Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 52 *Tribute to Judge Theodore McMillian*

January 1997

On Holding the Line and Retrogressive Zeitgeist: A Tribute to Judge Theodore McMillian

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Recommended Citation

Guadalupe T. Luna, *On Holding the Line and Retrogressive Zeitgeist: A Tribute to Judge Theodore McMillian*, 52 WASH. U. J. URB. & CONTEMP. L. 59 (1997)
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ON HOLDING THE LINE AND RETROGRESSIVE ZEITGEIST: A TRIBUTE TO JUDGE THEODORE MCMILLIAN

*GUADALUPE T. LUNA**

Circumstances make men just as much as men make circumstances.[1]

INTRODUCTION

This tribute provides an invaluable opportunity to recognize an individual who has transformed and enriched my life in immeasurable ways. With unmitigated restraint Judge McMillian's rich intellect, uncompromising integrity, and much appreciated wit and wisdom have imparted valuable enlightenment. Since first meeting the Judge in 1987 he continues to impress me in a number of ways. Nonetheless, two primary influences extend to the present.

The first draws keenly on the Judge's courage in facing racial and class oppression. The Judge's experiences with discrimination illustrate individualized forms of resistance successfully extend benefits beyond the personal. The second major influence involves the Judge's concern for the working poor and their relationship with

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1. KARL MARX & FREDRICK ENGELS, GERMAN IDEOLOGY 81 (C.J. Arthur ed., 1978).

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their urban environments. His generous time and energy working on behalf of children, provide examples of his commitment to St. Louis and its future as promised by its youth. By his actions, Judge McMillian continues to transform various aspects of impoverished conditions into beneficial improvements.

Judge McMillian's courage in facing prejudicial encounters has dared me to reject the status quo and engage in scholarship deemed professionally unsafe. Its focus involves examinations of race-based and gender oppression against Chicanas and Chicanos with a focus on their outsider status in law. The last section of this tribute, consequently, considers racial bias in the El Paso, Texas, border region. Not unlike so many impoverished urban and rural environments, the region suffers from race and class oppression. Nonetheless, a number of issues masking law's subordination of the region remains excluded from academic directed inquiry in law.

In its aggregate, my fragile hope is that this tribute demonstrate the ongoing results of Judge McMillian's continuing concern. Specifically, to ensure justice prevails for those on the margins of the legal system. It seeks to show how the Judge's own form of resistance against discriminatory conduct and prejudicial actions continue to bear fruit. The evidence, as examined below, consists of my teaching and research agenda.

I. JUDGE MCMILLIAN AND THE STATUS QUO

Since I met him in 1987, Judge McMillian's rich intellect, uncompromising integrity, and much appreciated wit and wisdom have imparted immeasurable and valuable enlightenment. Judge McMillian's legal opinions, as supporting evidence, reveal a sagacity and acumen contributing greatly to the vitality of law. His efforts to ensure equal protection to those outside the legal system, in particular, illustrate a sensitivity to inequality and uneven treatment in the writing and enforcement of the law. As gifts, his teachings are much valued, cherished, and profoundly appreciated. Through this small tribute I thereby bear witness to his spirit, intellectual astuteness, and unyielding high regard for the ability of law to transform the human condition.

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What I treasure most about Judge McMillian is his unparalleled tenacity, determination and uncompromising integrity in his encounters with discriminatory acts. Judge McMillian became a lawyer during the height of Jim Crow, when racial bias ran rampant, and when mandates of segregation enforced through violent means exacted great hardships on people of color.[2] It was a time when the status quo permitted challenges only at great personal cost and sacrifice. Judge McMillian, nonetheless, learned how to turn his encounters with racial bias into valuable educational experiences. Several of the judge's experiences with discrimination are well known and serve as examples of the Judge challenging the status quo. They further demonstrate how the Judge created his own space through the workings of his genius.

Judge McMillian's encounters with segregation and prejudice extended to the use of officers' clubs while attending Army War College in Aberdeen, Maryland. As the only African-American officer at the college, segregation prevented the judge from joining the Euro-American "all-white" officer's club. Instead, the Army furnished the judge with his own club. Segregated from the "all-white" officers' club, the Judge invited non-military people from off the base. Judge McMillian often has observed that, in creating his own space, he and his guests were able to have "some fine parties."[3] His actions, in essence, comprised his own form of protest.

Yet another example of Judge McMillian's experience with discrimination, occurred during his time with the still legally segregated military. During rest and recreation periods, ropes

2. Judge McMillian is the first and only African-American on the Eighth Circuit Court of Appeals, beginning his tenure in 1956 as a judge in the St. Louis circuit court. The Eighth Circuit Court of Appeals, located in the St. Louis federal courthouse, is but a short distance from the Old Courthouse where the Dred Scott case was heard in 1847 and 1850. For an overview of the historical framework during the period of Jim Crow and subsequent eras challenging the rules in force see, for example, RALPH D. ABERNATHY, AND THE WALLS CAME TUMBLING DOWN: AN AUTOBIOGRAPHY (1989); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1988); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986 (1987); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1966).

3. William J. Shaw, *Why Judge McMillian Worries*, ST. LOUIS POST-DISPATCH MAGAZINE, Aug. 11, 1991, at 8, 9.

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cordoned off a "white" section from an African-American section on the beach and thereby barred the judge from swimming with the Euro-American officers.[4] The Judge, nonetheless, transformed this negative experience by recalling that "[t]he funny thing was that the tide flowed through the black officers beach into the white section, a condition obviously overlooked by some white planner."[5] On a beach divided by race and class he essentially understood that the white officers' water received the effluent water that passed through the African-Americans' section first.

The fact that Judge McMillian became an attorney during a time when the exclusion of people of color was an acceptable practice in the legal community embodies an even more significant challenge to the status quo. While in law school a United States district court judge declined an invitation to speak at St. Louis University, Judge McMillian's law school, because of his presence.[6] Rather than retreat, Judge McMillian demonstrated great courage and remained where he ultimately graduated first in his class.

The judge's encounters with racial bias and his attendant rejoinders demonstrates how he used his genius to transform discriminatory actions into beneficial learning experiences. In essence, his actions comprised strong forms of resistance. That he continued and created his own space reveals his high regard for principles of fairness as embodied in law. Learning both from his life experiences and from his actions, I derived from Judge McMillian an appreciation for the value of individualized forms of social resistance and an understanding of how law can transform exigent conditions into more tolerable and even positive circumstances.

