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**LINGUISTIC DISCRIMINATION AGAINST NATIVE SPANISH SPEAKERS
IN THE NEW MEXICO BAR EXAMINATION IN THE 1970s**

BY

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B.A., Education (Major: TESOL, Minor: Spanish), University of New Mexico, 1977
M.A., Secondary and Adult Teacher Education, University of New Mexico, 1984

DISSERTATION

Submitted in Partial Fulfillment of the
Requirements for the Degree of
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Educational Linguistics

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DEDICATION

In loving memory of Mom and Dad, Ben and Vidalia Chavez, who supported me through the years.

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Errors and omissions are my own; I have myself to thank for them.

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ABSTRACT

In the 1970s, many people from Hispanic backgrounds, whether their first language was Spanish or English, who had graduated from law school took the New Mexico Bar Examination. A disproportionately large percentage of them (compared with their counterparts who did not come from Hispanic backgrounds) did not pass the Bar Examination. They therefore were denied admission to the bar. This dissertation examines how this came to be.

The study centers on the history of identity politics in New Mexico for Spanish-speaking people and their descendants. It examines the relationship between language and ideologies about race and ethnicity, as well as their effect on power politics. It explores controversies related to educational testing and how they may have been implicated in the results of the Bar Exam in New Mexico in the 1970s that were largely unfavorable to people from Hispanic backgrounds. The research includes personal interviews with Spanish-speaking native New Mexicans and other New Mexicans from Hispanic backgrounds, along with a detailed analysis of the legal proceedings and

transcripts. The legal cases are considered within the context of the history of New Mexico.

This dissertation argues that personal and group identities are socially constructed and always emerge in particular contexts that are affected by the dynamics of power, money, privilege, tradition, family, religion, and place (among other dimensions). The petitioners of Spanish-language heritage in 1972 chose to challenge the meager representation of *Nuevomexicanos* in the legal profession in the State even though they were not sure that they would prevail. Their efforts, although not directly successful, did reshape the trajectory of history and the legal profession within the State of New Mexico. Although the petitioners lost their suit, the enduring result of their efforts was an increase in the pass rate for *Nuevomexicanos*, who now comprise a greater proportion of lawyers and judges in New Mexico.

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Chapter 1. Introduction

In the 1970s, many people from Hispanic backgrounds, whether their first language was Spanish or English, who had graduated from law school (the University of New Mexico or elsewhere) took the New Mexico Bar Examination. A disproportionately large percentage of them (compared with their counterparts who did not come from Hispanic backgrounds) did not pass the Bar Examination. They therefore were denied admission to the bar. This dissertation examines how this came to be.

The study centers on the history of identity politics in New Mexico for Spanish-speaking people and their descendants. It examines the relationship between language and ideologies about race and ethnicity, as well as their effect on power politics. It explores controversies related to educational testing and how they may have been implicated in the results of the Bar Exam in New Mexico in the 1970s that were largely unfavorable to people from Hispanic backgrounds.

Those results in the 1970s were not surprising. What was different was that some *Nuevomexicano* examinees who had received failing scores contested those results. I will examine theories of identity, resistance, and agency to show how they were used to transform discrimination into empowerment and to change the composition of the test itself for future examinees. The enduring result was an increase in the pass rate for *Nuevomexicanos*, who now comprise a greater proportion of lawyers and judges in New Mexico.

The research included personal interviews with Spanish-speaking native New Mexicans and other New Mexicans from Hispanic backgrounds. These interviewees took

the New Mexico Bar Examination in the early 1970s but failed to pass the exam. Some of them filed suit in court to challenge that decision. The research will also include a review of transcripts from court proceedings.

Indigenous people have lived in what is now the State of New Mexico for two and a half millennia. They had been here for over two thousand years before the first Spaniards arrived. New Mexico history since the initial arrival of Spanish-speaking people may be divided into four periods: (1) under Spanish colonial rule (1540–1821), (2) under Mexican rule (1821–1848), (3) as part of the United States, but not yet a state (1848–1912; the Territory of New Mexico was organized in 1850 and lasted until 1912), and (4) as a state of the Union (1912–Present). This history is discussed in greater detail in Chapter 2 and Chapter 5.

New Mexico is the only state in the United States that is officially bilingual (Spanish and English), a point of law established by the Treaty of Guadalupe Hidalgo (1848). The Treaty ended the Mexican-American War and ceded Mexican territory, including what is now the State of Mexico, to the United States. The Treaty promised that the United States would protect the rights of the people already here. The United States pledged to honor the Spanish land grants given by the king of Spain and by Mexico. However, despite New Mexico's official bilingual status, in 1890, English became the official language of instruction in New Mexico public schools (Meléndez, 1997, pp. 209–210).

By the 1970s, the lack of much racial and ethnic diversity among those in the legal profession within the State of New Mexico was being called into question by members of various minority groups, including Native Americans, African Americans,

and Americans of Spanish and Mexican heritage. The research herein focuses on those of Spanish-language heritage. Although Native Americans, African Americans, and members of other groups that had been traditionally underrepresented in the legal profession also became more outspoken and assertive about how they were being treated, their efforts to achieve fairness and social justice are beyond the scope of this research. In the 1970s, a number of people from Spanish-language backgrounds, whether their first language was Spanish or English, had graduated from law school and took the New Mexico Bar Examination. A disproportionately large percentage of them (compared with their counterparts who did not come from Hispanic backgrounds) did not pass the Bar Examination, so they were denied admission to the bar.

Some of these graduates who were therefore unable to practice law in New Mexico argued in litigation that the way in which the bar examination was evaluated was discriminatory against Spanish-speaking New Mexicans and New Mexicans from Hispanic backgrounds whose first language or even only language was English (for instance, New Mexicans who spoke only English but whose grandparents spoke only Spanish and whose parents were bilingual in Spanish and English). Although they did not seek to prove any intentional or deliberate discrimination, the plaintiffs pointed to the incontrovertible discrepancy between the failure rate of the test takers from an English-language cultural background versus those whose cultural background was Hispanic, whether their first language was Spanish, they were dual-language Spanish/English speakers, or they spoke only English but were descended from Spanish-speakers. Test-takers suspected that there may have been linguistic traces in the essays that suggested that these test-takers had come from Spanish-language backgrounds, and this may have

been the basis for discrimination against them by those who scored the essays in those examinations. In October 1972, four New Mexicans of Spanish-language heritage bravely stepped forward and filed a lawsuit after having failed the New Mexico Bar Examination. At that time, the exam consisted entirely of essays. However, subsequently, the format of the examination was changed to include multiple-choice questions to test knowledge of the law without involving subjective assessments of writing ability.

An additional subsequent change to the New Mexico Bar Examination was that the cutoff score was lowered slightly to make up for bias in how the examination was assessed, along with a shift away from having the examination consist solely of essays to include multiple choice sections, which have been part of the examination ever since then. As a result of these changes, many more people from Spanish-language backgrounds entered the legal profession in New Mexico. Their voices should be added to those of others who have argued that the theories of equal opportunity, meritocracy, and colorblindness have a hollow ring in a game that is rigged in favor of those who enter the playing field from a position of deeply entrenched power and privilege.

What can an examination of the experience of the people who legally contested the low admission rate of Spanish speakers and others of Spanish-language heritage into the practice of law in New Mexico teach us? How can their experience be placed into the context of history? What can it tell us about racial identity, discrimination, resistance, and agency for Hispanic New Mexicans (*Nuevomexicanos*)?

Nuevomexicano identity, like all racial and ethnic identities, is a fluid and dynamic social construction that has shifted over time—and that continues to shift—as

the political, economic, social, and cultural context has shifted. What is clear is that those *Nuevomexicanos* who took the New Mexico Bar Examination in the 1970s and contested their failure to pass the Bar Examination faced a dominant American culture and testing system steeped in prejudice and discrimination against *Nuevomexicanos*. Their experiences can teach us much about how race and ethnicity have been constructed in New Mexico, as well as how systems of discrimination can be resisted. Their experiences were placed into a theoretical context, as well as a historical context, in this dissertation, through an examination of such theories as social constructivism, critical race theory, convergence theory, critical discourse analysis, critical hermeneutics, and whiteness theory.

Background of the Study

The School of Law at the University of New Mexico (UNM) was founded in the 1940s. However, during its first 20 years, only about 20 Hispanics graduated from UNM's School of Law, about one per year. In the 1970s, admission remained difficult for Hispanics, Native Americans, and African Americans. Furthermore, even those Hispanics admitted to the School of Law who completed their studies successfully were denied admission to the practice of law in New Mexico in disproportionate numbers due to the lower rate at which they passed the Bar Examination.

In part, the underrepresentation of Spanish-speakers and other people from Hispanic backgrounds to the legal profession resulted from lower test scores on standardized tests and on lower grades in high school and college. However, the hypothesis explored herein is that the assessment of samples of writing was biased by inferences about identity made on the basis of language use in the Bar Exam essays by

Spanish speakers and others from Hispanic backgrounds who were writing in English and that this led to the further underrepresentation of Hispanic New Mexicans in the practice of law in the State of New Mexico.

It is argued herein that identity is constructed in part through linguistic interaction (Bucholtz & Hall, 2005, p. 585). The people who evaluated the quality of writing of the essay portion of the Bar Exam—which at that time constituted the entire Bar Exam—may have inferred linguistic identity of Spanish-language speakers and others whose heritage language was Spanish, even if their primary spoken language was English. The effect of this inference was that these examinees were treated in a discriminatory fashion.

This study places the formation of a *Nuevomexicano* identity in a historical perspective, showing how this identity shifted during the successive periods of Spanish conquest and rule (1540–1821), Mexican rule (1821–1848), and as part of the United States, but not yet a state (1848–1912; the Territory of New Mexico was organized in 1850 and persisted until 1912), and then as a state (1912–Present). This study examines the controversy from three perspectives: (1) how identity is formed linguistically in socio-historical contexts, (2) how this controversy adds to the understanding of critical race theory and convergence theory, and (3) implications for educational testing and assessment. Chapter 3 presents methods of data collection and places that within a theoretical framework for the study to provide background on the relationship between language, ideology, and discourse, as well as an introduction to critical theory. Chapter 4 presents the results of legal proceedings, with comments from interviewees. The theoretical implications of the results are presented in Chapter 5, which assesses those results through critical race theory to assess cultural clashes in New Mexico, along with

theories of resistance and agency. Chapter 5 also discusses the implications from the results about identity, resistance, agency, and empowerment. In that chapter, the theoretical implications from critical race theory, whiteness theory, feminist theory, and the social construction of identity are summarized. Chapter 6 provides an overview of issues of educational testing and assessment and final thoughts.

Personal Narrative

I became interested in this topic by seeing people around me graduate from the School of Law at the University of New Mexico and take the New Mexico Bar Examination in the 1970s, only to fail that examination. Some of these people were Native American, some were African American, and some, like me, were descended from Spanish-speaking native New Mexicans. Actually, there were three different stages at which the disappointing results occurred that led, in many cases, to a suspicion that an injustice had occurred: (1) people from minority backgrounds who applied to the School of Law but were denied admission, (2) people from minority backgrounds who were admitted to the School of Law but flunked out, and (3) people from minority backgrounds who graduated from law school but did not pass the Bar Examination.

In my youth, I was part of and accepted the identity politics that was all around me. I accepted and believed that it was normal to have an Anglo-controlled court system. I did not see Hispanic lawyers or judges but only Anglo lawyers and judges. I was taught at a very young age to be cautious about what I said and did in obedience to, acceptance of, and humility towards the legal and political system. My father taught me at a very young age to prepare and to protect myself from the consequences of questioning and protesting injustice: immediate and certain prosecution. I wondered whether someone

had to be Anglo and white to become a lawyer or a judge, even though so many people in New Mexico—almost the majority—were Hispanic.

I saw the anguish suffered by the people who did not pass the Bar Examination. I witnessed how their growing suspicion of discrimination against them and their peers compelled them to file the lawsuits. When I interviewed them, they disclosed that they perceived a huge risk inherent in filing a lawsuit and thereby challenging the Bar. They had no certainty that all of them would survive taking on this conflict. The stresses that they were under personally, professionally, and financially were huge. Their lives and their careers were in limbo during the process. The outcome was unknowable.

In those lawsuits, it proved impossible to prove that a deliberate and systematic pattern of discrimination existed, something that the plaintiffs' attorneys did not even attempt to argue in court. However, these attorneys addressed the huge discrepancies between the proportion of English-speaking whites (Anglos) who passed vs. the much-lower proportion of members of minority groups who passed; these huge discrepancies were indisputable. The exposure of these unequal outcomes and the legal challenges to them eventually led to the lowering of the cutoff score for the examination and the shift away from an examination that was comprised solely of essays to one that also incorporated multiple-choice questions. As a result, from then on, many more Hispanic people were able to practice law in New Mexico.

Eventually, I was able to perceive a de facto pattern of unequal results that suggested discrimination against those from various minority backgrounds. People from various minority backgrounds at this time were becoming more aware of how their rights had been violated and continued to be violated. Many of them organized to assert their

rights.

Reyes Lopez Tijerina was one of the leaders in the movement to force the United States to uphold its commitment to honor the land grants mentioned in the Treaty of Guadalupe Hidalgo (1848). The land grant issue was not Lopez Tijerina's only focus; he also fought to enforce the bilingual provision in the Treaty of Guadalupe Hidalgo, which had been violated. He argued for the adoption of the term Indo-Hispano (rather than *Nuevomexicano*) to show solidarity between the indigenous people and the Hispanic people of this region. He showed me the importance of asserting one's own view of one's identity in seeking social justice.

People I knew contested a policy that had made it almost impossible for Hispanic people to practice law in New Mexico. They made me aware of issues of *Nuevomexicano* identity as formed through their struggle for empowerment in reaction to discrimination—indisputable *de facto* discrimination, even if proving intentional or deliberate discrimination remained elusive. In their case, their struggle to enter the legal profession stretched on in some cases for a decade, a decade of underemployment and financial deprivation. Many became so discouraged that they gave up the struggle and left the State of New Mexico. My experience taught me that personal and group identities are always formed in particular contexts: geographic, social, political, economic, legal, religious, etc. Issues of identity become important when rights and narratives are contested by opposing forces and interpretations.

These experiences of New Mexicans I knew who were from a Hispanic background, whether they did or did not speak Spanish, with the Bar Examination made me recognize the differences between *de jure* legal rights and *de facto* legal rights. The

State of New Mexico is unique in the United States in being officially (*de jure*) bilingual (Spanish/English). Given the official status of New Mexico as a bilingual state, how was it possible for those from a Spanish-language cultural background to hold an inferior status (*de facto*)? How was it possible for the provisions of the Treaty of Guadalupe Hidalgo that promised to uphold the legitimacy of the Spanish land grants to be abrogated (*de facto*)? I realized that I could not explore these issues without delving into history and into theories of racial and ethnic identity.

Purpose of the Study

The purpose of this study was to examine the experience of Spanish-speaking New Mexicans and other New Mexicans of Hispanic descent who took the New Mexico Bar Examination in the 1970s who were denied admission to the practice of law in New Mexico due to receiving a failing score on that examination. Although the standards for admission to the profession of law in New Mexico were changed as a result of lawsuits brought by those who had been denied admission in this way, these experiences raise important issues about *Nuevomexicano* history and identity, the construction of race, and resistance and agency.

Significance of the Study

The story of the Hispanic New Mexicans denied admission to the bar in the 1970s due to failing to pass the New Mexican Bar Examination has not been widely told. Their experience can be placed in a historical context to explore ongoing racial discrimination against *Nuevomexicanos* following the incorporation of what is now the State of New Mexico into the United States in 1848 (part of what became in 1850 the Territory of New Mexico). This history demonstrates that racial identity is a social construction that varies

due to context and that is affected by power dynamics. The struggles of *Nuevomexicanos* against discrimination illuminate how resistance and agency in contesting hegemonic constructions of racial and ethnic identity can lead to empowerment and self-determination.

Research Questions

This dissertation addresses the following questions:

1. What is *Nuevomexicano* identity, and how have the discourses about *Nuevomexicano* identity been shaped by the history of what is now the State of New Mexico?
2. How is educational pedagogy, especially educational testing, complicit in upholding hegemonic power structures that perpetuate racial inequalities?
3. How can theories of identity, resistance, and agency help transform discrimination into empowerment?
4. In what ways can the experiences of Hispanic New Mexicans (*Nuevomexicanos*) who took the New Mexico Bar Examination in the 1970s who were denied admission to the legal profession due to receiving failing scores on the Bar Examination shed light upon the above questions? In what ways do these experiences support or call into question narratives from the theoretical literature about racial identity and social, political, and economic inequalities (e.g., critical race theory, whiteness theory, feminist theory, the social construction of identity, etc.)?

Key Terms

Agency is the capacity to take action in the real world.

Constructionism asserts that meaning is made rather than found. In other words, people construct and test theories or interpretations of what is real through lived experience and through interactions with others. These experience and interactions are situated in specific contexts (time, place, milieu) that are themselves shaped by history, tradition, culture, language, ethnicity, and political, economic, and social factors, conditions, and forces. This theoretical position (which focuses on what people make of their own experiences based on how they have been socialized) thus stands in opposition to *essentialism*, which view meaning as inherent in a thing itself, independent of the point of view of the individual observer or participant. To constructivists, meaning is relative, provisional, personal, and subject to change as values and conditions change.

Convergence theory. Convergence theory looks at the civil rights era in the United States through the lens of interest-group politics: what the white power structures sought to gain by allowing civil rights to make headway in the courts and in legislation, specifically that advancing civil rights served United States interests abroad during the Cold War because the Soviet Union was highlighting segregation in the United States in its propaganda in the Third World. In this context, *Brown v. Board of Education* served both black and white interests in the United States—for a time.

Counternarratives are stories that stand in opposition to dominant discourses, or master narratives, on racial identity.

Critical discourse analysis views discourse as a social practice and as a social construction. Work in this area focuses on how social and political domination is created and reproduced by texts and speech acts. Language is a social practice used for representation and signification, through which reality is socially constructed in a value-

laden way.

Critical hermeneutics studies the development of knowledge by foregrounding the personal nature of interpretation. Aligned with this is the assertion that people have the right to interpret their own experiences in their own way and to view these personal interpretations of lived experience as definitive. People do not have to defer to traditional forms of interpretation or to hierarchies of power and domination, however entrenched they (and their supporting discourses) may be.

Critical race theory. Brooks (1994) defined critical race theory as “a collection of stances against the existing legal order from a race-based point of view” (p. 85). Cornel West defined critical race theory as the study of “the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation)” (Crenshaw, 1995, p. xi). Critical race theory (CRT) insists that racism is the norm, a permanent part of society.

Deconstruction. Deconstruction challenges any universalist ontology (the claim that reality is objective and the same for everyone) by highlighting how narrative discourses are situated in specific contexts tied to social values and power relations. All constructions of meaning are historically, socially, economically, and politically situated; universalist claims can be deconstructed by situating these claims and showing how they are not necessarily transferable to other contexts. For example, a deconstruction of an argument against affirmative action based on the theory of meritocracy and colorblindness entails evidence that the playing field is not level, so unequal results are not only the results of merit, but also of privilege and preexisting inequalities.

Ideology. Van Dijk (2004) defined ideology as “the foundation of the social

representation shared by a social group” (para. 4–5). Ideology represents the shorthand used in discourse between people who already believe the same things, including shared agreement on some key issues, terms, problems, and beliefs about reality (e.g., Marxist ideology). Ideology blurs the distinction between ontology and epistemology; it “disguises its premises as known facts” (Hall, 1982, p. 76).

Multiple consciousness is a concept that is linked with the social construction of identity. Self is a constantly changing social construction, not a fixed or immutable essence. As people move through different roles in different contexts, they see themselves differently and take on different personas (for example, as child, parent, or sibling; host[ess] or guest; employee, supervisor, colleague, or subordinate; member of a race or ethnic group; resident of a neighborhood or community; parishioner or nonbeliever; member of a political party or political activist; consumer; taxpayer; investor; tourist; etc.).

Nuevomexicanos are the Spanish-speaking residents (or their descendants) of (what is now) New Mexico who identify with the land of New Mexico and the cultural heritage of Spain, as brought to the Americas in the 1500s, influenced by both Mexico and its outlying territories and the indigenous people who lived there prior to the arrival of Spaniards and Mexicans. This heritage and identity have been shaped by the history of the colonial (Spanish) period (1540–1821), of Mexican rule (1821–1848), and of its time as part of the United States, prior to becoming a state (1848–1912; from 1850 to 1912, part of the Territory of New Mexico) and as a state (1912–Present) of the United States.

Social constructionism is the theory that identity is developed through discourse and social interactions, as opposed to arising out of some supposed preexisting essence of

being (essentialism). Social constructionists argue that all ideas of race and racial identity are fluid and dynamic, arising through social interactions, beliefs, and narratives, rather than being inherently real or fixed (facts that are discovered).

Standardized testing has served many purported functions in education, from measuring academic potential or intelligence (IQ) to mastery of subject content and even of the effectiveness of teaching pedagogy. Issues surrounding standardized testing are numerous, including: Are tests fair? Are tests culturally biased? Are they accurate? Does “teaching for the test” adversely affect educational outcomes?

Whiteness theory looks at narratives of race that systematically uphold the power and privilege of white people, even in the absence of any conscious intention to discriminate against or to disempower people of color. One example is construing privileged white people as objective and people of color as subjective. Whiteness theory calls into question how dominant groups have tried to decontextualize existence to make their claims to universalist ontology remain hegemonic. For example, in the debate over college and university admissions, people who have theorized about whiteness have claimed that the terms *color-blind* and *meritocracy* ignore great inequalities rampant in society. These inequalities include unequal access to high-quality K–12 education, which makes people born and raised in privileged families more likely to succeed in education and in life than people born and raised in underprivileged families. This is germane to this study because the pattern of the hugely unequal flunk rates between Anglos and Hispanics in the New Mexico Bar Examination was indisputable, even though no one could prove an intentional pattern of discrimination existed to keep *Nuevomexicanos* from entering the legal profession.

Chapter 2. The History of *Nuevomexicanos* and Issues of Identity Specific to It

This chapter provides the historical background needed to situate and examine the issue of the underrepresentation of native New Mexicans of Spanish-language heritage in the legal profession, specifically the disproportionate number of people from Spanish-language backgrounds in the 1970s who successfully completed all other requirements for admittance into the practice of law in New Mexico but failed to pass the New Mexico Bar Examination. The assessment of a candidate's ability to think like a lawyer, as judged through the writing sample of the New Mexico Bar Examination essay, cannot be separated from the construction of identity through language, culture, and history. The two parts of the review of the literature therefore address the following three questions. The first and second questions are addressed in this chapter; the third question is addressed in Chapter 6.

Question 1. How can we apply theories of identity to broaden our understanding of the history of Spanish-speaking people in New Mexico and their descendants?

- A. What is identity? How do people talk about group identity? How does identity politics play out in New Mexico?
- B. What is the history of the state and its peoples? How does that history affect how people identify themselves and how they interact with others today?

Question 2. What is the relationship between language and ideologies about race and ethnicity? In particular, what is the history of racism and language ideologies in the Southwest? What are the theories of resistance and agency, and how have they applied to the situation of Spanish-speaking New Mexicans and their descendants?

Question 3. What are the major issues related to educational testing? Which

issues might be implicated in the controversy surrounding the New Mexico Bar Exam, specifically how to evaluate writing?

This chapter provides a historical introduction to the issue of the disproportionate denial of admission of Spanish-speaking New Mexicans and others of Hispanic descent into the legal profession by providing an overview of the historical context in which this occurred. I examine the construction of *Nuevomexicano* identity under Spanish rule, Mexican rule, and as part of the United States. I present the history of the State of New Mexico and its peoples and show how history has affected the ways in which people have constructed their identity through their interactions with others. This background serves to prepare readers for theories about language, ideology, and identity, looking particularly at theories of race and racism and how theories can be applied to the situation in New Mexico, as well as the theories behind educational testing. This theoretical framework is summarized in Chapter 3.

Identity is multifaceted and fluid, shaped through social interactions, social conventions, and shifting circumstances. The social context in which identity is constructed includes both historical forces (discussed in this chapter) and ideological forces (discussed in the following chapter). Historical events and shifts in power dynamics in institutions shape social contexts and thus the formation of identity. Spanish-speaking residents of New Mexico and their descendants constructed their identities while they responded to historical forces. This section explores those forces. Significantly, identities are fluid social constructions that change in response to encounters with others. In what is now the State of New Mexico, identities changed as a result of contacts between Spaniards, indigenous peoples, Mexicans, and finally Anglos.

Nuevomexicanos' identities were influenced by various other factors, including social position, education, socioeconomic class, occupation, and political power or its lack.

The historical context shifted throughout history, from Spanish conquest of indigenous people and rule (1540–1821) and Mexican rule (1821–1846) through New Mexico's being incorporated into the United States, first before becoming a state (1848–1912, during most of which—1850–1912—it was part of the Territory of New Mexico) and then as a state (1912–Present). As will also be shown below, resistance to Anglo attitudes and prejudices led *Nuevomexicanos* to construct their identity as “Spanish,” ignoring a long history of Mexican and *mestizo* roots. The following section examines historical factors, such as the Treaty of Guadalupe Hidalgo (1848), the land grant issue, and the emergence of New Mexico as a tourist destination, starting in the 1890s, all of which influenced the construction of identities in New Mexico. It also charts the influence of land grant issue on the emergence of the Chicano movement in the 1960s.

New Mexico's native Spanish-speakers did not cross a border to enter the United States; they were already here on the land when the border crossed them when the northern provinces of Mexico suddenly became part of the United States. This territorial conquest occurred upon the termination of the Mexican-American War (1846–1848) without a shot being fired on February 2, 1848, with the signing of the peace treaty known as the Treaty of Guadalupe Hidalgo. New Mexico was the first state of the Union in which at the time of its admission as a state (in 1912), a minority group constituted the majority of the population. Spanish speakers were in the majority in New Mexico until the 1940 census. However, long before 1940, New Mexico Hispanics' identities had been shaped largely in “response to the increasing pressures brought by Anglo-American

dominance” (Rosenbaum, 1981, p. 7). The four basic responses were “withdrawal, accommodation, assimilation, and resistance” (Rosenbaum, 1981, p. 14).

Differences between Spanish-speaking New Mexicans and their descendants versus non-Hispanic New Mexicans are far from superficial:

The conflict and tension that have historically characterized relations between Chicanos and Anglo society, though rooted in political economy, extend well beyond it. In addition to being a conflict between economic and political systems, this has been a conflict between competing cultures, values, legal and judicial systems, and worldviews. (Mirandé, 1987, p. 225)

One issue at the center of ongoing clashes between Anglos and Hispanics has been Spanish land grants and the failure of the United States to abide by the promise made in the Treaty of Guadalupe Hidalgo (1848) that the United States would honor preexisting land rights. These rights had been granted under Spanish rule and had remained in force under Mexican rule. I discuss this issue in some detail in the following section before discussing cultural clashes that arose due to the diversity in what is now the State of New Mexico and tensions over prejudice and racial identity.

Next, I introduce how race, class, and ethnicity were involved in the formation of *Nuevomexicano* identities, an issue explored in greater depth in subsequent chapters. I review the effects of the rise of tourism in the Territory of New Mexico (later the State of New Mexico), beginning at the end of the 19th century. Finally, I sketch the emergence of the Chicano movement, in which simmering tensions over the land grants loomed large, as discussed in Chapter 5.

Land Grants and the Treaty of Guadalupe Hidalgo

New Mexicans proclaimed themselves to be native sons and daughters of the land. Some could trace their family lineage in New Mexico back to 1598. “Land was the basic resource of the territory and caused the greatest friction between Anglo and native New Mexican” (Rosenbaum, 1981, p. 22). The kings of Spain had claimed the right to the newly discovered lands in the Americas with the Treaty of Tordesia (June 7, 1494) and had made numerous liberal grants of land, often through subordinates. Upon proclaiming its independence from Spain in 1823, Mexico promised to honor these Spanish land grants. During the quarter century of Mexican rule (1823–1848), many additional land grants were issued. In the Treaty of Guadalupe Hidalgo (1848), the United States promised to honor Spanish and Mexican land grants.

Despite the promises made by the United States, land grant disputes continued long after the signing of the Treaty of Guadalupe Hidalgo, the treaty that had incorporated New Mexico into the United States. In part, conflicts over land grants stemmed from the clash between radically different legal traditions. Much of the most desirable land in New Mexico had been allotted in land grants—land on or near rivers, land that could be irrigated, land suitable for farming or grazing. Under Spanish rule, “tradition, not registered title, determined land ownership and use” (Rosenbaum, 1981, p. 23).

This tradition in Spanish law permitted fraud and corruption to flourish in New Mexico (Rosenbaum, 1981, p. 23) from 1854 to 1891 under the Office of the Surveyor General, which investigated over a thousand land grant claims. During this time, squatters bribed officials, including members of the notorious Santa Fe Ring. The Santa

Fe Ring was a group of powerful and wealthy lawyers and land speculators who in the late 19th century and early 20th century managed to profit from the corrupt and unscrupulous abrogation of the land rights (Spanish Crown land grants that the United States had agreed to honor in the Treaty of Guadalupe Hidalgo). The ring was active in the Lincoln County War and the Colfax County War and profited from the sale of land from the Maxwell Land Grant. The peak of its powerful land grab occurred in the 1870s. The resulting fraud was to the detriment of the rights of legitimate holders of land grants. So many claims were in dispute in the second half of the 19th century that Congress finally established a Court of Private Land Claims in 1891, which remained open until 1904.

The urgency of establishing the Court of Private Land Claims was underscored by the facts. At the time of the Court's creation, 111 disputed land grants reported to the surveyor had not been acted upon by Congress. Together, they comprised 6,643,938 acres in the State of New Mexico, approximately 8.5% of the total land in the State (Westfall, 1965). Less than six percent of the acres of the land in New Mexico for which land grant claimants tried to clear title were ultimately approved (Reynolds, 1904, p. 96).

Land ownership under Spanish law differed from the "fee simple" land ownership under English common law. Under Spanish law, land ownership, whether individual or communal, was not absolute, but contingent upon conditions being met, such as ongoing cultivation of the land. Land rights could be forfeited if the land was not cultivated for two years (Mirandé, 1987, p. 35). Under the "fee simple" legal standard essentially recognized by United States law, land ownership was rigid, formal, and without restriction as to heirs or resale (Mirandé, 1987, pp. 36–37).

The Treaty of Guadalupe Hidalgo guaranteed native New Mexicans' land rights. "No document is more important to the Chicano people than the Treaty of Guadalupe Hidalgo" (Mirandé, 1987, p. 9). Land was seen as a given in *Mexicanos'* use-based economy, not as "a commodity that [could] be bought, sold, and owned by individuals," as it was in the Anglo market-based (capitalistic) economy (Rosenbaum, 1981, p. 11). The immediate causes of friction between Spanish-speaking New Mexicans and English-speaking New Mexicans were "law and the land, fundamental differences in practices of land tenure and conceptions about proper land use" (Rosenbaum, 1981, p. 16). Although the Treaty of Guadalupe Hidalgo guaranteed existing property rights (i.e., Spanish land grants), it did not specify "how traditional forms of land ownership were going to be translated" to fit American jurisprudence, which "created increased distrust and hostility" during the period in which New Mexico was a United States territory (Rosenbaum, 1981, p. 16).

As Mirandé (1987) observed, "given . . . the contemptuous attitude toward the Mexican, it is not surprising that Anglo settlers typically disregarded Mexican laws" (p. 6). Clearly, the legal system in the United States, which is based on English common law, differed markedly from the legal systems in Spain and Mexico. Both had radically different histories and values: "Under Hispanic/Mexican law, communal or collective land ownership was widely recognized, whereas Anglo-American law only acknowledged individual ownership" (Mirandé, 1987, p. 230).

Spanish law preserved many feudal traditions about rights to land that accrued to people who had lived on or cultivated the land for generations. Anglo-American law was essentially rooted in capitalism, in which ownership was absolute, formal, and

unconditional. Spanish law traced its traditions through the canon law of the Roman Catholic Church to Roman law and the concept of natural rights. Canon law and natural law acknowledge and honor the rights of communities and families, not merely those of individuals. Ties to the land and to ancestors buried in the land gave people a birthright of first claims to the land and its resources.

Many Anglos viewed land grants from the king of Spain and from Mexico as illegal, despite the provisions of the Treaty of Guadalupe Hidalgo. Article X of the Treaty of Guadalupe Hidalgo “recognized the validity of all land grants issued by the Mexican government,” but this article was “stricken by the [United States] Senate” prior to ratification in 1848 (Mirandé, 1987, p. 11). The United States has “largely ignored” the Treaty and its provisions (Mirandé, 1987, p. 16), including the provision that land owners would not have to pay any fees to prove their right of ownership (Mirandé, 1987, p. 37).

The disputes over land rights, specifically the Spanish land grants that have not been recognized by United States courts (despite the provisions of the Treaty of Guadalupe Hidalgo), exist in the context of broader cultural clashes between Spanish speakers and English speakers. As shown below, the disputes over land rights played a prominent role in the emergence of the Chicano movement in the 1960s. The cultural clashes in New Mexico between Spanish speakers and English speakers are explored in the following section. These cultural clashes shifted from the period of Spanish rule to Mexican rule to United States rule.

Cultural and Linguistic Diversity in New Mexico

The Spaniards who came to what they regarded as the New World and arrived in what is now New Mexico had divergent agendas. Missionaries and Spanish settlers “were deeply at odds with one another” (Spicer, 1962, p. 306). Anglos backed the “civilizing” influence upon Native Americans of the Spaniards’ Christian religious focus (Spicer, 1962, p. 343). However, after Mexico’s independence from Spain (1821), the Mexican policy towards the Indians “discarded the overarching religious objective of the Spanish program” (Spicer, 1962, p. 572).

