*Restoring the Promise of* Hernandez v. Texas

Hispanic Bar Association of Houston

President’s Day Judicial Luncheon Address

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**[**Introductory remarks]

The issue I want to talk about is one that the judges here, as well as the lawyers who frequently try cases in this county, have no doubt observed. We live in what is by some accounts the most diverse metropolitan area in the United States. That diversity one of Houston’s greatest attributes.

Yet when jury panels show up for voir dire so we can select a jury that represents a cross section of the community, the jury pools don’t come close to reflecting the diversity of this county.

The most underrepresented ethnic group compared to its share of the population is the Hispanic community. The last census showed that 41% of Harris County is Hispanic; about 26% of citizens 18 and older (those eligible to serve) are Hispanic. But statistics from the county clerks’ office in 2012 showed that only 16% of the people showing up for jury duty were Hispanic.

Make no mistake about it, the turnout rate for all demographics is abysmally low. So jury turnout is a problem that affects all income levels and racial groups, but the problem is particulary acute in the Hispanic community. A 2005 Houston Chronicle study showed that in some heavily Hispanic areas turnout hovers around 5%.

It’s not just a Houston problem. A *Dallas Morning News* study from 2000 showed that while 1 in 4 Dallas County residents were Hispanic, only 1-in-14 of those showing up for jury service were. And a study Vinson & Elkins conducted a decade ago in connection with the firm’s work representing some prisoners on death row showed that for both Dallas and Harris Counties, Hispanics made up only 7-12% of jury venires.

I want to spend my time today talking about this issue of diversity in the jury pool: why turnout is so low in the Hispanice community, what can be done about it, and why it matters so much.

But first some history that makes this problem such a discouraging one.

1. **The History of Hispanic Exclusion from Texas Juries**

On the district court bench, I handled cases in both Galveston and Victoria. On the drive south on 59 to Victoria, I always passed through Jackson County. It’s 100 miles southwest of Houston. The county gave rise to a seminal civil rights cases for Mexican-Americans specifically but also for the Equal Protection Clause more generally.

In 1951, Pete Hernandez, a Mexican-American cotton picker, was indicted for murdering Joe Espinosa. No person of Mexican descent had served on a jury in Jackson County for at least twenty-five years. Exclusion of Mexican-Americans from jury service was common in south Texas. In the early 1930s, a lawyer named Alonso Perales had complained about the issue when all-white grand juries in Hidalgo and Willacy counties refused to charge anyone with the murders of several people of Mexican descent. We tend to think of the Equal Protection Clause in this area as protecting the rights of criminal defendants, but Perales framed it differently: “We ought to insist that on all juries there is adequate Mexican-American representation. In none of these cases did the grand juries punish the murderers, which shows that the authorities do not grant to unfortunate victims equal protection of the laws guaranteed to us in the 14th amendment.”

So as Hernandez’s trial began, the longstanding practice of excluding Mexican-American jurors rose to the forefront. Hernandez moved to quash the indictment and the jury panel. He argued that exclusion of Mexican-Americans from grand juries and trial juries based on their national origin this violated his right to equal protection of the laws. The trial court denied the motions. Hernandez was convicted by an all-white jury and sentenced to life imprisonment. The Texas Court of Criminal Appeals affirmed. The Court of Criminal Appeal did not view Mexican-Americans as a distinct class entitled to the protection of the Equal Protection clause.[[1]](#footnote-1)

Back to the *Hernandez* case as it reached the Supreme Court. The same year it decided *Brown v. Board of Education*, a unanimous Supreme Court overturned Hernandez’s conviction. Chief Justice Warren rejected the State of Texas’ argument that the Fourteenth Amendment only contemplated the protection of two classes, white and, in the parlance of that time, Negro. Instead, the Court held that the Fourteenth Amendment protects individuals from discrimination also on the basis of class and when laws produce unreasonable and different treatment on such a basis, the constitutional guarantee of equal protection is violated. *Hernandez v. State of Texas*, 74 S. Ct. 667, 670 (1954).

The Court first concluded that Hernandez had met his burden of showing that individuals of Mexican descent constituted “a separate class in Jackson County, distinct from ‘whites.” *Id*. at 671. The Court then cited the following evidence to show that Mexican-Americans were generally treated as a separate class in Jackson County: persons of Mexican descent had slight participation in business and community groups; children of Mexican descent had been forced until recently to attend segregated schools; one restaurant still displayed a sign stating “No Mexicans Served”; and on the courthouse grounds at the time of Hernandez’s trial, there were two different men’s toilets, one unmarked, and the other marked for “Colored Men” and “Hombres Aqui.” *Id*.

