Slaves, Reconstruction, and The Supreme Court of Texas

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I. Introduction.

History, Oliver Wendell Holmes, Jr. once observed, is a part of the rational study of law.[1] A look at the history of the Supreme Court of Texas reveals a rich and fascinating past, and the articles reviewed here cover some of the most tumultuous times in that court's history. Read on to find out how the antebellum supreme court took pains to protect the civil rights of African Americans within the constraints imposed by the system of slavery and to learn about George Paschal, the court's iconoclastic, shotgun-toting official reporter.

II. A.E. Keir Nash, *The Texas Supreme Court and Trial Rights of Blacks 1845-1860*, 58 J. AM. HISTORY 622 (1971).

In the 1970's, political scientist A.E. Keir Nash published a number of articles examining southern judicial decisions in slave cases.[2] Nash introduced his laudatory 1971 article on the Texas Supreme Court's treatment of African Americans before the Civil War with this excerpt from *Calvin v. State*, 25 Tex. 789, 796 (1860): "The law of the case . . . is precisely the same as if the accused were a free white man, and we cannot strain the law even 'in the estimation of a hair,' because the defendant is a slave."[3]

I discovered Nash's article while writing a piece on the Texas Supreme Court's decision in the "Emancipation Cases," *Hall v. Keese* and *Dougherty v. Cartwright,* 31 Tex. 504 (Tex. 1868), which dealt with the question of exactly when slave contracts became unenforceable. Nash's theory—that the supreme court had "a remarkable antebellum tradition of fair treatment of blacks"[4]—came as a great surprise. There is a substantial body of supreme court case law on slaves, and though my Emancipation Cases article does not involve the antebellum slave cases, I read a handful of those decisions and found little to encourage the notion that the court was progressive in its views on slavery.

Nash's comprehensive look at the cases, however, led him to a different conclusion: "Before 1861, a pattern of Texas judicial behavior prevailed which . . . was active in expanding protection of the black under the rule of law. The judges of the antebellum Texas supreme court appear to have been anxious to secure as much justice for the black man as was possible within a caste society."[5] Nash too was surprised to find that the Texas Supreme Court "exhibit[ed] a strong strand of concern for the black man *qua* human."[6]

Professor Nash analyzed four types of cases: (i) criminal prosecutions by the state against whites who harmed African Americans, (ii) felony trials of African Americans, (iii) civil suits by slaves seeking their freedom, and (iv) "subversion" against the slave system—enticing slaves to abscond or petty infractions such as selling liquor to African Americans.[7] His review revealed three commendable attitudes of the five judges who sat

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[1] Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897).

[2] Others have written on this topic as well. *See, e.g.,* WILLIAM E. WIETHOFF, A PECULIAR HUMANISM: THE JUDICIAL ADVOCACY OF SLAVERY IN HIGH COURTS OF THE OLD SOUTH, 1820-1850 (Univ. of Georgia Press 1996).

[3] A.E. Keir Nash, *The Texas Supreme Court and Trial Rights of Blacks 1845-1860,* 58 J. AM. HISTORY 622, 622 (1971) [hereinafter "Nash"].

[4] *Id.*

[5] *Id.* at 624.

[6] *Id.*

[7] *Id.* at 624-25.

on the Texas Supreme Court from 1845 to 1860: "a measured insistence on the rule of law as against hysterical protection of the institution of slavery; a demand that the 'humanity' of blacks be recognized as a countervailing force to the exigencies of 'property'; and a sympathy with the individual black seeking liberty."[8]

One of the cases Nash discusses draws an intriguing link between the past and present. After I mentioned my Emancipation Cases article to Chief Justice Wallace Jefferson, he directed my attention to *Westbrook v. Mitchell*, 24 Tex. 560 (1859). There, the supreme court affirmed a judgment rendered by N.W. Battle, a Waco judge whose slaves included Chief Justice Jefferson's ancestor, Shedrick Willis.[9] Judge Battle ruled that former slave Lewis John Redrolls could not lawfully sell himself back into slavery before January 27, 1858, when the Texas Legislature enacted a law permitting such transactions. The supreme court agreed: "The recognition of such a right might lead to its exercise for bad purposes."[10] In Nash's view, the court's opinion in *Westbrook* "contained a substantial hint that the Texas judges were less than warmly sympathetic to the new law."[11]

