Chapter 8
HEGEMONY THROUGH LEGAL CONSCIOUSNESS: Rights, Partial Democracy, and the Rule of Law

The four previous chapters analyzed the effects on Puerto Rican social, cultural, and political life of particular legal events related to the relationship between the United States and Puerto Rico. The present chapter focuses on more general features of Puerto Rico's legal and political system. Specifically, it discusses the extent to which the discourse of rights, the system of partial representative democracy, and the ideology of the rule of law may be regarded as part of the complex articulation of factors that have operated to reproduce American hegemony and to legitimate the existing power relationship between the two countries. To address this question is to raise important issues that lie at the core of the interconnection between law and the type of domination called "colonialism."

The approach taken in this chapter differs somewhat from that of the previous ones. It draws more on insights from the author's personal observations and reflections over the years and less on documentary evidence and analogous empirical data. Additionally, it dwells more on theoretical issues, seeking to identify the broader outlines of the problems discussed rather than to describe in detail their factual context.

Such an analysis helps in exploring the general and elusive nature of the phenomena examined here. Very little research, in some cases none at all, has been conducted in Puerto Rico on some of these topics from the perspective of their relationship to the country's colonial situation, the creation of identities and subjectivities, and the reproduction of American hegemony. This is particularly the case with rights and the rule of law. These aspects of Puerto Rico's legal and political culture are key to understanding the manner in which the majority of the population relate to American presence, influence, authority, and power in Puerto Rican society. However, the observations I advance here are proposed not as conclusions, but as suggested lines of inquiry in need of further elaboration and more in-depth study.

Referring to European colonialism, Fitzpatrick pointed out that law was always "a prime justification and instrument" of imperialism, as it was portrayed by imperialists as the means by which to raise the mass of uncivilized millions to "a higher plane of civilisation."[1] This civilizing rhetoric was central to the early colonial project launched by Spanish conquerors in the 15th and 16th centuries. Late-19th-century colonialism responded to new sets of determinants, such as the quest for the establishment of commercial-based domination in an expanding capitalist world economy. But, as Osterhammel noted, the claim that the colonizers were fulfilling a civilizing and liberating mission also formed part of the legitimation strategies of colonial rule during that period.[2] One of the moral "duties" that the rulers proclaimed, added Osterhammel, was "to bring the blessings of Western civilization to

[1] PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 107 (1992).
[2] JÜRGEN OSTERHAMMEL, COLONIALISM: A THEORETICAL OVERVIEW 109 (1997).

the inhabitants of the tropics."[3] As we saw in chapter 1, this was also part of the worldview of the promoters of overseas expansion in the United States during the second half of the 19th century.

This was also the objective openly expressed by American colonizers at the close of the Spanish American War. In an often-quoted statement, General Nelson A. Miles, commanding officer of the U.S. troops that landed in Puerto Rico in 1898, solemnly declared that it was the intention of the occupiers to bring to this newly conquered land "the immunities and blessings of the liberal institutions" of the American government and the "advantages and blessings of enlightened civilization."[4]

In most colonial experiences, however, the importation of European law into colonial societies suffered important transformations. Snyder and Hay pointed out that the law exported to the colonies was not simply metropolitan law: "It comprised the most authoritarian aspects of European law, from which most provisions regarding social welfare, basic rights and other entitlements largely had been excised."[5] The legal system had a "markedly administrative rather than rights-oriented" character, and the ideology of the rule of law "was practically absent in many if not most colonies."[6] In fact, as Ghai has argued, even in the African postcolonial states ideologies other than the rule of law and the idea of legality have proved more fruitful as legitimating discourses.[7] Shivji raised a similar point, claiming that in many African societies "legal ideology has little hegemonic significance."[8] Comaroff argued that the discourse of rights played a greater role in European colonialism in Africa than is generally recognized.[9] His analysis reveals, however, that although the discourse of rights serves at times to create spaces from which to resist colonial domination, often such discourse was greatly distorted to accommodate the colonizers' interests.

In all these respects the modern brand of colonialism exemplified by the Puerto Rican experience, especially after the 1940s, represents a significant departure from previous colonial patterns. In some of their most basic features, the discourse of liberal rights and the ideology of the rule of law have been extended to the colonial society in practically the same mold in which they circulate in the metropolitan state. Of course, this is not an exclusively American phenomenon. The remaining French, British, and Dutch dependencies in the Caribbean exhibit similar characteristics.[10]

[3] *Id.*

[4] DOCUMENTS ON THE CONSTITUTIONAL RELATIONSHIP OF PUERTO RICO AND THE UNITED STATES 49–50 (Marcos Ramírez Lavandero Ed. 1988).

[5] Francis Snyder & Douglas Hay, *Comparisons in the Social History of Law: Labour and Crime*, *in* LABOUR, LAW AND CRIME: AN HISTORICAL PERSPECTIVE 12 (Francis Snyder & Douglas Hay Eds. 1987).

[6] *Id.*

[7] Yash Ghai, *The Rule of Law, Legitimacy and Governance*, *in* THE POLITICAL ECONOMY OF LAW: A THIRD WORLD READER 253–61 (Yash Ghai et al. Eds. 1987).

[8] Issa G. Shivji, *Equality, Rights and Authoritarianism in Africa*, *in* ENLIGHTENMENT, RIGHTS AND REVOLUTION: ESSAYS IN LEGAL AND SOCIAL PHILOSOPHY 282 (Neil MacCormick & Zenon Bankowski Eds. 1989).

[9] John Comaroff, *The Discourse of Rights in Colonial South Africa: Subjectivity, Sovereignty, Modernity*, *in* IDENTITIES, POLITICS AND RIGHTS 193–236 (Austin Sarat & Thomas R. Kearns Eds. 1995).

[10] The British dependencies or crown colonies in the Caribbean region include Anguilla, Bermuda (geographically located in the Atlantic, but historically a part of the region), the British Virgin Islands, the Cayman Islands, Montserrat, and Turks and Caicos Islands. The Dutch possessions are Aruba and a five-island federation known as the Netherlands Antilles (constituted by Curaçao, Bonaire, St. Martin, Saba, and St. Eustatius). French Guiana (on the Caribbean coast of the South American mainland), Martinique, and Guadeloupe are formally integral parts of the French nation, but their social, economic, political, and cultural conditions resemble very much those of the dependent territories of the region. *See, generally*, C. A. SUNSHINE, THE CARIBBEAN: SURVIVAL, STRUGGLE AND SOVEREIGNTY 163–70 (1980); JOSÉ TRÍAS MONGE, 5 HISTORIA CONSTITUCIONAL DE PUERTO RICO chaps. 8–10 (1994); OSTERHAMMEL, *supra* note 2, at 118–19; G. Oostindie, *The Dutch Caribbean in the 1990's: Decolonization or Recolonization?*, 5 CARIBBEAN AFFAIRS 1 (1992); J. Connell, *Britain's Caribbean Colonies: The End of the Era of Decolonisation?*, 32 J. COMMONWEALTH COMPARATIVE POLITICS 87–106 (1994); Efrén Rivera Ramos, *Colonialism and Integration in the Contemporary Caribbean*, 6 BEYOND LAW 189 (1998).

The revealing fact, in all these cases, is that, in the long run, colonialism seems to have been better served not by excising the discourse of rights and legalism from the metropolitan claim to authority, but by promoting such discourse and ideology in the colonial societies themselves.

Fitzpatrick perceptively noted another important, more fundamental way in which the law of Europe and the law of the colonies differed. While European societies regarded themselves as self-determining subjects (they gave themselves their own law), this quality was denied those subjected to colonial rule. Fitzpatrick quoted Westlake, who in 1894 expressed the opinion that although all rights were not denied "uncivilized natives," the "appreciation of their rights is left to the conscience of the state within whose recognized territorial sovereignty they are comprised."[11]

In this respect there are similarities between classical European colonialism and the newer version of colonial domination exemplified by the American model. Thus, the U.S. Congress, with unswerving support from the Supreme Court, has repeatedly insisted that it has "plenary powers" over U.S. territorial possessions. These powers include the faculty to prescribe the nature and extent of their residents' citizenship rights and of their entitlements to social welfare benefits. It is true that the prerogative to determine what "fundamental rights" would be recognized for the inhabitants of the territories was taken away from Congress in the early part of the 20th century. But such power was accorded to another organ of the metropolitan state—its highest judicial forum. This was one of the effects of the doctrine established in the *Insular Cases*.[12]

In this chapter, I discuss the differences between European colonialism at the end of the 19th and first half of the 20th centuries and the type prevalent in late modern colonial welfare states. Those differences account, to an important degree, for the reproduction of U.S. hegemony over Puerto Rico's population. I analyze the dynamics resulting from the interplay among a rights-oriented as well as repressive state, a regime of partial democracy, the ideology of the rule of law, and the development of legal consciousness in the context of a colonial relationship. The main proposition is that the discourse of liberal rights, the experience of partial democracy, and the ideology of the rule of law have contributed to the reproduction of acquiescence to American rule and American presence in Puerto Rico. They have been key features of the American hegemonic project and constitutive parts of the legitimation process.

[11] FITZPATRICK, *supra* note 1, at 108, 109.

[12] See the discussion of the *Insular Cases* in Part II of this book.

Certainly, these discourses have also contributed to the widespread social acceptance of the political system in the mainland United States. They also explain in part the legitimacy enjoyed by the political systems in the most developed democratic societies in Europe. But, precisely, one of the defining characteristics of modern welfare colonialism in the Caribbean region is the extent to which it has relied on legitimating and hegemonic mechanisms prevalent within the metropolitan societies themselves. To a great extent, this parallel legitimacy has been possible due to the fact that the dependent societies have come to resemble in important respects the societies of the metropolitan states.

In chapter 3, I explained how American society and institutions have become an exemplary center for Puerto Rican society, resulting in significant transformations in economic practices, political traditions, legal procedures, educational policies, communication techniques, and other aspects of Puerto Rican social life. In the specific case of Puerto Rico, the parallels between the ways in which legitimation is produced in the colony and in the metropolitan society result from the fact that the political, legal, and economic institutional arrangements and many of the social and cultural life processes of the territory have been structured in accordance with the organizing principles of the metropolitan society.[13] Because needs and aspirations are many times defined in analogous fashion within the Puerto Rican community and in the wider American society, their modes of satisfaction tend to be the same or very similar, despite other cultural differences between the two societies.

To the extent that legitimation and hegemony are linked to the satisfaction of needs,[14] including cultural and political ones, legitimation and hegemonic processes tend to resemble each other in the metropolitan society and in the colonial community. Both share a reliance on the discourse of rights and other features of liberal democracy to buttress legitimacy. The colonial condition adds its own specificity to the process. That specificity must be taken into consideration and accounted for. It includes the situation of political subordination, the imbalance in economic exchanges and cultural power, and the structural dependency for the satisfaction of needs. It also involves geopolitical and regional factors, such as the perception of the majority of the population about the possibilities of embarking on an alternative project in light of the economic and political realities of the Caribbean region.[15]

Diverse sectors of the Puerto Rican population have actively participated in shaping this particular colonial experience. Puerto Rican elites and popular sectors alike have promoted the discourse of rights and adherence to democratic principles for reasons that include conscious valuations of what is best and most desirable. Responses from the population to the development of a liberal colonial state have involved varying degrees of acceptance, resistance, complicity, negotiation, and resignation. In this sense, the relationship between the colonizer and the colonized has not been unilateral.

[13] Efrén Rivera Ramos, *Self-Determination and Decolonisation in the Society of the Modern Colonial Welfare State*, in ISSUES OF SELF-DETERMINATION 115, 122 (William Twining Ed. 1991).

[14] *See, generally*, JÜRGEN HABERMAS, LEGITIMATION CRISIS (1988); Rivera Ramos, *supra* note 13. See the related discussion in the previous chapter about citizenship.

[15] *See* Rivera Ramos, *supra* note 10; Ramón Grosfoguel, *The Divorce of Nationalist Discourses from the Puerto Rican People: A Sociohistorical Perspective*, in PUERTO RICAN JAM: ESSAYS ON CULTURE AND POLITICS 57, 66–70 (Frances Negrón-Muntaner & Ramón Grosfoguel, Eds. 1997).

A Note on Coercion and Consent

The Theoretical Problem

Before proceeding, some comments are in order about the relationship between coercion and consent. The problem is posed in much recent sociological writing about law. The discussion has been motivated by a realization that many political systems have relied on mechanisms other than physical repression or the use of force to reproduce themselves and secure a high degree of acquiescence or active consent from the population. Modern industrial and postindustrial societies provide pointed examples.

Hunt has argued that the main trends in contemporary sociological theories of law have not been able to transcend a "dichotomous conception of law organized around the polar opposition between coercion and consent."[16] Although to conceptualize law in terms of the dimensions of coercion and consent may help to capture important characteristics of law, Hunt argued, none of the positions he examined—which included liberal and Marxist approaches—has succeeded in "advancing a coherent presentation of a mode of combination of the apparently opposed characteristics of law so as to produce a unitary conception not reducible to a choice between opposites or a fluctuation between them."[17] Hunt's argument reveals an important insight. However, his formulation fails to express the problem with precision.

First of all, there is the problem of defining "coercion." Certainly the use of physical force to repress—by means of imprisonment, corporal punishment, or execution—is a means of coercion. But other, more insidious forms of imposing someone's will may too be considered coercive: means such as surveillance, discrimination, ostracism, job dismissals, and psychological harassment. Also, certain practices, which Bourdieu would characterize as *symbolic violence*,[18] could be arguably classified as forms of coercion. These practices consist essentially in the imposition of ways of viewing and evaluating the world. Symbolic violence may take the form of explanations, principles, or rules, for example, the handing down of administrative or judicial decisions not subject to question. In other words, coercion shows itself in multifarious forms that range from those that rely on the use of extreme physical force to those that depend on other, nonphysical, yet forceful means of imposing compliance.

Second, in terms of social theory the binary opposition to be transcended is not that of "coercion" and "consent," but "coercion" and "persuasion." In contemporary societies, especially those of the most technologically advanced countries, consent, in the sociological sense, has to be viewed as the result of a complex articulation of coercive and persuasive mechanisms. Consent is not a polar category to be reconciled with its opposite, coercion. Rather, consent is the synthesis: the end result of a complex process in which the different forms of both persuasion and coercion

[16] Alan Hunt, *Dichotomy and Contradiction in the Sociology of Law*, in MARXISM AND LAW 95 (P. Beirne & R. Quinney Eds. 1982).

[17] *Id.*

[18] Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805, 812 (1987).

combine to produce an active acceptance of, or at least a passive acquiescence in, existing social arrangements. Coercion, then, is an active ingredient in the process of producing acquiescence and consent.

Third, in many contemporary societies, to be effective as part of the hegemonic process, coercion must be regarded as legitimate. In other words, it must rely on consent. Coercion may be considered legitimate either because it is viewed as authorized or lawful by those to whom it is directed, or because it is sanctioned by the majority when aimed at selected groups or individuals.

Is law principally a coercive or a persuasive mechanism? This is the question that much sociological literature seems to intend to address when discussing the (mistakenly formulated) coercion–consent dichotomy. Some theoretical approaches at times provide seemingly contradictory answers to this question. Thus, Gramsci at one point stated that "the law is the repressive and negative aspect of the entire positive civilizing activity undertaken by the State,"[19] while in other passages he stressed the educative function of law.[20] This has led Hunt to criticize the Gramscian approach as being riddled with the coercion–consent dichotomy. "The coercion–consent dualism," wrote Hunt,

> finds its most general expression in Marxist theory through the very widespread recent influence of Gramscian theory. . . . Within such a perspective the central focus has been upon the noncoercive face of law. . . . Yet there coexists in Gramsci an emphasis upon the repressive role of law and state.[21]

Cain provided an alternative reading of Gramsci on this matter. She interpreted the Italian thinker as proposing that law can be used both coercively and persuasively:

> It is persuasive because it assists the directive group by *creating* a "tradition" in an active and not in a passive sense. Law has an umbrella effect whereby the standards and ways of thought embodied in it penetrate civil society and become a part of common sense.[22]

One of the virtues of Cain's interpretation is that it helps to rid the problem of essentialist connotations, for it does not suppose that law *is* irremediably one or the other, but rather postulates that law *can be used* in either or both ways, with a multiplicity of possibilities regarding their mode of articulation and combined effects. This conception may also contribute to historicize the analysis, for then the question would become the following: How has law been used by determinate groups in certain places at given moments? This would be more consonant with a social construction of reality thesis, which in turn is theoretically closer to Gramsci's view of the cultural and historical nature of all social phenomena.

