

Not surprisingly, the issue of termination of employment based on an employee's violation of an "English only" rule has been raised in discrimination cases. The two leading cases on this issue suggest that the jurisprudence of this country may be evolving to

discrimination, Congress responded by demanding sameness of treatment. Again, the response to difference was an attempt to enforce sameness.

Jaff *supra* note 112, at 480 (emphasis in original). For further discussion on the limitations of legalistic arguments due to differences that make a difference, see Dowd, *Work and Family: The Gender Paradox and The Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989). See also West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

¹⁴⁶ Moran, *Bilingual Education as a Status Conflict*, 75 CALIF. L. REV. 321, 325, 345 (1987).

¹⁴⁷ It is interesting that Corky Gonzales described his dissatisfaction with the Democratic party as based on the party's perceived goal of "sterilization of human dignity." C. MUÑOZ, *supra* note 61, at 57. In other words, assimilation is a type of sterilization.

respect the dignity of each individual's identity.¹⁴⁸ In both cases plaintiffs challenged their employers' rule that only English must be spoken on the job. In both cases plaintiffs tried to link the right to not be discriminated on the basis of national origin and the right to speak Spanish on the job. In the earlier case, the Fifth Circuit denied the challenge, upholding the employer's rule.¹⁴⁹

In 1986 the Equal Employment Opportunity Commission (EEOC) promulgated a guideline that expressly linked national origin and an individual's primary language.¹⁵⁰ This guideline was cited in the second case addressing the propriety of an "English only" rule. In *Gutierrez v. Municipal Court*,¹⁵¹ the Ninth Circuit held the employer's rule improper.¹⁵²

¹⁴⁸ *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (holding employer's rule forbidding employees to speak anything but English on job did not discriminate on basis of national origin); *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988) (holding similar rule discriminatory in absence of business necessity).

¹⁴⁹ *Garcia*, 618 F.2d at 271. The Fifth Circuit conclusively explained that the Equal Employment Opportunity Act could not be interpreted to protect an employee's use of Spanish, though the employee argued that "[s]peaking Spanish is very important to me and is inherent in my ancestral national origin." *Id.* The plaintiff urged that the employer's rule should be forbidden because it harmed his self-identity, but the court was unwilling to accept the link between the statute's protection of national origin and the plaintiff's ethnic traits. *Id.* at 269. The court stated that "[n]ational origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage, or poverty, or with activities not connected with national origin, such as labor agitation. *Id.* (citations omitted).

¹⁵⁰ The EEOC guideline on speak-English-only rules states in part:

The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.

29 C.F.R. § 1606.7(a) (1990).

¹⁵¹ 838 F.2d 1031 (9th Cir. 1988).

¹⁵² *Id.* at 1044-45. The Ninth Circuit also held that an injunction was proper in light of the irreparable injury to the worker's identity. The court declared that "when the right the plaintiff is allegedly deprived of constitutes an important aspect of a person's identity — as does the right involved here — no additional injury need be shown." *Id.* at 1045.

Thus, the courts, aided by the Pregnancy Discrimination Act¹⁵³ and EEOC guidelines,¹⁵⁴ are progressing toward a recognition that there is a duty to refrain from excluding an individual based on a facially neutral standard that disproportionately impacts minorities based on an inherent trait of that minority.

b. The Duty to Refrain from Discrimination

Obviously, the degree to which culture is respected in tort law is reflected in the law's protection from denigration of that culture. At first glance, it may appear that the common law offers no remedy for discrimination.¹⁵⁵ The common law, however, has given protection against actions motivated by racial discrimination. In *Fisher v. Carrousel Motor Hotel, Inc.*,¹⁵⁶ the Texas Supreme Court stretched the law of assault and battery to cover a situation where the defendant had "snatched the plate from [plaintiff's] hand and shouted that he, a Negro, could not be served in the club. [Plaintiff] testified that he was not actually touched, and did not testify that he suffered fear or apprehension of physical injury."¹⁵⁷ Thus, plaintiff lacked the "physical contact" element of a battery and lacked the "apprehension" element of an assault. Nevertheless, the Texas Supreme Court found that the plaintiff had proven a battery cause of action and rendered judgment for \$900.¹⁵⁸ Without expressly holding that a cause of action exists for racially discriminatory conduct, the Texas Supreme Court protected a plaintiff from such conduct.¹⁵⁹

¹⁵³ See *supra* note 145.

