



Winter 1971

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John R. Silko

Recommended Citation

John R. Silko, *Beyond the Law - To Equal Education Opportunities for Chicanos and Indians*, 1 N.M. L. Rev. 335 (1971).

Available at: <https://digitalrepository.unm.edu/nmlr/vol1/iss1/12>

BEYOND THE LAW —TO EQUAL EDUCATIONAL OPPORTUNITIES FOR CHICANOS AND INDIANS

This note considers the question of reverse discrimination in the context of educational programs and policies specially designed to meet culturally related problems of Chicanos and Indians in New Mexico. It is proposed that: 1) the educational achievement levels of Chicanos and Indians in New Mexico are significantly below that of other ethnic groups, 2) the problem is largely due to cultural diversity, 3) the problem can be mitigated by educational programs and policies which are culture conscious, and 4) not only are such programs and policies constitutional, they may be constitutionally required.

I

Chicanos and Indians have always placed among the poorest and least educated people in the state of New Mexico.¹ A recent survey conducted by the Guidance Services Division of the New Mexico State Department of Education, randomly sampling from the 5th, 8th and 11th grades, indicates that the obtained grade equivalent of Spanish Surname and Indian students consistently falls far below the norm.² The disparity is particularly acute in the area of language expression and reading vocabulary.³ Comparatively few Chicanos and Indians make it into the undergraduate institutions of New Mexico,⁴ and only a fraction of these receive degrees.⁵ The reader may be surprised that approximately 28% of the state's population is Chicano,⁶ and 7% Indian,⁷ yet only about 7½% of persons with one to three years of college education are Chicano,⁸ and 1% Indian.⁹

1. It is thought unnecessary here to document the facts which the War on Poverty has succeeded in making generally known.

2. Guidance Services Division, New Mexico State Dep't of Educ., Results of 1969 Assessment Survey, Grades 5, 8, 11, at 6, 9 and 12 (1970), mimeo on file at New Mexico L. Rev.

3. *Id.*

4. Cultural Awareness Center, College of Educ., U. of New Mexico, Statistical Data on Student Enrollment in Colleges and Universities, at graph no. 4 (1970), mimeo on file at New Mexico L. Rev. See also, *infra*, notes 8 and 9.

5. Statistical Data on Student Enrollment in Colleges and Universities, *supra* note 4, at graph no. 1. See also, *infra*, notes 10 and 11.

6. U.S. Dep't of Commerce, Bureau of the Census, U.S. Census of Population 1960—Persons of Spanish Surname, at IX.

7. U.S. Dep't of Commerce, Bureau of the Census, 1960 Census of Population—Vol. I—Characteristics of the Population, Part 33 New Mexico, at 33-17, Table 15. The "First Printout of 1970 U.S. Census Tapes" confirms that the proportion of Indian population has remained approximately the same since 1960.

8. Percentage derived from statistics available in Persons of Spanish Surname, *supra* note 6, at IX and 15, and in U.S. Dep't of Commerce, Bureau of the Census, 1960 Census of Population—Vol. I—Characteristics of the Population, Part 33 New Mexico at XIII, Table A and at 33-171, Table 103.

9. Percentage derived from statistics available in U.S. Dep't of Commerce, Bureau of the

The disproportion is appalling. Notably, Chicanos hold only about 6% of the college degrees in New Mexico,¹⁰ and Indians .5%.¹¹ These statistics reveal a condition that one commentator has described as a "... prejudicial and inexcusable waste of the human resources of New Mexico."¹²

II

The low educational achievement levels of Chicanos and Indians do not appear to be primarily attributable to a number of factors traditionally linked to the hardships of ethnic minorities. It is suggested that neither segregation, nor inferior facilities, nor even financial considerations are principally responsible for the tremendous drop-out and fail-out rates.¹³ Rather, the problem is traced to diversity between the minority and the main-stream cultures.¹⁴ The most comprehensive study of Indian education in the Southwest, compiled in 1962 under the auspices of HEW, stressed an urgent need for

... more specific research ... on ... cultural problems. ... In particular, the teaching faculty should be made aware of the cultural values and conflicts involved with many Indian college students so as to be better able to understand, evaluate and assist Indian college students in their classes.¹⁵

Educators today concur that Chicanos and Indians are subjected

Census, U.S. Census of Population 1960—Nonwhite Population by Race, at 14, and in Characteristics of the Population, *supra* note 8, at XIII, Table A, 33-17, Table 15, and 33-171, Table 103.

