“Colored Men” AND “Hombres Aquí”

Hernandez v. Texas and the Emergence of Mexican-American Lawyering

Michael A. Olivas, Ed.
Foreword by Mark Tushnet

Arte Público Press
Houston, Texas

This volume is made possible through grants from the City of Houston through The Cultural Arts Council of Houston, Harris County and the Exemplar Program, a program of Americans for the Arts in collaboration with the LarsonAllen Public Services Group, funded by the Ford Foundation.

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Arte Público Press
University of Houston
452 Cullen Performance Hall
Houston, Texas 77204-2004

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Cover design by James Brisson

"Colored Men" and "Hombres Aquí": *Hernandez v. Texas* and the Emergence of Mexican-American Lawyering / edited by Michael A. Olivas.
p. cm.
ISBN-10: 1-55885-476-2 (alk. paper)
ISBN-13: 978-1-55885-476-5
1. Hernandez, Pete—Trials, litigation, etc. 2. Jackson County (Tex.) —Trials, litigation, etc. 3. Trials (Murder)—Texas—Jackson County. 4. Race discrimination—Texas—Jackson County. 5. Jury selection —United States. I. Olivas, Michael A.
KF224.H468C65 2006

2006040240

The paper used in this publication meets the requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.

Printed in the United States of America

6 7 8 9 0 1 2 3 4 5 10 9 8 7 6 5 4 3 2 1

"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)

Dedication

To the attorneys who brought this case and worked so hard on behalf of our community: Gus Garcia, Carlos Cadena, Johh J. Herrera, and James de Anda. They leaned against power when it was dangerous to do so, and left the trail clearer for those who followed so long after. All Latino and Latina lawyers and advocates stand on these shoulders, even if they do not realize it.

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Foreword

The so-called New Western Historians have shown us how to write cultural and social history from West and Southwest to East, in contrast to the traditional narrative written from East—the Pilgrims and all that—to West and Southwest. Writing political history from West and Southwest to East is more difficult, though perhaps possible. Writing constitutional history in that direction seems impossible, because of the central role African slavery played in the creation and early development of the Constitution. As this collection of articles on *Hernandez v. Texas* shows, the situation is different for contemporary constitutional law. The West and Southwest can become central to our understanding of the constitutional law of the twentieth and twenty-first century.

Constitutional law in the nineteenth century did confront the West and Southwest, but the issues implicated in those confrontations reflected the centrality of slavery in the constitutional law of the era. This is true of both the adjudicated Constitution and the non-adjudicated one. The Cherokee Removal cases presented a conflict among three national institutions—the national government, state governments, and the Supreme Court—in the course of implementing a national policy aimed at separating indigenous Americans from an area white Americans hoped to control. The Supreme Court's constitutional cases, though, were about the role of states and the Supreme Court in implementing that policy. That is, they were federalism cases in the ordinary mold. (*Johnson v. MacIntosh*, a non-constitutional case, did deal with fundamental questions about how the encounter between indigenous Americans and newcomers would develop.)

The Louisiana Purchase opened the way for migration from the East to what was then described as the West, and later to what we now call the West and Southwest. And there were constitutional issues connected to the Louisiana Purchase, though none reached the courts. The basic issue was whether the national government had the power to acquire territory by purchase. None of the powers enumerated in Article I—and nothing obviously inherent in the executive power of Article II—seemed to authorize permanent expansion by purchase. Note, though, that the question of whether an action fell within the enumerated powers was understood at the time to be fundamentally a question of states' rights. That is, the national government's power was limited so as to ensure that states would continue to control matters of particularly local concern, the most important of which was slavery in the South.

It would be relatively easy to write the constitutional history of the nineteenth century with slavery and its post-1865 legacy at its heart. And, I think, scholars of constitutional law continue to see slavery's legacy as central to the development of constitutional law in the twentieth century. In the standard story, for example, *Brown*

v. Board of Education lies at the core of twentieth century constitutional history. Harry Kalven wrote *The Negro and the First Amendment*, showing how cases arising out of the civil rights movement of the 1960s transformed free speech law. The Warren Court's revolution in constitutional criminal procedure is often described as an effort by the Supreme Court to regularize the law arising out of routine interactions between African Americans and the police in the nation's cities.

Yet, this collection shows how the standard narrative can be displaced. Accidental facts indicate the opening: that *Hernandez* was decided just a week before *Brown*; that two central cases in the criminal procedure revolution—*Escobedo v. Illinois* and *Miranda v. Arizona*—involved not African American but Latino defendants and one arose in the Southwest. In some ways, the question is, How wide an opening does the perspective from the West and Southwest provide?

