

FOREWORD

COMMEMORATING THE 50TH ANNIVERSARY OF *HERNANDEZ* *V. TEXAS*

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Like most of the readers of this special issue of the *UCLA Chicano-Latino Law Review*, I never studied the *Hernandez v. Texas*¹ case in law school, and never heard of it in civics class or in regular civilian life. As I pursued my career as a law professor and legal scholar, I saw tantalizing references to the case, and looked it up one day in the law library, pulling out the U.S. Supreme Court Reporter volume. The law librarian who helped me knew exactly where the volume was, as many people had requested her help to read the *Brown v. Board of Education* decision.² There it was, just before *Brown*.

As were others who are writing in this Commemorating issue, I was riveted by the Court's decision, which sketches 1950s Texas justice, the role of Mexican Americans, and the symbolic signage of the Jackson County Courthouse bathrooms that struck the justices so clearly.³ I grew up in 1950s and 1960s New Mexico,

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1. 347 U.S. 475 (1954).

2. 347 U.S. 483 (1954).

3. "The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites.' One method by which this may be demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between 'white' and 'Mexican.' The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing 'No Mexicans Served.' On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked 'Colored Men' and 'Hombres Aqui' ('Men Here'). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof." *Hernandez v. Texas*, 347 U.S. 475, 479-80 (1954) (footnotes and references omitted).

and my people were from Tierra Amarilla. My cousin, Eulogio Salazar, was shot dead in the famous 1967 Tierra Amarilla, New Mexico courthouse raid led by Reies Lopez Tijerina,⁴ so I knew that Mexican Americans were not accorded full status, but I never knew the extent of these historical facts. Even after I moved to Houston and became friends with Judge James DeAnda, one of the trial attorneys in the original *Hernandez* case, I never thought of it as a Houston case with my modest friend as one of its architects. After today, with all the papers written for this project, I expect this wrong to be righted.

The racial question in the case of Mexican Americans may seem quaint to some observers in today's artificially-"race-neutral" era, but it has been an issue with real consequence for this community over time, virtually always to the detriment and exclusion of people of Mexican-origin. History is replete with such racial calculations concerning Mexicans, even if traditional histories do not recount this version of American apartheid.⁵ One of the California signers of the 1849 California Constitution, Manuel Dominguez, was dismissed as a witness in a court proceeding, as he had "Indian blood," and thus was not deemed to be a reliable witness; Dominguez was a relatively privileged landholder and elected official, indicating that the caste system even extended to landowning elites.⁶ Pete Hernández and his lawyers knew he was not Anglo, in Jackson County, Texas or elsewhere, but it took the U.S. Supreme Court to acknowledge the sociology of Texas rural life and parse the criminal justice implications of this racial ascription. The quotidian details of bathroom and restaurant signage and the recitation of the town's social divide prompted this terse acknowledgement by the Court, almost hidden in the case's dry civil procedure: "No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof."⁷ And the Court could count, noting, "it taxes our credulity to say that mere chance resulted in there being no Mexican-

4. REIES LOPEZ TIJERINA, *THEY CALLED ME "KING TIGER"* 80-81 (Jose Angel Gutierrez trans. & ed., 2000).

5. For example, in a widely-used textbook that accompanied the PBS series of the same name, one paragraph is devoted to the case, and it is not even cited in the footnoted text. See FRANCISCO A. ROSALES, *CHICANO!: THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT* 108 (1997). As of 2005, there is no full-length book on the case, or on any of the lawyers involved, in contrast to the hundreds of texts and thousands of articles on *Brown* and its lawyers.

6. LEONARD PITT, *THE DECLINE OF THE CALIFORNIANS: A SOCIAL HISTORY OF THE SPANISH-SPEAKING CALIFORNIANS, 1846-1890*, at 202 (1966). See also Ricardo Romo, *Southern California and the Origins of Latino Civil-Rights Activism*, 3 WEST. LEG. HIST. 379, 380 n.3 (1990).

7. *Hernandez v. Texas*, 347 U.S. 475, 480 (1954).

Americans among the over six thousand jurors called in the past 25 years.”⁸

Years later, Professor Charles L. Black, Jr. referred to the veil of ignorance that was cast over Jim Crow practices, where Anglos would be so inured to the practices, and benefit so substantially from this system that they did not even recognize it. Although he was speaking specifically of the condition of Blacks, he noted:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated ‘equally,’ I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description. Here, I must confess to a tendency to start laughing all over again. I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning.⁹

Interestingly, he did not allude to the similar caste status accorded Mexican Americans such as was evident in Jackson County, Texas society and juryboxes, and he was surely wrong that subjugated African Americans did not “question its meaning.” By the time of the *Hernandez* case, surely Texas lawmakers and decisionmakers were on notice by *Sweatt v. Painter*¹⁰ that the terrain was shifting on its racial tectonic plates and that people of color in Texas were questioning segregation’s meaning.