10. Persons of Spanish Surname, *supra* note 8, and Characteristics of the Population, *supra* note 8.

11. Non-white Population by Race, *supra* note 9, and Characteristics of the Population, *supra* note 8.

12. Interview with Dr. Richard Griego, Coordinator of Chicano Studies, in Albuquerque, Oct. 22, 1970.

13. Interview with David Sanchez, Staff Member and Administrative Problems Specialist of the Cultural Awareness Center at the U. of New Mexico, in Albuquerque, Oct. 22, 1970. There is never enough financial aid to go around, but indications are that minority group students receive a goodly share. Interview with John Sheehan, Director of the U. of New Mexico Student Financial Aids Office, in Albuquerque, Oct. 23, 1970. 40.8% of total federal aid for students at the U. of New Mexico goes to Chicanos, and 1.2% to Indians. From the U. of New Mexico, Minority Group Federal Funds Analysis, 1969-1970, at 1 (1970), mimeo on file at New Mexico Law Rev.

14. David Sanchez interview, *supra* note 13. Also, interview with Mari-Luci Ulibarri, Ass't Director of Instructional Services for the Cultural Awareness Center at the Univ. of New Mexico, in Albuquerque, Oct. 29, 1970.

15. G. McGrath, R. Roessel, B. Meador, G. Helmstadter, J. Barnes, Higher Education of Southwestern Indians with Reference to Success and Failure 271-72 (Cooperative Research Project Number 938, 1962).

to curriculums and teachers which are decidedly oriented toward the white middle class.¹⁶ This means that the subject matter taught is frequently not relevant to the special interests and needs of minority group students, nor is it taught in a manner in which they can understand it. They are alienated, for example, by Anglo history books which degrade their heritage, and are puzzled by such lauded Anglo characteristics as aggressiveness which is frowned upon by Chicanos and Indians alike. Thus, concepts and facts which might be significant and interesting in the context of the main-stream culture may be rendered virtually meaningless to students whose "knowledge, attitudes, and habitual behavior patterns"¹⁷ are markedly different. The difficulty is compounded by language barriers and "teachers who are unable or unwilling to empathize."¹⁸

Largely due to compulsory attendance laws, Chicanos and Indians usually remain in the educational system until high school. The attendance rate in the lower grades is about average.¹⁹ Nevertheless, as indicated by low obtained grade equivalents, they do not do well and tend to fall further and further behind. (An anomalous result is that this seems to cause their white contemporaries in the integrated schools to achieve a lower obtained grade equivalent as well.)²⁰ Ultimately, most Chicanos and Indians will become discouraged and drop-out or fail. The sad end product of this process is individuals who have developed a negative self-concept which blots out ambition, and who are too unskilled to work except at the most menial tasks, if at all.²¹

Certainly the most desirable solution to this problem of cultural alienation would be institution of a pervasive program of teacher and curriculum sensitivity beginning at the inception of the educational process.²² This would eliminate the problem at its roots, and obviate the necessity of ever dealing with individuals who have suffered perhaps irreparable injury because of an obtuse educational system. Unfortunately, it seems likely that the system will continue to crank out damaged students for some time to come. Witness the debacle of

16. David Sanchez interview, *supra* note 13. See also, Mari-Luci Ulibarri interview, *supra* note 14.

17. R. Linton, *Acculturation and the Processes of Culture Change*, in *Acculturation in Seven American Indian Tribes*, 463, 466 (1940).

18. David Sanchez interview, *supra* note 13.

19. Persons of Spanish Surname, *supra* note 6, at 15. Non-white Population by Race, *supra* note 7, at 14.

20. Results of 1969 Assessment Survey, Grades 5, 8, 11, *supra* note 2; compare the graph at 12 with those at 6 and 9.

21. Mari-Luci Ulibarri interview, *supra* note 14.

22. *Id.* See also, David Sanchez interview, *supra* note 13.

discrimination in the nation's schools some sixteen years after the *Brown*²³ decision, which proceeds to adversely "affect [the] hearts and minds [of Negro schoolchildren] in a way that is unlikely to ever be undone."²⁴ Beyond the desirable solution, then, there need be provision to compensate for prolonged deficiencies in educational skills and self-concept. This note turns, now, to an examination of the programs and policies of the colleges and universities of New Mexico which are designed to cure culturally related problems of Chicanos and Indians.

III

Institutions of higher education in New Mexico employ two approaches in dealing with the educational deficiencies of Chicanos and Indians. One approach is not culture conscious because it does not distinguish culturally related problems from other problems. It might be termed the "immersion" approach because educationally deficient students of every creed and color are lumped together and are saturated with remedial studies which contain the standard white middle class orientation. The curriculum is a simplified and intensified version of what students are normally taught. Some white students benefit, but minority group students do not. The core problem of cultural alienation persists. Thus Chicanos and Indians either continue to be puzzled, frustrated and educationally deficient, or are transformed into artificial whites by attempting to identify with the alien white culture. Neither result becomes the purposes of education. Predictably, the strict "immersion" approach programs have consistently failed with minority group students.²⁵ With regard to Indians the Honorable Paul J. Fannen has observed,

The system of administration and education inflicted upon Indian people for the past 100 years has been actively oriented toward their assimilation into the "mainstream" of American society as rapidly as possible. These policies, which usually disregarded Indian values and philosophy, have only increased the Indians' resistance to assimilation and destroyed his feeling of self-worth.²⁶

Similarly, Chicanos do not profit by "immersion" approach programs.