However, in Gramsci the relationship between law and "consent," between law and hegemony, goes even further than the fact that law may be used both coercively

[19] ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 247 (Q. Hoare & G. N. Smith Eds. 1971).

[20] *Id.* at 195, 196.

[21] Hunt, *supra* note 16, at 86, 87.

[22] Maureen Cain, *Gramsci, the State and the Place of Law*, *in* LEGALITY, IDEOLOGY AND THE STATE 102 (David Sugarman Ed. 1983) (emphasis in the original).

and persuasively. For Gramsci, "the function of law" is to assimilate, educate, and adapt the majority of the population to the requirements of the goals that the ruling groups in society set to be achieved.[23] Through law the state "tends to create a social conformism which is useful to the ruling group's line of development."[24] This conformism is part of what he would call consent, and it is, partially, what hegemony is about. The crucial proposition, if Gramsci is read carefully, is that law produces these effects both through persuasion and coercion. For him the "ethical" dimension of hegemony consists in the creation of a "correspondence" between individual conduct "and the ends which society sets itself as necessary."[25] This congruity is achieved as much by persuasion as by coercion through "the sphere of positive law."[26] In other words, it is not that law at times is used to coerce and at others to generate consent. Rather, it is that law produces consent both through persuasion *and* coercion. The coercive effect of law, then, is as much a factor in producing consent as its persuasive capacity. Hegemony, for Gramsci, is the result of the operation of both persuasive and coercive mechanisms. Law is a particular form that combines both means of producing consent.[27]

Another way to look at the question is through the examination of the relationship among persuasion, coercion, consent, and subjectivity and, in turn, at the connection between subjectivity and law. To the extent that hegemony implies a form of consent to social and political arrangements and relations, it involves subjectivity. By *subjectivity* I mean the categories of perception and evaluation social agents use to assess the world. Giving consent to social arrangements and relations involves interpreting and evaluating them. Many social arrangements and relations are sanctioned by law. They are constructed through the effect of legal categories. The categories used by law are infused with meaning. Such is the case, for example, with the category *citizen*. To the extent that concrete social agents identify themselves with those specific categories, the meanings the law embodies tend to become part of their consciousness, in other words, part of a particular subjectivity. As I explained in the previous chapter, this is the way in which people become "subjective legal subjects," which I defined as people who operate under the premise that they possess the rights and obligations prescribed by law.

Usually, self-perception as a legal subject occurs in the context of certain actions that the actor wants to take or of specific acts or consequences he or she wishes to avoid or enjoin. Thus, this mode of construction of subjectivity, which passes through the appropriation by concrete social agents of the meanings ascribed to legal categories, is closely related to social practice. This process of appropriation of the meaning of legal categories may also occur in people who are not themselves or do

[23] GRAMSCI, *supra* note 19, at 195.

[24] *Id.*

[25] *Id.* at 196; *see also* Cain, *supra* note 22, at 102.

[26] GRAMSCI, *supra* note 19, at 196.

[27] Gramsci's view, thus understood, is entirely compatible with the constitutive theory of law that underlies this book. In fact, it is one of its supporting theoretical sources. The Gramscian analysis proposes that law has effects. Those effects have to do with the configuration of the prevailing understandings (or common sense) in a particular society and with the production of social practices (as in his assertion that law tends to generate conduct that corresponds with the general goals set by the ruling groups). Finally, Gramsci saw those effects as forming part of the social world, as constituting a particular culture.

not see themselves as subsumed in the relevant categories. For example, noncitizens may accept the meaning of the term *citizen* as defined by law and act according to its contents. In this sense, the legal norm creates an ideological map of what should be considered legitimate and illegitimate by all members of the community.

Many times the addressees of legal discourse willfully adopt the categories of perception and evaluation of reality contained in its statements. That which law considers legitimate is accepted as such by social agents. In other words, the contents of individual consciousness are directly influenced by the contents of legal discourse. For example, a groundbreaking decision by a liberal court declaring the equality of rights of children born in and out of marriage may eventually be accepted as fair by the majority of the population. In that case, we may say that the law has acted persuasively to produce consent.

The effect of law on subjectivity may also occur indirectly. Such is the case when the incorporation of the categories of law into consciousness is mediated through experience. This mediated absorption is the product of a particular mode of operation of normative discourse. This mode of operation results from the fact that norms tend to elicit responses from people. In the case of legal norms, those responses may be in the nature of compliance, resistance, or any of the multiple ways that social actors cope with the context that legal norms create.

Compliance with or accommodation to legal norms, in turn, may be based on a variety of motives, such as convenience, fear, or agreement with the values or purposes contained in the law. When observance of the law results from willful adherence to its substance or from a judgment of expediency, the law may be regarded as acting persuasively. When compliance results from fear of punishment or loss of a good, such as freedom or prestige, law is operating coercively. However, regardless of their nature or motive, as responses to law become generalized and repeated over time, they turn into routine practices. Examples of this would be the habits of stopping at red lights or avoiding entering into another person's property without permission resulting from repeated compliance with traffic laws or anti-trespassing laws. The experiences that said practices generate for those involved in them eventually may affect their subjectivity, because those practices begin to be perceived as "natural" or inevitable or because they end up being judged desirable. The latter may be the result of a mental slippage that gradually turns the perception of what *is* into the belief of what *ought to be*. From social practice—originated as a response to the legal norm—there emerges an intersubjective construction of the world that becomes part of the social understandings (or the common sense, as Gramsci would say) of the community at large or of certain sectors of the community. In this way, law contributes indirectly to constitute consciousness. It does so acting either persuasively or coercively. In sum, law contributes to produce consent through persuasion or coercion or both.[28] Since law usually elicits diverse responses within a given community, it generally operates to generate consent through a combination of coercion and persuasion.

For Gramsci, hegemony is a specific mode of exercising domination. One may, then, reformulate his proposition in other terms: Domination is the result of a complex articulation of technologies of power that include the use of force, insidious

[28] For a more extended discussion, see Efrén Rivera Ramos, *Derecho y subjetividad*, 5–6 FUNDAMENTOS 125 (1997–98).

forms of coercion, symbolic violence, regulation, and a host of other practices that work in a persuasive fashion. These practices and technologies of power reinforce each other in a multidimensional process. Law is a particular site in which many of those technologies and practices of power converge.

The Coercive Dimension of the American Colonial Project in Puerto Rico

The way to transcend the mistaken dichotomy between coercion and consent involves two steps. First, it is necessary to theoretically recognize the role of coercion in the production of consent, as I have done in the previous discussion. Second, efforts must be made to identify historical instances in which coercion has been used to reinforce hegemony in a particular case.

The Puerto Rican colonial experience under American rule has been characterized by various combinations of coercive and persuasive mechanisms for consolidating American hegemony. The very acts upon which the colonial relationship was founded were traversed by this complex dynamics of force and inducement. The encounter between colonizer and colonized was mediated by a military occupation touted as a promise of liberation. Legal reforms meant to open up new avenues of individual freedom for diverse sectors of society were imposed by a military government that responded to the strategic goals of the metropolitan power. Limited U.S. citizenship rights were descended upon the population in a unilateral show of force.

Since those early days and throughout the century, metropolitan largesse and self-discipline have coexisted with intense periods of selective persecution and repression of different sectors of the population. Coercion has included the overt use of physical force, more insidious forms of repression, and acts of symbolic violence.[29] Repression and selective persecution have been aimed particularly at the independence movement and against other social and political forces that, at different times, have questioned either the legitimacy of the colonial regime as a whole or some of the discrete and immediate manifestations of colonialism in Puerto Rican life.[30]

However, the effects of that repression have been more generalized, as their exemplary dimension has succeeded in inducing fear of the independence movement. Repressive activities have been conducted by direct agents of the metropolitan state (like the U.S. armed forces, the Central Intelligence Agency, and the Federal Bureau of Investigation [FBI]);[31] by agents of the local Puerto Rican government (such as

[29] The imposition of American citizenship in 1917, discussed at length in chapter 7, is a good example of an act of *symbolic violence*, an instance of coercion that, in the versatile manner in which law many times operates, eventually assumed a "persuasive" character, becoming one of the key pillars of American hegemony.

[30] Two examples of resistance aimed at concrete manifestations of colonialism have been the campaign of opposition to the draft in the 1960s and the struggle to expel the U.S. Navy from the island of Vieques.

[31] *See* RONALD FERNANDEZ, THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY 206–280 (1992); Leonor Mulero, *Admite la persecución a independentistas el FBI*, EL NUEVO DÍA, March 17, 2000, at 30; Leonor Mulero, *Ordena el FBI investigarse a sí mismo en el caso de las carpetas*, EL NUEVO DÍA, March 22, 2000, at 36.

the Puerto Rican police and the Puerto Rican Justice Department);[32] by political parties; and even by "private" actors operating in the realm of what Gramsci and others would call "civil society."[33] A few illustrations of these repressive practices will provide a rough picture of the coercive dimension of American colonialism during the 20th century. They should dispel any notion that American colonialism has been an entirely benign phenomenon totally devoid of the harshness and the painful, even brutal, effects of European colonialism.[34]

The first three decades of American colonial rule were particularly harsh. Poverty was widespread, despite a relative degree of modernization brought about by a program of public works to develop transportation, communications, and sanitation facilities and by the changes in the economic organization of the country introduced by American capitalism. Absentee American corporations controlled the sugar industry and exploited Puerto Rican workers. The depression of the 1930s aggravated the condition of the Puerto Rican population, providing fertile ground for an upsurge in social agitation. Furthermore, the imperial refusal to solve the colonial problem fostered the radicalization of the independence movement.

The first direct, radical, and organized challenge to the legitimacy of colonial rule came from the Nationalist Party, led by a charismatic Puerto Rican lawyer trained at Harvard University, Pedro Albizu Campos. Initially, the nationalists participated in the electoral process. But after the elections of 1932 they opted for a more confrontational politics aimed at inducing a crisis that would lead the United States to relinquish its control over Puerto Rico. The colonial administration responded violently.

A rapid succession of events eventually led to the incarceration of Albizu Campos and other nationalist leaders. In October 1935, four nationalists and a police officer died in a shootout after police detained four members of the party. In February 1936, the chief of police, an American, was killed. Two young nationalists arrested for that action were, in turn, assassinated while in police custody. As a result of these events, Albizu Campos and others were indicted for attempting to overthrow the government of the United States and were sentenced to jail terms of up to 15 years to be served in a prison in Atlanta, Georgia. In 1936, while Albizu was imprisoned, the police attacked a peaceful nationalist demonstration in the southern city of Ponce. Nineteen people, including two policemen, were killed, and more than 100 were wounded. A report by a commission of the American Civil Liberties Union, presided

[32] *See* ESTADO LIBRE ASOCIADO DE PUERTO RICO, COMISIÓN DE DERECHOS CIVILES, INFORME—DISCRIMEN Y PERSECUCIÓN POR RAZONES POLÍTICAS: LA PRÁCTICA GUBERNAMENTAL DE MANTENER LISTAS, FICHEROS Y EXPEDIENTES DE CIUDADANOS POR RAZÓN DE IDEOLOGÍA POLÍTICA (1989) [COMISIÓN DE DERECHOS CIVILES]; Noriega v. Hernández Colón, 88 J.T.S. 141 (1988) and 92 J.T.S. 85 (1992).

[33] COMISIÓN DE DERECHOS CIVILES, *supra* note 32; Noriega v. Hernández Colón, *supra* note 32.

[34] More elaborate descriptions and analyses of the historical events mentioned herein can be found in GORDON K. LEWIS, PUERTO RICO: FREEDOM AND POWER IN THE CARIBBEAN (1963); FERNANDO PICÓ, HISTORIA GENERAL DE PUERTO RICO (1986); JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997); RONALD FERNÁNDEZ, LOS MACHETEROS: THE WELLS FARGO ROBBERY AND THE VIOLENT STRUGGLE FOR PUERTO RICAN INDEPENDENCE (1987); RONALD FERNÁNDEZ, THE DISENCHANTED ISLAND, *supra* note 31; IVONNE ACOSTA, LA MORDAZA (1987); ARTURO MELÉNDEZ LÓPEZ, LA BATALLA DE VIEQUES (1989); ANN NELSON, MURDER UNDER TWO FLAGS: THE UNITED STATES, PUERTO RICO, AND THE CERRO MARAVILLA COVER-UP (1986)

by the well-known American attorney Arthur Garfield Hays, concluded that the police action had constituted a massacre and put the blame on the American governor.

Nationalist activity subsided until after the return of Albizu to the island in 1947. Another series of events, including a nationalist revolt in several towns in Puerto Rico in 1950 and an armed attack against the Blair House, the residence of President Harry S. Truman in Washington, ended in a new period of incarceration for the nationalist leader. He was released again in 1953. But in 1954 three young nationalists fired gunshots into the floor of the U.S. House of Representatives. Albizu was arrested and imprisoned once more. He was not freed until 1964 and died in 1965.

The events of 1950 triggered a massive wave of persecution against independence supporters of all political shades. Many were detained without trial. McCarthyism showed its face in the colony using as its principal instrument a gag law adopted by the Puerto Rican legislature in 1948 (popularly called "La Mordaza," or "The Muzzle").[35] The law was a Puerto Rican version of the infamous American Smith Act of 1940.[36] Other forms of harassment became common. Many independence followers were routinely denied jobs in government and private firms. Police surveillance and the monitoring of legitimate political activities became common practices. The more militant became subject to visits in their homes by U.S. federal agents as a harassing tactic. At one point even possession of a Puerto Rican flag was sufficient to prompt intervention by the Puerto Rican police.[37]

These measures have had long-lasting consequences in Puerto Rico. The independence movement was, in effect, criminalized. Proindependence advocacy was equated with "lack of patriotism," "communism," and "subversion." Not infrequently, to be an *independentista* in Puerto Rico after 1950 meant to become, for many practical purposes, a political and social outcast. The result was a pervasive fear and rejection among significant sectors of the population of anything that hinted at separation from the United States. Although some changes in that attitude have been noticed in recent years, strong lingering effects of those apprehensions are still evident among many people.

New economic, social, and political crises in the following decades created the conditions for new challenges to the colonial system, which, in turn, were met with new repressive policies. Toward the end of the 1960s, a strong movement against the drafting of Puerto Rican young men into the U.S. military and opposition to the Vietnam war produced a series of confrontations. The FBI and the federal judiciary intervened actively to curb the protests. In the 1970s the role of the U.S. military in Puerto Rico was again put into question by militant movements that called for the withdrawal of the U.S. Navy from Culebra and Vieques. Dozens were arrested and indicted because of their participation in acts of civil disobedience.

In 1978 two young *independentistas* were killed by police at a mountain top known as Cerro Maravilla. The official version of the incident, supported by the Puerto Rican Justice Department and the prostatehood governor, claimed that the police had acted in self-defense. However, a much publicized investigation conducted by the Popular Democratic Party-controlled Senate revealed that the two men had

[35] Pub. L. No. 53 of June 10, 1948 (Puerto Rico), repealed by Pub. L. No. 2 of August 5, 1957 (Puerto Rico)

[36] Smith Act of 1940, ch. 439, 54 Stat. 670, 18 U.S.C.A. 2385 (1940)

[37] *See* IVONNE ACOSTA, LA MORDAZA (1987)

been led to the site by an undercover agent and that, as many proindependence activists and intellectuals had alleged, they had been murdered after surrendering to the police. The Cerro Maravilla killings shook the public conscience. Their aftermath seems to have motivated a reassessment of the relationship of the colonial state and the population at large to the independence movement.

In the 1980s a new clandestine organization, Los Macheteros, staged a series of dramatic actions against the U.S. military. They included an armed attack against a Navy bus, in which two sailors were killed and nine injured, and the destruction of nine National Guard planes, causing damages estimated at $50 million.

In 1985, in a commando-style operation, hundreds of American enforcement officers arrested a group of Puerto Ricans in their homes in the early hours of the morning and charged them with participating or collaborating in the 1983 multimillion dollar robbery of a Wells Fargo facility in the United States. The Macheteros had claimed responsibility for the robbery, declaring that they committed the robbery as a means to finance their revolutionary activities. Many of those arrested were later convicted in a U.S. court in Connecticut and have served or are serving time in several American prisons. One of the leaders of the group, Filiberto Ojeda Ríos, who has since gone into hiding, was acquitted by a Puerto Rican jury of charges arising from incidents surrounding his arrest by FBI agents, who claimed that he had fired against them and wounded one of them. Ojeda Ríos alleged he was only defending himself and his wife against the gun-wielding officers.

