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DOSS V. BERNAL

ENDING MEXICAN APARTHEID IN ORANGE COUNTY

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Doss v. Bernal successfully challenged the residential segregation of Mexican Americans in Orange County, resulting in one of the earliest legal victories against racial housing covenants in the United States.[1] In fact, *Bernal,* which was decided in 1943, so captured national attention that both *Time Magazine* and Time Inc.'s popular radio news program *The March of Time* ran feature stories on the case (*March of Time* 1943; *Time Magazine* 1943). Nevertheless, the significance of *Bernal* is rarely acknowledged and not a single academic article or monograph has been published exclusively about the case.[2] Our purpose is to draw attention to the importance of *Bernal* for the courtroom successes that followed.

The existing historiography on restrictive covenants paints residential segregation as an injustice that affected primarily African Americans (Jensen 1969; Jones-Correa 2000–2001; McGovney 1945; Plotkin 2001; Vose 1967), and scant attention has been given to the experience of Chicanos and Latinos as targets of restrictive covenants and residential segregation more generally.[3] In fact, although the groundbreaking constitutional ruling in *Bernal* was issued before the 1945 "Sugar Hill" case, the latter is often incorrectly cited as the earliest legal decision in which a lower court ruled that restrictive covenants are unconstitutional based on the equal protection clause of the Fourteenth Amendment (Arellano 2010; Miller 1966).[4] *Bernal* was a persuasive precedent not only to the Sugar Hill case but also to *Shelley v. Kraemer*, the U.S. Supreme Court case that barred judicial enforcement of restrictive covenants in 1948.[5]

In addition to its consequence in the broader legal history of racially restrictive covenants, *Bernal* also holds a unique but hitherto overlooked place in Chicano and Latino legal history. *Bernal* was argued by David C. Marcus, who later served as lead counsel in the well-known *Mendez v. Westminster* case of 1946, which ended the educational segregation of Mexican youth.[6] *Bernal* was the first in a trilogy of Chicano desegregation cases successfully argued by Marcus that led to the historic victory in *Mendez*.[7] In *Bernal*, Marcus tested for the first time some of the legal arguments that he would employ in *Mendez*.

FACTS OF THE CASE

Alex Bernal was born in Corona, California, on May 28, 1914, to Mexican parents, Paul and Ramona Bernal.[8] He was raised in Fullerton, California, an Orange County community known in the early twentieth century for citrus production. Until 1937 he lived in a segregated section of Fullerton called Truslow Barrio. Alex married Mexican national Esther Munoz De Anda on February 6, 1938, and the couple had two children, Irene and Maria Teresa. The young family lived in an apartment in La Habra, a community just north of Fullerton. In 1943, in possession of increased financial resources earned from farming, Alex returned to Fullerton to work as a produce truck driver and to build a better life for his family.

The Bernals were attracted to a moderately priced white stucco home at 200 East Ash, in a residential tract known as the Sunnyside Addition. Sunnyside Addition was established in 1923, and by the time of the lawsuit it was a predominantly lower middle class community occupied exclusively by whites. The home on East Ash was located near Maple School and was just one street away from the segregated neighborhood in which Alex was raised (Bernal Family Testimonio 2010; *Time Magazine* 1943). The Bernals contacted the owners of the home to inquire whether they were interested in selling the property. The owners, Joe and Velda Johnson, agreed to sell the property for $4,250, and the Bernals secured a mortgage for the home from the First National Trust Bank of Fullerton. They made a down payment of $750.[9]

After purchasing the property, and several days before they were scheduled to move in, Alex and Esther were told by the Johnsons that they "might have a little trouble" because of a deed restriction that was attached to the property.[10] The restriction stated:

> The above described property is conveyed subject to the following stated express conditions running with the land, to wit:
>
> That no portion of the said property shall at any time be used, leased, owned or occupied *by any Mexicans or persons other than of the Caucasian race*.[11]

The Bernals quickly encountered trouble from the white residents of Sunnyside, and a lawsuit was soon filed in the Orange County Superior Court by Ashley V. Doss, Anna Z. Doss, Oliver E. Shrunk, and Virginia Shrunk "on behalf of a majority of all the other lot owners" of the Sunnyside Addition. The lawsuit requested judicial enforcement of the racial restriction and the issuance of an injunction that would expel the Bernals from their new home.[12] The Bernals refused to leave and instead hired Marcus to defend them (Bernal Family Testimonio 2010).