During my clerkship with Judge McMillian I became enlightened as to the dynamic aspect of law. The experience taught me an extraordinary amount about the process of law, doctrinal analysis, and critical differences between federal and state law. I learned legal

4. *See id.* "Euro-American" or "European Americans" references individuals from the dominant population.

5. *Id.* at 9.

6. Judge George H. Moore declined an invitation to speak at St. Louis University "because the school 'had that "nigra" out there.'" *Id.* at 10.

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principles and doctrinal analysis are deficient unless principles of justice, fairness, and equal treatment are also considered. His much appreciated wisdom in examining legal doctrine, its process, and application greatly sharpened my analytical skills.

Judge McMillian's generosity, as expressed through his time and energy in serving on innumerable boards, demonstrates his commitment to alleviating injustice. His distress, for example, over juvenile delinquency is well documented.[7] He strongly understands that "[t]he youth are our leaders of tomorrow, and they're probably our richest resource."[8] One of his most memorable observations about the condition of youth was that "[i]f we can put a man on the moon, help dissolve communism and bring about peace in the Middle East, we can overcome delinquency."[9] His work on various boards and projects concerning juveniles demonstrates his much appreciated dedication to solving problems affecting youth and his hope for the future and the well-being of urban environments.[10] His sense of community, however, disallows boasting and arrogance, and his humility is much admired in light of the numerous awards he has received.[11]

At present, resistance to issues of equality frequently place Judge McMillian in the dissent. As he did when he started his career, the judge once again finds himself holding the line against the retrogressive zeitgeist—the spirit of the age—which threatens the gains he (and others) fought so hard to accomplish. His experiences

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7. For example, Judge McMillian is a founder of the Herbert Hoover Boys Club. *See Herbert Hoover's Club for Boys—And Girls*, ST. LOUIS POST-DISPATCH, Mar. 6, 1996, at 6B; Terry Winkelmann, *Judge Theodore McMillian: Court Appeal*, ST. LOUIS TIMES, Feb. 1996, at 15. Through his actions the judge "encourages people to get involved." Winkelmann, *supra*.

8. Jerry Berger, *Judge Touts Project to Curb Delinquency*, ST. LOUIS POST-DISPATCH, Sept. 28, 1993, at D1.

9. *Id.*

10. *See* Winkelmann, *supra* note 7, at 15. One major goal of the judge is to alleviate juvenile delinquency. *See id.*

11. The judge is the recipient of numerous awards. *See, e.g.*, Jerry Berger, *Bustling HOK Is Adding MGM Grand Job In Vegas*, ST. LOUIS POST-DISPATCH, Sept. 4, 1996, at E1 ("U.S. Court of Appeals Judge Ted McMillian will be presented yet another award . . . ."); Jerry Berger, *75-year-old WEW Sold For $435,000*, ST. LOUIS POST-DISPATCH, May 16, 1996, at G1 (noting that Judge McMillian received the "distinguished lawyer award").

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with discrimination serve as reminders to those opposing a multicultural society, equal treatment, and representative democracy. He is one of the few holding the line against those who would deny opportunities permitted to a privileged few.[12]

In teaching about resistance, Judge McMillian helped direct my journey into the teaching profession and offered practical lessons. Specifically, to not fear addressing issues of inequality and disparate treatment and to confront unequal treatment that mocks democratic ideals for groups on the margins of the legal system. More importantly, his presence and the legal concerns he addresses continue to profoundly influence the scholarship I pursue. His experiences continue to teach me that even on the personal level one can turn the most odious forms of racism on their head. Furthermore, his lessons suggest opportunities to turn negative experiences to the advantage of those facing discrimination. His example in confronting racial bias with great courage dares me to extend law's application to considerations of race and class in my research and teaching agenda. My scholarship thus examines instances when interpreters of law ignore or discount equal treatment for people of color. It attempts to create space within the legal literature for the voices of outsiders.[13]

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12. For an example of privileges afforded to a select few, see Richard Delgado, *Inequality "From the Top": Applying An Ancient Prohibition To An Emerging Problem Of Distributive Justice*, 32 UCLA L. REV. 100 (1984)(offering a critical examination of federal public law conferring an "unconditional, substantial and enduring benefit on a few favorites" and its impact on equality). *See also* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-93-84, SUGAR PROGRAM: CHANGING DOMESTIC AND INTERNATIONAL CONDITIONS REQUIRE PROGRAM CHANGES (1993) (analyzing income support, or deficiency payments protecting the income of agricultural producers). The GAO report noted that federal benefits are distributed among a relatively small number of sugar growers. Over 40 percent of sugar grower benefits are awarded to 1 percent of farms with 17 cane farms receiving about 58 percent of benefits and 33 farms receiving over $1 million during the 1991 crop year. *See id.* at 3.

13. *See, e.g.*, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 344-45 (1987). Professor Matsuda identifies the term "outsider" as an alternative to the term "minority" because the term "minority" does not reflect "the numerical significance of the constituencies typically excluded from jurisprudential discourse." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 n. 15 (1989) [hereinafter Matsuda, *Victim's Story*]; *see also* Philip D. Ortego, *The Chicano Renaissance*, *in* LA CAUSA CHICANA, THE MOVEMENT FOR JUSTICE 42, 53 (Margaret M. Mangold ed., 1972)("Mexican Americans themselves were kept at arm's length as outsiders . . . .").

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Emboldened by Judge McMillian's influence, a shortened version of my efforts are addressed below.

II. CHICANAS/OS AND CREATING SPACE IN LAW

The absence of individuals with diverse ancestry and background in the legal culture diminishes the ability of law to remain vital.[14] Moreover, the lack of outsider voices within the legal commentary leads to distortions of legal doctrine[15] and causes, "bluntings, skewings, and omissions in the literature dealing with race, racism, and American Law."[16] Responding to this condition, critical race scholars seek to demonstrate how laws seemingly fashioned for the benefit of the public exempt people of color from their application.[17]

A salient theme advanced through "outsider jurisprudence" principally addresses the extent to which law is both a product and a promoter of racism.[18] With the door partially opened, critical race

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Focusing on issues of race and class is not without professional pitfalls. The writings of people of color confronting race and class issues is often criticized. *See* ANA CASTILLO, MASSACRE OF THE DREAMERS: ESSAYS ON XICANISMA 3 (1995) ("[O]ur frame of reference reduced to pedagogic arguments, if not simply a defensive (read angry) diatribe."). For a discussion of whether scholars of color should focus on issues of race and class, see, for example, Lloyd Cohen, *A Different Black Voice In Legal Scholarship*, 37 N.Y.L. SCH. L. REV. 301 (1992). On the resistance of those opposing the study of race and class, Ana Castillo writes, "By denying our right to express the ostracism—or not accepting our claims to the degree to which we are ostracized—that we experience in white society, they inadvertently contribute to it." CASTILLO, *supra*, at 3. For my resolution of the dilemma, with much thanks to Judge McMillian, see Guadalupe T. Luna, *"Agricultural Underdogs" and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9 (1996).

