UCLA
Chicana/o Latina/o Law Review

Title
Commemorating the 50th Anniversary of Hernandez v. Texas

Permalink
https://escholarship.org/uc/item/49w729vc

Journal
Chicana/o Latina/o Law Review, 25(1)

ISSN
1061-8899

Author
Olivas, Michael A.

Publication Date
2005
FOREWORD

COMMEMORATING THE 50TH ANNIVERSARY OF HERNANDEZ V. TEXAS

MICHAEL A. OLIVAS*

Like most of the readers of this special issue of the UCLA Chicano-Latino Law Review, I never studied the Hernandez v. Texas1 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,

---

* William B. Bates Professor of Law and Director, Institute for Higher Education Law and Governance, University of Houston Law Center.
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 Aquí' ('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, 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 De Anda, 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. 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.

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.” And the Court could count, noting, “it taxes our credulity to say that mere chance resulted in there being no Mexican-


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.


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

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.

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. Painter10 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 Hopwood13 has

---

8. Id. at 481.
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, and it may only be a matter of time before jury trials, voting, school attendance patterns, 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, Houstonian Alberto Gonzales was named to the post, completing an arc of many years.
The Houston City Attorney is Mexican American, as is the new school superintendent. 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. 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. 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.

Recent events in Arizona and other states where anti-alien animus is so evident, even when courts have struck down such official scapegoating, 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, and Luis Torres, who was strangled by police on a street in Baytown, yet

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


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.


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. 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. 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.

In its fiftieth year anniversary in 2004, all of America has remembered the towering Brown v. Board decision, and assessed its impact. 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. 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


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. Sánchez, 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. SÁNCHEZ (Americo Paredes ed., 1977).