23. *Brown v. Board of Education*, 347 U.S. 483 (1954).

24. *Id.* at 494. Little doubt that discrimination persists; see, *Races—Integrated, but Unequal Time*, Jan. 4, 1971, at 27.

25. Pettigrew, *The Consequences of Racial Isolation in the Public Schools: Another Look* (supp. to Coleman Report, 1967).

26. Fannen, *Indian Education—A Test for Democracy*, 10 *Ariz. L. Rev.* 661 (1968).

The Chicano culture is more nearly like the Pueblo Indian than Anglo culture in New Mexico. Therefore, remedial education which does not incorporate cultural sensitivity can aggravate the same cultural shock and normlessness in Chicanos as it does in Indians.²⁷

Some institutions in New Mexico have recognized this deficiency in the "immersion" approach programs and have reshaped their approach. Dr. William H. Huber, director of the University College and Counseling Center of the University of New Mexico, has concluded that the "immersion" approach is "unenlightened,"²⁸ and has reformed the once primitive remedial studies program in his department. The University of Albuquerque, the College of Santa Fe and Highlands University appear to also have taken steps in this direction.²⁹

The second approach is culture conscious because it is sensitive to the special educational needs which are prompted by cultural diversity. Programs and policies adopting this approach are custom made to reach and teach specific ethnic group students. They typically encourage teacher sensitivity to cultural diversity and emphasize curriculums made relevant to particular ethnic backgrounds. Concepts are taught in terms of the Chicano or Indian heritage, and necessary speech and speech pattern adjustments are made. They are intended to facilitate a minority group student's ability to successfully cope with the main-stream culture without destroying his respect for an identity with his own culture. Certain aspects of culture conscious programs tend to be ethnically selective, but justifiably so because concern with the variances of a particular culture necessarily works to the exclusion of other cultures and ethnic groups. Denying ethnic selectivity would dilute the advantage of concentrating on the unique problems stemming from the culture of any one ethnic group. In any case, the culture conscious approach is highly regarded by a number of educators.³⁰ Predictably, the success of this approach with minority group students is well established in New Mexico.

The University of New Mexico, although enrolling considerably less than a proportionate number of Chicanos and Indians,³¹

27. Interview with Dr. William H. Huber, Director of the Univ. of New Mexico University College and Counseling Service, in Albuquerque, Oct. 27, 1970.

28. *Id.*

29. See text accompanying notes 49 through 58, *infra*.

30. See Ross, *Cultural Integrity and American Indian Education*, 11 Ariz. L. Rev. 668-72 (1969). See also, David Sanchez interview, *supra* note 13, at Mari-Luci Ulibarri interview, *supra* note 14.

31. The Univ. of New Mexico enrollment figures are only relatively favorable: 15%

operates four meritorious programs which are at least partially culture conscious in approach. One is the College Enrichment Program, a state funded extension of an originally federally sponsored UNM Upward Bound project. Ostensibly, the program is labeled "for all disadvantaged students," but only four of over 150 participating students are not from minority groups.³² The figures suggest a degree of ethnic selectivity, but more importantly, the approach is plainly culture conscious. In an eight week pre-college summer session program, participants learn to adjust to main-stream culture concepts through such courses as verbal logic, which attempts to straddle speech and speech pattern gaps. Emphasis is on developing the minority group student's ability to analogize across cultures. This peephole into the mainstream culture is not confined to the classroom. Students attend opera, musical plays, ballgames, and visit points of interest such as Carlsbad Caverns. Beyond this, the program's vital concern is to instill positive self-concept in the students.

Our intent is not so much to teach anything, but rather to make the program participants aware of their self-worth, more assertive and more confident.³³

The one observable deficiency in the College Enrichment Program is its failure to sufficiently incorporate references to minority culture perspectives in its curriculum. It seems subtly to presume the mainstream culture viewpoint, which inhibits the minority group student's respect for and identity with his own heritage. Still, the program has been eminently successful in retaining nearly all participants at high grade levels despite their high risk predictions.³⁴

A second program is Ethnic Studies, including Chicano, Native American and Black study areas, which is jointly funded by the University of New Mexico and private grants. The program's offerings are generally not limited to minority group students, but salient features of each study area appear to be ethnically selective. The Chicano and Native American study areas operate tutorial programs for Chicanos and Indians respectively. Chicano Studies is proposing that seats be reserved in the popular and crowded Chicano

Chicano, 1.4% Indian. No official statistics are available, but estimates were supplied by Richard Griego, interview, *supra* note 12, for Chicanos, and by Richard Wilson, Director of the Univ. of New Mexico Native American Studies, interview in Albuquerque, Oct. 23, 1970, for Indians.