14. *See* Richard Delgado, Commentary, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) [hereinafter Delgado, *The Imperial Scholar*]; *see also* Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992).

15. *See* Delgado, *The Imperial Scholar*, *supra* note 14, at 566-73; *see also* George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994).

16. Delgado, *The Imperial Scholar*, *supra* note 14, at 573.

17. *See generally* Matsuda, *supra* note 13 (evaluating how a strict interpretation of the first amendment perpetuates racism).

18. *See, e.g.*, Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 195 (David Kairys ed., rev. ed. 1990).

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scholars have introduced stories, narratives and alternative forms of study to examine the relationship between legal knowledge and power. It comprises in essence forms of social protest.[19] By creating space within the legal literature, resistance continues to introduce much needed attention to and initiate changes in communities of color.[20] Gatekeepers to the legal profession, however, remain critical of race-based jurisprudence.[21]

During the present time of great resistance to equal protection principles,[22] civil rights,[23] and participatory democracy ideals,[24] Judge

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19. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989)(recommending the use of counterstories to "shatter complacency and challenge the status quo").

20. Environmental racism is an example of this theory in practice. *See, e.g.*, UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994); Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431 (1994). For a sampling of the response of critical race scholars and of the emerging critical Latino theory, see DERRICK BELL, RACE, RACISM AND AMERICAN LAW (3d. ed. 1992) and Richard Delgado & Jean Stefancic, *Bibliography: Critical Race Theory: An Annotated Bibliography, A Year of Transition*, 66 U. COLO. L. REV. 159 (1995).

21. *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1983). *But see* Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993). *See also* Rachel F. Moran, *On Being a Society of One*, 20 U.S.F. L. REV. 503 (1986) (discussing the attendant difficulties of minorities and women within the legal teaching profession).

22. Although marking the end of the "separate but equal" doctrine as the governing rule in force, the goals of *Brown v. Board of Education*, 347 U.S. 483 (1954) have not yet been fully attained. To fully implement the goals of *Brown* requires further and extensive school financing litigation to ensure that minority schools achieve parity with schools with individuals from the dominant population. *See, e.g.*, Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989). *But see* Hopwood v. Texas, 78 F.3d. 932 (5th Cir. 1996).

23. *See generally* Derrick Bell et al., *Racial Reflections: Dialogues In The Direction of Liberation*, 37 UCLA L. REV. 1037 (1990)(noting the general erosion and retrenchment of civil rights and calling for "serious reflection"). *See also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

24. *See, e.g.*, Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1974 (1994); LANI GUINIER, THE TYRANNY OF THE MAJORITY, FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994); A. Leon Higginbotham, Jr. et al., Shaw v. Reno*: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593 (1994); Torres, *supra* note 20.

Notwithstanding the spirit of the times, Judge McMillian remains steadfast in his defense

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McMillian represents the essence of living the critical race theory experience. His encounters with racial bias exemplify the consequences of interpreters of law that choose to ignore constitutional norms and hold law hostage to their own biases.[25] His ability to transform "discriminatory moments" into learning experiences allows me the fortitude and might to pursue my own research agenda. A short aspect of this agenda that reflects the Judge's concern for urban environments is examined below.[26]

A. Border Communities[27]

Cities on adjoining sides of the United States and Mexico border are characterized as "twin cities." Twin cities share socioeconomic and environmental characteristics, international relations, and other linkages.[28] One principal area includes the El Paso, Texas—Cuidad

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of remedies for people of color. "Affirmative action is not a right, only a remedy, one of many available to rectify wrongs, McMillian said. 'It's still needed because discrimination still exists. . . .'" Robert Goodrich, *Judge Praises Anti-Bias Program: Affirmative Action Needed, He Says*, ST. LOUIS POST-DISPATCH, Jan. 20, 1997, at 1B.

25. For an example of interpreters of law ignoring constitutional provisions, see generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

26. While the focus of this tribute is on individuals from the El Paso, Texas border region, its analysis also extends to Latina and Latino communities throughout the United States. For an example of the experiences of Chicanas and Chicanos residing in the Midwest region, see generally Dennis Nodín Valdés, *Betabeleros: The Formation of an Agricultural Proletariat in the Midwest, 1897-1930*, 30 LAB. HIST. 536 (1989); Dennis Nodín Valdés, *The New Northern Borderlands: An Overview of Midwestern Chicano History*, *in* 2 PERSPECTIVES IN MEXICAN AMERICAN STUDIES, MEXICANS IN THE MIDWEST 1 (Juan R. García ed., 1989).

27. The term "border" is used in a demographic sense. *See* John R. Weeks & Roberto Ham-Chande, *A Demographic Perspective of the U.S.-Mexico Border*, *in* DEMOGRAPHIC DYNAMICS OF THE U.S.-MEXICO BORDER 1, 4 (John R. Weeks & Roberto Ham-Chande eds., 1992). Functional definitions of the border, nonetheless, remain elusive. "For some purposes, it is convenient to define the border in terms of the territory covered by the municipalities which are directly adjacent to the United States. For other objectives, the border can extend more to the south or more to the north." Jorge Bustamante, *A Conceptual Vision of the Population Problems of the Border*, *in* DEMOGRAPHIC DYNAMICS OF THE U.S.-MEXICO BORDER, *supra*, at v.

28. Four international bridges connect El Paso to Ciudad Juarez, Mexico. Notwithstanding distinct international demarcations, El Paso and Ciudad Juarez are identified as twin cities sharing significant socioeconomic characteristics and linkages. *See generally* MONTEJANO, *supra* note 2, at 30; Leo R. Chavez, *Defining and Demographically Characterizing the Southern Border of the U.S.*, *in* DEMOGRAPHIC DYNAMICS OF THE U.S.-MEXICO BORDER, *supra*

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Juarez, Mexico region. Sixty to ninety percent of El Paso's commerce is international with the region constituting one of the world's largest ports of entry.

