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“FACTS ARE STUBBORN THINGS:”¹ IRREGULAR HOUSING IN THE TEXAS COLONIAS

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ABSTRACT

This article recounts a shared research trip in 1993 to test theoretical models that ignored the impoverished and the unique land use patterns in border-region colonias. Colonias are irregular housing structures that escape building code standards and lack the benefit of clean water, utilities, and health, safety and welfare law. The absence of zoning laws, land use planning mechanisms, and other legislation that addresses the impoverishment of colonia residents illustrated a construct in dire need of investigation. This article, in addressing the results of a joint effort between Professors Jane Larson and Guadalupe Luna, illustrates what transpires when theory is applied to facts and underscores the value of empirical research from the “bottom-up.” The evidence uncovered by this investigative journey exposed the causal linkages between law and the marginalization of population groups struggling to

* Professor and core founding member of the Indiana Institute of Technology Law School. The author thanks Professor Elizabeth Mertz and the editors for their much-appreciated recognition of Professor Jane E. Larson. The author especially thanks the editors for the assistance facilitating this article. Finally, the author thanks Associate Dean André Cummings at the Indiana Tech Law School for his greatly appreciated input in this tribute to Jane.

1. Quote I recall stenciled on a restaurant ceiling beam located in a gas station off of U.S. Highway 69 on the Indiana/Michigan border. The original quote is attributed to John Adams. *THE QUOTABLE JOHN ADAMS 150*, (Randy Howe ed., 2008).

maintain “pride of ownership” while employed in underserved economies. Ultimately, the project demonstrates the ongoing value of empirical research grounded in the reality of marginalized and distressed communities.

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INTRODUCTION

In 1993, Professor Jane Elizabeth Larson and I jumped outside of the legal formalism tethered to law libraries and traveled to the El Paso colonias in Texas.² We were both fairly new professors at the time, and we had been friends since our days in law school editing the “Law and Inequality Journal.”³ We wanted to expand our legal research on subordination and marginalization to include the voices and perspectives of those residing in the Texas colonias. The conditions of the Texas colonias offered insight not only from a race-consciousness perspective but also for studying housing insufficiency and its impact on people of color.⁴ Colonias – irregular housing structures that escape

2. At that time Professor Larson and I were influenced by the scholarship of Professor Frances Ansley and her work and activism against the Free Trade Agreement in light of its impact on women working in the maquiladora plants on both sides of the U.S.-Mexico border. *See, e.g.,* Frances Ansley, *The North American Free Trade Agreement: The Public Debate*, 22 GA. J. INT’L & COMP. L. 329 (1992). Professor Larson and I were also influenced by the work of Professor Henry McGee and his “Lost Cities at the Border” projects. *See* Henry W. McGee, Jr. & David F. Fuentes-Romero, *Lost Cities at the Border: Unlawful Habitation in Mexico and the United States* 3 (Sept. 6, 1990) (unpublished manuscript) (available from Border Research Inst., N.M. State Univ.). The scholarship and activism of Professor Catharine MacKinnon of the University of Michigan Law School also proved invaluable when we initiated our project.

3. University of Minnesota, *Law and Inequality: A Journal of Theory and Practice*. Established in 1981, the Journal examines “the social impact of law on disadvantaged people.” The Journal is available at <http://www.law.umn.edu/lawineq/index.html>.

4. This conception of bottom-up research stems in part from the scholarship of Professor Mari Matsuda, New Legal Realism, Critical Race Theory, and Latina/o Critical Legal Theory. In looking at the intersection of law and subordinated communities, this focus illustrates how law marginalizes outsiders who are in part unable to achieve equality or

building code regulations – are concentrated in “rural, unincorporated subdivisions along the United States-Mexican border.”⁵ The varied and diverse housing structures are commonly constructed of inferior materials that fail to meet federal or state building codes.⁶ While many buildings exhibit a pride of ownership with colorful address plaques, many began as low-quality mobile homes, and a few of the ones we witnessed consisted of cereal box materials or haphazard wood planks left by former owners.⁷

Health, safety and welfare regulations are absent from colonia settlements that are situated primarily in annexed rural areas.⁸ Without the applicable building code or zoning framework that protects urban residents, their colonia counterparts survive without the benefit of clean water, utilities or sewage disposal.⁹ The lack of roads and other urban infrastructure consequently cause colonia residents, who are primarily of Mexican descent, to experience unsafe and unhealthy housing conditions.¹⁰ Colonia settlements are not specific to Texas, and are primarily found in the unincorporated territories that skirt urban regions in the Southwest.¹¹ The lack of safe and affordable low-income housing

access, for example, elusive remedies to disparate treatment. *See, e.g.*, Philip D. Ortega, *The Chicano Renaissance*, in *LA CAUSA CHICANA, THE MOVEMENT FOR JUSTICE* 53 (Margaret M. Mangold ed., 1971-72) (“Mexican Americans themselves were kept at arm’s length as outsiders.”); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 *MICH. L. REV.* 2320 (1989) (the term “outsider” is used to avoid term ‘minority;’ the term ‘minority’ contradicts ‘the numerical significance of the constituencies typically excluded from jurisprudential discourse.’). For example of the invisibility of Latina/o groups within legal scholarship. *See, e.g.*, Berta Esperanza Hernandez-Truyol, *Las Olvidadas- Gendered in Justice/Gendered Injustice: Latinas Fronteras and the Law*, 1 *J. GENDER, RACE AND JUST.*, 355 (1998).

5. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-91-37, *RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER* (Nov. 1990) [hereinafter *RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS*]. Colonias is a Spanish term denoting a “community or neighborhood.” *Id.* Colonias are characterized “where one or more of the following conditions exist: substandard housing, inadequate roads and drainage, and substandard or no water and sewer facilities.” *Id.* In Texas colonias exist along the Mexico border with El Paso reporting the largest sized population of colonia inhabitants. *Id.* at 3.

6. *Id.* at 3.

7. Field notes from research trip by author (1993) (on file with author).

8. *See, e.g.*, *What is a Colonia?*, TEX. SEC’Y. OF STATE, http://sos.state.tx.us/border/colonias/what_colonia.shtml (last visited Mar. 31, 2013).

9. In the colonias researched, less than 1% had sewage systems. *RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS*, *supra* note 5 at 1.

10. *See, e.g.*, FEDERAL RESERVE BANK OF DALLAS, *TEXAS COLONIAS, A THUMBNAIL SKETCH OF THE CONDITIONS, ISSUES, CHALLENGES AND OPPORTUNITIES* (2002) [hereinafter “A THUMBNAIL SKETCH”].

11. Not unlike in Texas, low wages in California systemically helped to create and expedite farmworker colonias. Even today, unconscionable colonia residential circumstances plague farmworker communities across a number of locations. *See, e.g.*, *Facts About Farmworkers and Colonias*, U.S. DEPT. OF HOUSING AND URBAN DEV., (Mar. 6, 2008) (farmworkers’ average income is \$5,000); *United States v. Duro*, 625 F. Supp.2d 938 (C.D.

in El Paso, and the desire to escape urban crime, force low wage earners to live in the colonias.¹² The low wages that seasonal and migrant workers garner in an overly tight housing market makes finding safe housing nearly impossible.¹³ The insufficiency of affordable housing units in urban areas also affects low wage earners in the service industries throughout El Paso.¹⁴ In scattered locations throughout the Southwest, many colonias begin as outlying mobile home parks in unannexed county areas that thereafter grow into large and significant colonias.¹⁵ The burgeoning globalization of the market further fueled the additional colonia expansion in the region.

As property professors, Professor Larson and I had numerous questions about the atypical real estate “developments” that define colonia use and growth, and the legal loopholes that facilitated the rise of colonia communities on former agricultural lands. We found it difficult to reconcile the absence of regulation in the colonias with the building, zoning, and health and safety standards otherwise required in urban housing developments. We further struggled with the ongoing racism that taints the region and its legacy that followed the United States-Mexican War in 1848.¹⁶ Since that time, various civil rights legislation and judicial rulings have somewhat diminished the persistent segregation,¹⁷ the tradition of rigidly enforced Jim Crow “laws,” and the disparate treatment of Blacks,¹⁸ Mexicans,¹⁹ and the Indigenous in the

Cal. 2009). For further context concerning the housing challenges of farm laborers, *see generally* Ilene Jacobs, *Farmworker Housing in California*, 9 LA RAZA L.J. 177 (1996) (linking the problems of low wages and deficient housing that many farmworkers face).

12. *See, e.g.*, MICH. CIVIL RIGHTS COMM’N, A REPORT ON THE CONDITIONS OF MIGRANT AND SEASONAL FARMWORKERS IN MICHIGAN (2010), http://www.michigan.gov/documents/mdcr/MSFW-Conditions2010_318275_7.pdf; UFW of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) (allegations that city racially discriminated for refusal to permit proposed low income housing connections to water and sewage systems).

13. Guadalupe T. Luna, “*Agricultural Underdogs*” and *International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*,” 26 N. M. L. REV. 9, 30 (1996) [hereinafter *Agricultural Underdogs*].

14. *Id.* at 30. *See also* A THUMBNAIL SKETCH, *supra* note 10.

15. *See, e.g.*, Guadalupe T. Luna, *United States v. Duro: Farmworker Housing and Agricultural Law Constructions*, 9 HASTINGS RACE AND POVERTY LAW L.J. 397 (2012).

16. The U.S.-Mexican War is recognized as one of the “deadliest wars” in American history in terms of disease, with a mortality rate of 100 per 1,000 soldiers. RICHARD BRUCE WINDERS, MR. POLK’S ARMY: THE AMERICAN MILITARY EXPERIENCE IN THE MEXICAN WAR (1997). In the Treaty of Guadalupe Hidalgo that ended the Mexican-American War, the United States promised to respect the property rights of Mexican citizens in the conquered territory. Peace, Friendship, Limits and Settlement, Feb. 2, 1848, U.S.-Mex., art. VIII, 9 Stat. 922, 929 [hereinafter *Treaty of Guadalupe Hidalgo*].

17. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (judicial ruling agreeing with separate but equal doctrine).

18. *See, e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950).

19. *See, e.g.*, *Mendez v. Westminster Sch. Dist. of Orange County*, 64 F. Supp. 544 (C.D. Cal. 1946), *aff’d sub nom. Westminster Sch. Dist. of Orange County v. Mendez*, 161 F.2d 774 (9th Cir. 1947); *Plyler v. Doe*, 457 U.S. 202 (1982) (right of undocumented

region.²⁰ However, these legacies, as witnessed through the colonias, remain intact. The remnants of racism and unequal treatment in the region have cumulated in a lack of concern about impoverished racial groups employed in agriculture and about how the informal economies of the border region have promoted unsafe housing.²¹ In sum, the racism that remains in the region up through the present frustrates both residents and housing advocates who seek and struggle to improve the conditions of the colonias.²²

This article revisits Professor Larson's theoretical template that resulted from our early field research in the Texas colonias.²³ Theory often discounts facts in legal and non-legal scholarly investigations, and harm can occur when those facts are ignored or primary pieces of evidence are treated as outliers. The political land use debates of that time disregarded the factual realities of the colonias when some of those involved in the debate were pushing for lighter regulation of the housing sector.²⁴ For example, policymakers of the time argued that fewer regulations in the housing market would lead to a greater availability of housing options.²⁵ Our research, however, had made us aware that the facts surrounding colonia developments directly refuted the theories that supported less governmental intervention in the housing market.

children to an education); Maria Pabon Lopez, *Reflections on Educating Latina and Latino Undocumented Children: Beyond Plyer v. Doe*, 35 SETON HALL L. REV. 1373 (2005).

20. The El Paso region was home to numerous Indigenous communities that included the Mansos, Piros, Janos, Sumas, Tanos, Tiguas, Tompiros, Apaches, and Jumanos. Today, the Ysleta del Sur Pueblo is the only remaining organized group that is recognized by the federal government. See YSLETA DEL SUR PUEBLO, <http://www.ysletadelsurpueblo.org> (last visited Mar. 28, 2013). Other indigenous communities in Texas that have been there before the "first contact in 1528" have yet to achieve formal standing under stringent federal "standards." See LIPAN APACHE BAND OF TEXAS, <http://www.lipanapachebandoftexas.com> (last visited Mar. 28, 2013).

21. "Agricultural Underdogs," *supra* note 13, at 29-33 (citing to interviewees). See also Jacobs, *supra* note 11 (general housing challenges confronting farm laborers).

22. Advocates instigated investigations of illegal developer actions in the colonias with the Texas State Attorney. See, e.g., Anna Borgman, *State Investigation of Illegal Colonias Sought*, THE MONITOR, June 23, 1993, at 3. Before 1989, the Office of Attorney General of Texas did not have "direct authority to enforce laws related to development of subdivisions or the sale of lots without utilities or a guarantee of utility service." *Historical Sketch of Texas Laws Related to Colonias Remediation and Prevention*, OFFICE OF THE ATT'Y GEN. OF TEX. (2010), <https://www.oag.state.tx.us/consumer/border/colonias.shtml>. The Texas Attorney General provides a webpage enumerating the history of state law on the colonias. *Id.*

23. Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995) [hereinafter *Free Markets*]; Jane E. Larson, *Informality & Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137 (2002).