32. Interview with Larry Cordova, Ass't Director of the Univ. of New Mexico College Enrichment Program, in Albuquerque, Oct. 22, 1970.

33. *Id.*

34. *Id.* Also, interview with Arthur A. Blumenfeld, Assoc. Director of the Institute for Social Research and Development at the Univ. of New Mexico, in Albuquerque, Oct. 26, 1970.

Studies courses for Chicano students.³⁵ Native American Studies is proposing that an English course be scheduled for Indian students exclusively.³⁶ The ethnically selective features, of course, are an intrinsic part of the program's purpose to preserve minority culture integrity and respect.

We are working to promote more respect on the campus for the integrity of minority groups in New Mexico. Our hope is to sensitize the bureaucracy and to instigate a change in the University attitude which will mean a de-emphasis on acculturation.³⁷

This "de-emphasis on acculturation" is realized primarily through credit courses like Chicanismo (Sociology 227), which

... deals with the contemporary Chicano, his battle to preserve a distinct culture and heritage and the effects of social movements past and present.³⁸

Additionally, the study areas seek separate Ethnic Studies libraries, expanded services for minority group students, and implementation of student projects in Chicano, Indian and Black communities.

The value of the Ethnic Studies Program cannot yet be fairly measured for it is a mere infant, new in 1969. Thus far, student interest and participation is very great. Assuredly, though, the program's contribution will reflect the University administration's coolness toward it³⁹ as well as its funding, which has been described as "totally inadequate."⁴⁰ One program director suggested that University administrators are not attuned to culture consciousness.

The University has attempted to pattern itself after eastern schools by hiring hot-shot eastern faculty. It is a poor imitation at best. It should recognize that it exists in New Mexico and should relate to the people of New Mexico, including the Chicanos and Indians.⁴¹

A third program is a linguistics tutorial operated by the University College and Counseling Service and funded through the University of New Mexico. This program also has ethnically selective aspects. Not only are a majority of the participants from minority groups, but

35. Richard Griego interview, *supra* note 12.

36. Richard Wilson interview, *supra* note 31.

37. *Id.*

38. Gonzales, *Alive and Well—Chicano Studies Program*, The Albuquerque Hard Times, Oct. 1, 1970, at 15, col. 1.

39. Richard Wilson interview, *supra* note 31.

40. Richard Griego interview, *supra* note 12.

41. Richard Wilson interview, *supra* note 31.

there exists a policy of drawing on minority group instructors when available.⁴² Since minority group instructors frequently empathize better with educationally deficient minority group students than Anglo instructors, this does not seem out of place.

The program is culture conscious because the curriculum and tutors are sensitized to cultural diversity. English is taught by analogy, and consideration is given to varying speech and speech patterns. The tutors receive special training, including anthropology courses in patterns of culture, which helps them to reach the minority group students in terms of their own cultural background. Dr. William H. Huber, director of the University College and Counseling Service, has stated that "cultural rapport is critical"⁴³ and that the building of a positive self-concept in each individual is a primary goal.

The program must be subtle enough not to be perceived as an attempt to destroy their culture or switch them from their culture. Minority group students must adjust to the main-stream culture, but not by sacrificing their own cultural heritage and self-respect.⁴⁴

To this point the University College and Counseling Service tutorial program has been successful, and Dr. Huber anticipates its enlargement.⁴⁵ Presently, however, the program's impact is limited. It is restricted to only fifty students and is confined to problems of linguistics.⁴⁶

The fourth program is an OEO funded Indian Law Program, conducted "to encourage American Indians to attend law school and to assist them during their law school career."⁴⁷ The program includes an eight week pre-law summer session which is specially tailored to achieve a cultural rapport with Indians. Indian faculty members instruct, contemporary problems in Indian law are discussed, and there is a distinct effort made to advance each individual Indian's ability to analogize and understand across the cultural barriers. The approach is clearly culture conscious, but it is ethnically selective also because the program is exclusively for the benefit of American Indians. By concentrating on the unique educational difficulties of

42. Interview with Dr. Sven F. Winther, Ass't to the Director of the Univ. of New Mexico University College and Counseling Service, in Albuquerque, Oct. 26, 1970.