El Paso and Ciudad Juarez, its sister city, are no longer perceived as separate and apart from each other.[29] "Economic developers and business leaders . . . no longer see separate cities in two nations and three states. Now the cities that stretch from Santa Fe through Albuquerque, Las Cruces and El Paso into Juarez and Chihuahua City in Chihuahua, Mexico are a package with powerful trade potential."[30] The El Paso region is riddled with marked contrasts

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note 27, at 46. The region is fundamentally important to the free flow of goods and services specific to international markets. *See* INSTITUTE FOR MANUFACTURING AND MATERIALS MANAGEMENT, UNIVERSITY OF TEXAS AT EL PASO, PASO DEL NORTE REGIONAL ECONOMY SOCIOECONOMIC PROFILE 3 (1992) [hereinafter PASO DEL NORTE REGIONAL ECONOMY]. Each year more than 15 million people pass through U.S. immigration border points adding to the congestion of border cities and, in sum, blocking the stream of commerce. *See, e.g.*, INSTITUTE FOR MANUFACTURING AND MATERIALS MANAGEMENT, SOUTHWEST BORDER INFRASTRUCTURE INITIATIVE: FEDERAL REPORT 89 (1992) [hereinafter SOUTHWEST BORDER INFRASTRUCTURE INITIATIVE].

29. El Paso began with six settlements in 1680 where missions were located along the Camino Real (King's Highway) later becoming part of the Santa Fe-Chihuahua-Mexico City Trail. During the 1830s and 1840s a yearly average of $90,000 worth of merchandise destined for Chihuahua, Mexico, came through the area known as Paso Del Norte. *See, e.g.*, EL PASO DEP'T OF COMMUNITY & HUMAN DEV., COMPREHENSIVE HOUSING AFFORDABILITY FOR EL PASO 9 (1993) [hereinafter COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY]. I discovered El Paso during my time as a civil rights attorney with the Mexican American Legal Defense Educational Fund in San Antonio, Texas. It represents an important case study on agricultural legislation and international agreements and their impact on workers of Mexican descent.

30. Robbie Farley-Villalobos, *Las Cruces*, 21 NEW MEXICO BUSINESS J., Jan. 1, 1997, at N1; *see also* Deborah Petersen Swift & Mike Swift, *Mingling of Culture on the Rio Grande: Daily Life Crosses Border Both Ways*, HARTFORD COURANT, Nov. 26, 1996, at A1. By way of example, NAFTA is expected to increase the number of maquiladoras in the region. *See* COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY, *supra* note 29, at 22. Maquilas are also drawing agriculture into the food processing industries. *See* CALIFORNIA STATE WORLD COMMISSION, CALIFORNIA'S STAKE IN THE U.S.-MEXICO TRADE NEGOTIATIONS (1991). The NAFTA and its required infrastructure is elevating concerns about its impact on the environment. *See, e.g.*, JAN GILBREATH RICH, PLANNING THE BORDER'S FUTURE: THE MEXICAN-U.S. INTEGRATED BORDER ENVIRONMENTAL PLAN, U.S.-MEXICAN POLICY STUDIES PROGRAM (1992); Jan Gilbreath Rich, *Bordering on Trouble*, 8 ENVTL. FORUM 26 (1991)(discussing the ecological crisis that has developed at the border due to industrialization and rapid population expansion); Xavier Carlos Vasquez, *The North American Free Trade Agreement and Environmental Racism*, 34 HARV. INT'L L.J. 357 (1993).

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extending from internationally recognized laws to domestic agricultural policies.[31] The resultant outcome has imparted numerous adverse consequences for the region's Chicana/o and Mexican population.

Specifically, international agreements have long defined major aspects of the Chicana/o reality in the United States. The North American Free Trade Agreement,[32] the Bracero Program,[33] immigration laws,[34] and the maquiladora industry,[35] to name a few,

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31. As a major export and import region, El Paso is also recognized for the migrant and seasonal labor it provides the agricultural sector. *See, e.g.*, MARIO T. GARCÍA, MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY, & IDENTITY 1930-1960 (1989); OSCAR J. MARTÍNEZ, BORDER BOOM TOWN: CIUDAD JUÁREZ SINCE 1848 (1978). A migrant agricultural worker is "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802(8)(A)(1994). A seasonal worker is "an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802 (10)(A)(1994). Notwithstanding definitional demarcations, a field worker can occupy both categories. For an overview on the conflicting nature of the identification of field workers, see generally PHILLIP L. MARTIN, HARVEST OF CONFUSION, MEXICAN WORKERS IN U.S. AGRICULTURE (1988). Agricultural legislation introduced large scale commercial farming in the El Paso region and in turn facilitated the need for greater labor demands. *See* Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C.).

32. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. § 3301 (1994)) [hereinafter NAFTA]. The NAFTA, signed by the governments of Mexico, Canada, and the United States created the largest free market in the world.

33. The Bracero Program permitted temporary agricultural labor from Mexico to enter the United States to work under contract in agriculture during World War II. *See* Agreement on the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, U.S.-Mex., 56 Stat. 1759 (incorporated into the Agricultural Act of 1949, Pub. L. No. 82-78, §§ 501-509, 65 Stat. 119 (1951)). The Bracero Program was plagued with instances of abuse and allegations of discriminatory treatment constituting slave-like conditions for the workers. *See, e.g.*, ERNESTO GALARZA, MERCHANTS OF LABOR, THE MEXICAN BRACERO STORY (1964); DENNIS NODÍN VALDÉS, AL NORTE, AGRICULTURAL WORKERS IN THE GREAT LAKES REGION 1917-1970 89 (1991). When workers objected or sought to assert their rights by joining unions and through other legal remedies, employers garnered the support of the local, county, and state law enforcement agencies to stifle them. *See* ROBERT L. MARIL, POOREST OF AMERICANS, THE MEXICAN AMERICANS OF THE LOWER RIO GRANDE VALLEY OF TEXAS 47 (1989).

34. Immigration-associated privileges continue to generate extensive public debate. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.). Throughout agricultural history immigration exceptions permitted the agricultural sector to evade one of the most restrictive immigration laws ever enacted. *See, e.g.*, OSCAR M. TRELLES,

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reveal the extent to which public law can extend privileges to a select few. Yet the above laws and enterprises extend beyond the border region and into other environments throughout the United States. For example, the Bracero Program provided labor for other key agricultural regions in the country. The resulting confluence of various agreements systemically produces marked contradictory laws and policies. The ultimate outcome reflecting various aspects of a Third World City and mirroring a reality that is not relegated to the past but which also extends to the present.

