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Joaquin Avila Memorial Symposium Introduction

An Instrument at the Forefront of Social Change: The Legacy of Joaquin G. Avila

Steven W. Bender*

“We’re an instrument at the forefront of social change”

Joaquin G. Avila¹

“Power isn’t just handed over. You have to take it.”

Joaquin G. Avila²

I. INTRODUCTION

Joaquin was my colleague at Seattle University School of Law, but with his wealth of experience and his desire to share that hard-won knowledge, he seemed more like my teacher. When Joaquin first joined the Seattle law faculty in 2004, I was already a full professor in Oregon and fully aware of

* Professor and Associate Dean for Planning and Strategic Initiatives, Seattle University School of Law. I’m grateful for the passion and hard work of the editors and staff of the *Seattle Journal for Social Justice* who planned the Joaquin Avila Memorial Symposium. I hope they learned as much as I did about the spirit and dedication of this warrior for voting rights who was taken too soon by the ravages of life and struggle.

¹ *Mexican-American Fund Fights for Hispanics Within the System*, ASSOC. PRESS (June 12, 1983).

² Marcos Breton, *Before He Died Last Week, This Man Changed How We Vote in California. Did You Know Him?*, SACRAMENTO BEE (Mar. 18, 2018), <https://www.sacbee.com/news/local/news-columns-blogs/marcos-breton/article205223534.html>. In an interview, Joaquin explained the reason for his all-consuming involvement in securing political access was because “the political process . . . is where a lot of the power is, and we need to get that power so we can start improving our own [Latina/o] community in terms of education, economics, and so on.” EARL SHORRIS, *LATINOS: A BIOGRAPHY OF THE PEOPLE* 460 (1992).

the gauntlet that academia imposes on those who enter full-time teaching later in their careers. I sought to mentor Joaquin in the challenges and contradictions of an academic career for someone so steeped in ongoing, and often-draining, advocacy. Joaquin and I ended up co-authoring a book in 2008, *Everyday Law for Latino/as*.³ In our conversations about the book project, he taught me much about voting rights and their importance to the advancement of the Latina/o community. When I joined the Seattle faculty three years after the book's publication, in part to work more closely with Joaquin, he wasn't able to connect immediately for lunch. He was busy with a redistricting trial in Texas,⁴ and a Voting Rights Act⁵ trial in Washington D.C. immediately following that.⁶ Sadly, a few weeks after the start of my first semester as his colleague, Joaquin suffered a stroke that nearly killed him.

I visited Joaquin often after his stroke, while he underwent physical therapy, and he hoped to someday return to the classroom and the courtroom. Rather than dwell on his weakened condition, Joaquin spent most of our time together on those visits explaining his theories and strategies for social change to ensure equal access to the political process. Punctuated by his unrequited pleas for a smuggled milkshake or other sugary indulgences despite his diabetes, we spent hours during his long convalescence speaking about his ideas and about how the law school and I might help realize his vision. Joaquin never fully recovered physically from

³ STEVEN W. BENDER, RAQUEL ALDANA, GILBERT PAUL CARRASCO, AND JOAQUIN G. AVILA, *EVERYDAY LAW FOR LATINO/AS* (2008).

⁴ Earlier, Joaquin had called Texas "our Mississippi," meaning that what Mississippi had done to blacks in denying their voting rights was how Texas was treating Latina/o people. See Ellie Silverman, *Obituaries: Joaquin Avila, Civil Rights Lawyer Involved in Significant Court Victories for Hispanics, Dies at 69*, WASH. POST. (Mar. 13, 2018), https://www.washingtonpost.com/local/obituaries/joaquin-avila-civil-rights-lawyer-involved-in-significant-court-victories-for-hispanics-dies-at-69/2018/03/13/7db6d532-26c7-11e8-874b-d517e912f125_story.html [<https://perma.cc/2U8G-KA7Z>].

⁵ Now codified at 52 U.S.C.A. §§ 10301 et seq.

