

INTRODUCTION

THE ART AND SCIENCE OF CASEBOOKS: *LATINOS AND THE LAW: CASES AND MATERIALS*

*Michael A. Olivas**

Given how hard it is to write casebooks and instructional materials, the real question is: why would someone do it? There are mixed motivations and inspirations for doing so and, as in running for elected office or applying for a law school deanship, they are a contradictory mix of self-abnegating altruism and selfish ambition. Despite the many rewarding dimensions of this hardscrabble work, the enormous amounts of time and frustration involved violate all minimum wage laws and fool any reasonable calculations of return on investment, especially in legal education. Even so, hundreds of casebooks roll off the presses each year, both in bread and butter One L introductory courses and in more exotic, specialized fields. Into this world comes the estimable Richard Delgado, Juan Perea, Jean Stefancic casebook, *Latinos and the Law: Cases and Materials*,¹ the focus of attention in this Symposium.

I begin, as all casebook authors do, with the personal. I teach in the general areas of immigration and nationality law and education law, writ large. When I started teaching law in 1982, there was no casebook in either of these fields. There was a student edition of former-INS General Counsel Charles Gordon's immigration treatise, but it was, of course, treatise-y, with statutes and regulatory materials, but no cases.² I had used the text as a student at Georgetown Law where my teacher, Gordon, served as an adjunct, but I found it difficult and confusing (as did my University of Houston Law Center students, who regularly excoriated the text in my teaching evaluations, which included a question on the efficacy of the teaching materials). Those few of us teaching immigration law in those days used the text, supplemented with photocopied cases, themselves cut-and-pasted or whited out. But this was an unsatisfactory state of affairs, which was not remedied until

* William B. Bates Distinguished Chair in Law, University of Houston Law Center.

¹ RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANCIC, *LATINOS AND THE LAW: CASES AND MATERIALS* (2008).

² See CHARLES GORDON & ELLEN GITTEL GORDON, *IMMIGRATION AND NATIONALITY LAW* (student ed. 1979). The text, co-written with his daughter, has been out of print for many years. When he died in May 1999, the *New York Times* obituary included mention of his treatise, from which the student edition was excerpted. See Nick Ravo, *Charles Gordon, 93, I.N.S. Counsel*, N.Y. TIMES, May 2, 1999, § 1, at 58.

later in the 1980s, with the Alex Aleinikoff and David Martin text,³ the Stephen Legomsky text,⁴ and the Richard Boswell text.⁵ These are evidence of the workings of that mysterious casebook marketplace, the rise in the number of teachers and courses in the field, and the centrality of the subject matter in real life. Today, immigration and nationality law is a fully ripened field of study, with specialized refugee and asylum casebooks,⁶ as well as other teaching materials and manuals. It is only a matter of time before someone produces a casebook on immigration and business law, a much-needed and likely-popular text that has not yet satisfactorily emerged. I am thankful to all those colleagues who have produced these texts so that I did not have to do so and feel fortunate that my chosen field of study has matured to this point.

The same problem arose in my other field of study, the law of higher education, where the one casebook, written as a training manual/casebook by Harry T. Edwards and Virginia D. Nordin for the Harvard Institute for Educational Management, was no longer being printed in 1982.⁷ It did have supplements, which were no longer available after 1982,⁸ but when Professor Edwards of Harvard became Judge Edwards of the D.C. Circuit Court of Appeals, the original volume languished, with no plans by either author to continue it. I used it, received permission to photocopy it (paying royalties to the publisher), and supplemented it until my photocopied cases outnumbered the original pagination of the text. I then resorted to buying copies back from my students, hoarding copies like samizdat Russian tracts or Dylan bootlegs. I tried to interest others into taking up the cause, but no one took the bait. Finally, I was forced to remedy this myself, and in 1989, published my own casebook with Carolina Academic Press, a project now in its third edition.⁹ Judith Areen entered this market recently,¹⁰ and there is also a treatise on the

³ The most current edition is THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* (6th ed. 2008).

⁴ The most current edition is STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* (4th ed. 2005). For a critique of immigration casebooks, including discussion of the Legomsky and Aleinikoff selections, see Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525.

⁵ The most current edition is RICHARD A. BOSWELL, *IMMIGRATION AND NATIONALITY LAW: CASES AND MATERIALS* (3d ed. 2000).

⁶ The Aleinikoff et al. casebook was subdivided into a separate refugee and asylum law text: DAVID A. MARTIN, T. ALEXANDER ALEINIKOFF, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *FORCED MIGRATION: LAW AND POLICY* (2007). There is also a separate refugee text by Professor Boswell and his coauthors: KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* (3d ed. 2007).