43. William Huber interview, *supra* note 27.

44. *Id.*

45. *Id.*

46. *Id.*

47. From a brochure distributed by the Univ. of New Mexico School of Law announcing a "Special Scholarship Program in Law for American Indians" (1970), on file at the New Mexico Law Review.

Indians, the summer session has succeeded in greatly increasing the number of Indian law students.

Despite this farsighted approach, the program is not an unqualified success. Culture consciousness is not incorporated into the regular law school session and thus the Indian students are thrust into a difficult, alien and unsympathetic educational environment. Predictably, their attrition rate soars above that of other law students.^{4 8}

Some other institutions of higher education in New Mexico claim a more enlightened approach to curing the culturally related problems of Chicanos and Indians than the University of New Mexico. These include the University of Albuquerque which enrolls 30% Chicanos and 5% Indians,^{4 9} the College of Santa Fe which enrolls 47% Chicanos and 3% Indians,^{5 0} and Highlands University which enrolls 48% Chicanos and 3% Indians.^{5 1}

The enrollment figures are impressive, but more impressive is that each of these institutions operates culture conscious programs and that their policies are more ambitious than the University of New Mexico. Some are frankly ethnically selective. All three assist minority group students through: 1) special recruitment efforts, 2) relaxed entrance requirements, 3) special tutoring, and 4) special courses. The College of Santa Fe and Highlands University make special efforts to hire minority group instructors and sponsor ethnic studies programs. The University of Albuquerque and Highlands University give registration assistance and special counseling to minority group students. The University of Albuquerque appears the leader in selectively assisting minority group students.

We have a \$100,000 grant from HEW specifically to prolong the exposure that minorities have with the college scene. We have formed a minority student government with a budget of \$20,000, \$8,000 of which is absolutely earmarked.^{5 2}

48. Interview with Douglas Nash, Exec. Director of the American Indian Law Students Assoc. Inc., in Albuquerque, Oct. 29, 1970.

49. From a questionnaire sent by this writer to the President of the U. of Albuquerque, Albuquerque, Dec. 16, 1970, on file at the New Mexico Law Review.

50. From a questionnaire sent by this writer to the President of the College of Santa Fe, Santa Fe, Dec. 9, 1970, on file at the New Mexico Law Review.

51. From a questionnaire sent by this writer to the President of Highlands U., Las Vegas, Nov. 3, 1970, on file at the New Mexico Law Review.

52. Questionnaire to U. of Albuquerque, *supra* note 49. This writer was impressed with the quality and scope of several programs at the U. of Albuquerque, including the Alpha Center, Upward Bound and Talent Search, but most especially with the Southwest Cultural Center. The latter strongly emphasizes the contribution of Chicanos and Indians to the development of Southwestern Culture. "It is the purpose of the Southwest Cultural Center to plant the educational seeds necessary for the development of pride and dignity which we

It seems both unfortunate and anomalous that the three institutions mentioned above, among the smallest in New Mexico, carry the burden of working to cure the culturally related problems of Chicanos and Indians in New Mexico. Their programs have been largely successful,⁵³ but cannot hope to reach all who should have the educational opportunity they promise. Other institutions must recognize the truth and urgency contained in a pronouncement by Brother Joseph Miller of the College of Santa Fe.

I think that minority group students should receive special assistance during their undergraduate years. If this is not done they either will not get into the educational process or they will not survive.⁵⁴

But other institutions of higher education in New Mexico seem unconcerned. A recent questionnaire sent out to all colleges and universities in New Mexico elicited information on enrollment percentages for Chicanos and Indians which range far lower than at the institutions previously cited, down to an embarrassing .05% Chicanos and .00% Indians at the College of Artesia.⁵⁵ One other college simply stated that the number of minority group students was negligible⁵⁶ and another that the information was secret.⁵⁷ Two schools refused to return the questionnaire despite return addressed, stamped envelopes.⁵⁸

None of these institutions listed programs or policies which might significantly contribute to curing the culturally related problems of

believe to be inherent rights of all people. It is also the intention of this center to give a collective voice to those people whose individual shouts have fallen upon deaf ears for so many years." From a brochure published by the U. of Albuquerque entitled "Southwest Cultural Center—Media Center" (1970), on file at the New Mexico Law Review. Detailed information regarding the programs were obtained from interviews with Robert L. Martinez, Director of the Southwest Cultural Center and Ass't Dean of Students, in Albuquerque, Oct. 30, 1970, and Pat Gammill, Director of the Alpha Project College Program, in Albuquerque, Oct. 29, 1970.

53. *Id.* Questionnaire to College of Santa Fe, *supra* note 50, and questionnaire to Highlands Univ., *supra* note 51.