24. *Free Markets*, *supra* note 23, at 180.

25. *Id.*

Part I addresses Professor Larson's legal realism approach testing the limitations of free market theories.²⁶ Employing a bottom-up, multi-disciplinary, and empirical approach to the study of the colonias, this form of legal realism conflicted with free market ideologies, which were based on incomplete models and data.²⁷ During Professor Larson's first journey to the colonias, she discovered that efficiency-based models disregarded the causative impact and consequences of colonia developments on the working poor, comprised primarily of Mexican descent.²⁸ In my own work, I further addressed the impact of agricultural law on the farmworkers residing in the El Paso region.²⁹ My article rejected the legal formalist approach implicit in federal law and criticized the weak statutory enactments that had failed to provide farmworkers fair wages and safe housing opportunities.³⁰ Using legal formalism as a legislative framework can in fact help to institutionalize the subordination of workers, as with legislation that deprives workers of the right to improve the terms and conditions of their employment.³¹ The statutory constraints behind such agricultural laws that hurt marginalized farmworkers were irreconcilable with the human rights goal of providing adequate housing and wages for all workers, because they denied those rights to marginalized laborers who are critical to the nation's food production.³²

With a focus on gender, Part II provides an update on the conditions of the colonias since our first El Paso trip and emphasizes the need for a multi-disciplinary approach to injured and harmed communities. Women residing in the colonias employed in low wage jobs such as canneries, slaughterhouses or

26. In comparison, a legal realism approach looks to the specificity of each issue. *See, e.g.,* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978) (law and social reordering resulting from adjudication).

27. THE LIBERTARIAN PARTY NAT'L COMM., LIBERTARIAN PARTY 2012 PLATFORM (2012).

28. *Free Markets*, *supra* note 23, at 187-188.

29. WILLIAM KANDEL, PROFILE OF HIRED FARMWORKERS, A 2008 UPDATE, U.S. DEP'T OF AGRIC. ECON. RES. REPORT (2008), available at <http://www.ers.usda.gov/publications/err-economic-research-report/err60.aspx#.UWtOOB9dVzo>. *See also* Luna, *supra* note 15.

30. "Agricultural Underdogs," *supra* note 13 (citing to interviewees).

31. National Labor Relations Act, 29 U.S.C. § 152(3) (2012) ("not include any individual employed as an agricultural laborer.").

32. This results in part from the federal rules that exclude farmworkers from the right to petition for fair wages in contrast to non-agricultural workers. The federal exclusion for agricultural workers structurally ensnares them in disparate working conditions particularly where state law also denies them protections extended to non-agricultural workers. *See, e.g.,* 29 U.S.C. §§ 1801-1872 (2012). Nor does farm legislation provide incentives for agricultural employers to compensate their workers fairly. *See, e.g.,* Complaint, Luna v. Del Monte Fresh Produce, No. 06-21015 (S.D. Fla. 2006), available at http://www.splcenter.org/sites/default/files/Luna_v._Del_Monte_complaint.pdf. *See also* Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WISC. L. REV. 339 (2005).

in the fields often lack safe and affordable housing opportunities.³³ Moreover, women at the border have long confronted health issues related to the stress and reality of residing in underserved communities. The lack of health insurance and accessible health care providers impose further risks for the women of the colonias and their families.³⁴

Despite this background, a few gains have emerged since our research trip, including federal and state governmental programs to improve conditions in the colonias.³⁵ Government programs, within some limitations, have expanded access to water and other utilities in select remote areas.³⁶ In a few instances, housing for farmworkers has been constructed using federal funds, although not at levels sufficient to match the residential needs of workers in the sector.³⁷ Yet, notwithstanding legislation to control their growth, colonias form in places where the agricultural industry or underserved employment sector

33. Documented and undocumented work in the agricultural sector, and they both face a number of challenges. *See, e.g.*, SOUTHERN POVERTY LAW CENTER, *INJUSTICE ON OUR PLATES* (2010); Maria Ontivieros, *Lessons From the Fields, Female Farmworkers and the Law*, 55 ME. L. REV. 157 (2003); Robin R. Runge, *Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women*, 20 AM. U. J. GENDER SOC. POL'Y & L. 871 (2012).

34. The health challenges colonia residents confront are well-documented and still exists today. *See, e.g.*, T.W. Hejkal et. al., *Viruses in a Community Water Supply Associated with an Outbreak of Gastroenteritis and Infectious Hepatitis*, 74 J. OF AMERICAN WATER WORKS ASSOCIATION 318 (1982); Emily Ramshaw, *Major Health Problems Many Linked to Poverty, Plague Residents of Colonias*, N.Y. TIMES, July 10, 2011, at A21 (health difficulties of colonia residents Agua Dulce and Mexico Chiquito, and the health issues confronting colonia resident Laura and her five children).

35. Aileen B. Flores, *Lingering Water Needs Discussed at UTEP*, EL PASO TIMES, Aug. 18, 2011, available at http://www.elpasotimes.com/news/ci_18704924.

36. A series of legislative state enactments has sought to “address the issues associated with border colonias, designed to improve the quality of life for residents” with a focus on the “delivery of water and wastewater services.” *Colonias Legislation in Texas*, TEX. SEC'Y OF STATE (2013), <http://www.sos.state.tx.us/border/colonias/legislation.shtml>.

37. Low wages have hindered safe and affordable housing for farmworkers decade after decade notwithstanding the recognition that “[a]griculture is a significant economic engine” in various states. Lena Robinson, *Increasing the Harvest for Farmworker Housing*, *Federal Reserve Bank of San Francisco*, CMTY. INVESTMENTS, Sept. 2004 (“Agriculture is a significant economic engine for the West, representing a total of almost \$40 billion dollars in gross state product for the nine states that comprise the Federal Reserve Bank of San Francisco’s 12th District”); Peter Jensen, *Farmworkers Need Affordable Housing*, *New Study Reports, Shelter Costly for Low-Income Families*, NAPAVALLEYREGISTER.COM, Mar. 1, 2013 (the undocumented cannot reside in federally funding housing where available); WASHINGTON STATE FARMWORKER HOUSING TRUST, <http://www.farmworkerhousingtrust.org> (last visited Mar. 31, 2013) (“Our hearts are heavy as we announce that the WA Farmworker Housing Trust is ceasing operations”); Nancy Simmons, *Memories and Miracles-Housing The Rural Poor Along the United States Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Dona Ana County, New Mexico*, 27 N.M. L. REV. 33 (1997). *See also* KANDEL, *supra* note 29 (low wage levels of workers).

demands laborers.³⁸ The forces of globalization and neo-liberalism have further pushed Indigenous farmers in Mexico off their land, leading them to enter the United States as agricultural laborers and in turn also promoting patterned colonia growth.³⁹ Ongoing advocacy of women activists has been necessary to confront persistent subordination and inequality in the region.

Women in the colonias consistently challenge their housing conditions, but bureaucratic inaction and resistance continue to thwart their efforts.⁴⁰ These forms of marginalization underscore the utility of bottom-up research.⁴¹ Accordingly, the focus of my research further included studying the colonias using an interdisciplinary and critical analysis approach to expose how law institutionalizes the subordination of a population of rural homeowners. Throughout my research, I had the goal of discovering how the law could help diminish the marginalization confronting farm workers.⁴²

The confluence of the above considerations necessitated our journey to the El Paso, Texas region in an effort to gain a deeper understanding of the nation's agricultural laws and policies, and to review the housing issues plaguing the region.

I. "BOTTOM-UP" FIELD RESEARCH IN THE COLONIAS

Professor Larson and I attended the same law school where we served on the "Journal of Law and Inequality." Following her time as a lawyer in private practice in Washington, D.C., Jane became a law professor. A few years later, I also became a law professor after my time litigating in Texas with the Mexican American Legal Defense Educational Fund. We remained close friends from our time as law students to our new careers as law professors and until her untimely passing. The similarities between our class backgrounds led us to

38. See, e.g., Luna, *supra* note 15 (insufficient housing for farmworkers and for service workers); *Facts About Farmworkers and Colonias, What is a Colonia?*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (Mar. 2, 2008) <http://www.hud.gov/groups/farmwkercolonia.cfm>.

39. See, e.g., Frank Ackerman et al., *Free Trade, Corn, and the Environment: Environmental Impacts of US-Mexico Corn Trade Under NAFTA* (Global Dev. and Env't Inst., Working Paper, June 2003); Luna, *supra* note 15, at 401-02 (entry of the Purépecha Indians into the United States who fled their farms in Mexico from the consequences of globalization and negative impact on their agricultural operations).

40. See, e.g., Emily Ramshaw, *Improvement Comes Up Short in South Texas Colonias*, N.Y. TIMES, July 7, 2011, at A19.

41. A focus on outsiders reveals how law intersects with their forced marginalization. New forms of jurisprudence obligate critical examination of not only the consequences but also the causal sources of marginalization, which in turn reveals the need for greater critical knowledge to assist communities in need. During that early period, such scholarship was spurned and marginalized by mainstream scholarship but has since become more widespread. See, e.g., LATINA & LATINO CRITICAL LEGAL THEORY, <http://www.latcrit.org> (last visited Mar. 31, 2012).

42. "Agricultural Underdogs," *supra* note 13.

contemplate the law's intersection with marginalization and subordination, and to take seriously its impact on at-risk individuals and communities.

In contrast to the more common form of legal scholarship tethered to law libraries, outsider research on colonias barely existed. Omitted from our course textbooks were substantive materials regarding Indigenous rights, gendered rights, slavery, Chicana/o property rights, and the environmental harms at the United States-Mexico border.⁴³ It was difficult to reconcile the millions of acres taken from Indigenous women and their families with federal treaties that promised to recognize their property rights and their sovereignty over native lands.⁴⁴ Into the present, it remains difficult to reconcile the Treaty of Guadalupe Hidalgo covenants to protect property with the rule of exclusion highlighted in property and federal constitutional law requirements.⁴⁵ This lack of consistency and sustained attention to contradiction within the law further spilled over into legal education.

Law students primarily encounter a series of doctrinal analyses focusing on property ownership and on the relationships involving owners of real property.⁴⁶ Innumerable legal textbooks expound on the value of clear title, its obligatory requirements and the attendant linkages with the state.⁴⁷ Class discussions of real estate law, mortgage warranties, and other transactional real estate obligations generally include extensive consideration of the importance

43. Jan Gilbreath Rich, *Trade Takes Its Toll, Mexico Border Clearly Not Ready for Rapid Growth*, SAN ANTONIO LIGHT, May 12, 1991, at DI.

44. See, e.g., *United States v. Chaves*, 159 U.S. 452 (1895) (on land "since time immemorial"); *United States v. Sandoval*, 167 U.S. 278 (1897) (new treaty "interpretations" that eradicated the rights of the pueblo to the commons); Donald Juneau, *The Light of Dead Stars*, 11 AM. INDIAN L. REV. 1 (1983); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (abrogation of treaty rights). The case law of dispossession conflicts with U.S. Const., art. VI, cl. 2 (as the "supreme law of the land"). See also Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000).

45. Compare Justice Taney's "reasoning" on the Constitution in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), with his decisions in "interpreting" the constitution with the Treaty of Guadalupe Hidalgo. Treaty of Guadalupe Hidalgo.*supra* note 16. For one instance of land theft, see, e.g., Yolanda Zarate, *Treated Like Foreigners On Their Native Soil*, HOUSTON CHRON., Sept. 16, 1993, at 19.

46. See, e.g., *Javins v. First Nat'l Realty*, 428 F.2d 1070 (D.C. Cir. 1970) (doctrine of habitability); *Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wis. 1899) (waste law doctrine); *Ozark Poultry Products, Inc., v. Garman*, 472 S.W.2d 714 (Ark. 1971). In rare instances, litigation is able to address the plight of farmworkers residing in unsafe housing. See *Conlon v. U.S. Dep't of Labor*, 76 F.3d 271, 273 (9th Cir. 1996) (30 to 50 "shelters" consisting of cardboard and plastic sheets with no water or sewage systems serving unauthorized camp). See also *Estados Unidos Mexicanos v. De Coster*, 228 F.3d 332, 334 (1st Cir. 2000) (extensive and deplorable housing conditions with workers' children becoming ill from the "filth tracked into trailers from workers returning from the barns during winter").

47. The role of trespass law and the right to exclude provide two examples of such relationships. See, e.g., *Jacques v. Steenberg Homes*, 563 N.W.2d 154 (1997) (extensive punitive damages award notwithstanding nominal damages underscore state sanctions against trespassers).

of valid clean title.⁴⁸ The legal values, norms, and distinctions between ownership⁴⁹ and possession,⁵⁰ as well as how they affect relationships with both neighbors and the state, factor heavily in property law classes. However, there is no discussion of how a rule of law grounded in historical amnesia has failed the communities of color living in the destitute conditions characterizing border housing. Specifically, the promises made to protect local communities before the United States annexed Texas were rendered meaningless by the disregard of formerly held property rights.⁵¹ Thereafter, communities of color were forced into segregated and inferior neighborhoods that offered few of the city services available to the dominant population.⁵²

During the late 1980s and early 1990s, the intersection of race and class still remained outside of mainstream legal investigations and most academic classrooms.⁵³ Some legal studies of gender and a few journals that focused on feminism and related issues had surfaced by this time, but many issues remained unaddressed or unfinished.⁵⁴ Studies of gender-based discrimination, class struggle, and scholarly investigations focused on race constituted a small minority of law review and journal articles.⁵⁵ The talented faculty directing

48. Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511 (1991). For a contemporary article, see, e.g., Alfred L. Brophy, *Integrating Spaces: New Perspectives on Race in the Property Curriculum*, 55 J. LEGAL EDUC. 319 (2005).