⁷ See HARRY T. EDWARDS & VIRGINIA DAVIS NORDIN, *HIGHER EDUCATION AND THE LAW* (1979).

⁸ Cumulative supplements were published in 1980, 1981, and 1982. There were no supplements after 1982 and all of the supplements are now out of print.

⁹ See MICHAEL A. OLIVAS, *THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT* (3d ed. 2006).

¹⁰ See JUDITH AREEN, *HIGHER EDUCATION AND THE LAW: CASES AND MATERIALS* (2009).

subject (which, like the field, has grown exponentially, weighing in at over 1700 pages and two volumes), with a teaching supplement and online support from a national association of college lawyers.¹¹ After twenty-plus years on this treadmill, I am in the process of looking for a collaborator who can ease into the process. Even Dylan now makes his bootlegs into best-selling CDs, and “the times they are a-changin’.”¹² I also serve on the editorial board of Carolina Academic Press, and have helped my publisher scout for texts and textbook authors and have reviewed dozens for Carolina and other legal publishers.

While I was there at the start of these two fields of study, I was also there almost at the start of the rise of Latino and Latina law professors. In 1982, there were twenty-two of us (five at the University of New Mexico School of Law, in my native state), and in 2009, there are over 200 of us—still a small percentage of the 7500 total teaching law full-time in the fifty states and D.C., but certainly a growing number and substantial presence, as evidenced by the 2008 appearance of the Delgado, Perea, and Stefancic volume. Rather than wax nostalgic about this development,¹³ a matter better chronicled by other participant observers, I rejoice at its appearance and am pleased I can welcome the casebook into this world.

This brief autobiographical history of my own casebook experiences is mirrored in the astonishing rise of casebooks and other instructional materials in other developing fields, some of which did not even exist as fields of study when I was in law school or in my early teaching years (at least, as measured by the manifest evidence they were fields, or the appearance of casebooks): terrorism and national security law,¹⁴ animal rights law,¹⁵ alternative dispute resolution and negotiation/mediation law,¹⁶ food and drug law¹⁷ and the many DNA strands of health law,¹⁸ and intellectual property

¹¹ See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (4th ed. 2006); see also Michael A. Olivas, *Higher Education Law Scholarship and the Key to All Mythologies*, 33 J.C. & U.L. 591 (2007) (book review).

¹² BOB DYLAN, *The Times They Are A-Changin’*, on *THE TIMES THEY ARE A-CHANGIN’* (Columbia Records 1964).

¹³ I have weighed in elsewhere on these subjects. See, e.g., Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117 (1994); Michael A. Olivas, *Immigration Law Teaching and Scholarship in the Ivory Tower: A Response to Race Matters*, 2000 U. ILL. L. REV. 613; Michael A. Olivas, *Reflections on Academic Merit Badges and Becoming an Eagle Scout*, 43 HOUS. L. REV. 81 (2006). One of the most recent commentaries on the issues of Latino/a law academics is Ediberto Roman & Christopher B. Carbot, *Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?*, 83 IND. L.J. 1235 (2008).

¹⁴ See, e.g., VICTORIA SUTTON, *LAW AND BIOTERRORISM* (2003).

¹⁵ See, e.g., DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW: CASES AND MATERIALS* (2002).

¹⁶ See, e.g., R. HANSON LAWTON & RUSSELL L. WEAVER, *CONTEXTUAL NEGOTIATION: FACILITATED PROCEDURES AS ADVANCED NEGOTIATION* (2006).

¹⁷ See, e.g., PETER J. COHEN, *DRUGS, ADDICTION, AND THE LAW: POLICY, POLITICS, AND PUBLIC HEALTH* (2004).

¹⁸ See, e.g., WILLIAM E. ADAMS, JR., MARY ANNE BOBINSKI, MICHAEL L. CLOSEN, ROBERT M. JARVIS & ARTHUR S. LEONARD, *AIDS: CASES AND MATERIALS* (3d ed. 2002).

law.¹⁹ Each of these, as well as many others I could single out for mention, have casebooks (and the resultant law school courses), organized sections of the American Bar Association or other professional organizations,²⁰ specialized journals and/or treatises,²¹ and other formal evidence of their being developing, legitimate fields of inquiry requiring instructional materials.²² Scholars of knowledge dissemination and organizational networks—themselves the avatars of developing fields of study—note that all new fields go through these same stages of infancy and maturity,²³ and I have considered them healthy signs that the legal academy is evolving and maturing. Not all of these are salutary developments. Observers may believe them to be a sign of the excesses of the liberal state or, alternatively, evidence of a vast right-wing conspiracy, but the academic marketplace will only allow these developments if there is a place for them. In sum, people write casebooks (or instructional books across disciplines) to establish a field, to subdivide a field, and to put their own personal and pedagogical stamp upon a field—or for a variegated mixture of these motivations. Note that I do not include economic gain among the motivations, although that can result once in a blue moon. Carving out a specialized field of legal study can lead to lucrative consulting, litigation, or pro bono opportunities, but I believe that a profit motive is the least likely reason for undertaking such initiatives, and the least likely result.