The public hearings conducted to ascertain the truth of the Cerro Maravilla murders opened up new windows for understanding the nature, extent, and dimensions of the decades-long persecution of the independence movement and suppression of other popular struggles. One such discovery was the revelation that the intelligence division of the Puerto Rican police and the Bureau for Special Investigations of the Puerto Rican Justice Department had for many years kept so-called subversive files on persons who were known or suspected to be followers of the independence, socialist, labor, feminist, environmentalist, and other social or political movements or organizations. The information contained in the files had been collected through undercover agents, police informers, and even unsuspecting sources that included job supervisors, coworkers, relatives, and neighbors. A civil action filed in a Puerto Rican court led to the release of thousands of such files.[38] Both the superior court that decided the case and a separate inquiry by the Puerto Rico Civil Rights Commission[39] concluded that, for decades, independence followers and others considered "subversive" for engaging in perfectly legal activities had been subjected to a systematic pattern of persecution.

One illuminating aspect of these inquiries was the evidence suggesting that U.S. enforcement agencies had taken an active, if not a leading, role in these practices. In fact, the interference of the FBI in Puerto Rican political affairs had been substantiated before. Documents obtained from the U.S. Justice Department through the Freedom of Information Act revealed that the FBI conducted a systematic campaign of disinformation and destabilization against the independence movement in the 1960s and 1970s and that the agency meddled in the 1967 plebiscite and the 1968

[38] *See* Noriega v. Hernández Colón, 88 J.T.S. 141 (1988) and 92 J.T.S. 85 (1992).

[39] Comisión de Derechos Civiles, *supra* note 32.

general elections.[40] On March 16, 2000, during a congressional hearing in Washington, DC, answering questions by José Serrano, a representative from New York of Puerto Rican origin, the Director of the Federal Bureau of Investigations, Louis Freeh, admitted that the FBI had persecuted independence advocates in Puerto Rico and promised a full report on the matter.[41] The next day, Freeh created a task force to investigate.[42] As a result, the FBI has been delivering to the Puerto Rican legislature thousands of files kept on Puerto Ricans over the decades, including voluminous records on Nationalist leader Pedro Albizu Campos and former Governor Luis Muñoz Marín.

Law has thus clearly been used at various levels and in multiple forms in the coercive dimension of the colonial state. Laws, legal procedures, legal personnel, courts, and enforcement agencies have all been deployed against the various sectors that have suffered persecution and repression. Law has also been used as a site to contest those practices and seek redress, as the suit seeking enjoinment of the practice of keeping subversive files demonstrates.

Important sectors of the Puerto Rican population have come to perceive many of the actions and practices described as illegitimate. But others have "validated" those actions and practices, at various moments, with reference to the notion that they are appropriate ways of dealing with "subversives." In that sense, the continuation of those practices has depended on the existence of a social understanding, of varying degrees of extension and depth, sanctioning their legitimacy.[43]

More than that, those practices may have had the effect of buttressing the very social consensus on which they have depended for their efficacy.[44] Thus, the persecution of the independence movement after the 1950s was based, to a large extent, on a strategy of criminalizing the activities of its members in a variety of ways. The most glaring actions in this sense were detaining people for possessing Puerto Rican

[40] *See* Fernández, The Disenchanted Island, *supra* note 31, chap. 8. According to documents cited by Fernández, the FBI's primary tactics in 1967 and 1968 were to "confuse the *independentista* leaders, exploit group rivalries and jealousy, inflame personality conflicts, emasculate the strength of these organizations, and thwart any possibility of proindependence unity." *Id.* at 217. Fernández concluded, "The electoral impact of this harassment and interference was felt in two primary areas. First, by creating dissension within the groups, agents helped avert the possibility that . . . independence activists would once again become a significant force in island politics. Second, and more important for any understanding of the island from 1968 until today, the FBI continued a policy of harassment that "began" with Muñoz's enactment of La Mordaza in 1948. A youngster born in 1950 or 1960 grew up fearing the consequences of any independence activity. That fear became (and remains) an institutionalized part of Puerto Rican political life, and the FBI must assume a good degree of responsibility for helping the Populares strike fear into the heart of anyone considering an independence posture." *Id.* at 217–18.

[41] Leonor Muñero, *Admite la persecución a independentistas*, *supra* note 31, at 30.

[42] Leonor Muñero, *Ordena el FBI investigarse a sí mismo*, *supra* note 31, at 36.

[43] This assertion is supported by the findings and conclusions of the Puerto Rico Civil Rights Commission in its cited report. Comisión de Derechos Civiles, *supra* note 33. See also the concurrent opinions of Associate Justices Federico Hernández Denton and Jaime Fuster Berlingeri in Noriega v. Hernández Colón, 92 J.T.S. 85, at 9656 and 9658, respectively.

[44] Crenshaw suggested that the "coercion of nonconsenting groups may provide an important reinforcement to the creation of consensus among classes that do accept the legitimacy of the dominant order," alluding specifically to the "possibility that the coercion of Blacks may provide a basis for others to consent to the dominant order" in American society. Kimberle W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, *in* Critical Legal Thought: An American–German Debate 274 (C. Joerges & D. M. Trubek Eds. 1989).

flags and keeping police files of independence advocates. Placing many forms of independence advocacy outside the law, formally or symbolically, contributed to create a social space of illegitimacy that had a negative effect on the way many people viewed the movement. This perception of illegitimacy, which translated from the legal to the political and vice versa, generated or promoted attitudes adverse to any proposal of separation from the United States. The coercive dimension of U.S. policy depended on those very attitudes for its effectiveness.

It has taken many years for independence to be viewed again as a legitimate aspiration by the population at large. This has occurred largely as a result of the events surrounding the deaths of the two *independentistas* on the Cerro Maravilla mountaintop. By now, however, American hegemony over Puerto Rican society has developed deeper roots, and independence is rejected on other grounds. Its political and legal legitimacy as a status formula is one thing; its perceived viability as an economic, social, and political project to be embarked upon is quite another.

The Discourse of Rights

It is crucial to remember, in the context of the form of colonialism that the Puerto Rican situation represents, that the coercive dimension of the colonial regime has been interwoven, in a relationship that transcends mere coexistence or contradiction, with a widely accepted discourse of rights, the institutions of representative democracy, and an otherwise generalized observance of the rule of law. In the sections that follow, I discuss how these phenomena have operated to constitute subjectivities and consolidate American hegemony in the island. I will start with the discourse of rights.

The notion of rights is a key feature of modern law. A *right* may be defined as a claim that a subject may make on others with the legitimate expectation of securing compliance through established mechanisms. The central actor in a modern legal system is the legal subject, who is conceived as a bearer of rights and obligations. In classical jurisprudence the debate about rights was mostly confined to an argument about the sources of rights. Positivists would accord the status of rights only to those claims sanctioned by positive law. Natural rights theorists would justify rights by reference to higher principles or norms conceived either as emanating from divine authority or as requirements of "natural" or practical reason. Present-day debates still reflect these tensions. For example, contemporary human rights philosophy locates the source of rights in various conceptions of human nature or by reference to the notion of human needs.

More recently, a new controversy has erupted, largely as a result of the writings of critical legal scholars. The debate hinges on the extent to which rights discourse is linked to diverse forms of domination. Most of the discussion has focused on the dynamics of rights discourse within industrial or postindustrial democratic societies. Little attention has been given to the dynamics of rights discourse in a colonial setting.[45] Because of its relevance, before addressing the particular situation of Puerto Rico I will discuss the main features of what has been called the "critique of rights."

[45] For a notable exception, *see* John Comaroff, *supra* note 9. For a discussion of the importance of rights claims among states in the international arena, see Onuma Yasuaki, *Between Natural Rights of Man and Fundamental Rights of States*, *in* ENLIGHTENMENT, RIGHTS AND REVOLUTION, *supra* note 8.

Critique of Rights

As formulated by critical scholars in the United States, Europe, and other countries within the Western legal tradition, the critique of rights has revolved around two fundamental problems: (a) the limits of liberal rights discourse and (b) its (negative) political and ideological effects.

Writing from a feminist perspective, Smart summarized some of the perceived limits of rights discourse, particularly for subordinated groups.[46] The most obvious limit, conceded by liberal theorists, is that the recognition of rights is not a guarantee of their actual enjoyment.[47] This is the famous problem of the ever-present "gap" between formal declaration and "reality."[48] Second, rights do not necessarily solve problems. They tend to oversimplify complex power relations, focusing on one aspect of them and most of the time failing to contextualize that single aspect within the multiple dimensions in which social problems usually occur.[49] Third, although formulated to deal with a social wrong, rights are always focused on the individual, who must prove that his or her rights have been violated.[50] This tends to preclude any formulation of collective right.[51] Fourth, rights may be appropriated by the powerful to further their own interests to the detriment of those who sought protection by the enactment of a particular right.[52] Finally, any claim of rights can be effectively countered by claims of competing rights.[53] This, in fact, is a variant of the indeterminacy critique, which was one of the earlier contributions of the critical legal studies movement and has since become part of much current theoretical writing about law.[54]

[46] CAROL SMART, FEMINISM AND THE POWER OF LAW 138–59 (1989).

[47] *Id.* at 143–44.

[48] *See also* E. Denninger, *Government Assistance in the Exercise of Basic Rights (Procedure and Organization)*, *in* CRITICAL LEGAL THOUGHT, *supra* note 44; Richard D. Parker, *The Effective Enjoyment of Rights*, *in* CRITICAL LEGAL THOUGHT, *supra* note 44; Shivji, *supra* note 8, at 273.

[49] *See* SMART, *supra* note 46, at 144.

[50] *Id.* at 145.

[51] But see Gerald G. Postema, *In Defence of 'French Nonsense': Fundamental Rights in Constitutional Jurisprudence*, *in* ENLIGHTENMENT, RIGHTS AND REVOLUTION, *supra* note 8, at 110, arguing that there is "no logical barrier to speaking of rights of groups, classes, states, corporations, nations or families, which rights are not reducible to rights of members considered apart from their membership in the group" and that "it is conceivable, then, that some rights might secure collective goods or interests." Shivji also raised this possibility from a Marxist perspective, claiming that in the specific context of Africa the struggle for rights has to be reconceptualized so that the central demands be cast in terms of collective rights, particularly the "right to self-determination" and the "right to organize." Shivji, *supra* note 8, at 283. In the field of international law there has been, since World War II, an emergence of the recognition of collective rights in the forms of "rights of people." *See* Onuma, *supra* note 45, at 144–45; Anna Michalska, *Rights of Peoples to Self-Determination in International Law*, in ISSUES OF SELF-DETERMINATION, *supra* note 13, at 71, 72–75. From the critics' point of view it may be argued that these arguments and developments represent only an apparent transcendence of classical individualism by replacing it with a new kind of "group individualism" that, ultimately, separates one group from another and precludes the formation of truly universal relations of solidarity. From the perspective of political economy, these phenomena may be explained as made possible by the transformations related, on the one hand, to the development of corporate capitalism and, on the other, to the tendency toward a global economy based both on competitiveness and interdependence among collective units, such as large corporations and states or, even, blocs of states.

[52] SMART, *supra* note 46, at 145.

[53] *Id.*

[54] *See* Frances Olsen, *Liberal Rights and Critical Legal Theory*, *in* CRITICAL LEGAL THOUGHT,

As Olsen expressed it, "in any important social conflict each side can present equally logical arguments that the concept of protecting individual rights requires that they prevail over the other side."[55]

For many critical scholars law is riddled with a radical indetermination. Its provisions do not have a fixed meaning. Any meaning is provided by the interpreter. Interpretation, especially judicial interpretation, is an exercise of power. Rights discourse, therefore, is a malleable instrument that many times ends up serving the interests of the dominators. This radical ambiguity has been explained in various ways. Its source may be located in the equivocal nature, the pliability, of language, as the legal realists demonstrated long ago. But it may go even further. Picciotto, for example, referred to an inherent contradiction in law arising from the tension between the requirement of generality of application and the need for specificity (as a precondition of predictability).[56] There may be other explanations.

Thus, the ambiguity of law may well reside in the very purpose the liberal ideal ascribes to it: the definition of a sphere of autonomy for the individual. In the liberal worldview, individuals are subjects competing for social goods, and their claims are conflicting demands in an ever-expanding field of commodified relations where needs are satisfied and personality defined. The indeterminacy of law would provide the needed flexibility to accommodate these conflicting demands in continually shifting circumstances.

The question remains whether rights discourse, as a form of referring to social relations, can survive the transcendence of a "liberal" culture and whether, in a different social world, any type of rights discourse would still be afflicted by a radical indeterminacy. If such were the case, we would have to look to deeper causes that extend beyond law and beyond existing social relations. Kennedy, for one, referred to a "fundamental contradiction" between the need and the fear of others that was supposedly reflected in law's provisions and, inevitably, in judicial interpretations of rights.[57] Along these lines, but avoiding the essentialism exuded by the fundamental contradiction thesis, it could be posited that, inasmuch as social life is so often riddled with paradox, any attempt to capture social relations through normative discourse would almost certainly be doomed to bear the burden of indeterminacy. Rights, then, would be, at the very least, an ambiguous value subject to the contingencies of power and other social and historical conditions.

The critique of rights also draws attention to the perceived negative effects of the discourse of rights. Three distinct critiques can be identified from the most recent theoretical debates about the political and ideological effects of rights discourse: (a) the individualism (or alienation) critique; (b) the disciplinary effect of rights claims, and (c) the "rights fetishism" critique.

The individualism or alienation critique can be traced back to Marx. For Marx liberal rights not only defined autonomous zones for individuals, but also set them

supra note 44, at 242; Postema, *supra* note 51, at 116–19; James Boyle, *Introduction*, *in* CRITICAL LEGAL STUDIES xiii, xix–xxi (James Boyle Ed. 1994).

[55] Olsen, *supra* note 54, at 242.

[56] Sol Picciotto, *The Theory of the State, Class Struggle and the Rule of Law*, *in* MARXISM AND LAW, *supra* note 16, at 178.

[57] Kennedy later "recanted" the fundamental contradiction analysis as a "reified abstraction." Peter Gabel & Duncan Kennedy, *Roll over Beethoven*, 36 STAN. L. REV. 1, 15–16, 36 (1984).

apart from others and alienated them from their own social nature and their community. In his famous essay "On the Jewish Question," he stated the following:

> Thus none of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community. Far from the rights of man conceiving of man as a species-being, species-life itself, society appears as a framework exterior to individuals, a limitation of their original self-sufficiency. The only bond that holds them together is natural necessity, need and private interest, the conservation of their property and egoistic person.[58]

In sum, the discourse of rights reinforces individualism and alienation from self and from others. Fine replicated this criticism by asserting that "the law seems to engender community and common humanity, but at the same time, it produces mutual isolation, indifference and antagonism."[59] Writing from another political standpoint, Glendon argued that American "rights talk" enhances individualism, insularity, and the neglect of responsibility.[60] Picciotto added to the Marxist critique by suggesting that the channeling of struggles into the form of claims of "bourgeois legal rights" breaks up any movement toward solidarity through the operation of legal procedures that recognize only the individual subject of rights and duties.[61] Merry raised a similar point when, analyzing the cultural impact of domestic violence court cases, she concluded that "the nature of the law and its individualist construction of rights continue to construct the battered woman as an individual subject, enduring an individual injury rather than a collective wrong."[62]

From the perspective of political economy, it may be added that the tendency in market-oriented societies to commodify all relations, and to conceive of all aspirations in terms of value, results in the transformation of "rights" into things owned. This development could be seen as reinforcing what Habermas, following others, called the "possessive individualism"[63] that characterizes the dominant worldview in capitalist societies. But Habermas himself has refuted the thesis that the notion of rights is inevitably individualistic. Rights, according to Habermas, are constructed in the context of intersubjective relations. To assert a claim as a right is to invoke the recognition of the other members of the community as a legal subject.[64] "Rights," argued Habermas, "are based on the reciprocal recognition of cooperating legal persons."[65] He added,

> *At a conceptual level*, rights do not immediately refer to atomistic and estranged individuals who are possessively set against one another. On the contrary, as elements

[58] Karl Marx, *On the Jewish Question*, *in* NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 137, 147 (Jeremy Waldron Ed. 1987).

[59] BOB FINE, DEMOCRACY AND THE RULE OF LAW: LIBERAL IDEALS AND MARXIST CRITIQUES 145 (1984).

[60] MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[61] Picciotto, *supra* note 56, at 175.

[62] Sally Engle Merry, *Wife Battering and the Ambiguities of Rights*, in IDENTITIES, POLITICS, AND RIGHTS, *supra* note 9, at 305.

