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## Tribute to Judge Theodore McMillian

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## TRIBUTE TO JUDGE THEODORE MCMILLIAN

*JANE E. LARSON\**

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As Judge Theodore McMillian's law clerk in 1986-87, my reflections upon his career focus on the ways in which the experience of working at his right hand shaped my professional identity and moral commitments. This essay is an effort to define what is as often elusive as it is true; that is, the formative impact of a great teacher and mentor.

One day during my clerkship I accompanied Judge McMillian to a meeting at Washington University School of Law in St. Louis. As we drove out of the downtown area, the judge casually pointed to a street and said to me, "That's where the line was." "What line?" I asked. He explained that for many years, African-American attorneys were not able to rent office space in downtown St. Louis proper. (Most lawyers prefer to office near the courthouses in which they regularly appear, and near the other law offices with whom they regularly work.) The city's black lawyers thus clustered their offices on the first street bordering downtown ("the line"), symbolically ringing the professional world from which they were excluded.

In those offices, African-American lawyers practiced the same law as their white peers, but without the vital social networks of connection to others in the legal community that the close proximity of offices and courthouses in the downtown represented for white

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lawyers. Communities are based on shared identities and shared experiences. Although in everyday life these black and white lawyers may have referred to the same statutes, cited the same cases and appeared before the same judges, the legal community into which lawyer McMillian graduated when he completed his studies at the St. Louis University Law School remained defined by racial lines.

In the course of his career, Judge McMillian would come to sit in the most honored positions in those downtown courthouses. By the time I worked for him in the 1980s, Judge McMillian was among the most powerful and respected legal figures in the city. Yet his life included memories of a different social geography; underneath the surface he could still see the lines. By sharing this memory with me, my eyes, too, became more keenly observant.

This sensitivity to the complex web of social relationships represented by physical space bore fruit, not only for me but also for another of Judge McMillian's former law clerks, Professor Guadalupe Luna, who also has written for this tribute.<sup>1</sup> Together, Professor Luna and I undertook to investigate an emerging issue of urban growth that has interesting parallels to the history of spatial segregation that Judge McMillian brought home to us.<sup>2</sup>

The Texas side of the U.S. border with the Republic of Mexico is dotted with communities known in Spanish as "*colonias*."<sup>3</sup> Within Texas, more than a third of a million people live in these unincorporated subdivisions lacking the "basics" that residents of regulated jurisdictions take for granted: safe drinking water, sewers for carrying away human waste and flood waters, and housing with minimally adequate wiring, plumbing and construction. Elsewhere in the world, the health and safety risks and severe environmental degradation endemic to such shantytown settlements are well known.

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1. See 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).

2. See Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995); 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).

3. The word means generically "neighborhood," but has taken on more specific meaning in the Texas border region.

The urban policy of the United States, however, typically has not had to face such Third World problems.

A significant aspect of the *colonias* reality is their exclusion from the conventional municipalities that they encircle. Elsewhere in the world, it is a typical urban development pattern for middle- and upper-class people to live at the center of the city, and for the very poorest people to make their home in the suburbs, isolated from work and transportation networks, public services and civic amenities. In the United States, by contrast, a more common pattern is for the wealthier to occupy the suburbs and the poor to live in the core city. *Colonias* follow the foreign pattern, and have grown up as suburbs of the cities along the long international border stretching from Brownsville to El Paso, Texas. For many years, the Texas border cities determinedly have refused to annex these densely-settled “ring” communities. As a result, not only do the *colonias* lack basic public services (and suffer the attendant public health consequences), they are also denied access to the benefit of the whole range of land use regulations that local governments wield, from subdivision approval and building codes to zoning and planning, as well as the increases in public health and safety, and the quality of life these regulations assure. The exclusion of the *colonias* from political community with the cities they surround has meant that there has been neither the legal tools nor the political will to respond to the growth of substandard living conditions. As a result, *colonias* problems have worsened for more than two decades; today, they present grave public health, environmental and human welfare problems not only for local governments, but for state, federal and even international policymakers.

The Texas *colonias* are not simply home to the poor, but specifically to poor Latinos. More than ninety-five percent of *colonias* residents are Latino, a markedly disproportionate population even in this heavily Latino part of the nation. My research and that of Professor Luna suggests that this sharp racial disparity is a necessary context for understanding the spatial inequalities that mark *colonia* housing. Here, too, as in the history of many Northern cities like St. Louis, social hierarchy has been translated into patterns of physical

space.

Compared to the lofty ideals of justice and equality that animate the jurisprudence of a federal judge, perhaps drinking water and sewers is mundane. Yet to speak of physical patterns of human settlement is also to refer to a whole range of social relationships. Like the law offices of black lawyers in the St. Louis of generations past, *colonia* residents have been shut out from the heart and nerve center of the cities they surround, and also from the social networks and community that the city represents.

This recognition that the most mundane aspects of life are human places deserving of the fullest attention is the quality that I associate most strongly with Judge McMillian as a jurist. The nature of the job of a federal appellate judge isolates him or her from the public and even from the bar. Too often, appeals court judges are seen as remote, distant, even chilly figures. But those who have worked with Judge McMillian know that his daily thoughts, on and off the bench, are attuned to the human consequences that flow from the most remote or abstract of legal decisions. I recall, for example, that the judge instructed his clerks to consider *pro se* petitions of incarcerated men and women with great care, even though the petitions were typically handwritten, rambling and repetitious, the claims raised often meritless and there were no accompanying legal briefs to make our work easier. It was an ethical lesson learned for a lifetime to read a series of three hundred or more “claims” in a habeas corpus petition from an Arkansas prisoner only to discover, lodged indistinguishably between claims that the breakfast pastry had not been served hot and that the television did not get good reception, an allegation that the guards had tied the petitioner to his bed for days rather than offer him appropriate medical care for a seizure disorder. At that point I understood that the grave emerges imperceptibly from the mundane, and I further understood that it was Judge McMillian’s great patience with the seemingly ordinary that had made him an ethical judge.

Judge McMillian wears his judicial power with unusual graciousness and civility, ensuring that all who meet him or appear before him experience no boundary or line of exclusion. This is as true of his dealings with a waitress in a restaurant as with a highly

paid advocate flown in for the day to argue a case before the court. Judge McMillian teaches by his example, and also through his memories of places and people, that we each owe our fullest efforts at hearing and communicating the complexity of the spaces that we daily occupy.