The Native American peoples of this region were highly diverse, including Navajo, Apache, Tanoan (Tiwa, Tewa, Towa), Keresan, and Zuni. The Tanoan, Keresan, and Zuni are all Puebloan cultures, but they speak languages from entirely different language families and have very different cultural practices and histories. The Navajo and Apache are both Athabaskan-speaking, but their histories and cultures are quite different as well. The settled Pueblo people lived in fixed locations in communities based on agriculture.

Colonizing peoples, both Spanish and Anglo, took a brutal response to the indigenous peoples of New Mexico, as was the case across North America. Europeans, expecting to find nomadic hunter-gatherer Native Americans in New Mexico, were surprised to find that the Pueblos were settled, with permanent buildings. Early on, Anglos differentiated “civilized Indians” from “wild Indians,” regarding the people who inhabited the Pueblos at first as “civilized” people (Spicer, 1962, p. 343).

In the United States in the 1840s, there was “no settled policy for ‘civilizing’ the Indians” (Spicer, 1962, p. 344), but the effect of the expansion of the United States was to

push Native Americans westward. “Between 1850 and 1875, Anglo policy came to resemble more closely the policies of Spaniards and Mexicans towards Indians” (Spicer, 1962, p. 346). Part of the attempt to “civilize” Indians consisted of introducing the legal concept of individual ownership of land (Spicer, 1962, p. 347). However, there was nothing in Native American experience comparable to the Spanish idea of a king thousands of miles away who could convey ownership of land through land grants or the British idea of fixed individual ownership of land (Spicer, 1962, p. 385).

At the time of New Mexico’s incorporation into the United States, Spanish-speaking New Mexicans differed in several key ways from the majority of the population of the United States, which was Protestant and spoke English. The majority of New Mexicans spoke Spanish and practiced Roman Catholicism. Unlike all other minority populations entering the United States (except for Native Americans and blacks), Spanish-speaking New Mexicans were not voluntary immigrants (Rosenbaum, 1981). Unlike, for example, the entry of Cuban-Americans or Irish-Americans into the United States, the entry of Spanish-speaking New Mexicans “into American society was forced and involuntary. . . . Chicanos are a colonized people. . . . [They] had a foreign language [English] and culture [Anglo-American] imposed on them” (Mirandé, 1987, pp. 219–220).

Despite President Taft’s (1909–1913) desire to make English the official language of New Mexico, upon statehood, New Mexico became the first (and so far only) state in the United States to be officially bilingual (Nieto-Phillips, 2004, p. 182). This official policy has not always been honored; “the Public Education Law of 1890 had made English the language of instruction in public schools” (Meléndez, 1997, pp. 209–210).

Although the Pueblo peoples were here before the arrival of the Spanish, the Spanish arrived before some of the Native American groups arrived in New Mexico (e.g., Comanche and the Jicarilla Apache).

Anglo Prejudice Against *Nuevomexicanos*

Anglo-American prejudice against *Nuevomexicanos* was predated by prejudice against Spaniards by English people (and later by British people, after Scotland was incorporated into what became the United Kingdom, sometimes known as Great Britain). “The ‘Black Legend’ propagated mainly by England and pervasive in the English-speaking world held that Spanish exploits in the New World were particularly atrocious when compared [with] those of other colonial powers” (Nieto-Phillips, 2004, p. 146). This enduring unfavorable image of Spain and Spaniards first emerged in England in reaction to the anti-Protestant policies of Spain’s King Philip II, who reigned from 1556–1598 (Sampaolo, 2016). This self-serving propaganda of one colonial power (Great Britain) against one of its main rival colonial powers, Spain (Nieto-Phillips, 2004, p. 150), conveniently overlooked British brutality against indigenous peoples.

Anglo prejudices against *Nuevomexicanos* in the period of 64 years after the Treaty of Guadalupe Hidalgo (1848) delayed the granting of statehood to New Mexico until 1912, both because of the predominance of the religion of Roman Catholicism among New Mexicans and the racial construction of New Mexicans (“Mexicans”) as “nonwhite.” In this debate over the worthiness or unworthiness of “Mexicans” to become full American citizens via statehood, perhaps the dynamic cited by Skeggs (2008) would apply: Those who “were seen not to belong but who [had] to make claims on the state [were] asked to prove their racial and ethnic identities” (p. 21).

For *Nuevomexicanos*, as for others, “full entry into the United States body politic was elusive to nonwhites. [However,] whiteness was a slippery entity.” Spanish ancestry was one way to claim whiteness as opposed to an identity as “mixed-blood Mexicans” (Nieto-Phillips, 2004, pp. 48–49). As Gillborn (2005) noted, “Many groups that at one time or another have been defined as outside whiteness have been redefined and brought within the privileged group” (p. 489).

In the 19th century in the United States, “Mexicans were viewed as primitive, inferior, and an impediment to progress” (Mirandé, 1987, p. 8). *Mexicanos* did not ascribe to the Anglo concept of progress (including the American doctrine of Manifest Destiny). “Chicanos have been labeled as bandits and criminals because they have not passively accepted their economic and political exploitation. . . . They are a threat to society . . . because they reject both Anglo society and the *gringo* system of justice” (Mirandé, 1987, p. 286). *Nuevomexicanos* did not accept uncritically and absolutely such derogatory stereotypes of themselves.

Many politicians in Washington, DC, were openly suspicious of granting statehood to a predominantly Spanish-speaking population that adhered to the Roman Catholic faith, unlike the majority of the population of the United States, which spoke English and was Protestant. During the Mexican-American War, some American citizens referred to Mexicans as “greasers,” as “subhuman,” and as a “mongrel race” (Mirandé, 1987, p. 3). In this view, although Mexicans were nominally Christian, they practiced superstitions inherited from centuries of contact with and intermarriage with Native Americans. This attitude can be seen in a piece of anti-Mexican legislation, an antivagrancy law, which was popularly known in the 1850s as the “Greaser Law,” which

was accompanied by open calls for vigilante groups (Mirandé, 1987, p. 66). First passed in California in 1855, this law limited the rights of Americans of Mexican descent in their freedom of movement and was followed by other laws that nullified the requirement that laws be translated into Spanish and even outlawed practices popular in Spanish-language culture such as bullfighting (Mirandé, 1987). The animus against persons of Mexican descent was unmistakable in these pieces of legislation.

Such anti-Mexican views were based on a model of cultural deficit, with “Chicano culture . . . seen as an impediment to assimilation and integration” (Mirandé, 1987, p. 218). Chicanos did not fit the assimilationist ideal of voluntary immigration. The “colonization [of Chicanos] is an essential historical fact that cannot be ignored” (Mirandé, 1987, p. 222). Professional scholars addressed colonialism head-on through addressing Spanish and Spanish-American history through the lens of *hispanismo*, “a movement among professional scholars who understood both Spanish and ‘Spanish American’ history and cultures through the prism of colonialism” (Nieto-Phillips, 2004, p. 176).

Anglo Americans tended to conceive of Mexicans and New Mexicans as “persons of mixed (Spanish and Indian) blood [who had] inherited the worst characteristics of both races” (Nieto-Phillips, 2004, p. 53). For example, a 1901 newspaper editorial published in Las Vegas, New Mexico, “attacked New Mexico’s Spanish-speaking residents as slovenly and semi-pagan, degraded and superstitious, of mixed (‘Indian and Iberian’) blood, a people who lived in mud huts and slept on piles of rags for beds” (Nieto-Phillips, 2004, p. 13). In response, protestors claimed to be pureblooded descendants of the conquistadors of “illustrious lineage” with an “unbroken link to Spain” (Nieto-Phillips,

2004, p. 15).

From the 1850s on, statehood for New Mexico hinged on getting political leaders in Washington, DC, to see New Mexicans as racially “white” or at least as “white enough” (Nieto-Phillips, 2004, p. 9). However, in addition to opposition to statehood because of prejudice against *Nuevomexicanos*, those in Southern states who favored slavery opposed the admission of New Mexico as a state. Their opposition to statehood arose because New Mexicans insisted upon being admitted as a free (anti-slavery) state (Mirandé, 1987). So there was no convergence between the self-interests of the two groups.

In recent times, the construction of racial identity has shifted in other ways, in part because of demographic trends, including that in 2001, Latinos surpassed African Americans as a percentage of the population of the United States (Census data, cited in Bonilla-Silva, 2004). This has resulted in a shift in the United States, according to Bonilla-Silva (2004), from a biracial—white/black—society to a tri-racial society (as in Latin America and the Caribbean) of white, “honorary white,” and “collective black,” with some Latinos falling into each of these three categories (p. 933), as the Latino or Hispanic category is not strictly speaking simply or primarily a racial category, making it different from the categories of white and black.

The honorary white group is akin to the category of “Coloured” used in South Africa under apartheid (Bonilla-Silva, 2004, p. 932) for people who were less privileged than whites but not as disenfranchised as blacks. This social construction of racial identity has been used for the allocation of “ ‘the wages of whiteness’ (Roediger, 1991), such as good housing, decent jobs, and a good education” (Bonilla-Silva, 2004, p. 932).

Bonilla-Silva (2004) underscored the difficulty of constructing Latino racial identity unambiguously to accord with the traditional biracial (white/black) construction of race in the United States. The following section explores how tourism affected the construction of *Nuevomexicano* identities.

On the Eve of the 20th Century: The Effects of Tourism on *Nuevomexicano* Identity

The completion of the Transcontinental Railroad led to a big increase in immigration and tourism in New Mexico during the 1890s, “a key decade in the making of Spanish American identity” (Nieto-Phillips, 2004, p. 80). Part of the marketing strategy for tourism was the creation and promotion of the myth that there had been centuries of racial harmony between Spaniards and Pueblo Indians. The myth was of “two enduring civilizations, one indigenous, the other European” (Nieto-Phillips, 2004, pp. 10, 107). As a result of this promotion of a romanticized and idealized Spanish heritage supposedly preserved in New Mexico, by 1910, many Americans were “enamored of Spain’s past,” with celebration of the figures of “the virile conquistador and the selfless missionary” (Nieto-Phillips, 2004, p. 146). This Hispanophilia, this romanticized imagined past, also fed into the post-Industrial Revolution fantasy (which started with the Romantic movement in the early 1800s) of escaping from the industrial age, “born of a desire to return to a simpler way of life, that, in fact, had never been all that simple” (Nieto-Phillips, 2004, p. 147).

For purposes of boosting tourism, the actual genetic and cultural intermixing of Pueblo Indians, Apacheans (especially in northern New Mexico and southern Colorado), and “Spaniards,” a process that spanned centuries, was ignored, while the Spanish identity of New Mexico’s Spanish speakers was emphasized and romanticized.

Ironically, more tourists were interested in the Native American (“Indian” at that time) culture and its artifacts on sale (especially pottery and woven rugs) than the Spanish culture or its artifacts (Nieto-Phillips, 2004, p. 120). “Mixed blood” Mexicans (*mestizos*) were ignored in the tourism propaganda (Nieto-Phillips, 2004, p. 7). The booster tourism narrative flattered Anglo Americans’ vanity by fitting it into a narrative of progress and evolution, with “three layers of civilization” of ascending merit: indigenous, Spanish, and (Anglo) American, with American culture being the most advanced and “civilized” (Nieto-Phillips, 2004, p. 124).

Despite the romantic image of Spanish cultural purity created by tourist boosterism, there was some element of truth in this commercial propaganda. The scholar Aurelio Macedonio Espinosa (1880–1955) examined the language and folklore of New Mexico’s Spanish-speaking people:

Far removed from cultural centers in Mexico and the United States, the Spanish settlers [in New Mexico] had preserved many of their original [Spanish] linguistic traits and folktales, despite the presence of two local cultural forces, the Pueblo and Plains Indians, who, Espinosa boasted, made almost no mark on the Spaniards’ language or culture. (Nieto-Phillips, 2004, p. 181)

Espinosa’s faith in *Nuevomexicanos*’ linguistic purity echoed earlier notions of their purity of blood (Nieto-Phillips, 2004, p. 181). In any case, “by the 1920s, *Nuevomexicanos* throughout New Mexico had begun to look to Spanish history and language as symbols of their identity” (Nieto-Phillips, 2004, p. 197). This search for *Nuevomexicano* identity took a different turn in the 1960s with the emergence of the Chicano movement, in which one central issue pivoted upon the land grants and the

violation of terms of the Treaty of Guadalupe Hidalgo by the United States in the 19th and 20th centuries.

Conclusions on the Historical Construction of *Nuevomexicano* Identity

This chapter has examined the history of New Mexico as a way of situating the theoretical arguments about resistance, agency, and identity (which are explored further in the following chapters). I have shown that the social construction of identity of Spanish-speaking New Mexicans (*Nuevomexicanos*) and their descendants shifted over the history of their presence in this part of the world in response to the conditions of the time. Under Spanish rule (1598–1821), Spanish speakers in what is now New Mexico saw themselves as the bringers of a superior (European and Catholic) civilization and religion to the indigenous peoples of the region. This belief in their civilizing mission was consistent with the attitudes of other Europeans and their descendants in the Americas. Under Mexican rule (1821–1846), New Mexicans’ primary allegiances were to place, family, community, and religion, not to the nation (Mexico). This accounts, in part, for why so few New Mexicans chose to exercise the right guaranteed by the Treaty of Guadalupe Hidalgo (1848) to move to Mexico after the Treaty was signed and before and after the Territory of New Mexico was organized as part of the United States (1850–1912).

When New Mexico was a United States territory (1850–1912), overt prejudice and discrimination from Anglo Americans included characterizing “Mexicans” as “nonwhite” and as a “mongrel race” (a mixture of Spanish and Native American) that supposedly combined the worst features of Spanish Roman Catholic “idolatry” and “Native superstitions.” Many Anglos took the condescending attitude that they were

bringers of a superior civilization and religion to the area, while viewing Hispanics as more primitive and backward, socially, religiously, economically, and politically. Anglo Americans saw New Mexicans as an impediment to the nation's material, economic, and social progress, which delayed New Mexico's admission as a state of the Union.

Americans were uncomfortable with incorporating a people who were not "voluntary immigrants"; the residents of New Mexico had not crossed a border to enter the United States; instead, the border crossed them when the land that had been a remote northern province of Mexico suddenly became part of the United States. Anglos feared granting statehood to a majority Spanish-speaking territory whose people practiced Roman Catholicism and adhered to customs and legal traditions that did not match capitalist practices and the ideal of individualism then predominant among Anglo Americans. Supposedly, New Mexicans were lazy in addition to being superstitious (at least in the eyes of the Anglos, who spoke English and were overwhelmingly Protestant). As one Anglo remarked after his contact with "Mexicans" in the late 1840s, "The men are generally lazy, fond of riding, dancing, and gambling. . . . [and] are mostly addicted to liquor" (Mirandé, 1987, p. 4).

This prejudice by the majority culture of the country led powerful and privileged Spanish-speaking New Mexicans to claim that they were pureblooded Spanish descendants of the Conquistadors and had preserved Spanish culture (and blood) for centuries. Thus, they reasoned, they could lay claim to the glories of the past of the Spanish empire, however much the derogatory stereotypes of "Mexicans" might apply to the common Spanish-speaking laborers (*peones*) in New Mexico. By claiming "Spanish" identity, these New Mexicans therefore constructed their racial identity as "white" and

European rather than as “nonwhite” or Mexican (as members of a “mongrel race”). After the completion of the Transcontinental Railroad in 1880, the tourism boosters of the Southwest seized on this racial and cultural positioning to promote the myth of the three cultures of New Mexico, each supposedly more civilized than the one it had partially supplanted: Native American, Spanish, and Anglo.

After New Mexico gained statehood in 1912, some New Mexican writers by the mid-20th century conceded that this construction of identity was perhaps more myth than historical fact. Disagreements over customs and traditions have lingered to this day, as exemplified by ongoing disputes over Spanish land grants, which the United States had pledged to honor as part of the Treaty of Guadalupe Hidalgo. Despite an influx of Anglo Americans, Spanish speakers remained a majority of the New Mexico population until the 1940 census.

The *Nuevomexicano* construction of identity as “Spanish” was but one move in the resistance to Anglo dominance. New Mexico was at the time of its admission as a state the only state of the United States that was officially bilingual; it retains this distinction to this day. Many New Mexicans have resisted full assimilation to the “melting pot” of Anglo-American cultural dominance. The United States abrogated its pledge, made in the Treaty of Guadalupe Hidalgo, to honor Spanish land grants. Throughout the remainder of the 1800s, under the influence of the corrupt Santa Fe Ring, many New Mexicans were cheated out of their land rights through fraud, forgery, and other forms of injustice. The still-active legal cases about the United States’ abrogation of its pledge to honor Spanish land grants are another form of resistance to Anglo dominance (Ebright, 2008).

This chapter has provided a review of the history of New Mexico and the social construction of *Nuevomexicano* identity throughout the history of Spanish-speaking people in what is now the State of New Mexico. This material, along with the material presented below in Chapter 6 about educational testing, is essential in placing the events examined in this dissertation—of the high rates of failure of many people of Spanish-language heritage who had graduated from law school to pass the New Mexico Bar Examination in the 1970s. The following chapter presents an overview of data and methodology. The theoretical framework is presented in this chapter that was used to analyze the data: language ideologies, discourse analysis, and critical theory (critical hermeneutics, constructionism, sociolinguistic theories of identity, critical race theory, convergence theory, and whiteness theory).

Chapter 3. Data and Methodology

In this chapter, I examine data from two different sources. The first source is interviews with people who failed the New Mexico Bar Examination after having graduated from law school. The second source is court documents and transcripts from the court cases that followed the Bar Exam failures. The dissertation research entailed personal interviews and a review of transcripts from court proceedings. The three personal interviews were with Spanish-speaking native New Mexicans and other New Mexicans from Hispanic backgrounds who took the New Mexico Bar Examination in the 1970s and failed to pass the exam, some of whom filed suit in court to challenge the decision to assign them a failing grade on that examination. The review of transcripts from court proceedings involved a close examination of the legal activities that both preceded and followed the failure to pass the bar of the Hispanic law-school graduates. Although the two research methods—interviews and reviews of the transcripts—are treated separately here, they are intertwined in the discussion of the events in the following chapters. To highlight the importance of the theoretical frameworks used to interpret the data, the chapter concludes with an overview of the study's theoretical frameworks used in subsequent chapters to analyze the data.

Interviews

Ethnographic interviewing and data analysis require a type of researcher involvement quite distinct from that of quantitative research, primarily because the theoretical framework in ethnographic research emerges from the data gathered in the research process rather than preexisting the collection of data (LeCompte & Schensul, 2010, pp. 195–196). The researcher must be personally involved in constructing

meaning, a subjective process, as mental models of what is real are social constructions (an issue discussed further below in the section on the theoretical framework that was used in this study). This puts the researcher at risk of confirmation bias (picking data selectively to confirm the researcher's own preexisting beliefs).

In ethnographic research, unlike quantitative research, the interpretation of data is ongoing during the process of collecting data. It is “recursive or iterative,” which means that the ongoing questions get refined and augmented as new information emerges. “Research questions evolve as complexities in the field become clearer” (LeCompte & Schensul, 2010, pp. 197–198). Ethnographic interviewing requires the use of in-depth interviews with open-ended questions that stress the exploratory nature of the research and offer the researcher great flexibility (Schensul, Schensul, & LeCompte, 2010, p. 121).

Ethnographic research may be contrasted with critical hermeneutics. Both have interpretation at their core. Hermeneutics, a Greek term, can be traced to ancient Greek philosophy, in which it referred to “practical philosophy” about fundamental aspects of lived experience (Gadamer, 1983, qtd. in Smith, 1991). As a practice of interpretation, the meaning of the term *hermeneutics* has shifted over time. Hermeneutics was the main form of Biblical studies (scriptural exegesis) in medieval times and in the Renaissance. As noted in the *Stanford Encyclopedia of Philosophy*, the term became more philosophical than exegetical in German romanticism through the work of Schleiermacher and Dilthey (Ramberg & Gjesdal, 2014).

Later, Heidegger and Gadamer broadened the practice of critical hermeneutics from symbolic communication to the deepest philosophical conditions under which

culture operates (Ramberg & Gjesdal, 2014). Recent Continental philosophers of hermeneutics include Habermas, Ricoeur, and Derrida (Ramberg & Gjesdal, 2014). Hermeneutics shifted from its former primary role—interpretation of scripture—and away from analyzing linguistic communication. Heidegger shifted the focus of hermeneutics to ontology, “the most fundamental conditions of man’s being in the world” (Ramberg & Gjesdal, 2014, section 4), shifting the focus of hermeneutics from texts (interpreting the whole vs. parts of a text, the text vs. tradition) to “the interplay between our self-understanding and our understanding of the world.” Heidegger called this the hermeneutic circle, which is not merely philosophical, but existential (Ramberg & Gjesdal, 2014, section 4).

Goals and procedures for the interviews. Critical hermeneutics can be useful in shedding light on how people of Hispanic heritage made sense of their experience of having failed the New Mexico Bar Examination in the 1970s by challenging how others had assessed their competence to enter the legal profession. They did this in part by drawing attention in their lawsuit to a system of assigning points on the essays that made no sense to them and contradicted the corresponding scores on the tally sheets. They also challenged the assessment of their identification of and grasp of the relevant legal issues in their essays, which was in theory the basis of the entire grading process. They also challenged the assertion that the examinees and their examinations had remained anonymous throughout the grading process.

The interview prompts consisted primarily of open-ended questions with follow-up clarifying questions, which was an approach suitable for ethnographic research, which is qualitative and exploratory. Interviewees read and signed an Institutional Review

Board (IRB) consent form. This form indicated that the interview would be audiotaped and transcribed. However, responses have been kept confidential by using pseudonyms. Furthermore, all audiotapes and transcripts will be destroyed by the end of 2019. The consent form stated that each interviewee had the right to withdraw consent to participate at any time and for any reason (and some who had originally consented to be interviewed did exercise that right). Screening questions were used to verify that each interviewee was a Spanish-speaker or a person from a Hispanic background who took the New Mexico Bar Examination in the 1970s but failed the examination and therefore was denied the right to practice law in New Mexico. Questions included the following.

Interview questions.

1. After you first took the New Mexico Bar Examination, what happened when you received your test results? What was your reaction? How did you feel? What went through your mind? What questions did you have? What did you tell yourself about this outcome?

2. Who was the first person you told of the results? What did you tell him or her about these results? What did that person say? Who else did you tell? What did they say?

3. What did you do to respond to the results? What actions did you take? How did you come to decide on a particular course of action? What were the stages you went through, both in your thoughts and in your feelings, as you decided upon a course of action to take?

4. [IF interviewee has mentioned (unaided recall) the decision to take legal action, ask:] What was the chain of events and circumstances that led you to challenge the results

in court? Who, if anyone, encouraged and supported you to challenge the results in court? What did they say to you? How did you react and respond at that time to what they said? Who, if anyone, advised you against challenging the results in court? What did they say to you? How did you react and respond at that time to what they said?

5. What were your feelings—your hopes and fears—before the case went to trial?

6. What was the trial itself like? How were you treated? How did you feel?

What were your perceptions and beliefs at the time? What were the ups and downs you went through during the trial? What raised your hopes? What discouraged you in the course of the trial?

7. What were your perceptions during the trial of the New Mexico Supreme Court justices? The lawyers who represented the defendants? The lawyers who represented you and the other plaintiffs? How did your perceptions of the justices, the defense lawyers and the prosecuting lawyers shift over the course of the trial? What were your feelings towards these men, and how did you deal with those feelings while the trial was underway?

8. What was the outcome of the trial? How did it feel to you? What stories did you tell yourself and share with others when you first heard of the outcome? What did others tell you, and how did you react to what they told you? Would you say that your reaction hit you all at once or more in stages, with one set of thoughts and feelings coming on the heels of the last set of thoughts and feelings?

9. Did you believe at the time that the justices were fair and impartial?

10. Did you believe at the time that the lawyers for the defense were operating in good faith?

11. What were your feelings about the lawyers who represented you and your fellow plaintiffs? [AFTER GETTING UNAIDED RECALL, ASK:] Did you believe at the time that your legal representation was adequate? Inadequate? Well-prepared? Not well-prepared?

12. What did you believe at the time were the justices' primary reasons for ruling for the defense? Has your opinion about that shifted since then? If so, in what ways?

13. What do you think were the central arguments made on behalf of the defendants? What is your assessment of those arguments?

14. What do you think were the central arguments made on behalf of the plaintiffs? What is your assessment of those arguments? [AFTER GETTING UNAIDED RECALL AND FOLLOWING UP, AS APPROPRIATE, WITH OTHER QUESTIONS, ASK:] Did you favor the strategy of placing so much emphasis on whether independent bodies had validated the bar exam? Why or why not? Has your opinion changed over time? What about the raising of the issues of the de facto underrepresentation of Hispanic lawyers (vs. Hispanics as a proportion of the overall population in the State of New Mexico)? During and after the trial, did you wish that the lawyers who represented you had done something differently? If so, what?

15. In what ways, if any, did your beliefs about the legal system in New Mexico change from the time when you took the Bar Examination and received your results to the time when you learned of the outcome of the trial? What were some of the key turning points in that process for you?

16. What were the most valuable parts of this entire process to you?

17. What were the most difficult parts of this entire process to you?

18. What do you think are some of the ways in which your experience of taking the Bar Examination has affected your life?

19. How have your feelings, perceptions, and beliefs about your experience of taking the Bar Examination changed over time?

20. What direction has your career taken since you took the Bar Examination?

21. What else would you like to tell me? (Follow-up: Anything else, or not?)

Analysis of interview data. All interviews were audiotaped, and the tapes were transcribed. No respondent names appear on the tapes or transcripts; pseudonyms have been used instead. Transcripts were coded for key words and themes, and a narrative was constructed using the rich data that such interviews provided. Key words coded included: *Hispanic, Spanish, language, write (writing/wrote), speak, say, story, phrase, grade (grading, graded), number, point(s), score (scoring), qualify (qualified), belief (believe), different (difference), discriminate (discrimination), anonymous (anonymity), equality (inequality, unequal), and fair (unfair).*

These code words fell into three main topic areas: identity and language use, scoring of exams, and ideas of fairness. Key themes included bravery to step into the front line of battle with power; willingness to risk livelihood and future career prospects in the name of justice; persistence, perseverance, and commitment to social justice; and humility: If we don't do it, someone else will because it needs to be done. As proved necessary, with interviewee consent, I contacted interviewees later for brief follow-up questions, particularly when some answers seemed incomplete or ambiguous.

The interviews were treated as qualitative primary research. As such, various qualitative research tools were used in the analysis of the data, including thematic

analysis (involving coding, categorizing, or chunking together related ideas, experiences, attitudes, and actions), triangulation, etc. The themes that were developed emerged from the data so could not be predicted in advance. However, the open-ended questions yielded data on personal narratives (what happened at the time, soon thereafter, and long-term effects), as well as the personal feelings associated with these narratives and the thoughts and beliefs that the interviewees had about these experiences and how these may have change in the intervening decades.

Analysis of Legal Proceedings and Transcripts

An analysis of court documents (legal proceedings and transcripts) provided insight into the relevant legal standards of the 1970s. The analysis examined themes of multiculturalism, nondiscrimination, and affirmative action. It reviewed the extent to which and the ways in which the State of New Mexico's unique status in the United States as the only officially bilingual state (English/Spanish) was referenced in court documents. The analysis considers a series of legal activities and proceedings:

1. The formation of the Mexican-American Law Students' Association (MALSA) and La Raza National Law Student Association.
2. Two lawsuits against the Bar by the Mexican American Legal Defense and Education Fund (MALDEF).
3. The Pre-Law Summer Institutes run by the Council on Legal Education Opportunity, Inc. (CLEO).
4. The 1972 legal challenge by law school graduates to contest their original failing grades on the New Mexico Bar Examination.
5. The *amicus curiae* brief filed by officials from the New Mexico Legal Aid

Society, the Santa Fe Legal Aid Society, and New Mexico Rural Legal Services.

6. The 1972 petition for review of New Mexico Bar Examinations and admission to the Bar and the response of the New Mexico Board of Examiners.

7. The 1972 evidentiary hearing.

8. The *Alarid et al.* hearing and court review of the August 1972 Bar Examination procedures for admission to the New Mexico Bar.

9. The November 1972 *amicus curiae* brief and subsequent court hearing and ruling.

10. The November 1972 hearing of Alarid, Chavez, Tovar, and Uranga by the Supreme Court of the State of New Mexico.

I obtained copies of the legal proceedings and transcripts of court cases by going to Santa Fe in person and requesting them from the Secretary of the Supreme Court of the State of New Mexico. She subsequently provided me with microfiche records from which I made photocopies; the microfiche archives had been made from the original paper documents, which I was surprised to learn were no longer on file in the archives.

The key words coded from the legal transcripts and court documents included two main topic areas: (1) scoring of exams (*grade/grader/grading/regraded/regrading, number, numerical, mathematical, sum, point/points, score/scoring, error, qualify/qualified, answer sheet, tally sheet, notation, percent/percentage*) and (2) ideas of fairness (*believe or belief, different or difference or disparity, discriminate or discrimination or discriminatory, anonymity or anonymous, equality or inequality, fair or unfair, [make] sense or nonsense*).

Coding of the scoring of exams. In this section, I present examples of coding

and summarizing in the topic area of the scoring of exams: *mathematical errors and inconsistencies in grading*. This includes discourse in the interviews and court documents that involves tallying the exam scores, discrepancies between points on the margins of the essays and points on the tally sheers, and arbitrariness and lack of uniformity in grading and lack of clear standards of assigning points.

In the following examples, I have highlighted the key words that were coded.

(a) from Petition for Review of Bar Examinations and for admission to the bar (filed October 16, 1972):

“Petitioner Tovar reviewed his examination on September 22, 1972, and found several *mathematical errors* in transferring the *sum* total from examination paper to the *tally sheet*. The Clerk of the Supreme Court of the State of New Mexico made the above corrections making Petitioner’s *grade* 66.1 *percent*. Other *mathematical* and substantive *errors* were found. If the above *errors* were corrected, his *grade* would be above 67 *percent*.” (p. 5, from “Petitioner’s review of Bar Examination results,” VIII)

(b) from Petition for Review of Bar Examinations and for admission to the bar (filed October 16, 1972):

“The one *percent* review rule was not followed in at least two instances.” (p. 10, “Abuse of discretion in *regrading*,” XXIII)

(c) from Response of the New Mexico Board of Examiners (filed November 15, 1972):

“said marginal, *numerical notations* [on the examination essays] are not controlling. It is the *percentage grade* placed and initialed by each grader on the

separate *grade* sheets [AKA “*tally sheets*”] pursuant to the procedures and instructions described in Paragraph 3 of the Second Defense that are controlling and were so deemed by the Board.” (p. 9)

(d) from cross-examination of Mr. Bondurant (A = answer to question asked) in court case (Alarid et al., 1972):

A: I did not know that apparently one or more examiners used their own system of marginal *notations*. I was not aware of that. Had I known it I would have talked to them and tried to get them in line with the suggestions. (p. 104)

....

Q: Have you ever questioned as to why the difference between the *scores* on the *answer sheet* and the *scores* on a *tally sheet*? (p. 106)

A: I was never aware of any discrepancy until this case.

Q: Did you question it this time?

A: Yes, sir.

Q: What explanations were given to you for the discrepancy?

A: The explanation that was given to me was that one or more *graders* used an unusual system of grading which I did not understand. (p. 107)

Coding of fairness. Examples of coding and summarizing within the area involving ideas of fairness, violation of anonymity, and violation of equal protection include the following.

Violation of anonymity.

(a) from Petition for review of Bar Examinations and for admission to the bar (filed October 16, 1972):

“Petitioners, on information and belief, allege that all or several of the members of the Board of Bar Examiners knew the names of unsuccessful applications whose examinations were *regraded* before September 22 and 23, 1972, the dates that the eight examinations were *regraded*. Robert H. Scott, for example, had written to each of the members of The Board of Bar Examiners his bar examination *grade*.” (p. 11)

(b) from cross-examination of Mr. Bondurant (A = answer to question asked) in court case (Alarid et al., 1972):

Q: So the danger existed, did it not, of disclosing the identity of the applicant? By that I mean the name and number of an applicant prior to the time the Board met for *regrading* [the] examination?

A: I think this would be a possibility if you made a mental note of what his total *grade* was and what his number was and what his name was. (p. 115)

Violation of equal protection.

(a) from *Amicus curiae* brief (filed November 22, 1972):

The New Mexico Bar Examination

“The problems created for the Mexican-American student by the educational system are carried through law school to the bar examination. The Bar Exam, which tests primarily the facility to write the English language under pressure in a short period of time is the identical type of exam which has always penalized the Mexican American for his bilingualism.

“The *discriminatory* impact of the examination is obvious when one considers the following. Based on the results of the last examination,

approximately 88% of the Anglos passed while approximately 30% of the Mexican-American applicants passed. *Albuquerque Journal*, October 16, 1972.

. . . .

“The law is clear that a statistical *disparity* between similarly situated groups gives rise to a prima facie case of discrimination. *Griggs v. Duke Power Co.*, U.S. 424 (1971). Furthermore, though a test may be neutral on its face, if it operates to exclude a minority from participation in a job, it violates the Equal Protection Clause unless shown to be related to the job to be performed.” (pp. 6, 8)

The following section provides a summary analysis or brief overview of the main points made by the plaintiffs and the defendants in the major legal documents reviewed in this research.