⁶ For background on redistricting and the Voting Rights Act, see BENDER et al., *supra* note 3, at 98-113.

his stroke and would readily tire or lose his voice. Even so, he never lost his mental acuity and his passion for justice, nor abandoned his involvement in voting rights litigation. Even as he lay dying from cancer in 2018, Joaquin told me about one of his current cases in California, working with our mutual friend Dolores Huerta and the Mexican American Legal Defense and Educational Fund (MALDEF) on a redistricting controversy.⁷

Rather than reflect on his life, Joaquin was more intent on strategizing for the future. I gave him my commitment to help pursue his ideals of justice. A couple days after my last visit, he died when, as he put it during that final encounter, “modern medicine took me as far as I could go.” This symposium in his honor, held at Seattle University School of Law on March 1, 2019, and represented in part in this volume, reflects the commitment several of us made to carry on his vision of equality in the political process.

II. NAVIGATING THE DIVIDE AND DISCONNECTS OF THEORY AND PRACTICE FOR SOCIAL CHANGE

Joaquin graduated from Harvard Law School in 1973. From 1977 to 1982, he taught courses in voting rights and civil rights litigation as a lecturer at the University of Texas; in 1990, he taught a course on voting rights litigation at Berkeley. By the early 2000s, some thirty years into his advocacy career, Joaquin pursued teaching full-time.⁸ Full-time teaching positions in the law school academy usually require a significant

⁷ See James Burger, *Court Ruling Against Kern Districts Puts Local Politics in a Tough Pickle*, THE BAKERSFIELD CALIFORNIAN (Mar. 1, 2018), https://www.bakersfield.com/news/court-ruling-against-kern-districts-puts-local-politics-in-tough/article_ca42e8da-1daf-11e8-bc83-f18487366596.html [https://perma.cc/53CZ-4QCD].

⁸ Joaquin taught a voting rights and a Latinos and the Law course at UCLA School of Law as a lecturer in the academic year 2003-04, before joining the faculty of Seattle University School of Law in 2004, first as a visiting assistant professor and then, in 2005, as an assistant professor. At Seattle, Joaquin taught courses in constitutional law, civil procedure, civil rights litigation, voting rights, and Latinas/os and the law before assuming the role in 2009 of Executive Director of the National Voting Rights Advocacy Initiative, as a Distinguished Practitioner in Residence.

commitment toward the steady production of well-placed scholarship. Indeed, even the best teachers in the classroom who perform the most acclaimed public service and advocacy outside the school will not thrive, or even survive, in the academy if they do not meet these expectations of consistent publication. Moreover, many law schools have written and sometimes unwritten rules and expectations about what “counts” as scholarly production. For law professors joining the academy after a judicial clerkship or two in which they hone their writing skills, perhaps fresh from an endowed fellowship to give them an opportunity to develop a research and scholarly agenda, these expectations are readily met.

In contrast, those with a long record of advocacy often experience difficulty when the only scholarship that seemingly counts is the lengthy law review article building on the existing law review literature in a narrow area, rather than briefs filed in litigation, guides directed at the practicing bar, or publications targeting other audiences such as communities in need of legal guidance—such as our *Everyday Law* book aimed to serve. Often the latter types of publications flow naturally from a litigation career, where the emphasis is on practical how-to guides rather than dense, jargon-laden law review articles of academics speaking largely to each other and in language unheard in the courtroom. This is the so-called theory-practice divide,⁹ in which academics who tend to have little experience in the trenches detail their prescriptions for perceived social problems, while lawyers in those trenches of advocacy speak a different language to each

⁹ See, e.g., Will Rhee, *Law and Practice*, 9 LEGAL COMM. & RHETORIC: JALWD 273, 275-76 (2012) (although detailing how through lack of definition the so-called theory-practice divide is “amorphous and unhelpful” and an oversimplification, recognizes anecdotal evidence exists that legal scholars and practitioners “do appear to be talking past one another,” and supplies oft-quoted remarks of Chief Justice John Roberts that a “great disconnect” exists between legal practitioners, on the one hand, and legal scholars who “deal with the legal issues at a particularly abstract and philosophical level”); see also David Hricik and Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less For Themselves*, 38 SUFFOLK L. REV. 761 (2005).

other, to judges, and, most importantly, to the community they are advocating for and with.