54. Questionnaire to College of Santa Fe, *supra* note 50.

55. From a questionnaire sent by this writer to the President of the College of Artesia, Artesia, Nov. 3, 1970, on file at the New Mexico Law Review. Questionnaire sent to the presidents of other schools elicited the following intermediate figures: New Mexico State U., Las Cruces, 15% Chicano, 1% Indian; Eastern New Mexico State U., Portales, Nov. 10, 1970, 11% Chicano, 1.2% Indian; and New Mexico Military Institute, Roswell, Nov. 12, 1970, 9% Chicano, 0% Indian; all on file at the New Mexico Law Review.

56. From a questionnaire sent by this writer to the President of St. John's College, Santa Fe, Oct. 30, 1970, on file at the New Mexico Law Review.

57. From a questionnaire sent by this writer to the President of New Mexico Inst. of Min. & Tech., Socorro, Nov. 20, 1970, on file at the New Mexico Law Review. "I would like to point out that [this writer] has not given assurance of confidentiality of our responses."

58. These were New Mexico Jr. College, Hobbs, and Western New Mexico Univ., Silver City.

Chicanos and Indians. Their replies at best suggested that "immersion" approach remedial programs were available.

Our school's for average intellect students—so all require special tutoring. In this system most students start with the same academic potential—hence no special program for the minorities.⁵⁹

Others flatly stated that they weren't concerned. The problem is "not relevant to our situation."⁶⁰

Any survey of educational opportunity for New Mexico's Chicanos and Indians will conclude that not enough is being done to cure the deficiencies. There is too much ignorance and prejudice. Nevertheless, some worthy steps are being taken which must not be discouraged. These include the culture conscious programs which run to the heart of the educational problems of Chicanos and Indians. The programs evidently succeed, which is little short of a miracle considering the years of educational disadvantage heaped upon each participant. But cultural barriers can be bridged, and so such programs must be permitted to continue and to grow. For Chicanos and Indians it is the only chance for equal educational opportunity and commensurately, a fair run in the game of life.

IV

The constitutional standing of culture conscious programs and policies in education has not undergone rigorous scrutinization. It presently represents a gray area in the law which provides leverage to the unsympathetic while casting a "chilling effect"⁶¹ on the hopes of advocates. It is this writer's position that culture conscious programs and policies are not only constitutional, they may be constitutionally required.

Culture conscious programs and policies raise a twofold question. First, is culture consciousness, which may be equivalent to racial consciousness, a constitutionally forbidden form of educational discrimination? Second, is ethnic selectivity in the culture conscious program a constitutionally forbidden form of educational discrimination?

Some writers have interpreted the now classic *Brown v. Board of Education*⁶² decision to stand for the proposition that race cannot be a valid criterion in the formulation of educational policies.⁶³

59. Questionnaire to College of Artesia, *supra* note 55.

60. Questionnaire to St. John's College, *supra* note 56.

61. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

62. *Brown v. Board of Education*, *supra* note 23.

63. See generally P. Kauper, *Frontiers of Constitutional Liberty* 219 (1956) and Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1 (1959).

They find support in language extracted from the subsequent case of *Bolling v. Sharpe*,⁶⁴ that "[s]egregation in public education is not reasonably related to any proper governmental objective. . . ."⁶⁵ This means, they conclude, that education must be color blind. Were this proposition sound, it would probably invoke a death knell to the culture conscious programs and policies. Culture conscious programs are necessarily race conscious because they are designed to assist racial minority groups in terms of the cultures they embrace. Happily, the proposition is not well founded.

The Supreme Court has not foreclosed racial classifications that are not invidious⁶⁶ and serve a legitimate governmental purpose.⁶⁷ Whirlwinds of debate continue to focus on what constitutes a legitimate governmental purpose. The Supreme Court found such purpose as early as the Japanese Relocation cases,⁶⁸ and more recently in permitting racial notation on divorce decrees⁶⁹ and the classification by race in the exercise of the preemptory challenge.⁷⁰ The federal government itself has occasionally seen fit to articulate that a racially selective program which is justifiably exclusive ought to be free from judicial question. Title 45 of the Code of Federal Regulations includes reference to Indian health and Cuban refugee programs.

An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his.⁷¹

Allowance for racial classification in education, provided that it serve a legitimate governmental purpose, has only recently been clarified. The Supreme Court, in *Green v. County School Board of New Kent County*,⁷² rejected a school board's "freedom of choice" plan for integration because it did not accomplish a reasonable de-

64. 345 U.S. 497 (1954).

65. *Id.* at 500.

66. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

67. *United States v. Jefferson County Board of Education*, 372 F.2d 836, 876 (1966). The phrase is akin to the "pressing public necessity" test employed in *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and the "permissible state policy" test employed in *McLaughlin v. Florida*, 379 U.S. 184, 189 (1964).

68. *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944).