¹⁵⁴ See *supra* note 150.

¹⁵⁵ Consider whether a cause of action for wrongful termination "per se" should be recognized where the employer has violated Equal Employment Opportunity (EEO) provisions, 42 U.S.C. §§ 2000e-2(a),(d),-3 (enumerating unlawful employment-related employer practices). In other words, where the statutory standard has been violated, why is an independent cause of action in tort not recognized? Cf. *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987) (predicating restaurant's negligence liability to motorists injured by restaurant's bar patrons on statute prohibiting sale of liquor to intoxicated patrons).

¹⁵⁶ 424 S.W.2d 627 (Tex. 1967).

¹⁵⁷ *Id.* at 628-29.

¹⁵⁸ *Id.* at 631.

¹⁵⁹ *Id.* at 630. Compare the court's treatment of a Chicano who had been struck by a former Texas Ranger in *Lopez v. Allee*, 493 S.W.2d 330 (Tex. Civ. App. 1973) (affirming take-nothing judgment on jury's finding defendant acted in self-defense over plaintiff's objection to submission on

Similarly in *Dominguez v. Stone*,¹⁶⁰ the defendant, who was on the board of directors of plaintiff's employer, "made certain statements concerning plaintiff which referred to her alienage and ethnicity. The statements were to the effect that plaintiff was not suited for her employment . . . because she was a Mexican."¹⁶¹ The New Mexico Court of Appeals reversed a summary judgment against plaintiff after concluding that there was an issue of fact on the plaintiff's claims of defamation and intentional infliction of emotional distress.¹⁶² The court's opinion emphasized the defendant's repetitive description of the plaintiff as a Mexican and noted "[i]t is common knowledge in New Mexico that the word 'Mexican' when used in circumstances similar to those in the instant case connotes prejudice and disparagement."¹⁶³ The opinion implies that "Mexican" is a racial slur,¹⁶⁴ yet this plaintiff was a Mexican citizen, who had been residing legally in New Mexico since she was three years old.¹⁶⁵ Certainly any employer has a qualified privilege to express her opinion that an employee is not qualified,¹⁶⁶ yet it is clear that the court was condemning the way in which the defendant used "Mexican" in a disparaging fashion.¹⁶⁷ In other words, the court was not prohibiting an employer's inquiry into citizenship, but rather condemning the negative secondary meaning that the speaker knew was being

self-defense issue for lack of pleadings and lack of evidence to justify submission).

¹⁶⁰ 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981).

¹⁶¹ *Id.* at 212, 638 P.2d at 424.

¹⁶² *Id.* at 213-14, 215, 638 P.2d at 425-26, 427.

¹⁶³ *Id.* at 213, 638 P.2d at 425.

¹⁶⁴ *Id.* at 215, 638 P.2d at 427.

¹⁶⁵ *Id.* at 212, 638 P.2d at 424.

¹⁶⁶ Compare *Dominguez*, 97 N.M. 211, 638 P.2d 423, with *Espinoza v. Farah Mfg. Co.*, 414 U.S. 8, 87-86 (1973) (holding that nothing in EEO provisions prohibit employment discrimination on basis of citizenship or alienage). The EEOC guidelines have since changed and now prohibit "citizenship requirements [that] have the purpose or effect of discriminating . . . on the basis of national origin." 29 C.F.R. § 1606.5(a) (1991).