Nash concludes with this plaudit for the supreme court's progressive views on the treatment of African Americans before Reconstruction:

> The "unfree" marketplace of the slave economy seemed to allow in the judicial marketplace of ideas greater freedom for the display of justice and humanity toward the black than did state courts after emancipation. Nowhere was this more true than on the Texas supreme court between 1845 and 1860. At the very least, it seems safe to assert that the judicial lot of the southern black in this century would have been measurably more secure had all twentieth-century southern judges been as insistent as [Justice James H.] Bell and his brethren that the law was to be applied precisely the same for a black claimant as for a white man, and that it could not, because of color, be strained "even in the estimation of a hair."[12]

III. James P. Hart, *George W. Paschal*, 28 TEX. L. REV. 23 (1949).

James P. Hart was an associate justice on the Supreme Court of Texas from 1947 to 1950. His 1949 biographical piece on George W. Paschal, whose many vocations included official reporter of the Texas Supreme Court, is absolutely riveting. Paschal was a fascinating character:

> George W. Paschal was one of the outstanding figures in the legal profession in Texas in the period from the annexation of Texas to the Union to the end of Reconstruction. He is remembered today chiefly because of his *Digest of the Laws of Texas* and his reports of the decisions of our Supreme Court, but he was also an outstanding legal practitioner, a judge of the Supreme Court of Arkansas, a lecturer in law in Georgetown University in Washington, D.C., and he even edited a newspaper in Austin, *The Southern Intelligencer*.[13]

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[8] *Id.* at 625; *but see* Thomas D. Russell, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*, 1996 UTAH L. REV. 1161, 1164-65 (1996) (arguing that "Nash's findings of solicitude and fairness must be confined to the narrow categories of cases that he examined: white assaults on and murders of slaves and free blacks and manumissions.").

[9] *See* Kevin Priestner, *Profile: Wallace Jefferson*, 66 TEX. B.J. 405 (2003); Anita Davis, *Wallace Jefferson Takes Oath of Office*, 64 TEX. B.J. 580 (2001).

[10] 24 Tex. at 562.

[11] Nash at 636.

[12] *Id.* at 642.

[13] James P. Hart, *George W. Paschal*, 28 TEX. L. REV. 23, 23 (1949) [hereinafter "Hart"].

Paschal's life, Justice Hart observed, was "full of paradoxes." He was a native Southerner and an anti-abolitionist, but he was vehemently opposed to secession and was placed under house arrest by Confederate authorities during the Civil War.[14] Yet when the war ended, Paschal disparaged "carpetbaggers" and urged clemency for imprisoned Southern leaders.[15] Federal military authorities appointed Paschal official reporter of the Texas Supreme Court during Reconstruction, but he was "bitterly critical" of the court he served even though its members were appointed by the same authorities.[16]

Justice Hart's article also came to my attention while doing research for my Emancipation Cases article because Paschal played a significant role in that litigation. Not only was he the supreme court's official reporter, but he also argued the cases, joined by Charles S. West. Only West and Paschal responded to the Court's call to the entire bar for lawyers willing to present arguments.[17] In his official report of the court's decision, Paschal baited his enemies with anti-secessionist vitriol, including this harangue against the former rebels:

> Those who had been loudest to proclaim their purpose to perish in the defense of slavery were the first to reach the provost marshal's and the loudest in their response to the manumission oath. Then they hurried back to contrive some plan to retain the services of those who they had owned. The negroes stood aghast, not knowing whether most to trust their old masters or their liberators.[18]

Justice Hart recounts intriguing details about Paschal's life, such as his marriage to the daughter of a Cherokee chief, his service as a justice on the Arkansas Supreme Court, his practice as a Texas attorney, and his tenure as editor and publisher of *The Southern Intelligencer*, a weekly newspaper published in Austin.[19] In one account, Justice Hart describes how the intense competition between *The Southern Intelligencer* and *The Texas State Gazette*, also published in Austin, led to a near gun battle on the streets of Austin:

> The culmination of this bad feeling was an incident in 1859 in which challenges for duels were exchanged, Paschal and his son and their antagonists appeared on Congress Avenue, armed with double-barreled shotguns (but at different times), and the parties were finally put under peace bonds by Judge Vontress at Georgetown and Judge Terrell at Austin.[20]