A recent *Houston Chronicle* story reminded us that women, including white women, were not allowed to be seated on Houston juries until November 1954 — several months and many jury panels after the *Hernandez* and *Brown* decisions.¹¹ Yet it is clear that the demography and social norms have changed to the extent that it is inconceivable that women or African Americans or Mexican Americans can be held back or excluded. The Houston Independent School District, with nearly a quarter of a million schoolchildren is less than ten percent white.¹² *Hopwood*¹³ has

8. *Id.* at 481.

9. Charles L. Black, Jr. *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1961). See also Gerald Torres, *The Evolution of Equality in American Law*, *HASTINGS CONST. L.Q.* 613 (2003) (citing Black’s conclusions).

10. 339 U.S. 629 (1950) (striking down a separate Texas public law school for Blacks, citing it as unequal).

11. Roma Khanna, *Legal Strides for Women Came with Time: 50 Years ago, Houstonian was the First Female Juror to Lawfully Sit on Texas Panel*, *HOUS. CHRON.*, Sept. 26, 2004, at B1.

12. For Houston Independent School District data see <http://www.houstonisd.org> (last visited Nov. 20, 2004). For studies of the Houston Independent School Dis-

been overturned by *Grutter*,¹⁴ and it may only be a matter of time before jury trials,¹⁵ voting,¹⁶ school attendance patterns,¹⁷ and all the other racial and gender practices that divide us will be eliminated.

At least that is what we hope for, perhaps against all logic and odds. Within weeks of the death of the first Mexican American federal judge, Reynaldo Garza, asked by then-President Carter to be his Attorney General,¹⁸ Houstonian Alberto Gonzales was named to the post, completing an arc of many years.¹⁹

trict, which gave birth to the Houston College for Negroes, later Texas Southern University (1935), the Houston Junior College, later the University of Houston (1927), and the Houston Community College System (1989), see WILLIAM H. KELLAR, *MAKE HASTE SLOWLY: MODERATES, CONSERVATIVES AND SCHOOL DESEGREGATION IN HOUSTON* (1999); GUADALUPE SAN MIGUEL, *BROWN, NOT WHITE: SCHOOL INTEGRATION AND THE CHICANO MOVEMENT IN HOUSTON* (2001); ANGELA VALENZUELA, *SUBTRACTIVE SCHOOLING: U.S.-MEXICAN YOUTH AND THE POLITICS OF CARING* (1999). For a more personal, less-objective narrative of the Houston Independent School District see DONALD R. MCADAMS, *FIGHTING TO SAVE OUR URBAN SCHOOLS—AND WINNING!: LESSONS FROM HOUSTON* (2000). The “win” in Houston has been quite contested, especially considering how dropout data and “zero tolerance” policies have evolved. See Jason Spencer, *Assistant Principal Files Whistleblower Suit*, HOUS. CHRON., Apr. 17, 2004, at 29A (discussing data fraud in Houston Independent School District dropout records); Rachel Graves, *Backlash Growing Over Zero Tolerance*, HOUS. CHRON., Apr. 18, 2004, at 1A (reviewing inconsistencies in discipline policies); Jason Spencer, *HISD Focuses on Achievement Gap*, HOUS. CHRON., May 16, 2004, at 1A (discussing racial isolation in Houston Independent School District schools).

13. *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001).

14. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the use of race in college admissions to establish a “critical mass”); see also *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down college admissions practice of allocating points on racial basis).

15. *McClesky v. Kemp*, 481 U.S. 279 (1987) (racial sentencing disparities). See also Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997). Texas, especially the Houston-area Harris County, has been engaged in an extraordinary tug of war with the U.S. Supreme Court, regarding the racial composition of juries. See Patty Reinert, *High Court, 5th Circuit Battling Over Death Row*, HOUS. CHRON., Dec. 5, 2004, at A1; Linda Greenhouse, *Justices Give Second Hearing in a Texas Death Row Case*, N.Y. TIMES, Dec. 7, 2004, at A1.

16. Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731 (1998); Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289 (1997).

17. Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795 (1996). For the postsecondary counterpart, including an analysis of college admissions based in part upon residency issues see Michael A. Olivas, *Brown and the Desegregative Ideal: Higher Education, Location, and Racial College Attendance Policies*, 90 CORNELL L. REV. 391 (2005).

18. See LOUISE ANN FISCH, *ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE* (1996). Garza died on September 14, 2004. Laura B. Martinez, *Judge Garza dead at 89, Nation's first Mexican-American District Judge Dies of Pneumonia*, BROWNSVILLE HERALD, Sept. 15, 2004, at A1.