¹⁶⁷ *Dominguez*, 97 N.M. at 215, 638 P.2d at 427. At its most fundamental level of harm, discrimination based on citizenship can have devastating economic effects on Chicanos terminated from their jobs. See, e.g., R. GRISWOLD DEL CASTILLO, *supra* note 45, at 99 (recounting financial difficulties of Chicano family in 1925 when father terminated from his WPA job because he lacked U.S. citizenship). Also, consider the degree to which secondary meanings and disparaging usage can be abusive. See Austin, *Employer Abuse, Worker Resistance, and the Tort of International Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

communicated. Again, the court's opinion seems to be implicitly providing protection against discrimination based on ethnicity.¹⁶⁸

In discussing the intentional infliction of emotional distress cause of action, *Dominguez v. Stone* relied on the Washington Supreme Court's opinion in *Contreras v. Crown Zellerbach Corp.*¹⁶⁹ The *Contreras* opinion held that the plaintiffs' allegations of "continuous humiliation and embarrassment by reason of racial jokes, slurs and comments made in his presence by agents and employees of the defendant corporation"¹⁷⁰ came within the tort of outrage.¹⁷¹ Justice Utter offered the most direct endorsement that tort law is committed to furthering the goals of pluralism when he stated:

As we as a nation of immigrants become more aware of the need for pride in our diverse backgrounds, racial epithets which were once part of common usage may not now be looked upon as "mere insulting language." Changing sensitivity in society alters the acceptability of former terms. . . . "Plaintiff's own susceptibility to racial slurs and other discriminatory conduct is a question for the trier of fact, and cannot be determined on demurrer." The same conclusion is compelled with regard to Mexican-Americans and the various slang epithets that may have once been in common usage regarding them. It is for the trier of fact to determine, taking into account changing social conditions and plaintiff's own susceptibility, whether the particular conduct was sufficient to constitute extreme outrage.¹⁷²

Thus, the common law protects against discriminatory conduct, though it does not specifically articulate the general norm of the tort of discrimination. As a consequence, there are courts that have not comprehended a general antidiscriminatory norm embodied in the above cases. Therefore, courts are arriving at dissimilar results in cases involving similar facts.¹⁷³ Hence, there

¹⁶⁸ Indeed, Justice Lopez recommended to the trial court judge that he recuse himself and suggested a change of venue in the interest of justice. *Dominguez*, 97 N.M. at 216, 638 P.2d at 428. Again the curious question of whether the judge's racial background gives him a unique perspective arises. Cf. Kennedy, *supra* note 132 (analyzing recent writings examining "effect of racial difference on the distribution of scholarly influence and prestige in legal academia").

¹⁶⁹ 88 Wash. 2d 735, 565 P.2d 1173 (1977).

¹⁷⁰ *Id.* at 736, 565 P.2d at 1174.

¹⁷¹ *Id.* at 742, 565 P.2d at 1177.

¹⁷² *Id.* (quoting *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 498 n.4, 468 P.2d 216, 219 n.4, 86 Cal. Rptr. 88, 91 n.4 (1970)).

¹⁷³ See, e.g., *Ceravolo v. Brown*, 364 So. 2d 1155 (Ala. 1978) (holding

is a need to articulate a general norm explaining the impropriety of discriminatory conduct.

It should be noted that many cases are brought alleging both civil rights discrimination theories and tortious theories of defamation,¹⁷⁴ intentional infliction of emotional distress,¹⁷⁵ wrongful discharge,¹⁷⁶ prima facie tort,¹⁷⁷ and intentional tort.¹⁷⁸ This frequent combination of theories suggests that it would be more intellectually honest to recognize a tort action for discrimination.¹⁷⁹ This tort would express the respect afforded cultural diversity in the United States and would therefore serve the goal of pluralism.

c. Intragroup Conflicts

As discussed above, Chicanos are a heterogeneous group. This diversity within the group leads to the question of the role of culture in defining the legal relationships between members of the

conduct that included threats, ethnic slurs, and epithets such as "dead beat" and "crook" not actionable as slander per se and not basis for cause of action absent special damages).

¹⁷⁴ See, e.g., *Jackson v. Southern California Gas Co.*, 881 F.2d 638 (9th Cir. 1989); *Breen v. District of Columbia*, 400 A.2d 1058 (D.C. App. 1979); *Monsanto v. Electronic Data Sys. Corp.*, 141 A.D.2d 514, 529 N.Y.S.2d 512 (App. Div. 1988); *Henderson v. Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 313*, 90 Wash. 2d 666, 585 P.2d 147 (1978).