Having shown that Mexica-Americans were treated as a separate class, Hernandez then had to show discrimination. There was a challenge with the demographic data. The census at that time did not classify by Hispanic origin. So Hernandez’s legal team reviewed the names on the census rolls and concluded that 14% of Jackson County residents had Mexican or Latin American last names and 11% of adult males over 21 bore such names. The State of Texas disputed that reliance on Spanish-sounding surnames but the Court logically concluded that “these Spanish surnames provide ready identification of the members of this class” that allowed the jury commissioners to identify Mexican-Americans for exclusion. That significant population of Mexican-Americans also convinced the court that the absence of members of that group from jurors was no accident. The Court concluded: “[I]t taxes our credulity to say that mere chance resulted in there being no members of this class among the over 6,000 jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision[.]”

The case was a great triumph for the emerging movement to obtain civil rights for Mexican-Americans. One lawyer who worked on the case had previously identified jury participation as one of three primary civil rights issues facing the Mexican-American community, along with school desegregation and elimination of restrictive real estate covenants. But the effect of *Hernandez v. Texas* was not limited to Mexican-Americans; by recognizing “national origin” discrimination, it was a watershed case in that extended the protections of the EP clause to races and groups other than African-Americans. As we know, that clause in the years since has been expanded beyond racial or ethnic groups to protect women, the disabled, gays, and others.

A significant historical footnote to the case is that one of the young lawyers who handled most of the brief writing on the case was James DeAnda who later helped found MALDEF and became the first Mexican-American federal judge to sit in Houston when appointed by President Carter.

**II. Why turnout is so low**

So for most of our lifetimes it has been unconstitutional to systemically exclude Hispanics from jury venires. With randomly selected panels for trials, the concern about exclusion of jurors from venire pools is gone. I should note that I’m talking here about what I’m familiar with, which is randomly selected jurors that apply for federal trial and grand juries and state trial juries. The state grand jury selection process, which is not a random selection, has been criticized of late for selecting racially unrepresentative panels along with other problems.

But my focus here today is on jury trial panels in which intentional discrimination in the selection of panel members has been eliminated. Of course, there is still the problem of racial bias in selecting a jury from members of the venire that can give rise to *Batson* challenges, but the data indicate that the greatest obstacle to the goal of juries that reflect a cross section of the community is who shows up, not what happens to those who do show up.

To try and remedy a problem it usually helps to understand its causes. Why do so few Hispanics show up for jury selection? Studies and commentators have identified a number of reasons.

1. The Hispanic population trends very young, and young people of all ethnic groups show up at very low rates. In my own experience, you don’t see many jurors, of any race, under the age of 30. Statistics bear this out: in 2012, half the people who turned out for jury service were 40 to 59 years old. Only 31% of those appearing were under 40.
2. There are also a number of obstacles to jury service that stem from Hispanics being a community made up in large of immigrants or the children of immigrants. At the most basic level, the census bureau found that 46% of the county’s 1.1 million Hispanics over the age of 18 are not citizens. Even taking that into account, however, 31% of the county’s citizens who are 18 and older are Hispanice but a significantly smaller percentage of those showing up are Hispanic. Another issue related to being a community of current and recent immigrants is language barriers. Indeed, a study looking at Asian-American turnout for jury duty in Northern California showed similar levels to the low levels I’ve discussed for Hispanics in Harris County. And aside from possible language barriers, recent immigrants lack familiarity with jury service and the American legal system.
3. There is also a strong correlation between income level and those who show up. As we know, jurors are basically working for free. State court pay has improved in recent years thanks to a new law in 2005 that raised jury pay for the first time in fifty years. I believe it’s still just $6 for that first day when the jury is selected. And even the $40/day for service covers little more than the costs of getting downtown and eating lunch. The low pay hits hardest those who are not salaried employees, but who lose money when they don’t show up. So that also provides part of the explanation.

**III. What Can Be Done About It?**

So what can be down to make our juries more representative of our communities? The biggest problem is that poor turnout for jury service seems to be one of those problems where everyone in the judicial system just shrugs and accepts it. Perhaps the reason the problem is given so little attention is the fear that discussing low turnout could drive that turnout even lower. Those who show up and perform their civic duty would be shocked and upset to hear how few of their fellow citizens perform their civic duty. My judicial assistant was helping me prepare for this speech by organizing articles into a binder. When she saw the low levels of turnout reported in some studies, she couldn’t believe it, “I thought you had to show up. What happens to these people who don’t show up?”

I hated to tell her the answer which is that nothing happens. We end up getting enough people to pick a jury and get the case tried. We are too busy to worry about the people ignoring the summons.

What should we be doing instead?