49. See, e.g., *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B.1722) (relationship between the “true owner” and the finder and the Doctrine of Relativity of Title).

50. See, e.g., *Johnson v. M’Intosh*, 21 U.S. 543 (1823) (title derived from purported “sale” did not recognize superior title of ownership in Native Americans); *State v. Shack*, 277 A.2d 369 (N.J. 1971) (rejecting in part that farmworker employees were not tenants under state law).

51. The case law is extensive but for one example, see *Peralta v. United States*, 70 U.S. 434, 437 (1865).

52. The segregation of Blacks and Mexicans in Texas is well-established whether from Jim Crow legislation or discriminatory attitudes against both groups and other people of color. See, e.g., DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986* (1989); MARIO T. GARCIA, *DESERT IMMIGRANTS: THE MEXICANS OF EL PASO, 1880-1920* (1982); ARNOLDO DE LEÓN, *THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821-1900* (1983).

53. See, e.g., *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682 (1953). Such exclusions directly and causally linked with case law reinforces the outsider to law status of subordinated communities. See also *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

54. See, e.g., Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through The Lens of the California Law Review*, 100 CALIF. L. REV. 381 (2012); Marilyn Fitterman, et al., *Law on the Feminist Frontier*, N.Y. TIMES, Oct. 27, 1991, at 613 (discussing Catherine MacKinnon and feminism).

55. See, e.g., Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003). LatCrit Theory was organized as a non-profit in 1992 and later published works from its symposia. For examples of a few early articles on LatCrit Theory, see Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate*, 85 CALIF. L. REV. 13/10 LA RAZA L.J. 229 (1997/1998); Leslie Espinoza & Angela

attention to long-ignored legal disparities and inequities impacting women and other groups faced harsh employment realities, and, in some circumstances, lost tenure.⁵⁶ Engagement with theory in law is to be highly valued but those with progressive worldviews at the time faced unusually aggressive resistance to their criticisms of globalized markets and the status quo.⁵⁷

In contrast, land use debate and theory were generating extensive scrutiny of eminent domain, zoning, and other public and private disputes.⁵⁸ Law-and-economics theorists and Libertarians were advocating for less regulatory and governmental intrusion on private property ownership.⁵⁹ The ideologues of the time argued that overly regulated markets lessened housing opportunities for those residing in low-income circumstances and, yet, neglected to contemplate the quality of the type of housing that would surface in the absence of regulation.⁶⁰

In a similar vein, the lowering of trade barriers in the agricultural economy also followed from arguments that efficiency and economic activity increases with trade agreements such as the North American Free Trade Agreement (“NAFTA”).⁶¹ Yet shrinking trade barriers created an agricultural marketplace that did not reflect concern for the labor and housing needs necessary to expedite the opening of global agricultural markets.⁶² Rather, NAFTA’s protection of the agricultural marketplaces labor sections were mere “guiding principles” that were appended at the end of its statutory framework.⁶³

Harris, *Embracing the Tar Baby: LatCrit Theory and The Sticky Mess of Race*, 85 CALIF. L. REV. 1585/10 LA RAZA L.J. 499 (1997/1998).

56. See, e.g., Marilyn Fitterman et al., *Law on the Feminist Frontier*, N.Y. TIMES, Oct. 27, 1991, at 613; Professor Arriola recounting her “unwelcomed [status] as a Latina lesbian in a university with a bad history on the hiring of minorities.” Elvia R. Arriola, *March!*, 19 CHICANO-LATINO L. REV. 1,7 (1998); GABRIELLA GUTIERREZ Y MUHS ET AL., PRESUMED INCOMPETENT, THE INTERSECTION OF RACE AND CLASS FOR WOMEN IN ACADEMIA (2012).

57. While this author in general views engagement in debates as a positive endeavor, in this case, the extent to which legal commentators attempted to redefine the focus of race-based theory and thus derail its intellectual core became deeply problematic.

58. *Free Markets*, *supra* note 23.

59. *Id.*

60. *Id.* at 181.

61. See North American Free Trade Agreement, 19 U.S.C. § 3301, at § 3331(a)(2) (2006) [hereinafter NAFTA]. NAFTA, which created the world’s largest agricultural marketplace, was based on a contractual agreement among and between the United States, Canada and Mexico; Guadalupe Luna, *Injured and Abandoned Agricultural Workers and the NAFTA*, in *SECTORAL LABOR EFFECTS OF NORTH AMERICAN FREE TRADE* 267 (Rafael Fernández de Castro et al. eds., 1993) [hereinafter *Abandoned Agricultural Workers*].

62. *Abandoned Agricultural Workers*, *supra* note 61, at 269 (finding the NAFTA legislative structure does not provide mandatory housing for workers within its original regulatory structure).

63. The maquiladora automobile auto parts plants in the region had additionally increased the population in the colonias as well as in expediting squatter communities along the border region. See generally, 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 2, 26-30(1993), available at <http://www.gao.gov/assets/160/153900.pdf>

Furthermore, NAFTA's forthcoming demand of low wage earners promised to exact yet greater harm on farmworkers confronting the absence of safe housing.⁶⁴ The lowering of trade barriers thereby set the stage for irreparable injury to the smaller owner-operated farms and businesses in the United States and Mexico.⁶⁵

Outside of legal studies, historians have often studied border regions and their unique role in both nations' origins.⁶⁶ In Texas, for example, the disparate treatment that tainted race relations has often masked the role of law in the creation of the colonias.⁶⁷ The law's role in the dispossession of Indigenous and Mexican property holders of their lands following the United States-Mexican War was in fact a significant factor leading to the inadequate and segregated housing market in the region.⁶⁸ Another unfortunate legacy of the "rule of law" flowed from the way attorneys expediting the displacement of Mexicans, the Indigenous, and others from their lands contributed to the longstanding segregation and impoverishment plaguing the region.⁶⁹ High levels of poverty,

(specifying safety and occupational hazards including inter alia ergonomic, physical, chemical hazards and lack of oversight of plant conditions in which the workers are primarily women); Leslie Kochan, *THE MAQUILADORAS AND TOXINS, THE HIDDEN COSTS OF PRODUCTION SOUTH OF THE BORDER* (1989) (loss of U.S. jobs and the employees "...most of whom are women and young girls" earn "as little as \$2.90" daily). These conditions remain prevalent even today. See Alicia Schmidt Camacho, *Feminicidio, Reification, and the Theft of Mexicana Subjectivity*, 4 *CHICANA/LATINA STUDIES* 22 (2004) (illustrating additional hazards for the women employed in the region).

64. "Agricultural Underdogs," *supra* note 13, at 10. Since its adoption, the provisions of NAFTA have been expediting the loss of ownership of small farming operations in Mexico with the former owner operator migrating to the U.S. for employment in the agricultural sector. See, e.g., Ackerman et al., *supra* note 39, at 17.

65. Federally enforced low wages force the children of farmworkers to reside in impoverished and dangerous circumstances. See, e.g., HUMAN RIGHTS WATCH, *FIELDS OF PERIL: CHILD LABOR IN UNITED STATES AGRICULTURE* 12 (2010), available at <http://www.hrw.org/reports/2010/05/05/fields-peril>. See also 29 U.S.C. §§ 1801-1872 (2006) (showing that the few federal remedies "permitted" to farm laborers are weak and insufficient to bar the type of harm that these workers confront. This legislation, for example, does not provide incentives that could preclude employers from obtaining subsidies or other forms of federal privilege if they do not fairly compensate their workers).

66. Social scientists and others have written extensively on the border and continue to produce new scholarship. See generally, *WOMEN ON THE U.S.-MEXICO BORDER* (Vicki L. Ruiz & Susan Tiano, eds., 1987); OSCAR J. MARTINEZ, *BORDER PEOPLE: LIFE AND SOCIETY IN THE U.S.-MEXICO BORDERLANDS*, xvii (1994); Denna Meyler & Milagros Peña, *Walking With Latinas in the Struggle For Justice: A Case Study of El Centro Mujeres de la Esperanza*, 24 *J. OF FEMINIST STUDIES IN RELIGION*, no. 2, 97 (2008).

67. See, e.g., *Rodriguez vs. San Antonio Indep. School Dist.*, 411 U.S. 1 (1973) (exemplifying the long-standing challenges to Texas's school financing systems).

68. *Alliance of Descendants of Texas Land Grants v. United States*, 27 Fed. Cl. 837, 839 (1993).

69. RUDOLFO ACUNA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 316–318 (6th ed. 2007) (providing Chicana/o history on the role of attorneys in partition actions facilitating dispossession of land).

unemployment, and a depressed economy further impacted the border, and the way they were linked to the law did not ever get sufficient attention.⁷⁰ Jane and I could thus neither assess the factual situation of the colonias in light of the leading land use arguments at that time, nor make sense of their asserted evidence in light of the lack of low-income and safe housing for area residents.

We were aware that the colonias presented an enhanced example of what transpires when law institutionalizes the disparate treatment of communities on the basis of race, class, sex, gender and other at-risk classifications. Additionally, colonia residents and their advocates seeking improvements to the harmful housing conditions faced governmental resistance from the very state and federal agencies who directly and indirectly created the harmful conditions.⁷¹ With a perhaps naïve belief in the power of engaging and testing theories, we headed to El Paso County in 1993.

II. EL PASO COUNTY: A CONTEXTUAL “BOTTOM-UP” FRAMEWORK

Historically, the El Paso region is steeped in a legacy of conquest, violence, and challenges to the Indigenous and Chicanas/os’ use of their land and access to the natural resources of the region.⁷² Following the United States-Mexican War, an international peace agreement in 1848 established a two thousand mile long geographical demarcation between the two nations.⁷³ Thereafter, the Texas legislature incorporated the City of El Paso in 1873, which dominates El Paso County. Ciudad Juárez, Mexico blends into the landscape that geographically defines its sister city of El Paso.

Notwithstanding its unique history of conquest and violence, and although the Rio Grande demographically divides the two nations, the border region shares cultural, linguistic and other values. Spanish, for example is spoken in

70. Kathleen Staudt, & David Spener, *The View from the Frontier: Theoretical Perspectives Undisciplined*, in *THE U.S.-MEXICO BORDER, TRANSCENDING DIVISIONS, CONTESTING IDENTITIES* 3, 23 (David Spener & Kathleen Staudt eds., 1998). Moreover, NAFTA has also engendered further hardship for farmworkers. *See, e.g.*, ASSOCIATION OF FARMWORKER OPPORTUNITY PROGRAMS, *FARMWORKERS’ HEALTH AND JOBS AT RISK FROM U.S.-MEXICO FTA, AGREEMENT MUST PROTECT WORKERS ON BOTH SIDES OF THE BORDER* 1-2 (1991). Periodic reviews on NAFTA illustrate the harm to the Latino labor market. *See* WILLIAM C. VELASQUEZ INSTITUTE, *LATINOS HURT BY NAFTA LABOR MARKET IMPACTS*, vol. 3, no. 1 (1997) (illustrating the problems with NAFTA three years after its adoption).

71. *See, e.g.*, Ramshaw, *supra* note 40.

72. *See e.g.*, OSCAR J. MARTINEZ, *TROUBLESOME BORDER* 85 (1988) (involving the war against local communities for the area’s communally accessed salt beds); PAUL COOL, *SALT WARRIORS* xi, 1 (2008) (involving the struggle over control of the El Paso salt beds).

73. *See* Treaty of Guadalupe Hidalgo, *supra* note 16 (the Treaty ended the war and promised to recognize the population remaining as possessing all the rights of all landowners within the U.S.). These promises, however, were not kept. As a result, the supremacy of treaty law was compromised when the landholders attempted to defend their property interests following the war. *Compare* Art. VIII of Treaty, *with* *United States v. Bernal*, 24 F. Cas. 1123 (N.D. Cal. 1855) (No. 14, 581) (holding that although proof of ownership was established, the U.S. failed to protect its interests as promised in the Treaty).

both nations, with music and culture intermingling at the border.⁷⁴ Professor Oscar Martinez characterized the border in the past as fluid with both sides of the “borderlanders” blending “the structures, institutions, and life expressions of two societies to create something novel and entirely theirs—the ambiente fronterizo, or borderlands milieu.”⁷⁵ As he underscored, “the area stands as a prime example of bi-national interdependence, providing striking evidence of the trend toward closer ties among the world’s nations and societies.”⁷⁶ In other words, the border zone created a “[t]ransborder interdependence” that “is rooted in the economic interaction that has existed between the United States and Mexico for several generations.”⁷⁷ At that time, the region stood “as a prime example of bi-national interdependence, providing striking evidence of the trend toward closer ties among the world’s nations and societies.”⁷⁸ To the detriment of the United States, the region has since transformed significantly from those earlier days when entry into both nations was deemed inconsequential.⁷⁹ Although some interconnections remain, major legislative influences grounded in federal law have dramatically transformed the region.⁸⁰

The deluge of violence that presently stains Ciudad Juarez, Mexico has fractionalized the fluidity of the border.⁸¹ The politicized demand for increased

74. Oscar J. Martinez, *Human Interaction in the Texas-Mexico Borderlands* at 4, available at <http://humanities-interactive.org/borderstudies/text/essay.html> (last visited Mar. 20, 2013).