[63] JURGEN HABERMAS, LEGITIMATION CRISIS 77, 82–83 (1988).

[64] JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 88 (1996).

[65] *Id.*

> of the legal order, they presuppose collaboration among subjects who recognize one another, in their reciprocally related rights and duties, as free and equal citizens.[66]

In this view, rights are seen as buttressing the relational aspect of living.

Other authors have also stressed the capacity for rights discourse to build social relations marked by solidarity rather than isolation. Scheingold, for example, has maintained that the claim of a right, particularly through litigation, implies a certain politicization of a demand, which may contribute to the formation of a collective identity to the extent that the claim is made by groups of individuals who view themselves as sharing a common plight.[67] Sherry has argued that many of the most important rights that eventually made their way into the U.S. Constitution "serve a communal or civic purpose." "Certainly many of the rights were necessary or useful to a deliberative republican citizenry (freedom of speech is one such right), and others offered 'protection to various intermediate associations . . . designed to create an educated and virtuous electorate.' "[68]

Building upon a Foucauldian analysis of power, Smart asserted that the claim for rights has another important effect: It generates new mechanisms for surveillance, regulation, and control. The recognition of a legal right immediately calls for the establishment of a machinery to enforce it. This machinery enhances the power of the state and regulatory apparatuses, which claim the need for more information about the subjects entitled to rights.[69] Piven and Cloward, among others, advanced a similar insight almost two decades before in relation to welfare recipients.[70]

The Australian jurist Valerie Kerruish has authored an elaborate formulation of the "rights fetishism" critique.[71] Working from the basic categories of Marxist political economy, Kerruish concluded that liberal legal practices and jurisprudence, operating as ideology, have helped to produce a social phenomenon that may be described as "rights fetishism." One aspect of rights fetishism consists in the attribution of a universal value to rights, much in the same fashion as commodities are ascribed a universal value (of exchange) apart from the specific use value of each object produced. Another aspect is the process whereby "rights" become an abstract reality that begins to command certain veneration. Finally, fetishization involves a process by which the identity of a person is defined by his or her rights—by the fact that he or she is a legal subject.[72] In short, it is having rights that constitutes the person, or more precisely, rights are the source of one's value as a person. This is the most profound effect, in the realm of consciousness, of the discourse of rights.

The critique of rights has elicited vigorous responses. In the United States, particularly, lawyers engaged in activist work and feminist and minority scholars took to task the critical legal studies critique of rights by stressing the benefits that the

[66] *Id.* (emphasis in the original).

[67] STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974); *see esp.* chap. 9.

[68] Suzanna Sherry, *Rights Talk: Must We Mean What We Say?*, 17 LAW & SOC. INQ. 491, 498 (1992).

[69] SMART, *supra* note 46, at 142, 143.

[70] *See* F. PIVEN & R. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1971), *see also* Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 667–68 (1987–88).

[71] VALERIE KERRUISH, JURISPRUDENCE AS IDEOLOGY (1991).

[72] *Id., esp.* 139–65

claim for rights entails for those in subordinated positions in society.[73] For Crenshaw, "rights have been important." "They may have legitimated racial inequality, but they have also been the means by which oppressed groups have secured both entry as formal equals into the dominant order and the survival of their movement in the face of private and state repression."[74] Olsen suggested that one important value of the possibility of claiming rights is the sense of human worth that such claims reinforce in those making them.[75] "On a personal level," Olsen wrote, "to claim a right is to assert one's self-worth, to affirm one's moral value and entitlement. It is a way for a person to make a claim about herself and her role in the world."[76] This reasoning converts into a positive gain the effects of rights Kerruish attributed to the phenomenon she labeled "rights fetishism."

That rights provide benefits to people, including the less powerful, is something that most critics of rights discourse would concede. Marx himself did not rule out "bourgeois rights" as a mere sham. Fine has interpreted Marx's critique as one directed not at individual rights in themselves but at the limited nature of those rights in bourgeois society. The question for Marx, according to Fine, was not the abolition but the enlargement of individual rights, the limitless extension of right until it encompasses the totality of human experience.[77] Picciotto admitted that a right "encapsulated in bourgeois legal form is certainly better than no right at all"; the aim, however, is to transcend the limitations of this form if social transformation on behalf of the working class is to succeed.[78]

Kerruish also proposed that rights "be taken seriously" in at least two senses: (a) the claims of subordinated people are claims for rights and must be attended to, and (b) rights, if properly kept to their specific contexts, have a political use value.[79] There are both political and moral reasons for this attitude. "The political point," she wrote, "is that in a society structured by materially unequal social relations, people on the down side of these relations would be worse off without law than they are with law"; while the "moral point is still the Kantian perception of the ethical value of equal concern and respect for individuals."[80] Her "political point" implies that the valuation of rights has to be contextualized. To the extent that the critique of rights adopts the form of an absolute rejection of rights, without attending to the historical, social, and political context, it slips into abstract, a priori theorizing, with the risk of becoming what Olsen termed a "new Scholastic Orthodoxy."[81]

[73] *See, e.g.*, Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984); Olsen, *supra* note 54; Crenshaw, *supra* note 44; Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV 323 (1987).

[74] Crenshaw, *supra* note 44, at 293.

[75] Olsen, *supra* note 54, at 244.

[76] *Id.*

[77] *See* FINE, *supra* note 59, at 129.

[78] Picciotto, *supra* note 56, at 175.

[79] One of the best analyses of the political use value of rights has been provided by the American political scientist Stuart Scheingold. In his now classic THE POLITICS OF RIGHTS, *supra* note 67, Scheingold saw rights as political resources that can be used for the effective activation and mobilization of social groups to achieve social change.

[80] KERRUISH, *supra* note 71, at 145. A question Kerruish does not seem to answer is whether the "moral" reason for taking rights seriously would imply that rights, in the end, do have a universal value, apart from their obvious specific use value in particularized political contexts.

[81] Olsen, *supra* note 54, at 253.

Shivji made a similar point, in the African context, arguing that the "struggle for formal legal equality and democracy," cast in a new language of "collective rights," "has still a role to play in the African formation."[82] Comaroff and Abel have produced case studies that have shown how even in its traditional liberal form rights discourse was useful first in generating resistance against the colonizers in colonial South Africa and, later, in the struggle against the system of apartheid.[83] The Japanese jurist Onuma Yosuaki, emphasizing that the "rights" formulation has a particularly strong appeal to those who are oppressed or alienated from various values and interests in society, predicted that

> as long as there remains an apparent hierarchical structure in terms of power, a frustration resulting therefrom, and a keen desire to express the claims of the powerless in a legitimate and effective manner, the attempts to formulate these claims as rights will continue to exist.[84]

This, he added, is also valid for international society, where there are enormous gaps between a small number of rich and powerful nations and a large number of poor and powerless ones. The poorer nations, he suggested, will benefit from recourse to the discourse of rights.[85]

The debate generated by the critique of rights has produced a new awareness, on both sides of the question, of the ambiguity and even paradoxical character of rights. It has become generally accepted that, from the point of view of political struggles and attempts at social transformation, the claim of rights has limitations but can produce tangible benefits. As Sarat and Kearns expressed it, "We know now that rights can be sources of empowerment and protection for persons against the societies in which they live, yet they can constrain those same persons."[86] "Rights persist and flourish," they concluded, "at least in part, because of, not in spite of, their many-sidedness and their paradoxical qualities."[87]

The Discourse of Rights in Puerto Rican Society

The Puerto Rican experience under American rule has differed in one important respect from many other colonial experiences. The language of rights has been a key feature of the dominant discourses in Puerto Rican society and an important mediating phenomenon between the United States and the Puerto Rican population. Although in other colonial situations the discourse of rights may have been part of the legitimating strategies of both colonizers and colonized, the difference in the Puerto Rican case lies in the centrality of such language in Puerto Rican culture during the course of the 20th century.

[82] Shivji, *supra* note 8, at 282–83.

[83] *See* Comaroff, *supra* note 9; Richard L. Abel, *Nothing Left but Rights: Law in the Struggle against Apartheid*, in IDENTITIES, POLITICS, AND RIGHTS, *supra* note 9, at 239–70.

[84] Onuma, *supra* note 45, at 151.

[85] *Id.* at 150, 151.

[86] Austin Sarat & Thomas R. Kearns, *Editorial Introduction* to IDENTITIES, POLITICS, AND RIGHTS, *supra* note 9, at 7

[87] *Id.* The collection of articles contained in the cited book on identities, politics, and rights, edited by Sarat and Kearns, reflects this approach to rights as ambiguous and paradoxical.

Several factors may have contributed to this development. For example, the discourse of rights was not foreign to Puerto Rican political elites when the United States invaded the country. They were well versed in its nuances. Nineteenth-century Puerto Rican liberals had already made the claim of rights a major element of their political discourse to confront the oppression of the Spanish regime. They soon started to wield its critical edges against the new invader. Thus, a significant number among them began to demand their "right" to self-government.

Another factor may be the extent to which, since the early days of the American occupation, the subordinated sectors of Puerto Rican society felt attracted to the new regime. Many workers, women, and Black and mixed-race Puerto Ricans saw in the forms and symbols of American legal and political discourse an opportunity to shed the state of social oppression they identified with Spanish colonialism and with the Creole elite that had exploited and marginalized them.[88] For example, the founder of the prostatehood Puerto Rican Republican Party was a Puerto Rican physician of African descent who had studied in the United States. The suffragist movement took inspiration in its American counterpart. The labor movement of the early part of the 20th century established close links with U.S. labor unions. In fact, the first Puerto Rican Socialist Party adopted statehood as its goal for the resolution of the colonial problem of Puerto Rico.

A third factor contributing to the development of a rights-oriented political culture may be the fact that, especially since the middle of the 20th century, in many respects Puerto Rican society has come to resemble more and more, in its organizing principles and daily practices, the societies of advanced capitalism. To the extent that the liberal discourse of rights embodies a certain equivalence to the ideological framework of commodity exchange in a capitalist economy, as Pashukanis and other Marxists and neo-Marxists have suggested,[89] it is understandable that a colonial society with a relatively modern market economy would become the site of a normative discourse of social relationships that assumes the form of expanding claims of individual rights.

A related factor was the deepening insertion of Puerto Rican society into the worldview of modernity as the century progressed. By *modernity*, I mean the cultural forms associated with the development of industrialized societies and liberal democratic or socialist states. Rights discourse has been a principal feature of these social and cultural formations, particularly in the version of modernity in American and Western European cultures. Rights discourse, then, has been an important component of modern subjectivity. Puerto Rico gradually became a modern colonial society, with a corresponding reliance on rights discourse to interpret and evaluate the legitimacy of social and political relations.

Finally, another contributing factor to the development of a rights-oriented public and private discourse in Puerto Rico has been the basic conceptual and normative framework the ruling elites of the metropolitan state elaborated to facilitate its exercise of authority over the territory, together with the compromises they made to attend to the material and symbolic demands emerging from the various sectors of

[88] *See* Wilfredo Mattos Cintrón, *La hegemonía de Estados Unidos en Puerto Rico y el independentismo, los derechos civiles y la cuestión nacional*, 16 EL CARIBE CONTEMPORÁNEO 21, 27–28 (1988).

[89] *See* EVGENI PASHUKANIS, LAW AND MARXISM (1983); FINE, *supra* note 59; KERRUISH, *supra* note 71.

the territory's population. It is to this conceptual framework that I now turn my attention.

The governing elites of the United States who helped shape the country's colonial policy at the turn of the century had differing views regarding how to treat the populations of the recently acquired territories. A strong current argued that the establishment of a colonial regime in those territories was not incompatible with the recognition of basic fundamental rights of the subjected populations. Indeed, to be successful, the colonial project would have to rely on such recognition. The idea was expressed very clearly by Senator Teller, who saw "no reason . . . why the United States may not have a colony" but felt that the country was bound to extend to any colony the "great principles that underlie the government" and to maintain there "a free government" and "liberty."[90] Senator Teller's remarks synthesized the basic political conceptual framework that would, in due course, be adopted by the three branches of the government of the United States.

This basic framework is clearly evident in the rationale of the *Insular Cases*. Those cases drew a sharp distinction between civil rights and democracy, between "fundamental" individual rights and the rights of political participation. They relied also on another conceptual cleavage that distinguished between the "civil rights" of the inhabitants and the "political status" of the territory. These conceptual differentiations would justify extending certain rights deemed "fundamental" while preserving the basic subordination inherent in a colonial system.

A complex normative structure emerged from this basic conceptual framework. The *Insular Cases* made clear that the inhabitants of unincorporated territories could claim the "fundamental" rights enshrined in the U.S. Constitution. Those guarantees were deemed to be limitations imposed on the actions of the territorial and "federal" governments.[91] Throughout the century that has elapsed since the first group of cases were decided, the Supreme Court has been engaged in determining what those "fundamental rights" might be. The *Insular Cases* themselves established that indictment and trial by jury were not fundamental enough.[92] Either by express holding or by implication, the Court has determined that at least the following constitutional rights should be considered fundamental, and therefore applicable in Puerto Rico: freedom of expression,[93] due process of law,[94] equal protection of the laws,[95] the right to travel,[96] and the protection against unreasonable searches and seizures.[97] It has been

[90] Quoted in José Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 429 n.146 (1978).

[91] The term "federal" is placed here in quotation marks because, strictly speaking, unincorporated territories are not considered to be part of the federation, but territory belonging to the United States. In practice, however, the government of the United States is referred to as the federal government in all its dealings with the territories. In subsequent text, the quotation marks will be omitted both for stylistic purposes and to conform with current usage of the term.

[92] Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904).

[93] Balzac v. Porto Rico, 258 U.S. 298 (1922); Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 1046 (1986).

[94] Bianchi v. Morales, 262 U.S. 170 (1923); Secretary of Agriculture v. Central Roig, 338 U.S. 604 (1950); Calero Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Examining Board v. Flores de Otero, 426 U.S. 572 (1976).

[95] Examining Board v. Flores de Otero, 426 U.S. 572 (1976); Califano v. Torres, 435 U.S. 1 (1978); Harris v. Rosario, 446 U.S. 651 (1980).

[96] Califano v. Torres, 435 U.S. 1 (1978).

[97] Segurola v. United States, 275 U.S. 106 (1927); Torres v. Puerto Rico, 442 U.S. 465 (1979).

suggested that, regardless of the rationale of the *Insular Cases*, most of the Bill of Rights of the U.S. Constitution should be considered extensive to Puerto Rico.[98] Puerto Ricans residing in Puerto Rico may also claim against the U.S. government those rights extended to them by congressional legislation creating federal entitlements.

Another dimension of the normative structure of rights in Puerto Rico consists of claims that may be made exclusively to the government of Puerto Rico. These rights constitute what may be called the "internal regime of rights." Their source may be legislation passed by the U.S. Congress that limits the powers of the Puerto Rican government or provisions contained in the Constitution of Puerto Rico and in Puerto Rican laws. A group of such statutory rights created by the U.S. Congress was contained in Section 2 of the Jones Act of 1917,[99] a bill of rights claimable against the government of Puerto Rico. The list included most of the rights found in the Bill of Rights and other provisions of the U.S. Constitution. The provisions of Section 2 were repealed in 1950 by Public Law 600,[100] the U.S. statute that authorized Puerto Ricans to draft their own constitution. The bill of rights contained in the Puerto Rican Constitution of 1952 replaced the statutory scheme of basic civil rights adopted in the Jones Act. The Constitution of the Commonwealth of Puerto

[98] Former Associate Justice William Brennan's concurrent opinion in Torres v. Puerto Rico, 442 U.S. 465, 474 (1979), adhered to by Justices Stewart, Marshall, and Blackmun, contained the expression: "Whatever the validity of the old cases such as *Downes* . . . *Dorr* . . . and *Balzac* . . . , in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's." *Id.* at 476. For more detailed discussions of the matter, see ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1989); David Helfeld, *How Much of the United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?*, 110 FED. RULES DEC. 452 (1986); José A. Cabranes, *Puerto Rico and the Constitution*, 110 FED. RULES DEC. 475 (1986); R. Pérez-Bachs, *Applicability of the United States Constitution and Federal Laws to the Commonwealth of Puerto Rico*, 110 FED. RULES DEC. 485 (1986).