Summary analysis of key themes in major legal documents. This section provides a summary analysis (the main points) of the court proceedings and other legal documents. These include the arguments made by the plaintiffs and the defendants, as well as the ruling of the justices of the Supreme Court of the State of New Mexico.

(1) Petition for review of bar examinations and for admission to the bar (filed October 16, 1972). Key claims:

- (a) Substantive and arithmetic errors had been made in grading the essays.
- (b) Anonymity had been violated; examiners knew the identity of at least some essay writers.
- (c) The cutoff score of 67 percent was arbitrary.
- (d) The Bar Examiners were obligated to avoid even the appearance of

impropriety.

(2) Response of the New Mexico Board of Examiners:

(a) Denial of allegations that examiners were professionally competent.

(b) Denial of having made arithmetic errors in tallying the scores.

(c) Denial that the cutoff score used was arbitrary.

(d) Denial that bar examiners knew identity of examinees when grading essays.

(e) Denial of having shown favoritism or partiality.

(3) Evidentiary hearing. Court asserted that burden of proof rested on the defendants; mere denial of wrongdoing was insufficient.

(4) *Amicus curiae* brief (filed November 22, 1972):

(a) Presented alternatives to a bar examination to assess competence.

(b) Traced heritage of Spanish-speaking people and unequal education.

(c) Argued that discrepancies in flunk rates violated Equal Protection of Constitution.

(d) Argued that examiners needed to prove that skills tested were job-related.

(5) Court hearing and ruling on *amicus curiae* brief (November 27, 1972). Court ruled that the plaintiffs had failed to prove that they had been deprived of Constitutional rights or had been the victims of discrimination.

(6) Hearing, *Alarid et al.*, for court review of August 1972 bar examination procedures for admission to the New Mexico Bar:

(a) Plaintiffs alleged that there was no uniform standard to grading essays.

- (b) Plaintiffs alleged that the examiners were obligated to review all borderline exams without having to receive any explicit request for a review and to check for mathematical errors.
- (c) Defendants testified that they had already lowered the cutoff score from 70 to 67.
- (d) Basis for assigning points remained unclear, but defendants argued that examinees earned points simply by correct identification of the relevant legal issue(s).
- (e) Only two instances of mathematical errors were introduced into court testimony (despite allegations that all four plaintiffs had been victims of such errors), and they were not large enough to change a failing grade to a passing one.
- (f) Defendants testified that no evidence had been introduced to prove violation of due process or equal protection rights.
- (g) Court dismissed the petition on December 1, 1972.

I next examine with the three main theoretical frameworks that guided the collection and analysis of both sources of data: language ideologies, discourse analysis, and critical theory. All three allow us to see how language use, power relations, race, and social structure affected this case.

Theoretical Framework

In this section, I review the three theories that inform this study: language ideologies, discourse analysis, and critical theory. These theories are useful for analyzing the data and answering the research questions. These theories also provide a method for

the analysis. The primary method used was thematic analysis, described in the section on discourse analysis. Discourse analysis was critical in this study because it focuses on how language is used in real contexts, contexts in which people create narratives about their lived experiences as they perceive them. Themes to be coded for the analysis were shaped by the research on language ideologies and on critical theory.

Language Ideologies. According to Silverstein (1998), ideology mediates processes about how we rationalize, interpret, systematize, and construe reality. As Gal (1998) noted, “linguistic forms become indexes of the social group that regularly use them” (p. 327). Van Dijk (1998) defined ideologies as “political or social systems of ideas, values, or prescriptions of groups or other collectivities [that organize or legitimate] the actions of the group” (p. 3). Van Dijk (1998) focused on how “ideology is expressed and reproduced by discourse” (p. vii). He defined ideologies as “the basis of the social representations shared by a group” (p. 8).

According to Dirk Geeraerts (2003), there are two approaches to language and ideology in the literature: critical discourse analysis and the “ideologies of language” approach. Geeraerts’ concept of language variation is associated with group identity and race that is either prized or stigmatized in policy and educational practices.

The relationships between language and ideology can provide an analysis of how identity is shaped through language and how language shapes identity. Examining the interplay between language and systems of power is crucial in understanding how the framing and assessment of essay exams that regulate professional status, such as the Bar Exam, can be biased by ideologies about language use. Johnstone et al. (2006) showed that correlations between demographic identities and linguistic usages become a

“sociolinguistic ‘marking’ (Labov 1972b, 179) of class and place” and then a sociolinguistic stereotype (p. 77).

Language use and discourses common to the legal profession are not free from ideology; legal discourse does not merely transmit messages, but also structures the rules of how things should be perceived, defining thereby what reality is, which constitutes “a shaping of the whole ideological environment” (Hall, 1982, p. 65). Therefore, the issue of who controls the dominant discourses and who controls access to powerful discourse communities (such as the legal profession) is necessarily highly political.

Discourse analysis. Discourse analysis deals with the study of language use in real contexts, such as conversation and narrative. By analyzing discourse data, we look at the different ways in which we use language to negotiate meaning with one another, both in local interactions and in larger social and cultural arenas. Discourse analysis looks at language use—texts, narratives, conversation, and public discourse—in context as the production of meaning and as a locus for exploring social structures and beliefs. There are many approaches to discourse analysis. Each approach highlights a different focus. The focus, for example, may be prosody, morphosyntax, information structure, narrative structure, turn-taking and collaboration/negotiation in interaction, or the construction of identity in discourse.

The literature and methods of discourse analysis have a close connection to the study of language ideologies (discussed above). In much of the research on discourse analysis, discourse is seen as both social practice and social construction (e.g., Fairclough, 2013; van Dijk, 2004). Such research focuses on how social and political domination is created and reproduced by texts and speech acts. Language is a social

practice used for representation and signification through which reality is socially constructed in a value-laden way. All writers of texts are socially situated in particular cognitive, social, historical, cultural, and political contexts.

One implication of this is that language is not a neutral conduit through which reality is expressed. It does not merely articulate or reveal the true or essential nature of things (essentialism). Meanings and truths—what anything signifies—are interpretations produced through discourse (social constructionism). “The power to signify is not a neutral force” (Hall, 1982, p. 70).

Particularly important in discourse analysis is critical discourse analysis (CDA). Fairclough (2013) explained that CDA begins with a view of language as a social practice; it is a type of action. Language is a historically and socially placed action, both socially shaped and socially shaping, what Fairclough (2013) called “constitutive.” As Lippi-Green (1997) observed, “Language is . . . a flexible and constantly flexing social tool for the emblematic marking of social allegiances. We use variation in language to construct ourselves as social beings, to signal who we are, and who we are not and cannot be” (p. 63). This process occurs for both self and other, a phenomenon that W. E. B. Du Bois referred to over a century ago as a “double consciousness” for black Americans (Pyke, 2010, p. 551).

Critical discourse analysis scrutinizes how text and talk reproduce social and political domination. Proponents of critical discourse analysis have argued that language constitutes social identities, social relations, and systems of knowledge and belief. “Discursive practices, events, and texts arise from relations of power and power struggles” (Fairclough, 2013, p. 132). People have unequal access to the linguistic and

social resources and to resources controlled by institutions (Maddibo, 2006, p. 56). As Fairclough (2013) noted, “Language connects to the social through being the primary domain of ideology and through being both a site of and a stake in struggles for power” (p. 15).

Wodak (2014) said that CDA examines the relationship between language and society. Discourse is a social practice that both shapes and is shaped by situations, institutions, and social structures. “Discourse . . . helps to sustain and reproduce the social status quo and . . . contributes to transforming it” (Wodak, 2014, p. 173). CDA (Wodak, 2014, pp. 179–80) questions three things: (1) what elements of the context (e.g., setting, experience, and personality) are relevant, and what are the typical discourse patterns? (2) How are differences in knowledge expressed? and (3) How are values expressed? These three questions are considered at length in the discussion of both the interviews and the court documents.

The literature on discourse analysis also reminds us that the role of the researcher is important in drawing conclusions from the analysis. In the discussion of the interviews, I used the entirety of the interviewees’ comments in my analysis. As Johnstone (2007) noted, discourse does “not exist independently of discourse analysts’ choices about . . . how to select and delimit chunks out of the flow of talk or writing . . . and treat them analytically” (p. 20). Although pulling out pieces of the interviews for the discussion may seem artificial, it is, as Johnstone (2007) pointed out, an “essential first step of any discourse analysis” (p. 21).

The particular qualitative approach to discourse analysis followed here is thematic analysis. According to Braun and Clarke (2019), thematic analysis (TA) is a method for

“systematically identifying, organizing, and offering insight into patterns of meaning (themes) across a data set” (p. 57), a way of identifying the commonalities in how a topic is talked about. Joffe (2012) said that TA “illustrates which themes are important in the description of the phenomenon under study (Daly et al., 1997). A thematic analysis should highlight the most salient constellations of meanings present in the dataset” (p. 212). Themes noted within such an analysis may contain “manifest content” (e.g., observable mentions of value or attitude), or “latent content” (i.e., “references in the transcripts [that] refer to stigma implicitly, via mentions of maintaining social distance from a particular group.” This is a bottom-up approach, in which the codes and themes emerge from the content of the data (Braun & Clarke, 2019, p. 58).

The discussion of language, ideologies, and power continues with a look at critical theory. The following section covers critical hermeneutics, constructivism, sociolinguistic theories of identity, critical race theory, and convergence theory, as well as the literature on counterstorytelling and counternarratives. The treatment of the Bar Exam essays of heritage-language speakers in New Mexico in the 1970s illustrates institutional maintenance of prior inequalities. The implications of this are clearer through the lenses of the critical theory discussed in the following section.

Critical theory. In this section, I examine critical hermeneutics, constructivism, sociolinguistic theories of identity, critical race theory, and convergence theory, as well as the literature on counterstorytelling and counternarratives. All are means of critiquing and establishing the grounds for resistance to narrative ideologies about identity. What these theories have in common is that they facilitate considering issues of power, social structure, and race in analyzing the data collected here.

Critical hermeneutics studies the development of knowledge by highlighting the personal nature of interpretation. This theory claims that people may claim the right to make their own interpretations of their lived experience and to view these as definitive rather than deferring to tradition and hierarchies of power and domination, however well-entrenched. “The aim of interpretation . . . is . . . human freedom” (Smith, 1991, p. 189).

Critical hermeneutics thus stresses the validity of a personal perspective on the meaning of lived experience. In this study, the interviewees’ responses are analyzed through this framework by examining the content of what they say rather than what the researcher’s position or conclusions are on what they say. I report what they think and believe about their own experience and foreground their own conclusions.

Constructionism (or *constructivism*) highlights the importance of case studies in exploratory research. Constructivism is the theory that individuals make meaning or form social constructions of reality based on their socialization: their experiences, individual relationships and interactions with others, group affiliations, and the models of reality conveyed by those individuals and groups, often implicitly through attitudes, assumptions, and deeply ingrained beliefs. “Constructivists claim that truth is relative and that it is dependent upon one’s perspective” (Baxter & Jack, 2008, p. 545). Case studies are one way to explore in depth what an individual believes to be true based on that individual’s subjective point of view. This enables the researcher to construct a coherent narrative of their actions (in this case, taking legal action after being denied admission to the legal profession after receiving a failing grade on the Bar Exam). The constructivist approach makes it possible to explain how and why so many people from Hispanic backgrounds came to believe that they had been subject to illegal discrimination

that they chose to challenge in court.

In exploring the construction of individual and group identities, the researcher should avoid reductionism (viewing the data through only a single lens, such as race, socioeconomic status, or gender). Identities are multifaceted and fluid as people navigate from one context and group to another: family, workplace, peer groups, neighborhood, religious and political associations, and others, so the same individual can be daughter, granddaughter, sister, wife, mother, aunt, boss, employee, friend, enemy, acquaintance, neighbor, parishioner or former parishioner, and fundraiser. Individuals put on and take off many masks and roles, each of which is linked with values, beliefs, and constructions of reality, as they shift from one context to another. As a result, “identities seem contradictory, partial, and strategic,” highlighted or hidden, depending on context, sometimes making the term *affinity* more useful than *identity* (Haraway, 1990, p. 197). Nuances and differences, therefore, about what it means to be Hispanic, Chicano/a, or New Mexican, for instance, should be highlighted rather than glossed over. For this reason, I generally prefer the term *identities* rather than *identity*.

Sociolinguistic theories of identity ask how individuals shape their personal identity in reference to memberships in groups or communities. In recent decades, viewing identity as based on a fixed or unchangeable essence of people (for example, through belonging to a particular race or nationality) has come to be labeled *essentialism*, in opposition to an emergent theory of social identity based on interaction with others in society that has come to be known as *social constructionism* or simply *constructionism* (Ochs, 1993, p. 289). Essentialists believe that certain traits are an inherent part of being a member of a particular group (e.g., Hispanic or Anglo). Tacitly or explicitly, racism

relies upon essentialist beliefs about race and racial identity, while constructionists have argued that the notion of race and racial categories are social constructions and therefore necessarily arbitrary. Racial identities and racial categories are phenomena in the eyes of the beholder and the beholder's mental map of reality rather than being phenomena that exist independently of the viewer in the outside world.

A philosophical summary of the two views might be that essentialists believe that identity is real, something inherent in a person and therefore merely discovered or discerned; it exists inside us independently of our perceptions or observations of it. On the other hand, a constructionist would argue that identity is fluid and dynamic; it emerges from the complex interactions between our beliefs, values, and ever-changing social situations; it exists for us only in the context of particular settings and environments; it is context-specific rather than something that exists independent from social structures and norms. To the constructionist, identity is neither fixed nor inherent in the thing or person being observed. As Ochs (1993) put it, the "assignment of social identity is a complex and inferential process" (p. 290). Michel Foucault (1984) also argued that meaning (beliefs about reality) come into being through language and discourse; therefore, meaning exists only in social and historical context rather than being universal. The social constructionist view of identity is supported in what follows through a summary of how the identity of Spanish speakers in what is now New Mexico has shifted through the history of this area since the arrival of Spanish speakers several hundred years ago.

My view is that identity comes into being through social interactions and interpersonal relationships rather than being something essential that pre-exists such

social interactions and relationships. Identity comes into being through actions, interactions, choices, and personal decisions. “Identity is performed, constructed, enacted, or produced moment-to-moment in everyday conversations” (Benwell & Stokoe, 2006, p. 52). Identity, therefore, is “not essentially given, but actively produced” (Kroskrity, 2000, p. 111). Language acts occur in specific contexts in which language plays an active role in transmitting, creating, and reinforcing values, ideas, and notions about what is real. The discourses of narratives and counternarratives shape conventional and alternative views of such things as race and social, economic, and political inequalities, as well as how these are perpetuated through legal and educational institutions. Examining the interplay between language and systems of power is crucial in understanding how the framing and assessment of essay exams that regulate professional status, such as the Bar Exam, can be biased by ideologies about language use.

Critical race theory has been defined by Brooks (1994) as “a collection of stances against the existing legal order from a race-based point of view” (p. 85). The UCLA School of Public Affairs (2014) noted that critical race theory “provides a critical analysis of race and racism from a legal point of view” (n. pag.). Cornel West defined critical race theory as the study of “the historical centrality and complicity of law in upholding white supremacy” (Crenshaw, 1995, p. xi),

Matsuda (1991) defined critical race theory as “the work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law and [who] work toward the elimination of racism as part of a larger goal of eliminating all forms of subordination” (p. 1331). Tierney’s (1993)

definition highlighted the “attempt to understand the oppressive aspects of society . . . to generate societal and individual transformation” (p. 17). Critical race theory has been used to scrutinize the theoretical bases for opposition to affirmative action and other aggressive legal remedies for racial discrimination and inequalities in American society.

Critical race theory (CRT) has examined how the interests of the dominant race are served through institutional structures, including education. CRT looks at entrenched racial discrimination, including segregation in education (Castagno & Lee, 2007). Why has it endured? CRT has argued that race or class interests conflict with racial equality. CRT explains how support for racial equality ends when this entails sacrificing white privilege, as in white reaction to affirmative action in higher education (Bell, 1980).

Attention to narrative is a major strength of CRT: it generates counternarratives to challenge the conventional wisdom about race, privilege, and whiteness. In the context of legal scholarship and legal reasoning, any single narrative approach raises questions: Whose narrative is authoritative? How does the justice system determine which narrative approach meets the legal standards of fact, logic, and linear reasoning? (Taylor, 1999, p. 197). How and why are counternarratives ignored, silenced, or dismissed? Whose story is told? These are questions that Toni Morrison raised at the beginning of her novel *Beloved*. Morrison thereby explicitly explored the subject of minorities who are forced into silence about how their racial identity has been constructed. Her novel is a counternarrative that challenges the silencing of minority voices.

Convergence theory has looked outside the realm of racial politics in the United States to place the civil rights era in its international historical context (Dudziak, 2009). What did the white power structures gain by allowing civil rights to make headway in the

courts and in legislation? One argument made by convergence theorists has been that advancing civil rights served United States' interests abroad in the Cold War because the Soviet Union was highlighting segregation in the United States in its propaganda in the Third World.

Convergence theory is focused on interest-group politics. The central claim of this theory is that whites have allowed blacks to gain more civil rights in this country only when this served white interests. Bell (1980) argued, "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites" (p. 523). Convergence theory must scrutinize how interest groups function in a given context. The collapse of the Soviet Union changed Cold War politics, which had made it advantageous for white elites to push desegregation to counter Soviet propaganda about the prevalence of racism and economic exploitation in the United States.

Convergence theory postulated that in *Brown v. Board of Education* (1954), the United States Supreme Court overturned *Plessy v. Ferguson* (1896) to fight Communism. Although interests between blacks and whites converged at the time of *Brown*, they have diverged since, with resistance to integration and affirmative action cropping up as in the growth, especially in the South, in white students' enrollments in private schools as a way to bypass court-mandated racial integration in public education.

Perhaps convergence theory's claim to place racial issues within a historical context has only been partly fulfilled. Cold War politics have been overlooked in most discussions of the switch from *Plessy* to *Brown*, but there is more to racial politics than group self-interest (Dudziak, 2009). Some people make huge sacrifices out of moral conviction. Some white people showed great conviction during the Abolition movement

and the later civil rights movement. One critique of whiteness is that the black–white racial dichotomy marginalizes people of color who are not black, including Asian Americans, Hispanic Americans, and Native Americans, who occupy an ambiguous racial middle ground. Native Americans have embraced critical race theory, convergence theory, and a counter-storytelling methodology (Castagno & Lee, 2007).

Whiteness theory has argued that many whites ascribe subjectivity and irrationality to people of color. Whites ascribe objectivity and rationality to the dominant white race, resulting in seeing nonwhites as the subjective and irrational Other. Critical race theory insists that even in the absence of personal ill will against people of color, whites benefit from white privilege, just as convergence theory shows that whites relinquish this privilege only when and how it serves their perceived interests to do so.

This dynamic of whiteness theory, CRT, and convergence theory is revealed in an examination of **narratives and counternarratives** of racial identity and racial politics. Counternarratives (texts and speech acts) express and form people’s views of race and the inequalities that are perpetuated through institutions and systems of power. These inequalities perpetuated by institutions and systems of power, are, in turn, challenged through language, counternarratives, and critical discourses. Identity, in turn, also shapes ideology. Critical discourse analysis, critical race theory, and convergence theory explain how discourses of identity have shifted in New Mexico since Spaniards arrived as legal and social practices changed.

The critical theories described here are useful for examining narratives, counternarratives, and the construction of race. They can be applied to the assessment of linguistic minorities who took the New Mexico Bar Exam in the 1970s. These theories

challenge the narratives that justify or overlook racial inequalities and racial discrimination (Taylor, 1999).

It did not serve the interests of privileged white people (in this case, members of the Bar who graded the examination essays) to reexamine the narratives and counternarratives of the heritage-language speakers who took the Bar Exam in the 1970s because at least initially, there was no perceived convergence of self-interests between the graders and those who had failed the examination. This perception of self-interests did shift later when the examiners were accused of being racist, and they then did not perceive it as being in their interests for that characterization of themselves to continue. Once that shift had occurred, there was a convergence of interests that led the Bar Examiners to address the issue of the perceived racism and inherent unfairness of the Bar Examination and how it traditionally had been structured and graded.

Chapter 4: Results

In this chapter, I present a detailed picture of the events of the Bar Exam controversies of the early 1970s. The discussion weaves together my analysis of the court documents and the transcripts of my interviews with the former law students involved in the struggle rather than presenting the two strands of data analysis separately. The purpose for this was to provide a clear picture of what happened during those years, paving the way for an analysis of the changes that followed. The analysis involves an examination of those events from various theoretical frameworks. All of these involve the role played by race, identity, agency, and ideology. The analysis includes a review of implications for educational testing and assessment.

Benjamin Chavez, Jr., Michael Alarid, Jr., Roland Tovar, and Jose M. Uranga, Jr. were founding members of the Mexican-American Law Students Association (MALSA). At the same time, La Raza National Law Students Association was founded, uniting law students from around the country. These student groups led a 10-year battle to change admissions policies to the New Mexico State Bar Association. At the start, only about one student of Spanish-language heritage had been admitted per year in the first two decades of the law school's existence, even though professors and administrators at UNM were trying to appear to be supportive of Hispanic students.

Demonstrations before the New Mexico Supreme Court and swearing-in ceremonies occurred. The Mexican-American Legal Defense and Education Fund (MALDEF) sued the Bar twice. Mario Obledo was the attorney for MALDEF. In the latter of the two suits, Cruz Reynoso, who became a justice of the Supreme Court of the State of California, and Luis Romero, a professor at the UNM School of Law, were

attorneys of record in conducting the suit. When they sued the Bar, it was revealed that UNM assigned secret code numbers linked to the names of students who took the Bar Exam to ensure anonymity in grading. Suits were brought due to the disproportionate failure rate of minority students who took the Bar Examination.

Student protests and demonstrations continued in full force at the Supreme Court Building in Santa Fe and the governor's office of then-Governor Jerry Apodaca. A significant outcome was that the cutoff score was slightly lowered for passing the New Mexico Bar Examination to offset the inadequacies of the exam process. Another outcome of protests and other pressure from the public for change was the introduction in 1969 of the Pre-Law Summer Institute run by the Council on Legal Education Opportunity, Inc. (CLEO), a three-month summer class held in Colorado that helped prospective Hispanic applicants to prepare for their entrance examination to the UNM School of Law. This summer class, CLEO, is still held today, and from its inception, it has steadily boosted the number of successful applicants to UNM's School of Law.

Because of the efforts of CLEO to prepare students for their first semester of law school, in the fall of 1969, 25 new Hispanic students were admitted to the law school instead of the 1 or 2 who had been admitted per year (on average) prior to the access of New Mexican prospective law students to the CLEO summer program. The CLEO summer institute was a crucial part of preparing one of the plaintiffs in the 1972 lawsuit for law school, and it also planted the seed for his later conviction that he had been discriminated against when he took the New Mexico Bar Examination for thinking and writing like a Hispanic. As he explained recently, "I was part of CLEO. They came in and talked about how our writing is different, how we look at things different[ly], and

then, we flunked. It was great.”

After the end of the fall of 1969, the first semester of higher admission rates for students who had benefited from the CLEO summer institute, 51% of the class at the UNM School of Law was placed on academic probation during their second semester there. “We [Hispanic students] came into the school in large numbers, whereas before, only one or two were admitted into the law school in any given year.” As one interviewee admitted, “Law classes were very difficult. . . . Some of [the law school professors] seemed intent on weeding people out, [although] some of the professors were very open to help somebody who needed help with their studies.” The school introduced adjustments to accommodate the greater number of minority students who had been admitted. Despite these efforts, some of them were unable to pass and were disenrolled from the school.

Even those who succeeded in graduating from the UNM School of Law still faced the additional hurdle of passing the New Mexico Bar Examination. After several attempts by the four plaintiffs, two of them passed, while the other two did not pass. They left the State of New Mexico following their unsuccessful legal challenge in 1972 to contest their original failing grades on the Bar Examination and receiving failing grades on subsequent examinations.

The four petitioners asked the court in 1972 to review the grading procedures used for their bar examinations. The four of them alleged that mathematical errors had occurred in how their essays had been graded that if corrected would have resulted in their receiving passing scores. The court responded by ordering the Bar Examiners to no longer do the mathematical calculations on the examinations themselves. The court

proceedings and transcripts of that particular case and related legal proceedings are analyzed in the following section.

Analysis of Legal Proceedings, with Comments from Interviewees

Michael Alarid, Jr., Benjamin Chavez, Jr., Roland Tovar, and Jose M. Uranga, Jr., learned through local newspaper articles that several nonminority students who had taken the examination and failed had managed to have their examinations regraded, as a result of which, those initially unsuccessful nonminority candidates had been admitted to the bar and were therefore able to practice law in the State of New Mexico (Bar examiners, 1972; Six admitted, 1972; Tests graded, 1972). One of them, the newspapers reported, had claimed that mathematical errors had been made in computing his test score. The legal challenge to the results denying Alarid et alia admission contained several allegations, including an allegation of mathematical errors and a claim that they had been denied their equal protection and due process rights enumerated in the Fourteenth Amendment of the Constitution of the United States. None of their efforts to challenge their failing grades in court were successful.

The court refused to allow arguments to be heard that were based on the *amicus curiae* brief filed by officials from the New Mexico Legal Aid Society, the Santa Fe Legal Aid Society, and New Mexico Rural Legal Services. This brief and its claims—basically that the highly disproportionate flunk rate for “Mexican Americans” was evidence of a de facto pattern of discrimination—were not considered in the trial, although admitted into evidence. As one of the plaintiffs later told me in an interview,

“The *amicus* brief—the court didn’t even use it. It tells the story. It tells how we’ve been put down for years ’cause of the way we write. It’s different, and you

can tell it's different. And anyone who says you can't tell is lying. That's what the *amicus* brief says.”

The plaintiffs argued, “You're grading us because of the way we phrase it. . . . Our central argument was: Be fair.”

Even though the plaintiffs never argued in court that a deliberate attempt to discriminate against people of Spanish-language heritage was the reason for the high flunk rate, in their interviews, these men noted the presence of prejudice against “Mexicans” in the Southwest, particularly in the State of Arizona and in many rural parts of New Mexico. One remarked, “In Arizona, you were never called Hispanic or Spanish like we were called here [in Albuquerque]. You were Mexican, and they'd just look down on you.” But even in Albuquerque, where “redneck” attitudes were not as prevalent, one interviewee who was among the plaintiffs noted, “I could tell that my writing was different. And I firmly believe that's what the *amicus* brief was all about. People will know how Hispanics write. And I don't [care] about what they say that they can't.” He went on to compare the pass rate for Anglos of about 80–85% versus the pass rate for Hispanics being perhaps 31%. It was only when the Bar Examination was changed from the exclusively essay format to multiple choice “that our guys started making it,” as one of the plaintiffs noted recently.

The court did, however, consider that the facts in dispute (including the allegation of mathematical errors in computing exam scores—an allegation that the Board of Examiners denied) and the issue of possible violation of the Fourteenth Amendment were significant enough for the court to grant an evidentiary hearing to allow the plaintiffs to make their case in court. The court said that mere denials of mathematical errors and

mere denial of discrimination were insufficient; facts were in dispute. Significantly, the plaintiffs did not base their argument on any conscious or deliberate intention on the part of bar examiners to discriminate against candidates of Spanish-language heritage.

Petition for review of bar examinations and for admission to the bar. Roland H. Tovar petitioned the Supreme Court of the State of New Mexico in October 1972 for a review of his bar examination and admission to the Bar. He had been notified on August 24, 1972, that he had failed to pass the Bar Examination. This petition for review was denied on October 16, 1972. On October 19, 1972, petitioners Michael Alarid, Jr., Benjamin Chavez, Jr., Roland Tovar, and Jose M. Uranga, Jr., petitioned the court to review the grading procedures used for their bar examinations and to admit them to the Bar of the State of New Mexico. In support of this petition, they cited the Court's jurisdiction over admitting applicants to the Bar. They argued that they were qualified to practice law in the State of New Mexico, as evidence for which they cited law school experience, awards received, and legal work already performed during their time in law school and subsequent to their graduation from the UNM School of Law.

One of the central claims (assertions of fact) in the petition was that all four petitioners received scores below the 67 percent cutoff score due to mathematical errors in grading that the petitioners noticed when they were permitted to review their essays after being notified that they had failed the examination. They did so after learning that eight other examinations had been regraded and that all eight examinees who had originally failed the examination had been offered admission to the Bar after the completion of that regrading. The four petitioners argued that the definition of "borderline" score was critical (basically, within one percent of the cutoff score).

Roland Tovar reviewed his examination and detected mathematical errors in how it had been graded. He asserted that if all of the errors had been corrected, his score would have been above the 67 percent cutoff score. Ben Chavez, Jr., also spotted mathematical errors and asserted in the petition that if these errors had been corrected, his score would also have been above the 67 percent cutoff score. Similarly, both Michael Alarid, Jr., and Jose M. Uranga, Jr., asserted that if the mathematical errors written in the margins on their essays (not on the tally sheets) had been corrected, their scores would have been above the 67% cutoff scores. The discrepancies between the numbers on the examination essays and the scores on the tally sheets led to a perception among those who had been flunked of unfairness. “We kept telling them, ‘This is [ridiculous]. Your numbers don’t match, and this is so arbitrary. You can just do whatever you want to do.’” Even if the questions themselves were fair (which is what the examinees said later in interviews), the problem was in

“the way they graded them. It [made no sense]. As you can tell from the transcript, the argument ‘Oh, that’s only one half of one percent. That’s all arbitrary. What does that even mean? It didn’t make any sense. When we were arguing it in court, it didn’t even make sense to them. And they were trying to defend it.’”

The problem was not at the law school; the real barrier to entry into the legal profession was the grading of the New Mexico Bar Examination.

“You couldn’t blame the law school. The law school didn’t do it. They [the examiners] did it. So all of these people [examinees] passed the law school, and they were very good students. And that’s how they stopped us: the bar. . . . They

weren't fair. You could tell from their testimony. They were irate: "How dare you accuse us of being racists? How dare you question our authority?"

The defendants, in addition to being unhappy with the plaintiffs and being forced to defend their grading in court, were also unhappy about being scrutinized in the court of public opinion through media scrutiny. The whole issue that eventually led to the court case came to the attention of its future plaintiffs through the newspaper articles about the examinees who had flunked but then later were admitted to the bar. The bar examiners "were mad because the regrading of these individuals made the headlines in the newspapers, so the issue was brought before the public, so the courts were quite unhappy about that." Once that news became public, as one interviewee put it, "I wanted to see if I could get the same treatment as those they had regraded and passed." However, this was not easy because "at that time, many of us—the Hispanics, Native Americans, and Blacks—felt somewhat intimidated by the system. We didn't want to be intimidated."

One of the plaintiffs argued even in a recent interview that he believed that the justices ruled for the defense "to protect the bar—protect the bar commissioners. I think there was one Hispanic. The rest of them were all white guys. You knew they were friends." However, his view has softened over the years, as reflected in his interview comments:

"They were protecting the sanctity of the bar. I can't blame them for that. I mean, the bar is a wonderful thing. I've come to find after 45 years that most of them are pretty good guys. They really are. But there's the bad ones."

He explained further in his interview, "There were people in there [who] were racist, and they got us. It's just that simple. Did we prove who? No. . . . But it's fair now."

The plaintiffs' cause was hampered by the lack of full discovery. The ground rules were that the court would not second-guess arguments or judgments about the merits of the essays: identifying the pertinent legal issues of any answer given by the examinees. Although the court considered the issue of possible "arbitrariness or capriciousness" in setting the pass/fail cutoff score, the court excluded "arbitrariness or capriciousness" of examiners' grading of the essays from consideration. The justices privately reviewed the essays but never entered the contents of the essays into evidence, and their merits were not subject to reevaluation or reappraisal by the court because the court refused to consider *substantive* errors on grading the essays (i.e., "failure to give credit to petitioners' answers commensurate with the score value of the model answers"—a criterion-referenced form of evaluation). All of the plaintiffs alleged that substantive errors had been made in grading their essays, as well as mathematical errors.

However, only the issue of defendants' alleged *mathematical* errors from marginal numerical notations on the exam papers and numbers on the tally sheets, cover sheets, and the final grade were reviewed by the court. The hearing was limited to that issue from the outset. In the eyes of the plaintiffs, the defendants' explanations and justifications of the scores on the tally sheets and the marginal notations "didn't make any sense." The plaintiffs were left with the conviction that they had demonstrated what the examination purported to measure: knowledge of the legal issues involved. "We hit the issue. They didn't like the way we explained it or whatever. We got the issues. That's one thing all four of us knew. We got the issues. We just wrote it down differently." The court neither considered nor addressed this allegation of the plaintiffs about substantive errors: not receiving credit for satisfactorily identifying the legal issues

involved according to the model answers, which (apart from mathematical errors) was the basis of the allegation that their essays had not been graded fairly.

The petitioners also alleged in their petition that contrary to the claim of anonymous grading that at least some of the examination graders knew the identities of the unsuccessful applicants when their examinations were regraded. This was a serious allegation, as it potentially would undermine the claims of impartiality and fairness about the grading (and regrading) process. Robert H. Scott, for example, was one of eight originally unsuccessful applicants later recommended for admission to the Bar. Was this evidence of favoritism or partiality because the examiners had known his identity? Why had those eight examinations been regraded? Why did the petitioners only learn that this had occurred when they read about it in newspaper stories? (The articles in question were “6 admitted to Bar after being told they had failed,” which appeared in the *Albuquerque Tribune* on October 3, 1972, “Bar Examiners check grades, pass 8 more,” which appeared in the *Albuquerque Journal* on October 4, 1972, and “Tests graded incorrectly; six allowed into NM Bar,” which appeared in *The New Mexican* on October 4, 1972.) Why did the examiners not answer questions about this matter? There was much evidence to support at least the appearance of partiality and favoritism. “When you looked at the way they graded it, it was so simple to discriminate. It was so arbitrary. You could make up these numbers. . . . And there was no defense to it.”