19. Eric Lichtblau, *Broad Influence for Justice Dept. Choice*, N.Y. TIMES, Nov. 21, 2004, at A30.

The Houston City Attorney is Mexican American,²⁰ as is the new school superintendent.²¹ However, Professor Guerra Thompson's and Sheridan's contributions to this volume reveal that race still matters a great deal in the criminal justice system, in Texas and elsewhere.²² A recent Houston study revealed the extent to which jury selection remains predominantly white: only nine percent of Harris County's grand jurors were Latino, far less than the demographics would dictate in a county where over a third of the residents are Latino.²³ Equally troubling was the evidence that a very high percentage of the grand jurors are employees of law enforcement agencies or closely related to law enforcement officials, suggesting a less-than-arm's length relationship with police or court officials.²⁴

Recent events in Arizona and other states where anti-alien animus is so evident,²⁵ even when courts have struck down such official scapegoating,²⁶ continue to provide evidence that Latinos, especially Mexican-origin communities, have a great deal to struggle against. Mexicans and Mexican Americans are still subject to excessive police force, as in the Harris County cases of Jose Campos Torres, who was thrown into Buffalo Bayou by police and drowned while in their custody in Houston,²⁷ and Luis Torres, who was strangled by police on a street in Baytown,²⁸ yet

20. Kristen Mack, *Mayor Appoints City Attorney to Staff*, HOUS. CHRON., Feb. 18, 2004, at A18.

21. Jason Spencer, *Just the Standard Perks, Please*, HOUS. CHRON., Dec. 5, 2004, at B1 (reporting on the appointment of Abe Saavedra to be Houston Independent School District Superintendent and salary negotiations).

22. Clare Sheridan, *Peremptory Challenges: Lessons from Hernandez v. Texas*, 25 CHICANO-LATINO L. REV. 77 (2005); Sandra Guerra Thompson, *The Non-Discrimination Ideal of Hernandez v. Texas Confronts a "Culture" of Discrimination: The Amazing Story of Miller El v. Texas*, 25 CHICANO-LATINO L. REV. 97 (2005).

23. Steve McVicker, *Are Judges Taking a Narrow View of Justice*, HOUS. CHRON., Nov. 14, 2004, at A18 (citing study of jury composition in Harris County).

24. *Id.* (showing that many if not most of the grand jury commissioners were employees or former employees of courts or law enforcement agencies).

25. Susan Carroll, Elvia Diaz & Yvonne Wingett, *Prop. 200: Federal Judge will Hear Constitutional Issues Dec. 22*, THE ARIZ. REPUBLIC, Dec. 1, 2004, at A1 (Temporary restraining order on public referendum concerning undocumented aliens and state presence).

26. Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995).

27. Jose Campos Torres was thrown into a Houston bayou by police officers, where he drowned in May 1977, see <http://www.tdcj.state.tx.us/stat/porterhenrylast.htm> (last visited Apr. 14, 2005).

28. Luis Torres was choked to death by Baytown, Texas police officers while their police car video was running. For the story on the death, see Jake Bernstein, *Are you Experienced? Video of a Police Killing Produces Shockwaves in Baytown*, TEX. OBSERVER, Mar. 29, 2002, at 3. To review the actual police video, see <http://www.texasobserver.org/showTOC.asp?IssueID=55> (last visited May 3, 2005).

the perpetrators were never punished. And no Mexican American represents the city in Congress or sits on the Southern District federal bench in Houston, the country's fourth largest city. Controversy swirls around the racial character of twenty-first-century designer medicines and the conundrum presented by genetic markers²⁹ and racial ascriptions³⁰ reminds us that racism and racial privilege are eddies and flows, seeking their own path and deeply etching the landscape.

Authors in this volume have noted these currents throughout their writings over the years; indeed, my own knowledge of *Hernandez* arose in large part due to the earlier efforts of several of these authors.³¹ Writing in another venue, Kevin Johnson noted:

Unfortunate as it may be, uncivil times for civil rights has been a recurrent theme in U.S. history. Ebbs and flows of racism and nativism have deeply affected racial and other minorities in the country. Importantly, in the struggle for social justice, minority groups must appreciate the relationship between the various subordinations. Backlashes against the groups often are related in a complex matrix.³²

But today, we take note of one substantial change — the *Hernandez* case is a clear example of how a people took control of their own fate, and with persistence and sheer talent, prevailed. The larger Anglo society may not have heeded the message or

29. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s* (1994). For a recent review of issues concerning "racial designer drugs" see January W. Payne, *A Cure for a Race? Heart Drug Findings Set off Ethics Debate*, WASH. POST, Nov. 16, 2004, at HE-1.