The 1990 combined population of Paso City, El Paso county and

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II & JAMES F. BAILEY, III, IMMIGRATION AND NATIONALITY ACTS, LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 54 (1979) (noting that the Immigration Law of 1917 imposed literacy requirements, a head tax, and added to the list of inadmissible classes of aliens permitted entry into the United States). The alleged labor shortages, as perceived by agricultural employers and which result in special treatment, are subject to criticism. *See generally* MEXICAN WORKERS IN THE UNITED STATES: HISTORICAL AND POLITICAL PERSPECTIVES (George C. Kiser & Martha Woody Kiser eds., 1979). The practice of exempting the agricultural sector from the immigration laws continues. The Seasonal Agricultural Worker Program created an exception to the stated goals of the Immigration Reform Control Act of 1986 which sought to deter the employment of foreign workers in the United States. *See* Pub. L. No. 99-603, §§ 301-305, 100 Stat. 3359, 3411-3434. Other immigration laws also facilitate the entry of nonimmigrants into the United States temporarily "to perform agricultural labor." *See, e.g.*, 8 U.S.C. § 1101(a)(15)(H)(ii)(a)(1994).

35. "Maquila" is a Spanish term derived from the verb "maquilar" and translates into "perform a task for another." Of the two thousand maquiladoras located in Mexico, three hundred are established in Cuidad Juarez comprising the highest concentration of maquilas in a border region. *See* PASO DEL NORTE REGIONAL ECONOMY, *supra* note 28, at v. The maquila industry has induced some scholarship. *See, e.g.*, ANNETTE FUENTES & BARBARA EHRENREICH, WOMEN IN THE GLOBAL FACTORY (1984); M. Patricia Fernandez-Kelly, Commentary, *Labor Force Recomposition and Industrial Restructuring In Electronics: Implications For Free Trade*, 10 HOFSTRA LAB. L.J. 623 (1993); David Voigt, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, 2 MINN. J. GLOBAL TRADE 323 (1993); Dedra L. Wilburn, Comment, *The North American Free Trade Agreement: Sending U.S. Jobs South of the Border*, 17 N.C. J. INT'L L. & COM. REG. 489 (1992).

Environmental concerns purportedly caused by maquilas have generated debate. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-94-22, U.S.-MEXICO TRADE: THE WORK ENVIRONMENT AT EIGHT U.S.-OWNED MAQUILADORA AUTO PARTS PLANTS (1993); Daniel I. Basurto Gonzáles & Elaine Flud Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659 (1991); David J. Molina, *A Comment on Whether Maquiladoras Are in Mexico for Low Wages or to Avoid Pollution Costs*, 2 J. ENVT. & DEV. 221 (1993); Cheryl Schecter & David Brill, Jr., *Maquiladoras: Will The Program Continue?*, 23 ST. MARY'S L.J. 697 (1992); Santos Gomez, *Environmental Risks Related To The Maquiladora Industry And The Likely Environmental Impact Of NAFTA*, 6 LA RAZA L.J. 174 (1993).

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Ciudad Juarez is established at 1.7 million persons.[36] Population data defines the El Paso region as one of the poorest in the country. High poverty rates and unemployment are linked to the low skill requirements of major employers in the region.[37] El Paso residents work principally in low-skill, low-wage employment in the agricultural, construction, and manufacturing industries. In the service industries, transportation, tourism, and retail centers constitute major employment sectors. Notwithstanding its booming industry, population data corroborates the region's high unemployment rates.[38] Further data reflects that two-thirds of the population of El Paso is of Mexican origin[39] and forty percent of El Paso's population twenty-five years or older lacks a high school diploma.[40]

El Paso is also unique in that farmworkers critical to the production of food in the country reside in both the city and rural areas. In both areas they are principally segregated in the Segundo Barrio (Second Neighborhood), located on the south side of the city,

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36. *See* BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, POPULATION & HOUSEHOLD DATA (1990). El Paso, which encompasses about 87% of the County's total population, is the largest Standard Metropolitan Statistical Area (SMSA) on the Texas-Mexico border, and is the fastest growing area in Texas. *See* Weeks & Ham-Chande, *supra* note 27, at 11.

37. A congressional report demonstrates how poverty rates have increased in rural areas. In 1990, rural poverty rates were higher compared to poverty rates eighteen years before. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-93-40FS, RURAL DEVELOPMENT: PATCHWORK OF FEDERAL PROGRAMS NEEDS TO BE REAPPRAISED 39 (1993). This reflects the concentration of low-skill, low paying jobs in manufacturing in rural areas. *See id.*

38. *See supra* note 36.

39. I use the term "Mexican" to reference all people of Mexican birth and descent. "Mexican nationals" references citizens of Mexico; and Chicana/Chicano references Mexicans residing in the United States. I use "Latina/Latino" to reference Puerto Ricans, Cubans, and those from Central and South America. The terms are used interchangeably with an "emphasis on regional self-designations." GENARO M. PADILLA, MY HISTORY, NOT YOURS, THE FORMATION OF MEXICAN AMERICAN AUTOBIOGRAPHY xi (1993). Other authors employ alternative designators. *See generally* ANA CASTILLO, MASSACRE OF THE DREAMERS (1994) (Xicanisma).

40. *See* SOUTHWEST BORDER INFRASTRUCTURE INITIATIVE, *supra* note 28, at 89. Drop-out levels are among the highest in Texas. Figures for the 1989-1990 school year show 3,000 students left before graduation. *See* COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY, *supra* note 29, at 14. The quality of education has induced litigation. *See, e.g.*, Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

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and in "colonias."[41]

An important aspect of the region includes colonia pockets which are addressed next.