Bridging that divide is a challenge. Pursuing litigation in distant venues and producing traditional legal scholarship are separately often exhausting endeavors, and doing both while teaching classes requires a herculean effort. But Joaquin somehow managed to perform in all these arenas, even at the same time. In the advocacy arena, his work was renowned. He argued two voting rights cases to the U.S. Supreme Court as part of his own voting rights legal practice, obtaining in one case a unanimous decision and in the other an 8–1 favorable outcome.¹⁰ Joaquin was primarily responsible for engineering what became California’s Voting Rights Act of 2001—helping eliminate discriminatory at-large elections.¹¹ In recognition of his achievements and vision, Joaquin received a MacArthur Foundation “Genius Award” in 1996, as well as honors from such diverse organizations and interests as the California State Bar, the California legislature, the Hispanic National Bar Association, the League of United Latin American Citizens, the Harvard Law School Alumni Association, and the Mexican government.¹² Joaquin was honored, too, for his law teaching, notably receiving the outstanding faculty award from Seattle University’s Black Law Student Association in 2005.

¹⁰ In the first ruling, *Lopez v. Monterey County, Cal.*, 519 U.S. 9 (1996), a unanimous Court ruled that the lower court should not have allowed an at-large election of municipal court judges without a preclearance because Monterey County was a covered jurisdiction for which electoral procedure preclearance was required under the federal Voting Rights Act. In the second ruling, with only Justice Rehnquist dissenting, *Lopez v. Monterey County*, 525 U.S. 266 (1999), the Court ruled the federal preclearance requirement did not violate state sovereignty, nor did the fact the county was trying to implement a voting change required under state law absolve it from preclearance required by federal law, in this instance at the county, but not the state (California), level.

¹¹ Cal. Elections Code §14025 et seq. (prohibiting at-large elections—defined as those where voters of an entire jurisdiction elect the members of a governing body—that result in racially polarized voting; not requiring proof that officials or voters intended to discriminate, and awarding attorneys’ fees to a prevailing plaintiff in a discrimination lawsuit to ensure equal voting rights).

¹² Joaquin G. Avila vitae 1–2 (on file with author, current as of Feb. 10, 2017).

In addition to his advocacy work, Joaquin published in a variety of settings, both in traditional legal scholarship venues and in formats meant for practitioners. His writings targeting practitioners and community members include a Voting Rights Act Handbook published in 1977 by MALDEF—an advocacy organization that Joaquin eventually led—and a Voting Rights Litigation Manual published in 1978 by Texas Rural Legal Assistance. Through his law firm and a local press in Fremont, California, in 1989 Joaquin also published a hardbound booklet on the history of voting rights litigation and advocacy and a roadmap for the future of addressing voting rights discrimination against the Latina/o population in California, titled *Latino Political Empowerment: A Perspective*, and earlier a booklet titled *Su Voto, Su Derecho—The Untapped Latino Voting Power of the Bay Area* published in 1987, as well as several bar association articles.¹³ Also falling in this category is the *Everyday Law* book previously mentioned, meant for use by community members desiring knowledge of their legal rights. Dolores Huerta, co-founder of the United Farm Workers union, called that book “an invaluable tool for our farm workers, their advocates, and others” that makes “the tools for justice accessible” to these audiences.¹⁴ Augmenting the book’s practical materials relevant to the Latina/o population addressing immigration, language rights, employment and housing discrimination, education, and the criminal justice system, was its discussion—written by Joaquin—of the barriers to effective Latina/o political participation and empowerment, the dilution of Latina/o voting strength, and strategies to protect Latina/o voting rights.¹⁵

¹³ *Id.* at 12–13 (specifying, for example, “Judiciary Should Reflect State’s Diversity,” KING CTY. BAR ASSN. BAR BULL. 14 (Aug. 2006); “Voting Rights Update,” ORANGE CTY. HISPANIC BAR ASSN. J. (Fall 2003); “Stand Up. Be Counted,” LA VOZ, NEWSLETTER OF THE SAN FRANCISCO LA RAZA LAWYERS ASSN. (Spring 1999)).