BROADER HISTORY OF MEXICAN SEGREGATION

The Bernal's experience of residential segregation and housing discrimination was unfortunately common throughout California during the early twentieth century.

In 1940 at least two hundred segregated Mexican barrios, or "colonias," existed throughout central and southern California (Gonzalez 1994). These colonias, also referred to as "campos," emerged in the early twentieth century in places such as Fullerton, Placentia, Santa Ana, El Modena, Pasadena, San Gabriel, Monrovia, Whittier, Montebello, Pomona, Glendora, Azusa, Corona, Ontario, and San Bernardino (Gonzalez 1994). The colonias formed as a result of the great Mexican migration in the early years of the twentieth century and the expansion of the citrus industry in California. Between 1900 and 1930, nearly 750,000 Mexicans immigrated to the United States in search of work and respite from the violence and disruption of the Mexican

Revolution. Many were recruited to Southern California to work as pickers and packers for the burgeoning, and highly lucrative, citrus industry (Gonzalez 1994).

From 1890 to 1940 citrus was California's most profitable agricultural crop (Gonzalez 1994). In the late 1930s California produced 60 percent of all citrus consumed in the United States and 21 percent of the global citrus supply. In 1938 alone, California citrus farmers earned $51,000,000. The backbone of the booming citrus industry was Mexican immigrant labor. Mexicans comprised nearly 100 percent of the 22,000 citrus pickers in California in 1940, and at the height of citrus production in the mid-1940s, the great majority of packers were Mexican women (Gonzalez 1994).

Despite their central role in the citrus industry, Mexican immigrants were deliberately segregated from the dominant white community through three primary mechanisms. Beginning in the 1910s, landowners and real estate agents collaborated to create housing developments that were marketed exclusively to Mexicans. Local citrus associations also sponsored segregated housing for their Mexican employees as part of company towns (California Citrus Institute 1923; Gonzalez 1994). These self-contained company towns were located within citrus ranches and included elementary schools, community halls, and facilities for recreation and adult education classes. In addition, some immigrant families found housing within segregated neighborhoods that had been established in the 1880s, before the rise of the citrus industry. These neighborhoods were located on the outskirts of dominant white communities and usually bordered citrus or agricultural fields. Residential segregation was enforced, and racial interaction minimized, through the proliferation of zoning ordinances, racially restrictive covenants, and "sundown" laws, which penalized Mexicans for appearing in white communities after sunset (Martinez 2009).

The segregation strategies created colonias that were home to as many as 100,000 Mexican citrus workers and their families between the years of 1910 and 1950. Fullerton had several segregated Mexican colonias, known as Bastanchury Ranch, Campo Pomona, and the Truslow Barrio.

According to historian Gilbert Gonzalez, colonias were comparable to Mexican villages because they were islands of Mexican life (Gonzalez 1994). They reflected Mexican rural culture and synthesized the various regional and local Mexican traditions familiar to the immigrants. Each village was culturally self-sustaining, and members observed a variety of patriotic and religious celebrations and rituals. The colonia also provided social, economic, and medical support through voluntary reciprocal self-help activities.

Unfortunately, many Mexican colonias were also characterized by poverty, overcrowding, and lack of infrastructural resources such as heat and running water (Gonzalez 1994). Contemporary observer and California historian Carey McWilliams described these citrus worker villages, or "Jim-towns," as rustic, segregated, and impoverished:

> From Santa Barbara to San Diego, one can find these Jim-towns, with their clusters of bizarre shacks, usually located in an out-of-the-way place on the outskirts of an established citrus-belt town…always "on the other side of the tracks."…The Jim-towns lack governmental services; the streets are dusty unpaved lanes, the plumbing is primitive, and the water supply is usually obtained from outdoor hydrants." (McWilliams 1946, 218; Gonzalez 1994, 12)

A California Governor's Report from 1930 corroborates this disheartening description in its discussion of one Mexican colonia called Maravilla Park:

> This district…was built up without regard to the proper requirements for sanitation in congested districts. Two, and sometimes three, shacks are built upon one very small lot, leaving little unoccupied space. The shacks are flimsy shells, usually constructed of scrap lumber, old boxes, or other salvage." (California Department of Industrial Relations, Agriculture, and Social Welfare 1930, 177)