A third central claim of the petition was that the cutoff score of 67 percent was arbitrary. An additional allegation of arbitrariness was in the definition of “borderline” cases. They had been defined as being within one percent of that cutoff score for passing the examination.

The final argument in the petition was the importance to the Court and the Bar of the State of New Mexico of “avoiding even the appearance of impropriety in the admission process.” The petitioners argued that they sought a full disclosure of the facts. They argued that this was necessary given the ambiguous, incomplete, and confusing statements that had been made to date by Bar Examiners. The petition on behalf of the four claimants for the review of their bar examinations and admission to the Bar was submitted on October 19, 1972. However, only *mathematical* errors in grading were considered by the court (numerical notations, scores, and grades), not *substantive* errors in grading (getting credit for identifying legal issues). I said to one of the 1972 plaintiffs recently, “I wanted to see copies of the test because if they had examined the tests, that might have changed the whole history of New Mexico about standardized testing and how it’s done. The graders would have had to explain the numbers on the sides of the essays. And they would have had to explain the way everything was done. But they didn’t have to explain anything.” The interviewee responded, “But they didn’t do full discovery. . . . After we saw the tests, they destroyed them. We did want them. But they were gone.”

Response of the New Mexico Board of Examiners. The New Mexico Board of Examiners denied allegations made in the petition, namely that Tovar, Chavez, Alarid, and Uranga had already demonstrated prior to taking the Bar Examination that they were professionally competent and prepared to be admitted to the Bar and to practice law in the State of New Mexico. The Board also denied making any errors in the tallying of points that had already been written on the examinations. The examination then consisted entirely of essays, as the multiple-choice portions that have since then been part

of the exam were only added later. The Board denied making errors because they alleged that the notes in the margins were not percentages. What mattered, they argued, were the percentages on the tally sheets, not numbers written on the essays themselves. They never explained in any clear or coherent manner what those notes and numbers signified.

The Board denied having any knowledge about the assertions made in *The New Mexican* or outright denied the claims of fact made in the article in that publication, even though reporters from the newspaper had interviewed examiners prior to publishing the story. Furthermore, the Board denied that the passing grade cutoff of 67 percent was “arbitrary.” The Board denied that the examiners who reexamined disputed examinations had knowledge of the identity of any of the essay writers, even the identity of one of the original eight protestors was known to them, according to a contemporaneous newspaper report (Bar examiners, 1972). The Board denied having any knowledge of examinees’ identities and stressed rigorous adherence to anonymity through the assigning of numbers to each exam and careful adherence to policies that insured anonymity. Furthermore, the Board asserted that there was “absolutely no truth to the assertion that any applicant’s paper was graded or regraded based on any knowledge of [the examinee’s] identity.” The Board denied acquiescing to any political pressure or showing any favoritism or partiality in grading.

Regarding the issue of errors in computing the exam scores, the Board asserted that the “marginal numerical notations [on the essays] are not controlling” because these were not identical with the percentages assigned to the essays in examination. It was the percentage grades on separate tally sheets that were “controlling.” They asserted that the two sets of numbers were not identical, although they never clearly explained what the

notations on the essays meant. They argued in the Board's Exhibit A, a memorandum of November 10, 1972, "to all unsuccessful August, 1972 bar examinees and other interested parties," that the percentage grades on the tally sheet initialed by each examiner were controlling, not the written notations on the essays themselves. They never explained what those notations meant, creating a feeling of disbelief and mistrust. As one of the plaintiffs insisted in a recent interview, "I didn't flunk it [the Bar Examination that he took in 1972]." He said it was because of what he wrote and believed even more than four decades later that the real issue was that his writing was identifiable as something written by a Hispanic. He found the defendants' argument about marginal notations to be pure gibberish. His language was blunt and bitter. He claimed that he had said at that time, all those years ago:

"Look at this. . . . I got 170 points in the corner, and then all of a sudden, they gave me 21 [points] or something. The whole thing is [ridiculous]. It doesn't make sense. And they know how Hispanics are writing. . . . We are different. We say things different[ly]. . . . I learned to speak Spanish [through working with other Spanish-speaking people]. I could tell in the way I wrote some of the things [in the Bar Exam essays] that I said it like that. And I'd catch myself, and I felt that that's why we got flunked."

Another interviewee concurred. Speaking of the discrepancies between marginal notations and grades computed on the tally sheets, as well as the rationalizations and pseudo-explanations for these discrepancies in court testimony, he said, "I thought that their answers [under oath] were not adequate. They were just covering it up." As he explained further,

“The figures on the side of the exams next to the different paragraphs most of the time, I think, would add up to the grade given in that particular exam answer.

However, sometimes it didn’t, and when it didn’t, they did not say that it had to add up to the score of that particular essay answer.”

Evidentiary hearing. The court granted an evidentiary hearing because facts were in dispute and to uphold the examinees’ right to due process and equal protection of the law, pursuant to the Fourteenth Amendment. In granting the evidentiary hearing, the Court stated, “While it is arguable that the Petitioners must carry the burden of proof, the interest at hand is so great that the Board must come forward with evidence and not just denials.” Despite the denials, an injustice might have occurred, and the passing grade might have been arbitrary. These issues were clearly in dispute. The Court explicitly mentioned the previous eight examinations that had been regraded in a manner that was “much more lenient,” as evident by the fact that all eight of these examinees whose exams were regraded “were given a passing score” on the second round. The Court therefore ordered the discovery process to be undertaken.

***Amicus curiae* brief (filed November 22, 1972).** On November 22, 1972, Michael B. Browde, the director of the New Mexico Legal Aid Society, John P. Gallegos, the director of the Santa Fe Legal Aid Society, and Jeffery L. Fornaciari, the acting director of New Mexico Rural Legal Services, filed an *amicus curiae* brief (No. 9580) with the Supreme Court of the State of New Mexico. In this brief, they addressed the question of whether the New Mexico Bar Examination discriminates against Mexican-American law graduates and whether “there are realistic and practical alternatives to the Bar Examination.” They cited 21 legal cases and 16 other sources. They examined the

historical perspective of *Nuevomexicanos*, the issue of Mexican Americans in the public school system, and the Bar Examination.

They traced the history of people of Spanish-language heritage to the conquistadors and cited the Treaty of Guadalupe Hidalgo, without which, they noted, residents of New Mexico “would undoubtedly be speaking Spanish today” (pp. 2–3). They cited a history of segregation of Hispanics from Anglos in New Mexico and Texas. They cited predominantly Spanish-language populations in many schools and the lower student retention rates in those schools. They pointed to a lack of appreciation of bilingualism and the “devastating results” of this phenomenon of not appreciating bilingualism (pp. 4–5). They argued that the problems in the school system persisted through law school and to the Bar Examination itself, “which tests primarily the facility to write the English language under pressure, . . . the type of exam [that] has always penalized the Mexican-American for his bilingualism” (p. 6).

The pattern of unequal results for Anglos and examinees from Spanish-language backgrounds, they noted, was stark: a pass rate for what was then “the last examination” of 88 percent for Anglo examinees and “approximately 30 percent” for “Mexican-American applicants” (p. 6). Browde, Gallegos, and Fornaciari (1972) argued that legal precedent recognized the principle that such “a statistical disparity between similarly situated groups gives rise to a *prima facie* case of discrimination,” despite an appearance of neutrality of the test itself, because “it operates to exclude a minority from participation in a job,” thereby violating the Equal Protection Clause (p. 8). They readily conceded that the examiners harbored or exhibited no motive to discriminate; they did not allege any supposed discriminatory motivation behind the unequal results. However,

they argued that the burden of proof rested on the examiners to prove that the skills tested by the exam were job-related, as in their petition, they noted that the petitioners had won awards and had relevant work experience in practicing law in a competent manner during their time in law school and subsequent to graduation (p. 9). The plaintiffs believed that the defendants were irate to have their authority called into question, something that had never happened before. “Obviously, after we sued them, they were irate. They were irate that we were even thinking about going after the Bar. . . . The examiners, the bar commissioners, were mad at us. And you could feel the tension when we walked in.” As one interviewee stressed, “We were the first ones who ever attacked them.” The father of one plaintiff, a prominent politician, told his son: “They’re gonna hate you.” In the trial, a different interviewee noted, “We knew we were being treated differently. . . . They were very upset that we sued.”

Browde et al. (1972) argued that this issue of potential violation of Equal Protection required validating that the Bar Exam measured job-related skills fairly. Does the exam measure what it is supposed to measure? (p. 10). Browde et al. (1972) argued that the Board had not answered any of the three “minimal requisites for validation” of the examination: (1) that “the job to be performed is analyzed,” (2) that the exam is relevant to previously identified necessary skills, and (3) that the exam measures what it claims to measure (p. 10).

Court hearing and ruling on *amicus curiae* brief (1972). The Court granted a hearing on November 27, 1972, based on its authority to “define and regulate the practice of law in the State of New Mexico.” The Court did so without authorizing full discovery. The Court asserted that its most crucial responsibility was to ensure that those admitted to

practice law were competent so that New Mexicans obtained competent legal representation. A secondary consideration was to ensure impartiality and fairness in the process of examining those who sought admittance to the practice of law in the State. The Court noted the petitioners' questioning of the cutoff score of 67 percent, the issue of how borderline cases were treated, and the allegation of mathematical errors in computing examination grades. The Court said that unsuccessful examinees did have the right "to a reasonable review" (p. 4).

However, the Court ruled on December 1, 1972, "that petitioners have wholly failed to establish by evidence the allegation of their petition" that they had been deprived of constitutional rights or that they had been subject to discrimination. The Court dismissed the Petition and denied the petitioners the relief sought. The petitioners, however, had not been granted full discovery, so they had been deprived of the means to prove their claims by providing evidence.

Hearing, *Alarid et al.*, for court review of August 1972 bar examination procedures for admission to the New Mexico Bar. The hearing of Alarid, Chavez, Tovar, and Uranga by the Supreme Court of the State of New Mexico commenced on November 27, 1972. On behalf of the petitioners, one of their attorneys, Mario Obledo, said that he would "show this Court that there is no standard uniformity of grading of the State Bar Examination." This lack of uniformity of grading (based on each examiner developing his own idiosyncratic grading rubric based on the model essay answers given to him) resulted in the petitioners' being denied "due process and equal protection under the Fourteenth Amendment" (p. 6). Mr. Obledo said that he would show that the regrading (of the first eight examinations that were reviewed after examinees failed) had

not been a routine matter initiated by the examiners of reviewing borderline cases but instead was done “on the basis of someone requesting it” (Alarid et al., 1972, p. 50).

The examiners had failed to honor their obligation to review all borderline examinations and to check for mathematical errors. Under oath, Mr. Olmsted admitted to mathematical errors in calculating the scores for all four of the petitioners:

MR. OLMSTED: I would stipulate that as to Mr. Uranga, as to the second question, question 6. There is some indication marginally of a total of 80 points, whereas the grade on the tally sheet to that question was 55. Similarly, as to Mr. Tovar, the fourth section, question 5, the total of the marginal points appears to be 85, [but] the grade received on the tally sheet was 80, a five-point discrepancy. (p. 15)

As to Mr. Chavez, second section, question 2, indicated total marginal points for his answer to that question, 80, tally sheet grade of 70. As to Mr. Alarid, fourth section, question 5, indicated total marginal points opposite his answer to that question, 40, tally sheet grade for that question, 35. (p. 16)

What actually happened appeared to some to be part of an attempt to use connections to gain an advantage not routinely extended to all borderline cases. When regrading one of the contested examinations, they must have known whose exam they were regrading because one individual had approached several examiners in person and had complained of mathematical errors. Nonetheless, Mr. Bondurant, an examiner, said, “I positively have not known of any instance in which the secrecy [anonymity] of examinees’ identities was breached” (p. 142). Examiners denied knowing the numbers or recognizing the handwriting (p. 179). Denying is not the same as proving.

The examiners explained that in prior examinations, the cutoff score had been 70. After reaching a consensus that the August 1972 examination had been more difficult—again, a subjective judgment for which no criteria were identified, rationale explained, or justification given, the cutoff score was lowered, first to 69, then 68, and then 67, with discussion at each grade point (p. 214). Had the examiners lowered the cutoff score to let certain people in? The cutoff was based on a subjective judgment or consensus of the level at which someone “was legally competent to represent the people of New Mexico” (p. 136).

What was the basis of assigning points? They could not give a convincing reason or rationale in court, giving rise to a perception that what had happened was not fair, which turned into lingering mistrust. Mr. Bondurant testified that he had allocated “points based on an issue basis and that the man had demonstrated to me that he could think like a lawyer” (p. 124). What does “thinking like a lawyer” mean? How is this defined or recognized? What are the criteria? Are those criteria objective?

Mr. Bondurant admitted that the first ten answers to any question on the examination were graded on a provisional basis until the examiner grading the answers to that question to “get a feel” (purely subjective) for the question, after which the examiner “might want to revise your grading system” (p. 135). No objective evidence was provided for this. Examiners conceded that New Mexico had a higher cutoff score than those used in several other states. However, it used a lower cutoff score for experienced lawyers already licensed to practice law by some other state in the United States (p. 230). This dual standard was never explained or justified. This too created a perception of unfairness and a lingering suspicion of possible discrimination.

Mr. Bondurant testified that one or more examiners had their own idiosyncratic ways of assigning points on examinations that were not the same as percentage scores used on the tally sheet (p. 104). This was a frank admission that a standardized method of grading and assigning points had not been used, underscoring arbitrariness in grading. This piece of evidence was a crucial response to petitioners' claims that mathematical errors had been made in calculating their examination scores, the correction of which would have resulted in their passing the exam and being admitted to the Bar.

Contrary to claims made by all four petitioners that computational errors had been made in scoring their examinations, Justice Stephenson stated that only two cases of mathematical errors had been mentioned in the trial, "neither of which changed the results" from a fail to a pass after correction (p. 253). Mr. Olmsted, in an attempt late in the hearing to challenge the petitioners' claim that their rights had been violated, summarized, "As Mr. Obledo says, the main thrust of the petition here is directed to alleged arbitrariness and mathematical errors" (p. 257). However, this summary ignored the defense's failure to provide any objective rationale for how the cutoff score had been determined, aside from gut feel, intuition, or group consensus, leaving the issue of arbitrariness unaddressed.

Exams that had original scores between 65.99 and 67 were identified for review as borderline cases (p. 110). Mr. Bondurant, an examiner, testified that his intention and that of other examiners had been "to create a leeway . . . that would do justice to the applicants" (p. 112). The interviews and the testimony in court revealed that some whose original grades, according to the bar examiners, were not within this borderline range actually were within this range. According to testimony in court and interviews, because

of mathematical errors, the bar examiners had not reappraised all of the borderline examinations.

The lingering perception was that this leeway for reappraising borderline examinations was more lenient to some than to others. This perception was based on the belief that the scores for the examinations had not all been computed correctly, based on marginal notations on the essays themselves. The marginal notations added up to the scores on the tally sheets in most cases, but in some other cases, they did not. The plaintiffs maintained that the defendants never explained this discrepancy between marginal notations and tally sheets adequately.

Mr. Olmsted later refuted the insinuation or implication that in regrading borderline examinations, “the Board was doing something it wasn’t supposed to do”; instead, he claimed that according to Rule 21(d), a rule of the Supreme Court of the State of New Mexico, the Board was obligated to review borderline examinations (p. 118). Rule 21(d) stated, “The Board of Examiners shall make reappraisal of borderline cases as appropriate to assure fairness in grading” (Bar Examiners’ statement to press, Exhibit 1). Who gets to define what “borderline,” “as appropriate,” or “fairness” mean? These terms are not defined in the rule.

Mr. Olmsted stated that the implicit allegation or insinuation of the petitioners was that their right to due process had been violated, but he argued that there had been no proof presented that this had actually occurred (pp. 204–205). He never addressed the de facto disproportionate failure rates of examinees from Spanish-language heritage backgrounds vs. examinees as a whole. Justice Montoya admitted that the petitioners “concede the Bar Examiners have no discriminatory motive,” so therefore any denial of

due process was unintentional. However, Justice Montoya summarized the key legal issue of the case as follows:

The effect is the thing that is relevant, and they [the petitioners' attorneys] argued [that] once the discriminatory impact has been established and proven that the persons administering the exam have the burden of coming forward and demonstrating that the exam is job-related. (pp. 205–206)

This comment suggested that Justice Montoya was more sympathetic to the plaintiffs than Justice Stephenson was. Justice Montoya insisted that the burden of proof was on the defendants to prove that the examination measured what it claimed to measure.

The defendants unsurprisingly asserted in their testimony that the examiners looked for and assessed examinees' "ability to perceive and express significant facts and legal issues contained" in the situation and question as presented in the examination (p. 211). The examiners asserted in their testimony that simply identifying legal issues correctly 67 percent of the time resulted in a passing grade. On this basis, they argued that "the grading is primarily objective" (p. 212). However, they provided no examples, evidence, or proof.

The petitioners' counterargument was that this assertion—that the examination measured relevant legal skills and that the grading had been essentially objective—had not been independently "validated by any professional testing firm" (p. 215). Justice Oman asked Mr. Obledo whether he knew of any firm that validated bar examinations; Mr. Obledo replied that he did not (p. 217). Without having the power of discovery and possible admission into the court record as evidence of the essay answers from the bar examination, what other form of argument was open to him? Judge Hernandez asked Mr.

Obledo whether Texas (where he had taken the bar examination) used such a procedure as a measure of validation. Mr. Obledo's answer was, "Not insofar as I know." Justice Hernandez then asked whether there was "some validating organization that you know of." Mr. Obledo answered, "Not that I personally know of" (p. 216). Judge Hernandez then asked how many states validate their bar examination; Mr. Obledo answered that he did not know (p. 216).

Mr. Lucero, another attorney for the petitioners, testified that "the State of California has a validating procedure," as did the State of New York (p. 217). The defense was not interested in this evidence and did not pursue this line of inquiry. When asked, Mr. Obledo was unable to present figures about flunk rates for Mexican Americans in New Mexico "over the years," although he had provided the rates for the year in question, 1972 (p. 220).

Mr. Olmsted's summary argument for the defense was an assertion that "the examination was fairly designed and intended to measure or test those job-related and job-required skills of these examinees" (p. 259). He asserted (in a reiteration of an earlier claim) that the grading had been objective (p. 260). He repeated the testimony that the marginal points were "not controlling" (the percentages on the tally sheets were) (p. 262). He argued that the standard of correctly identifying two out of three legal issues was "doggone generous, . . . not an unreasonable requirement" (p. 262). He argued that despite the talk about violation of due process, the evidence did not support that claim (p. 268), leaving unaddressed the huge disparity in flunk rates. His final argument was the public interest of holding lawyers to a high standard of professional competence (p. 269). Which lawyers have a high standard of competency? Who decides? On what basis? Is

the exclusively essay format of the bar examination fair? Is it graded in a fair manner?

Mr. Obledo, in justifying this line of reasoning about validation, returned to the point “of the tremendous flunk rate of the Mexican American” and again asserted that the exam was not job-related (pp. 216–217). The disparate flunk rates were never addressed by the bar examiners as part of their defense. This left the due process and equal protection arguments about the low representation of Mexican Americans in the legal profession in New Mexico unaddressed and unresolved. The plaintiffs lacked full discovery, so they were unable to pursue this line of inquiry vigorously.

The Court dismissed the petition on December 1, 1972. But as one of the plaintiffs noted, even though none of them might succeed—and even if they could not prevail in court—they felt as if they had to make the attempt, regardless of the outcome, given that the possibility of a continuation of the huge discrepancies between the admission rates of Hispanics and Anglos to the bar in New Mexico was simply unacceptable to them.

Chapter 5. Theoretical Implications of Results

This chapter summarizes the findings about language ideologies, discourse analysis, and critical theories of race and identity by applying the theories that formed the study's methodology as outlined above (in Chapter 3) to the results presented in the previous chapter (Chapter 4) and showing their effects on the politics of identity. These concepts are crucial in understanding how it was possible for some of these men to prevail, not only for themselves, but also for those who would follow them in seeking to enter the ranks of lawyers and judges in the State.

This chapter also presents conclusions and implications about resistance, agency, and empowerment via insights gained from feminist theory and deconstructionist approaches to identity. All of these theoretical perspectives insist upon placing the formation and reinforcement of identity, as well as the transformation of identities, in the context of time and place (history) and dynamics of power (politics, socioeconomics, professional identities, and the distribution of privileges). Narratives and counternarratives shape and contest the construction of racial identity and hierarchies of power and privilege rooted in discourses about race, the construction of which critical race theory explains. The chapter concludes with a look at the politics and discourses of identity that are specific to the State of New Mexico.

“Thinking Like A Lawyer”: The Politics of Identity

The politics of identity emerge in specific historical contexts through conflicts over competing group claims to power, prestige, status, legitimacy, allegiance, and material resources (Bhabha, 1994). In these contexts, power, privilege, and access to resources are distributed unequally, so even though all individuals are actively involved

in constructing their own identities through their use of language (and in other ways), “some identities—notably race and caste—are imposed and coercively applied. There are economic constraints on processes of identity-making” (Kroskrity, 2000, p. 113). Also, in addition to the social construction of identity (how people conceive of their identity, based on discourses, cultural traditions, and various narratives situated in formal and informal contexts), differences in circumstances, such as wealth and poverty, having connections (or not having connections) to people in positions of power, alter the de facto dynamics of power and opportunity in both obvious and subtle ways. Despite the rhetoric of equal opportunity, competition in the marketplace (for jobs, admissions to colleges and professional programs) does not occur (to use a prevalent cultural metaphor) on a level playing field; some people start out life with advantages that others lack—a fact of life revealed recently in the scandal of a Hollywood A-list actress who paid a professional test-taker to take an examination for her daughter to tilt the scales further in her favor for admission to elite colleges. Equal opportunity remains an elusive goal, given how prone people in positions of power, wealth, and privilege are to pass on those advantages to their children and the children of friends and acquaintances who travel in their circles.

People form social identities through their interactions and speech acts in various social contexts (e.g., with parents, siblings, neighbors, schoolmates, teachers, religious figures, friends, bosses, coworkers). In these relationships, people occupy higher, lower, or equal social status and power. Any given individual’s social identity, therefore, is multifaceted, depending on social context. As Ochs (1993) stated, “speakers attempt to establish the social identities of themselves and others through verbally performing

certain social *acts* and verbally displaying certain *stances*” (p. 288; italics in original).

Identity is socially constructed largely through language and speech acts as these adhere to or flout the social conventions that exist in various contexts (e.g., organizational culture, unwritten family rules, ethnic identity, etc.). As such, identity is always in flux; it is constantly negotiated and renegotiated as people move from one context to another and as these contexts also change. “Identity, whether on an individual, social, or institutional level, is something that we are constantly building and negotiating throughout our lives through our interaction with others” (Thornborrow, 2004, p. 246).

“Thinking like a lawyer” is something necessarily manifest in and through language and linguistic discourse, which always occurs in specific social, cultural, and institutional contexts, which in turn are linked with hierarchies of power and rules of how society is structured. As such, thinking like a lawyer can never occur independent from power relationships or hierarchies of power, privilege, or tradition.

What does it take for someone from outside what some have perceived and characterized as “an old boys’ club” of white male privilege to be received as “one of us”? Although one of the interviewees conceded 45 years after managing to break into that old boys’ club—and going on to have a successful career as a lawyer—that those inside that club were not bad men, he indicated that he and the other members of his Hispanic study group had studied hard for two and a half months, by the end of that time for eight to ten hours a day. “We went in very optimistic. We knew the stuff. We quizzed each other. . . . It was an intense group study.”

As a result, he said, “I knew the issues” and asserted that after taking the test, “I absolutely felt that I had passed it.” What is remarkable in his case is not only his lack of

personal bitterness, given how hard it was for him to break into that “old boys’ club.” Also remarkable was his bravery in taking on that challenge and persisting in it for so long, given his failure at his first attempt to pass the Bar Examination and the failure of his legal challenge to those initial results.

Critical Race Theory and Cultural Clashes in New Mexico

This section presents the problems the New Mexico Bar Examination of the 1970s as seen through the lenses of critical race theory, theories of resistance and agency, feminist theory, and identity politics, all of which were in play—some self-consciously—on the part of the bar examinees of Spanish-language heritage who failed the examination and chose to contest those results in the legal system of the State of New Mexico. The broader movements of social protest for greater political and social equality influenced these individuals. The theories about such pressures for change also help people to better understand what happened and why the efforts of these individuals ultimately prevailed in the sense that the system was reformed and changed, resulting in the admission of greater numbers of *Nuevomexicanos* and members of other minorities to the ranks of lawyers and judges in the State of New Mexico from that time forward.

Critical race theory. Critical race theory (CRT) has attempted to fill a vacuum in discussions of race. Taylor (1999) noted, “most policies and practices relating to race operate without a coherent theoretical basis” (p. 181). Opponents of critical race theory have argued that it inconsistently bounces between essentialism and constructionism, which they have alleged to be a problem that has lingered within feminism and identity politics in the United States in recent decades (Cameron, 1997; Lin, 2008a; Roediger, 1991). Cameron (1997) has argued that CRT has not resolved its theoretical problems,

including the lack of empirical evidence for a black voice, an essentialist myth, which is similar to the debate over whether there is a “women’s language” (p. 25).

CRT has argued that members of the dominant race do not perceive their own whiteness, but some white scholars are now scrutinizing whiteness (e.g., Roediger, 1991) to see how it ascribes subjectivity to racial minorities, but objectivity to the dominant white race, the effect of which is to focus on the problems of the racial Other, while ignoring white privilege. The construction of objective and subjective, as well as how these play out in the formation of identity, is at the heart of determining who is capable of thinking like a lawyer and therefore worthy of admittance to the Bar.

CRT criticizes white privilege and how it is maintained. Bell (1980) argued that progress for blacks “requires the surrender of racism-granted privileges for whites,” such as a sense of automatic entitlement to positions of power, one problem being that some whites resist surrendering this power and deny the existence of their sense of entitlement (p. 523). Convergence theory has emphasized how white elites’ interests have been served by advancing the interests of racial minorities. It may portray white interests as monolithic, but white elites can have different interests than less privileged whites. This divergence was evident in the 2008 election, with much higher levels of support for Obama from college-educated whites (who tend to support affirmative action) than from white adults who had not gone to college (many of whom oppose affirmative action).

The interests of the most privileged typically are at odds with the interests of the least privileged, regardless of racial, ethnic, or cultural identity. The surrender of white privilege after *Brown*, from desegregation policies to affirmative action policies, was hardest for the least privileged whites, whose “fear of loss was intensified by the sense

that they had been betrayed” (Bell, 1980, p. 525). Less privileged whites “were incensed that elite whites would allow a restructuring of the social class system that had always guaranteed even the poorest whites a higher status than blacks” (Taylor, 1999, p. 188).

Critical race theory has taken on the forms of argument used to challenge affirmative action that attempt to deny any animus of white people towards or prejudice against people of color (i.e., anti-affirmative action theories that deny being rooted in overt or mean-spirited racism), namely: the theories of neutrality and colorblindness, equal opportunity and meritocracy, as these have been used to oppose policies of affirmative action (Taylor, 1999, p. 184). *Neutrality* and *colorblindness* are derived from the “justice is blind” ideal: that laws should be applied without regard to a person’s status. The term *neutrality* only implicitly addresses race: that the law should be neutral on race, neither favoring nor punishing anyone based on race. The term *colorblindness* applies this concept explicitly to race, meaning that race should not be considered in such things as admissions or hiring. The problem with colorblindness is that this approach leaves inequalities in place rather than remedying them through affirmative action to “level the playing field.”

Critical race theory has argued that such positions advance the interests of privileged whites. Meritocracy and colorblindness have shaped the neoconservative battle against civil rights and affirmative action. Critical race theorists have challenged ignoring whiteness when discussing race by focusing on the racial Other, which makes whiteness normative and blackness “marginal” (Taylor, 1999, p. 184).

Critical race theory (CRT) insists that racism is the norm, a permanent part of society. This claim could lead to fatalistic acceptance of entrenched inequities and denial

of responsibility for racism. However, CRT seeks to identify the embedded institutional and cultural practices of racism precisely so that they can be contested and challenged. Whites who have embraced the colorblind model wish to believe that they are not complicit in racial discrimination. “Most whites simply deny, usually not maliciously, that racism exists” (Taylor, 1999, p. 198). CRT suggests that they are deluding themselves. CRT has also postulated that people of different races think, write, reason, and argue in certain ways.

Are all whites complicit? CRT would disagree with this sweeping characterization. Instead, CRT “critiques systems that promote and sustain majority interests. More specifically, CRT would assert that although individual whites are ‘innocent,’ they benefit from dominant group membership” (Taylor, 1999, p. 199).

Critical race theory looks beyond overt racism to scrutinize covert forms of oppression. The language of equal opportunity and colorblindness hides overt racism beneath a veneer of fairness and impartiality. Collins (2000) cited postmodernism and the celebration of multiculturalism as traps that could lead people to settle for something less than substantive change. Collins (2000) argued that token hires through affirmative action were not enough. Inequalities persist.

Narratives, counternarratives, and the construction of race. Critical race theory is useful for examining narratives, counternarratives, and the construction of race in considering the assessment of linguistic minorities who took the New Mexico Bar Exam in the 1970s. Critical race theory challenges the narratives that justify or overlook racial inequalities and racial discrimination (Taylor, 1999). It calls into question the self-congratulatory narratives about concessions that the white power elite has made to racial

minorities. Convergence theory looks at the relationships between social structures, social attitudes, and economics. Convergence theory states that the power elites make concessions only when doing so serves their own interests (Taylor, 1999).

Critical race theory and convergence theory (see Chapter 3) have portrayed the civil rights movement differently from the conventional narrative, which stressed alliances between those who had been discriminated against and privileged white liberals (Bell, 1980). These liberals have been portrayed as motivated by selfless concern for social justice. They joined ranks with black activists in the 1970s to press for civil rights legislation and to enforce desegregation laws in the wake of *Brown v. Board of Education* (1954).

Rather than stressing disinterested benevolence (a selfless concern by some of those in positions of power and privilege for the rights of the oppressed), convergence theory has postulated that those in power further the cause of minorities only to the extent that the goals of the minority groups converge with the self-interest of the powerful. Critical race theory and convergence theory supply a different explanation for the acquiescence of the white power structure to some demands made by blacks. These critical stances could be appropriated for examining the treatment of New Mexico linguistic minorities.

Critical race theory and convergence theory can help in constructing counternarratives of the civil rights movement and of the current neoconservative opposition to affirmative action and multiculturalism (Castagno & Lee, 2007). Diversionary narratives (e.g., the narrative of liberal virtue in the civil rights movement) can distract from systems of domination and oppression. It is imperative to scrutinize the

narratives that perpetuate these systems of domination and oppression. Collins (2000) argued against settling for symbolic change.

There is a fierce battle about the terms of the debate. The neoconservatives harp upon meritocracy and colorblindness, while critical race theories insist upon social justice and cite the persistence of racism. They are willing to scrutinize whiteness, including differentiating “whiteness” from “white people”: “ ‘Whiteness’ is a racial discourse, whereas the category ‘white people’ represents a socially constructed identity, usually based on skin color” (Leonardo, 2002, p. 31, qtd. in Gillborn, 2005, p. 488). As Gillborn (2005) explained, “Critical scholarship on whiteness is not an assault on white people per se: It is an assault on socially constructed and constantly reinforced power of white identifications and interests” (p. 488). Critical race theory and convergence theory offer tools that could help forge substantive change in reducing inequality, discrimination, and oppression. However, whether they will lead to the desired results of greater equity and social justice remains an open question.

Counternarratives are stories that stand in opposition to dominant discourses or master narratives on racial identity. The metaphor of the mask occurs in counternarratives about the differences between public and private identity, as well as associated explorations of internalized racism in examining how we index identity in self-description. In their dominant discourse, Anglo Americans stressed the supposed passivity of *Nuevomexicanos*, but many Hispanic New Mexicans were anything but passive in resistance to Anglo cultural dominance. They obtained access to growing numbers of printing presses in the latter 19th century, making it possible to disseminate counternarratives and thereby “gave voice and expression to concerns rooted in the

conflict and open racial hostility directed at them, . . . [using] ‘Yankee ingenuity’ to counter Anglo-American attempts at a cultural conquest of the region” (Meléndez, 1997, p. 23).

Counterstorytelling is a methodology within critical theory that can be used as a form of resistance (Solorzano & Yosso, 2001). Solorzano and Bernal (2001) explained that counterstorytelling combines critical race theory with resistance to racism, whether internalized racism or racism encountered in social interactions. *Beloved*, a novel by Toni Morrison, is a counternarrative because it tells a story (as Morrison stated) that did not get passed on. Counternarratives tell the stories that do not get told in mainstream narratives; they give voice to those whose voices have been silenced. Counternarratives are therefore “a tool for analyzing and challenging the stories of those in power and whose story is a natural part of the dominant discourse—the majoritarian story” (Solorzano & Bernal, 2001, p. 328).

People whose stories are not told can recede into invisibility, along with voicelessness. In giving them voices and faces, counternarratives can help these people in the margins to build community. This helps empower them to “challenge the perceived wisdom of those at society’s center” and “transform established belief systems” (Solorzano & Bernal, 2001, p. 328).