69. *Tancil v. Woolls*, 379 U.S. 19 (1964) *aff'g* *Hamm v. Virginia State Bd. of Elections*, 230 F. Supp. 156 (E.D. Va. 1964).

70. *Swain v. Alabama*, 380 U.S. 202 (1965). See Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 Mich. L. Rev. 1553, 1588-91 (1969).

71. 45 C.F.R. § 80.3(d) (1968).

72. 391 U.S. 430 (1968).

gree of integration. The Court conceded that the plan removed the legal barriers sustaining segregation but was not satisfied. Consequently, it ordered the New Kent County School Board to be color conscious in implementing a plan that worked, and dispelled any lingering illusions that *Brown* required strict color blindness in education.

Green was a striking decision on the part of the Supreme Court, but its color conscious mandate was not new to the lower courts. Just prior to *Green* two lower court decisions were rendered which not only anticipated the mandate but broadened it into new dimensions of constitutional interpretation.

In *United States v. Jefferson County Board of Education*,⁷³ the Court of Appeals for the Fifth Circuit scrapped an earlier "freedom of choice" plan because it did not work. Judge Minor Wisdom in speaking for the court observed,

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.⁷⁴

To Judge Wisdom, undoing "the effects of past discrimination" meant more than providing integrated facilities. He concluded that Negro schoolchildren who had been disadvantaged by the inherently inferior facilities of segregated schools were entitled to compensatory education as well. Judge Wisdom therefore ordered that the Jefferson County Board of Education provide remedial programs.

(b) Remedial Programs. The defendants shall provide remedial education programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education.⁷⁵

The court plainly indicated that race might be a valid criterion for determining who should receive compensatory education. "Here race is relevant, because the governmental purpose is to offer Negroes equal educational opportunities."⁷⁶

United States v. Jefferson County Board of Education clearly

73. 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied sub nom.*, Board of Education of the City of Bessemer v. United States, 389 U.S. 840 (1967).

74. *Id.* 372 F.2d at 876.

75. *Id.* at 900.

76. *Id.* at 877.

broadened the scope of color consciousness in education. It illuminates a principle of constitutional interpretation which obligates the educational system to furnish compensatory education to racial minorities who have been unfairly disadvantaged because of discrimination. The soundness of this holding was not confined to the analysis of Judge Wisdom. *Jefferson* was affirmed by the Court of Appeals sitting en banc and ultimately given tacit approval by the Supreme Court through a denial of certiorari.

*Hobson v. Hansen*⁷⁷ carried the Jefferson rationale into the nation's capitol. The United States District Court for the District of Columbia concluded that the "tract system" which had been instituted in those schools was an unconstitutional denial of equal educational opportunity to the poor in general and to Negroes specifically. Under the "tract system" children were grouped according to tested ability and locked into a course of study ranging from "basic" for the slow student to "honors" for the gifted student. The court determined that because the ability grouping tests were standardized on white middle class children, Negroes were at a disadvantage and became consigned to the inferior education of the lower tracts.

... such children, so stigmatized by inappropriate aptitude testing procedures, are denied equal opportunity to obtain the white collar education available to the white and more affluent children.⁷⁸

Accordingly, the court abolished the "tract system".

Judge J. Skelly Wright in writing for the court stated that abolition of the "tract system" was only a first step toward equal educational opportunity. The school system of the District of Columbia had a further obligation to provide compensatory education to all disadvantaged children.

It is because of the high proportion of disadvantaged children in the District school system that it is imperative that special programs outside the regular school curriculum be adopted so that the disadvantaged child has a real opportunity to achieve at his maximum level of ability.⁷⁹

In the broadest sense Judge Wright was saying that educational opportunity could be equal only if students with differing educational needs were afforded differing educational programs.

77. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

78. *Id.* 269 F. Supp. at 407.

79. *Id.* at 471.

Equality of educational opportunity is here measured by the degree of response to the differing educational needs of children. The same educational programs for all children, in other words, will not necessarily amount to the provision of constitutionally equal programs. This may mean, among other consequences, that in order to provide equal educational opportunity, a school board must spend more for some children's educational programs than for others.⁸⁰

Judge Wright disparaged the shallowness of the "tract system" group testing, suggesting that educational programs must not ignore racial and cultural considerations.

Because of their race and the ever present reminders of being 'different', Negro children generally are subject to very serious problems of self-identification. By the time the Negro child is about to enter school he has become very much racially self-conscious, which causes considerable psychological turmoil as he attempts to come to terms with his status as a Negro.⁸¹

Disadvantaged children typically are saddled with tremendous handicaps when it comes to competing in the ethnocentric academic society of public schools. That society, mirroring American society generally, is strongly influenced by white and middle class experiences and values.⁸²

Similarly, they must account for language differences.