¹⁷⁵ See, e.g., *Farmer v. United Bhd. Carpenters & Joiners of Am., Local 25*, 430 U.S. 290 (1977); *Southern California Gas Co.*, 881 F.2d 638; *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428 (Minn. 1983); *Monsanto*, 141 A.D.2d 514, 529 N.Y.S.2d 512; *Jemison v. Crichlow*, 139 A.D.2d 332, 531 N.Y.S.2d 919 (1988).

¹⁷⁶ See, e.g., *Southern California Gas Co.*, 881 F.2d 638; *Strauss v. A.L. Randall Co.*, 144 Cal. App. 3d 514, 194 Cal. Rptr. 520 (Ct. App. 1983); *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 561 A.2d 179 (Ct. App. 1989); *Hubbard*, 330 N.W.2d 428; *Monsanto* 141 A.D.2d 514, 529 N.Y.S.2d 512; *Murphy v. American Home Prods. Corp.*, 136 A.D. 2d 229, 527 N.Y.S.2d 1 (1988); *Faillace v. Port Authority*, 130 A.D. 2d 34, 517 N.Y.S.2d 941 (1987); *Holien v. Sears, Roebuck & Co.*, 298 Ore. 76, 689 P.2d 1292 (1984); *Jones v. Industrial Electric-Seattle, Inc.*, 53 Wash. App. 536, 768 P.2d 520 (1989).

¹⁷⁷ See, e.g., *Murphy* 136 A.D.2d 229, 527 N.Y.S.2d 1; *Faillace* 130 A.D.2d 34, 517 N.Y.S.2d 941.

¹⁷⁸ *Hillery v. Hartford Accident & Indem. Co.*, 503 So.2d 592 (La. Ct. App. 1987).

¹⁷⁹ Consider Professor Delgado's proposal for a cause of action in tort for racial slurs. Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

group. Indeed, often the diversity of the group will be the source of conflict.

To begin this inquiry it is necessary to particularize the facts under which a court may use culture in its lawmaking choice.¹⁸⁰ Consider the following: Plaintiff is defendant's mother. Plaintiff complains that seven years ago she discovered from a neighbor that her son had written an article published in a national magazine about their family's alienation resulting from the cultural and linguistic conflict between the home and school. At that time she promptly wrote her son a letter asking him to "please write about something else in the future."¹⁸¹

Subsequently, defendant published a book containing the same type of intimate details about the family. Indeed, he even included his mother's letter in the book. The book was very controversial because the defendant also included attacks on the public issue of bilingual education and advocated the assimilationist goal espoused by a majority of the society. A group known as the "English Only Organization" embraced defendant as a spokesperson for the organization,¹⁸² and defendant has consequently toured the United States promoting his book and telling his family's story. As a result of all of this notoriety his mother has been ostracized, ridiculed, and she has suffered many sleepless nights obsessively ruminating about the book and its contents.

Does she have a cause of action for damages? Does she have any interests that warrant protection against the particular inva-

¹⁸⁰ See Kennedy, *supra* note 110, at 559-60; Keeton, *supra* note 119, at 33-37.

¹⁸¹ R. RODRIGUEZ, *supra* note 19, at 178. The mother wrote:

Your dad and I have only one objection to what you write. You say too much about the family . . . Why do you have to do that? . . . Why do you need to tell the *gringos*? . . . Why do you think we're so separated as a family?

. . . Writing is one thing, the family is another. I don't want *tus hermanos* [your siblings] hurt by your writings. . . . Especially I don't want the *gringos* knowing about our private affairs. Why should they? Please give this some thought. Please write about something else in the future. Do me this favor.

Id.

¹⁸² See M. BARRERA, *supra* note 67, at 174 (opining that "the 'English only' movement is a continuation of the long American tradition of ethnocentrism, Anglo-conformity, and cultural intolerance"). The plaintiff's condemnation of bilingual education and call for assimilation thus naturally makes him a candidate to represent this group.

sion by the defendant's conduct?¹⁸³ There is a principle based on cases that have used a theory of recovery for highly objectionable publicity given to private information about the plaintiff.¹⁸⁴ This cause of action is allowed though the statements made are true and there would be no cause of action for defamation.¹⁸⁵ This cause of action, however, requires that "the matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities."¹⁸⁶ Again, the role of culture in defining what are "ordinary sensibilities" must be considered as in deciding what is "reasonable." Thus, the question persists whether the principle is designed to protect the mother from the type of harm suffered, arising in the manner described.¹⁸⁷