1. Colonias

Colonias are located primarily in unincorporated peripheries of border cities. While definitions vary they are principally defined as: "Rural and unincorporated subdivisions characterized by substandard housing, inadequate plumbing and sewage disposal systems, and inadequate access to clean water. They are highly concentrated poverty pockets that are physically and legally isolated from neighboring cities."[42] Colonia pockets adjoin both countries but colonias in El Paso comprise a sizable portion of the colonia communities throughout the country.[43]

Because colonia formations have tended to increase dramatically in number and population, not even experts can determine their numbers or total population with precision. One study estimated approximately 122 colonias with 9,522 dwellings in El Paso County with population estimates ranging from 47,827 to 80,000 residents.[44]

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41. "Colonias" is a Spanish term for "neighborhood." *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-91-37, RURAL DEVELOPMENT: PROBLEMS AND PROGRESS ON COLONIAS SUBDIVISIONS NEAR THE MEXICO BORDER (1990). Other colonias are found in: California—San Diego, Imperial; Arizona—Yuma, Pima, Santa Cruz, Cochise; New Mexico—Hidalgo, Luna, Dona Ana; Texas—Hudspeth, Culberson, Jeff Davis, Presidio, Brewster, Terrel, Val Verde, Kinney, Maverick, Dimmit, Webb, Zapata, Starr, Hidalgo, Cameron. *See* Weeks & Ham-Chande, *supra* note 27, at 5.

42. JORGE CHAPA & JORGE DEL PINAL, ENUMERATION, HOUSING CHARACTERISTICS AND SAMPLING RATES IN THE COLONIAS OF THE TEXAS BORDER AREA: A PERSPECTIVE ON CENSUS DATA 1993 RESEARCH ON UNDOCUMENTED ETHNIC POPULATIONS (1993).

43. The examination of colonias remains largely excluded from the legal literature. *But see* Jane E. Larson, *Free Markets Deep In The Heart of Texas*, 84 GEO. L.J. 179 (1995); Luna, *supra*, note 13.

44. Approximately 15,000 people live in colonias in the Laredo, Texas region. *See* Thaddeus Herrick, *Housing Prices In Border Town Beats Some Big Cities*, HOUS. CHRON., Jan. 5, 1997, at Metro. Others place the colonia population residing between El Paso and Brownsville at 400,000. *See id.*; *see also* Allen R. Myerson, *This Is The House That Greed Built: Texas Developers Profit From Squalor*, N.Y. TIMES, Apr. 2, 1995, at 3-1 (referring to the Texas Water Development Board estimate that more than 1,400 colonias hold 340,000 residents).

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Colonia residents include primarily Chicanas and Chicanos, resident aliens, and Mexicans working in agriculture,[45] the maquila plants, or service-oriented industries. Poverty rates in colonias are at least double those of Texas.[46] Unemployment or underemployment levels similarly rate among the highest in Texas.

Colonias appear and expand for several reasons. First, low wage levels exclude thousands of families from more expensive segments of the housing market.[47] A desire to escape crowded cities, exorbitant rental charges,[48] and urban-related crime areas also contributes to the flight of low wage earners from cities.[49] Second, the sale of acreage for use as colonias permits owners/operators to earn higher profits

45. Estimates of the Texas farmworker population range between fifty thousand and seven hundred thousand. *See* THE TOMÁS RIVERA CENTER, MIGRANT ENUMERATION (1993). "Approximately 8,000 agricultural workers and family members, the majority of whom are Mexican Americans from the Rio Grande Valley of Texas, migrate to Wisconsin each summer. . ." Paula M. Lantz et al., *Peer Discussions of Cancer Among Hispanic Migrant Farm Workers*, 109 PUBLIC HEALTH REPORTS 512, 513 (1994); Farley-Villalobos, *supra* note 30, at N1 ("The seasonal work in agriculture, which plays a major role in the economy with crops such as cotton, chile, pecans and production of dairy products, also pushes the unemployment rate to 9.9 percent in July and 8.2 percent in September. That's higher than the state average for the same months: 7.2 percent and 8 percent, respectively.").

46. On the human conditions of those residing in poverty stricken areas in border communities, see, for example, GLORIA ANZALDÚA, BORDERLANDS, LA FRONTERA, THE NEW MESTIZA (1987); RAUL A. FERNANDEZ, THE MEXICAN-AMERICAN BORDER REGION (1989); MARIL, *supra* note 33.

47. Approximately 61,000 families are in need of low-income housing alternatives. *See* Emily Jauregui, *El Paso's Demand For Inexpensive Homes Grows*, EL PASO TIMES, Dec. 4, 1993, at A1. Income levels of less than $10,000 a year disallow homeownership. The housing stock of inexpensive homes, costing about $50,000, constitutes less than 15 percent of all houses for sale in the city. The city retains about 17,000 housing units for the 39,937 residents that earn less than $13,300 yearly. *See id.*; *see also* Thaddeus Herrick, *Housing Prices in Border Town Beats Some Big Cities*, HOUS. CHRON., Jan. 5, 1997, at Metro ("'You've got families doubling up, pooling resources to pay rents and mortgages.'") (quoting finance consultant Betty Flores, who helps create low-income housing through a nonprofit group known as the Azteca Economic Development and Preservation Corp.); Pauline Arrillaga, *Looser Trade Rules, Cheap Labor Fuel Texas-Mexico Border Boom*, L.A. TIMES, Sept. 8, 1996, at A-26 (quoting Anastacia Ledesma, who was forced to find housing in the depressed Sparks colonia near El Paso because she "'couldn't pay for a house in town'").

48. In El Paso, agricultural workers double up on units without personal bathrooms and kitchens. Water is accessed by common faucets and bathrooms. Yet the units without modern conveniences often rent for $300 per month.

49. Interview with Sandy New, a farmworker advocate, in El Paso, Texas (Dec. 2, 1993).

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outside the agricultural enterprise.[50] Finally, the absence of a defined regulatory process and the shortage of county rules prohibiting the subdivision and selling of rural land makes the transition from cotton farmer to developer not only easy but inexpensive.[51]

Considered "among the poorest (communities) in the nation,"[52] colonias have several common features. Buyers purchase unplatted lots of rural property, ranging from 50 ft. by 100 ft. to one-half acre lots for as low as $5.00 down and $5.00 a week.[53] The housing stock initially begins with buyers living in mobile homes. Thereafter, they expand their units with materials consisting of discarded lumber, cereal boxes, cinder blocks, pallets, and other inferior construction materials. High proportions of household units have only one bedroom and overcrowding is common.[54]

Paved streets, sidewalks, storm drainage, public gas, electricity, and basic telephone service are also missing in colonia communities.[55] Adequate sewage disposal is practically non-existent

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50. The contract form of deed for sale assists buyers with questionable credit history or low wages. Upon default, however, the transfer of land defaults to sellers and in some instances comprises an investment in perpetuity. Although several states permit remedies for contract for deed sales, Texas offers among the least equitable remedies against forfeitures.