Of course, one of the most important things that we all strive to do, is to make the jury experience as efficient and user-friendly as possible for those who do show up. Like any business, you want repeat customers and customers who are going to spread their positive reactions to their friends. Make sure the jury is being used when they are at the courthouse: minimize side bars, preadmit most exhibits. And use timing orders so the jurors know how long they will be serving. Make the trials easier to understand with preliminary instructions on the law and consider allowing jurors to ask questions to improve their comprehension of the testimony. But even the most efficient and understandable trials won’t solve the large turnout gap I’ve discussed. What can be done outside of our courtrooms?

We like to think that education can solve most of our problems. In this case, there is little public discussion of this issue. I do commend the Harris County Clerk’s Office which has made it a priority to engage in public outreach initiatives, such as putting ads on buses, as well as making jury duty more convenient for the jurors, and those efforts have reportedly boosted turnout. But how many elected leaders have you heard ever talking about jury duty? This may be an opportune time to start doing so. With controversies surrounding the criminal justice system the lead news stories on many days recently, the call for citizens from all segments of society to participate in the criminal justice system may resonate more than it would have in the past.

Then there are a variety of carrot or stick approaches. On the carrot side, there are proposals to increase juror pay, bills have been filed in the legislature to give tax breaks to employers who pay their employees while they are serving on a jury, and even proposals to provide child care services for jurors. A study by the American Judicature Society, which proposes a number of these reforms, nonetheless concluded that the stick approach is the most effective. Sending follow-up mailings to no-shows and, if necessary, requiring them to appear for show-cause hearings and incur penalties was found to be most successful in improving the response rates for summons. Of course, this enforcement takes time and money from an overburdened court system and also increases negative associations with jury service. For that reason, most groups studying the issue of low juror turnout have recommended reforms that involve a combination of these different measures.

**IV. Why It Matters**

You may be sitting there thinking, “Well sure, more people should show up for jury duty, but is it really such a big issue compared to all the other challenges our society faces.” Let me close by explaining why I think this issue deserves our attention.

First, it matters to the basic everyday functioning of our court system. We live in a majority-minority county and state. As we all know, those demographic trends will continue and Hispanics will be an increasing percentage of our population. Hispanic participation in the jury system is thus essential to its continued success.

Second of all, it matters to the parties before the court. The jury is the people’s voice in the justice system. The requirement that the jury be composed of a representative cross-section of the population ensures that people of diverse backgrounds, occupations, and views are making the important decisions about life, liberty and property that jurors make every day.

Third, it matters to the public legitimacy of our justice system. Public respect for verdicts lags when certain segments of our society do not believe they are playing a role in the system.

But the final reason this matters may be one you are not thinking about. It matters to the people who are not showing up for jury duty. They are missing out an experience that teaches them not just about our court system, but about our democracy and civic life. A recent exhaustive study, summarized in the book *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation*, showed the following effects of jury service on people who had served on juries: they voted more frequently; followed the news more closely; had more faith in our system of government; and even became more active in charitable causes.

The results of this study aren’t surprising. The ability of jury service to inculcate democratic values was recognized almost 200 hundred years ago when Alexis de Tocquville came over from France and conducted his tour of our young Republic. He observed the following in *Democracy in America*:

To look upon the jury as a mere judicial institution is to confine our attention to a very narrow view of it; for however great its influence may be upon the decisions of the law courts, that influence is very subordinate to the powerful effects which it produces on the destinies of the community at large.

He continued:

The jury contributes most powerfully to form the judgment to increase the natural intelligence of a people, and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitous public school, in which every jury learns to exercise his rights and becomes practically acquainted with the laws of this country. . . I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.

Increasing jury service among Hispanics won’t just benefit the court system. It can also play an important role in increasing low voter turnout and improving other measures of civic engagement.

***Conclusion***

So the next time we see, from either the bench or bar, a jury panel walk into a courtroom that does not reflect the great diversity of our city, think back to *Hernandez v. Texas* and trailblazing civil rights lawyers like Judge deAnda who fought heroically for the right of all our citizens to serve on juries. And think to the future, and how the vitality of our justice system will depend on broad participation from all of the diverse communities that make up this city. We owe it to both the past and the future to work to ensure that the jury system fulfills its promise of being the people’s voice in our justice system and that incubator of self-government.

1. Interestingly, in a 1925 case, that court had recognized Roman Catholics as a group that could invoke the equal protection clause when they were excluded from grand jury service. That case was decided during the height of the Ku Klux Klan and anti-Catholic bigotry. So no doubt there was religious animosity at play—it had been at least five years since a Catholic grand juror had served, but it’s noteworthy that the case was not far from Jackson County—in Bee County west of Corpus. In south Texas at that time, it’s likely there was large overlap between Catholic citizens and Hispanic citizens. Indeed, the defendant in the case, convicted of selling liquor during Prohibition, was Antonio Juarez. [↑](#footnote-ref-1)