Cases addressing the principle hold that a plaintiff must expect casual observation by her neighbors and the public as to her activities and some reporting of same.¹⁸⁸ Prosser noted that "there will be liability only for publicity given to those things which the customs and ordinary views of the community would regard as highly objectionable."¹⁸⁹ Under these circumstances should a court consider the cultural background of the family in deciding whether a son owes his mother a duty to refrain from publishing intimate facts about the family? If so, the mother could show that her sons's conduct was particularly egregious in light of the Chicano culture's emphasis on familism. In other words, the publication of facts about the family is more offensive and objectionable in light of the culture's heightened veneration of the sanctity of family. Furthermore, she could show that Mexican and American people conceptualize the idea of respect in very different ways. The implications of the word "respect" are different in the two cultures.¹⁹⁰ The Mexican notion of respect involves a fervent emotional reverence.¹⁹¹ Furthermore, respect is bestowed by

¹⁸³ W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 134, § 54, at 358.

¹⁸⁴ *Id.* § 117, at 856-63 (discussing public disclosure of private facts).

¹⁸⁵ *Id.* at 856.

¹⁸⁶ *Id.* at 856-57.

¹⁸⁷ See Crowe, *supra* note 139, at 906.

¹⁸⁸ W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 134, at 857.

¹⁸⁹ *Id.*

¹⁹⁰ See R. DÍAZ-GUERRERO, *PSYCHOLOGY OF THE MEXICAN: CULTURE AND PERSONALITY* 90 (1975); see also R. GRISWOLD DEL CASTILLO, *supra* note 45, at 28, 74, 78, 105.

¹⁹¹ R. DÍAZ-GUERRERO, *supra* note 190, at 102, 109; see also A. MIRANDÉ,

Mexicans based on "predetermined . . . beliefs, traditions, etc., much more than by the individual merits of the individuals."¹⁹² Thus, the defendant's mother could show that because of her culturally defined relationship to her son, he owes her a duty not to publish private facts about their family.

What value should the court give to the defendant's claims that his mother had rejected these Mexican values and has accepted American values? Should the defendant's proof that his mother had encouraged his assimilation be a complete defense to any culturally-based standard? How can a court reconcile these diverse interests?

One model which has been offered as part of a proposal to allow a cultural defense in criminal cases suggests consideration of culture when the crime "is confined to voluntary participants within the defendant's culture."¹⁹³ If the plaintiff can show that the defendant consented to belonging in the Chicano group and subscribed to Chicano tenets, then the defendant's conduct should be evaluated pursuant to the standards as defined by Chicano cultural values. It is reasonable to believe that a factfinder can evaluate evidence of the defendant's participation in this Chicano family as well as evidence of the defendant's alienation from the family and assimilation. Upon deciding what standard to use the factfinder can proceed to determine whether the defendant breached a duty to his mother of refraining from publishing private facts about the family.

2. Standard of Care — Breach

Once a duty has been established, the question of whether that duty has been breached may also depend upon whether cultural norms are considered. The question is whether the requisite standard of care is that of a "reasonably prudent *person*, with all the ethnic, sexual, and cultural diversity such a phrase implies, or is it . . . that of a reasonably prudent white Anglo-Saxon

supra note 21, at 109. *But see* Acosta-Cooper, *supra* note 49, at 43, 48-49 (reporting grandparents' perception of "a loss of respect for parents by today's youth").

¹⁹² R. DÍAZ-GUERRERO, *supra* note 190, at 110 (quoting Díaz-Guerrero, *Symposium on Culture and Child Development*, 3 AM J. ORTHOPSYCHIATRY 31 (1961)).