75. *Id.* at 1.

76. *Id.*

77. *Id.*

78. *Id.*

79. Prior to September 11, 2001, entry into Mexico was not onerous so that innumerable visits to Mexico from Texas could occur with great ease. After September 11th, however, the heightened focus on the nation’s security, although grounded in controversy over its intent, has resulted in increased militarization of the border. The Homeland Security website provides a wealth of information on its purpose. *Border Security*, U.S. DEP’T OF HOMELAND SEC., <http://www.dhs.gov/border-security> (last visited Mar. 18, 2013); See also Sergio Pena, *Collateral Damages: The Impact of 9/11 on the U.S.-Mexico Border: El Paso-Ciudad Juarez*, 3 J. OF LAW & BORDER STUDIES 1, 1 (2003).

80. These transformations include the extensive government border patrol activities and clear harm on the United States side of the border, such as racial profiling and the construction of the border fence. Ciudad Juarez, the sister city of El Paso, became, for an extensive period of time, a deadly city as a result of drug activity and violence against women. See Damien Cave, *Wave of Violence Swallow More Women in Juarez*, N.Y. TIMES, June 24, 2012, at A6, available at <http://www.nytimes.com>. More recently, violent crime activity has somewhat diminished. See Emma O’Connor, *Mexico’s Ciudad Juarez No Longer The Most Violent City in the World*, TIME NEWS FEED, Oct. 15, 2012, available at <http://newsfeed.time.com/2012/10/15/mexicos-ciudad-juarez-is-no-longer-the-most-violent-city-in-the-world/>. El Paso, in comparison, has been recognized as one of the nation’s safest cities for two years in a row. Aaron Bracamontes, *El Paso Repeats As U.S. City With Lowest Crime Ranking*, EL PASO TIMES, Dec. 8, 2011, available at http://www.elpasotimes.com/ci_19496681.

81. Travel between the two nations now requires extensive documentation, passports, and in some instances, specific insurance for your vehicle. See generally, *Mexico Country*

border security, one of the many unfortunate results of the events of September 11, 2001, has fragmented the unique cultural, social, and economic relationship between the two nations. The relentless “war” against Mexicans and broader Latina/o groups—whether undocumented or citizens—has further escalated across the nation and along the increasingly militarized border.⁸² The practice of the past when residents traveled freely between Mexico and the United States to visit families and to generate commerce has significantly dissipated as a direct result of federal Homeland Security law.⁸³

Specific Information, U.S. DEP’T OF STATE, http://travel.state.gov/travel/cis_pa_tw/cis/cis_970.html (last visited Mar. 18, 2013) (beginning March 2010, passports are now required to travel between the U.S. and Mexico). When Jane and I first entered Mexico in the early 1990s, neither the United States nor Mexico required a passport. However, during our research trip in 1993, our rental vehicle required special insurance in order to enter Mexico. When we were at the United States entry in El Paso, the border patrol stopped our vehicle, ordered us out, and brought German Shepherds to perform a drug sweep of our rental vehicle. After a brief question and answer period inside the border patrol office, we were permitted to leave and return to our hotel, which was only a short trip from the entry point in El Paso. El Paso research notes by author (1993) (on file with the author).

82. *See, e.g.,* TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992*, 167 (1996). Since September 11, 2001, The Department of Homeland Security has systemically increased the militarization of the U.S.-Mexico border. U.S. DEP’T OF HOMELAND SEC., *SECURING AND MANAGING OUR BORDERS*, <http://www.dhs.gov/securing-and-managing-our-borders> (last visited Mar. 18, 2013). Additionally, the threat of entry of drugs and undocumented aliens into the United States has increased surveillance at the border, resulting in fatalities to some individuals traveling in rural areas. *See, e.g.,* Manny Fernandez, *Outrage in Texas After Airborne Police Sharpshooters Kills Two*, N.Y. TIMES, Nov. 4, 2012, at A15.

83. El Paso is a major port of entry into the United States. In the past, it was not uncommon to have dinner in Ciudad Juarez and return the same evening. Today, however, this practice is almost non-existent given the violence in Ciudad Juarez, the erection of the border wall, and the adoption of overly strict immigration laws. *See, e.g.,* REAL ID Act of 2005, Pub. L. 109-13, 19 Stat. 113, 1-1143, Div. B. May 11, 2005, 119 Stat. 302, and codified at 8 U.S.C. § 1101. For a description of the border fence, see *Tactical Infrastructure/Border Fence*, U.S. DEP’T OF HOMELAND SEC., <http://www.cbp.gov> (last visited Mar. 18, 2013). For further context on the free transfer of goods and services between the two nations before and immediately after Operation Blockade, see Sue Anne Pressley, *On The Streets of El Paso, They’re Feeling the Pinch: Border Crackdown Has Impact on Economy Crime*, WASH. POST, Nov. 14, 1993, at A03 (evidencing the economic impacts illegal immigration regulation has for people working and residing on both sides of the border). Rather than approach the matter of undocumented entry as a human rights issue, the U.S. has escalated and engaged in a reign of “security driven” measures that have not worked and that have instead generated excessive animosity against individuals looking or perceived as looking “foreign.” The highly controversial state-enacted measures that followed arguably conflict with federal law. Although this conflict ultimately yielded to preemption jurisprudence, these measures continue to create divisiveness against people of color generally. *See, e.g.,* NAT’L CONFERENCE OF STATE LEGISLATURES, *STATE OMNIBUS IMMIGRATION LEGISLATION AND LEGAL CHALLENGES*, IMMIGRATION POLICY PROJECT (Aug. 27, 2012), <http://www.ncsl.org/issues-research/immig/omnibus-immigration-legislation.aspx> [hereinafter IMMIGRATION POLICY PROJECT].

Homeland Security law has moreover imposed extraordinary “security” measures at the border and has fractured the property of many local landowners with the construction of a heinous border wall.⁸⁴ Homeland Security has furthermore ignored environmental laws in the construction of the wall, impeding the free movement of indigenous wildlife at the border and potentially threatening the survival of various species.⁸⁵ Curiously, Homeland Security skirted the properties of landowners with political connections while Mexican-descent homeowners and Indigenous property holders have to ask permission of border officials to “visit” their backyards that sit on the other side of the border wall.⁸⁶

In addition to Homeland Security issues, federal agricultural law also directly impacts El Paso County.⁸⁷ The region is a significant agricultural producer and important to the nation’s food production law and policies. Because of its favorable climate and seasons, El Paso exports domestic food products that are essential to the agricultural marketplace.⁸⁸ El Paso’s linkages to international markets, in which women are increasingly employed, also trace their roots through agricultural history.⁸⁹ Due to accelerated growth from

84. IMMIGRATION POLICY PROJECT, *supra* note 83.

85. *See, e.g.*, Petition for Writ of Certiorari *Defenders of Wildlife v. Chertoff*, 554 U.S. 918 (2008).

86. *The United States v. 0.26 Acres of Land, et al.*, Civ. Action No. B-08-351 (2009) (indicating a condemnation and takings of Tamez property sought for border fence purposes); *See also* Petition for Writ of Certiorari, *County of El Paso v. Chertoff*, 129 S.Ct. 2789 (2008); Suzanne Gamboa, *Texas Officials Sue U.S. Over Border Fence*, USA TODAY, May 17, 2008, available at http://usatoday30.usatoday.com/news/nation/2008-05-16-border-fence-suit_N.htm. Another example involves the struggle surrounding retention of community rights over the natural resources of the region since the U.S.-Mexican War. *See Cool, supra* note 72, at 1.

87. The nation’s farm bills legislatively define food production in the United States. *See, e.g.*, RENEE JOHNSON & JIM MONKE, CONG. RESEARCH SERV., RS22131, WHAT IS A FARM BILL? 6 (2012).

88. *See* TEX. STATE HISTORICAL ASS’N, <http://www.tshaonline.org> (last visited Mar. 20, 2013).

89. *El Paso County*, TEX. STATE HISTORICAL ASS’N, (2013), <http://www.tshaonline.org/handbook/online/articles/hce05> (last visited Mar. 20, 2013) (stating that the Rio Grande Valley of El Paso County has been “irrigated since prehistoric time and produces bountiful harvests of cotton, pecans, and alfalfa, and lesser amounts of fruits and vegetables”); Todd Staples, *Texas Livestock Directory*, TEX. DEP’T OF AGRIC. 5, <http://www.texasagriculture.gov/Portals/0/Publications/TDA/Livestock%20Directory.pdf> (last visited Mar. 20, 2013) (showing that animal husbandry is also significant in the region); *2007 Census Agricultural Atlas Maps*, USDA, http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Ag_Atlas_Maps (last visited Mar. 21 2013). The region is also dependent on hand laborers, and retains a workforce also comprised of undocumented workers. Moreover, the region was instrumental when the U.S. legislature adopted the Bracero Program to recruit laborers for agricultural employment in the northern tiers of the nation. The program retains a heinous history of worker maltreatment, including inter alia stolen wages, depressed wage levels and enslaved conditions as well as broken contracts. *See, e.g.*, ERNESTO GALARZA, MERCHANTS OF LABOR:

NAFTA generated industries, cheap labor in the El Paso region remains in demand within the service, agriculture, and transit industries.⁹⁰

NAFTA has since generated contradictions for colonia residents who had previously heard assertions such as: “Border communities have reaped tremendous benefits from trade with Mexico. Under NAFTA these communities stand to gain more.”⁹¹ Conversely, NAFTA has not rendered the “tremendous benefits” promised to border communities.⁹² Notwithstanding low wage laborers’ value to the nation’s food production, these workers continue to suffer as a result of inadequate pay in conjunction with insufficient safe housing.⁹³

In its totality, as scholars have recognized, the conquest of the former Mexican Republic and of Indigenous communities has generated extensive harm to the region. To excavate the “legal” antecedents that caused such injury required direct investigation of the colonias.⁹⁴

THE MEXICO BRACERO STORY, 184-97 (1964) (illustrating the Program’s heinous history of worker maltreatment of stolen wages, depressed wage levels, slavery-like conditions, and broken contracts); ROBERT MARIL, POOREST OF AMERICANS, THE MEXICAN-AMERICANS OF THE LOWER RIO GRANDE OF TEXAS 29 (1989). The United States has enacted extensive legislation to assist agricultural employers such as exceptions to the immigration code in periods of restrictive immigration “reforms” to bar undocumented entry. *See* 8 U.S.C. § 1101 (h) (2012); “*Agricultural Underdogs*,” *supra* note 13, at 42-43 (depicting the consequential economic and health injuries to workers).

90. *See Service Port-El Paso*, U.S. DEP’T OF HOMELAND SEC., <http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/tx/2402.xml> (last accessed Mar. 19, 2013) (illustrating that El Paso is a major point of entry into the U.S. and is crucial for the transportation of agricultural goods and services). The City has three bridges to accommodate international trade and services and comprises a significant “foreign trade zone” for the U.S. *See International Border Ports of Entry*, CITY OF EL PASO, <http://home.elpasotexas.gov/bridges/> (last visited Mar. 20, 2013).

91. DONALD A. MICHIE, THE BORDER TRADE ALLIANCE, SOUTHWEST BORDER INFRASTRUCTURE INITIATIVE, FEDERAL REPORT, THE INSTITUTE FOR MANUFACTURING & MATERIALS MANAGEMENT 89, 91 (1992).

92. TERRAL SMITH, COMMITTEE ON NATURAL RESOURCES, TEXAS HOUSE OF REPRESENTATIVES, 72ND TEXAS LEGISLATURE, INTERIM REPORT 1990, 13 (1990) (“Colonias persist and continue to increase in number because residents, often unable to afford to buy land or home anywhere else purchase property in largely unimproved developments.”).

93. *See, e.g.,* KANDEL, *supra* note 29, at 5 (“[F]armworkers. . . are critical to U.S. agricultural production, especially for labor-intensive agricultural sectors such as fruits and vegetables.”). Women farmworkers confront numerous difficulties while employed in the agricultural industry. *See, e.g.,* HUMAN RIGHTS WATCH, CULTIVATING FEAR 60-62 (2012), http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf; SOUTHERN POVERTY LAW CENTER, INJUSTICE ON OUR PLATES, IMMIGRANT WOMEN IN THE U.S. INDUSTRY 4-5 (2010) (explaining, *inter alia*, the working conditions, sex related violence, health, child defects, and wage theft that women endure in agriculture).