Without intending to disparage the insights on constitutional criminal procedure we can get by looking from the West and Southwest, I will focus here on equal protection law, moving from some relatively narrow doctrinal points to a broader vision of the nation's self-understanding. We can begin by noting the transformation of the subject matter of the equal protection clause from "African Americans" to "race." The Supreme Court suggested in the *Slaughterhouse Cases* that the clause was not likely to be invoked successfully on behalf of any class other than African Americans. That observation seems at best quaint today. Partly because of a deep universalism in U.S. constitutionalism, the litany, "race, religion, and national origin" rapidly became embedded in our understanding of equality's concerns, later to be expanded to include gender, sexual orientation, age, and more.

What, though, is "race"? How do we know when people are discriminating on the basis of race? As several essays here demonstrate, *Hernandez* can be seen as the origin of, and perhaps the best justification for, the view that race discrimination consists of a socially constructed process of subordination, and so as the origin and justification for a view of the equal protection clause in severe tension with the now prevailing view that the clause aims at practices that are not neutral with respect to race. The anti-subordination interpretation of the equal protection clause carries with it important doctrinal consequences, such as the near-automatic validation of genuine affirmative action programs.

The view from the West and Southwest illuminates issues even from within the race-neutrality interpretation of the equal protection clause. A persistent issue within that interpretation is what to do about practices, neutral on their face, that have a racially disparate impact. Again, the account of the facts in *Hernandez*, and the Court's explanation for its holding that those facts demonstrated an equal protection violation, show both why disparate impacts should be constitutionally troubling, and how to identify practices with such impacts. A less common issue that *Hernandez v. Texas* brings to the surface is the one directly confronted, and decided wrongly, in *Hernandez v. New York*: What is the constitutional status of a practice expressly grounded on a racially neutral criterion that is closely correlated with race? This question differs from that of disparate impact, because disparate effects can arise from the use of racially neutral criteria that are only loosely correlated with race (but are correlated with other facts, such as poverty, that are correlated with race). Few cases involving African Americans raise the "correlated with race" issue in as clear a form as *Hernandez v. New York* does. The *Hernandez* cases make it clear that the "correlated trait" cases cannot sensibly be resolved without paying attention to the social construction of race.

The view from the West and Southwest brings into clearer view some even broader questions. With slavery and its legacy at the center of the narrative of constitutional law, it is possible to pose the constitutional choice open to the United States as one between binationalism and integration. The black-white racial binary might be used to describe segregation, or a world in which institutions are truly separate and equal, or the world envisioned by some black nationalists. The universalist alternative is integrationism. Some of the essays in this collection show precisely how the view from the West and Southwest came to complicate the narrative. In the first instance, the question was, Given the black-white racial binary, where can law locate Mexican-Americans in the two-category system of racial hierarchy? The background and litigation posture of *Hernandez v. Texas* show how that question came to seem badly posed. Mexican-Americans were, from one angle, neither black nor white, and from another, were both black and white.

The next step was conceptually simple, though difficult to take in practice. The racial binary was replaced by a multi-tiered system of racial hierarchy, still with whites at the top. One might say that multinationalism replaced binationalism. And that replacement transforms quite dramatically the way we can think about race. Sustaining a vision of a binationalism of equals was enormously difficult given the history of racial subordination in the United States. Sustaining a vision of a multinationalism of equals was substantially easier—and even easier once multinationalism became understood anew as multiculturalism. The integrationist alternative did not disappear, of course, but the competition between multiculturalism and integrationism as visions of a society of equals occurred on terms much more favorable to the multicultural alternative than had characterized the position of binationalism in its competition with integrationism.

I have sketched out how the view from the West and Southwest can modify the presently prevailing modes of understanding equal protection law. A question for future research is the extent to which that view might have similar effects on the modes of understanding other parts of constitutional law. It seems clear to me that the view from the West and Southwest could affect the presently prevailing mode of understanding the constitutional organization of foreign affairs, for example, by making the Insular Cases as important as the Steel Seizure Case, and by treating cases involving national power over immigration as foundational cases—equivalent in importance to the cases involving national power over the economy.

What of other areas of constitutional law? Can the view from the West and Southwest change the way students of constitutional law understand the First Amendment? Questions of federalism? The essays in this collection of course do not offer answers to those questions. What they do, though, is make it possible to ask them. Over the next decades, we may come to see how the view from the West and Southwest helps us see the entire Constitution differently.