¹⁹³ Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1309 (1986).

male?"¹⁹⁴ *Friedman v. State*¹⁹⁵ offers an interesting example of a court accommodating differing beliefs. In *Friedman*, an orthodox Jewish teenager sued the operator of a ski lift for negligently leaving her and a friend on the lift. Her primary physical injuries were caused by her jumping from the lift based on her belief that it was a violation of Jewish law for an unmarried woman to be with a man after dark in a place where she could not readily be reached.¹⁹⁶ The court, taking plaintiff's belief into account, found her behavior reasonable. Thus this unorthodox belief was incorporated into what was considered to be "reasonable" conduct.¹⁹⁷

Courts have also considered Chicano culture in determining what the standard of care is. In *Doersching v. State Funeral Directors & Embalmers Examining Board*,¹⁹⁸ a funeral director, Doersching, put the nude body of Arnulfo Rocha, who had died in an automobile accident, in large plastic trash bags, wrapped it in a flannel sheet, and then put it in a casket. The clothes provided by the Rocha family were not in or with the casket. Doersching also did not suture the carotid incisions, the head wound, nor did he wash or clean decedent's hair or properly embalm the body.¹⁹⁹ When the casket arrived in Nuevo Laredo, Mexico, the family was present and opened the casket to identify the body. The Funeral Directors Examining Board revoked Doersching's license "for having badly botched a funeral."²⁰⁰

The majority opinion of the Wisconsin Court of Appeals, in affirming the Board's revocation of Doersching's license, did not discuss the effect, if any, of the testimony of the Mexican funeral director in deciding whether Doersching's conduct was "grossly negligent and outrageous" which is the standard utilized by the licensing authorities to decide whether to revoke a director's license.²⁰¹ The dissent argued, however, that there was no viola-

¹⁹⁴ G. CALABRESI, *supra* note 8, at 26 (emphasis in original).

¹⁹⁵ 54 Misc. 2d 448, 282 N.Y.S. 2d 858 (Ct. Clms. 1967).

¹⁹⁶ *Id.* at 452-53, 282 N.Y.S.2d at 862; *see also* G. CALABRESI, *supra* note 8, at 51 (discussing *Friedman*).

¹⁹⁷ *Friedman*, 54 Misc. 2d at 456, 282 N.Y.S.2d at 865-66; *see also* G. CALABRESI, *supra* note 8, at 52.

¹⁹⁸ 138 Wis. 2d 312, 405 N.W.2d 781 (Ct. App. 1987).

¹⁹⁹ *Id.* at 319, 405 N.W.2d at 784.

²⁰⁰ *Id.* at 316, 405 N.W.2d at 783.

²⁰¹ *See* WIS. STATS. ANN. § 445.13(1) (West 1988) (providing that examining board may suspend or revoke license for unprofessional conduct); WIS. ADM. CODE §§ FDE 3.01 (July 1988) (defining unprofessional conduct).

tion because Doersching was merely ignorant of Mexican culture.²⁰² There is clearly a bias in the dissent's position that white Anglo-Saxon Protestant norms determine the standard to which Mr. Doersching should be accountable. In other words, the dissent would define the statutory norm as being the norms of a white Anglo-Saxon Protestant society, and the dissent would hold that the specific norm utilized in this case should not protect values held by a Catholic Mexican family.

Should the individual norm created in the case at hand ignore the culturally relevant values of the participants to this transaction? Would it be totalitarian to tell the Rocha family that their cultural preference for an open casket funeral, which had been communicated to Doersching,²⁰³ was unreasonable, invalid, or recognized as wrong by the applicable legal standard? Would this de jure proclamation of cultural deficiency promote an internalization of the deprecating conclusion that leads to low self-esteem and a loss of cultural identity?²⁰⁴ If the majority had been more concerned with promoting a pluralistic coexistence, it would have mentioned the evidence of the culturally bound expectations of the Rocha family. Once again, however, an appellate court majority missed an opportunity to explain that the goals of a pluralistic society require recognition of and respect for diverse cultures.

Perhaps the most obvious way in which courts have accommodated differing cultures while considering the standard of care is in a court's treatment of whether linguistic limitations should be considered. For example, in the dissenting *Doersching* opinion,

²⁰² The dissent stated that:

The board's conclusion that Doersching's action exhibited a willful disrespect for the feelings and welfare of the Rocha family impute to Doersching a knowledge of Mexican culture. The Mexican funeral director, Sanchez, testified as to the importance of viewing the body in Mexican culture. He said it is important for the Mexican family members to be with the deceased until the last possible minute and that is why it is important to be with the body. This evidence came out at the time of the hearing, but there is no evidence that Doersching was aware of these aspects of Mexican culture at the time he was retained.