94. The legacy of the U.S.-Mexican War results from not only military defeat but from the extensive dispossession of millions of acres of land belonging to Mexican and Indigenous former owners. *See, e.g.,* PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST, THE UNBROKEN PAST OF THE AMERICAN WEST 343 (1987); U.S. GEN. ACCOUNTING OFFICE, GAO-04-59, THE TREATY OF GUADALUPE HIDALGO FINDINGS AND

A. Professor Larson and the El Paso Colonias

Guided by her concern about low-income housing and the impoverished, Jane sought to examine the colonia developments and to use them as an empirical example in testing the claims of land-use scholars of that period. One particular grouping of “free market proponents” charged that the insufficiency of low to moderate-income housing were among the “consequences of too much regulation.”⁹⁵ Insufficient housing units, accordingly, were not “an indication of market failure that justifies government intervention.”⁹⁶ In support of an anti-regulatory regime, as Jane observed, Professor Randall Filer asserted that “homelessness in New York City could be solved by lifting building and housing codes, as well as zoning, density, and other land use restrictions, in order to permit the poor to buy whatever housing they can afford.”⁹⁷

To support their advocacy of “free market” models, the leading land use theorists of that time also presented Houston, Texas, as a city operating without the regulatory state.⁹⁸ Houston, they broadly declared, did not revert to a “slum-like” state in the absence of zoning laws or other regulations.⁹⁹ Jane cast considerable doubt on these assertions when she pointed to the tools that the city was then employing as its own regulatory structures, including “controls on lot sizes, business placement, and setback requirements.”¹⁰⁰ Still, other theorists argued that less regulation promotes freedom of property.¹⁰¹ For example, Libertarians “resist[ed] governmental control of land use as unwarranted intrusion into the realm of private property.”¹⁰² Jane’s work in the colonias tested this and other similar declarations against land use regulation, for example that “it interferes with the optimal allocation of a scarce resource – physical space for human habitation in densely settled places.”¹⁰³ Zoning laws, which had the purpose of promoting beneficial land use, also led to “exclusionary zoning” with the attendant segregation of “communities along racial and economic lines,” and thereby “further worsening housing problems for the poor.”¹⁰⁴

POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO (2004), available at <http://www.gao.gov/new.items/d0459.pdf> (illustrating one contemporary example of the thousands of disposed acreage and its legacy that remains beyond the war).

95. *Free Markets*, supra note 23, at 230.

96. *Id.* at 230-31.

97. *Id.* at 181 (citing to Randall K. Filer, *Opening The Door to Low-Cost Housing*, CITY J. (1993)).

98. *Free Markets*, supra note 23, at 181.

99. *Id.*

100. *Id.* at 182.

101. *Id.*

102. *Id.* at 180.

103. *Id.*

104. *Free Markets*, supra note 23, at 180.

In contrast to the models described above, Jane considered the relationships between law and the diverse people of color residing in the neglected colonias. Based on direct investigation and empirical evidence, she successfully revealed what transpires in the absence of health, safety, and welfare legislation. Employing a ground-up and multi-disciplinary approach, Jane advanced knowledge within legal scholarship regarding the unique real estate markets that characterized colonias. Based on her knowledge of the Texas example, Jane knew that a great deal of evidence had been omitted from law-and-efficiency models. For example, those who employed Houston as evidence of the success of having no zoning laws ignored the setbacks and other urban planning tools that defined the City's own unique form of land use. As she stated, even though the City did not retain a "planning agency and had no zoning ordinance... a range of other governmental land use regulations, including controls on lot sizes, business placement, and setback requirements" defined Houston's land use approaches.¹⁰⁵ In addition, a relative paucity of regulation in the marginalized regions of the colonias had resulted in grave health and safety dangers for the residents of those regions. It was difficult to reconcile optimistic arguments about positive results that should follow from an absence of regulation with the systemic deficiencies found in the Texas colonias.

Advancing knowledge about the colonias' dire straits, Jane showed how "pure theory" is difficult to reconcile with stubborn facts. As she stated, "Regardless of how intuitively appealing pure theory is, it cannot persuade as facts do, nor can it produce evidence sufficient to make public policy choices about matters so fundamental to individual and social welfare."¹⁰⁶ She underscored the fact that a gap existed between legal theory and praxis when she emphasized, "An attempt to make theory speak to facts, and vice versa, is needed," and further relied on Robert Ellickson's "observation of the 'culture' clash between legal scholars doing interdisciplinary work within economics, and those employing the methods and theories of anthropology, sociology, history, philosophy, or literature."¹⁰⁷ These scholars' failure to contemplate the work of each other, as she stated, impairs "real-world causes, correlations, and outcomes."¹⁰⁸ When legal theory proceeds with considering real-life consequences, the consequences can cause irreparable harm to marginalized groups.¹⁰⁹

105. *Id.* at 182.

106. *Id.* at 229.

107. *Id.*

108. *Id.*

109. State anti-immigrant laws in theory purport to eliminate undocumented presence in the U.S., but the harm outweighs the "theory" specific to the children left behind and the economic interests that employ their parents. *See, e.g.*, James Pinkerton, *Changing Face of Illegal Immigration is Female*, HOUSTON CHRON., June 28, 2008, at A1 (describing a raid involving women with more females employed in "clothing-related industries, restaurants, motels, janitorial services.").

Jane and I knew from prior visits to the region that extensive injury can follow in the absence of land-use restrictions, including the situation that results when the commons disappears into the hands of the smaller group of those holding legal and political authority. As Jane demonstrated, the “unincorporated areas” and the locus of the colonias had “no zoning laws, no subdivision and infrastructure requirements nor government provision of public services.”¹¹⁰ Additionally, no “building or housing codes, no growth controls, and no planning mechanisms” existed in the colonias.¹¹¹ Against the backdrop of the many other deficits in the region, this absence of regulation resulted in neither safe, affordable housing nor greater freedom for property holders in the region.

In her first colonias article, Jane detailed her empirical discoveries and demonstrated the utility of knowledge that emerges from engaging in legal investigations from the ground-up.

B. El Paso Colonias and Causal Linkages

Colonias traverse the geographical border between the United States and Mexico, but inferior housing conditions also exist in other areas throughout Texas.¹¹² Historically, the affliction of low wages throughout the region – a hardship that was at times codified in federal law – coupled with the insufficiency of safe low-income housing, led to the growth of several colonias developments near employers.¹¹³ Federal restraints that blocked agricultural workers from improving their terms and conditions of employment resulted in difficult housing situations for workers who could only earn less than minimum wage levels.¹¹⁴ Thus, farmworkers and the under-employed have historically resided near the agri-industries that employed them. For example, in the 1930s, the Southern California citrus industries – a significant employer of women – paid such low wages that these women were forced to reside in the unannexed colonias of Los Angeles.¹¹⁵

110. *Free Markets*, *supra* note 23, at 182.

111. *Id.*

112. A THUMBNAIL SKETCH, *supra* note 10.

113. *See, e.g.*, *U.S. v. Duro*, 625 F. Supp. 2d 938, 940 (2009) (illustrating mobile home park housing agricultural workers in deplorable conditions).

114. *See* KANDEL, *supra* note 29.

115. Gilbert G. Gonzalez, *Women, Work, and Community in the Mexican Colonias of the Southern California Citrus Belt*, 74 CAL. HIST. 58, 62 (1995). Moreover, the increase of the colonias has been long recognized outside of legal investigations. *See* Andrew G. Wood, *Anticipating the Colonias: Popular Housing in El Paso and Ciudad Juarez, 1890-1923*, 4 BORDER CITIES AND CULTURE 493, 502 (2001) (“...elites in both cities showed little sympathy for the urban poor. Instead of developing measures designed to remedy housing shortages, officials choose either to ignore the problem or to blame residents for the dilapidated state of popular neighborhoods.”).

Notwithstanding its diverse economy, high unemployment and/or underemployment rates have not ceased in the region.¹¹⁶ Low educational rates reflecting the state's earlier segregation and racial policies were also part of the reason that caused many to seek employment in the service, agriculture, construction, and manufacturing industries.¹¹⁷ Transportation, tourism and retail centers are also sources of employment.¹¹⁸ The supply of alternative and safe low-income housing continues to exceed demand across the nation.¹¹⁹ In urban areas, crowded, costly high-density tenement housing that lacks modern conveniences such as private washroom facilities can lead many workers to escape to the colonias.¹²⁰ Because it fails to meet the unrelenting need for housing and has yet to formulate policies to assist those in need of safe affordable housing, El Paso encourages flight into unannexed rural regions.¹²¹ In sum, the unavailability of safe low-income housing, segregation, urban crime, and the absence of municipal habitability standards or sanctions on slumlords have caused many to flee the city.¹²² The city and county's disinclination to improve the human condition within their boundaries accordingly generates the growth of colonias.¹²³

In El Paso, the collapse of the cotton market further accelerated the growth of its county colonias when growers sold their acreage to real estate developers.¹²⁴ The number of colonias remains imprecise, but one study during that time reported approximately 122 colonias with 9,522 dwellings in El Paso County.¹²⁵ Census data, although also imprecise, estimated that 70,000 individuals resided in two major cluster groups of colonias during our research

116. See U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, HOUSEHOLD AND FAMILY CHARACTERISTICS (1992) (illustration that El Paso one of the poorest cities in a major border region); *State and County Quick Facts, El Paso, Texas*, U.S. CENSUS BUREAU, available at quickfacts.census.gov/qfd/states/48/4824000.html (last viewed Mar. 20, 2013) (23.3% listed as "persons below poverty level percent 2007-2011"); Roy Lopez, *El Paso, Texas: The Chamizal Neighborhood*, in THE ENDURING CHALLENGE OF CONCENTRATED POVERTY IN AMERICA 125 (2007), http://www.frbsf.org/cpreport/docs/el_%20paso_tx.pdf ("El Paso, the Southwest's largest border city, is located in the seventh poorest metro region in the nation.").

117. "Agricultural Underdogs," *supra* note 13, at 24.

118. *Id.*

119. *Id.* at 23 (citing interviews with El Paso advocates, and government officials).

120. *Id.* at 30.

121. *Id.* at 31-33.

122. *Id.*

123. One landlord owned a two-story building and rented rooms to laborers, including women and children when the building had only one bathroom per floor and no laundry facilities. The tenants had to wash their clothing by hand in a common open area with one sink. The circumstances were not reconcilable with habitability law. Notes from an El Paso research trip by author (1992) (on file with author).

124. María-Cristina García, *Colonia*, TEX. STATE HISTORICAL ASS'N, <http://www.tshaonline.org/handbook/online/articles/poc03> (last visited Mar. 14, 2013).

125. "Agricultural Underdogs," *supra* note 13, at 31 (citing to interviewees).

trip.¹²⁶ Individuals of Mexican origin dominate the region today, but in the 1980s, Central American immigrants fleeing their war-torn nations also contributed to the region's population growth.¹²⁷ Increases to the population of the region have since also resulted from the onslaught of globalized markets. Neo-liberal policies and the ongoing growth of the agricultural industry propelled yet newer population groups to the region.¹²⁸ The need for cheap, low-cost labor ultimately generated the ongoing loss of the farmlands of the Indigenous in Mexico.¹²⁹ In turn, the Indigenous population groups relocated to places such as the Texas colonias and throughout the Southwest.¹³⁰

The role of developers and their "patently predatory practices" that drew the impoverished to the colonias are also underscored in Jane's earlier article. She also provided evidence of the extent to which law facilitated disparate housing conditions, including the effects of the risky contract-for-deed sales of colonia lots.¹³¹ Although vague promises of forthcoming water and other public utilities were ultimately never honored, this did not dissuade the urban working poor from purchasing colonia lots.¹³² The precarious contract-for-deed sales disallowed colonia residents the corresponding warranties and remedies that extend to "traditional" real estate contracts, leaving them without recourse when they relied on promises of forthcoming water.¹³³

Low transactional costs and fees with very small down payments on lots permitted easy "sales." In the event of a default, developers operating without the restraint of purchaser remedies would force buyers out of their lots and homes so that the property could be sold yet again.¹³⁴ Developers would fail to properly record title to colonia properties, with dire consequences for the buyers of the "sold" lot.¹³⁵ In some instances, developers also failed to maintain their mortgage obligations, which led to the default of real estate loans.¹³⁶

126. Data collection gaps result in incomplete estimates of colonia populations, but one estimate asserts there are 324 colonias housing a population of 77,864. *Map of Colonias, TEX. HEALTH AND HUMAN SERVICES COMM'N* (2009), http://www.hhsc.state.tx.us/hhsc_projects/oba/colonias-maps.shtml.

127. See, e.g., CASA DE PROYECTO LIBERTAD, CENTRAL AMERICAN SETTLEMENT IN SOUTH TEXAS (March 27, 1992) (on file with the author). Fleeing military strife nations has caused many to seek refuge in the United States. James LeMoyne, *Salvadorians Stream to the U.S., Fleeing Poverty and Civil War*, N.Y. TIMES, Apr. 13, 1987, at A1. In the present time, many flee foreign nations as a result of globalization. See, e.g., Ackerman et al., *supra* note 39.

128. "Agricultural Underdogs," *supra* note 13, at 23. See also *Free Markets*, *supra* note 23, at 214-215 (providing tables on census data).

129. "Agricultural Underdogs," *supra* note 13 at 14-15. See also Ackerman et al., *supra* note 39.

130. Ackerman et al., *supra* note 39.

131. *Free Markets*, *supra* note 23, at 208-209.

132. *Id.* at 193-195.

133. *Id.* at 193-95, 208-09.

134. *Id.* at 194.