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Acknowledgements

As with so many other things in life, nothing gets done alone or by one's self. A project like this had many parents, and it took a village. The actual idea came from a number of discussions I had with my Houston attorney friend J. Michael Solar, whose firm had been joined by Judge James de Anda. He and I wanted to take the Judge's light out from underneath the bushel basket, and to honor him for his many accomplishments. We were joined at lunch one day by Nicolás Kanellos, fellow UH professor and publisher of Arte Público Press, whose Board I had chaired for over ten years. He wanted to launch a Latino Civil Rights Series, and had already lined up an author to undertake a volume on the GI Forum, the Mexican American veteran's group that had been founded by Dr. Hector P. García, a Corpus Christi physician and civil rights veteran who had been a friend of James de Anda when he practiced in that city. These unfocused ideas converged into a conference on the fast-approaching fiftieth anniversary of the *Hernandez v. Texas* case, and we all took note of how many *Brown v. Board* conferences and commemorations were being held. All of us took note that there were scheduled to be over fifty *Brown* symposia in its fifty year celebration, and a national commission established to spur reconsideration of that important case. Yet this was the only *Hernandez* symposium to lead to publication. It was a scene straight out of a Mickey Rooney movie of the 1940's: hey, let's put on a conference!

It was natural that the University of Houston Law Center would host this conference, as it was Houston lawyers who took the cases that led to *Hernandez*, and it is the nearest law school to Jackson County, Texas. In 1951, when Pete Hernandez shot Joe Espinosa, the lawyers feared for their safety in that town where the case was being tried, so two drove back to Houston each night (James de Anda and Johnny Herrera), while the two from San Antonio (Carlos Cadena and Gus Garcia) returned to their homes there.

Of course, I thank the wonderful scholars who participated in this project: Laura Gómez, Ian Haney López, Clare Sheridan, Sandra Guerra Thompson, Neil Foley, Kevin Johnson, and Steven Wilson. Juan Perea delivered a paper at the conference, but did not include it in the earlier *Chicano-Latino Law Review* volume; I appreciate his submitting it for this larger book project. In addition, Professors Amilcar Shabazz, George Martinez, and Richard Delgado presented talks at the conference which were not submitted for either volume. Earlier work by virtually all these scholars had suggested *Hernandez*'s importance, and I was very pleased that we were able to attract such fresh and nuanced scholarship from so many accomplished

authors. Overall research assistance was provided by UHLC students Ryan T. Miller and Eric L. Munoz, while additional assistance was provided by University of Chicago undergraduate student Alejandro Flores, a Houston native. The UCLA Chicano-Latino Law Review staff provided superb legal research and editorial assistance, particularly Isabel Cesanto and Caryn Mandelbaum. From Arte Público Press, I acknowledge Nicolás Kanellos, Marina Tristán, and Gabriela Baeza Ventura. At UHLC, many colleagues helped out, but I single out Deborah Jones, Nancy Rapoport, Leah Gross, Ruth Shauberger, Sam Barker, Waqar Jamil, and Augustina Reyes. My New Mexico grade school classmate Paul Espinosa showed us his brilliant film The Lemon Grove Incident and inspired all the conference participants. I also acknowledge the generosity of the J. Michael and Patricia Solar Fund of the Greater Houston Community Foundation, the Mexican American Bar Association of Houston, the Hispanic Bar Association of Houston, the Hispanic National Bar Association, Perry & Haas, LLP, Prudential Financial, Belo Corp., and KHOU-TV. In particular, I acknowledge the support of Philip Shelton and Kent Lollis of the Law School Admissions Council and Rafael Magallan of the College Board.

Michael A. Olivas
University of Houston Law Center

Chronology in *Hernandez v. Texas*

April 23, 1950: Aniceto Sanchez commits murder in Richmond, Ft. Bend County, TX; defended by John Herrera, A.D. Azios, and James de Anda.

May 1, 1950: Sanchez indicted by grand jury.

Fall 1950: Attorneys move to quash indictment, charging that all white grand jury and petit jury violated Equal Protection; denied by District Court.

March 19, 1951: Attorneys file exception, appeal decision not to quash indictment, citing Ft. Bend demography; brief written by James de Anda.

March 20, 1951: Aniceto Sanchez goes to trial.

April 7, 1951: Sanchez sentenced to not less than 2 years and not more than 10 years.

April 20, 1951: Sanchez appeals to Texas Court of Criminal Appeals.