Doersching, 138 Wis. 2d at 337, 405 N.W.2d at 791 (Sundby, J., dissenting).

²⁰³ *Id.* at 318, 405 N.W.2d at 784.

²⁰⁴ See *supra* notes 12-40 and accompanying text.

the judge discussed the family's inability to speak English.²⁰⁵ This judge would allocate the burden of communicating on the Rocha family. Specifically, this opinion suggests that the miscommunications led to Mr. Doershing's having undertaken a certain standard of care different than if he would have understood the culturally bound expectations of his clients, and that Mr. Doershing cannot be blamed for such conduct in light of the miscommunication.

Other courts would place the burden of lack of English proficiency on the defendant-employer or product manufacturer. For instance in *Exxon Corp. v. Roberts*,²⁰⁶ the court held that the owner of an oil well should have had safety meetings to coordinate the operations by Spanish-speaking casing contractor's crew and English-speaking drilling contractor's crew. There was sufficient evidence that under these circumstances the failure to accommodate for different language usage was a proximate cause of the death of a worker. Similarly, in *Aguayo v. Crompton & Knowles Corp.*,²⁰⁷ the court cited the warnings that were given in both English and Spanish as evidence that the product manufacturer had complied with the standard of care to warn foreseeable users. Thus, courts accommodate cultural differences, such as language, into standard of care determinations, but a direct articulation of the validity of this accommodation is lacking. This lack of an open consideration of the issue leaves judges free to apply their own subjective notions on whether cultures should be accommodated or whether people should be forced to assimilate, or conform to a standard of care solely defined by white male Protestant values.

This discussion, grounded in concrete cases, should reveal that tort law decisionmaking is affected by the cultural values utilized. This pluralistic society recognizes the differences, yet enforces sameness in treatment, proceeding as if differences among individuals and groups does not make a difference. This denial of the differences that do in fact exist leads to an obvious tension.²⁰⁸ Courts should expose the fictional meritocratic scheme which is clearly predisposed to using white male norms, and legitimate the consideration of cultural factors influencing decisionmaking.

²⁰⁵ *Doersching*, 138 Wis. 2d at 336, 405 N.W.2d at 791 (Sundby, J., dissenting).

²⁰⁶ 724 S.W.2d 863 (Tex. Ct. App. 1986).

²⁰⁷ 183 Cal. App. 3d 1032, 228 Cal. Rptr. 768 (1986).

²⁰⁸ See Jaff, *supra* note 112, at 467-68.

CONCLUSION

A tension that pervades this Article is the insistence on equality as well as diversity. In a sense, this is the tension that an immigrant society which is constitutionally committed to egalitarian ideals suffers. Too often the price of equality means assimilation which in turn means betrayal of one's self.²⁰⁹ Preservation of one's identity must be allowed in order to attain true equality.

Chicanos can avoid the harmful ways of life of assimilation, fragmentation, and separation by insisting upon transforming the society into a genuinely pluralistic system. Pluralism, however, requires the celebration of culture, not its suppression.²¹⁰ Thus, to those critics who condemn a court's consideration of culture in lawmaking as discriminatory, I respond that it would be discriminatory to pretend that courts are "culture-blind." To ignore the present bias of the law and insist that courts are proceeding on meritocratic premises is to live in a self-deceptive fantasy. The opportunities to nurture pluralism through the fertile field of tort law are plentiful, and are certainly not exhaustively discussed in this paper. The lack of honest forthright judicial explanations of the consideration given to culture in lawmaking choices, however, leads to the conclusion that it is not appreciated as a valid factor. While recognition of culture in lawmaking choices protects diversity, condemning discrimination protects equality. By recognition of theories of recovery for discrimination, tort law may also be used to serve egalitarian goals.

²⁰⁹ See M. BARRERA, *supra* note 67, at 5, 68, 71, 73-74, 157; A. MIRANDÉ, *supra* note 21, at 96, 101.

²¹⁰ Note, *supra* note 193, *passim*.