Surely, there is a place for the Delgado, Perea, and Stefancic volume in the marketplace, and the several authors contributing to this Symposium, friends and significant scholars all, have situated the casebook as an important development.²⁴ There have been several related texts that legal educators and political scientists have produced,²⁵ but its place with a major publisher

¹⁹ See, e.g., KEITH AOKI, *SEED WARS: CONTROVERSIES AND CASES ON PLANT GENETIC RESOURCES AND INTELLECTUAL PROPERTY* (2008).

²⁰ For one example in my field of higher education law, the D.C.-based National Association of College and University Attorneys (NACUA) provides many organizational tools and resources. See National Association of College and University Attorneys, <http://www.nacua.org> (last visited Apr. 9, 2009).

²¹ For example, the *Journal of College and University Law* is jointly published by the University of Notre Dame Law School and NACUA. See *Journal of College and University Law*, <http://www.nd.edu/~jcul> (last visited Apr. 9, 2009). It is a hybrid, refereed and student-edited law review, on whose editorial board I serve.

²² See generally JOHN C. SMART, KENNETH A. FELDMAN & CORINNA A. ETHINGTON, *ACADEMIC DISCIPLINES: HOLLAND'S THEORY AND THE STUDY OF COLLEGE STUDENTS AND FACULTY* (2000) (study of academic disciplines and knowledge production theory). See, in particular, *id.* at ch. 1 (“Academic Disciplines and Academic Lives”), for a discussion of faculty research and discovery.

²³ *Id.*

²⁴ A personal disclosure: I saw a proposal for another such project at my publisher several years ago, which we did not accept for publication.

²⁵ See JOSÉ LUIS MORÍN, *LATINO/A RIGHTS AND JUSTICE IN THE UNITED STATES: PERSPECTIVES AND APPROACHES* (2d ed. 2009); REYNALDO ANAYA VALENCIA, SONIA R. GARCÍA, HENRY FLORES & JOSÉ ROBERTO JUÁREZ JR., *MEXICAN AMERICANS AND THE LAW: ¡EL PUEBLO UNIDO JAMÁS SERÁ VENCIDO!* (2004); see also Michael A. Olivás, Book Review, 32 *AZTLÁN* 221 (2007) (reviewing CARLOS R. SOLTERO, *LATINOS AND AMERICAN LAW: LANDMARK SUPREME COURT CASES* (2006)). The authors also collaborated on a more compre-

and the professional reputation of its authors virtually guarantee its centrality and salience for those who wish to teach or conduct scholarship in this field.

I believe that all the essays in this Symposium stand on their own, so I do not comment upon them in depth, but I note that they do fall along an arc of reaction to the overall project, and I urge Professors Delgado, Perea, and Stefancic to read them all carefully as they undertake a second edition and supplements. The arc I note runs along a continuum from those who took specific issue with or suggested very detailed changes in the text, Kevin Johnson and Keith Aoki,²⁶ and Leticia Saucedo,²⁷ to those who engaged the casebook at a macro or theoretical level, as did Cristina Rodríguez,²⁸ Gerald López,²⁹ and, at the most general level, Chicano historian Rodolfo Acuña.³⁰ Of these respondents, Johnson³¹ and Aoki³² have participated in casebooks, Rodríguez is the coauthor of the forthcoming edition of Legomsky's immigration law casebook,³³ Saucedo is coauthoring a separate forthcoming Latino-focused casebook,³⁴ and Acuña (who does not teach law) has written a popular text on Chicano history, widely employed by professors who teach undergraduates.³⁵ I predict that the second edition of *Latinos and the Law* will likely reflect the many excellent suggestions surfaced here, particularly those by the two essays that parse the casebook in detailed, useful fashion. I wish that I had received such nuanced feedback at such an early stage from my users, although I do hear from them regularly and particularly pay attention to the student reactions. I have deleted cases and added new ones based upon this cybernetic loop, and I listen carefully and consider all the feedback I receive. (As one unlikely development, I have tried to make the casebook more detailed with sources cited and research literature I have consulted, as I discovered that many university counsel, attorneys general staff, and litigants used the book, unexpectedly to me, for its reference value.) One of the

hensive casebook on racial issues, which included many materials on Latinos and Latinas. See JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS, JEAN STEFANCIC & STEPHANIE M. WILDMAN, *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2d ed. 2007).