Slang expressions predominate; diction is poor; and there may be ethnically based language forms. The language spoken by Negro children in the ghetto has been classified as a dialect.⁸³

Even the defendants in the case acknowledged the problem.

Dr. Lenon testified that, in constructing sampling groups, socio-economic and cultural factors seem to account for any significant variances.⁸⁴

Arguably, *Hobson v. Hansen* extended the principle of constitutional interpretation laid down in *Jefferson*. In *Jefferson* Judge Wisdom maintained that school systems must provide compensatory education to racial minorities who have been unfairly disadvantaged because of discrimination. In *Hobson* Judge Wright suggested that school systems must provide an education which is adapted to the special needs of students. He allowed that race and culture are valid

80. J. Horowitz, *Law, Lawyers and Social Change* 510 (1969).

81. 269 F. Supp. at 482.

82. *Id.* at 480.

83. *Id.*

84. *Id.* at 483.

criteria for determining the composition of differing educational programs. The decision is a landmark, and was strengthened upon appeal by affirmation of the Court of Appeals for the District of Columbia.

Now it is appropriate to return to the twofold question raised by culture conscious programs and policies in New Mexico. First, is culture consciousness, which may be equivalent to racial consciousness, a constitutionally forbidden form of educational discrimination? *Jefferson* and *Hobson*, which discuss the issue of racial consciousness in education, are in point. Both permit racial consciousness in the formulation of compensatory education where circumstances justify it. Furthermore, *Hobson* specifies looking to the particulars of cultural variation, including language differences. Therefore, culture consciousness is constitutional if it is essential to programs and policies designed to meet the special needs of Chicanos and Indians which are brought on by cultural discrimination in education. This would appear to serve a legitimate governmental purpose. Indeed, if the factor of equality of educational opportunity isolated in *Jefferson* and *Hobson* is that of "opportunity to achieve at his maximum level of ability,"⁸⁵ then culture conscious programs and policies may be constitutionally required.

The second part of the question, regarding ethnic selectivity in the culture conscious programs, requires separate consideration. No doubt that if ethnic selectivity is justifiable in the culture conscious programs it ought to be constitutional. One writer considers this impossible.

But special treatment of a racial class, drawn to include individuals of diverse need and to exclude others of equal need, is quite another matter. If compensation is allotted on the basis of race, middle class blacks who have escaped at least some of the ravages of discrimination will share in limited remedial resources, and they will do so at the cost of diminished aid to the poor. On the other hand, underprivileged non-blacks who may have been injured in substantially similar ways will be denied benefits which persons of the same means, but of a different color, are accorded.⁸⁶

This analysis is faulty. First, it unrealistically excludes individual need as a criterion for receiving aid. Existing programs employing ethnic selectivity require that their candidates be from the culturally unassimilated stock which has educational deficiencies. Evaluation of such individual need is neither difficult nor overlooked. Secondly, the analysis oversimplifies the problems of disadvantaged students.

85. *Id.* at 471.

86. Vieira, *supra* note 70, at 1613-14.

To a large extent Blacks, but more certainly Chicanos and Indians, are educationally handicapped because of cultural diversity. Programs which treat culturally based problems are frequently more effective by concentrating on one or two racial groups. Any incorporation of students with other types of problems would dilute this effectiveness and disservice all students. Thus, ethnic selectivity. The legitimate governmental purpose test is met.

CONCLUSION

It is well documented that culture conscious programs and policies are the best hope of Chicanos and Indians in New Mexico. Even so, there is evidence that present programs of this nature are being constricted by doubts as to their constitutionality. Dean Thomas Christopher of the University of New Mexico School of Law has forewarned:

I believe that someday somebody will sue us over our Indian Law Program in the federal courts. We therefore attempt to avoid and minimize the reverse discrimination issue so long as we can.⁸⁷

This writer does not believe that the issue should be avoided. Rather, it should be shouted that Chicanos and Indians have a right to programs and policies which will compensate for cultural discrimination. If they request the programs from the educational system administrators or initiate court action to compel implementation of this deserved right, then let it be, let it be.

It is difficult, very difficult to get any facts concerning our history and our way of life. The lies, half-truths, and propaganda have won total sway over the facts. We have no knowledge of our heritage. . . . The ruling culture refuses to let us know how much we did to advance civilization in our lands long ago. It refuses to recognize and appreciate our craft and strength and allow us some of the fruits of our labor. All this has left an emptiness in our lives, a void, a vacuum that must soon be filled by hostilities.⁸⁸

JOHN R. SILKO

87. Interview with Thomas Christopher, Dean of the Univ. of New Mexico School of Law, in Albuquerque, Nov. 2, 1970.

88. G. Jackson, Soledad Brother—The Prison Letters of George Jackson 56-57 (1970).