¹⁴ BENDER et al., *supra* note 3, book jacket.

¹⁵ *Id.* at ch. 7. Joaquin used the book as a text in his Latinas/os and the Law course at Seattle University.

Joaquin also published significant scholarship in traditional venues for scholarly works. He published as early as 1973 as a law student—authoring a comment in the Harvard Civil Rights-Civil Liberties Law Review, for which he served as a case and comments editor.¹⁶ A decade later, while President and General Counsel of MALDEF, Joaquin published a law review article on the campaign for bilingual-bicultural education.¹⁷ He later published two short law review articles, one on the importance of societal cohesiveness and the role of voting rights litigation in developing leadership in the political process needed to ensure such cohesiveness,¹⁸ and a second on the obstacles to full political participation of the Latina/o population, and the importance of such inclusion.¹⁹ In 2006, he published an article on election administration, using the case study of the 2004 Washington gubernatorial election, seeking to make the electoral process more accessible to subordinated groups.²⁰ The next year, Joaquin was the lead author of a lengthy published report on the “efforts of minority communities in California to secure access to the political process,” focusing primarily on the contributions of the federal Voting Rights Act toward that representation.²¹ And the following year, in the Yale Law Journal Pocket Part, Joaquin published a short critique of an article on

¹⁶ Joaquin G. Avila, *Comment, Legal Paraprofessionals and Unauthorized Practice*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 104 (1973).

¹⁷ Joaquin G. Avila, *Equal Educational Opportunities for Language Minority Children*, 55 U. COLO. L. REV. 559 (1984).

¹⁸ Joaquin G. Avila, *Access to the Political Process and the Development of Leadership: A Key to Future Social Cohesiveness*, 11 BERKELEY LA RAZA L.J. 91 (2000).

¹⁹ Joaquin G. Avila, *The Importance and Necessity of Political Integration*, 13 BERKELEY LA RAZA L.J. 43 (2002).

²⁰ Joaquin G. Avila, *The Washington 2004 Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process*, 29 SEATTLE. U. L. REV. 313 (2006).

²¹ Joaquin G. Avila, Eugene Lee, and Terry M. Ao, *Voting Rights in California: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 131 (2007).

voting rights.²² Finally, in a law review article published after his stroke but before his death, Joaquin co-authored a critique of the Supreme Court’s decision in *Shelby County v. Holder*,²³ which struck down “the most effective civil rights law ever enacted by Congress”—the preclearance procedure in section 5 of the federal Voting Rights Act.²⁴

In navigating both worlds, advocacy and academia, Joaquin accomplished what critical scholars view as crucial to an antistatist mission—connecting theory to action in order to better ground the work of scholars in the communities most affected by the outcomes of societal injustice that damage some while privileging others. One such school or movement of critical scholars, LatCrit (Latina and Latino Critical Legal Theory), has long maintained the need for such scholarly engagement—or praxis—with and within these affected communities:

²² Joaquin G. Avila, *Renewing the Promise of Ending Voting Discrimination: A Return to an Effective Section 5 Retrogression Standard*, 117 YALE L.J. POCKET PART 251 (2008).

²³ 133 S. Ct. 2612 (2013). Joaquin, along with twelve other voting rights practitioners, had filed an amicus curiae brief with the Supreme Court in the *Shelby* litigation, arguing that striking down the preclearance mechanism in covered jurisdictions would eliminate the deterrent effect to prevent discrimination and would leave discrimination to be remedied on a case-by-case basis by the “small number of colleagues with the experience and expertise necessary to litigate such cases.” Brief of Joaquin Avila et al., *Shelby County, Alabama v. Eric H. Holder, Jr.*, No. 12-96. In addition to the *Shelby* litigation, Joaquin also was part of amici curiae briefs in a number of cases before the Supreme Court, including *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987) (filed on behalf of the Democratic National Committee); *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984) (filed on behalf of the Mexican American Legal Defense and Education[al] Fund); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (filed on behalf of the Mexican American Legal Defense and Educational Fund); *Oliver v. United States*, 466 U.S. 170 (1984) (filed on behalf of the American Civil Liberties Union of Northern California); *Blum v. Stenson*, 465 U.S. 886 (1984) (filed on behalf of the NAACP Legal Defense and Educational Fund, Inc.); *Grove City College v. Bell*, 465 U.S. 555 (1984) (filed on behalf of the Mexican American Legal Defense and Educational Fund).