135. *Id.*

136. *Id.*

Moreover, if colonia property holders did not in fact legally own their property, they were barred from using their homes as capital and from requesting loans to improve their properties.¹³⁷ In sum, this form of real estate relationship provides an example of the broad range of harm that results from deficient and insufficient legislation; these harms are clearly not the product of over-regulated markets.

During that period and until the Texas Attorney General was provided with the legislative authority and jurisdiction to prosecute the developers, deficient legislation in Texas permitted the sale of layouts that conformed generally to a community with streets but without regulations that obligated developers to provide running clean water, drainage, or utilities.¹³⁸ Until the legislature was ultimately forced to adopt new legislation, the Texas Attorney General moreover lacked jurisdiction to bring legal challenges against unscrupulous developers.¹³⁹ Colonias residents were without the legal protection that accompanies property ownership in communities outside of the colonias, where homeowners are enabled to pursue remedial relief when developers fail in their contractual obligations. The type of land use and housing stock found in the colonias highlights the harsh conditions that result when the existing rules negate buyer remedies or support discrimination.

Colonia lot sales varied, but in general housing for low-income buyers occupied somewhere between approximately 50 feet by 100 feet and one-half acre lots. Sales, however, were burdened by the lack of protections extended to buyers in regulated housing markets – protections such as setbacks or zoning regulations. The housing stock ranged from brick ranch-style homes and mobile units to self-help housing constructed from inferior construction materials. Discarded lumber, cereal boxes for walls, and other deficient materials framed innumerable housing structures in the colonias. As Jane's evidence illustrated:

“The best built homes in the *colonias* are small bungalows of two to four rooms, constructed of concrete block. Although such houses look neat from the outside, inside it is not unusual to find no floors, walls, or ceilings. In addition, only half of *colonia* homes in one recent study had indoor toilet facilities. In one-room shacks, walls are frequently built of cardboard or of wood slats covered with plastic sheeting.”¹⁴⁰

As she explained, “[use of] materials scavenged from abandoned buildings, industrial pallets, and used tires, is common.”¹⁴¹ “Families typically

137. *Free Markets*, *supra* note 23, at 240-41.

138. *See id.* at 198-200.

139. *See, e.g.*, *Texas v. Solis*, No. D-1-GV-000030 (Travis Cnty. Dist. Ct. May 18, 2006).

140. *Free Markets*, *supra* note 23 at 191-192.

141. *Id.* at 192.

build their houses with their own labor and that of friends and relatives.”¹⁴² The “empty lots. . .or ones with only a foundation standing” indicated “the owner is waiting to accumulate enough money to begin the next stage of the construction process.”¹⁴³ In some instances the ultimate construction of the house would take “several years or more.”¹⁴⁴ In witnessing the endurance required of colonia residents in order to construct their homes, we also observed their pride of ownership. Many colonias have names, and on some houses, we also observed family names on their front doors.

For a period of time, the water utility board of El Paso provided water to some colonias, but in 1979 the board discontinued supplying water to “new customers outside the city.”¹⁴⁵ Running water, as Jane wrote:

“. . .is rare in the colonias, and water is commonly stored in fifty gallon steel drums and plastic containers that previously stored hazardous or toxic waste. The colonias’ water sources include polluted runoff, contaminated wells, and irrigation canals that are contaminated with sewage and agricultural chemicals.”¹⁴⁶

Without adequate water, improper sewage, and waste disposal, colonia residents remained exposed to yet additional burdens.

Almost “all colonia residents” are, into the present, forced to create their own “private sanitary sewage system” with attendant and dire consequences for the County’s groundwater.¹⁴⁷ Without safe running water, some residents ineffectively constructed disposal systems that deposited raw sewage contamination onto nearby areas. By contrast to sewer and plumbing codes in cities, colonia residents created their own methods for waste disposal. The construction of “open pit cesspools in the back yard, septic tanks, or outhouses” illustrates what transpires when residents are required to engage in self-help open housing markets.

As Jane wrote: “untreated human waste seeps into the soil, eventually reaching the underground water table and contaminating the well water source for *colonia* households.”¹⁴⁸ Although the residents were very resourceful in

142. *Id.*

143. *Id.*

144. “Improvisational housing construction methods are common to colonia homebuilders. Houses may be built, for example, from garage doors recovered from city houses under renovation, which are then hammered onto a simple wooden frame to make walls. Fences may be built from pallets, bedsprings, or stacks of used tires. Roofs may be constructed from more garage doors, sheets of plywood, or planks covered with plastic sheeting. Old carpets and plastic sheets pressed directly into the earth can create a floor, and carpet scraps tacked to the walls may insulate the house for warmth and quiet.” *Id.*

145. García, *supra* note 124.

146. “*Agricultural Underdogs*,” *supra* note 13, at 33.

147. *Free Markets*, *supra* note 23, at 187.

148. *Id.* at 187-188.

facing very difficult circumstances, we also witnessed the unintended consequences of their desperate measures: pollution and unsafe structures that environmental regulations and building and housing codes try to curtail.

“Where waste is not fully contained, it contaminates not only the ground water but also the soil; as residents walk from their yards into their houses, they carry waste-contaminated soil on their feet. The dangers of improvised sewage solutions are exemplified by the home of Juanita Torres Aleman in the El Paraiso *colonia* in Starr County (Rio Grande Valley). An outhouse borders a muddy field behind Aleman’s house. The ground below the outhouse has reached saturation, and Aleman is planning to shift the outhouse several feet away. Her family has dug another hole, which has already become half-filled with filmy yellow water. To make things worse, a neighbor’s outhouse sits just a few feet away.”¹⁴⁹

The absence of health and sanitation legislation, coupled with contaminated sewage disposal, continue to produce dire health consequences in the colonias into the present period.

In her search for primary evidence, Jane reached out for area health records and interviewed area residents. Jane’s research revealed the health consequences for colonia residents, who experienced chronic and environmentally related illnesses including tuberculosis, gastroenteritis, cholera, lead poisoning, diarrhea, and hepatitis.¹⁵⁰ Skin rashes from bathing in polluted water erupt when plumbing and sewage capabilities are not regulated in a housing sector. Under such conditions, additional health hazards such as cholera emerge.¹⁵¹ Open burning of garbage and tires polluted the ambient air quality and produced yet another set of difficult circumstances for colonia residents. Faced with a lack of local health care options, colonia residents confronting ill health resorted to self-help in the region’s markets or sought medical aid in Mexico.

Were any remedies available to those residing in the irregular housing of El Paso? Based on a bottom-up approach freed from the orthodoxies and constraints of the prevailing doctrines of the time, Jane relied on her data and rejected many of the assertions of land use theorists. She, however, did not fall back on a false dichotomy, in which the available solutions were reduced to either/or templates. Drawing on her empirical research, Jane was able to explore a full range of potential remedies for the colonias inside the United States.

149. *Id.* at 188.

150. See *Free Markets*, *supra* note 23, at 188-191. The above conditions continue to plague the region.

151. *Update: Cholera—Western Hemisphere, 1992*, CENTER FOR DISEASE CONTROL, (Sept. 11, 1992), <http://www.cdc.gov/mmwr/preview/mmwrhtml/00017604.htm>.

C. El Paso Colonias and Professor Larson's Remedial Proposals

At all times during our research, we remained cognizant of our class privilege as law professors and did not seek to address colonia issues from any "top-down" positions. In approaching the region from the bottom-up, we sought out local advocates, met with numerous city and county officials, professors, attorneys and a host of individuals concerned with the colonia residents. In her article, Jane discusses the activists and colonias residents who sought governmental assistance:

"...*colonia* residents have mobilized strong, grassroots political and communities organizations, like the El Paso Interfaith Sponsoring Organization (EPISO) and Valley Interfaith. . .both EPISO and Valley Interfaith have been key players in bringing, local, state, and federal political attention to the needs of the Texas *colonias*."¹⁵²

Interviewing so many diverse groups directed Jane to a host of potential legal remedies.

Thus, Jane offered several different kinds of remedies but also advocated a call for action "at all levels of government" to encompass local, state and federal action; the policy interventions that she envisioned also blended in her empirical analysis. Her proposed remedies contemplated "seven interlocking measures" that addressed each legal issue that she had discovered in the colonias.¹⁵³ The measures included actions such as regularizing land title in order to counter the unreliable deed contracts employed in the colonias. She argued for making credit available at market rates to low-income households to permit land purchase, home construction, and home improvement possibilities.¹⁵⁴ Without clear title, land cannot be used to borrow credit from traditional lending institutions. Still other potential remedies included a measure to "adopt policies supporting self-help housing and abandon current 'no-growth' policies."¹⁵⁵ The drawbacks of limited government in El Paso inspired a proposed remedy to delegate general ordinance-making powers to counties. It followed that the County could then "enact minimal but appropriate land use regulations" in the colonias for "both. . .new and existing housing."¹⁵⁶ The trilogy of local, state, and federal involvement should "mandate extension of municipal water and sewer service" to unincorporated regions in the County and finally to "extend the franchise to local government elections to noncitizen permanent."¹⁵⁷ Her proposals, as she declared, "intended to be adopted as a

152. *Free Markets*, *supra* note 23, at 197.

153. *Id.* at 238-239.

154. *Id.* at 238.

155. *Id.*

156. *Id.* at 239.

157. *Id.*

whole.”¹⁵⁸ Specifically, “each of the seven measures requires all of the others to keep the balance of cost increases and quality tradeoffs intact.”¹⁵⁹ Finally, she asserted that “taken together, the proposal states a coherent agenda focused on economic and political empowerment of poor families and workers at the border.”¹⁶⁰

When Jane presented the unique set of factual circumstances that characterize the colonias in conjunction with the negative role of law in expediting sales without buyer remedies (along with local government authorities’ failure to redress the situation), her approach provided a new context for analyzing these kinds of problems. Specifically, it opened a window within law to examine the real-life issues that impact the human condition at the border, and even in to the present, continues to have power in demonstrating the value of new legal approaches.¹⁶¹

The next section addresses yet another area that demands the attention of concerned scholars and activists. It emphasizes the continuing relevancy of empirical and multi-disciplinary research.

III. WOMEN AND THE COLONIAS

*“To the extent anyone is coming to their aid, it’s mainly female activists. . . .”*¹⁶²

Jane’s article articulated and promoted a legal realist theoretical model that looked at a set of facts from yet another direction. The colonias are a direct consequence of the prevailing ruling order in the region that disenfranchised people of color. When this situation is examined solely through the tools of standard legal investigations, the unique historical factors and the role of law in the local region disappear. For example, through mob rule and extra-legal actions, Texas “law” permitted the lynching of both Black and Brown people. The State, moreover, vigorously protected its Jim Crow laws that structurally impacted all people of color.¹⁶³ In both instances, the combined experiences of each group cannot and should not be consigned to a mere historical footnote. Jane was aware that each group whose situation and

158. *Free Markets*, *supra* note 23, at 239.

159. *Id.*

160. *Id.*

161. Jane’s contribution to the New Legal Realism, Empirical Law and Society Project followed the first New Legal Realism Conference at the University of Wisconsin in 2004, available at <http://www.newlegalrealism.org>.

162. See, e.g., Laura Paskus, *Women Build Groundwork in Makeshift ‘Colonias*, WOMENSENEWS.ORG (Aug. 23, 2007), <http://womensenews.org/story/the-world/070823/women-build-groundwork-makeshift-colonias#.UTkzXzBwqRk> (citing to Esperanza ‘Espy’ Holguin).

163. See George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1993-1994).

history had been erased by the dominant legal formalist paradigm must be studied to preclude the promulgation of reified falsehoods that hinder justice for all marginalized groups. Against such a backdrop, Jane contributed immeasurably to generating knowledge about the colonias and to testing land use norms based on incomplete and misleading information.

Since the time of our travels, the colonias have received a measure of attention on both the state and federal levels. Beyond the results of our own research projects, a growing number of extensive and thorough reports have appeared with much of the attention resulting from the advocacy and efforts of area residents, many of whom were women.¹⁶⁴ And this time, government officials responded with some urgency but with inconsistent results.¹⁶⁵ Federal reports gradually created the means to provide a measure of water in some colonias. Additional attention from the United States Department of Housing and Urban Development (“HUD”) provided further information on the colonias. In some instances HUD offered housing grants to

“ . . . any identifiable community in the U.S.-Mexico border regions of Arizona, California, New Mexico, and Texas that is determined to be a colonia on the basis of objective criteria, including lack of a potable water supply, inadequate sewage systems, and a shortage of decent, safe, and sanitary housing.”¹⁶⁶

The HUD website, along with additional potential aid from federal agencies such as the Environmental Protection Agency and the United States Department of Agriculture, also directs readers to colonia information at the state level.¹⁶⁷ A number of websites further highlight the human reality of colonia residents.¹⁶⁸ Texas, which once lacked statutory jurisdiction to prosecute faulty colonia sales, has since brought legal challenges against developers who exploited the need for low-income housing opportunities. The population in some El Paso colonias has also declined, but the Texas Secretary

164. See, e.g., Paskus, *supra* note 162; REBECCA DOLHINOW, *A JUMBLE OF NEEDS, WOMEN’S ACTIVISM AND NEOLIBERALISM IN THE COLONIAS OF THE SOUTHWEST* (2010).

165. The Texas Secretary of State retains a colonias program and lists them by county. *Directory of Colonias Located in Texas*, TEX. SEC’Y OF STATE, <http://www.sos.state.tx.us/border/colonias/reg-colonias/index.shtml> (last visited March 14, 2013).