51. Until May 1990, a lax regulatory process and state code required only that developers record a plan of lot layouts that conformed to "reasonable" requirements regarding streets and infrastructure, without explicit laws ensuring the regulations of running water, drainage, and electricity. *See* David L. Hanna, Comment, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871, 877 (1996). The Texas Attorney General has nevertheless targeted colonia developers and has succeeded in securing several forms of remedies for colonia buyers. *See id.* at 911 n.162.

52. JORGE CHAPA & JORGE DEL PINAL, ENUMERATION, HOUSING CHARACTERISTICS AND SAMPLING RATES IN THE COLONIAS OF THE TEXAS BORDER AREA: A PERSPECTIVE ON CENSUS DATA 1993 RESEARCH ON UNDOCUMENTED ETHNIC POPULATIONS (1993).

53. Interview with Sandy New, *supra* note 49.

54. The Farmers Home Administration (FmHA) provides home loans to rural residents ineligible for private financing. *See* 7 C.F.R. §§ 1944.152, .157(a)(2)(1997). Colonia resident buyers, however, fail to qualify for home improvement loans for three principal reasons: (1) they lack clear title; (2) they lack an history established and therefore cannot borrow from established credit agencies; and (3) the FmHA excludes the contract of deed form of sale from its regulatory framework. *See* 7 C.F.R. § 1944.157 (1997) (eligibility requirements for loans). *But see* 57 Fed. Reg. 3922 (1992) (the intended effect of the methodology and Formula for Allocations Loan and Grant Program funds is to "establish funding priority for colonias in certain circumstances") (codified at 7 C.F.R. pt. 1940, subpt. L, ex. C).

55. The absence of paved roads or enumerated addresses, for example, have prevented

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and running water is rare. Residents consequently resort to storing water in fifty gallon steel drums and plastic containers, some of which may have previously stored hazardous or toxic waste. Colonia residents also rely on irrigation canals contaminated with sewage and agricultural chemicals.

The lack of essential urban infrastructure taints the health of residents and extends into city areas as well. Area residents endure high levels of chronic and environmentally related illnesses. In broad measure they include tuberculosis, gastroenteritis, cholera, lead poisoning, diarrhea and Hepatitis A.[56] Other forms of illnesses attributed to the improper disposal of human waste and inadequate sanitation generate even higher rates of episodes with chronic diseases, skin rashes, and hypertension.[57] Congested, unpaved streets, the open burning of garbage and burning of tires outdoors and in stoves to warm homes during cool evenings imperil breathing and cause the lack of ambient air quality.

In sum, the focus on the El Paso region mirrors Judge McMillian's concern for his community in St. Louis, his dedication in seeking to improve the human condition of those on the margins of law, and his regard for the future. The next section addresses other individuals in the region that are also engaged in their own forms of resistance but whose voices in academic direct inquiry are rarely heard.

B. "Send My Roots Rain"[58]

Within the El Paso colonia communities, there are those who, like

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medical personnel from assisting victims of automobile accidents and other emergencies. Interview with Viviana Patino, former county attorney, El Paso, Texas, in El Paso, Texas (Dec. 2, 1993).

56. *See* TEXAS DEP'T OF HUMAN SERV., THE COLONIAS FACTBOOK: A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH TEXAS AND WEST TEXAS BORDER COUNTIES (1988)[hereinafter COLONIAS FACTBOOK]. These conditions continue today. *See, e.g.,* Myerson, *supra* note 56, at 3-1 (noting that suit has been brought by the Texas Attorney General because of the inadequate or unsanitary waste water facilities in colonias).

57. *See* COLONIAS FACTBOOK, *supra* note 56.

58. IBIS GOMEZ VEGA, SEND MY ROOTS RAIN (1992).

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Judge McMillian, are engaged in their own forms of resistance.[59]

1. La Mujer Obrera

La Mujer Obrera (The Woman Worker) is an organization of El Paso garment workers. In El Paso more than 85 percent of the 18,000 garment workers in the region are of Mexican ancestry. They work in factories and sweatshops with no fire exits or air conditioners, poor sanitary conditions, and unsafe equipment. Conditions in the garment plants have been characterized as "sobering"[60] and many employers fail to provide workers' compensation, meet minimum safety standards, or pay minimum wages. In attempting to recover lost wages by unscrupulous employers who failed to compensate garment workers for hours worked, La Mujer Obrera also seeks to improve the deplorable working conditions which characterize the garment sweatshops.[61]

La Mujer Obrera has employed non-violent forms of protest and in some instances engaged in hunger fasts in order to attract attention to the disparate working conditions of the El Paso garment industry. Women strikers, for example, have chained themselves to the sewing machines of their employer in an effort to attract the attention of state and federal officials.[62]

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59. Economy disallows a complete listing of those working to improve the living and working conditions in the El Paso colonia region. A few examples of the nature of advocacy groups and their efforts with the working poor of El Paso include the following individuals and organizations: Rosa Garcia with the Tierra del Sol (helping to develop alternative forms of housing for migrant workers); the Governor's Border Work Group (drawing attention to the housing conditions in colonias); Sister Maribeth Larkin and her work with the El Paso Interreligious Sponsoring Organization (registering residents to vote).

60. *Id.* (quoting Vivana Patino, former assistant attorney general in El Paso). For an example of the nature of the garment industry generally, see U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-95-29, GARMENT INDUSTRY EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS (1994).

61. *See* Naomi Young, *UFW Fasts To Aid Workers*, THE DAILY TEXAS, June 12, 1991.

62. *See El Paso Garment Contractor Drops Complaint On Protesting Employees*, AUSTIN AMERICAN-STATESMAN, Jan. 29, 1991, at B4. Workers asserted that contractors who had employed them for garment work frequently would close their shop without paying for labor, and would subsequently move down the street and open another shop under a new name. *See id.* In one instance, one of the workers active in the strike was beaten at a factory. *See* Suzanne Gamboa, *Masked Garment Workers Protest Hearing*, DALLAS MORNING NEWS, Nov. 7, 1990,

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During the course of their struggle, La Mujer Obrera has rejected great pressures to adopt the status quo[63] asserting that "we did not invent these sweatshops, and . . . if there is a destructive factor involved in the garment industry and this community, that factor is the sweatshops."[64]

Until their efforts attracted attention, the women workers charged state and federal officials with breaking promises and failing to address sweatshop conditions in the industry.[65] The failure of state agencies to respond to their complaints led women garment workers to march into state offices in protest.[66] Ultimately, La Mujer Obrera succeeded in its struggle against the status quo by filing a lawsuit against offending companies.