One question the Supreme Court has refused to decide is by virtue of what clause of the U.S. Constitution do the "due process" and "equal protection" guarantees apply to Puerto Rico. The Fifth Amendment applies only to the federal government, while the Fourteenth Amendment is addressed to the states. The issue is not without legal significance. For the Fifth Amendment to protect against actions of the Puerto Rican government, the latter would have to be considered no more than an extension of the "federal" government. If the Fourteenth were the source of the protection, then Puerto Rico would be considered a sovereignty akin to a state of the union. In a well-known footnote in Calero v. Pearson, 416 U.S. 663 (1974), Justice Brennan stated, "Unconstitutionality of the statutes was alleged under both the Fifth and Fourteenth Amendments. The District Court deemed it unnecessary to determine which Amendment applied to Puerto Rico . . . and we agree. The Joint Resolution of Congress approving the Constitution of the Commonwealth of Puerto Rico, subjects its government to "the applicable provisions of the Constitution of the United States, . . . and there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States." *Id.* at 668–69 n.5 (citations omitted).

In Examining Board v. Flores, 426 U.S. 572 (1976), Justice Blackmun, writing for the Court, referred to Brennan's footnote thus. "The Court, however, thus far has declined to say whether it is the Fifth Amendment or the Fourteenth which provides the protection. *Calero-Toledo*, 416 U.S., at 668–669, n. 5. Once again, we need not resolve that precise question because, irrespective of which Amendment applies, the statutory restriction [under discussion] . . . is plainly unconstitutional." *Id.* at 601.

[99] Jones Act, ch. 190, 39 Stat. 951 § 2 (1917) (codified at 48 U.S.C. § 731c (1987).

[100] 64 Stat. 319, 48 U.S.C.A. 731b (1950).

Rico[101] provides the current formal framework for the internal regime of rights in the country.

The Puerto Rican Constitution follows closely, in most respects, the American constitutional model, although there are some significant differences. The Puerto Rican Constitution adopts the American institutional arrangement of separation of powers. The judicial system provided for is very similar to that existing in the United States, with the peculiarity that judicial review of legislative acts is expressly established in the constitutional text. Puerto Rican Supreme Court justices enjoy life tenure. Judges of the inferior courts are designated for specified periods of time. The system is predicated on the principle of judicial independence.

Article II contains a bill of rights that in many respects surpasses the provisions of its federal counterpart. It recognizes the familiar rights protecting against the deprivation of liberty and property without due process of law, the guarantees of equal protection of the laws, freedom of speech and assembly, and the rights of the accused in the criminal process. But additionally, it expressly consigns the right to privacy (which protects against state and private action), several important rights relating to employment (such as the right to equal pay for equal work and to a reasonable minimum wage), and a direct condemnation of discrimination on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Since 1952, the Supreme Court of Puerto Rico has made it a point to assert the principle that the Constitution of Puerto Rico, in questions relating to human rights, should be regarded to enshrine a much broader scope of protections than those contained in the U.S. Constitution.[102]

It is evident that the writers of the Puerto Rican Constitution of 1952 wished to go beyond the traditional liberal conception of rights. They drafted a section providing for certain social rights, such as the rights to obtain work; to an adequate standard of living; to social protection in the event of unemployment, sickness, old age, or disability; and to special care during motherhood and childhood.[103] The Puerto Rican electorate approved that section, together with the rest of the constitution. However, the U.S. Congress rejected the provision and excluded it from the approval it extended, with certain conditions, to the remainder of the document drafted by the Puerto Rican Constitutional Convention and ratified by the Puerto Rican people.[104]

The Puerto Rican Constitution of 1952 articulates a particular political vision: a combination of American political theory and the worldview of the Puerto Rican elites that led the process of economic, social, and political reform during the 1940s. Those elites were, in large measure, the biological and political heirs of the creole *hacendados* and liberal professionals who, in the late 19th century and early years of the 20th, had embraced the liberal political creed, first as a response to the absolutism of the Spanish regime and later as a way of reaffirming their identification with, and admiration for, American institutions.

[101] See chapter 3 for a brief description of the process that led to its adoption.

[102] *See, for example,* Figueroa Ferrer v. ELA, 107 D.P.R. 250 (1978) (declaring that the right to obtain a divorce on mutual agreement, without stating the reasons for the request, is part of the right to privacy protected by the Constitution); Soto v. Secretario de Justicia, 112 D.P.R. 477 (1982) (recognizing the right to obtain certain information from the government as part of the freedom of speech guarantee).

[103] Constitution of Puerto Rico § 20

[104] Public Law 447, 66 Stat. at L. 327, 48 U.S.C.A. 731d (1952). The requirement imposed by the U.S. Congress on the Puerto Rican Constitutional Convention and on the Puerto Rican people that Section 20 be excised from the Constitution can be considered another instance of symbolic violence. It constituted an imposition, in the manner of rejection, of certain principles of social organization.

Many among the leaders and technocrats who participated in the process that produced the Puerto Rican Constitution had been trained in American universities and professed the basic values of the American political system. Many of them also had a pronounced inclination to take on social questions, influenced by early contacts with the labor-led Puerto Rican Socialist Party or by the social democratic ideals of the Rooseveltian New Dealers. This inclination partly explains the inclusion of certain social rights in the Constitution. The explanation also lies in the fact that, to a certain degree, the Constitution crystallized some of the claims that had been made throughout the first four decades of the century by popular movements, such as the labor and the women's rights movement.

Of course this regime of rights has limits of the type mentioned above in the general discussion of the critique of rights. The most obvious one is the "gap" existing in many instances between the formal declaration of rights and the "reality" of their enjoyment. The profound social inequalities that still exist in Puerto Rican society effectively preclude many people from full enjoyment of their rights.

For example, it is estimated that more than 60% of Puerto Rican families live below the poverty level.[105] Poor communities often bear the brunt of police brutality, and despite the existence of legal aid programs, acute problems of access to the courts are prevalent. In 1991, 72% of the men convicted and under custody had been unemployed at the time of their arrest, 65% did not have an occupation or trade, and half had not obtained a formal education beyond the ninth grade. Among women convicted and in jail, 99.7% were unemployed at the time of their arrest, 93.4% did not have an occupation or trade, and 4 out of 10 had not studied beyond the eighth grade. Among young adults, 81% of those in jail had been unemployed, 65% did not engage in any trade or occupation, approximately half had not studied beyond the eighth grade, the majority had been convicted for crimes against property; and 90% of the crimes had been motivated by economic difficulties.[106]

An increasing number of poor households are headed by women. Working women are still paid less than men for comparable work. Moreover, women are often victimized when they take part in judicial processes.[107] Poor immigrants from nearby Caribbean countries, like the Dominican Republic, have been increasingly subjected to discriminatory practices and are often the object of bigoted remarks, both in private and in public, not only by ordinary citizens but also by government officials. Gay men and lesbians have suffered from discrimination and prejudice in all levels and activities of society. The Puerto Rican situation confirms Smart's insight that rights do not necessarily solve complex social problems. Despite the profusion of

[105] *See* CONSEJO DE DESARROLLO ESTRATÉGICO PARA PUERTO RICO, OFICINA DEL GOBERNADOR, EQUIDAD, CALIDAD DE VIDA Y DESARROLLO ECONÓMICO EN PUERTO RICO: LA CUESTIÓN DE LA POBREZA 28 (1992) [LA CUESTIÓN DE LA POBREZA]. The extent and nature of poverty in Puerto Rico is extensively discussed also in *Desigualdad y pobreza en Puerto Rico* (documentary film, Linda Colón prod. 1988) (copy on file at the Faculty of General Studies of the University of Puerto Rico).

[106] LA CUESTIÓN DE LA POBREZA, *supra* note 105, at 7.

[107] *See* Esther Vicente, *Las mujeres y el cambio en la norma jurídica*, 56 REV. JUR. U.P.R. 585 (1987); COMISIÓN JUDICIAL ESPECIAL PARA INVESTIGAR EL DISCRIMEN POR GÉNERO EN LOS TRIBUNALES DE PUERTO RICO, EL DISCRIMEN POR RAZÓN DE GÉNERO EN LOS TRIBUNALES (1995).

rights recognized by the legal system, fundamental oppressions and unequal power relations still prevail, including class, gender, racial, and colonial subordination.

Another limiting effect of the discourse of rights in the Puerto Rican context can be detected. The liberal conception of rights prevalent within such discourse exerts an ideological pressure that tends to force the formulation of demands into the mold of individual rights, to the detriment of more collective demands. This tendency, however, seems to be countered by other types of discourses arising from a long tradition of social struggles that bring to the surface a more collective vision, such as when diverse groups claim the protection of the "rights" of a certain community, such as the rights of "workers" or of "women," viewed as distinct groups. A recent expression of this collective vision was contained in the claims made by the residents of Vieques that they have a collective right to be left alone by the U.S. Navy.[108]

The conflict between individual and collective rights tends to emerge especially in the context of discussions about the future political status of Puerto Rico. The demands attendant to a collective right, such as the right of self-determination of the Puerto Rican people, may encounter difficulties when confronted with the individual rights of Puerto Ricans viewed as individual American citizens or as individual voters. The claim of a collective "right" of a people to preserve its identity may clash with the preferences of individuals who assert their individual rights to self-expression.

This clash has become apparent, for example, in debates about the issue of language in Puerto Rico. The goal of preserving the collective right to preserve Spanish as a defining feature of Puerto Rican culture may collide with the expectations of individual Puerto Ricans who do not speak Spanish (for example, some of those raised in the continental United States) not to be discriminated against on account of language. Thus, the Puerto Rican context exemplifies the tensions inherent in claims of collective rights when confronted with those of individual members of the collectivity.

The limitations of rights discourse identified above, however, should not be taken as evidence that such discourse has been only a trap for Puerto Ricans as a community. The discourse of rights has not been a sham, a naked legitimating strategy of the powers that be. The language of rights and the concrete experience of a regime of liberal rights, despite their constraints, have produced opportunities for the vindication of important claims. They have been deployed internally against the Puerto Rican elites who control the state apparatus as well as externally against the policies and actions of the metropolitan state. The many examples include individual victories won in local and federal courts of law, as well as gains more collective in nature, such as the people's right to elect their own legislature and their own governor, however limited the powers of those officials may be.

In this sense, rights in the Puerto Rican context have not been simply an illusion. They have yielded tangible benefits. They have been part of the material experience of negotiating, sometimes on the larger scale of history, most of the time on a day-to-day basis, the conditions of existence of Puerto Ricans, both as individuals and as a national community. Rights, then, within the context of the colonial relationship between the United States and Puerto Rico, have exhibited the ambiguous and paradoxical character that other authors have described in a variety of situations in other communities.[109]

[108] See the brief discussion of the Vieques issue in chapters 3 and 7.

The regime of rights in place in Puerto Rico has had a variety of constitutive effects on Puerto Rican society. Those effects have touched on all aspects of living and struggling within the community, on all dimensions of the country's social fabric, and on the larger facets of its historical experience as well as on the most minute details of its daily interactions. The regime of rights has helped to shape the relations and practices that compound family life, economic structures, educational systems, artistic expression, political organizing, the dispensation of justice, the electoral process, and many other social phenomena.

The regime of rights is, in turn, supported by a highly developed infrastructure to administer the handling of rights claims. That complex web of institutions includes a sizable organized legal profession, a relatively modern system of courts, a high number of judicial functionaries, several professional law schools, diverse legal services programs, and an increasing number of informational and other support services geared to the legal profession. This infrastructure is part of the material manifestation of a pervasive legal culture and of the importance of the discourse of rights in this particular society. All of these phenomena call for more extensive and in-depth sociological analysis, for they help to define the character of contemporary Puerto Rican society. That fuller inquiry cannot be pursued here, so my examination is limited to those effects of the discourse of rights that most directly pertain to the relationship between the United States and Puerto Rico.

An important effect of the discourse of rights has been the development of a "federal" machinery for the protection of rights. Its workings include the supervision of the local state apparatus by the U.S. federal court system and the operation of the U.S. Supreme Court as ultimate arbiter of many individual and collective conflicts. This supervision has made possible a type of subjection to metropolitan control that many view as legitimate, and even desirable or simply convenient. In fact, independence advocates and other social and political activists who oppose the American regime in Puerto Rico or question some of its adverse consequences have sought remedy in federal courts as a way to exercise leverage against local Puerto Rican officials or against the federal bureaucracy and the U.S. military. Examples include civil rights suits against the Puerto Rico and U.S. governments and court challenges to U.S. Navy activities in Vieques. At different moments, the role of the federal court in Puerto Rico has been criticized and even radically questioned, both politically and in academic writing.[110] However, in a very important way, the view of the federal

[109] *See, for example*, the collection of essays in IDENTITIES, POLITICS, AND RIGHTS, *supra* note 9, especially those discussing the place of the discourse of rights in colonial South Africa, in the struggle against apartheid, and in the context of wife battering cases in Hawaii.

[110] *See, e.g.* Carmelo Delgado Cintrón, *El juez federal Bernard Rodey y la crisis de 1909; La oposición de la Cámara de Delegados a la Corte Federal*, 40 REV. COL. ABOG. P.R. 415 (1979); Miriam Naveira de Rodón, *Federal Court Jurisdiction and the Status Commission*, 39 REV. COL. ABOG. P.R. 131 (1978); Roberto Tschudin, *The United States District Court for the District of Puerto Rico: Can an English Language Court Serve the Interest of Justice in a Spanish Language Society?*, 37 REV. COL. ABOG. P.R. 41 (1976)

The most recent political challenge to the U.S. District Court in Puerto Rico has been the refusal of Vieques protesters to recognize the court's authority to judge them for their acts of civil disobedience. The court's orders to incarcerate some protesters pending trial for misdemeanor charges has triggered

court system as a guarantor of rights has served to buttress American hegemony within segments of the population in different periods.

There are still more profound ways, however, in which the discourse of rights has operated to consolidate U.S. hegemony over Puerto Rico. The vision enshrined in the Puerto Rican Constitution has developed a force of its own. The language of rights has become a central feature of political discourse in Puerto Rican life throughout the social spectrum. Because of its visibility and great weight in public life, the legal profession—which to a large measure has taken as its "exemplary center"[111] the American bar—has been instrumental in spreading this vision and transforming it into part of the dominant, hegemonic culture. In this sense, the discourse of rights has been not only a product of an ideological consciousness, but also a primary producer of that consciousness.[112]

The discourse of rights promotes a view whereby social relations and needs are interpreted and articulated in terms of rights possessed, claimed, or denied. Rights discourse is a component of a broader phenomenon that may be called *legal consciousness*, or the awareness of law as a constitutive element of personal and social experience that, in turn, produces a tendency to view the world through juridical lenses. Legal consciousness and rights discourse, therefore, constitute a particular subjectivity. They form part of a subject's perception and evaluation of the world and of the subject's relationship to it. Through those lenses, the world is perceived either as conforming or deviating from law, as fulfilling or frustrating the promises held by rights. The discourse of rights, then, has contributed to produce a certain way of viewing the world, that is, a certain type of subjectivity, within the Puerto Rican community.

I have discussed already how rights are closely associated with notions of personal worth. This is an important feature of the kind of subjectivity that incorporates rights discourse as one of its constitutive elements. On the basis of my observations of Puerto Rican society, I believe that substantial sectors of the Puerto Rican population ascribe a great significance to the notion of rights.[113] For many, having rights constitutes one as a person, as a moral being. In this sense, their identity as people is to a great extent defined by their perceived status as bearers of rights. The extent to which that self-perception outweighs the sense of identity produced by other factors, such as language, ethnicity, or other shared "cultural" practices, is difficult to determine. In fact, it may be that, in many people, there is no felt need to balance them. All those factors may work to reinforce each other. Such would be the case, for example, when a person claims the right to speak a certain language, for example Spanish. In that instance his or her identity is being constructed both as someone who has a right and as someone who speaks and wants to speak that language as his or her own. The notion of the self as a "rights bearer" is, then, another among the multiple identitary factors that coalesce into the making of his or her specific identity.

Certainly, there are bound to be differences in this construction of the self depending on such variables as class or generation. But what seems obvious, in the Puerto Rican case, is that many express a great appreciation for the idea that they have rights. This does not mean necessarily that they can recite with precision the specific rights accorded them by the legal order. Nor does it mean that those rights are effectively enjoyed by them. What it means is that there is a generalized belief that they, as individuals, have rights. Sometimes, the content of those rights deemed to be possessed may coincide with the "objective" definition contained in actual legal texts. Other times, it may not. Nonetheless, people continue to view themselves as legal subjects, that is, as bearers of rights.

The crucial fact, as far as the reproduction of hegemony is concerned, is that, for considerable segments of the population, this source of moral worth is the American legal and political system. It is in the institutions of the metropolis that "safeguards" of this worth are perceived to be located. The paradox that results is that the devaluation that colonialism has historically entailed becomes invisible, concealed, as it is compensated by the sense of worth that is felt to derive from being an American citizen and a bearer of rights. As we have seen, that citizenship and those rights have very serious limitations. But they are accorded enough value to provoke strong reactions in their defense and to stimulate aspirations to see their benefits extended.