THE LAWSUIT

In moving to the Sunnyside Addition, the Bernals challenged entrenched attitudes toward race and class by seeking improved social and educational opportunities. The Dosses, the Shrunks, and the other unnamed plaintiffs alleged "that the use and occupation of a residence on said Tract No. 448, Sunnyside Addition, as aforesaid by persons known as Mexicans, or persons other than of the Caucasian Race, will cause an irreparable injury to these plaintiffs, and to all other owners of lots in said Tract."[13] According to the plaintiffs, the Bernals' presence would lower property values and lower the social standard of living in the Sunnyside development. The complaint clearly articulated the racist fears of the plaintiffs:

> The permitting of Mexicans and other races to live in and to use and occupy the residence buildings in said tract, would necessitate coming in contact with said other races, including Mexicans in a social and neighborhood manner, and that if said race and Mexican Residential use and restriction in said tract of land is broken, other Mexicans and persons of other races will soon move in and occupy residences in said Restricted residential district, and that the value of said residential property therein will be greatly depreciated…and for further reasons that such breach of said restrictions and conditions will greatly lower the social living standard.[14]

According to one of the plaintiffs, these negative effects were "always caused by the intermingling of peoples of other races with persons of the Caucasian race, to the detriment of persons of the Caucasian race."[15]

To establish their claim that housing prices dropped when racial minorities moved into white neighborhoods, the plaintiffs enlisted the expert testimony of real estate broker Harry Crooke and tax appraiser Howard Irwin. Crooke and Irwin testified that the intrusion of non-Caucasians such as the Bernals

in a homogeneous white neighborhood typically caused a 25 to 50 percent devaluation in housing values.[16]

Marcus, arguing on behalf of the Bernals, responded that no irreparable damage or injury had been suffered by the plaintiffs because no devaluation had occurred since they moved into the neighborhood. On the contrary, most homes in the Sunnyside Addition had retained a value of $3,000 or more.[17] The Bernals also claimed that they had no knowledge of the restriction prior to their purchase of the property.

In addition to these factual defenses, Marcus presented two novel legal arguments that were based on public policy and the equal protection clause. Prior to *Bernal*, a few lower courts had ruled that race-based covenants were void because they were contrary to public policy, but not because they violated the civil rights of minorities; rather, they impinged upon the "freedom to vend to the greatest advantage of the owner" (McGovney 1945, 14).[18] Building upon this established public policy defense, Marcus developed a creative argument tailored to the unique sociological and political situation of the Mexican-descent population of the United States. He asserted that racially restrictive covenants against Mexicans ran counter to public policy because Mexicans are Caucasian and because the enforcement of covenants against them would violate the United States' "good neighbor policy" with Mexico and Latin America.[19] To prove the claim that Mexicans are Caucasian, Marcus called upon the expert testimony of A. O. Bowden, professor of anthropology at the University of Southern California (Bernal Family Testimonio 2010).

Marcus's public policy argument had never before been presented in a court of law. He reasoned that if restrictive housing covenants could be applied to exclude Mexicans who were Caucasian, then what would preclude the future imposition of similar types of covenants against other white groups such as the English or other European-descent populations? Permitting restrictive covenants to be applied to Mexican Americans would open the door to the application of similar restrictions against other Caucasian groups in the United States.[20] This argument was an early articulation of the "other white" legal strategy that was later successfully used by attorneys Gustavo Garcia and Carlos Cadena in *Hernandez v. Texas*, a case about discrimination in jury selection that was decided by the U.S. Supreme Court in 1954; the Court held that Mexican Americans constituted an "other white" ethnic group that could experience discrimination and therefore they merited protection under the Fourteenth Amendment.[21]

In addition to the assertion of the Bernal family's "whiteness," Marcus claimed that the enforcement of restrictive covenants against Mexicans violated public policy because it ran counter to the Good Neighbor Policy established by the Roosevelt administration in the early 1930s.[22] An important element of Roosevelt's foreign policy, the Good Neighbor Policy foreswore unilateral intervention in the domestic affairs of Latin American nations, creating political ties that helped unite the hemisphere. Marcus argued that Mexican nationals such as Esther Bernal deserved equitable treatment within the U.S. legal system because Mexico was a friendly neighbor and that, because of this relationship, social discrimination against Mrs. Bernal and her Mexican-descent family through enforcement of the restrictive covenant was a violation of federal public policy.