²⁴ Joaquin G. Avila, Barbara Phillips, and Molly P. Matter, *How a Targeted Triggering Approach Can Repair the Voting Rights Act: Congress Can Eliminate the Blight of Voting Discrimination Once and For All!*, 85 MISS. L.J. 1163, 1164 (2017).

Recognizing and accepting the political nature of legal scholarship in this country leads to [this] guidepost: recognizing *that critical outsider scholars must become academic activists both within and beyond our institutions, professions, or local situations*. This . . . guidepost establishes antisubordination praxis as a framework for the connection of theory to action and for the inter-connection of our work as teachers, scholars, and social actors. This guidepost emphasizes the relationship of knowledge production to social action and to social justice.

The relationship of theory to praxis, and of both to politics, inclines our work toward community and coalition-building on multiple levels and across multiple borders.²⁵

While this antisubordination mission is aimed at inculcating the value in legal scholars of performing work that matters beyond the academy, Joaquin built his bridge from the opposite direction—from advocacy on behalf of communities in need *toward* the legal academy. Such efforts from both directions are needed to bridge the theory-practice divide.

Through the efforts of pioneers such as Joaquin, both advocates and scholars have begun to appreciate the need for more cross-pollination between the academy (and its production and development of critical schools of legal thought), and advocacy (and its rich variety of approaches to lawyering for social change known variously as “public interest” lawyering, “movement” lawyering, “civil rights” lawyering, and such). As a forthcoming textbook on advocacy tackling systemic injustice in law and society posits, these “Schools [of legal knowledge] and Approaches [to advocacy] *jointly* are the wells from which systemic activists and advocates draw critical knowledge based on experience with struggle.”²⁶ Joaquin’s

²⁵ Steven W. Bender and Francisco Valdes, *At and Beyond Fifteen: Mapping LatCrit Theory, Community, and Praxis*, 14 HARV. LATINO L. REV. 397 (2011); 1 U. MIAMI RACE & SOC. JUSTICE L. REV. 177 (2011); 22 BERKELEY LA RAZA L.J. 301 (2012).

²⁶ FRANCISCO VALDES, STEVEN W. BENDER, & JENNIFER HILL, *CRITICAL JUSTICE: SYSTEMIC ADVOCACY IN LAW AND SOCIETY* (forthcoming 2020) (manuscript at ch. 1) (on file with author).

legacy is his deposit of a store of critical knowledge in both wells—those knowledges rooted in the advocacy experience and seeking to build on the limited number of lawyers trained and experienced in voting rights advocacy, and those aimed at scholars seeking to promote the study and teaching of voting rights to empower future generations of advocates.

Joaquin was a rare individual blessed with both genius and persistence in all the forums he labored in. He persisted with dogged advocacy when judges in Texas turned their backs to him in court,²⁷ and when they treated him poorly elsewhere as happened in California.²⁸ He persisted in the academy through teaching future generations of voting rights gladiators and with his scholarly writing (while maintaining his advocacy work) despite the pressures and incentives in that venue all focused on the rate of scholarly production and its placement in top journals. Only death would fully stop him.

III. INSIGHTS AND REMEMBRANCES FROM FRIENDS IN THE FIGHT

This written representation of the Joaquin Avila Memorial Symposium contains a variety of contributions from Joaquin’s friends and colleagues—most of them tributes from a variety of legal actors—from those who battled in the voting rights litigation trenches with him, and in allied battles for minority group rights and dignity, and from colleagues who worked with him in academia. The symposium volume also includes a lengthier article from Joaquin’s mentee in the latest generation, who carries on his voting advocacy work by applying critical theory and contributing critical knowledge. Molly P. Matter, who worked closely with Joaquin in his final years, connects the legacy and jurisprudence of the notorious *Plessy v.*

²⁷ Luis Ricardo Fraga, *Joaquin Ávila: America At Its Best*, 18 SEATTLE J. SOC. JUST. 15, 17 (2020).