2. Union de Trabajadores Agricolas Fronterizos

The Doctrine of Agricultural Exceptionalism has long facilitated the exclusion of agricultural labor from legislation required of other industries. As an example, workers are disallowed protective status under the National Labor Relations Act,[67] state worker's compensation legislation, and benefits extended to those employed in other industries in the country.[68] The ability of the agricultural sector to evade legal obligations required of other industries[69] contributes to

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at D13.

63. "Our organization has been accused of being destructive, of setting out to destroy the garment industry by bringing negative publicity to El Paso." Suzanne Gamboa, *Garment Industry Comes Under State Investigation*, HOUS. CHRON., Feb. 3, 1991 (quoting a spokesperson for La Mujer Obrera).

64. *Id.*

65. "They make promises. They say they'll send investigators. Then they disappear." James E. Garcia, *Garment Workers Storm El Paso Mayor's Office*, AUSTIN AMERICAN-STATESMAN, May 2, 1991, at B3 (quoting Maria Anotonia Flores of La Mujer Obrera).

66. *See id.*; *see also* Suzanne Gamboa, *Garment Workers Rally Over Wage Fight*, DALLAS MORNING NEWS, Dec. 19, 1990, at 18B.

67. National Labor Relations Act, 29 U.S.C. § 152(3)(1994) (farmworker exclusion).

68. An examination of the types of benefits allowed the agricultural industry would include the study of, *inter alia*, income support measures, deficiency payments, loans, extensive legislation promoting the economic well-being of the sector and other immeasurable benefits derived from bio-technology, licensing, and trademark legislation. *See generally* Agricultural Act of 1949, 7 U.S.C. § 1421 (1994).

69. American agricultural legislation is based on the "concept of agriculture's

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the under-employment and impoverishment of field workers and/or those working in related areas such as in agro-maquila plants.[70] Agricultural workers seeking representation are confronting long entrenched public laws that have denied to them the dignity extended to workers in other industries in the country.[71]

El Paso is unique in that it houses not only an extensive number of farmworkers employed in the region's chili, pecan, and cotton fields but also many who provide agricultural labor throughout the country.[72] A number of farmworkers reside in the city where they are segregated primarily in Segundo Barrio, an area of crowded tenements without kitchens or restrooms. Despite innumerable barriers and hardship, the Union de Trabajadores Agricolas Fronterizos (Union of Border Agricultural Workers—UTAF) in El Paso is striving to improve the terms and conditions of agricultural employment in the region.[73] Working against a body of law

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uniqueness," an ideology characterized as "agrarianism, or agricultural fundamentalism, or the agricultural creed." DON PAARLBERG, FARM AND FOOD POLICY: ISSUES OF THE 1980S 1-7 (1980). "Farmers were considered uniquely worthy . . . good God-fearing citizens, stalwart defenders of the republic, and a stabilizing element in the society." *Id.* at 5. For interpretations of the ideology of the agricultural agenda, see GALARZA, *supra* note 33, at 106 (referencing Carey McWilliams' "Great Exception" in describing agribusiness exceptions to legislation affecting agricultural labor); Jim Chen, *American Ideology*, 48 VAND. L. REV. 809 (1995).

70. Agro-maquila plants encompass work in food processing plants. *See, e.g.*, Marc Linder, *Crewleaders and Agricultural Sweatshops: The Lawful and Unlawful Exploitation of Migrant Workers*, 23 CREIGHTON L. REV. 213 (1989-1990); Jesse Katz, *'Chicken Trail' Is an Endless Loop of Woes*, FORT WORTH STAR-TELEGRAM, Dec. 8, 1996, at 38.

71. For an overview of how laws are used to thwart farmworker efforts, see generally *Medrano v. Allee*, 347 F. Supp. 605 (S.D. Tex. 1972) (striking farmworkers alleged Texas Rangers, state officers, and county officials used threats of prosecution, arrested, detain them without filing charges, and threatened them with further prosecutions if pro-union activities did not cease), *modified*, 416 U.S. 802 (1974). Agricultural interests have criticized government funded legal services for their representation of field workers and have curtailed legal representation for the workforce. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-90-144, LEGAL SERVICES CORPORATION: GRANTEE ATTORNEYS' HANDLING OF MIGRANT FARMWORKER DISPUTES WITH GROWERS 1 (1990) (report responding to the requesters' "general concern with the magnitude and propriety of grantee attorneys' actions against growers who employ migrant and seasonal farmworkers").

72. For example, approximately 8,000 agricultural workers, the majority of whom are Chicana/os travel from the Rio Grande Valley and migrate to Wisconsin. *See* Lantz, *supra* note 45.

73. For a sampling of references to examples of the conditions in which agriculture employs agricultural labor, see *Wilson v. Prudential Insurance* Co., 97 F.3d 1010 (8th Cir.

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protecting the agricultural sector in permitting the exceptions to beneficial legislation afforded other industries places UTAF in difficult circumstances. Yet, UTAF succeeded in securing legalization for a number of their members under immigration laws, in drawing attention to secure compensation for travel time to the fields, in creating better educational systems, and in generally improving the terms and conditions of agricultural employment.[74]

CONCLUSION

Judge Theodore McMillian represents a living case of critical race theory in practice and as a gifted scholar on the bench he continues to accomplish many significant things. Off the bench, his influence permits inclusion of those enumerated above. Furthermore, any gains made by the UTAF and La Mujeres Obreras have been accomplished by the sacrifice of those affected by laws and attitudes similar to those who tried to keep the pioneering efforts of Judge McMillian away from the bench and away from making the kinds of changes that expedite representative democracy. Because of the tools Judge McMillian shared, this attorney can help create spaces within the culture of law for the disenfranchised and those holding outsider status within the law.

1996); U.S. GEN. ACCOUNTING OFFICE, GAO/T-HRD-91-40, FARMWORKERS FACE GAPS IN PROTECTION AND BARRIERS TO BENEFITS (1991); DENNIS NODÍN VALDES, AL NORTE: AGRICULTURAL WORKERS IN THE GREAT LAKE REGION, 1917-1970 (1991); Jeanne M. Glader, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455 (1991).

74. *See generally* Dennis N. Valdés, *Legal Status and the Struggles of Farmworkers in West Texas and New Mexico, 1942-1993*, LATIN AMERICAN PERSPECTIVES, Vol. 22, No. 1, at 117 (Winter 1995).

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