If identity is socially constructed, if identity is always relational, not inherent (Harris, 1997, p. 118), then what stories do people tell themselves while resisting discrimination and oppression? Harris (1997) cited Zora Neale Hurston’s essay “How it feels to be a colored me,” which contained the insight that “her colored self is always situational” (p. 119). The Other is always seen through the eyes of someone in a position

of power who has a different construction of identity for self and other.

Counterstorytelling as a form of resistance can educate listeners, viewers, and readers about this social and relational reality to help dislodge folk essentialism from its privileged position in popular culture. This would permit notions of the social and relational construction of identity to emerge from the lofty realms of graduate seminars and to enter the mainstream, into the realm of lived experience, not just academic discourse. Montoya (1997) stressed the importance of foregrounding experience in constructing counternarratives, which is why she wrote her essay autobiographically from a Latina point of view. She insisted that the focus on lived experience was one of the most important tenets of feminism.

For feminists, Pyke (2010) observed, the “study of internalized sexism among women has long been regarded as essential to strategizing against gender oppression” (p. 552). The point of excavating such internalized oppression is not to wallow in it, but to transform it. “To forge effective methods of resistance, it is necessary to understand how oppression is internalized and reproduced” (Pyke, 2010, p. 552). The narrative of oppression must be understood before a counternarrative can be constructed.

To construct counternarratives, Fineman (1997) started with two legal responses of feminism to the construction of woman as Other. The first was to fight for equality, acknowledging no inherent differences between men and women. This assimilationist thrust was manifest, for example, in challenging professional barriers to women in the workplace. Because such past exclusion had been based on arguments of differences between the sexes, this first approach denied such differences. However, a more recent approach from feminist theory has legally challenged the emphasis on “sameness of

treatment” (Fineman, 1997, p. 53).

“ ‘Postegalitarian feminists’ urge a reconsideration and reconstruction of differences—this time from a feminist perspective” (Fineman, 1997, p. 54). This move away from assimilationism is similar to the move away from the cultural “melting pot” theory to the recognition and preservation of ethnic differences through the (also culinary) metaphor of the “salad”: the American people are not a puréed soup, in which all distinctions have been blended away (or melted together). Instead, these distinctions can remain recognizable, as a tomato wedge or a slice of boiled egg in a salad remains identifiable, while still contributing to the salad. “Arguing for a theory of difference questions the presumed neutrality of institutions” (Fineman, 1997, p. 54), which is in line with other theories of resistance that have challenged notions of objectivity and universalism. Institutions, like individual identities, are social constructions. Institutions “are reflective of primarily male experiences” (p. 54), as well as the values of the dominant culture.

Some of the most important counternarratives have arisen in response to racial narratives advanced by conservatives and privileged whites who opposed affirmative action through the ideas of colorblindness, race neutrality, and meritocracy. The clash of these narratives and counternarratives is significant for this research. These different constructions of race and the elusive goal of fairness (equality) have been litigated in cases about educational policy and have been reported in the press.

López and Olivas (2008) explored a now-forgotten case heard by the United States Supreme Court even before *Brown v. Board of Education* (1954), namely: *Hernandez v. Texas* (1954), which upheld the rights of Mexican Americans and others

under the Fourteenth Amendment. In this case, the court did not uphold the notion that justice is or should be colorblind. The court ruled that nonwhite jurors should have been included on the jury for Hernandez, a Mexican American who was tried and convicted of being guilty of murder by an all-white jury. As López and Olivas (2008) noted, “*Hernandez* stands in opposition to the claim that the Constitution should be colorblind” (p. 273). *Hernandez* expanded recognized racial categories beyond white and black by proving in this case that Mexican Americans suffered racial discrimination.

Tension between Anglo Americans and *Nuevomexicanos* also played out in the press. The history of the press in New Mexico after the signing of the Treaty of Guadalupe Hidalgo was about who would control the discourse about current events in New Mexico. This involved a struggle between Anglo-American attempts at cultural domination and *Nuevomexicano* resistance to those attempts. “Anglo-American publishers and editors,” due to the predominance of the Spanish language in New Mexico, soon realized that they needed to publish “materials in Spanish,” using *Nuevomexicanos* as translators, while Anglos retained control over “ownership and editorial policy” (Meléndez, 1997, p. 23).

Growing literacy in Spanish (largely a product of Catholic schools), coupled with access to the Anglo printing technology, led to the emergence of more publications owned and controlled by Spanish-speaking New Mexicans by the late 1800s, “a powerful culture of print with the capacity to communicate with the majority of the citizenry of the Southwest” (Meléndez, 1997, p. 26). In the 1880s and 1890s, such Spanish-language publications emerged in Santa Fe as *La Voz del Pueblo* and *El Independiente* (Meléndez, 1997, p. 28). However, the Spanish-language press lost power and influence as the

officially bilingual policy of New Mexico was undercut by such occurrences as the passage of the Public Education Law of 1890, which made English the official language of instruction in New Mexico's public schools (Meléndez, 1997, pp. 209–210). *El Nuevo Mexicano*, the last Spanish-language newspaper established in the 1890s that remained continuously in publication, “ceased publication on April 30, 1958” (Meléndez, 1997, p. 210).

What critical race theory adds to our understanding of the 1970s bar

examination issue. To the extent that critics of it may be correct that critical race theory (CRT) veers between essentialist and constructionist views of race, it merely mirrors the views of race held by various members of society. A central claim of CRT is that members of the dominant power structure do not perceive their own whiteness, although prone to characterize nonwhites as the Other—in this case, people incapable of “thinking like a lawyer.” In this way, CRT may explain how bar examiners discriminated against bar examinees of Spanish-language backgrounds without necessarily possessing any overt or conscious intention to exclude *Nuevomexicanos* from the Bar. CRT does examine power structures, especially how white privilege is maintained, a central issue in this case study.

Theories of resistance and agency. Agency is the capacity to take action in the real world. One “longstanding issue regarding research on identity [is] the extent to which it is understood as relying on agency.” The problem arises when identity “is conceptualized as located within an individual rational subject who consciously authors his identity without structural constraints” (Bucholtz & Hall, 2005, p, 606). Within sociocultural linguistics, “agency is productively viewed as the accomplishment of social

action. . . . Identity is one kind of social action that agency can accomplish” (Bucholtz & Hall, 2005, p. 606).

“Resistance theories demonstrate how individuals negotiate and struggle with structures and create meanings of their own from these interactions,” which is one way in which these theories acknowledge human agency (Solorzano & Bernal, 2001, p. 315). Language policies have become a focal point for resistance, for although “on the surface, language policies appear to follow the rules of pluralistic democratic societies, including advocating that all citizens should have the opportunity to use a variety of languages,” language policies in fact serve as a “platform for observing the dynamic whereby minorities have begun to demand rights while established groups fight to maintain their privileged status” (Shohamy, 2007, p. 120).

Mediated action, Tappan (2006) argued, results from “the relationship between the individual and the social, cultural, historical, and institutional contexts in which the individual lives” (p. 2122). These contexts shape and provide the cultural tools or mediational means that are available to the individual (Tappan, 2006, pp. 2122–2123). The tools available to the individual, in turn, shape the individual mind, according to Vygotsky (Tappan, 2006, p. 2123). The individual must appropriate the relevant tools for individual mastery and ownership to occur (Tappan, 2006, p. 2125). This mastery occurs through participating in interpersonal interactions, such as those with teachers, coaches, teammates, family, friends, and fellow students, as well as through messages transmitted through various media (Tappan, 2006, pp. 2126–2127).

Similarly, acquiring internalized oppression requires mediated action; for this reason, Tappan (2006) suggested using the term *appropriated oppression* in place of

internalized oppression. “Appropriated oppression results from the mastery and ownership of cultural tools that transmit oppressive ideologies, messages, and scripts” (p. 2127). This shift in terminology underscores that the phenomena of “oppression and domination are fundamentally sociocultural, not simply psychological” (Tappan, 2006, p. 2127). As such, these phenomena can be viewed through a wider lens, one that considers forms of discourse and other artifacts of consciousness (Tappan, 2006, p. 2127). “Oppression originates in discourse” (Kumashiro, 2000, p. 40, qtd. in Tappan, 2006, p. 2136). Certain “forms of discourse frame how people think, feel, act, and interact” (Tappan, 2006, p. 2137). One of the implications of viewing oppression as mediated action is to change how we view those affected by oppression by moving “from the image of the oppressed as victims and the privileged as villains” who “operate out of a static mindset that cannot be changed” (Tappan, 2006, p. 2139).

Agency can be mobilized in response to or in resistance to racism and oppression, but it is also important to remember that racism and oppression are likewise results of agency. As discussed above, racism and oppression can be internalized, and resistance to racism and oppression also have both external and internal forms (Solorzano & Bernal, 2001, p. 324). Internal transformational resistance involves conforming outwardly, while inwardly conducting a critique of oppression (Solorzano & Bernal, 2001, p. 324).

Tappan (2006) argued that internalized oppression and internalized domination should be viewed “not as internal, psychological qualities or characteristics, but rather as sociocultural phenomena—that is, as forms of ‘mediated action’ ” (p. 2115). Tappan insisted that racism, sexism, and homophobia (along with other forms of oppression) are not merely problems that result from the attitudes held by individuals. Therefore, solving

the problem of oppression requires more than fixing or changing individuals' attitudes. The solution requires systemic changes in institutional structures, procedures, and embedded organizational norms because attitudes that result in oppression are "systematically embedded in the structure of our social lives" and in institutional structures (Tappan, 2006, p. 2117).

People who have been disenfranchised and disempowered regain agency through resistance. The alternative to resistance is to acquiesce to the perpetuation of inequalities and social injustices through internalizing the values of and identifying with the oppressor, which can result in two phenomena identified by Freire: *self-deprecation* and *horizontal violence* (Tappan, 2006). The first, self-deprecation, is "a sense of shame, humiliation, self-hatred, and low self-esteem that is characteristic of the oppressed" (Tappan, 2006, p. 2118). In the second, horizontal violence, "members of the oppressed group engage in violence against their own comrades" (Tappan, 2006, p. 2119).

Systemic changes are needed in educational institutions to produce greater social justice and equality. Schools, including law schools, have been turned into "testing and sorting models of assessment that reproduce the wide range of inequalities that characterize a larger social order" (Giroux, 2001, p. 47). Like Giroux, Feinberg and Soltis (1998) lamented an educational system driven by the demands of marketplace capitalism, which they satirically dubbed "factory prep" (p. 3). Resistance to the forces of market capitalism and its educational institutions and other mechanisms of social control is divided. Allen (1999) observed, "Current counter-hegemonies are structured and delimited by the dialectic between [classical] liberal humanism and modernist identity politics" (p. 272). In modernist identity politics, groups of individuals, especially

minorities, have formed tribes or interest groups to challenge the abstract universalist classical liberal rhetoric about equality of opportunity and meritocracy to point out that some groups, overall, achieve and receive less due to an unequal distribution of money, power, and privilege.

Theories of resistance include theories of space, feminism, critical race theory, convergence theory, and counterstorytelling. The intersection of feminism and racial politics is a particularly fruitful area for addressing resistance as it pertains to the Chicano identity. In particular, black and Latina feminists have generated particularly useful insights on resistance. In this section, I begin with a look at the notion of space in representation and resistance. Then I turn to a discussion of feminist theory and notions of identity politics as they relate to Chicano identity in New Mexico.

Masking and unmasking while crossing boundaries. Moving across racial and language boundaries involves moving from one set of rules and expectations to another. Things that are safe and familiar in one's home context can be seen as hostile or threatening in another context. Crossing cultural boundaries thus frequently involves masking and unmasking, phenomena familiar to Americans from a Spanish-language background. "Throughout history, masking and unmasking concepts have been used to explore the inner self—the person hiding behind the public face," including works in the traditional Euro-American literary canon, including William Shakespeare's "All the world's a stage / And all the men and women merely players" (Montoya, 1997, p. 277). This trope appears also in the writings of prominent Latin American writers. These themes have been explored, for example, by Fregoso and Chabram (1990) and by Anzaldúa (1990).

Octavio Paz, among other Latino-American writers, has discussed the mask metaphor, but, according to Montoya (1997), “shows little understanding of the discriminatory and oppressive forces within American society and fails to accept the mask as a strategy for resisting external subordinating forces. Paz concludes by urging humanity to tear off the mask, to eschew the disguise” (p. 277). How easy it is for those in a position of power and privilege to insist that Others remove their masks. Paz apparently did not acknowledge this truth: “The more menacing the power, the thicker the mask” (Scott, 1990, p. 3). In extremely unequal power situations (concentration camp inmate to Nazi guard, for example), “the public transcript of the victim bears the mark of mortal fear” (Scott, 1990, p. 3).

This navigation of different realms is one many black people have faced in going from cultural and social spaces dominated by blacks to those dominated by whites. The concept of “code switching” between Ebonics and standard English surfaced in an unexpected way in the political arena with Senator Reid’s comment about “Negro dialect” (in reference to then-candidate Barack Obama, who, according to Senator Reid, did NOT use it, a backhanded compliment). This example shows the persistence of the impulse to brand the Other, even by well-meaning liberals (who may, as Senator Reid did, convey the impression that they don’t mind black people, as long as they act white).

Surely, the linguistic minorities who took the New Mexico Bar Exam in the 1970s, many of whom were the first members of their families to go to college, let alone to law school, were branded linguistically and ethnically as other, whether or not the people seeing them as other were liberal. Resistance must include foregrounding the moves that paint members of minorities as Other, while acknowledging the skills that are

needed for members of minority groups to navigate different social realms through the construction of a multiplicity of selves.

Minorities, while donning a professional mask within the dominant culture, are subject to “the theatrical imperatives that normally prevail in situations of domination,” which “produce a public transcript in close conformity with how the dominant group would wish to have things appear” (Scott, 1990, p. 4). This public transcript, given while acting within the dominant culture, has a counterpoint in the private sphere (talking jive instead of standard English, for example): what Scott (1990) termed a “hidden transcript, produced for a different audience and under different constraints of power” (p. 5). Such counternarratives or hidden transcripts can emerge in support groups and peer groups as a source of resistance because peers pick up on code language and cues that members of the dominant culture tend to miss, ignore, or gloss over. Encouragement to expand and elaborate is given by members of the dominant culture to minorities only in certain social or political contexts, typically when the interests of those in power converge with the interests of minorities.

Masking and unmasking may be at the heart of the Bar Exam essays written by heritage-language speakers. What if precisely the removal of the mask in their essays led to heritage-language speakers being construed as Other and therefore inadequate? An alternative hypothesis could be that these takers of the New Mexico Bar Exam were insufficiently skillful at constructing a mask in English that demonstrated that they could think and write like lawyers (like white people) while navigating the legal waters of the dominant Anglo culture. “*Esto es el exilio / Esta tenerme que inventar un nombre, / un figura, / una voz nueva*” (Montoya, 1997, p. 278). [“This is exile / this having to invent a

name for myself, / a face, a new voice.”] Masking and unmasking requires gaining greater self-awareness, looking in the mirror of self-consciousness in ways that can be painful to the extent that one has absorbed harsh self-judgments and self-assessments from the dominant culture, a theme explored in the following section.

Self-scrutiny and internalized racism, the oppressor within. Internalized racism is the oppressor within. People are terrified by oppression, sometimes represented by the figure of the evil racist (e.g., Adolf Hitler). But what is perhaps even more terrifying is the possibility of letting this figure into one’s own psyche as the oppressor within, the voice of oppression that tells us that we are inferior and undeserving of dignity and equality. Perhaps this is why the plaintiffs in the 1972 lawsuit felt that they had to challenge the results of the Bar Examination, given that they had felt that they had achieved and demonstrated mastery of the legal issues in question in their essay answers. Maybe the plaintiffs had to prove something to themselves, even if they could not prove it in court to the satisfaction of the New Mexico Supreme Court justices.

Internalized oppression is tied to complex relationships between feelings of shame and guilt, which are internalized, and feelings of blame and anger, which are directed at other people. The inner oppressor is the product of the internalization of racism, which happens only through the unconscious acceptance of the belief that racism and oppression are normal. According to Tappan (2006: 2116),

Internalized oppression is a concept currently widely used across a variety of disciplines and critical projects, including contemporary critical pedagogy (see, for example, Freire, 1970; McLaren, 1998; Tatum, 1997; Young, 1990), to describe and explain the experience of those who are members of subordinated,

marginalized, or minority groups, . . . those who are powerless and often victimized, both intentionally and unintentionally, by members of dominant groups; and those who have ‘adopted the [dominant] group’s ideology and accept their subordinate status as deserved, natural, and inevitable’ (Griffin, 1997, p. 76). (p. 2116)

Even if there are dangerous moves in the construction of minority identity made by those in the dominant culture that should be resisted, perhaps equally problematic is the oppression of self that is produced and replicated internally. In 1903, W. E. B. Du Bois discussed the idea of “double consciousness” for the African American, who was born into “a world [that] yields him no true self-consciousness, but only lets him see himself through the revelation of the other world” (Pyke, 2010, p. 551). Within black feminist theory, Harris (1997) summed it up this way: “This experience of multiplicity is also a sense of self-contradiction, of containing the oppressor within oneself” (p. 118). Eleanor Roosevelt understood this concept when she said, “No one can take away your self-respect without your consent.”

Resistance must contain an element of self-scrutiny and self-reflection.

According to Pyke (2010), “the feminist study of internalized sexism among women has long been regarded as essential to strategizing against gender oppression (e.g., Anzaldúa, 1993; Bordo, 1990; Crenshaw, 1995; Dinnerstein & Weitz, 1994; Peterson, 1986; Pyke, 1996)” (p. 552). Pyke (2010) stressed that internalized racism among people of color was “not the result of some cultural or biological characteristic of the subjugated . . . or [some] other shortcoming of the oppressed. . . . [Instead,] it is an

inevitable condition of all structures of oppression” (p. 553). There are “social structural and cultural mechanisms that maintain and reproduce systemic processes of domination . . . through the production of ideologies or knowledge,” which is sometimes referred to as “indoctrination and mental colonization” (Pyke, 2010, p. 556).

The constructive response to internalized racism and any resultant racial self-hatred is resistance and agency to counter such processes of domination. This may necessitate painful self-scrutiny around

the phenomenon of “defensive othering,” which Schwalbe et al. (2000) described as identity work engaged by the subordinated in an attempt to become part of the dominant group or to distance themselves from the stereotypes associated with the subordinate group. This dynamic is evident in the formation of negative sub-ethnic identities within the group. For example, among Mexican Americans, the [identity] *wetback* (Obsatz, 2001) [is] used to denigrate co-ethnics who are newly emigrated. (Pyke, 2010, p. 557)

This is one form of distancing from the dominant group’s stereotypes of the whole minority group. “Defensive othering is a form of internalized racism” (Pyke, 2010, p. 557).

Space in representation and resistance. Every individual, every group, and every community must carve out a space for itself, so attempts to rob people of their space and their ties to place (such as *Nuevomexicanos*’ ties to the land) are inherently

disempowering, while resisting that move to decontextualize a person or a people is potentially empowering. Speech acts can be used to harm others, to rob them of their sense of belonging “within the community of speakers. . . . To be injured by speech is to suffer a loss of context, that is, not to know where you are” (Butler, 1997, p. 4). After a verbal assault, one may lose the sense of connection with others in a caring community, a loss of sense of space in which one belongs and is valued.

Claiming personal and group space can be a powerful form of resistance, and in New Mexico, one nexus of this struggle has been ongoing disputes over Spanish land grants, which were honored in the Treaty of Guadalupe Hidalgo, but violated in the westward push under the concept of Manifest Destiny. No one’s experience is decontextualized; life experience is always contextualized; it always exists in time and space. Group identity functions in relation to space because identity is always relational and contextual; identity is situated within a geographic, political, spatial, and cultural context. Discourse always occurs within specific contexts or spaces. Political discourses occur within political contexts. “It is not sufficient to observe, for instance, that political discourse often features the well-known ‘political’ pronoun *we*. It is crucial to relate such use to such categories as *who is speaking*, *when*, *where*, and *with/to whom*, that is, to specific aspects of the *political situation*” (Van Dijk, 2004, para. 46).

Dominant groups have tried to decontextualize existence while claiming a hegemonic universalist ontology. Dominant groups ignore the issue of space, the issue of context, to draw attention away from the relations of power and privilege between groups, which always exist in contexts, in space. Feminist theorists have resisted moves to decontextualize interpersonal encounters by challenging, for example, the scholarly

pose of objectivity and the accompanying pretense of the invisibility of the observer or commentator:

There is an ethical commitment to recognizing the situatedness and partialness of any claim to knowledge. . . . The feminist commitment to explicitly positioning oneself as a researcher rather than effacing one's presence in the research process, a practice that echoes the politics of location in reflexive ethnography, has exposed the fact that reality itself is intersubjective in nature, constructed through the particulars of self and other in any localized encounter. (Bucholtz & Hall, 2005, p. 605)

Oppressed groups have resisted the hegemonic claims of dominant groups in part by opposing their attempts to marginalize or eliminate the space of oppressed people. This is why the failure of the United States to honor the land rights of *Nuevomexicanos* has endured as a major ongoing source of bitterness. Theories of resistance have embraced the concept of space.

Allen (1999) cited Lefebvre's concepts of perceived space, conceptual space, and lived space. According to Lefebvre, perceived space uses a "blinding objectivism" that enforces "normative ways of seeing" (qtd. in Allen, 1999, p. 259). Conceived space forms "spatial logocentrism" that submerge lived space, allowing "humans to both 'see' and 'not see' the world" (Allen, 1999, p. 259). Lived space "is the space of representation and resistance" that "resists the essentializing visions of cool, rationalized conceived space" (Allen, 1999, p. 259). Allen (1999) explained, "explorations of lived space and its relationship with perceived and conceived space are epistemological" (p. 261). Lefebvre's concepts are discussed further below in the section "Identity politics in

New Mexico populations” (see page 131).

Feminist and deconstructionist critiques of universalist ontology. A universalist ontology drawn from Enlightenment ideas about the “rights of man” permeated the Declaration of Independence. In practice, American claims about universal human rights can be used and have been used to silence the voices and ignore the values and experiences of members of minority groups, including Hispanic New Mexicans and African-American women (among others). Feminist theorists have criticized the universalist ontology of patriarchy, but paradoxically, some white feminists have essentialized the notion of “woman,” relying on a universalist ontology (albeit one that contests patriarchal values) back into the discourse, a move that black feminists and Chicana feminists have challenged.

These minority feminists have argued that the experiences of white women are not necessarily representative of the experiences of all women, particularly those of women of color. There are multiple identities for women and multiple discourses about what it means to be a woman. Not all women have equal access to power, money, and privilege. Can privileged white women speak for all women?

The Declaration of Independence purportedly addressed “a universal audience—nothing less than ‘mankind’ itself, located neither in space nor in time” (White, qtd. in Harris, 1997, p. 115). Identity politics has resisted such universalizing claims, even as it has resisted essentialist claims, looking instead to the social construction of identity within specific contexts. Universalist claims, Harris (1997) insisted, as in the case of the Declaration of Independence, rest upon silencing dissenting voices to produce the illusion of unanimity. Minorities have resisted moves to silence them, to render them voiceless

and invisible.

White women feminists occasionally have moved to essentialize “woman,” a type of universalist ontology that women of color have called into question, especially when white feminists have implicitly claimed that they could speak for all women. Hurtado (2003) noted, “The differences in what white hegemonic feminisms and Chicana feminisms saw as the site for intervention have had enormous repercussions for how we define feminism within the academy” (p. 170). Some 2019 feminist gatherings have been criticized in the media for lacking diversity racially and ethnically. Collins (2000), a black feminist, has proposed her own ideas for resistance through empowerment.

Collins (2000) noted, “Developing a black feminist politics of empowerment requires specifying the domains of power that constrain black women, as well as how such domination can be resisted” (p. 19). Resistance requires understanding the structural domain of power. Resistance requires understanding how segregation by race, class, and gender occurs. Stratification of opportunities and results does not occur at random. Mechanisms interlock in systems to perpetuate such stratification, including housing patterns, which are tied to access to education (which schools children attend), which is linked with job opportunities, which produces economic results, and these results tend to be self-perpetuating. Children from privileged families are more likely to have high-paying, high-status jobs than are children from disadvantaged or underprivileged families.

Social constructionists have challenged the universalist and essentialist premises of legal discourse. One of these challenged premises is the claim of entrenched powers “to speak from the position of ‘objectivity’ rather than ‘subjectivity,’ ‘neutrality’ rather

than ‘bias’ ” (Harris, 1997, p. 116). Derrida’s idea of deconstruction therefore factors into resistance to such ontological claims because such claims are used to justify a perpetuation of the unequal distribution of the social goods of wealth, position, and power. Texts, including legal texts, reflect and reinforce “complex cultural codes of power, assertion, and domination” (Harris, 1997, p. 116), which apportion greater status and legitimacy to some people than to others.

Harris (1997) implicitly embraced deconstruction by challenging not only the “notion that anyone can speak for everyone else, but also that there is a unitary self. Instead, she argued for the existence of “multiple consciousness” (p. 116); self is a constantly changing social construction, not a fixed or immutable essence (an idea further explored below). Alcoff (1997) addressed feminist theory and deconstruction: “The dilemma facing feminist theory today is that our very self-definition is grounded in a concept that we must deconstruct and de-essentialize” (p. 87).

As noted above, the Anglo Americans who had incorporated the Territory of New Mexico (later the State of New Mexico) into the United States had embraced a universalist ontology traceable to the Declaration of Independence. This universalist ontology grew from 18th-century European Enlightenment ideas about “the rights of man” that emerged after the Renaissance and the Reformation in Europe. These ideas stressed the rights and responsibilities of individuals and individual conscience, as well as the right to democratic forms of political organization, rather than traditional historical group allegiances (e.g., to the King or to the Church). This universalist ontology was challenged in the court cases under review.

Group struggles and identity politics. An important point in feminist theory is

the issue of identity politics. Bordo (1990), for example, discussed “the indeterminacy and heterogeneity of cultural meaning and meaning-production” (p. 147). According to Haraway (1990), who espoused the idea of heterogeneity, claimed that identity politics is based on the idea of homogeneity within each group. Identity politics, according to Haraway (1990) leads to the division of the body politic into interest groups (e.g., socialist vs. bourgeois, gay vs. straight, white vs. persons of color). Haraway (1990) warned that identity politics leads to idealization and thus notions of purity and authenticity rather than acknowledging diversity. She claimed that we must realize that we are all heterogeneous so that we can begin to establish new alliances, an “affinity politics” based on contingent coalitions.

Butler (1999) also attacked identity politics and gender dualism, proposing instead a notion of gender as polymorphous. Her focus has been on performativity, to perform repetitive patterns in a subversive way rather than to re-establish a priori positions, as through the performances of cross-dressers, who parody gender construction through exaggerated stylized repetition, subverting hegemonic masculinity (Butler, 1999, p. 138). Butler (1999) argued for “new possibilities for gender that contest the rigid codes of hierarchical binarisms. . . . It is only within the practices of repetitive signifying that a subversion of identity becomes possible” (p. 145).

Collins (2000), like Butler (1999), proposed a route to change. She discussed “transversal politics” as a means to forge substantive change. She argued that change affects not only individuals, but also groups. People’s participation in and identification with groups (race, gender, age, class, citizenship status, and sexuality) must be considered, as groups “have distinctive patterns of participation in shaping domination

and resistance” (p. 245). Transversal politics involves building coalitions. It also involves conceiving “of cognitive frameworks used to understand the world and to change it” (Collins, 2000, p. 245). These efforts involve acknowledging particulars and communities rooted in particular social conditions and practices.

Resistance involves work towards reclaiming the rights of minorities to construct their own identity rather than deferring to the construction of minority identity by the dominant group—as “other” and as less than a full or whole self. Fineman (1997), for example, examined “the historical construction of women as ‘different’”—that is, as “other” (p. 53). Collins (2000), Dudziak (2009), and Harris (1997), among others, discussed the construction of African Americans as “other,” and Hurtado (2003), López and Olivas (2008), Mirandé (1987), and Nieto-Phillips (2004) examined the construction of Hispanics as “other.”

Resistance involves reclaiming the right of minorities to define themselves. This includes the choice of names. Therefore, debates over Negro vs. Afro-American vs. African American vs. black, American Indian vs. Native American, and Hispanic vs. Spanish vs. Chicano/a vs. Latino-American vs. *Nuevomexicano/a*, etc. are important facets of the right to self-definition and self-constructed identities instead of being defined as the “other.” The “other” is defined in reference to and as a variation of the white norm (Harris, 1997, p. 122). Resistance and the construction of identity are necessarily linked. Harris (1997) remarked, “Black women have had to learn to construct themselves in a society that denied them full selves” (p. 121).

Multiple consciousness. Like Haraway’s (1990) notion of heterogeneity, multiple consciousness is a concept that can be useful in resistance, for it permits the

forging of alliances without glossing over differences. Harris (1997) stressed the three major contributions that black women have to offer postessentialist feminist theory: the recognition of a self that is multiplicitous, not unitary; the recognition that differences are always relational rather than inherent; and the recognition that wholeness and commonality are acts of will and creativity, rather than passive discovery. (p. 117)

The concept of multiple consciousness, linked with the multiplicitous sense of self, is useful for anyone who crosses a boundary—or who seeks to cross a boundary—into a profession that has been dominated by people from a different socioeconomic class, race, ethnicity, culture, or set of values.

People can assimilate without necessarily losing their sense of self. People can pick up, put on, and then leave aside identities, such as those identities that are linked with professional roles when the professional leaves the workplace and enters personal space. The boundary between public life and personal life seems to be increasingly blurred in contemporary culture, which is obsessed with the private lives of public figures (celebrities and politicians, among others). However, this line is worth preserving so that people are free to construct their identities as they choose. This means that in private, they should be allowed to choose to take off the mask that they wear in public roles (work life or professional life). But how is the sense of self to be respected, given multiple consciousness, when a piece of writing is to be evaluated, supposedly in an objective or at least a fair manner?

Culture, politics, and identity in New Mexico. The history of New Mexico illustrates hegemony, how “ideologies play a role in the legitimization of power abuse by

dominant groups,” with ideology defined as “the foundation of the social representation shared by a social group” (Van Dijk, 2004, para. 4–5). Ideology represents the shorthand used in discourse between people who already believe the same things and share the same values.

Althusser [argued] that ideology, as opposed to science, [moves] constantly in a closed circle, producing not knowledge, but a recognition of the things [that] we already know. It [does] so because it [takes] as already established fact exactly the premises [that] ought to [be] put into question. (Hall, 1982, p 75)

Ideology “disguises its premises as known facts” (Hall, 1982, p. 76).

Prior to the period of extensive contact between the vastly different cultures of English speakers and Spanish speakers in New Mexico was the period of Spanish colonial rule, in which Spanish speakers encountered the Native Americans already here when the Spaniards first arrived. Coronado arrived in New Mexico in 1540–1541. The early Spanish policy “had resulted in the extermination of the West Indians and had given priority to enrichment of Spaniards over conversion of Indians” (Spicer, 1962, p. 331). The Spanish policy “after 1600 placed prime importance on turning Indians into good Christians” (Spicer, 1962, p. 331). The Spaniards, and later the Mexicans, “thought of themselves as bearers of civilization” to the Indians (Spicer, 1962, p. 5). In this, the Spaniards were importing a European idea. “The ancient distinction in Europe between civilized and barbarian was ready-made for Spanish use” (Spicer, 1962, p. 281).

The legal distinction between Indian and non-Indian that “had formed the basis of Spanish colonial society . . . had been legally abolished [after Mexico’s independence from Spain] in 1821” but was reinstated by the United States (Nieto-Phillips, 2004, p.

54). However, it would be erroneous to infer that the legal equality between Indian and non-Indian under Mexican rule stemmed from racial harmony. Despite Mexico's legal equality of the races, Mexican society and New Mexican society had "remained highly stratified by race" under Mexican rule (Nieto-Phillips, 2004, p. 42).

Conflicts between Mexican leaders and Indians in various regions of Mexico constituted "a most serious threat to the existence of Mexico as a unified nation" (Spicer, 1962, p. 334). This manifested in a "war of the castes" in the Yucatan between Mayan Indians and descendants of the Spaniards, violent suppression of a Zapotec uprising in the Isthmus of Tehuantepec, and other threats to national unity in various regions from Huastec Indians, Apaches, Yaquis, and Mayos (Spicer, 1962, p. 334). "Throughout Mexico, it was apparent that the problems of Indian adjustment had not been solved" (Spicer, 1962, p. 334). Spicer (1962) noted that Spanish policy towards Indians evolved through trial and error into something that was more coherent or consistent than either Mexican or Anglo-American Indian policy, perhaps because after the agitation of las Casas, the Spanish regarded Indians as "full citizens of the Spanish Empire" (p. 335). (Bartolomé de las Casas [1484–1566], a Dominican friar, railed against the Spanish exploitation of indigenous peoples in the Americas.) In what is now New Mexico, the Spanish were definitely more respectful of Pueblo peoples and more successful at living in harmony with them after the Spanish returned to New Mexico in 1692 after having been expelled during the Pueblo Revolt in 1680.

Nuevomexicano identities. The formation of *Nuevomexicano* identities after incorporation into the United States can be understood through the view of identity postulated by Bucholtz and Hall (2005): "Identity is best viewed as the emergent product

rather than the pre-existing source of linguistic and other semiotic practices and therefore as fundamentally a social and cultural phenomenon” (p. 588). Integration into the United States for Spanish-speaking New Mexicans was marked by difficulties due to profound cultural differences: “Mexican culture . . . was Catholic, feudal, traditional, communal, and person-oriented, whereas Anglo-American culture was Protestant, capitalistic, modern, individualistic, and materialistic” (Mirandé, 1987, p. 226).