Marcus also argued that the disputed racial covenant violated the Marcus's rights under the equal protection clause of the Fourteenth Amendment.[23] This constitutional argument was quite innovative: no court in the United States had ever ruled that restrictive covenants violated the equal protection clause. The prevailing legal reasoning of the time was that race-based covenants did not trigger an application of the equal protection clause because such agreements were contracts between private individuals and did not involve state action (Arellano, 2010; Jensen 1969; Jones-Correa 2000–2001; McGovney 1945; Plotkin, 2001). The implicit assertion of Marcus's argument was that a state court's enforcement of private covenants constituted state action and therefore invoked the Fourteenth Amendment's equal protection guarantees. Once again, Marcus's legal reasoning was ahead of its time—it was affirmed five years later by the U.S. Supreme Court in *Shelley v. Kraemer* (Jones-Correa 2000–2001; Ramos 2001–2002).

The equal protection argument was also pathbreaking insofar as it rested on the assumption that Mexican Americans fell within the purview of the Fourteenth Amendment. In 1943 the equal protection clause was typically viewed as providing constitutional protection for only African Americans and Asian Americans. Since Mexican Americans were usually classified by courts as "white," they were not usually afforded the constitutional protections of the Fourteenth Amendment (Garcia 2009; Gomez 2006). The Bernals' assertion of their rights as protected minorities was novel, and it was vindicated eleven years later in *Hernandez v. Texas*.

After a four-day trial that was attended by many Mexican American soldiers and World War II veterans, Superior Court Judge Albert F. Ross ruled in favor of the Bernals. In his judgment, dated September 18, 1943, Judge Ross declared:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that plaintiffs…take nothing by their complaint; that the provisions of plaintiffs deed providing "That no portion of the said property shall at any time be used, leased, owned or occupied by any Mexicans or persons other then [sic] of the Caucasian race," as respecting and concerning defendants Alex P. Bernal a citizen of the United States and Esther Bernal a citizen and National of the Republic of Mexico is null and void as in violation of public policy in that said restriction has a tendency to be and is injurious to the public good and society; violative of the

> fundamental form and concepts of democratic principles…and inimical to the social and political policy of the Government of the State of California and the United States of America…[and] is violative of the V. and XIV. Amendment of the Constitution of the United States.[24]

Judge Ross elaborated upon the public policy basis for his judgment and reiterated his constitutional objection to racially restrictive covenants against Mexican Americans.

> If it is decided …that because a person is a Mexican…he can be restricted from occupancy, the same rule will have to apply to the English, French, or anyone else that any residence district might see fit to exclude.…The Republic of Mexico is…a friendly neighbor.…Because I feel that the [deed] restriction is contrary to public policy and…decidedly unconstitutional…I will order judgment for defendants." (*Time Magazine* 1943, 25)

CONCLUSION

Doss v. Bernal is an important but largely forgotten legal case that sheds critical light on Chicano housing segregation in the early twentieth century. Notwithstanding the existing literature that frames the topic of racially restrictive covenants as an issue that primarily affected African Americans, *Bernal* reminds us that race-based residential segregation was an insidious phenomenon that also affected the lives of thousands of Mexicans in California and in the United States.

Alex and Esther Bernal were pioneers, contesting and prevailing against legal apartheid of Mexicans in Orange Country. Their lawsuit rested on legal arguments that would serve as persuasive precedent in overturning racial covenants on a national level in *Shelley v. Kraemer*. These same arguments, moreover, formed the basis for overturning the educational segregation of California's Mexican students in *Mendez v. Westminster*.

NOTES

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1. Doss et al. v. Bernal et al. (1943), Superior Court of the State of California, Orange County, no. 41466. Quoted passages are drawn from the trial documents: defendant and plaintiff depositions; the court's findings of fact and conclusions of law, and plaintiff's exceptions to the same; plaintiff's complaint for injunction; the court's judgment; and the court's ruling. The documents were found in the archives of the Orange County Superior Court.

2. Although few academic publications exist related to *Bernal,* an excellent article by journalist Gustavo Arellano (2010) presents the facts of the case. For an excellent examination of *Bernal* as part of a broader discussion of the life and legal activities of attorney David Marcus, see Carpio (2012).

3. Racially restrictive covenants may be defined as private agreements barring non-Caucasians from occupying or owning property (Jones-Correa 2000–2001). For one of the few scholarly treatments of Mexican Americans and racially restrictive covenants, see Ramos (2001–2002).