²⁶ See Keith Aoki & Kevin R. Johnson, *Latinos and the Law: Cases and Materials: The Need for Focus in Critical Analysis*, 12 HARV. LATINO L. REV. 73 (2009).

²⁷ See Leticia M. Saucedo, *National Origin, Immigrants, and the Workplace: The Employment Cases in Latinos and the Law and the Advocates' Perspective*, 12 HARV. LATINO L. REV. 53 (2009).

²⁸ See Cristina M. Rodríguez, *Latinos: Discrete and Insular No More*, 12 HARV. LATINO L. REV. 41 (2009).

²⁹ See Gerald P. López, *Changing Systems, Changing Ourselves*, 12 HARV. LATINO L. REV. 15 (2009).

³⁰ See Rodolfo F. Acuña, *On Pedagogy*, 12 HARV. LATINO L. REV. 7 (2009).

³¹ See KEVIN R. JOHNSON, CATHERINE A. ROGERS & JOHN VALERY WHITE, *COMPLEX LITIGATION: CASES AND MATERIALS ON LITIGATING FOR SOCIAL CHANGE* (2009).

³² See AOKI, *supra* note 19.

³³ See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* (5th ed., forthcoming 2009).

³⁴ See REYNALDO ANAYA VALENCIA, SONIA R. GARCÍA, HENRY FLORES, JOSÉ ROBERTO JUÁREZ, JR. & LETICIA M. SAUCEDO, *THE LEGAL CONSTRUCTION OF A LATINO IDENTITY* (forthcoming 2009).

³⁵ See RODOLFO F. ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (6th ed. 2007); see also *VOICES OF THE U.S. LATINO EXPERIENCE* (Rodolfo F. Acuña & Guadalupe Compeán eds., 2008).

best features about writing a casebook is that authors become the beneficiaries of many contributors, who regularly send materials such as cases, briefs, statutes, regulations, URLs, and war stories—all of them welcome grist for the mill.

I would predict some of this unanticipated collateral value for *Latinos and the Law* as well, for many of these cases and issues will be unknown to the general public and to law students. I am particularly pleased to see the inclusion of *Hernandez v. Texas*,³⁶ the important but unknown 1954 U.S. Supreme Court case on Mexican Americans and jury selection, as I have spent several years trying to bring this Jaime Crow decision to the attention of criminal law, civil rights, and law and society scholars and authors—and, by osmosis, to the casebook authors in these fields who have ignored this case. The case was decided days before *Brown v. Board of Education*,³⁷ but you would not know it from its near-complete omission from casebooks, treatises, and scholarly histories of *Brown*. In 2004, the fiftieth anniversary of this more famous case repeated the eclipsing of the remembrance of *Hernandez*, like the predictable cycle of a comet.

Now that there is a casebook, the zen-like riddle of whether or not Latinos exist in the law can be answered in the affirmative. We have always been there, from *Cortez v. State*³⁸ to *Hernandez* to *Miranda v. Arizona*³⁹ to *Plyler v. Doe*,⁴⁰ but no one heard us in the forest. With the publication of *Latinos and the Law*, there is now a venue, one that we should all celebrate and to which we should contribute.

³⁶ 347 U.S. 475 (1954); see “COLORED MEN” AND “HOMBRES AQUI”: *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING (Michael A. Olivas ed., 2006); Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-Subordination Constitution: The Story of Hernandez v. Texas*, in *RACE LAW STORIES* 273 (Rachel F. Moran & Devon W. Carbado eds., 2008).

³⁷ 347 U.S. 483 (1954).

³⁸ 69 S.W. 536 (Tex. Crim. App. 1902); see Michael A. Olivas, *Hernandez v. Texas: A Litigation History*, in “COLORED MEN” AND “HOMBRES AQUI”: *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING, *supra* note 36, at 209, 221-22 & n.68 (concerning Gregorio Cortez trial). For the authoritative history and folklore concerning this case and the early 1900s trial, which I calculate to be the first challenge by a Mexican American to jury composition, see AMÉRICO PAREDES, *WITH HIS PISTOL IN HIS HAND: A BORDER BALLAD AND ITS HERO* (1958).

³⁹ 384 U.S. 436 (1966).

⁴⁰ 457 U.S. 202 (1982); see Michael A. Olivas, *Plyler v. Doe, the Education of Undocumented Children, and the Polity*, in *IMMIGRATION STORIES* 197 (David A. Martin & Peter H. Schuck eds., 2005).