²⁸ Barbara Phillips, *Joaquin Avila: Voting Rights Gladiator*, 18 SEATTLE J. SOC. JUST. 21, 22 (2020).

Ferguson case²⁹ to modern Supreme Court decisions, particularly in the context of voting rights, which espouse colorblindness. Critical scholars have demonstrated that invoking colorblindness against the backdrop of rampant racial inequality is a sure-fire means of ensuring the continuation of that disparate status quo. Rather, these scholars, and Molly P. Matter here, have argued for color consciousness and insight that

would encourage noticing race in each context in which it arises, including the operation of white privilege and any other advantaging or disadvantaging function of race. Rather than suppressing an awareness of race, as an aspiration to colorblindness does, color insight would encourage further exploration of the impact of race in society.³⁰

Armed with color insight and the value of antistatutory subordination, judges would recognize that sometimes race must be taken into account to effectively disable white privilege—in the voting rights context, for example, to supply a permissible alternative to the political districts in a state with a twenty-two percent black population that had failed to elect a black representative to Congress since the Reconstruction era in the 1800s following the Civil War.³¹ Matter’s contribution to the symposium as a voting rights advocate helps bridge the theory-practice divide, borrowing insights from critical theorists on the use of so-called colorblindness as a tool to preserve the discriminatory status quo in voting, higher education

²⁹ 163 U.S. 537 (1896).

³⁰ Margalynne J. Armstrong and Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. Rev. 635, 649 (2008).

³¹ Molly P. Matter, *The Shaw Claim: The Effects and Gradual Descent of Colorblind Jurisprudence*, 18 SEATTLE J. SOC. JUST. 25 (2020) (discussing the background for the Supreme Court’s decision in *Shaw v. Reno*, 509 U.S. 630 (1993), and critiquing the Court’s colorblind jurisprudence deployed to strike down redistricting aiming to counter that drought of black representation and which successfully had placed two black representatives in Congress since its implementation).

admissions, and other settings, and applying them to the sites of advocacy she inhabits daily.

IV. CONCLUSION

While staying accountable to the Latina/o and other disadvantaged communities he served, Joaquin sought accountability to those communities from our cherished institutions—primarily the democratic system—for their promises on paper of equality. His life work was countering systemic bias, such as the at-large election system, with his own systemic and comprehensive approach to challenging discriminatory electoral systems in Texas, California, and wherever else they were found.³² He thus met systemic injustice with systemic advocacy and helped enfranchise the disenfranchised. I’m better for knowing him, and for what he has left behind in his advocacy and his writings—a blueprint for the transformation of the political process so that no group is disadvantaged in the political process, and no group unfairly advantaged. As Seattle lawyer David Perez, who worked with Joaquin at Seattle University School of Law as a Korematsu Center fellow, summarized: “All he cared about was fairness. All he wanted was equality. And when our nation fell short of those ideals, he was there to hold us to the commitments we had made to one another. We’re a better country because of this man.”³³

In a 2015 presentation to law students at the University of Texas, after the *Shelby* decision, Joaquin rallied their participation to overcome the setback *Shelby* posed to fair voting rights. He sought the development of his ideas into law review articles he offered to co-author with students. He urged the students to be “part of an army that will restore the right to a meaningful vote in our community.” And he told them he would see them

³² Joaquin Avila Notes for Skype Presentation to University of Texas at Austin (Nov. 13, 2015) (on file with author).

³³ *Law School Honors ‘Voting Rights Gladiator’ Joaquin Avila*, SEATTLE LAWYER 6 (Fall 2018).

“at the front in the upcoming battles.”³⁴ Those struggles are ongoing, and Joaquin drew the blueprints for the battles to come.

Que en paz descanse.

³⁴ Avila, *supra* note 32, at 7-8.