Paschal reported the cases decided by the Texas Supreme Court from 1866 to 1869, in volumes 28-31 of the Texas Reports.[21] In those days, Justice Hart explains, the reporter "was expected to make an independent study of the record and to make independent statements of the facts and the decision of the lower court, as well as to summarize the briefs and arguments of counsel."[22] Paschal's summaries contain valuable historical information and "lively personal reminiscences" about members of the supreme court and some of the more notable cases that came before the court.[23]

The court, however, was not amused by Paschal's creative reporting and ordered him to truncate his

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[14] *Id.*; *see also* James W. Paulsen, *If At First You Don't Secede: Ten Reasons Why The "Republic of Texas" Movement is Wrong*, 38 S. TEX. L. REV. 801, 808 (1997).

[15] Hart at 13.

[16] *Id.*

[17] *Hall v. Keese*, 31 Tex. 504, 534-35 (1868) (Hamilton, J., dissenting).

[18] *Id.* at 511.

[19] Hart at 24-27.

[20] *Id.* at 27.

[21] *Id.* at 34.

[22] *Id.*

[23] *Id.* at 34-35.

reports.[24] Unbowed, Paschal rebuked the justices in his preface to volume 31 of the Texas Reports:

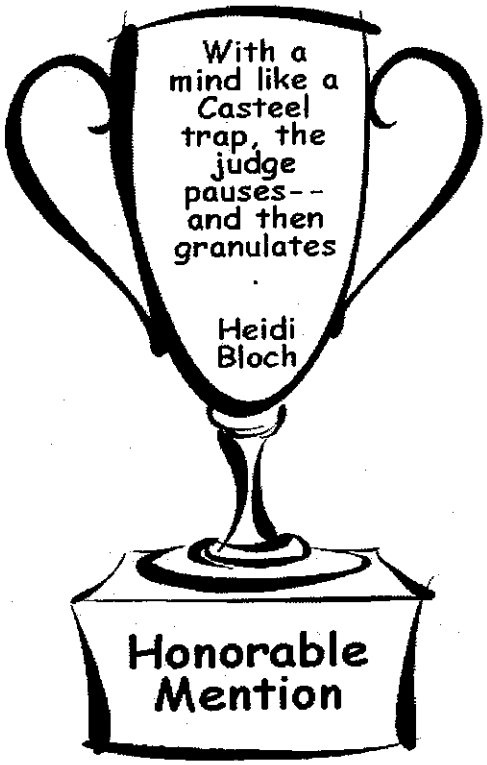
> I know of no legal authority for this interference. Every lawyer will well understand the little credit to be given to reports which should leave the whole history of the facts to the judge and suppress the beliefs of counsel! Had I desired to retaliate, I should have printed these gentlemen's opinions just as they wrote them, and have left them to take care of their own literary fame.[25]

Paschal's insubordination got him fired.[26] He later became a professor at the Law School of Georgetown University in Washington, D.C., which he was instrumental in founding.[27] He died in 1878 in Washington, where he is buried in the Rock Creek Cemetery.[28] Justice Hart concludes with this masterful synopsis of Paschal's legacy:

> The impression which we get from considering Paschal's life as a whole is that he was a man of very high ability, approaching genius, who never seemed to find himself, as we would say today, well adjusted to his environment. As a lawyer and legal author, he seems to have been universally respected. He was, however, almost continuously involved in violent controversy. His fate was to be in the minority in the South at a time when the South was in dire trouble and when his views were regarded by most of his neighbors as treasonable. We may conjecture that under different conditions he would have been a nationally famous advocate, jurist or author, or possibly all three. As it was, he led an exciting, fearless and industrious life, and we are indebted to him for enlightening many pages of Texas legal history which would otherwise be dull and obscure.[29]

IV. Conclusion.

It's anyone's guess what the contrarian George Paschal would say about Professor Nash's theory that the Texas Supreme Court was a champion of African American civil rights before the Civil War. Most likely, his response would have been something akin to Abba Eban's sardonic remark: "History teaches us that men and nations behave wisely once they have exhausted all other alternatives."[30]



[24] *Id.* at 35.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 41.

[28] *Id.*

[29] *Id.* at 41-42.

[30] JON WINOKUR, THE PORTABLE CURMUDGEON 135 (Dutton 1992).