Anglo prejudice against the Mexicans who had suddenly become American citizens was overt and was a major cause of resistance to admitting New Mexico as a state, which did not occur until 1912. Anglo Americans’ “ideas were built upon the ideology that the *Mexicano* [or ‘Greaser’] was racially inferior and, by extension, intellectually deficient” (Meléndez, 1997, p. 43). Although the Anglos viewed the residents of New Mexico unequivocally as Mexicans, these residents did not identify strongly as Mexicans.

During the colonial period in Mexico’s northernmost province, New Mexico’s *Mexicanos*, residents of an “isolated frontier, . . . did not have a strong sense of nationalism” (Rosenbaum, 1981, p. 9). The territory was viewed as a military buffer zone by Spanish colonists, which endured “a long period of isolation” (Rosenbaum, 1981, p. 21). Very few Spanish-surnamed New Mexicans exercised their right to retain Mexican citizenship (and to move to what remained Mexican territory) in the aftermath of the signing of the Treaty of Guadalupe Hidalgo (Mirandé, 1987). Their “attachments formed [not around nationality but] around region, race, religion, language, and custom” (Rosenbaum, 1981, p. 9).

After the incorporation into the United States, *Nuevomexicano* claims to New

Mexico as their homeland became more explicit. Anglos were referred to variously, including as “*Americanos* or *extranjeros* [foreigners],” in contrast with *Nuevomexicanos* as “*nativos* [natives]” (Meléndez, 1997, p. 59). Ties to the land, viewed as the homeland, were critical, which underscores the bitterness of *Nuevomexicanos* towards the abrogation of land rights guaranteed by the Treaty of Guadalupe Hidalgo. With ties to the land that dated back for three centuries before New Mexico’s incorporation into the United States, *Nuevomexicanos* essentially claimed auto-indigenization: being the indigenous people of the region in opposition to the Anglo colonizers. Construction of identity often remains incoherent and unconscious until threatened. When institutions, traditions, and customs are overtly attacked, then identities and values are articulated and defined in their defense, but as noted elsewhere, this did not result in anything like a monolithic view of *Nuevomexicano* identity, as the self-interests of *Nuevomexicanos* differed from one another’s, notably, for example, between *ricos* and *peones*.

Identity arises through social and linguistic interactions. “Identity is the social positioning of self and others; . . . identity is a discursive construct that emerges in interaction” (Bucholtz & Hall, 2005, pp. 586, 587). The construction of the racial identity of *Nuevomexicanos* after the period of the incorporation of New Mexico into the United States in 1848 occurred in response to overt Anglo prejudice and discrimination against Spanish-speaking *Nuevomexicanos* and their descendants. Soon after Mexican land was ceded to the United States in 1848, the land that is now part of the State of New Mexico became part of the Territory of New Mexico (1850–1912). New Mexico was admitted as a state of the Union in 1912. Bucholtz and Hall (2005) argued that

Identity is the product rather than the source of linguistic and other semiotic

practices and is a social and therefore cultural rather than a primarily internal phenomenon. . . . Identities are relationally constructed through several, often overlapping, aspects of the relationship between self and other, including similarity–difference, genuineness–artifice, and authority–delegitimacy. Identity may be in part intentional, in part habitual and less than fully conscious, in part an outcome of interactional negotiation, in part a construct of others’ perceptions and representations, and in part an outcome of larger ideological structures and processes. (p. 585)

These negotiations and constructions of identity occur within the context of power relations and institutional structures capable of conferring or withholding the status of legitimacy. Bucholtz and Hall (2005) further explained what they meant by the dichotomy or dynamic interplay of authority and delegitimacy:

Authorization involves the affirmation or imposition of an identity through structures of institutional power and ideology, whether local or translocal. The counterpart of authorization, illegitimation, addresses the ways in which identities are dismissed, censored, or simply ignored by those same structures. (p. 603)

Authority/delegitimacy, as is argued below, was particularly powerful in shaping how *Nuevomexicanos* constructed their identities in the face of overt prejudice and discrimination. This discrimination, overt in the 1800s, persisted into the 1900s and was actively contested with the emergence of the Chicano movement in the 1960s, as discussed below.

Spanish culture was not imported wholesale to the Americas, and Spanish culture was not monolithic. “The sixteenth-century culture of Spain exhibited great regional as

well as class variations” (Spicer, 1962, p. 283). Any exploration of the construction of identity of Spanish-speaking New Mexicans and their descendants that overlooked socioeconomic distinctions, for instance, would be incomplete and therefore inaccurate. Nevertheless, shifts in identity politics can be tied to historical forces, from the time that Spaniards differentiated themselves from Jews and Moors during and after the Conquest of Granada (1492) to the time in which *Nuevomexicanos*’ claims to links with Spain and Spanish blood, language, and culture aided their efforts for New Mexico to gain statehood. This advantageous positioning occurred by emphasizing *Nuevomexicanos*’ direct links in ancestry and culture to Spain and Europe. This constructed *Nuevomexicanos*’ identity as white and therefore suitable for full citizenship in the United States.

Identity is a social construction. Therefore, identity is always relational. “It is only through relations with others that identity can be known” (Skeggs, 2008, p. 28). In the case of *Nuevomexicanos*, this occurred first through their attempts to prove their superiority to the indigenous peoples whom they encountered in New Mexico and then through their efforts to refute the claims of superiority made by Anglo Americans in relation to *Nuevomexicanos*. “Subordinated peoples often find that they have to collude . . . to resist and strive to gain recognition” (Lin, 2008b, p. 2). In interacting with Anglo Americans, *Nuevomexicanos* constructed a Spanish (white European) identity so as to qualify for full American citizenship.

The space of the national imaginary generates senses of who can and cannot belong to the nation, illuminating a difference between those who in the tradition of possessive individualism own their experience and articulate it as a self-

identity and those who have to prove before the law (and culture) that they can occupy personhood. (Skeggs, 2008, p. 20).

By *possessive individualism*, Skeggs (2008) meant the process by which identity becomes “a resource that can be owned and used for political claims-making within a politics of recognition” (p. 26).

The claim made by *Nuevomexicanos* of being Spanish Americans served several purposes. It deliberately overlooked *Nuevomexicanos*’ connection with Mexico as citizens of its northern provinces after the end of Spanish colonial rule. It ignored centuries of contact with and (arguably for most New Mexicans of Spanish descent) mixed lineage with Native Americans. It stressed European roots, thereby claiming racial identity with the white race and showing suitability (given the Anglo prejudices of the times) for American citizenship (Nieto-Phillips, 2004, p. 4).

By the 1890s, rich Hispanics (*ricos*) in New Mexico were claiming to be “Spaniards” and therefore both “European” and “white.” In the late 19th century, elite Spanish-speaking families in New Mexico sometimes distanced themselves from Spanish-speaking New Mexicans of less wealth and privilege by claiming that unlike themselves, the people who worked for them as laborers (*peones*) were *mestizos* (mixed-race *Mexicanos*) (Nieto-Phillips, 2004, p. 7). The *ricos* co-opted and legitimated Anglo notions of whiteness, while letting the *peones* suffer the brunt of the discrimination that resulted from this construction of racial identities. Hybridization thus tacitly reified notions of race and racial identity in a manner analogous to the way in which Bonilla-Silva’s (2004) description of “honorary white” and “collective black” identities preserve preexisting racial hierarchies tied to unequal distribution of status, wealth, and power.

Bonilla-Silva's (2004) concepts of "honorary white" and "collective black" are discussed in greater depth above (see p. 29). a

At the time of the Spanish-American War (1898), Anglo-American suspicions of disloyalty of New Mexicans of Spanish heritage surfaced (in ways similar to the ways in which the loyalty of Japanese Americans was questioned during World War II). This negative view was

coupled with the widely held view that all Mexican peoples were racially nonwhite, were of mixed (Spanish and Indian) blood, and were "unfit" to assume the rights and responsibilities of full [United States] citizenship. [Such attitudes] inspired powerful reactions among the Spanish-speaking people of New Mexico; together, they help us understand the national context in which many New Mexicans contested and elaborated their "Spanish-American" identity. (Nieto-Phillips 2004, p. 2)

To Spanish-speaking New Mexicans during this time (and more broadly, from the 1880s to the 1930s), Spanish history and the Spanish language became increasingly important "symbols of their 'Spanish' (white) racial identity, twin wellsprings of pride and empowerment" (Nieto-Phillips, 2004, p. 2). Spanish-heritage New Mexicans of "various echelons struggled to reclaim some degree of control over their political destiny and cultural assets" through links with their Spanish heritage (Nieto-Phillips, 2004, p. 8).

Underscoring the social construction of Spanish identity by New Mexicans, Nieto-Phillips (2004) argued that New Mexicans' Spanish "identity [is] neither genuine nor spurious but 'invented' " (pp. 8–9). This construction of Spanish identity led to sharp disagreements between New Mexicans of Hispanic descent, which involved controversy

and the accusation of “false consciousness,” especially to the extent to which New Mexicans dissociated “from anything that carries a Mexican implication” (Nieto-Phillips, 2004, p. 4). Carey McWilliams “unmasked Spanish-American identity as a ‘fantasy heritage’ ” in the book *North from Mexico* (1949) (Nieto-Phillips, 2004, p. 5).

The Spanish concept of “purity of blood” (*limpieza de sangre*) emerged during the period of the expulsion of the Moors from Granada (1492), after the establishment of the Spanish Inquisition in 1478. This concept retained its currency long after the Middle Ages, however; it played a prominent role in the ideology of Franco’s Spain in the mid-20th century. Purity of blood was linked with conquest and became “the defining symbol of Spanish Catholic identity” (Nieto-Phillips, 2004, pp. 20–21).

Spain was hardly unique in this. Emphasis on bloodlines or lineage “pervaded Europe by the Middle Ages” in the status given to nobility and gained through military conquest. In Spain, this focus upon bloodlines was connected to persecutions of Jews and Moors, including rich *conversos* (those persons who converted to the Catholic faith from Judaism and Islam) (Nieto-Phillips, 2004, pp. 17–19). People of Spanish Catholic blood claimed to be superior to people of Indian, Moorish, or Jewish blood. During the period of Spanish colonial rule, the “language of blood purity” (*limpieza de sangre*) led to a complex caste system (analogous to the obsolete terminology for Americans of mixed African and European descent, e.g., mulatto [half white, half black], quadroon [three-fourths white, one quarter black], etc.). However, underneath the many now forgotten categories, its primary purpose was to differentiate Spaniards from their Indian and African slave subjects in the Americas (Nieto-Phillips, 2004, p. 23).

Within Mexican society, complex social distinctions were recognized both on the

basis of race (*casta*) and social status (*calidad*). Eventually, these multiple categories collapsed into two terms: *españoles* (Spaniards) and *indios* (Indians) (Nieto-Phillips, 2004, p. 9). However, by 1820, the terms *español* and *indio* “referred less to degrees of blood purity or racial mixture than to cultural, ethnic, or geopolitical boundaries,” such as living in a Pueblo or elsewhere (Nieto-Phillips, 2004, p. 37).

In New Mexican society in the early 19th century, many caste labels were phased out as status came to be defined more by individual occupation than by bloodline (Nieto-Phillips, 2004, pp. 28–30). Once New Mexico’s Spanish speakers had become part of the United States, from 1850 to 1912, those among them who favored statehood frequently “invoked their European racial identity and long history of conquest and colonization to gain acceptance [from Anglo Americans] and recognition of their rights through statehood” (Nieto-Phillips, 2004, p. 53). This class of New Mexicans included members of the notorious Santa Fe Ring, which “despised [United States] federal control during the territorial period” (Nieto-Phillips, 2004, p. 62). The Santa Fe Ring was a group of rich and politically powerful Anglos and *Nuevomexicano ricos* that advocated for statehood during the 1870s and 1880s because they expected to cash in on the growth in trade and industry (as well as “political appointments and patronage”) that would result from statehood; “enormous stretches of disputed land, as well as water rights, hung in the balance” (Nieto-Phillips, 2004, p. 61). A key figure in the Santa Fe Ring was Thomas B. Catron, who managed to gain ownership of two million acres of land in New Mexico (portions of 31 land grants and other land grants in their entirety) between 1867 and 1883 (Wooden, 1959).

As has been shown in this section, the construction of identity is always relational

and embedded in a social context affected by historical, cultural, political, and economic forces negotiated through linguistic interactions. Once New Mexico had been incorporated into the United States, Spanish-speaking *Nuevomexicanos* faced overt prejudice from Anglo Americans, who regarded them as nonwhite Mexicans unfit for American citizenship. This prejudice delayed New Mexico's admission as a state. The powerful and wealthy Spanish-speaking residents of New Mexico (the *ricos*) emphasized their racial and cultural ties to Spain, constructing their identity as white and European and contrasting this with those *Mexicanos* who worked for them (*peones*), who were viewed as mixed-race (Spanish and Indian) *mestizos*. The *ricos* borrowed from the discourse of purity of blood (*limpieza de sangre*), in which Spaniards differentiated themselves from Jews and Moors. This section has underscored the importance of the move for statehood for New Mexico and Anglo resistance to this from the mid-19th century to the early 20th century. The following section jumps forward to the emergence of the Chicano movement in the 1960s.

The emergence of the Chicano movement. The Chicano movement emerged in California, New Mexico, and elsewhere in the 1960s due to the persistence of mistreatment of Chicanos, despite some earlier legal victories (e.g., *Mendez v. Westminster* in 1947, which addressed segregation, and *Hernandez v. Texas* in 1954, which concerned the Fourteenth Amendment rights of Latinos related to the use of an all-white jury). Disputes over land grant rights, a central issue for Reies Lopez Tijerina, were one of the main factors that led to the emergence of the Chicano movement in the 1960s and its ongoing activism, which continued after the 1960s. Another major factor was the impetus to see that migrant farm workers were paid better and treated better led

by César Chávez.

Many of the migrant farm workers were Mexican. César Chávez organized farm workers in California and Florida in 1962 through the National Farm Workers Association (later known as the United Farm Workers union). The plight of the farm workers was addressed through La Raza Unida party, which was founded by José Angel Gutiérrez in 1970. Chávez called for a consumer boycott of grapes and also organized hunger strikes, both of which helped increase awareness of the mistreatment and low pay of farm workers.

Rudolfo “Corky” Gonzales brought attention to Chicano identity through his poem “*Yo Soy Joaquin*” (“I Am Joaquin”) and through a political manifesto, “The Plan Espiritual de Aztlán.” In 1968, the Mexican American Legal Defense and Education Fund was founded. Student walkouts in 1968 and 1970 brought attention to ongoing dissatisfaction with ethnic stereotyping and unfair treatment of Chicanos.

The frustration over continued violations of the Treaty of Guadalupe Hidalgo’s commitment to honor the Spanish land grants eventually led Reies López Tijerina in 1963 to form the Alianza Federal de las Mercedes (the Federal Land-Grant Alliance) as part of his efforts to restore land rights of Spanish-speaking citizens in the Southwest that had been violated by Anglos (Tijerina, 2000). He also helped to organize the 1967 Poor People’s March on Washington. Although regarded as a key leader of the Chicano movement, Tijerina’s preferred term was “Indiohispano.” Tijerina has sometimes been called the Chicano Malcolm X—a reference to Tijerina’s radicalism. Members of this Alliance resorted to civil disobedience and the occupation of part of the national forest reserve that they claimed was rightfully their land (Tijerina, 2000). On June 5, 1967,

they seized and held the Tierra Amarilla courthouse in New Mexico. Tijerina was thus more radical than other leaders of the Chicano movement, such as César Chavez (Tijerina, 2000, p. vii).

In this and preceding sections, I have examined the history of New Mexico and its influence in shaping the identities of the Spanish-speaking people who settled here and that of their descendants, as this has shifted over time. The following section addresses the role of language, ideology, resistance, and agency. This includes some of the complexities inherent in describing cultural identity through concepts developed by philosophical and political theorists who have examined group identity.

Identity politics in New Mexican populations. As has been shown above, identity politics for Spanish-speaking people in New Mexico and their descendants has shifted over history as New Mexico went from being a Spanish territory to being part of northern Mexico, then to being a territory of the United States and finally a state within the United States. As also argued above, identity is relational (that is, something shaped and defined by relationships between individuals and groups rather than being an essential characteristic of an individual or group that exists independently of social relations). In the broadest terms, under Spanish rule, Spanish speakers in New Mexico saw themselves as transmitters of a superior civilization (European, specifically Spanish culture) and religion (Roman Catholicism) to the indigenous peoples of New Mexico, who were seen as uncivilized and pagan. Under Mexican rule, as a people living far from Mexican centers of power, New Mexicans' primary affiliation was not nationalistic ("Mexican identity"), but to family, local community or region, and religion.

Once incorporated into the United States, when the border crossed them as they

continued to live where they had for generations, New Mexicans were subjected to a view from Anglo Americans similar in many ways to the views of the original Spanish-speaking settlers to the Native peoples of the region. Anglo Americans largely saw New Mexicans as mixed-race “mongrels” (part Spanish, part Native American) who lagged behind Anglo Americans in initiative, enterprise, and ambition (Mirandé, 1987, p. 24). Protestant Anglo Americans’ socially constructed Hispanic New Mexicans’ identity as incorporating the worst features of Spaniards and Native Americans. In social structure, politics, and economics, they were seen as backward and semi-feudal (rather than capitalistic), while in religion, they were seen as superstitious and idolatrous, combining the worst religious features of Native American paganism and Roman Catholicism.

The construction of their own identity by Hispanic New Mexicans after their incorporation into the United States was largely a reaction against the ways in which Anglo Americans constructed New Mexicans’ identity. One of the main strategies was to reject the “mongrel race” construction of identity by insisting on the purity of both Spanish culture and Spanish blood that had been preserved among Spanish-speaking New Mexicans and their descendants. This belief in the purity within New Mexico of the preservation of Spanish culture and blood featured in writings from the late 1800s through the 1900s, in tourism boosterism and in other places. This was reflected in a self-labeling of New Mexicans as “Spanish” (rather than “Mexican” or “Mexican American”), although many Spanish-language writers in New Mexico have labeled this belief as “myth” rather than as “history.”

In New Mexico, resistance to the universalist ontological claims of Anglo Americans has taken unique forms. Within the context of New Mexico history,

Lefebvre's concepts of perceived space, conceptual space, and lived space (introduced above on page 112) could be applied as follows. The Anglo-American notion of "Manifest Destiny," which was used to legitimize the westward expansion of the United States, was a way of perceiving space that imposed "normative ways of seeing" to silence any opposition to this thrust of conquest and colonization by invoking divine providence. This was an outgrowth of the earlier myth of the "virgin continent," a conceived space (empty land) that conveniently ignored the Native peoples of North America, while simultaneously constructing a gendered order in which the land was feminine, passive, and receptive to the conquest by the virile, active, and male European conquerors.

The lived space of the New Mexicans, including those with Spanish land grants that predated the arrival of Anglo Americans by centuries, was an inconvenient truth to be "not seen" in these perceived and conceived spaces of Anglo American colonizers. The land grants, the lived space representing resistance and the persistence of tradition, however, did not simply disappear. They remain contested to this day as a source of resistance against the abrogation of United States treaty obligations.

In this subsection, I have shown the importance of context and lived space in the construction of identity. In the following section, I show why feminist theorists and deconstructionist theorists have argued for the heterogeneity of identity. Identity is composed of multiple consciousnesses. Resistance therefore is comprised in part by contesting the universalist ontology of hegemonic power structures.

Nuevomexicano identities and discourses about Nuevomexicano identities. In New Mexico, the Hispanic population has encountered political and cultural bias. However, at the time of the 1972 trial, as one interviewee observed, "There was no

backing up of studies at that time. Now there are studies showing that exams can have cultural and racial bias. At that time, it was unheard of.” Foucault (1984) observed that power and resistance always play off against each another: “Where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power” (p. 14). As shown below, resistance counters power and hegemony through discourse and social practice, which is how the agency of those in resistance can be discerned.

In the first two decades of its existence, the University of New Mexico (UNM) School of Law graduated only about one person of Spanish-language heritage per year. Prior to the 1970s, there were few lawyers and judges in New Mexico from Spanish-language backgrounds. The few *Nuevomexicano* law-school graduates who took the New Mexico Bar Examination suffered a disproportionately high “flunk rate.” According to one interviewee, only about 31 percent of Hispanic bar examinees passed the Bar Examination versus about 80–85 percent of Anglo bar examinees. Prior to 1972, no one had legally challenged or formally complained about these unequal results for law school admission rates, law school graduation rates, and pass rates for *Nuevomexicanos* who took the New Mexico Bar Examination.

In 1972, four petitioners of Spanish-language heritage filed a lawsuit after having received failing grades on the New Mexico Bar Examination, and others also filed suit. The four had believed after taking the examination that they had demonstrated in their essays a sufficient grasp of the legal issues involved to have earned a passing score. They expected when leaving the examination room that they would be admitted to the Bar in the State of New Mexico. That did not happen.

However, as these four men were letting the results and the implications of those results sink in, local newspapers reported that eight other young men, all of whom were Anglos, all of whom had taken and failed the examination, had subsequently been given passing scores. Some of these Anglos whose examinations had been regraded came from families with powerful connections. When the case of the petitioners went to trial, the bar examiners justified their reconsideration of those other examinees' results by citing Rule 21(d) of the Supreme Court of the State of New Mexico, which obligated bar examiners to reappraise "borderline cases as appropriate to ensure fairness in grading" (Bar Examiners' statement to press, Exhibit 1). Few people, including those who sat for the Bar Examination, had heard of this rule prior to reading the newspaper accounts in the local press.

The admission to the Bar of those other unsuccessful candidates who had initially received failing grades made the four who subsequently petitioned the court (along with other petitioners in other cases) suspicious. They suspected that their cultural and linguistic background had been inferred from their style of writing and that there might have been an effort to keep the numbers down of examinees from Spanish-language backgrounds and other minority backgrounds who were admitted to the Bar. The petitioners, along with some other minority bar examinees, suspected that their anonymity had been breached and their racial or ethnic identity had been inferred and had counted against them.

Certainly, regardless of the particulars of the experience of these four men, there was a huge and persistent de facto gap in the "flunk rate" between Hispanics and Anglos. One interviewee said that the pass rate was about 31 percent for Hispanics and about 80–

85 percent for Anglos. Adding to the unsuccessful examinees' confusion and concern was that when they were allowed to review their essay examinations, they discovered that the marginal notations and numbers written on their essays did not match the numbers on the tally sheet.

Local newspapers had noted in the stories about the eight Anglos who had failed the Bar Examination but who later had been admitted to the Bar that there were mathematical errors in the scoring of their examinations. In the subsequent trial, the argument made largely in the *amicus curiae* (friend of the court) brief was that the huge discrepancy in pass rates between those of Anglos and those of Hispanics constituted a de facto pattern of discrimination that violated the due process clause of the Fourteenth Amendment. This line of reasoning, although it was admitted into evidence, was not considered by the court in the trial, as the justice would not allow the plaintiffs' lawyer to be heard on brief and argument.

Nevertheless, even though the justices did not consider the argument presented in the *amicus curiae* brief, they ruled that the legal issues in question and the questions of fact in dispute were significant enough for the case to go in trial. In the trial, the explanations of the discrepancies in the scores between the marginal notations and the tally sheets were incoherent, meaningless, and unconvincing. However, the plaintiffs' attorneys never asserted or made part of their argument a claim that there had been any conscious or deliberate attempt to discriminate on the basis of ethnicity or linguistic heritage. The question was: had the examinations been graded in a fair and an impartial manner?

At that time, the New Mexico Bar Examination consisted entirely of essays. The

plaintiffs' essay answers themselves were never reassessed for the extent to which examinees had identified the legal issues involved or the extent to which they had demonstrated the ability to reason logically, to analyze accurately, and to apply fundamental legal principles (although the plaintiffs wanted the *substantive* merits of their essays to be reevaluated). Only *mathematical* errors were considered in court. After the examination, the plaintiffs were allowed to review their essays, and in doing so, they noticed discrepancies between the points or scores written in the margins of their essays and the points on the tally sheets. What they found on their own examinations was similar to what had been reported in the newspaper accounts for other examinees who initially failed but later were admitted to the Bar.

The scores on the tally sheets were later ruled in the lawsuit to be controlling, but attempts to explain the discrepancies between those scores and the marginal numbers or points were at best incoherent and at worst disingenuous and utterly unconvincing. In any case, bar examiners were instructed in the future not to make any marginal notations on the examinations. The essay examinations in question in the 1972 case were destroyed.

The plaintiffs did not prevail in their lawsuit. However, after a ten-year battle, all future New Mexico Bar Examinations contained multiple-choice questions rather than relying solely on essay answers. The plaintiffs received a ruling against them, which resulted in the dismissal of their suit, but the examination was changed from purely essays to include multiple-choice questions. Furthermore, the cutoff score was lowered slightly. From then on, the pass rate for *Nuevomexicanos* and members of other groups traditionally underrepresented in the legal profession in New Mexico increased.

Although the petitioners never argued in court that the exam graders intended to discriminate against test-takers who came from a Spanish-language heritage, they had a strong suspicion that this had been the case for years. However, the examinees believed that characteristic ways of phrasing things would make it easy for exam graders to infer which test-takers came from a Spanish-language background rather than an English-language background. The petitioners had approached the idea of filing their suit in court with great trepidation. They feared that their efforts to challenge the rules and procedures of what they perceived as an elite club restricted primarily to Anglos was unprecedented and would be met with harsh reprisals. They feared that some of them would never make it into that club no matter how hard they tried, especially after having challenged them.

Some people warned the plaintiffs against filing the suit and contesting the results of their examinations. Such an undertaking meant challenging the power and authority of the gatekeepers of the legal profession in the State of New Mexico. Taking on that battle felt risky to those who took it on, according to their interviews, as it aroused in them a fear that retaliatory action might be taken against them.

Conclusions about Identity, Resistance, Agency, and Empowerment

As many in the American civil rights movement have observed, history proves that oppressed groups do not gain equal rights merely by asking politely for them. A century ago, the suffragettes outraged many of their contemporaries by engaging in what was then regarded as unladylike behavior, including marches, sit-ins, destruction of property (throwing bricks through store windows), and engaging in a hunger strike after being arrested. The plaintiffs in this case realized that they were striking a hornet's nest of secure power by challenging the bar examiners in a way in which they had never been

challenged before. “They’re gonna hate you,” one was warned. Another plaintiff put it this way: “You’re never going to pass the Bar exam ever after this.” The reaction of the defendants was indignation, the implicit question being “How dare you accuse us of being racist?”

This challenge to the way in which the bar examination was conducted and how it was graded occurred after a period of decades in which entrenched systems of power and domination had been contested elsewhere through various forms of peaceful civil disobedience, notably by Mohandas Gandhi in India—leading to the end of British rule in India—and by the Rev. Dr. Martin Luther King, Jr., and others in the U.S. in the 1960s—which led to the Civil Rights Act of 1964, which made racial segregation in public places and made discrimination on the basis of race illegal. By the time the plaintiffs filed their legal challenge to their bar exam results, Cesar Chavez had organized migrant farm workers through a successful series of actions, which included public consumer boycotts of grapes, which raised public awareness of the harsh working conditions of Mexican migrant farm workers.

What all these leaders had in common was an appeal to fairness and simple human justice. That appeal was strong enough to make people willing to face force (blows from police stanchions, attacks from police dogs, and sometimes even the threat of murder) to stand up for equal treatment before the law and universal human rights. The short-term fear of “They will hate you” may ultimately be replaced by the satisfaction of knowing “We did it. We changed things.”

The impact of the plaintiffs’ efforts reached far beyond the trajectories of their individual legal careers. It changed the future of the gate-keeping process used to

determine who could or could not practice law in New Mexico. The composition of the bar examination was changed from an entirely essay format. The cutoff score was lowered slightly. The numbers of men and women from Spanish-language admitted to the Bar did increase substantially. The discourses of challenging entrenched power occurred in the context of the Chicano movement and corresponding movements by other groups that historically had faced discrimination through the civil rights movement, the women's movement, or the gay rights movement. Discourses always occur and are situated within historical context, and they sometimes have the effect of changing that context irrevocably, as occurred in this case.

Theoretical Implications from Critical Race Theory, Whiteness Theory, Feminist Theory, and the Social Construction of Identity

The argument that has run throughout this dissertation is that discourses embedded in history and historical contexts shape identity. Discourses are fostered in specific cultural, historical, socioeconomic, political, and linguistic contexts, and through discourses and the structures of power that they create and reinforce, power and resources are apportioned. *Nuevomexicano* identity traces its roots to the arrival of the first Spanish-speaking people to what is now the State of New Mexico late in the 1500s. This identity has been shaped first by interactions with the various indigenous tribes and Pueblos and later by various other influences during the successive periods of Spanish colonial rule (1540–1821, Mexican rule (1821-1848), and United States rule, initially as a territory (1850–1912) and then as a state (1912–Present).

The social construction of *Nuevomexicano* identity, as well as its fluidity, is evident through the examination of the historical record provided above, for example,

through the history of Spanish land grants. Land and the ties to the land loom large in *Nuevomexicano* identity, underscoring the importance of the land grant disputes and the history of Spanish land grants in *Nuevomexicano* identity. As noted above, part of the contentiousness surrounding these seemingly endless legal disputes stems from the differences between Spanish law and English common law. This social construction of identity should not be seen or portrayed as monolithic. In fact, sometimes, privileged *Nuevomexicanos* united with privileged Anglos for mutual benefit—at the expense of both indigenous peoples and underprivileged *Nuevomexicanos*—in the land grant disputes. These power struggles split *Nuevomexicano* identity into the two camps of *ricos* and *peones*, who often were seen—or at least portrayed—as having very different racial identities.

Prejudice against Mexicans, Roman Catholics, and people who spoke Spanish (instead of English) lay behind the relatively late admission of New Mexico as a state of the Union (in 1912). Another reason for opposition to New Mexico's admission as a state came from Southern states that objected to New Mexico's insistence that it be admitted as a "free" state (no slavery). The disparaging attitudes of racial and ethnic prejudice (as well as religious intolerance) took various forms, including lumping (Catholic) Mexicans in with "pagan" Indians as superstitious and idolatrous (in contrast with civilized white Protestants). Another disparaging construction of identity of Mexican Americans was to see them as a "mongrel race" that embodied the worst characteristics of both Spanish and indigenous. All of this has occurred against a backdrop of the construction of racial identity in this country through a bifurcated lens of black vs. white or at least of white vs. nonwhite.

As noted above, as part of a strategy to gain power and wealth, privileged Hispanics (*ricos*) identified themselves as white, as Spaniards. They characterized themselves as pureblooded descendants of the conquistadors (a myth that ignored many inconvenient truths about five centuries of history and the numerous intermarriages between Spaniards and native peoples). Although this construction of racial identity may have reached its peak late in the 1800s and early in the 1900s through the three-cultures myth of New Mexico (indigenous, Spanish, and Anglo), it lingers to this day through self-identification of some New Mexicans as “Spanish,” which ignores the passage to and through Mexico en route to this former outlying territory of Mexico.

Critical race theory, as defined by Cornel West, scrutinizes “the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation)” (Crenshaw, 1995, p. xi). Critical race theory is therefore an appropriate theoretical lens through which to examine the 1972 lawsuit filed by four plaintiffs of Spanish-language heritage who received failing grades on their New Mexico Bar Examination. Their belief was that the examiners had inferred their Hispanic background from their distinctive writing style and altered the scores that they had received (points on the essays themselves) so that their scores on the tally sheet rationalized a decision to deny them admission to the bar.

Certainly the administration of the Bar Examination up until that time had upheld a wide disparity in flunk rates. The result of that disparity had been to privilege Anglo test takers over Hispanic test takers (regardless of whether there was any conscious or deliberate intention to discriminate on the part of the bar examiners). However, the interviews revealed that the petitioners believed that they had been discriminated against,

even though this was not part of their legal argument.

The stance taken by the plaintiffs is in line with Matsuda's (1991) definition of critical race theory as "the work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law and [who] work toward the elimination of racism as part of a larger goal of eliminating all forms of subordination" (p. 1331). Critical race theory seeks to transform society (Tierney, 1993), in part through examining and challenging institutional structures that perpetuate entrenched racial discrimination. Class interests conflict with racial equality; people who hold disproportionate power, wealth, and privilege tend to maintain social inequality because it serves their own interests to do so, the exception being when their own interests converge with the interests of oppressed minorities (convergence theory being the study of interest-group politics, as discussed below).

Feminist theory, particularly feminist linguistics, is congruent with social constructionism and discourse analysis in focusing on how identity (in the case of feminist theory, gender identity) is socially constructed through discourses. Inequalities that privilege one group at the expense of another (or others) leave traces in speech acts and discourses. Feminists have insisted on using gender-neutral language (e.g., *flight attendant* instead of *stewardess*, *mail carrier* instead of *postman*) or at least language with gender parity (*husband and wife* instead of *man and wife*, *men and women* instead of *men and ladies*—or worse, *men and girls*). As noted above, inequalities of power and privilege have been embedded within the discourses about the social construction of racial identity. Some privileged New Mexican Hispanics (*ricos*) have constructed their racial identity as white (pureblooded Spaniards). This refuted the identity socially

constructed by some Anglos of New Mexican Hispanics as “mongrels” or mixed-raced “Mexicans.”

Whiteness theory is based on an examination of discourses to identify the narratives of race that systematically uphold the power and privilege of white people, even in the absence of any deliberate intention to disenfranchise people of color. Assumptions and generalizations are embedded in cultures, traditions, and institutions. Whiteness theory situates racial identity not in genetics but in narratives and discourses, seeing it as a social construction rather than as a scientific concept or fact. Some of the most privileged Hispanics in New Mexico sought to construct their racial identity as white by stressing their Spanish ancestry and “purity of blood” (*limpieza de sangre*), a tactic that can be traced back in Spain to the expulsion of the Moors from Granada in 1492.