30. While it is clear that race is a social construct and a function of sociology, there are also clear biological and physiological features as well. These racial characteristics are often at odds with the sociology of race. For the long arc of this topic see Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L. J. 109 (1998); Tanya Kateri Hernandez, *Multiracial Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998); Rachel L. Swarns, *Hispanics Debate Census Plan to Change Racial Grouping*, N.Y. TIMES, Oct. 24, 2004, § 1, at 21.

31. See, e.g., George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience, 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994); George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997); JUAN PEREA ET AL., *RACE AND RACISM: CASES AND RESOURCES FOR A DIVERSE AMERICA* 517 (2000) (casebook including *Hernandez* case and commentary); Ian Haney López, *Race and Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997); Steven Wilson, *Brown Over "Other White": Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145 (2003); Clare Sheridan, *"Another White Race": Mexican Americans and the Paradoxes of Whiteness in Jury Selection*, 21 LAW & HIST. REV. 109 (2003); NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE* (1997); Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"? Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997).

32. Kevin R. Johnson, *Immigration, Civil Rights, and Coalitions for Social Justice*, 1 HASTINGS RACE AND POVERTY L.J. 181, 200 (2003).

behaved properly, then or now, but these courageous lawyers raised their voices and prevailed in our highest court, on behalf of their client and their community. Judge James DeAnda's remarks, delivered in his quiet and unassuming manner at the November 2004 conference that spawned these papers, cannot disguise the extraordinary challenge these lawyers faced in mid-century Texas, where they did not even feel safe enough to stay the night in Edna, Texas, and as a result, retreated every night to their homes in Houston and San Antonio.³³ Many of these same lawyers learned the lesson from Thurgood Marshall and the NAACP Legal Defense lawyers, and with LDF assistance, established the Mexican American Legal Defense and Educational Fund (MALDEF) in Texas in 1968.³⁴ MALDEF has since exceeded the modest expectations of its founders, and has evolved to become the major organizational legal force on behalf of Latino communities.³⁵

In its fiftieth year anniversary in 2004, all of America has remembered the towering *Brown v. Board* decision, and assessed its impact.³⁶ Others have remembered the occasion of a young white Tupelo, Mississippi truckdriver, Elvis Presley, wandering into a Memphis, Tennessee recording studio the same year, and changing the world in another racially-significant manner.³⁷ However, this is the first major scholarly occasion devoted to this fascinating Texas case, decided within days of *Brown*, and which signaled the start of Mexican American lawyering. That development is still in progress, and the scholarship evident here is in the tradition of George I. Sanchez and the others who provided the

33. Personal communication by James DeAnda, Nov. 2004. See also GUSTAVO GARCIA, A COTTON-PICKER FINDS JUSTICE, THE SAGA OF THE *HERNANDEZ CASE* (Ruben Munguia ed., 1954). This fascinating pamphlet was published by the San Antonio printer Ruben Munguia in June 1954, following the announcement of the decision a month earlier. Few copies exist, and I consulted the one from the Special Collection of the Library at the University of Texas, Permian Basin. I placed the public domain document on the *Hernandez* at 50 conference website at <http://www.law.uh.edu/hernandez50> (last visited May 3, 2005), and it will be reprinted in the appendix materials of "COLORED MEN" AND HOMBRES AQUI: *HERNANDEZ V. TEXAS AND THE RISE OF MEXICAN AMERICAN LAWYERING* (Michael A. Olivas ed., forthcoming 2005).

34. GUADALUPE SAN MIGUEL, "LET ALL OF THEM TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981, at 169-81 (1987).

35. *Id.* To review MALDEF's range of litigation efforts see <http://www.maldef.org> (last visited May 3, 2005) (listing recent cases filed in civil rights actions).

36. Many law schools and organizations have celebrated the decision with commemorations and special law review issues. For a listing of several such activities see <http://www.brownat50.org/index.html> (last visited May 3, 2005).

37. PETER GURALNICK, LAST TRAIN TO MEMPHIS: THE RISE OF ELVIS PRESLEY (1994).

intellectual foundation of this movement.³⁸ I thank all the authors who contributed to this volume and to the conference that led to this discussion.

I welcome all of you to *Hernandez*.

38. George I. Sánchez was one of the first Mexican American scholars, and served on the University of Texas Education faculty for many years, until his death in 1972. See, e.g., George I. Sánchez, *Group Differences and Spanish-Speaking Children: A Critical Review*, 16 J. APPLIED PSYCHOL. 5 (1932); GEORGE I. SANCHEZ, FORGOTTEN PEOPLE: A STUDY OF NEW MEXICANS (1940). For a volume that reviewed his career and scholarship see HUMANIDAD: ESSAYS IN HONOR OF GEORGE I. SANCHEZ (Americo Paredes ed., 1977).