August 4, 1951: 24 year old service station attendant Pedro (Pete) Hernandez shoots and kills tenant farmer Joe Espinosa in Chinco Sanchez's Tavern, Sprung's Grocery, Edna, Jackson County, TX.

August 4, 1951: Indicted by all white grand jury and petit jury panel for murder.

August 8, 1951: Hernandez denied bail.

September 1951: San Antonio attorneys Gustavo Garcia and Carlos Cadena join defense team to challenge Texas jury practices.

October 4, 1951: District court refuses to quash indictment; attorneys use Aniceto Sanchez brief, edited for Jackson County demographics; de Anda sends materials to Cadena, who re-drafts with updated data.

October 8-11, 1951: Tried by all white jury (actual trial on October 11: charge read 1:15 pm; jury reviews case 4:30 pm; verdict received 8:00 pm).

October 11, 1951: Convicted of murder with malice aforethought by all white jury.

October 11, 1951: Sentenced to 99 years.

November 21, 1951: *Aniceto Sanchez v. State* decided by Texas Court of Criminal Appeals.

June 18, 1952: Texas Court of Criminal Appeals affirms judgment.

October 22, 1952: Texas Court of Criminal Appeals refuses rehearing.

January 21, 1953: Petition for writ of certiorari filed with U. S. Supreme Court.

October 12, 1953: Certiorari granted by U.S. Supreme Court, 346 U.S. 811 (1953).

October 1953: Marshall Trust donates $5000 for civil rights trials; funds disbursed by George I. Sanchez; local LULAC councils donate funds for printing, filing costs.

January 11, 1954: Gus Garcia and Carlos Cadena argue *Hernandez*; Garcia given 12 minutes more than usually allowed for oral arguments.

May 3, 1954: Supreme Court issues *Hernandez v. Texas*, 347 U.S. 475 (1954).

May 7, 1954: TX Prison System notifies Jackson County Sheriff that Pete Hernandez (No. 124147) is to be handed over to Jackson County.

June 10, 1954: Case remanded to TX Court of Criminal Appeals.

June 14, 1954: Remanded case filed in TX Court of Criminal Appeals.

September 28, 1954: Hernandez re-indicted.

October 16, 1954: Gus Garcia files change of venue motion; retrial moved to Refugio County.

November 15, 1954: Second trial held.

November 1954: Jury finds Pete Hernandez guilty, sentences him to 20 years; he serves sentence in Harlem State Prison Farm, inmate No. 136125.

June 7, 1960: Recommended for parole by TX Board of Pardons and Paroles.

June 8, 1960: Paroled and released by order of Gov. Price Daniel.

Introduction
Commemorating the 50th Anniversary of *Hernandez v. Texas*

Michael A. Olivas

Like most of the readers of this volume, 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 book, 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, and my people were from Tierra Amarilla. My cousin, Eulogio Salazar, was shot in the famous 1967 Tierra Amarilla, New Mexico courthouse raid led by Reies López 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 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.

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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).

[4] REIES LÓPEZ TIJERINA, THEY CALLED ME "KING TIGER" 80-81, 99-100 (José Angel Gutiérrez trans. & ed., 2000).

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 Mexican-origin people. 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 Californio 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 Hernandez 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-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]

[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 F. ARTURO 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 CALIFORNIOS: 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).

[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).

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 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.

[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 District, 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. See the chapters by Thompson and Sheridan, repectively, in this volume.

[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).

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] The Houston City Attorney is Mexican American,[20] as is the new school superintendent.[21] However, Professors 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 the

[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. For a critique of the poor record of such appointments, see Kevin R. Johnson and Luis Fuentes-Rohwer, A Principled Approach to the Quest for Racial Diversity on the Judiciary, 10 MICH. J. of RACE & L. 5 (2004)

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

[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).

perpetrators were never punished. And no Mexican American represents the city in Congress or sits on the Southern District federal bench in Houston,[29] the country's fourth largest city. Controversy swirling around the racial character of twenty-first-century designer medicines and the conundrum presented by genetic markers and racial ascriptions[30] remind 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 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 de Anda's remarks, delivered in his quiet and unassuming manner at the November 2004 conference that spawned these chapters, 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

[29]Judge de Anda, who left the bench in 1992 for private practice, was the last Mexican American to serve in the Houston federal judiciary.

[30]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. 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, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003); 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).

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 only 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. Sánchez and the others who provided the 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*.

[33]James de Anda, Nov. 2004 Remarks, at pp. 229-239 in this volume. 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 is reprinted in the Appendix of this volume.

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

[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).