Whiteness theory looks at systems of power, wealth, and privilege, as well as how these are tied to and based on socially constructed identities of race. Therefore, it is “not an assault on white people per se: It is an assault on socially constructed and constantly reinforced power of white identifications and interests” (Gillborn, 2005, p. 488). Some Hispanics during the period of American rule (territorial and statehood) used the concept of whiteness to enhance their own power, wealth, and privilege at the expense of other Hispanics who were not socially constructed as being white but as of mixed race.

If nothing else, the bifurcated identity of *Nuevomexicanos* as both white (Spanish) and nonwhite (brown, Chicano, mixed race) might call into question the arbitrariness of racial schemas overall or how people are forced to fit into preexisting racial categories, which seem as hard to explain or justify as the scores on the tally sheets of the plaintiffs

bar examination essays. As with the plaintiffs' argument, it may be easy to get lost in the details and to remember that the fundamental issue at stake was fairness: Were the examinees' essays graded in a fair and impartial manner? Just as in various civil rights movements, the issue was one of basic human rights and the principle of fairness that must underlie any legitimate system of law: Do women deserve the vote (i.e., are women being treated fairly)? (Suffragists). Is "separate but equal" just (i.e., are blacks being treated fairly)? (*Brown v. Board of Education*). Are the rights of migrant farm workers being violated (i.e., are migrant farm workers being treated fairly)? (United Farm Workers and Cesar Chavez). Are the rights of bar examinees being honored in an equal and impartial manner regardless of their ethnic or linguistic background? (1972 lawsuit).

Convergence theory would argue that powers that be generally agree to change—systemic, radical change—if and only if such change serves their interests. Therefore, as argued above, the United States seriously addressed the racial issue of discrimination against American blacks—as exemplified by segregation in the South—only when it served United States interests to do so due to competition with the Soviet Union for influence in the third world, in which the presence in the United States of rampant racism and overt racial discrimination, both of which were receiving increasing scrutiny in the press, made the Soviet alternative look more appealing than it would if the United States made vigilant strides toward racial equality.

Could a similar dynamic have been in play in the 1970s following the court case? The issue began in the press with reports that Anglo examinees who had failed the examination had subsequently been admitted to the bar. Thus the seed of the lawsuit was planted: If their failing grades can be reconsidered and revised, why not ours? Even if

there had been no conscious or deliberate attempt to discriminate against bar examinees from a Spanish-language background, even the appearance of such discrimination may have been embarrassing, especially in light of a huge disparity between Anglos and Hispanics in flunk rates. As the justices ruled, mere denial of the allegations was insufficient. But even though the defendants were acquitted in court, what about the court of public opinion? Did the suspicion of a double standard gain traction in the public imagination, bolstered by the undeniably and disproportionately high flunk rate of *Nuevomexicanos*? Given other changes that were then occurring in American society, was it in the self-perceived interests of the legal profession to be more accommodating to the non-Anglos who were struggling to join the legal profession? Did the explicit or implicit accusation “You are a racist” sting enough for the members of the old boys’ club enough for them to open the door to their club of money, power, and privilege somewhat wider than they had in the past?

These theoretical approaches stress that discourses—the discourses that both reflect and shape identity—always occur in particular contexts and arise amidst and in response to various forces: cultural, economic, political, and social (among others). These theories do help shed light on how the plaintiffs in the cases discussed in this research changed the legal discourse by challenging it in a way that no one had ever done before. This helped to produce lasting results in the New Mexico Bar Examination (including the shift from the essay-only format, the cutoff scores, and procedures for notations on the examination) and on the composition of who from then on was able to enter the legal profession in the State of New Mexico. The theories reviewed herein help explain how and why all of that happened, thereby changing attitudes, discourses, and

legal practices. One central paradox in this story—the stories of those who challenged their failing grades—was initial failure, followed by ultimate success in making lasting changes to the gate-keeping practices for the legal profession in the State of New Mexico.

Chapter 6. Educational Testing Theory and Implications for Assessment

The chapter reviews the literature on testing theory and testing procedures, including a close look at grading rubrics to evaluate writing samples and other issues with assessing writing, including arguments about bias and inequality in testing. I critically examine how teaching to the test tends to reinforce pre-existing inequalities and the effect of student demographics on test results. I present an overview of the history of educational testing in this chapter. I explore different types of tests, as well as different methods for evaluating writing. The purpose of this analysis is to assess testing bias, the pedagogical issue that is at the heart of this dissertation research. Testing bias occurs when a test provides an advantage to one group that results in higher scores even when there is no actual superiority in that group on the skill or knowledge supposedly being measured.

Testing and Testing Bias in Evaluating Writing

Testing is at the heart of this dissertation research, specifically how written essays submitted in the 1970s for the New Mexico Bar Exam by Spanish-speaking New Mexicans and other New Mexicans of Hispanic backgrounds were evaluated. As noted above, in the early 1970s, the New Mexico Bar Examination was comprised entirely of essay questions. This section of the dissertation explores the history of testing and describes different types of tests to assess testing bias.

Testing bias occurs when a test has a structure that provides an advantage to one group (for example, White members of the middle class) or a set of groups that manifests in the form of higher scores even when there is no actual superiority in that group on what is supposedly being measured (for example, subject knowledge or abstract thinking

ability). Associations between this kind of bias and the recent push for school accountability are explored. Accountability has come to refer to holding students, teachers, and schools responsible for learning and academic achievement, as measured by standardized tests. I argue below that in many ways, objectivity in assessment is more elusive when evaluating writing samples than it is with multiple-choice examinations. Furthermore, I argue that despite claims to the contrary, using grading rubrics for writing samples fails to eliminate subjectivity or bias in grading.

The next section provides an overview of the history of testing. In that section, I examine the history of standardized testing and then explore how the purpose of testing has shifted from gathering information about students' abilities and needs to holding schools accountable for student achievement. I close with a discussion of the culmination of this process as embodied in the No Child Left Behind act of 2002. This chapter summarizes the history of testing, as well as the theory behind testing and testing practices.

Standardized tests are consistent in format, content or questions, manner of administration, and scoring. The format could be multiple-choice answers, true/false, a short answer comprised of the test taker's own words, or essays composed by the test taker. If a standardized test includes a short answer comprised of the test taker's own words or an essay composed by the test taker, independent evaluators assess these, using a rubric and benchmarks (samples). The supposed advantage of standardized tests is that their *validity* and *reliability* can be demonstrated empirically. This chapter provides an overview of the history of standardized testing. This chapter describes different ways to assess testing bias, the pedagogical issue that is at the heart of this dissertation research.

Testing bias occurs when a test has a structure that provides an advantage to one group or a set of groups that manifests in the form of higher scores even when there is no actual superiority in that group on the skill or knowledge supposedly being measured.

History of Standardized Testing

Originally, educational testing was intended to identify students who needed special educational assistance due to poor academic performance via norm-referenced tests, the IQ test being one type of norm-referenced test. *Norm-referenced tests* assess a student's performance relative to the performance of others (the extent to which the student's performance is above or below average). *IQ* or *intelligence quotient* has been measured by a test by Binet that took its present form in 1908. In 1912, the German psychologist W. Stern divided mental age by chronological age, giving the most common way in which IQ is used or understood today.

Although from the outset, educational testing was intended to assess the quality of schooling, the emphasis was not originally upon rewarding or punishing schools based on student performance on standardized tests, which is a more recent phenomenon known as school accountability (an issue discussed below). Educational testing originally was used to evaluate the quality of schooling without considering accountability.

The first major approach to standardized educational testing started in 1845 when a Massachusetts state superintendent of instruction, Horace Mann, pressured Boston school trustees to adopt written examinations. Mann insisted on written tests because enrollment had increased substantially, rendering oral testing no longer viable (Ryan & Shepard, 2008). These examinations were used to classify students, and they also put comparative information about schools' relative performance into the hands of state

authorities (Resnick, as cited in Ryan & Shepard, 2008).

In the 1880s, Galton proposed the first efforts to measure intelligence through standardized tests, and Alfred Binet and his colleagues further refined this kind of testing. In 1912, William Stern coined the term intelligence quotient (or IQ) in a book. IQ testing had its genesis in beliefs about a correlation between intelligence and morality. At that time, a largely uncontested belief in the moral superiority of European culture—especially of northern and western Europe—underlay the colonialism of European powers on other continents and was used to justify the colonial enterprise from an ethical perspective. That viewpoint now seems almost unbelievably dated. This attitude of cultural, political, moral, and religious superiority has been called into question since then, for example, through the independence movements in former colonial territories, such as in India, which gained its independence from the United Kingdom shortly after the end of World War II.

The IQ tests were originally intended as empirical proof of this supposed intrinsic superiority of white Europeans. Alfred Binet, a director of the psychology laboratory at the Sorbonne in Paris, decided to study the measurement of intelligence in 1898 (Gould, 1981). He looked at the measurement of skulls in relation to intelligence and published nine papers on craniometry in *L'Année Psychologique*, a journal that he founded in 1895 (Gould, 1981).

In 1894, France's public education minister commissioned Binet to perform a study to identify children whose lack of success in the normal classroom suggested the need for special education (Gould, 1981). Binet brought together many short tasks that involved basic reasoning processes (e.g., ordering, comprehension, invention, and

correction) that involved diverse activities. Binet hoped that by mixing together enough tests of different abilities, he would be able to abstract a child's general intellectual potential with a single score (Gould, 1981).

Binet published three versions of this scale. His original 1905 editions simply arranged the tasks in a hierarchical manner according to the level of difficulty. The 1908 version established the criteria still used in measuring intelligence. In 1912, the German psychologist W. Stern argued that mental age should be divided by chronological age, and the IQ was born (Gould, 1981). Although performance on the tasks used to measure IQ have suggested objectivity, critics of IQ testing have argued that cultural bias skews the results of IQ tests, an allegation explored below.

Precursors to the present-day accountability movement. During the 1960s, educational practice shifted from using tests for information to holding students or educators directly accountable for scores. This shift from gathering information to enforcing accountability is the most important change in testing in the past half century (Koretz, 2008). However, the goal of reforming and improving education predates the contemporary push towards accountability testing, which has focused on judging the quality of schools (Ryan & Shepard, 2008).

Although IQ tests originally were meant to measure the intellectual potential of individual students, these tests and other forms of standardized educational testing came increasingly to be used to measure the achievement of schools. Some early testing was intended to help inform instructional design and thus was essentially practical in emphasis; the aim was to assess such issues as how much time to allocate to certain topics during the school day. For example, in the 1890s, Joseph Rice administered

spelling tests to students and discovered no difference between students taught spelling for 15 minutes versus those taught for 30 minutes. Later, testing was aimed more towards reforming instructional practice. Starting in 1908, Thorndike and his students developed hundreds of achievement tests that were then implemented on a wide scale throughout different bureaus of cooperative research (Ryan & Shepard, 2008).

The motivation for standardized testing shifted again in the mid-20th century in response to Cold War politics. In 1957, the Soviet Union launched Sputnik. The United States' principal reaction to this event was shock that the Soviet Union could surpass the United States in technology and science, given that the United States was economically and industrially preeminent at that time. This event occurred after a period of complacency in the United States following World War II.

Many people wondered whether the United States was competitive with the USSR in mathematics and science education (Madaus, Russell, & Higgins, 2009). To secure Congressional support for federal intervention in elementary and secondary education, the National Defense Education Act (NDEA) was touted as a boon for national defense because Congress required the fullest development of the mental resources and technical skills of young Americans. The Act was a landmark expansion of educational testing (Madaus et al., 2009). The NDEA authorized funds for local testing programs in both public and private schools. This was the first time the federal treasury had funded educational testing at the state and local levels. The political grounds for the test were explicit, and this precedent of linking testing with political goals was maintained as the Civil Rights movement in the 1960s increased public concern about equality in educational opportunities for minority children. In response to this growing concern, a

new focus emerged on assessing the effectiveness of school programs to make schools accountable.

As noted above, testing was introduced to identify underperforming students who needed extra interventions. The tests were used originally for information, not accountability (whether applied to students or schools). However, this focus shifted in the past half century, as chronicled in the following sections, as testing and school accountability have taken center stage in debates over national educational policy. At first, this was spurred by Cold War competition between the United States and the USSR after the Soviets launched Sputnik in 1957, when Americans suddenly worried about deficiencies in American math and science education. Additional legislation expanded the role of testing and school accountability through the enactment of the Elementary and Secondary Education Act (ESEA) of 1965 and other components of the school accountability movement, as explored in the following section.

The emergence of the modern school accountability movement. Title I of the Elementary and Secondary Education Act (ESEA) of 1965 launched the development of the field of educational evaluation and the school accountability movement (Wright, 2008). *Evaluation* is a term often used interchangeably with assessment or test. Evaluations through tests supposedly measure not only the learning of the individual student, but also the effectiveness of the teacher and the school. Federal policy shifted when officials looked at business practices and focused on cost–benefit analysis and production outcomes (Resnick, as cited in Ryan & Shepard, 2008). Evaluation research was becoming a part of public policy.

The ESEA issued a mandate for the evaluation of every Title I and Title III

project (Worthen & Sanders, as cited in Ryan & Shepard, 2008). A key aspect of Title I was a new implied contract between the federal government and local school districts: that federal dollars would be spent on education in exchange for evidence of program effectiveness. This launched the accountability movement. These evaluation provisions came about because then-Senator John Fitzgerald Kennedy doubted that school administrators understood how to provide effective programs to disadvantaged children (Ryan & Shepard, 2008).

Federal legislation increased the importance of testing by using test results to document the need to increase educational opportunities for disadvantaged and minority children. Student test results were used to judge the success of educational reform programs. The Civil Rights Act of 1964 and the Equal Educational Opportunity Survey (EEOS) contributed greatly to the exponential growth of educational testing (Madaus et al., 2009). “Commonly known as the Coleman Report after its lead author, the report prompted a dramatic shift in the way people judged school quality” (Coleman, Hobson, McPartland, Mood, & Weinfeld, as qtd. in Madaus et al., 2009, p. 17). The shift was made from inputs to outputs. The outputs were student test scores, the accountability tool (Madaus et al., 2009).

The National Assessment of Educational Progress (NAEP) was instituted in 1969 and was part of the trend toward large-scale data gathering. The NAEP was intended to be an information source and a neutral monitor of educational effectiveness (Ryan & Shepard, 2008). The NAEP was never designed to hold individual schools or school districts accountable in today’s sense, but rather to show where instruction was effective as is versus where it needed to be altered. Nevertheless, with the surge in accountability

pressures, politicians and others not directly involved in teaching have attempted to identify scapegoats for perceived shortcomings of the educational system, threatening the proposed neutrality of the NAEP. The NAEP made possible the use of tests to monitor public schools nationally and rank schools according to their relative success or failure to achieve certain standards (Madaus et al., 2009).

There are two NAEP assessments. One is designed for detailed reporting in any given year. The other is designed to provide the most consistent estimates of long-term trends (Koretz, 2008). Both NAEP assessment tools have been administered periodically to samples of students across the nation. The NAEP has tested students in various grade levels in mathematics, reading, science, and occasionally other subjects (Madaus et al., 2009).

The Scholastic Aptitude Test (SAT), a college admission assessment tool, was first administered in 1901. Between 1963 and 1977, SAT scores declined rapidly: the median verbal score declined by 50 points, and the median math score dropped by 30 points (Madaus et al., 2009). A special panel inferred that the main reason for the decline in scores was demographic changes in the population of students who were taking the SAT (Ryan & Shepard, 2008).

The number of minorities and women taking the SAT had increased. These new test-takers were earning lower scores than those of prior test-takers, who had been predominantly middle-class and upper-middle-class white males. Madaus et al. (2009) claimed that, rather than a change in the demographics of test-takers, the main reason for the continuing decline in median SAT scores after 1970 was the waning quality of schools and schooling (Madaus et al., 2009).

Hayes, Wolfer, and Wolfer (1996) concurred that the decline in test scores was due to the use of more simplified school textbooks. The factors involved in variations in test scores are a central focus of this dissertation. Concerned about these and other trends in education, policymakers have imposed new educational mandates since 1975, including the Education for All Handicapped Children Act of 1975, which have upped the stakes in high-stakes testing, as explained in the following section. *High-stakes testing* means that the test results determine outcomes that are significant: the ability to graduate from high school, for example, or to be granted or denied a professional license (such as the right to practice law in a state).

Educational testing mandates that have emerged since 1975. The Education for All Handicapped Children Act of 1975 mandated identifying the special needs of handicapped children. These students with special needs were supposed to receive individual educational plans (IEPs) and to receive proper placement (Madaus et al., 2009). *Individual education plans* (IEPs) became mandatory for students with special needs after the passage of the Education for All Handicapped Children Act of 1975. The criteria for determining specific learning disabilities included a severe discrepancy between the student's achievement and intellectual ability in one or more of the following areas: oral expression, basic reading skills, reading comprehension, mathematical calculation, and mathematical reasoning. These gaps were determined by standardized tests through measurement and documentation (Madaus et al., 2009).

More educational reform was introduced during the 1990s as links between testing and school funding became more prominent in the United States. These tests were known as high-stakes tests because decisions about funding, remediation, and even

the closing of supposedly failing schools were made on the basis of test scores. The consequences for low scores on these tests were so severe that scandals arose when in some states, it was found that teachers and school administrators were altering student answer forms to skew test results (for which some current and former school employees received prison sentences in April 2015). These high-stakes tests became de facto standards that served to define what educators taught.

The high stakes of testing affect all levels of education, from K–12 through graduate-school programs. These include passing or failing a professional examination, as determined by a cut score, as was and remains the case with the New Mexico Bar Examination. *Cut score* is the threshold on a test that differentiates between levels of performance, the most common being pass/fail on a professional or an educational examination. At stake was nothing less than the competitiveness of the American workforce in the global economy.

The first major proposal introduced in the 1990s was the Goals 2000: Educate America Act, which established eight goals for American education (Madaus et al., 2009). Goals 2000 called for establishing “world-class” standards to identify what all students should know and be able to do to live and work in the 21st century. High-stakes tests would be administered to determine whether these standards were being met. Goals 2000 was intended to achieve eight educational achievement goals by the year 2000 and called for national testing programs to monitor progress toward these eight goals and the attainment of the “world-class” standards. However, this ambitious nationwide program was never developed. Instead, states developed their own standards and testing programs (Madaus et al., 2009).

In 1997, the Individuals with Disabilities Education Act (IDEA) was enacted. The IDEA had important implications for testing because it required students with disabilities to participate in both the general curriculum and the assessments of achievement administered by districts and states (Madaus et al., 2009). According to Madaus et al. (2009),

The 2004 reauthorization of IDEA continued the expectation that students with disabilities [would] take standardized tests and achieve at levels commensurate to [their] peers without disabilities. This testing requirement was prompted by a belief that if they did not participate in state and local assessment programs, students with disabilities would receive an unequal and inferior education. Here again, tests were used as a tool to alter instruction. (p. 21)

In 2002, No Child Left Behind (NCLB) was passed after scores from the NAEP failed to show any significant improvement. No Child Left Behind was designed to ensure that all children would have a fair and equal opportunity to obtain a high-quality education and reach proficiency on challenging state academic achievements and academic standards (Hursh, 2008). Many critics of educational practice in the United States argued that the United States was performing below the achievement levels of its industrialized competitors. No Child Left Behind was combined with elements from common state policies for testing and accountability and became a federal mandate for any state to receive funds under Title I of the ESEA (Koretz, 2008; Wright, Wright, & Heath, 2006).

No Child Left Behind requires annual testing in mathematics and reading in grades three through eight and in one secondary grade. This legislation also established a

complex system for determining whether states and schools make adequate yearly progress (AYP) toward student proficiency goals (Koretz, 2008). If schools and districts failed to meet their performance goals, a variety of administrative sanctions were prescribed (Superfine, 2008).

While the statutory provisions governing standards and assessments were not entirely new at the federal level, the accountability mandates included in the NCLB were unprecedented; the federal government had never before specified in such detail the steps that states, districts, and schools must take to increase student performance if schools failed to perform adequately. (Superfine, 2008, p. 48)

The specific educational mandates in recent legislation, such as No Child Left Behind, have stemmed in part from a greater awareness of educational inequalities and more demand from the public that minorities (including racial minorities and students with special needs) be treated fairly. The emergence in the political and educational discourse of the rights of linguistic and cultural minorities has led to increased scrutiny of how educational policies suppress diversity (Shohamy, 2007, p. 117). Language tests, formerly seen primarily as a “tool used to measure language knowledge are viewed today as instruments connected [with] and embedded in political, social, and educational contexts” (Shohamy, 2007, p. 117).

This section has provided an overview of the history of educational testing in the United States. The next section provides an overview of testing theory and testing practices.

Testing Theory and Testing Practices

A test is a critical examination, observation, or evaluation. A test can be used to

evaluate, to prove a set of beliefs, or to measure skills, knowledge, aptitudes, or a level of intelligence (Testing, 2010). Tests have become a crucial part of education to measure student knowledge and intellectual aptitude. Controversy surrounds cultural bias in testing (as discussed below)—whether people familiar with certain cultural values get a boost in their scores, while the mental abilities and aptitudes of those unfamiliar with those values may be underestimated. It is easier to identify and correct cultural biases in selection tests (in which the test-taker must select the one correct answer choice from the options given in a multiple-choice or true/false question) than in supply tests (in which the test-taker must supply or construct an answer in response to a prompt, such as by writing an essay), a key issue for the dissertation about the scoring of the essays in the New Mexico Bar Exam, which in the early 1970s constituted the entire examination, as the multiple-choice portions were only added later. Ryan and Shepard (2008) noted three general problems with achievement tests:

First, achievement-testing programs grew up alongside IQ testing, relied on the same statistical techniques for test construction and for evaluating test quality, and suffered from the same limitations [e.g., of not identifying how or why some students mastered material that remained challenging for other students]. Second, both Mann and Thorndike instituted testing programs because they had already concluded that schools were failing; [they believed that] gathering data would help them promote school reform. Third, focusing attention on standardized tests often produces perverse results, as Rice discovered when educators spent more time on spelling after his study, despite his finding that more time made no difference. (p. 26)

Assessment and evaluation are often used synonymously with the word test. A test can measure a full range of skills or knowledge, referred to as a domain (Koretz, 2008). The evaluation or test is a sample of a larger domain of interest (Madaus, Russell, & Higgins, 2009). An achievement test can be used, for example, to make an inference about how students would perform across an entire domain, based on students' answers to a small sample of questions. Achievement tests are sometimes referred to as criterion-referenced tests. *Criterion-referenced tests* aim to measure or predict the behavior of a person or that person's mastery of the content material being tested, based on a test score. Most academic examinations are criterion-referenced; criterion-referenced tests differ from *norm-referenced tests*, which compare student performance relative to the performance of the student's peers. The use of this type of inference to predict behavior or mastery in criterion-referenced tests is fundamental to achievement tests (Crocker & Algina, 1986).

Two types of test items: Selection and supply. There are only two types of test items: selection and supply. In a selection prompt, test-takers choose or select from predetermined options (e.g., multiple choice or true–false answer choices), whereas in a supply item, students must generate (or supply) the answer in their own words. “In general, assessments that are centered on selection of a response tend to test at the lower-order levels of learning” (Abbott, 2012, p. 34). Selection and supply are determined by what is being measured within a domain. The items sampled from the domain are the building blocks of the test.

Selection items are more common with standardized tests. Each selection item has only one correct answer. Multiple-choice items have two parts. The stem is the

question statement, while the correct answer is the keyed response (Wright, 2008). True–false questions are multiple-choice, but also have only one correct response. A single option can be the correct answer for more than one stem in a matching question. The use of such multiple-choice tests with only one correct answer per question permits the development of tests on which the students’ answers are fast, easy, and inexpensive to score by machine. The selection test can be administered efficiently to large groups of people. Students can respond quickly to selection items, so more items can be taken from the domain in a test of any given duration (e.g., half an hour).

The supply item asks students to create (or supply) an answer in their own words that would involve recall, analysis, or a synthesis of information, such as through writing an essay in response to a reading passage and a prompt or question (Madaus et al., 2009). Another term for a supply item is a “constructed-response item” (Johnson, Penny, & Gordon, 2010, p. 121). Supply items are being used increasingly with state testing programs to measure domains of knowledge, such as writing proficiency and math competency. *Domains of knowledge* cover the entirety of a field of knowledge or an individual’s knowledge of that field of knowledge (e.g., reading comprehension or arithmetic ability). The theory behind any achievement test is that from the samples taken from that domain of knowledge, an inference can be made about how a student would perform across an entire domain.

Supply items ask the test taker to produce a tangible product (such as an essay) that can then be evaluated according to some preset criteria. Supply items are attractive because they require students to produce responses in their own words and to demonstrate their skills. The time required to complete supply tasks, however, often

limits their use to just a few samples on most tests (Madaus et al., 2009).

This section has explored issues of test design and evaluation for multiple-choice or true-false (selection) tests and fill-in-the-blank (supply) tests. If supply tests ask students to supply more than just filling in the blanks—for example, by writing an essay—how should the material that students supply in their own words be assessed? Holistic grading approaches and grading rubrics have emerged as ways of imposing order and structure on what otherwise might be entirely subjective assessments of student writing. *Holistic grading* is based on an overall impression or assessment of a student’s achievement (e.g., on a piece of writing) rather than assigning points for specific components or using a rubric to make multiple assessments (e.g., on clarity, coherence, spelling, punctuation, grammar). In holistic grading, typically one score is given for the overall level of quality of a piece of student work, as defined in a grading *rubric*.

The following section explores the nature of these approaches to assessment and the controversies that surround them. The biggest controversy—and the one with the greatest relevance to this dissertation research—is the issue of whether the use of such approaches to grading can ever be truly impartial or fair.

Grading and grading rubrics. “Through the use of [grading] rubrics, teachers clearly outline specific criteria and component parts of the assignment and provide information about what constitutes appropriate levels of performance for each component” (Abbott, 2012, p. 37). In theory, rubrics facilitate impartial assessment of student responses because the people who assess the student product, such as an essay, follow a set rubric (e.g., those rubrics presented in Table 1 and Table 2, below), which streamlines and standardizes assessment of student work. However, assessments of

pieces of writing are often highly subjective, and it is difficult, if not impossible, to eliminate completely the perception of quality in writing that may be based on cultural background and values. Scales for assessing language proficiency (e.g., from “novice” to “advanced” and “professional”) “affect *de facto* language policy” (Shohamy, 2007, p. 124). As Shohamy (2007) noted, with particular relevance to the subject of this dissertation, “language tests serve as tools for denying entrance to educational institutions and the workplace,” representing “a serious violation of human rights” (p. 124).

The following holistic scoring guide (see Table 1, on the following page) is an example of a guide for holistic scoring, taken from the Advanced Placement Program in foreign languages for the College Board (University of Delaware, n.d., pp. 2–3):

Table 1

Sample Holistic Scoring Guide

Overall Assessment	Points	Explanation
Demonstrates superiority	9	Strong control of the language; proficiency and variety in grammatical usage, with few significant errors; broad command of vocabulary and of idiomatic Spanish.
Demonstrates competence	8, 7	Good general control of grammatical structures, despite some errors and/or awkwardness of style. Good use of idioms and vocabulary. Reads smoothly overall.
Suggests Competence	6, 5	Fair ability to express ideas in Spanish; correct use of simple grammatical structures or use of more complex structures without numerous significant errors. Some apt vocabulary and idioms. Occasional signs of fluency and sense of style.
Suggests incompetence	4, 3	Weak use of language, with little control of grammatical structures. Limited vocabulary. Frequent use of Anglicisms, which force interpretations on the part of the reader. Occasional redeeming features.
Demonstrates incompetence	2, 1	Clearly unacceptable from most points of view. Almost total lack of vocabulary resources, little or no sense of idiom and/or style. Essentially Hispanized English.
Floating point		A one-point bonus should be awarded for a coherent and well-organized essay or for a particularly inventive one.

(University of Delaware, n.d., pp. 2–3)

Holistic scoring consists of establishing a single grade for an entire piece of writing, “based on the total impression of a whole text” (University of Delaware, n.d., p.

1). This impression should be based on “specific criteria” established ahead of the

evaluation “on which the evaluation is to be based” (University of Delaware, n.d., p. 1). The scoring guide (or grading rubric) should “describe each feature and identify high, middle, and low quality levels for each feature” (University of Delaware, n.d., p. 1). The claim for the supposed objectivity to be obtained through a scoring guide is that through it, the people who grade or score these tests

can avoid falling prey to many of the causes of the diversity in judgment among graders or among papers evaluated by one grader: “(1) flavor and personality (‘style as the revelation of a personality, individuality, originality, interest, and sincerity’), (2) organization and analysis, (3) quality of ideas, (4) usage, sentence structure, punctuation, and (5) wording and spelling.” (Perkins, qtd. in University of Delaware, n.d., p. 2)

However, even proponents of holistic scoring concede “the subjectivity inherent in holistic scoring” (University of Delaware, n.d., p. 2).

One alternative to holistic grading for pieces of writing is analytic scoring. *Analytic scoring* guides specify criteria for assessing student achievement (e.g., a piece of writing’s grammar, vocabulary, mechanics, fluency, and relevance). Analytic scoring guides thus differ from *holistic grading*. One example appears on the following page (see Table 2, on the following page). However, it is incomplete or vague in that “descriptions of each end of this Likert-type scale should be given, with 5 being ‘outstanding’ and 1 being ‘poor,’ for example,” with clarification also needed for each term (grammar, vocabulary, etc.): Through the use of an analytic scoring guide, students can learn how their grade or score was calculated, with helpful feedback. But how reliable are such analytic ratings?

Table 2

Sample Analytic Scoring Guide

Criteria	Points (1–5 Scale)					Comments
Grammar	5	4	3	2	1	
Vocabulary	5	4	3	2	1	
Mechanics	5	4	3	2	1	
Fluency	5	4	3	2	1	
Relevance	5	4	3	2	1	

(University of Delaware, n.d., p. 6)

When different raters of a student essay disagree (i.e., they assign a different score to the essay), “testing agencies must resolve the score discrepancy before computing an operational score for release to the public” (Johnson et al., 2010, p. 121). Some ways of addressing interrater discrepancies are more reliable than others; “some forms may be associated with artificially inflated interrater reliability” (Johnson et al., 2010, p. 121). Choosing one method rather than another one also “may affect the percentage of papers that are defined as passing in a high-stakes assessment” (Johnson et al., 2010, p. 121).

Johnson et al. (2010) examined four common methods for resolving disagreements in scoring from two raters: “(1) combining scores from two raters, (2) substituting an expert’s score for original scores, (3) combining scores from raters and expert, and (4) combining scores from an expert rater and the closest rater” (Johnson et al., 2010, p. 130). The third method was found to provide the greatest reliability (Johnson et al., 2010, p. 133). However, even when experts rated essays on which the

original raters disagreed, “the two experts did not completely agree in their assessments of the papers” (Johnson et al., 2010, p. 136). The inevitable conclusion is that no matter which method is used, absolute fairness (complete objectivity) remains elusive. This inconvenient truth must be addressed, given the high cost of failure in school, an issue explored in the following section.

Testing bias and inequality. This dissertation has examined the discriminatory impact of language policy. As Shohamy (2007) noted about basing entrance decisions on proficiency in another language (as was the case with Spanish-speakers and other Hispanics who took the New Mexico Bar Examination in English),

By establishing entrance criteria that include the test of another language, new *de facto* policy is created, the implication of which is that the “tested language” becomes the most important language to acquire and master. Indeed, [as] tests are often more powerful than any written policy document, they lead to the elimination and suppression of certain languages in society. (p. 120)

High-stakes testing and the cost of failure. Failure in education is a widespread and painful subject. According to Holt (2005, qtd. in Hursh, 2008),

Most children in school fail. For a great many, this failure is avowed and absolute. Close to 40 percent of those who begin high school drop out before they finish. For college, the figure is one in three.

Many others fail in act, if not in name. They complete their schooling only because we have agreed to push them up through grades and out of the schools, whether they know anything or not. There are many more such children than we think. If we “raise our standards” much higher, as some would have us

do, we will find out very soon just how many there are. Our classrooms will bulge with kids who can't pass the test to get into the next class.

But there is a more important sense in which almost all children fail: Except for a handful, who may or may not be good students, they fail to develop more than a tiny part of the tremendous capacity for learning, understanding, and creating with which they were born and of which they made full use during the first two or three years of their lives. (p. 49)

Holt's observations captured the issues in 1964 (Hursh, 2008). These issues are at least as relevant now. Standardized testing has been a part of the United States' educational system for decades. These tests support making decisions about individual students that often have a huge impact on their future: what careers and income levels may be available (or closed) to them.

Proponents of standardized testing have argued that standardization is important to all students for reasons of fairness: so that students may all gain equal exposure to the same tasks that are administered and scored the same way (Koretz, 2008). Standardization is intended to avoid irrelevant factors that might distort the comparison between individuals and therefore result in unfair advantages and disadvantages. Standardization, its proponents argue, provides comparable information.

Opponents of standardization argue that the disadvantages of standardization include the fact that results are not truly comparable if students have disabilities or limited proficiency in the language of testing (Koretz, 2008). Standardized testing, in theory, is used to identify potentially outstanding academic talent and to ensure that instruction is on course (Noddings, 2007). However, students entering a standardized

system with different advantages and disadvantages will tend to emerge with those preexisting advantages and disadvantages replicated in the supposedly standardized results, which is intrinsically unfair.