Some independence supporters have minimized the relevance of this "reality" of rights, particularly at the individual level, and have stressed the importance of the collective and personal devaluation inherent in a colonial relationship. For the more radical, the discourse of rights has been a mere illusion, a "hoax" that conceals colonial domination and exploitation. In many ways this radically skeptical counterdiscourse has missed the point and is the product of a reductionist view. Its proponents have been unable to see the ambiguous, paradoxical nature of social life. They have failed to acknowledge that recognizing the very real sense in which rights "exist" within this colonial framework does not preclude the possibility and desirability of exposing the devaluation resulting from a relationship of political subordination. Nationalist discourse has operated many times under the assumption that the only, or most important, dimension of freedom is the freedom of collectivities, such as nations. Often the gain of individual rights appears to be considered secondary to the claim of collective liberty.

Set in another location in the spectrum of political discourses within the Puerto Rican community, a recent postnationalist critique has stressed the value of rights for the Puerto Rican people as they have accrued throughout a century under U.S. rule. This perspective acknowledges the subordinate condition that colonialism entails. It explains the ideological attachment of most Puerto Ricans to U.S. citizenship as being the product of a conscious choice based on the appreciation of the democratic gains of the population flowing from a regime of civil and political rights. This position has ended up rejecting independence out of concern that an independent Puerto Rico will become a neo-colonial state deprived of the rights now enjoyed through U.S. citizenship. Some of its members have adhered to statehood as the solution to the status problem. Others have called for a nonessentialist approach to the status question, expressing a willingness to consider any political status as long as it does not imply severing the connection to the United States and losing the benefits of U.S. citizenship.[114]

harsh criticism from the Puerto Rican Bar Association, law professors, and political and religious leaders, among others.

[111] CLIFFORD GEERTZ, NEGARA: THE THEATER STATE IN NINETEENTH CENTURY BALI (1980).

[112] *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 112 n.120 (1984).

[113] This fact is made patently clear in a documentary film sponsored by the Puerto Rican Bar Association under the title *Nosotros, el pueblo de Puerto Rico* (Angelita Rieckehoff prod. c. 1982).

[114] *See, generally*, PUERTO RICAN JAM, *supra* note 15; Juan Duchesne et al., *Algunas tesis democráticas ante el plebiscito de 1998*, DIÁLOGO, March 1999, at 38–39.

As an explanation of Puerto Rican attitudes, this perspective seems to have hit the mark. It shares many of the views expressed in this book. As a political proposition, however, it exhibits a shortcoming that is the reverse of the reductionist view held by some independence advocates. If those in favor of independence tend to naturalize nationhood, the postnationalists tend to essentialize rights. If some independence advocates at times make too much of collective, to the detriment of individual, rights, some fragments of the postnationalist discourse seem to dissolve the collectivity into the maze of individual aspirations enveloped in the liberal discourse of rights. The radical postnationalists appear to have assumed the discourse of rights without problematizing it. Although they acknowledge that the rights presently enjoyed are restricted in range, their solution is to struggle to expand their scope.

In some ways this is reminiscent of Marx's contention that bourgeois rights should be expanded to cover the whole of social experience. Pointing to the limited reach of the content of rights at a given moment, however, is not the same as accounting for the paradoxical effects of rights, as explained in this chapter. The degree to which rights simultaneously liberate and subject is absent from the discussion in their academic writings.

One of the most striking features of this radical postnationalist discourse is its insistence on linking the viability of a regime of rights to the continued connection with the metropolitan state. This conclusion is based, among other things, on the calculation that without the protection of U.S. citizenship, globalized capital would be mercilessly exploitative of Puerto Rican workers and that Puerto Rican elites would manifest a meager disposition to guarantee the enjoyment of rights to many subaltern groups, like women, gay men and lesbians, and others. It relies for this prediction on an assessment of the realities observed in nearby independent countries in the Caribbean.[115] In a substantial manner this position exemplifies the degree to which the discourse of rights has penetrated Puerto Rican consciousness and the historical connection established between such discourse and the American presence in the island.

The sense of liberty associated with the notion that the system is protective of rights has led many Puerto Ricans, from all sectors of society and professing diverse political and religious persuasions, to link the conditions of relative freedom they experience with the colonial relationship itself, or at least with American rule. Many openly attribute the "existence" of rights to the American presence. In Puerto Rico "modernity" has tended to be equated with the particular brand of modernity incarnated in American institutions and the American "life world."[116] In the same fashion "rights" are thought by many people to be equivalent to the particular regime of rights characteristic of American political life. Association—or "permanent union" —with the United States is considered a precondition for the preservation of rights.

Two paradigmatic, and poignant, expressions of this belief can be found in the published statements of two very different members of Puerto Rican society. One, a poor, Black man named Cruz Rivera who lived in a public housing project, stated the following in an interview in a Puerto Rican cultural newspaper:

[115] *See* Grosfoguel, *supra* note 15, at 66–70; Ramón Grosfoguel, *Colonialismo puertorriqueñista*, EL NUEVO DÍA, Nov. 9, 1998, at 58.

[116] The term is taken from Habermas, *supra* note 63, at 4.

> I am a statehooder. I believe in permanent union between Puerto Rico and the United States. . . . The United States has made me identify myself with freedom, with the kind of democracy that has always existed in that country, with the capital it generates. I have been a poor person who wants to get ahead, a person who believes in freedom of expression, which is fundamental to democracy. That made me become a statehooder.[117]

In an article penned for the opinion page of the *New York Times*, his well-to-do compatriot, author Rosario Ferré, wrote,

> The majority of Puerto Ricans prize their American citizenship. It represents for us economic stability and the assurance of civil liberties and democracy. On the other hand, we also cherish our language and culture. Thus, Puerto Rico's situation has historically been a paradox. . . . As a Puerto Rican and an American, I believe our future as a community is inseparable from our culture and language, but I'm also passionately committed to the modern world. That's why I'm going to support statehood in the next plebiscite.[118]

As may be readily seen from the two quotes, the conviction that civil liberties may only be preserved by maintaining a close association with the United States partially explains the growth of the prostatehood movement. Some among its leaders, when confronted with the argument about the devaluation inherent in the colonial relationship, propose that the way to overcome it is by becoming "full-fledged" members of the American polity. "Equality of rights" has become the slogan of the movement. According to this rhetoric, the complete dignity of Puerto Ricans can be achieved only through the equality of rights perceived to be the inevitable by-product of incorporation as a state of the union. Arguably, it is within this sector of the Puerto Rican population that the identity created by the rights deemed to be inherent in the condition of being a member of the American union has attenuated with most effectiveness the weight traditionally accorded by nationalists to such factors as ethnicity and language in the formation of a collective identity.

In sum, as much as it has served to vindicate particular claims, satisfy discrete needs, and articulate localized and more overarching resistances to diverse forms of oppression, the discourse of rights has also contributed to reproduce American hegemony within the Puerto Rican population. To the extent that "rights" have been associated with the American presence, that presence has been legitimated.

As of this writing, the goal of establishing a liberal colonial system has been achieved, and the discourse of liberal rights has been an important factor in the reproduction of that colonialism. It is true that in recent decades there has been an increasing critique of the present political arrangement. However, this does not invalidate the conclusion just stated. The results of the several referenda held in the island on the status question and the public discourse on the matter indicate that the majority of the population prefers the present arrangement to severing ties with the United States. Furthermore, most of those who favor statehood are satisfied with remaining under the present subordinate political relationship until statehood is achieved.

The present arrangement seems to be acceptable until a formula is found to gain

[117] R. Otero, *Yo soy de Canales: Entrevista a Cruz Rivera*, Ptso 13, May 1992, at 2, 3.

[118] Rosario Ferré, *Puerto Rico, U.S.A.*, NEW YORK TIMES, March 19, 1998, at A-23.

greater political power (through greater autonomy or full incorporation into the United States) without losing the connection to the United States. This attitude has very much to do with the perceived connection between the enjoyment of rights and life within the American legal and political orbit. Whether formal colonialism is finally shed or not, the discourse of rights may still operate to contribute to a transformed, but still close, entanglement of the Puerto Rican nation with the accouterments of American modernity and American political and legal culture. This is what hegemony is about.

The above argument is not based on the attribution of some form of "false consciousness" to the Puerto Rican population. By *false consciousness* I mean a form of misrepresentation that somehow conceals the "true state" of things. False consciousness implies that people have been "brainwashed" to accept their current beliefs. The way in which the concept of hegemony is sometimes explained may produce that impression. What I have attempted to do is to provide a sociohistorical explanation of why most Puerto Ricans accept American presence and American rule.

On the other hand, avoiding the attribution of any form of collective false consciousness does not require one to disregard the fact that sometimes people operate under misconceptions about certain phenomena. Thus, there may be popular misconceptions about the meaning accorded in the official legal system to concepts such as *citizenship* or *right*. Or they may make decisions based on mistaken calculations about the probable effects of their actions. Identifying these misconceptions and miscalculations is not the same as attributing them to a form of false consciousness, as understood in some theoretical and political literature.

In the same vein, the fact that people associate in their minds certain phenomena does not imply that the link is "true" or "false" in any objective fashion. What may be more important, in explaining behavior, is that the link is made. Those mental associations do not have to be attributed to false consciousness for us to understand that they may be conditioned by particular forms of discourse and experience. Many times those associations are made under conditions that render alternative interpretations very difficult to arrive at. Historical conditions and events, including the discourses prevalent in certain moments, all affect those interpretations.

The association that many Puerto Ricans have made between a society ruled by rights and the American presence is such an interpretive phenomenon. It has been made within a given historical context. That context includes having lived during 100 years under American colonialism. U.S. colonialism, as constructed by the imperial state and as experienced by the Puerto Rican community, has been a prime conditioner of the social, political, and cultural perceptions of Puerto Ricans and of their interpretations of the world, including their calculations about the viability of a regime of rights outside the American sphere and their assessments about the possibility of alternative futures. To deny this would be to set aside an enormous fact of power that has been actively operating in Puerto Rican society for such a long time.

The Regime of Partial Democracy

Puerto Rico's internal governing processes have been organized according to the principles of liberal representative democracies. Officials of the government of Puerto

Rico are elected by popular vote. The system is considered democratic by most of the population. Yet it is a system of only partial democracy in a very important sense. Although the Puerto Rican government is subjected to scrutiny through popular elections, Puerto Ricans residing in Puerto Rico are deprived of full participation in the election of officials of the U.S. government and in decisions taken by that government regarding fundamental aspects of Puerto Rican life. Thus, a regime of internal democracy coexists with a system of undemocratic colonial subordination. That regime of internal democracy, moreover, is riddled with many of the limitations shared by most modern systems of representative democracy that impede the citizenry from fully participating in the affairs of the community.

I examine below the undemocratic character of the political relationship between the United States and Puerto Rico as well as the characteristics and shortcomings of the latter's internal political system. Finally, I look at the extent to which, despite these constraints, this "partial" and limited democratic experience has contributed to a generalized acquiescence, if not active consent, to U.S. rule in Puerto Rico.

The Undemocratic Character of Colonial Subordination

The status of nonincorporated territory, as defined by the U.S. Supreme Court, implies that Congress is invested with plenary powers over Puerto Rico.[119] This means that, constitutionally, Congress has exclusive control over fundamental aspects of life in the territory. The executive branch of the U.S. government also exercises important functions and conducts operational activities in Puerto Rico. The U.S. federal judiciary has jurisdiction over important legal controversies emerging from activities or behavior occurring in or pertaining to Puerto Rico. Despite this massive intervention of the U.S. government in Puerto Rican life, Puerto Ricans residing in Puerto Rico do not vote for the president of the United States or elect representatives to the U.S. Congress, except for a nonvoting resident commissioner for Puerto Rico who sits in the House of Representatives.[120]

This obviously undemocratic arrangement is one of the fundamental reasons for the conclusion that Puerto Rico is a colonial dependency of the United States. This fact has been stressed continuously since the early decades of the century by the independence movement[121] and has been at the core of the claim for admission into the union made by followers of the statehood movement.[122] Even many supporters of the current Commonwealth status, including influential leaders of the Popular Democratic Party, find the situation problematic and have striven to obtain reforms that would, in their assessment, eliminate the most flagrantly undemocratic features of the system.

Thus, during the 1989–1991 plebiscite discussion,[123] the Popular Democratic

[119] See the full discussion of the matter in chapters 4 through 6.

[120] *See* chapter 3.

[121] *See* Statement by Rubén Berríos Martínez, President of the Puerto Rican Independence Party, *in* 1 *Political Status of Puerto Rico: Hearings on S. 710, S. 711, and S. 712 before the Senate Committee on Energy and Natural Resources*, 101st Cong., 1st Sess. 143 (1989) [*Hearings*].

[122] *See, e.g.*, Statement by Carlos Romero Barceló, Former Governor of the Commonwealth of Puerto Rico, *in* 1 *Hearings*, *supra* note 121, at 113.

[123] See chapters 6 and 7 for more detailed discussions of the process that took place during 1989–1991 as a result of the proposal to hold a plebiscite in Puerto Rico to "solve" the status question.

Party proposed various measures to increase the participation of the people of Puerto Rico in decisions of the U.S. government that affect the island.[124] Jaime B. Fuster, former resident commissioner of Puerto Rico in Washington and now an associate justice of the Puerto Rico Supreme Court, explained the matter in the following terms to the U.S. Senate Committee on Energy and Natural Resources during hearings held in San Juan in the summer of 1989:

> That even today the United States should stand accused of being a colonialist power by both those who favor independence and by those who favor statehood is largely due to this question of the applicability of Federal laws to Puerto Rico. . . . To us it is necessary to do away with indiscriminate extension of Federal laws to Puerto Rico which occasionally hamper our development efforts. And we should also like to remove the cloud of doubt that hovers over the legitimacy of the Commonwealth relationship.
>
> For both these practical and theoretical reasons, we need a mechanism that will allow for adequate consent and participation in Federal legislation not dealing with overriding national interests.[125]

Throughout the 20th century the U.S. government has been adamant in its refusal to augment that participation in any significant way.[126] This attitude surfaced again during the process that led to the scuttling of the plebiscite proposal in 1991.[127] Developments related to the discussion of the plebiscite bill presented in Congress in 1996 by Representative Don Young confirmed congressional reluctance to grant Puerto Rico greater powers of participation in the enactment of federal legislation while it remains a Commonwealth as currently defined.[128] This latter process opened the possibility, however, of exploring a fourth alternative—apart from Commonwealth, statehood, and traditional independence—that would recognize Puerto Rican sovereignty but preserve close legal and political ties between the United States and Puerto Rico. This status option, known variously as "free association" or the "associated republic status," was not openly adopted as its main proposal by any Puerto Rican political party.

But its rather ambiguous inclusion in the Young Bill and the insistence of a close majority of the House of Representatives in defining Commonwealth as an unreformed territorial status forced the Popular Democratic Party to look to the free association alternative more closely and to try to produce a definition of Common-

[124] *See* S. 712, 101st Cong., 1st Sess. Title IV (1989).

[125] 2 *Hearings*, *supra* note 121, at 6, 8. Similar comments were made by such Popular Democratic Party stalwarts as former Resident Commissioner (and former president of the University of Puerto Rico) Jaime Benítez; the president of the Puerto Rican Senate, Miguel Hernández Agosto; and the speaker of the Puerto Rican House of Representatives, José R. Jarabo. *See id.* at 41, 63, 83.

[126] *See, generally*, ANTONIO FERNÓS ISERN, ESTADO LIBRE ASOCIADO DE PUERTO RICO: ANTECEDENTES, CREACIÓN Y DESARROLLO HASTA LA ÉPOCA PRESENTE (1974), TRÍAS MONGE, *supra* note 34.

[127] Before reporting favorably on S. 712, one of the original plebiscite bills, the Senate Energy and Natural Resources Committee eliminated from it a provision to grant nonvoting representation to Puerto Rico in the United States Senate and diluted significantly, almost to the point of obliteration, the Popular Democratic Party proposal that Puerto Rico have a greater say in federal decision making. JUAN M. GARCÍA PASSALACQUA & CARLOS RIVERA LUGO, PUERTO RICO Y LOS ESTADOS UNIDOS: EL PROCESO DE CONSULTA Y NEGOCIACIÓN DE 1989 y 1990 (1990).