166. *Community Development Block Grant - Colonias*, DEPT. OF HOUSING AND URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/colonias/cdbgcolonias (last visited March 14, 2013).

167. *Id.*

168. See, e.g., *Colonias Initiatives (2003 – 2007)*, STATE ENERGY CONSERVATION OFFICE, <http://seco.cpa.state.tx.us/colonias/> (last visited March 12, 2013) (describing a number of community projects and initiatives between SECO and local universities).

of State has nonetheless generated a seven-page listing of the *recognized* colonias remaining in the State.¹⁶⁹

Also since that time, legal investigations of intersectionality and of the fact-based reality of outsiders marginalized by law has developed with great force.¹⁷⁰ Scholars pursuing such novel agendas are finding safe harbor in some legal institutions and their scholarship is creating even more new forms of knowledge on various issues drawing on innovative paradigms, including critical legal feminism, queer legal studies, and Latina/o critical legal theory.¹⁷¹ By contrast with the past, law journals are more willing to publish research that focuses on subordination on the basis of gender, ethnicity, sexual orientation, race, class, and other inequities.¹⁷² The landscape of legal inquiry includes an increasing number of scholars who organize their research trajectories to include the broad spectrum of law and inequality that has resulted in harm to communities and to the disenfranchised.¹⁷³ Some corners of legal education and a few course books have also followed in exposing the real-life consequences that result when the law chooses to ignore vast segments of society and diverse cultures.

At the border, women of Mexican descent and other Latinas have also not accepted their circumstances in the colonias without protest. Whether in the colonias of New Mexico, Texas, or California, women engage in grassroots activism to improve their plight in the colonias.¹⁷⁴ To protest their difficult

169. For more information, see *Colonia Communities*, ATT'Y GEN. OF TEX., <http://maps.oag.state.tx.us> (last visited March 13, 2013) (showing a map and geographic locations of colonias by county).

170. See, e.g., Berta Hernandez-Truyol, *The Gender Bend: Culture, Sex and Sexuality-A LatCritical Human Rights Map of Latina/o Border Crossings*, 83 IND. L.J. 1283 (2008); Berta Hernandez-Truyol & Jane E. Larson, *Sexual Labor and Human Rights*, 37 COLUMBIA HUMAN RIGHTS L. REV. 391 (2006).

171. See, e.g., *LatCrit: A Conceptual Overview*, LAT CRIT, <http://www.lat.crit.org/content/about/conceptual-overview/> (last visited March 16, 2013).

172. See, e.g., *O'Brien Center for Scholarly Publications*, UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, <http://journals.uchastings.edu/journals/websites/race-poverty/index.php> (last visited March 11, 2013) (explaining the Hasting Race and Poverty Law Journal was created "to address the vacuum in legal scholarship pertaining to issues of race and poverty" and that its mission is to promote and inspire "discourse within the legal academy regarding issues of race, social justice, and the law"); *About*, UNIVERSITY OF CALIFORNIA, BERKELEY, <http://genderlawjustice.berkeley.edu/about/> (last visited March 11, 2013) (stating the Berkeley Journal of Gender, Law & Justice was created in 1984 to preserve the voices of diversity and maintain a commitment to social change); *Chicana/o Latina/o Law Review*, UCLA LAW, <http://orgs.law.ucla.edu/cllr/Pages/Default.aspx> (last visited March 11, 2013) (stating this Law Review started thirty years ago).

173. See generally, *About LatCrit*, LATINA & LATINO CRITICAL LEGAL THEORY, INC., <http://www.latcrit.org/index/> (last visited March 10, 2013) (explaining it was organized as a non-profit in 1992, and listing its portfolio of projects that span law review publications, a North-South Exchange, and other programs to promote the research and potential transformation of communities of color that commonly were excluded from legal studies).

174. See, e.g., Paskus, *supra* note 162; DOLHINOW, *supra* note 164, at 142.

working conditions, border women and agricultural workers have consistently agitated for reform and initiated unions.¹⁷⁵ They have also protested repressive governmental regimes and promoted engagement in the political sphere.¹⁷⁶ In several instances, women have formed nongovernmental organizations seeking reforms in the colonias.¹⁷⁷

As in the past, women have also retained strong linkages with their communities. Women in border regions and throughout the United States for example retain a history of forming mutualistas (mutual aid) societies to assist their families and others in the communities during great times of need.¹⁷⁸ Their organizing for change is also reflected in the political realm in several ways. In Texas, for example, women serve as ombudspersons with the State Colonia Initiatives Program, including its director Enriqueta “Keta” Caballero. Border women in the colonias have also reported “satisfaction from working together,” and their self-sufficiency is recognized as a survival tactic in the colonias.¹⁷⁹

Today, some women are also becoming owners of small farms and are developing enterprises within the informal economy.¹⁸⁰ Women-directed litigation against discriminatory USDA regulations has succeeded to some extent.¹⁸¹ Recently, the USDA agreed to a settlement specific to women and

175. See, e.g., Venise Wagner, *New Union Set to Unite Ag Workers Along the Border*, THE BRAWLEY NEWS, Jan. 17, 1990 at A5 (interview of Ventura Gutierrez of the United Packing House Workers in California); *Morristown: In the Air and Sun* (2007) (documentary describing Mexican workers account of globalization in their home nation and their unionization struggle in Tennessee).

176. See generally, Clara Lomas, *Transborder Discourse: The Articulation of Gender in the Borderlands in the Early Twentieth Century*, in 24 FRONTIERS: A J. OF WOMEN STUDIES 51 (2003) (arguing that women’s work as activists has often been ignored).

177. DOLHINOW, *supra* note 164, at 141 (noting the growth of nongovernmental organizations that are run by women in the colonias).

178. See Kent Paterson, *One Million Immigrants Create Controversial Border Settlements*, NORTH GALVESTON COUNTY WEEKLY NEWS, Sept. 4 – 10, 1997 (discussing when colonia resident, Lorenza Dorado, from the Colonias Development Council in New Mexico helped bring in water to a nearby colonias with assistance also from other public agencies); Naxiely Lopez, *Health Advocates Celebrate Headquarters Opening*, THE MONITOR MCALLEN, TEXAS, June 12, 2010 (stating that South Texas Promotoros Association “comprised mostly of women, reaches out to the underserved in the colonias”).

179. See Georgianna Vaccaro & Ann Lessem, *Mexican Women Confront Mainstream Policy: Voices from the Colonias Address Family Self-Sufficiency*, in 2 ADVANCING WOMEN IN LEADERSHIP JOURNAL (Winter 1999), available at www.advancingwomen.com/awl/winter99/vaccaro.html.

180. See, e.g., Barbara J. Robles, *Latina Microenterprise and the U.S.-Mexico Border Economy*, in 3 THE ESTEY CENTRE J. OF INT’L LAW AND TRADE POLICY 307 - 327 (2002), available at <http://www.community-wealth.org/sites/clone.community-wealth.org/files/downloads/article-robles.pdf>.

181. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-1124T, DEPARTMENT OF AGRICULTURE: HISPANIC AND OTHER MINORITY FARMERS WOULD BENEFIT FROM IMPROVEMENTS IN THE OPERATIONS OF CIVIL RIGHTS PROGRAM (2002) (demonstrating that farm loan applications for Hispanic farmers longer than for non-Hispanic farmers and complaint cycles and impediments); *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

Hispanic farmers for heinous discrimination and faulty loan procedures.¹⁸² Without USDA loans, many of them could not procure the necessary seeds or equipment to operate their farms, forcing some farms to go bankrupt. In contrast, members of the dominant population had greater access to loans and in some instances would purchase the defaulted property.¹⁸³

Yet many smaller farm operations do not qualify for the financial subsidies permitted to larger, more industrial farms.¹⁸⁴ As owner-operators, the smaller farmers are at elevated risk of forfeiture resulting from the lack of federal credit otherwise available to agribusiness.¹⁸⁵ Until the law of credit within the USDA and its eligibility hurdles are changed, the smaller farms held by women face uphill survival battles.¹⁸⁶

Notwithstanding the above and at this juncture, the question remains whether colonia research from the bottom-up is sustainable today. Despite many gains, there remains an urgent need for further empirical research and for fact-based, multi-disciplinary investigations to advance theories and models that can help to solve injustices against women and children, to improve the general human condition for marginalized groups. Women and their labor in the *maquiladoras*, service industry, and agricultural sector are significant to the border economy. Low wage levels and the absence of safe and affordable housing present formidable challenges today as they did during the time of Jane's and my research trips.

For example, while some water is filtering into the colonias, "[e]very day, families who live in remote areas. . . are forced to spend their last pennies to pay for it."¹⁸⁷ Colonia resident Suki Perez, for example, emphasizes, "area residents have been asking for . . . services for 25 years."¹⁸⁸ As was also revealed in Professor Larson's article, Suki Perez further reveals what transpires from unsafe water: "the well water we have is not suitable to drink or

182. U.S. DEP'T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE: A REPORT BY THE CIVIL RIGHTS ACTION TEAM 64 – 66 (Feb. 1997) [hereinafter CRAT]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-755T, U.S. DEP'T OF AGRIC.: MANAGEMENT OF CIVIL RIGHTS EFFORTS CONTINUES TO BE DEFICIENT DESPITE YEARS OF ATTENTION (May 14, 2008).

183. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-755T, U.S. DEP'T OF AGRIC.: MANAGEMENT OF CIVIL RIGHTS EFFORTS CONTINUES TO BE DEFICIENT DESPITE YEARS OF ATTENTION (May 14, 2008); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-942, U.S. DEP'T OF AGRIC.: IMPROVEMENTS IN THE OPERATIONS OF THE CIVIL RIGHTS PROGRAM WOULD BENEFIT HISPANIC AND OTHER MINORITY FARMERS (Sept. 2002).

184. CRAT, *supra* note 182, at 8.

185. *Id.*

186. The USDA has retained discriminatory policies and practices from the past that forced the forfeiture of the family farms of Blacks, Chicanas/os, and Native Americans. See, e.g., CRAT, *supra* note 182, at 16, 27.

187. Aileen B. Flores, *Lingering Water Needs of Colonias Discussed at UTEP*, EL PASO TIMES (Aug. 18, 2011), http://www.elpasotimes.com/news/ci_18704924.

188. *Id.*

cook. It smells bad, and it dries our skin and itches after bathing.”¹⁸⁹ Perez’s visit – along with the help of local community members and the Border Interfaith in El Paso – persuaded government agencies to provide greater access to water into the region.¹⁹⁰ Nonetheless, access to clean water still remains an issue for colonias throughout the state.

Gender issues in the colonias are centered on health care, race, and economic deprivation. Health providers and researchers are now beginning to understand the distinctions in terms of health needs that exist among rural women, urban women, and women who live in the colonias.¹⁹¹ Careful examination of these differences helps to illuminate how inadequate and untargeted health care affects “all categories of women’s health, including obstetric and gynecologic outcomes and access to care.”¹⁹² Minority women living in rural areas may face even greater risks based on their combined characteristics. The location of the colonias in desert areas, lack of transportation, and distance to health care providers present further challenges for colonia residents who need to access health care. When faced with illness, many of them seek health care in Mexico where controls over medicine are not as rigidly applied as in the United States. The daily stress of residing in the colonias presents yet another health care issue.

Colonia women often confront additional health hazards where they reside. Colonia women living adjacent to landfills containing hazardous materials witness the birth of their children afflicted with health defects or cancers. Numerous instances of birth defects and cancer clusters have emerged in farmworker colonias adjacent to agricultural fields.¹⁹³ Emerging cancer clusters raise critical questions about the environmental quality of the nearby dumpsites and agricultural fields that use toxic chemicals on their fruits and vegetables.¹⁹⁴ Notwithstanding their employment in agriculture, many women

189. *Id.*

190. *Id.*

191. See *Health Disparities for Rural Women*, 113 *OBSTETRICS & GYNECOLOGY* 762-765 (March 2009).

192. *Id.* at 762.

193. See, e.g., Roberto Suro, *Rash of Brain Defects in Newborns Disturbs Border City in Texas*, N.Y. TIMES (May 31, 1992), <http://www.nytimes.com/1992/05/31/us/rash-of-brain-defects-in-newborns-disturbs-border-city-in-texas.html>; John M. McClintock, *Cluster of Babies in Texas Born Without Brains, Pollution Suspected as Cause of Defect*, THE BALTIMORE SUN (Jan. 19, 1992), http://articles.baltimoresun.com/1992-01-19/news/1992019003_1_matamoros-brownsville-texas-born; Nancy San Martin, *Children of the Fields, Birth Defects Occur At An Alarming Rate Among Guatemalan Migrant Workers, The Question is Why*, SUN SENTINEL (July 14, 1996), http://articles.sun-sentinel.com/1996-07-14/news/9607130153_1_neural-tube-defects-birth-defects-guatemalan.