4. Anderson et al. v. Auseth et al. (1945), Superior Court of the State of California, Los Angeles County. In the late 1930s African Americans, including film stars Hattie McDaniel, Louise Beavers, and Ethel Waters, began moving into West Adams Heights, a neighborhood just south of downtown Los Angeles. This community was referred to as Sugar Hill. White plaintiffs in this case claimed that the presence of African American residents in the community violated the terms of a racial covenant in effect for the area, and that the presence of black residents had resulted in their inability to sell their properties to prospective white buyers. Superior Court Judge Thurmond Clarke dismissed the case and held that racial covenants violated the Equal Protection rights of African Americans.

5. Shelley v. Kraemer (1948) 334 U.S. 1. In this case the petitioners, who were black, purchased a home in a St. Louis subdivision that was governed by a restrictive covenant. Respondents sought an injunction in the Circuit Court of St. Louis ordering enforcement of the racial covenant and divestiture of the property from petitioners. Upon review of the case, the U.S. Supreme Court ruled that, although restrictive covenants on their face do not violate the Fourteenth Amendment because they represent contracts by private parties, judicial enforcement of racial covenants encompasses state action and therefore triggers application of the equal protection clause. In this monumental ruling, the Supreme Court held that judicial enforcement of the racial covenant in question violated the equal protection rights of the petitioners. In so doing, the Court, for all practical purposes, invalidated the invidious legal institution of racially restrictive covenants.

6. Mendez et al. v. Westminster School District et al., 64 F.Supp. 544 (C.D. Cal. 1946), *aff'd,* 161 F.2d 774 (9th Cir. 1947) (en banc). In this case, Gonzalo Mendez, William Guzman, Frank Palomino, Thomas Estrada, and Lorenzo Ramirez filed suit against the Westminster, Garden Grove, Santa Ana, and El Modena School Districts for excluding Mexican children from white schools on the basis of ethnicity. In its groundbreaking decision, the district court departed from the "separate but equal" doctrine and held that the segregation of Mexican children violated the equal protection clause of the Fourteenth Amendment. In a ruling of more limited scope, the Ninth Circuit Court of Appeals affirmed the decision of the district court on the grounds that the state education code did not provide for the segregation of Mexican students who were considered "white" by law.

7. The second case in the desegregation trilogy, preceding *Mendez,* was Lopez et al. v. Seccombe et al., 71 F. Supp. 769 (S.D. Cal 1944). This desegregation case was initiated by Ignacio Lopez, Rev. R.N. Nunez, Eugenio Nogueroa, Virginia Prado, and Rafael Munoz, on behalf of the more than 8,000 persons of Mexican and Latino descent residing in San Bernardino, California. They claimed that many Mexicans and Latinos had been denied access to the city park and playground despite the fact that they were tax-paying, U.S. citizens. The court ruled that the city's segregation practices violated the Mexican descent population's right of equal protection under the Fourteenth Amendment. The court issued a permanent injunction prohibiting the city of San Bernardino from denying future access to the said park and playground.

8. Bernal deposition, 4.

9. Bernal deposition, 16; *Time Magazine* (1943), 25. The article by Arellano (2010) states that the house was for sale.

10. Bernal deposition, 18. The article by Arellano (2010) states that this occurred three days after the Bernals moved into the house; the quote from the former owner is also slightly different.

11. Findings of fact and conclusions of law, 3; emphasis mine.

12. Findings of fact and conclusions of law, 5–6.

13. Complaint for injunction, 6.

14. Complaint for injunction, 6.

15. Hobson deposition, 14.

16. Plaintiff exceptions, 2–3.

17. Plaintiff exceptions, 1.

18. See, for example, Los Angeles Investment Co. v. Gary (1919) 181 Cal. 680; Porter v. Barrett (1925) 233 Mich. 373; White v. White (1929) 108 W. Va. 128; and Williams v. Commercial Land Co. (1931) 34 Ohio Law Rep. 559.

19. Findings of fact and conclusions of law, 5–6; judgment, 2; plaintiff exceptions, 4; ruling, 1; see also *Time Magazine* (1943).

20. Ruling, 1; see also *Time Magazine* (1943).

21. Hernandez v. Texas (1954) 347 U.S. 475. The Court's ruling extended the Fourteenth Amendment's guarantee of equal protection to Mexican Americans; I discuss the equal protection clause below. For scholarly analysis of *Hernandez v. Texas,* see Garcia (2009); and Olivas (2006).

22. Ruling, 1; see also *Time Magazine* (1943).

23. Findings of fact and conclusions of law, 6; judgment, 2.

24. Judgment, 2.]

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