[128] H.R. 856, 105th Cong., 2nd Sess. (1998) (enacted)

wealth status more akin to the characteristics of an associated republic. That route began to be seen beyond a small circle of its long-time proponents as a legitimate solution to the democratic deficit of the present relationship, without having to resort to the full integration of Puerto Rico into the American union or to a more radical severance of ties with the United States. Free association was finally included as a separate option on the ballot during the Puerto Rican-sponsored plebiscite held in December 1998. The option was represented in the process by several small autononist groups that included some known members of the Popular Democratic Party. The free association formula obtained only 0.3% of the votes cast in that plebiscite.

Congressional refusal to increase Puerto Rican participation in federal legislation or to grant a greater degree of autonomy than is now vested in the Puerto Rican government, absent a substantial change in the political status of the island, is grounded in the view that Congress may not relinquish its plenary powers over Puerto Rico as long as the latter remains unincorporated territory of the United States. The reaffirmation of such momentous power has been a constant part of the legitimating discourse deployed to support all varieties of congressional action regarding Puerto Rico. Those actions have ranged from the extension and limitation of citizenship rights to the granting and elimination of tax incentives and the determination of the processes designed to decide the political future of the island.

This stance does, in fact, produce markedly paradoxical results in the context of self-determination claims. There has been a very profound contradiction in the so-called self-determination bills presented in Congress to address the question of the political status of Puerto Rico. Although purporting, however sincerely, to create the conditions for the exercise of self-determination by Puerto Ricans, all the recent proposals have operated under the premise that Congress has the ultimate power of decision regarding the terms of the bills and the procedures to be followed in the self-determination process. Puerto Rican political parties, government officials, and other sectors of Puerto Rican society have been consulted through various means on these matters. But Congress has always claimed the final say. Establishing the rules of the game is as important as making substantial input into the decision-making process, if not more so. Puerto Rican collective self-determination is, consequently, made to depend on an initial act of determination by the metropolitan state directed at defining the content and the form of the available possibilities and the means to attain them.[129]

This view is the direct result of the discourse of power legitimated by the *Insular Cases*. It is a product of the way in which the colonial relationship has been legally constructed since the early days of its establishment. This critique against those congressional processes generally produces the response that, although conceptually correct, the observation fails to grasp the "practicalities" of the situation. Congress, after all, is the real power in this matter. This realist, pragmatic appraisal of the power relationship may be directly on target, especially when referring to the politics of the self-determination process. Yet the truer the response appears to be, the more it reaffirms the adequacy of the critique. For it lays bare the colonial, ultimately undemocratic, character of the relationship.

[129] For a similar view, *see* Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILLANOVA L. REV. 1119, 1210 (1997)

Internal Government of the Colony

In the early days of the American occupation, Puerto Rican politicians of different persuasions sought to gain control of the internal governmental apparatus of the country. However, despite the proclamations heralding a new age of democracy and freedom, the United States soon showed itself reluctant to entrust the administration of the colony entirely to Puerto Ricans. In fact, the metropolitan state was more inclined to formally recognize certain individual rights than to release its direct control over the island's internal governmental structure. Liberalism and democracy, it must be remembered, are not necessarily identical. The governing elites of the American state always stressed the difference, particularly in the context of territorial possessions. The basic assumption that justified withholding control from the "native population" was that Puerto Ricans were unfit for self-government.[130] This attitude would gradually be modified in the course of the relationship.

After the initial 2-year period during which the country was governed by military commanders, the United States established a civilian government. The first such government consisted of a governor, appointed by the president of the United States; a House of Delegates, whose members were elected by qualified voters residing in the island; and an Executive Council, integrated by appointees of the U.S. president. The Executive Council had both executive and legislative functions, serving in effect as a second legislative chamber, an obvious departure from the traditional American model of separation of powers. This structure would facilitate the goal of devising an internal government with some degree of participation of the native elites while preserving as great a control as possible in the hands of the metropolitan power.[131]

As a result of continued pressure from Puerto Rican political leaders, the Executive Council's legislative functions were abolished by the Jones Act of 1917. This measure established a bicameral legislature elected by popular vote. In consequence, Puerto Rican political leaders gained additional clout. In 1947 Congress authorized Puerto Ricans to elect their own governor. The following year Puerto Ricans chose Luis Muñoz Marín, the charismatic founder of the Popular Democratic Party, as their first elected governor. Since then Puerto Rico has had seven elected governors, all of them Puerto Ricans, three belonging to the pro-Commonwealth Popular Democratic Party and three to the prostatehood New Progressive Party.

The reform movement that culminated in the promulgation of the 1952 Constitution shifted to the Puerto Rican people the power to approve the internal structure of their government, under the supervising eye of the U.S. Congress. The Puerto Rican Constitution established a three-branch government, the basic structure of which remains to this date. The governor, as chief executive officer, and the members of the bicameral legislature are elected by popular vote. The members of the Supreme Court are designated by the governor, with the advice and consent of the Puerto Rican Senate.

Puerto Rico has been engaging in party politics for over a century. The first political party in the modern sense, the Liberal Reformist Party, was founded in 1870. Most political parties since then have forged their identities in great measure around the positions they take regarding the political status of the island. The country

[130] *See* FERNÁNDEZ, THE DISENCHANTED ISLAND, *supra* note 31, at chap. 1.

[131] *See id.* at 19–21.

has also had a long experience of general elections,[132] starting from the time of the Spanish colonial regime. From 1809 to 1898 there were 24 such elections to select different types of functionaries, including representatives to the Spanish Cortes when such representation was allowed.[133] During Spanish rule voting was severely restricted to certain classes of people.[134] Under the American regime there have been 29 general elections.[135]

Electoral practices in the first four decades of American colonial rule were fraught with irregularities, the purchase of votes, physical and psychological coercion, and other corrupting activities. Despite this generally recognized fact, voter participation in the 14 elections held from 1900 to 1936 averaged 74.47% of those eligible to vote.[136] In 1940 the newly formed Popular Democratic Party strove to imprint a new meaning onto the voting process, presenting it as the vehicle for the oppressed masses to get rid of the old political bosses and to facilitate the social and economic transformation so many were clamoring for.

The definitive victory of the Popular Democratic Party at the polls in the election of 1944 was repeated in 1948, and the subsequent social, economic, and political reforms the party was able to put in motion, with support from the Roosevelt and Truman administrations, gave credence to the argument advanced by the populist reformers that voting did make a difference. Since then, voter participation in electoral events in Puerto Rico, especially general elections, has been even larger. The 14 general elections held from 1940 to 1992 averaged a registered voter participation of 81.41%.[137] Notwithstanding occasional allegations of fraud, the results of the elections are generally accepted as valid, transitions from one government to another are peaceful, and in cases of controversy, the judiciary's resolution of conflict enjoys a great degree of legitimacy.

Of even more significance is the fact that voting has acquired a special mystique, a particular value, for the majority of Puerto Ricans. One explanation for this phenomenon may lie in the feeling of empowerment that voting has been engineered to produce since the reforms of the 1940s. Additional reasons may be found in the fact that voting in Puerto Rico is closely tied to concrete material interests. The past 50 years have witnessed the development of a colonial welfare state that has become a crucial actor in the economic and social life of the community. The Puerto Rican government employs approximately one-third of the work force in the country and administers a great variety of social and economic programs. It grants permits and licenses. It provides an array of public services such as electricity, water, and telecommunications. It allocates public housing and runs a sizable public education system that extends from kindergarten to graduate university programs. It pays enor-

[132] "General elections" are those whose purpose is to elect the officials of the government, be they functionaries of the internal government or representatives or delegates to the government of the metropolitan state. *See* FERNANDO BAYRÓN TORO, ELECCIONES Y PARTIDOS POLÍTICOS DE PUERTO RICO 2–3 (1989).

[133] *Id.* at 3.

[134] *Id.* at 4.

[135] *See id.* at 3. The cited work covers elections held until 1988. The numbers provided here include the general election that took place in 2000.

[136] *See id.* at 348.

[137] *See id.* at 349; ESTADO LIBRE ASOCIADO DE PUERTO RICO, COMISIÓN ESTATAL DE ELECCIONES, RESULTADOS FINALES: ELECCIONES GENERALES 3 DE NOVIEMBRE 1992, at 1 (1993).

mous amounts of money to the private sector for contracts to provide a wide spectrum of goods and services, and it regulates a countless number of activities and relationships.

Municipal governments, which are the most important local government bodies, also render needed services and establish significant links with local communities, groups, and individuals. A notable degree of patronage at both levels of government inspires added interest in the makeup of their administrations. All of this means that the outcomes of electoral events, especially those that determine who controls the government apparatus, always involve high stakes for the many people whose daily lives and enterprises are directly affected by government decisions, particularly those that beget inclusions and exclusions or that grant or withhold benefits. The high turnout to determine who makes those decisions is, therefore, understandable.[138]

These features of Puerto Rican internal democracy—elected government officials, a long tradition of party politics, belief in the power of suffrage, large voter participation, respect for the outcomes of elections, and acceptance of judicial arbitration of electoral disputes—have coexisted with other characteristics that form an important part of the island's political culture. For example, Puerto Rican politics have always exhibited a great measure of paternalism and *personalismo*.[139] Political parties have relied heavily on patronage to preserve the loyalty of their followers. Preference for the strong charismatic leader is still the norm, rather than the exception. On many occasions these traits have worked to muzzle discussion of substantive issues, as the voters' attention is drawn to questions of personality, personal loyalties, and the preservation or conquest of privileged access to public perquisites based on political affiliation. Party allegiance has tended to prevail over independent judgment. There have been growing signs of dissatisfaction in this regard, however, manifested in an increase in the number of "unaffiliated" voters and those who cross party lines to endorse candidates of other parties on the basis of their performance or their proposed programs of action.

Paternalism, *personalismo*, and unconditional party allegiance are not exclusive to the Puerto Rican political system. They are found in many countries of Latin America, the Caribbean, Asia, and Africa as well as in regions and political communities in Europe and the United States. In Puerto Rico, they may be the surviving political traits of a former cultural milieu associated with the world of the *haciendas*. This fusion of the old and the new is not an unfamiliar phenomenon in contemporary societies. As Habermas indicated, the sociocultural systems of many liberal societies have contained diverse blendings of precapitalist and bourgeois elements in their traditions.[140]

[138] Referenda and other electoral events not related to the election of officials tend to elicit a lower voter turnout. Thus, for example, the 1952 referendum to approve the Constitution of Puerto Rico drew out 58% of registered voters; the 1967 plebiscite, 66%; the 1970 referendum to lower the voting age to 18 years, 35%; the 1991 referendum on "Democratic Rights Guarantees" (*see* chapter 7), 62%; the 1993 plebiscite on political status, 73.6%; the 1994 referendum to amend the Constitution to abolish the absolute right to bail and to increase the number of justices in the Puerto Rico Supreme Court, 62.9%; and the 1998 plebiscite, 71.3%. *La voz del pueblo en las urnas*, EL NUEVO DÍA, July 28, 1998, at 4; ESTADO LIBRE ASOCIADO DE PUERTO RICO, COMISIÓN ESTATAL DE ELECCIONES, ESCRUTINIO RESULTADOS ISLA, PLEBISCITO 13 DE DICIEMBRE DE 1998 (1999).

[139] *See* LEWIS, *supra* note 34, at chap. 17. *Personalismo* is an attitude that accords greater importance to the personality of the leader than to his or her ideas or program.

[140] HABERMAS, *supra* note 63, at 32–33.

The democratic system established in Puerto Rico for internal governance manifests the limitations of all modern formal democracies. According to Habermas, in these systems citizens are in fact excluded from real substantive participation through various mechanisms and practices. One of those excluding practices is what he termed *structural depoliticization*, which consists in relegating citizen participation to occasional voting, or even the public expression of protest, while entrusting real decisions to political, bureaucratic, or technocratic elites.[141] "The arrangement of formal democratic institutions and procedures," argued Habermas, "permits administrative decisions to be made largely independently of specific motives of the citizens." He added, "This takes place through a legitimation process that elicits generalized motives—that is, diffuse mass loyalty—but avoids participation."[142] In fact, modern formal democracy "counts now as only a method for selecting leaders and the accouterments of leadership."[143] Formal democracy replaces the notion of self-determination of the people by a process intended "to make possible *compromises* between ruling elites."[144]

These same tendencies can be observed in the Puerto Rican political system. Popular enthusiasm for voting and political debate does not necessarily translate into effective power to influence fundamental decisions. Despite the populist discourse that became part of the codes for political communication with the masses since the middle of the 20th century, real decision making (in the limited spheres over which the Commonwealth government can exercise control) has often been withheld from the population.[145] Aware of these shortcomings, many popular movements in Puerto Rico have demanded greater participation in the resolution of issues that affect their constituencies. Thus, communities have organized themselves to press for access to administrative decisions that might have a negative impact on their environment. Women's groups have taken their pressure directly to the legislature to claim specific reforms on their behalf.[146] Workers have struggled to augment their influence in public decision making by promoting legislation recognizing their right to collective bargaining in the government sector. Students and faculty have sought inclusion in the decision making bodies of the public university.

In sum, the internal government of Puerto Rico is based on the institutions of representative democracy and draws on a long tradition of party politics, popular elections, and sustained voter participation. Nonetheless, it is afflicted by traits that, on many occasions, distort democratic politics. Additionally, the shortcomings of

[141] *Id.* at 36–37.

[142] *Id.* at 36.

[143] *Id.* at 123.

[144] *Id.* (emphasis in the original)

[145] A recent dramatic example of this phenomenon was the 1997 decision by the Puerto Rican government to partly privatize the government-owned telephone company. A massive wave of opposition surged from a wide spectrum of voices in the Puerto Rican community. Despite a turbulent general strike that pitted the police against demonstrators, the governor went ahead with the sale. Part of the popular backlash was to be felt the following year as some voters apparently decided to "punish" the pro-statehood governor by voting against statehood in a plebiscite promoted by him. The plebiscite had been called by the governor, again despite strong opposition to its realization even by people of his own political party.

[146] *See, e.g.*, Esther Vicente, *Beyond Law Reform: The Puerto Rican Experience in the Construction and Implementation of the Domestic Violence Act*, 68 REV. JUR. U.P.R. 553 (1999).

formal liberal democracies effectively preclude its citizens from important public decision making through various mechanisms.

Puerto Ricans do participate in the election of the officials of the government of Puerto Rico. This makes this internal arrangement democratic in a formal and, to a certain extent, real sense. However, they do not participate in the election of those who govern them or in decision making processes at the level of the metropolitan state; this external setup is thus undemocratic. The political structure designed to govern Puerto Ricans can only be described, then, as an example of partial democracy.

Effects of the Partially Democratic Experience

The effects within the Puerto Rican community of the experience of partial democracy are difficult to ascertain. More detailed, empirical study, using quantitative and qualitative methods of sociological inquiry, would help to produce a better understanding of the phenomenon. This particular experience should be studied especially in connection with the production of identities and subjectivities, in relation to perceptions of the individual and collective self, and in regard to the manner in which notions of self-worth have been generated. As happens with the discourse of rights, arguably those effects also will be found to be multisided, ambiguous, and paradoxical. Following are some suggestions meant to stimulate further research about the ways the regime of partial democracy may have contributed to the legitimation of American rule and the reproduction of American hegemony.

Over the course of a century,[47] the Puerto Rican population has been subjected to norms they have not participated in producing directly or through elective representatives with full voting powers. In this very fundamental sense, the Puerto Rican legal subject has been denied one of the most basic goods promised by the regulating ideals of modernity: the condition of being a self-determining subject. In the modern tradition, manifested politically in the ideals of the French and American Revolutions and expressed philosophically by the Kantian notion of moral autonomy, self-determination has principally referred to the capacity of the subject to give himself or herself his or her own norms. This is, in sum, what is meant by the concept of "self-government."

In this regard, self-determination extends well beyond the act of choosing among different political status alternatives. It refers to the capacity or, normatively, to the right to continuously adopt, or participate in the production of, the norms that regulate the subject's own life, whether conceived as an individual or as a collective subject. Colonialism entails a denial of this self-governing capacity. The plenary powers claimed and exercised by the U.S. Congress over the peoples of the territories subvert the ideal of self-governance. The repercussions of this condition on the questions of identity and the formation of subjectivities should not be underestimated.