194. See, e.g., Thomas A. Arcury et al., *Pesticide Safety Among Farmworkers: Perceived Risk and Perceived Control as Factors Reflecting Environmental Justice*, 110 *ENVIRONMENTAL HEALTH PERSPECTIVES* 233 (April 2002); Gloria A. Coronado et al., *Agricultural Task and Exposure to Organophosphate Pesticides Among Farmworkers*, 112 *ENVIRONMENTAL HEALTH PERSPECTIVES* 142 (Feb. 2004).

and their families in the colonias also experience hunger, malnutrition, and ill health.¹⁹⁵

This backdrop illustrates that a bottom-up approach is still needed to study the colonias. Despite changes in the colonias and local sub-economies, the housing needs of the impoverished and working poor continue in all of their complexities, to create serious challenges. A focus on the bottom reveals that the cheap labor of women and service providers poses an enduring problem particularly when coupled with the lack of safe affordable housing: this focus reveals how existing legal mechanisms maintain disparities and indeed inefficiencies. Agricultural officials often assert that without farmworkers, the nation's growers and producers would risk financial ruin. The officials however continue to ignore the conditions surrounding the farmworkers, including their linkages to the colonias.¹⁹⁶ And to the detriment of women and their families in the colonias, the desperate need for adequate safe housing is rendered invisible in federal farm bills that fail to provide incentives that could discourage harmful housing circumstances.

Funding and bureaucratic logjams hinder access to yet other potential remedies for colonia residents.¹⁹⁷ So long as federal laws fail to legislate inclusion in the Fair Labor Standards Act, or link the production of food to the sexual harassment and abuse of women in the fields, or bar human trafficking in agriculture,¹⁹⁸ or disallow and inspect for child labor in the fields, or allow agricultural law benefits to growers who harm their workers including on the basis of gender, or expedite the sale of dangerous pesticides, much work remains to be done.

IV. CONTINUING BROADER STRUGGLES IN THE COLONIAS

Since Jane's and my travels to the colonias, violence in Ciudad Juárez and the fluid nature of the border are forcing ongoing change to the region. Both nations are witnessing further environmental degradation resulting from United States' "laws" and policies that burden border communities. The newly

195. Wesley R. Dean et al., *Cultural Repertoires and Food-Related Household Technology Within Colonias Households Under Conditions of Material Hardship*, INTERNATIONAL J. FOR EQUITY IN HEALTH (2012) (discussing the high incidence of food insecurity and diet-related chronic disease Mexican-American women residing in the colonias experience).

196. See KANDEL, *supra* note 29.

197. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-126, RURAL WATER INFRASTRUCTURE, IMPROVED COORDINATION AND FUNDING PROCESSES COULD ENHANCE FEDERAL EFFORTS TO MEET NEEDS IN THE U.S.-MEXICO BORDER REGION (Dec. 2009) (identifying the governmental agencies, grants and bureaucratic complexities).

198. See Michael J. Pisani & David W. Yoskowitz, *The Maid Trade: Cross-Border Work in South Texas*, 83 SOCIAL SCIENCE Q. 568 (2002) (for a discussion on a "informal" marketplace for domestic servants in a border community in South Texas and the instance of an enslaved twelve year old); *Farms Charged With Human Trafficking*, N.Y. TIMES, April 20, 2011, at A15 (stating that employers confiscated passports of workers if they complained of their conditions).

implemented and alarming border wall erected at tremendous expense to the nation and constructed under a false premise of terrorists entering the nation is also harming wildlife and threatening their extinction.¹⁹⁹

After our earlier trips to Texas and the colonias, neither Jane nor I discarded our concern and regard for the colonias. In the last few months before her untimely passing, I called Jane to join me in a property battle involving Professor Eloisa Tamez's litigation against Homeland Security in the construction of the fence that divides Texas from Mexico.²⁰⁰ I was hoping she would join me in working with Professor Tamez and the Apache Lujan band to protect land grant property whose genealogy dates back to the time of Spanish domination, as well as to protect the remaining native lands located in the Brownsville, Texas region. Professor Tamez's battle is grounded on a family land grant dating back to the 1700s, but ongoing federal encroachment is diminishing the size of her property and attendant ownership rights.

Due to the perceived threat of forthcoming terrorist activities, landowners have witnessed the forced division of their property, with the border fence actually cleaving their backyards. For example, Professor Tamez is forced to travel to nearby border patrol sites to gain "permission" to cross the fence and visit her backyard to access her medicinal herbs.²⁰¹ With each request she is questioned as to the purpose of her trips to the back region of her own lot that is now on the other side of the border fence and on United States soil. In sum, new issues have arisen that also mandate further study and new theories are needed to thwart the often selfish intent of political actors.

Now, more than ever, advances in legal education—including consideration of the histories of women and broader communities of color—are being challenged. The pendulum reflecting the neo-liberalism of the present is swinging back to that time when the status quo rained unrestrained harm on the marginalized that dared to seek change in the law. The examples are numerous, as in the instance of Chicana histories under siege at Michigan State University where university actions led to the fall of the Chicana/o Program and expedited the loss of Chicana/o faculty.²⁰² The children of Arizona moreover are seeing their books, whether Chicana/o history, or books written

199. Press Release, The University of Texas At Austin, Border Fences Pose Threats to Wildlife on U.S.-Mexico Border, Study Shows (July 12, 2011), *available at* http://utexas.edu/news/2011/07/12/border_wildlife.

200. For a listing of the agencies that maintain the border, *see Tactical Infrastructure/Border Fence*, CUSTOMS AND BORDER PROTECTION, http://www.cbp.gov/xp/cgov/border_security/ti/ (last visited March 15, 2013).

201. *United States v. 1.04 Acres of Land*, 538 F. Supp. 2d 995 (S.D. Tex. 2008) (involving Professor Tamez's property). Notes on Professor Tamez's experience on file with author.

202. *See Arizona Ethnic Studies Network-Banned Books*, ARIZONA ETHNIC STUDIES, <http://azethnicstudies.com/banned-books> (last accessed March 14, 2013) (list of banned books which include Chicana/o history books for youth). *See generally* U.S. COMMISSION ON CIVIL RIGHTS, *THE EXCLUDED STUDENT, EDUCATIONAL PRACTICES AFFECTING MEXICAN AMERICANS IN THE SOUTHWEST* (May 1972).

by Elizabeth Martinez and cherished Native American authors, removed from their classrooms. Access to broader based knowledge, which for a time was available to the children in Arizona and other places, is being limited, denying full accounts of histories unique to people of color.²⁰³ Much work will be required if we are to avoid a return to the past when historical “amnesia” purposely omitted the nation’s diverse histories.

Ultimately, Professor Larson’s colonia articles demonstrate the value of investigative and empirically directed research, as well as the vitality of a New Legal Realism. As I have explained, women and their children in rural and urban communities continue to confront a host of challenges to their well-being and present needs. If legal scholarship were to take their plight seriously, legal researchers would have to question the role of law in masking such conditions within the geographical boundaries of the United States.²⁰⁴ If these consequences were included in assessments of law at the border, the result would be a very strong argument in favor of removing the legal hurdles that prevent border women from improving the conditions they confront, as Jane also argued in her work.

Jane’s approach further responds to the common criticism that legal scholars limit their research to each other and fail the public and communities in distress.²⁰⁵ Concerned about the impoverishment of residents in inferior infrastructure communities in the colonias, we explored flawed trailer parks and other unsafe conditions that might provide potential answers as to how best to address the deprivations resulting from the lawless free markets forced upon residents of the colonias. Following that first trip, we also conceptualized a series of additional trips to the colonias. Thereafter, colonia research became highly politicized; not wishing to impose our belief systems and worldviews, which we understood could possibly be construed as “top-down,” we took a “let’s see what happens to the local community” approach before we committed to our joint return to the region. Jane and I were extremely concerned that we not intrude on the residents but that the residents tell us their circumstances and the directions they sought.

When Jane and I spoke of our latest interests, even with her health challenges, we enjoyed great bursts of laughter, shock, and dismay over how we had attempted to do so much with our joint ventures. Notwithstanding her exciting enthusiasm about our projects, we also knew there might be costs to

203. See Gregory Rodriguez, *Why Arizona Banned Ethnic Studies*, L.A. TIMES (Feb. 20, 2012), <http://articles.latimes.com/2012/feb/20/opinion/la-oe-rodriguez-ethnic-studies-20120220>.

204. Jaime Chahin, *Las Colonias: Children of the Colonias*, W.K. KELLOGG FOUNDATION (1999), available at <https://digital.library.txstate.edu/bitstream/handle/10877/4107/Las%20Colonias.pdf?sequence=3>.

205. *Larson on the Colonias Projects*, NEW LEGAL REALISM EMPIRICAL LAW AND SOCIETY, <http://www.newlegalrealism.org/readings/AddreadLarson.html>.

bear.²⁰⁶ Many in the academy deemed our approach, for example, inconsequential. Newly emerging scholars attempting to research and engage with outsiders also endured extensive criticism from those who supported the status quo.²⁰⁷ Within the hierarchy of legal institutions, however, neither of us had any idea what Jane's trajectory would be when she returned to her academic institution seeking tenure, based in part on her colonia research. Her tenure battle attracted national attention, with many appalled at what she endured.²⁰⁸

Jane eventually accepted an offer at a different law school; her former school therefore failed to benefit from her highly regarded scholarship on the colonias at the intersection of empirical research and the jurisprudence of property. Her insights, which had also expanded the theoretical constraints of gender law, happily benefited another institution as well as her entire profession.

Jane was also an effective teacher who did not hoard her talent but shared it with so many others. She made invaluable contributions to the profession, the academy, and to our communities. She helped create and establish New Legal Realism at the University of Wisconsin, assisted with conferences at her new institution such as the Flourishing Scholar Series, and contributed to the efforts of the LatCrit community in its quest for justice for marginalized communities.²⁰⁹ Her joint-authorship and her contributions to the legal academy still yield benefits to so many.²¹⁰

206. See, e.g., Heather Gold, *I Remember My Mentor, Prof. Jane E. Larson* (2012), <http://www.vimeo.com/34415858>; GUTIERREZ Y MUHS ET AL., *supra* note 56.

207. I however did not receive the kind of harsh criticism that Jane received at her institution at my own school, Northern Illinois University, and to the contrary was highly encouraged to continue writing in any trajectory that engaged the law.

208. While the faculty at Jane's home law school (Northwestern) voted for tenure, the university administration of that particular institution—in a move that many felt hindered the vitality of that school from a multi-disciplinary approach—rejected the faculty's recommendation. The criticism was intense and at one point there were charges of unfair and unusual procedures employed during Jane's tenure process. She did not seek redress because she was aware of the high risk and costs of litigation in these sorts of cases, but happily repaired to an institution better suited to her kind of legal scholarship, with a long and deep tradition of empirical research on law.

209. See also Jane E. Larson, *Class, Economics, and Social Rights*, 54 RUTGERS L. REV. 831 (2001-2002) (where Professor Larson discusses the themes of LatCrit through the lens of class broadly conceived).

210. See, e.g., Peter M. Ward, Flavio de Souza, Cecilia Giusti & Jane E. Larson, *El Titulo En La Mano: The Impact of Titling Programs on Low-Income Housing in Texas Colonias*, in 36 LAW & SOC. INQUIRY 1 (2011) (showing the impact of local programs that assist low income homeowners in obtaining clear title to their property); LINDA HIRSHMAN & JANE LARSON, *HARD BARGAINS, THE POLITICS OF SEX* (1998) (examining the regulation of heterosexual relationships).

CONCLUSION

Field research and multi-disciplinary studies are firmly established in areas outside of law and highly valued whether in science, health, the humanities, or innumerable social sciences areas. In general, these kinds of studies can demonstrate the direct impact that vague and arbitrary rules or twisted administrative regimes can have in furthering injustice and inequality – and at times, this can actually provide practical benefits of a kind many wish to see following from law professors’ research. During an earlier time, legal knowledge was highly resistant to the data obtained through field research. Adherence to the limitations of the then-prevailing theories permitted law to rely on abstractions based in dominant normative systems, so that both law and legal theory were based in misunderstandings and misrepresentations of the discrimination facing women and subordinated communities of color. And despite the many theoretical and empirical contributions that have shed light on a quite different reality since then, at the present time, an upsurge in theoretical models based in neo-liberalism models is fostering a return to the narrowed and misleading legal views of the past. Heightened scrutiny of this unfortunate situation will be required of the legal profession and the legal academy in order to repair the ongoing damage these assumptions and models are causing to legal ethics, and to ensure that law can continue in a positive, informed direction so as to serve our communities.

Although Jane and I remained committed to working together, time ran out for us. Even now as I reflect on her work, as well as on her concern for women, children, and the impoverished, I am painfully reminded of the harmful consequences of those commitments that Jane bore during her lifetime with great dignity. Her approach directly conflicted with that of ideologues who resisted engagement about remedying unsafe housing circumstances and testing imprecise models against the stubborn facts plaguing colonias developments.

My immediate response to Jane’s passing caused me to write a blog post that in protest against her detractors declared, as I do now, this: “If she could hear me now I would shout to the moon and back: Juanita you were right.” The increasing gap between the poor and the wealthy, as well as the lack of safe housing for the rural and urban poor, are unconscionable. The zeitgeist of the times needs, now more than ever, enlightened scholars to tackle the new hardship that neo-liberalism is imposing on impoverished women and their children, now more than ever. Mil gracias querida amiga for your greatly appreciated work when legal “theories” elected to ignore injury-inducing circumstances. Descansa in paz.