Tests should be used to help students rather than being used to penalize them. High-stakes standardized testing is used so that candidates must be able to pass these tests if they want to become lawyers, doctors, nurses, pilots, or teachers (Noddings, 2007). Advocates of standardized testing argue that children need to become prepared to take various types of tests that they will face later in life, and they need to prepare for such competition during K–12 schooling. This testing practice is now provided to them. People study hard and take tests to get into a particular profession because they have specific individual goals. In a K–12 school environment, however, a test is coercive in the sense that children and adolescents in that setting cannot in any meaningful way withhold their consent to be tested, and there is little evidence that the material tested is really necessary for a fifth grader or a high school graduate (Noddings, 2007).

Tests in schools could be used for healthy competition or as a game to stimulate curiosity. Instead, high stakes are attached to these tests. The school relationships with children are destroyed as children usually trust their teacher, and a caring student–teacher relationship has been formed. Hence, many schools focus on students who are at risk of performing poorly on high-stakes tests and increase test preparation and drill-and-practice (Madaus et al., 2009). In response, the parents who are in a position to do so often pull their high-ability students out of the public schools and move them into private schools. Such parents may believe that the private schools have fewer mandates and are not constrained by public accountability requirements (Madaus et al., 2009). This trend in

education is one of the ways in which the testing and school accountability movement are changing educational outcomes, giving rise to the question explored in the next section:

Does teaching for the test reinforce preexisting inequalities?

Does teaching for the test reinforce preexisting inequalities? Many educators value testing, but testing has its limitations and its detractors. Of particular concern is whether the teaching-for-the-test mentality now so prevalent in American schools causes a failure to develop higher-order critical-thinking skills, such as those that are needed to write a coherent and original argumentative or analytical essay. Such an approach may be leaving students from certain cultural backgrounds at a competitive disadvantage unrelated to their intellectual potential.

Our schools are, in a sense, factories in which the raw products are to be shaped and fashioned into products to meet the various demands of life. The specifications for manufacturing come from the demands of 20th-century civilization, and it is the business of a school to build its pupils according to [the] specifications [that have been] laid down. (Cubberley, qtd. in Au, 2009, p. 19)

High-stakes testing can be seen as an inequality for education and social reform in that it is an application of elitism and enables the maintenance of strict institutional and social hierarchies (Au, 2009). In the history of testing, the scientific principles about management were applied to education. In particular, these principles were applied to the school organization and to the curriculum itself.

In 1912, John Franklin Bobbitt published an article entitled “The Elimination of Waste in Education.” The publication of this article launched his career as a leader in the curriculum field (Kliebard, qtd. in Au, 2009, p. 21). Bobbitt’s importance in curriculum

studies stemmed from the application of Fredrick Taylor's concepts of scientific management. Bobbitt's concept of efficiency in education was built upon the predetermination of objectives. These objectives fundamentally drive the entire process of education (Au, 2009). The belief is that the administrator will gather all possible information about the educational process to develop the best possible methods for teachers to get students to meet those standards. Teachers, according to this belief, are not able to do this alone. Teachers must receive the necessary direction from administrators. Tests can also be used to determine teacher performance, as well as the rates of pay (Au). Therefore, the school is like a factory, and the administrators are its managers.

High-stakes testing also provides policymakers with a powerful tool that, like the administrators, directs what is taught, what is learned, and how it is learned. The policymakers have a hand in education, as well as in the school organization. In 1990, a survey was conducted in which test directors of 40 states were asked whether "teachers spend more time teaching the specific objectives on the test than they would if the tests were not required." The answer was a unanimous *yes* (Madaus et al., 2009). The negative consequences were cited by a third of the test directors, who viewed the practice of spending more time teaching the test's specific objectives negatively. They concluded this because they felt that the tests drove the curriculum (Madaus et al.).

There are three predictable ways that high-stakes testing affects teaching and learning. Teachers pay more attention to tested content and decrease emphasis on content that is not tested (Hursh, 2008). This narrows the content and the skills taught and learned within a specific discipline. The high-stakes test preempts time and coverage of

disciplines not tested (Madaus et al., 2009). This narrows the curriculum across subject fields. Third, there is a trickle-down effect. The content and skills covered in the upper grades displace the content and skills of lower grades that were not tested, altering the curriculum across grades.

In 2001, a national survey of over 4,000 teachers found large differences between high-stakes situations and those teaching in areas in which the stakes were not as high (Madaus et al., 2009). One of the differences was that 80 percent of teachers in schools with mandatory high-stakes testing reported that there is so much more pressure for high scores on those tests that the teachers in those schools have little time to teach anything that is not on them. In schools with low-stakes tests, only 56 percent felt that way. Eighty-five percent of high-stakes teachers reported teaching test-taking skills to prepare students, while only 67 percent of low-stakes teachers reported doing so. Forty-three percent of high-stakes teachers reported that they greatly increased the time spent on instruction of tested areas, but only 17 percent of low-stakes schools reported greatly increasing time on tested areas. Sixty-three percent of high-stakes schools reported using test-preparation materials developed commercially or by the state, and 44 percent used items from the state test to prepare students. In contrast, only 19 percent of teachers in lower-stakes schools reported engaging in this type of test preparation. Seventy percent of teachers in high-stakes schools also indicated that they prepared students for the test throughout the year, as compared with only 43 percent in lower-stakes schools (Madaus et al.). The survey also revealed that 80 percent of the teachers believed that the scores on the state-mandated tests were not an accurate reflection of the quality of education, underscoring that they questioned the utility of altering teaching methods to boost test

scores.

Classrooms in public schools in the United States are more racially, ethnically, and linguistically diverse than ever before, precisely when standardized test results are being used more than ever before to assess the educational quality of schools and to hold them accountable for those results. The following section addresses student demographic differences and how they affect curricula and instruction in the schools in the face of high-stakes testing. Cultural values shape families' and students' views of education and their approaches to it. Families from different cultures have different patterns of communication within the home and different standards of what constitutes appropriate interactions between children and adults, all of which are bound to affect students' experiences in school.

Student demographic differences. The effects of state testing programs on curriculum and instruction not only vary with the stakes associated with the test, but also by classroom demographics. Why are demographics important in understanding test performance? The one-size-fits-all approach to high-stakes testing is meant to improve and prove the achievement levels of all children, regardless of the school that they attend. Robert Sternberg of Tuft's University summed it up when answering a question about "how well can we measure a student's intelligence through standardized testing?"

If you grow up in [affluent] Weston or Wellesley, for most of the kids, the tests are fairly good measures of the analytical part of intelligence. If you grow up in [not so affluent] Roxbury, chances are, it's not going to tell you the same things as it does [with] a kid from Weston. And the reason is that kids grow up with different challenges. Kids who grow up in middle-class, mostly white, suburbs

have the luxury of developing memory and analytical skills, which is what these tests, and to a large extent schools under the current administration, very much value. If you grow up in a more challenging environment, then you have to develop creative and practical skills because every day can be a real challenge. (DeMarco, qtd. in Madaus et al., 2009, p. 147)

The types of skills and knowledge included on most state achievement tests align with the skills of students from affluent areas (Au, 2009). This alignment of content and skill sets gives students from affluent areas an advantage over their less affluent peers, who have developed other important skills that are not tested. To overcome these inequalities, teachers in high-minority schools believe that they must make more modifications to their instruction to prepare their students for the state tests.

Narrowing what is taught and learned across the curriculum has existed in education for a long time, but this is more prevalent now than ever before. The teachers focus on the tested subject areas so much that they have less time for anything else. As a result, developing valued talents is often neglected (Koretz, 2008).

People from different socioeconomic classes and different cultural groups view testing in different ways. Family and cultural background influence the way students feel about and interact with tests. Richard Rothstein of the Economic Policy Institute has done research to show how family backgrounds and experiences from home can influence students' behavior in the classroom and on high-stakes tests (Madaus et al., 2009). In a recent analysis of the NAEP reading test scores, Rothstein examined the influence of home factors on test performance. This analysis revealed that collectively, single-parent families, parents reading to a child every day, hours a child spends

watching television, and the frequency of school absences explained two-thirds of the differences in reading scores (Bartley & Coley, as cited in Madaus et al., 2009). This relationship between home factors and test performance raises the question: Can the use of test scores be used to judge school quality without considering the class-related factors that can influence learning and test performance?

Cultural values can affect a student's experiences in school. Those values can ultimately affect test scores. High-stakes testing incorporates two culturally held values: achievement is an individual accomplishment, and individuals must display their accomplishment publicly (Hursh, 2008). These beliefs are not universal. Some cultures hold these values, while other cultures reject them. Middle-class children are socialized to those two values, and they are socialized to assume the role of information-givers. This orients them towards success on standardized tests. Their parents have tested them prior to their entrance into school. Many children from other cultural backgrounds are not asked by adults to be information-givers. Therefore, they do not have a clear conception of what testing is or how to approach it.

Navajo children, as one example of children not from a white middle-class background, socialize to a great extent through nonverbal communication and emphasize spatial skills and sequential visual memory (Higgins, et al., 2009). Research on Navajo children found that they learn through repeated observation and self-initiated self-testing. Mistakes are not publicly acknowledged, and public questioning does not occur. They see testing in school as an evaluative tool; testing forces them to display their knowledge publicly, which goes against their socialization. Revealing their skills and competencies in such a public manner is awkward for them, yet they are ultimately labeled by their test

performance despite their lack of socialization into that position (Madaus et al., 2009).

Test performance is affected by culture in testing minorities, recent immigrants, bilingual students, and females. Equality in testing remains elusive, as does the goal of equal opportunity in education. Noddings (2007) noted,

[Equality] is at the heart of No Child Left Behind's mission: There should be no substantial gap in achievement between Whites and any other racial/ethnic group. All groups should be equal in results, as exhibited in achievement-test scores. If we put aside groups of limited-English-proficient speakers and special education students, for whom demand is logically ridiculous, we should be able to agree that substantial difference between racial groups is an indication that something is wrong. . . . The question remains: What is wrong? (p. 28)

Problems with Educational Assessment and Testing

No Child Left Behind suggests that all students should experience the same curriculum and should achieve similar results. Noddings (2007) pondered what things all students learn and when we should provide different experiences for children with different aptitudes and interests; Plato, Rousseau, and Dewey agreed. "There is nothing more unequal in education than sameness" (Noddings, 2007, p. 94). John Gardner (1961/1984) argued that some children who would one day be competent in a trade might have difficulty in academic studies, but they should have a strong academic program, even if they would fail in school. In a democratic society, different capabilities need to be accommodated through different curricular offerings (Noddings, 2007).

As noted above, there are only two types of test questions: selection and supply. A series of multiple-choice questions comprises a selection examination, and such an

examination can be tested empirically for fairness and avoidance of racial, ethnic, or socioeconomic bias. Essay examinations, however, are a form of testing and assessment in which students must supply their own answers and explanations, and assessing the merits of supply-type tests involves some subjective judgment on the part of the examiner or grader. Attempts to modify or curtail bias include the use of grading rubrics, as discussed above, but no matter how well-intentioned such measures may be, they may never fully eliminate bias or subjectivity in assessing student writing.

The interviewees believed that their style of writing revealed their Hispanic cultural background and that this may have adversely influenced the examiners' assessment of the examinees' ability to think like a lawyer. This cultural bias may have been operative even in the absence of any conscious intention or motivation to discriminate against bar examinees from minority backgrounds. These issues are explored in the three sections that follow in this chapter: difficulties in evaluating student writing, cultural bias in testing, and educational pedagogy and hegemonic power structures.

Difficulties in evaluating student writing. Teachers are aware of the difficulty of assessing students' writing samples. "Many teachers are uncomfortable with assigning subjective grades to student work [because] such grades are most often based on impressions rather than on discrete points" (University of Delaware, n.d., p. 1). One possible safeguard against subjectivity in grading is discrete-point scoring: "Discrete-point scoring is easy, quick, and objective"; furthermore, "such grades can easily be accounted for and explained" (University of Delaware, n.d., p. 1).

The problem is that in task-oriented writing, "discrete-point scoring is essentially

impossible,” given the divergent ways in which students will approach the task, with their writing differing greatly in length, content, and quality (University of Delaware, n.d., p. 1). If discrete-point scoring is impossible, then holistic scoring may be employed. Is it true, as some claim, that holistic scoring “offers a very strong measure of validity and reliability” (University of Delaware, n.d., p. 1)? (*Validity* refers to the extent to which a test measures what it claims to measure. *Reliability* refers to confidence that the same procedure, experiment, test, or approach will yield the same results if repeated under controlled conditions.) Yes, some claim, but if and only if “the criteria are predetermined, based on the specific categories of phrases, grammar, and vocabulary to which the students are directed” (University of Delaware, n.d., p. 1).

Cultural bias in testing. “The subjective decisions required in scoring constructed-response items . . . contribute a unique form of measurement error not associated with supplied-response items” (Johnson et al., 2010, p. 122). *Scoring issues* are contentious in high-stakes standardized tests when people are evaluating writing (short answers or essays using the test taker’s own words) or other answers (e.g., math problems) that cannot be scored by machine (unlike multiple-choice answers). One issue in assessment of individuals’ writing samples is the possibility of cursory examination of individual answers (little time spent), even though the outcomes of the test have high stakes (*high-stakes testing*). The subjective nature of assessing writing samples is at the heart of the problem of the speakers of New Mexico heritage languages who did not pass the Bar Exam in the 1970s.

In addition to any possible overt ethnic bias among the scorers, there may have been unwitting cultural bias in the rubric itself or in the assessments of the pieces of

writing (essays) when measured against that rubric. Surprisingly little is known about how teachers assess students (Kalthoff, 2013), leaving room for unconscious cultural bias to affect teachers' evaluations of students' written and oral performance, as well as other aspects of their academic performance. One key issue for social justice in education is disproportionate representation. *Disproportionate representation* refers to a comparison of the incidence of a given population (for example, a racial or ethnic group) that is overrepresented or underrepresented relative to the population as a whole, for example, in rates of failure on standardized tests or in special education placement. Another is standard setting.

Standard setting in a test must hold up to scrutiny (in court if necessary) to determine a *cut score* (for example, for a bar exam, the minimum score needed to obtain licensure to practice law in a state). The pass/fail line (cut score) must be empirically justifiable and not arbitrary. Schools are implicated in allocating social and economic capital, according to social or economic reproduction theory (Kalthoff, 2013). Cultural reproduction theory has "highlighted the significance of schools for [legitimizing] the dominant culture in all of its specific characteristics" (Kalthoff, 2013, p. 89).

Cultural bias in testing can take many forms, and some have argued that cultural bias in testing has been pervasive since the inception of educational testing. One obvious form of cultural bias, known as facial bias (Nitko, 1983, as cited in Zurcher, 1998), is stereotypical representation in images or words of people from different racial or ethnic groups (such as occupations or professional status). Another form, known as test content vs. experience differential (Nitko, 1983, as cited in Zurcher, 1998), favors those groups more exposed to the vocabulary or concepts. Someone living in a foreign country who

learned English from British instructors might have no idea what the words dime, nickel, or quarter mean, so solving word problems with those terms would be a culturally biased way to measure their problem-solving or numeric skills.

Slope bias and intercept bias (Anastasi, 1988, as cited in Zurcher, 1998) refer to two types of statistical problems with test scores for minorities. Slope bias means that scores for minorities have lower correlation with the variable (aptitude or achievement) that the test ostensibly measures, while intercept bias means that “test scores for individuals in a minority group systematically underpredict performance on a criterion . . . compared to scores from those in the majority” (Zurcher, 1998, p. 104). Intercept bias means that a test is not fair for minorities.

“In general, [although not always,] courts have ruled that scores from standardized tests are culturally biased” (Zurcher, 1998, p. 104). In several cases in California, courts ruled that tests had been culturally biased against Mexican Americans, Chinese Americans, and African Americans (Zurcher, 1998). However, findings of cultural bias in standardized testing have not been universal. The *Wechsler Intelligence Scale for Children—Third Edition* (WISC-III), for instance, was found to predict “scores from achievement tests and classroom grades for samples of African American and Hispanic American students as well as they did for White students” (Weiss, Prifitera, & Roid, 1993, as cited in Zurcher, 1998, p. 105). Rather than underpredicting scores for certain minorities, scores on the Scholastic Aptitude Test (SAT) actually “overpredicted first-year college grades at a statistically significant level for African American and Asian American students” (Zurcher, 1998, p. 105). To avoid cultural bias in testing, some recent tests have been consciously designed to be culture-free through using “content that

is not necessarily more familiar to one cultural group than another” (Zurcher, 1998, p. 105).

Other recent work on cultural bias in testing includes Cole (1981); Jencks and Phillips (2011); Reynolds, Livingston, Willson, & Willson (2010); and Moynihan (2014). The issue explored in the following section is whether teaching for the test reinforces preexisting inequalities through devoting less instructional time to developing critical thinking skills and other higher-order mental tasks needed for long-term success in the information age rather than the short-term advantages that can be gained through higher scores on standardized tests.

Educational pedagogy and hegemonic power structures. A distinctive characteristic of the 1972 lawsuit was that no one before had possessed the temerity to challenge the powers that be—the bar examiners. These examiners were forced to answer allegations in court that arose from revelations made in local newspapers that some nonminority examinees who had failed the bar examination had obtained a different result after a regrading (one for which they had not even formally petitioned). This was a surprise to the minority examinees who had failed the test, who learned that some others who had sat for the same examination had obtained a reconsideration of their results in secret. These minority examinees wrote to the bar examiners after the examinees read these accounts in the newspaper. They asked that their examinations get regraded, but the bar examiners never replied to their letters. This left a lingering impression of a lack of equal treatment of examinees by the bar examiners.

When the minority examinees followed up by filing a lawsuit to request a regrading of their essays, the examiners sent out a letter to all unsuccessful examinees

that indicated that the case would go to trial and that unsuccessful candidates would be kept informed. The plaintiffs asserted that they deserved a regrading because marginal notations on their essays suggested that they had obtained passing scores (ones that did not match the numbers on the tally sheets). This was a claim that the justices had found raised significant questions of fact pertaining to a potential violation of the petitioners' Fourteenth Amendment rights to due process and equal treatment. The bar examiners' simple denial of wrongdoing, the justices found, was insufficient.

In question was whether the examiners had adhered to or violated the rules: Rule 7 (“no suspicion [of] improper considerations”), Rule 21 (“nonidentity grading” [anonymity]), Rule 22 (“posting of passing grades”), and other rules, as explained below. Rule 22 was violated in the case of the eight who were regraded because the public found out via newspaper accounts rather than through the mandatory posting by the Secretary of the Board of Bar Examiners (Alarid et al., 1972, Transcript of proceedings, p. 228). Rule 23 (“30-day waiting period”) was violated when at least some of the eight who later received a change from failing to passing scores were allowed to review their examination essays before the 30-day waiting period had expired; this is when some of them noticed mathematical errors in grading. Rule 33 (“availability to discuss general problems . . . with applicants”); this was violated by the lack of response to the letters from the unsuccessful examinees who later became the four plaintiffs. Thus multiple mandatory rules had been violated, according to the evidence presented to the court by the plaintiffs’ attorneys in the trial.

At the heart of the matter lay the issue of how to assess essays in a fair manner. No matter what method is used to assess pieces of writing—as discussed above—such as

a grading rubric, there remains some subjective element in which people of good will may sometimes simply see things differently—let alone the possibility that some people of ill intent may use the cloak of lack of accountability to infer racial or ethnic identity to discriminate against members of minority groups in a deliberate and malicious manner.

In this case, the plaintiffs sincerely believed that they had demonstrated through their essays that they possessed a sufficient grasp of the legal issues involved to be admitted to the legal profession in the State of New Mexico. As they readily admitted, they had ways of phrasing things that stemmed from having come from a Spanish-language heritage that they believed might be identifiable to some people who read their essays. The defendants argued in their testimony that the examinees had not demonstrated a sufficient ability to identify the legal issues in question and even that the examiners had given the benefit of the doubt (as far as possible) to the “boys” who had taken the examination. As they argued, they had to balance their protection of the people of New Mexico from possible representation by lawyers who were not qualified against the rights of people seeking admission to the legal profession to be given due consideration and a fair chance to prove their ability through demonstrating a minimum grasp of legal issues and legal reasoning. However, they were unable to prove this in court because the substantive merits of their essays were never reassessed in the trial.

Although the plaintiffs never argued that there was a conscious and deliberate attempt on the part of the examiners to discriminate against and fail examinees whom they identified (based on their distinctive style of writing) as coming from a Spanish-language background, they had a lingering suspicion that there was a reluctance on the part of the members of the bar to open the floodgates of the legal profession to applicants

who came from such a different cultural and linguistic background. As noted in interviews, this attitude may not have been as evident in Albuquerque as in other parts of the State of New Mexico (or other states), but they sincerely believed that they had not been treated in a fair manner; they asserted that they had left the examinations believing that they had demonstrated a sufficient grasp of legal issues but had not been given full credit for that due to the style of writing that was carried over from Spanish speech and language patterns of formulating and expressing thoughts: “They know how Hispanics are writing.”

Although the defendants never conceded a conscious (or unconscious) attempt to weed out applicants from a Spanish-language background, and although the *amicus curiae* arguments were not considered in the trial, the facts about disparities between admission rates between Hispanic and Anglo applicants remained stark and told a story that could not be ignored in an era of rapidly advancing gains for groups of people who had long been marginalized and discriminated against in many areas of American culture and society: for example, in education, the job market, political office. The lawsuit occurred at a time when many groups had become more vocal (or strident, in some others’ view) about asserting their rights. Many women were questioning staying in unsatisfying marriages in deference to the sanctity of marriage. Draftees were questioning and protesting against what they perceived as an unjust war in Vietnam. Blacks, women, Chicanos, and gays and lesbians were refusing to accept a continuation of the status quo in silence.

The highly disproportionate flunk rate for “Mexican Americans” (31% admission to the bar vs. 80–85% for Anglos) was evidence of a de facto pattern of discrimination

“ ’cause of the way we write” (according to one interviewee), which another interviewee also believed was identifiable. Although the plaintiffs lost the battle, they can be said to have won the war in fighting the entrenched pattern of de facto discrimination. First, the justices of the New Mexico Supreme Court agreed for the case to proceed to trial, arguing that a simple denial of the allegations by the defendants was insufficient, given the significance of the Constitutional issues involved (due process, nondiscrimination); significant facts were in dispute. Even though the verdict favored the defendants, as a result of the trial, the cutoff score (pass/fail) was lowered, and the examination was changed from an all-essay format to some multiple choice questions and fewer essays to bypass the quagmire of subjective assessments of writing style and make assessments of the legal issues involved more objective. The result was that the disparate admission rates to the bar disappeared, and there are many more men and women from Hispanic backgrounds practicing law in the State of New Mexico now than was the case prior to the trial.

Conclusions about Educational Testing and Assessment

The stated purpose of the New Mexico Bar Examination, as articulated by bar examiners under oath in trial transcripts, is to permit only those who have a sufficient grasp of legal issues to enter the legal profession and to practice law in the State of New Mexico. The examiners acknowledged the need to be fair to examinees and to give them a fair chance to prove that their knowledge of the law was sufficient—by the criterion of being able to identify successfully at least two out of three of the legal issues in questions in the examination. At the time in question, the early 1970s, this was measured solely by essay answers to case questions.

A key point contested in the trial was a question of fact: had the failing scores resulted from mathematical errors in tallying points noted in the margins of the essay examinations? The numbers in the margins did not always match the numbers on the tally sheets, leading to confusion and the belief on the part of examinees that perhaps their identity had been inferred from their style of writing and that they had been discriminated against in the scoring of their examinations. Significantly, the plaintiffs did not accuse the examiners of any deliberate or conscious attempt to discriminate against examinees of Spanish-language heritage. However, the suspicion that this had occurred lingered. The examiners, to avoid any recurrence of such a controversy, were instructed in the future not to make any marginal notations on essay examinations and to confine these solely to the tally sheets. The plaintiffs found the explanations of the discrepancies between marginal points and points on the tally sheets made by the defendants in the trial incoherent and unconvincing. Facts not in dispute were the huge differences in pass rates of Anglos (“80–85%”) vs. Hispanics (“31%”) were not in dispute. However, these facts were not considered as evidence in the trial, as the evidence presented in the *amicus curiae* brief was not assessed or considered during the trial.

What educational theorists have maintained is that although various efforts to standardize the grading of essays (and other “supply” tests) may be helpful in reducing bias in grading, it may be impossible to eliminate the element of subjectivity in assessing any supply-type of testing or assessment. Significantly, the New Mexico Bar Examination was altered after the lawsuit from an exclusively essay format to include multiple-choice questions. These could more reliably indicate whether the test-takers could identify correctly the issues of law in question and thereby uphold the purpose of

the test to prevent people who were not competent at providing legal representation to the people of New Mexico from becoming practicing lawyers or judges in the State.

This chapter has reviewed the literature about educational testing, which emerged in the later part of the period in which Spanish-speaking people have lived in this area. The review of this history (summarized above in Chapter 2 and further analyzed in Chapter 5) is essential in placing the events examined in this dissertation in context—of the high rates of failure of many people of Spanish-language heritage who had graduated from the School of Law to pass the New Mexico Bar Examination in the 1970s. This chapter ends with conclusions about educational testing and assessment; and final thoughts.

Final Thoughts

This dissertation has examined the formation of *Nuevomexicano* identity through a historical perspective of almost five centuries since the first Spaniards arrived in what is now the State of New Mexico. It has also examined this identity through various theoretical frameworks that help explain how it came to be that a handful of law school graduates from a Spanish-language background who took the New Mexico Bar Examination in the early 1970s and failed that examination through receiving failing grades on their essays challenged that result in court. Although initially unsuccessful, ultimately, they succeeded in altering the composition of the examination and the cutoff scores for a passing grade on that examination. As a result, the representation of people of Spanish-language heritage (in this case *Nuevomexicanos*), along with members of other groups traditionally underrepresented in the legal profession, have become practicing lawyers and have become judges in much greater numbers in recent decades.

Many of the theories used as background for placing this case in context have examined power dynamics, including whiteness theory, feminist theory, and convergence theory. Those theories explain how those with power and privilege retain their power and privilege. The historical review provided above in preceding chapters has traced the link between power dynamics and the social construction of racial identity to legitimate the positions of those who possess power and privilege.

Whiteness has been linked with power. The power dynamics of whiteness played out historically not only in the conquest of North America by Europeans and people of European descent, but also in who among *Nuevomexicanos* claimed access to power, wealth, and privilege. European culture, religion, and heritage—including genetics—were used to justify the appropriation of the land and resources possessed by the native peoples in what is now New Mexico (and elsewhere in the New World). The *ricos* who were of Spanish-language heritage used the claim of “purity of blood” (*limpieza de sangre*) of descent from the Spanish conquistadors to characterize themselves as “Spanish.” This semantic move arose in response to Anglo smears against *Nuevomexicanos* as “Mexicans” or a “mongrel” (mixed) race.

Although the suit was dismissed, after the ten-year battle that followed it, things were never the same again in New Mexico. The plaintiffs had argued in an *amicus curiae* brief that even absent an intention to discriminate, the unequal results of pass rates of Anglos vs. Hispanics spoke for themselves: a pass rate of about 80–85% for Anglos versus a pass rate for Hispanics of perhaps 31% (personal interview). Prior to the lawsuit, there had been very few Hispanics admitted to the Bar in New Mexico: on average about one a year in the first two decades of the University of New Mexico

School of Law's granting law degrees. The issues raised in the 1972 suit about possible violations of due-process rights of the Fourteenth Amendment had been serious enough for the court to agree that the defendants had to make their case in court; mere denials of an intent to discriminate (or to deny the seriousness of mathematical errors and discrepancies in scores) were insufficient, given the questions of facts that were in dispute.

This dissertation has presented this lawsuit and its aftermath—of Hispanics, as well as members of other traditionally underrepresented minorities, entering the ranks of the legal profession in New Mexico in greater numbers—in a historical context. This historical context is unusual for many reasons. Some New Mexicans of Spanish-language heritage can trace their families' presence in this area back to the 1500s. Those whose ancestors were here during the period of Spanish settlement after Coronado's arrival in New Mexico in 1540–1541 did not cross the border to enter the United States. The opposite was the case: the border crossed them after the signing of the Treaty of Guadalupe Hidalgo in 1848, which resulted in the incorporation of what is now New Mexico into the United States and the shift in their identity from being Mexican to being *Nuevomexicanos*.

This dissertation has traced the cultural clashes between Spanish (later Mexican and *Nuevomexicano*) culture and Anglo culture in the history of this region. The two cultures had different legal systems. These different legal systems had different laws about land ownership, resulting in disputes over land rights stemming from land grants originally made in the name of the Spanish Crown. These land disputes have persisted throughout the period in which New Mexico has been part of the United States, both as a

territory and as a state. These land disputes are ongoing even now (2019).

This dissertation has also traced the social construction of *Nuevomexicano* identity during the Spanish colonial period (1540–1821), Mexican rule (1821–1848), and rule by the United States, first as a territory (1850–1912) and later as a state (1912–Present). As noted above, conflicts within the New Mexico Territory or the State of New Mexico have not always fallen along Anglo vs. *Nuevomexicano* lines, but sometimes more along lines of wealth and power, as with the Spanish-heritage *ricos* who aligned themselves with wealthy Anglos to obtain power and wealth. However, broadly speaking, the “three cultures” (of Native Americans, descendants of the Spanish conquistadors, and Anglos) myth has been influential in the social construction of *Nuevomexicano* identity. The emergence of New Mexico as a tourist destination after the development of railway lines popularized and reinforced the “three cultures” myth of New Mexico, which has persisted to this day.

This dissertation has argued that personal and group identities are socially constructed and always emerge in particular contexts that are affected by the dynamics of power, money, privilege, tradition, family, religion, and place (among other dimensions). The four petitioners of Spanish-language heritage in 1972 chose to challenge the meager representation of *Nuevomexicanos* in the legal profession in the State even though they were not sure that they would prevail. Their efforts, although not directly successful (they lost their lawsuit) did reshape the trajectory of history and the legal profession within the State of New Mexico.

As noted above, the grading of essays is perhaps inevitably and invariably subjective. One result of the 1972 lawsuit was that the New Mexico Bar Examination

was changed from an exclusively essay format to incorporate multiple-choice questions about points of law. A point of contention—one that lingered in the minds of interviewees for decades after the 1972 lawsuit—was that the exam graders had equated (perhaps unconsciously) “thinking like a lawyer” with “thinking like an Anglo.” People make inferences about the identities of others even without seeing them simply by hearing their voices or by reading the words that they choose to use in writing. The plaintiffs believed that the inferences about their style of writing and therefore their identity had adversely affected the graders’ assessment of their answers on the Bar Examination.

Theories of identity, racial identity, whiteness theory, feminist theory, resistance, and agency generally support the constructionist view of reality and identity: that people’s view of reality and that people’s sense of identity (their own and others) are rooted in social discourse and narratives. Discourse and narratives are always situated in specific contexts historically, culturally, politically, and economically. For the plaintiffs in the 1972 lawsuit—who believed that they had unfairly been denied admission to the Bar after taking the Bar examination—their struggle to prove that they were worthy of admission to the Bar inevitably and inextricably was interconnected with their identity as people from a Spanish-language heritage who had grown up in New Mexico.

According to social constructionists, no one has any inherent traits solely (much less inevitably) based on genetic heritage or race. These traits are acquired, ascribed, or inferred—with or without conscious or tacit consent—based on habits of thought that are embedded in culture and everyday lived experience in myriad ways. Language is a vessel for conveying the social construction of reality. This is true in families. It is true

in friendship and kinship networks. It is true in people's places of worship and their religious communities. It is true in the political arena, and it is also true in the arenas of finance, commerce, and law. Our stories shape who we are and how we perceive our own identity.

Although people may think of reality as somehow fixed, social constructionists argue that our mental maps of reality are constantly in flux. They shift as quickly as do fashions in food, clothing, politics, or religion. For example, elaborate terminology used to be prevalent for people of mixed race who had at least some African, Spanish, or Native American ancestors could make distinctions between people based on perhaps only one of their great-grandparents (one sixteenth of their ancestry). But constructions of reality change as people's perception of what is in their own self-interest changes. As noted above, convergence theory argued that the Jim Crow laws of the United States South were dismantled because widely reported discrimination against African Americans, as codified by *Plessy v. Ferguson* (1896)—commonly referred to as “separate but equal” education—became embarrassing and counterproductive to the global interests of the United States during the Cold War, especially in the Third World, as the United States vied with the Soviet Union for dominance and power in post-colonial countries in Africa and elsewhere.

Convergence theory could account in part for changes that have occurred in New Mexico in the wake of the 1972 lawsuit. As one interviewee noted, the members of the Bar who had graded the examination argued in court that they had made every effort to be fair to the “boys” who had taken the examination. The examiners seemed to find the idea that they could be perceived as racists to be disturbing and offensive. The idea that

someone could believe them to be guilty of discriminating against people that more overtly racist or bigoted individuals might call “Mexicans” was a troubling possibility to them. The court did not consider in the trial the argument presented in the *amicus curiae* brief that the de facto discrepancy in flunk rates showed an irrefutable, even if unintended, pattern of discrimination. Nonetheless, those facts remained irrefutable—and troubling.

As former President Theodore Roosevelt said in a speech commonly known as his “Man in the Arena” speech given at the Sorbonne in 1910, which he delivered a year after leaving office,

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.

The men of Spanish-language background who entered the arena to contest what they sincerely believed to be an unfair and discriminatory result (how their Bar Examination essays had been graded) earned the respect of their peers and all who have followed them. They put their lives, their careers, their reputations, and their honor on the line and

suffered the blows. They carried the wounds and bruises from the arena along with the crown of victory or the bitterness of defeat. Indisputably, through their actions, they changed the course of history and the constitution of the legal profession in the State of New Mexico.

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