In addition to other factors, identities are formed in reference to the norms by which people choose, or are forced, to live. Subjectivities are closely related to identities. Thus, for Americans, their individual and collective identities, especially

[47] The analysis is limited here to the period under American rule. If one adds the additional 400 years of Spanish colonialism the country endured, the extension of time to which these considerations apply is obviously substantially longer.

in the political sense, have much to do with the contents and types of norms (including the most basic of them: the Constitution) by which they feel they have chosen to guide their lives. Europeans have always seen in European law a particularly defining feature of the European character. Puerto Ricans, however, are continuously forced to live under norms they have not chosen. In this sense, part of their identity is being shaped not only by the content of norms adopted by others, but also, and most importantly, by the very fact that those norms have been produced by others.

Certainly, many Puerto Ricans find the content of many of those norms desirable. They even feel their tangible benefits. For the purpose of this analysis, however, it is irrelevant whether those norms are deemed to be good or bad, detrimental or beneficial in some particular sense. The question is that they have been determined by others. Living by norms determined by others may lead to feelings of alienation. This may be the case, for example, with subjects ruled by a benevolent dictator. Those who benefit from the generous decrees of the dictator may feel grateful. Yet they may feel that their welfare is not in their own hands, but in those of the ruler. They may feel alienated from the power that produces their welfare or their misery.

Second, accommodating one's daily practices to rules that correspond to cultural codes different from one's own may produce an unsettling gap between action and self-perception. This rift eventually may be mended either by circumventing the norm or by transforming one's own cultural codes. In either case, the subject's identity will have been affected. Additionally, if, for reasons of expediency or other motives, those norms are routinely obeyed, the practice of compliance may engender a disposition to abide by such norms even when they do not respond to the obliging subject's assessment of fairness or necessity.

In Puerto Rico, federal legislation is accepted as legitimate by most of the population. Its application is deemed legally valid and enforceable. For some time, some people advanced the argument that in 1952 Puerto Ricans had given their "generic" consent to be ruled by the U.S. Congress. Therefore, they had no need to participate fully in the passing of federal legislation. The legitimacy of federal legislation was predicated on this alleged generic approval. That argument has long been discredited.

Historically, the legitimacy of the legislative power of Congress over Puerto Rico has been more the effect of the normative consequences ascribed to the acquisition of Puerto Rico by the United States than the product of any democratically based theory of legitimacy. The result has been that this fact of power—the acquisition by force reaffirmed through a treaty—has led to compliance with legal norms that have not been the product of a participatory process. In a conceptual and experiential slippage that goes from practice to normative conclusion, the habit of obeying norms adopted by others seems to have led to a positive normative assessment of the validity of such norms. The validity of metropolitan law is then, as a practical matter, made to depend on the fact of power.

It is true that many people today question the present relationship between the United States and Puerto Rico because of its colonial character. But very few of them are proposing that U.S. legislation does not validly apply in Puerto Rico because it is colonial in nature. Thus, despite the fact that they believe that Puerto Rico is a colony of the United States, no statehooder, autonomist, or free associationist and very few independence advocates would subscribe to the position that U.S. laws

should not be generally obeyed because they are colonial laws.[148] The validity of federal law in Puerto Rico is assumed as a consequence of the latter's acquisition by the United States in 1898.

This historical experience, reproduced daily both consciously and unconsciously in myriad instances, must have an effect on notions of the self, particularly regarding the aspiration to become a self-determining subject. In this sense, one of the most profound effects of colonialism seems to be the production of a subject accustomed to conform to norms arising out of the will of an outside power, that is, norms that are the product of a heteronomous definition of obligation. A derivative of this disposition could very well be a psychosociological inclination to accept nonparticipation in obligatory norm-making, particularly in the "metropolitan" spheres of power, as somehow "inevitable," "legitimate," "necessary," or "natural."[149] The power relationship embodied in the situation of political subordination that has been produced through colonialism is thus normatively and practically acquiesced to. In other words, it is legitimated.

The preceding analysis refers to that feature of the colonial system that has made of Puerto Rico a partially democratic polity. That is, it relates to the condition resulting from the lack of participation in decisions made by the metropolitan state. However, the internal government of the territory *has* been structured according to the organizing principles of modern representative democracies and allows a significant degree of participation. In the long run, this too has had important hegemonic effects.

First of all, this limited internal democratic regime has produced a sense of popular participation. The fact that in general elections the population votes for political parties that include in their platforms the traditional alternatives to the status problem has convinced many that the country's present relationship with the United States is the result of popular will. The fact is that in the entire century that Puerto Rico has "belonged to" but not been "a part of" the United States, the latter, as a whole, has not demonstrated any serious intention to terminate that condition by incorporating Puerto Rico as another state of the union, granting independence, or recognizing any other form of sovereignty. In fact, the United States government has not appeared to be willing to relinquish its power over Puerto Rico by facilitating a transition to any other form of relationship less subordinate in nature, even in a formal sense. As long as Puerto Ricans remain divided as to the specific form in which a change of status should occur, the U.S. Congress seems to be more than happy to continue retaining its plenary powers and acting accordingly.

In this scheme of things, the will of the people on which the solution to the status question is deemed to depend must always be expressed within the limits of colonial legality. To a great extent those limits were constructed by the doctrine adopted in the *Insular Cases*. Colonial legality, in turn, has imposed strictures on

[148] I am referring to a wholesale rejection of U.S. laws because of their colonial foundation, in the fashion proposed by the nationalist leader Pedro Albizu Campos. There have been discreet instances of civil disobedience to protest specific situations or actions of the U.S. government considered to be particularly outrageous—for example, the civilian occupation of land controlled by the U.S. Navy in the island of Vieques. However dramatic and effective they may have been in calling attention to these situations, these actions do not amount to a radical questioning of the legal validity of U.S. rule.

[149] *In accord, see* Román, *supra* note 129, at 1179 (Puerto Ricans' history "of being ruled throughout their existence has fostered an acceptance of foreign rule").

the ways of transforming the very social and economic conditions that operate to reinforce dependence and consent. Consent has thus been continually reproduced. The will of the people in the colony has been conditioned, through the effect of heteronomously determined needs, by the colonial situation. Therefore, that "will" (as expressed through colonial legality) has, until now, been formulated to reaffirm the relationship.

Acquiescence has become the justificatory principle of the relationship of domination. It has been colonialism by consent in its most elaborate and sophisticated version.[150] On the other hand, the most desirable alternative to the present situation, as expressed at the polls, is one that addresses the question of formal political subordination by seeking full incorporation into the union. If this were to pass, American hegemony over Puerto Rico will have been complete.

This structure of partially democratic participation has provided a context for action. It constitutes the framework within which any "legitimate" discussion and action regarding the colonial question must be conducted. Even the forms of resistance to colonial rule are conditioned by the structures designed to channel political action considered appropriate by the metropolitan state, by those who control the internal governmental apparatus, and by a substantial part of the population. Thus, many forms of revolutionary or "radical" methods of struggle have been delegitimized.

Moreover, there is a tendency to relate the existence of a democratic regime, however limited, to the American presence itself. The experience of democracy, for many, is the direct result of the American occupation of 1898. To the extent that formal democracy, elections, and other features of the political system are associated, accurately or not, with the American presence, that presence is legitimated.[151] Conversely, separation from the United States raises in many minds the specter of an antidemocratic future. The fears expressed by many people during the campaign leading to the 1991 referendum (fostered aggressively by the supporters of statehood) were related not only to the possible loss of economic benefits and American citizenship,[152] but also to the imagined threat that that exercise posed to the continuity of the democratic experience.

This perception of threat has been continuously reinforced by interpretations of Puerto Rican reality put forth by colonial elites that have emphasized, among other things, the desirability of modernization American style, the virtues of American citizenship, the need to keep at bay the "enemies of progress" (for example, those who advocate independence or socialism), and the superiority of the democratic nature of the regime over the dictatorships and corrupt governments of Latin America.

American hegemony, then, is predicated not only on a perceived superiority of the American economic system and its capacity to satisfy needs, but also on the impression that its political system is the best imaginable. For some time, especially at the height of mass support for Commonwealth status, these perceptions seemed to be powerful enough to obliterate the reality of political subordination that is endemic to colonialism, whatever its guise. An increasing awareness of the demo-

[150] *See* Rivera Ramos, *supra* note 13, at 120–21.

[151] *See* Mattos Cintrón, *supra* note 88, at 28–29.

[152] *See* chapter 7.

cratic weakness of the present relationship has developed, and different groups are seeking new political articulations. However, the discerned superiority of the American political system over other perceived alternatives is blocking the envisioning of a future that is not, somehow, linked to the United States.

Ideology of the Rule of Law

The ideology of the rule of law has been a mechanism of moral and political persuasion in the context of the relationship of political subordination that has existed between the United States and Puerto Rico. The effects of this ideology must be viewed in conjunction with those of the discourse of rights, the experience of partial democracy, and the repressive dimension of the system. For it is their conjoined operation that partially accounts for the reproduction of the prevalent attitudes of the majority of the population regarding the value of the continued association with the United States, irrespective of the form that that relationship may assume.

The rule of law has been defined in different ways. One view, associated with neoconservative doctrines in the Anglo-American world, seems to equate it with the notion of "law and order," or with the idea that people should obey the law and be ruled by it.[153] The traditional liberal conception, on the other hand, emphasizes that the main purpose of the rule of law is to impose inhibitions on state power: The government should be ruled by law and be subject to it. This is the main sense in which British historian E. P. Thompson used the concept in an attempt to retrieve what he understood to be its original import.[154] From a sociological perspective, the rule of law has been defined as "the use of legal forms to regulate and legitimize state power."[155] In this chapter *rule of law* will encompass both the normative liberal conception, as explicated by Thompson and others, and the sociological definition.

The Theoretical Debate and the Critique of the Rule of Law

The principal contemporary debate regarding the rule of law in the Anglo-American world, particularly among neo-Marxist scholars, was sparked to a great extent by Thompson's defense of the liberal ideal of the rule of law as a universal value.[156] For Thompson,

> the rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behavior of the powerful and mystify the powerless. They may disguise the realities of power, but, at the same time, they may curb that power and check its intrusions. And it is often from within that very rhetoric that a radical critique of the practice of the society is developed.[157]

[153] See the discussion in Picciotto, *supra* note 56, at 169–70. I have also drawn from M. D. A. Freeman, *The Rule of Law: Liberal, Marxist and Neo-Marxist Perspectives*, lecture delivered during the Anglo-Soviet Symposium sponsored by University College London (July 20, 1990).

[154] E. P. Thompson, *The Rule of Law*, *in* MARXISM AND LAW, *supra* note 16, at 130–37. The cited work is an excerpt from the concluding chapter in E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975). Further references will be to the excerpted piece.

[155] THE POLITICAL ECONOMY OF LAW, *supra* note 7, at 651.

[156] Thompson, *supra* note 154.

[157] *Id.* at 134.

According to Thompson, "the inhibitions upon power imposed by law" are an important legacy, a cultural achievement, of the agrarian and mercantile bourgeoisie of the 17th century and of their supporting yeomen and artisans. Insofar as the rule of law itself imposes "effective inhibitions upon power" and can be invoked for "the defense of the citizen from power's all-intrusive claim," it must be regarded as an "unqualified human good."[158] Even in the colonial context, Thompson argued, the rules and rhetoric of law imposed some constraints upon the imperial power.[159] "Even rulers," Thompson commented, "find a need to legitimize their power, to moralize their functions, to feel themselves to be useful and just."[160]

The most important criticisms of Thompson's position do not deny the benefits and advantages of the rule of law for subordinated groups and peoples. Some of them, in fact, do little more than reemphasize what Thompson himself conceded: that law's effects are contradictory. Others go beyond this critique.

Fine summarized Thompson's contribution as reviving the liberal conception of the rule of law as a weapon against the growth of state authoritarianism, persuasively demolishing the conservative view that the "rule of law" means unconditional obedience to the state and attacking the tendency on the left to dismiss civil liberties as a sham and law as merely a class instrument.[161] However, he criticized Thompson for "reducing" law to one of its functions and neglecting the democratic limits of liberalism.[162]

Kerruish echoed an aspect of Thompson's claim when she asserted that "law can and has conferred benefits on people who are subordinated and devalued within existing social relations and it imposes constraints of some kind on dominant and empowered people."[163] "We need not doubt," Kerruish remarked, "that law is useful or beneficial to some people some of the time. Indeed it is hard to imagine how legal practices and institutions could have the vitality and persistence they do have if that were not the case."[164] Yet that does not warrant according to law a universal value.[165] Picciotto, on the other hand, declared that the strategy for subordinated groups, especially the working class, must be "not to uphold the impossible ideals of the liberal forms of state and the 'rule of law', but to insist on the necessity that it be transcended, in forms which challenge the dominance of capitalist social relations."[166]

What the dispute reveals, once more, are the complexities of the legal phenomenon, the paradoxical quality of law. In that sense, the debate about the rule of law follows closely the developments and perspectives gained as a result of the controversy over the benefits and limitations of rights.

One critique of European imperial law has consisted in exposing how "the ideal of the rule of law" was not extended to many colonial societies.[167] Kerruish percep-

[158] *Id.* at 135.

[159] *Id.*

[160] *Id.*

[161] FINE, *supra* note 59, at 8.

[162] *Id.* at 8, 175.

[163] KERRUISH, *supra* note 71, at 3.

[164] *Id.* at 19.

[165] *Id.*

[166] Picciotto, *supra* note 56, at 179.

[167] *See* Snyder & Hay, *supra* note 5, at 12; KERRUISH, *supra* note 71, at 142.

tively noted that some of those criticisms presuppose the notion of "a pure, uncorrupted form" of the law. Nonetheless, insofar as a regime based on the rule of law is better than one based on despotism, this flaw of imperial law had significant consequences for those subjected to the most extreme forms of authoritarian rule in the colonies. Due to the characteristics of the American colonial project in Puerto Rico, this chapter is concerned, however, with another type of critique: the degree to which the ideology of the rule of law, extended as it was to the colony, has operated to reproduce the metropolitan power's hegemony.

The Rule of Law in the Puerto Rican Context

In the course of their struggles against the authoritarian Spanish regime, 19th-century Puerto Rican liberals became attracted to various versions of the ideal of the rule of law. Not surprisingly, the organic intellectuals of the Puerto Rican socially hegemonic classes would be willful recipients of the Anglo-American notion of the rule of law as an organizing principle of the country's political and legal system. Throughout the 20th century the heirs to that liberal tradition, regardless of their position on the status of Puerto Rico, have replicated, refined, and expanded the vision that the best form of government is one subject to law. They have not been alone in the reproduction of this discourse. Many of those in the socially and economically subordinated sectors of Puerto Rican society, in their localized struggles and resistances against the metropolitan state or local elites, have also tended to view the ideal (expressed in various forms) as something close to an "unqualified human good." Law is perceived by many not only as a repressive mechanism, but as a shield against arbitrary power. The ideology of the rule of law has grown strong roots in public consciousness, particularly since the political reforms initiated in the 1940s.

The constraints imposed on the local government and the metropolitan state by this discourse on the rule of law have at times benefited powerless individuals and groups. But the ideology of the rule of law has also legitimated American rule or buttressed American hegemony in two fundamental ways.

First, the metropolitan state has sought to justify its exercise of power by reference to law. This was the primary function of the constitutional doctrine of territorial incorporation developed by the Supreme Court in the *Insular Cases*. The ideology of the rule of law, as a powerful element of the idea of legitimacy in the American political and constitutional order, compelled the American governing elites to obtain an authoritative statement from the highest tribunal of the land sanctioning their decision to install a colonial regime in the territories acquired after the Spanish American War.

Of course, it must not be forgotten that this legal benediction came from an organ of the metropolitan state. The Supreme Court was not an independent arbitrator located in a position of neutrality between the metropolitan power and the people of the conquered territory. Furthermore, the sources used as interpretive guides, the traditions examined, the interests weighed, and the normative principles developed and applied were part of the history and the worldview of the framers and rulers of the metropolitan state itself. It was the shared understanding of the governing elites that the word spoken by the members of the Supreme Court would be the law of the land regarding the power that could be exercised over the new colonial dependencies. If that power could be grounded in the Constitution, it would have to be considered legitimate. It was so found.

Since then, the exercise of congressional power over Puerto Rico has been justified with reference to the notion that the Constitution sanctions it. The law of the metropolitan state itself has become the justificatory basis for the exercise of imperial power.[168] Furthermore, specific exercises of power are considered legitimate only if sanctioned by congressional legislation in accordance with established constitutional norms and procedures, or if they are undertaken pursuant to the constitutional prerogative of the executive or the judicial branch. In sum, the colonial regime is justified with the argument that it is sanctioned by law. In fact, for the metropolitan state, for most of Puerto Rico's political elites, and for substantial, if not most, segments of the population, even processes aimed at dismantling colonialism must follow the law.

There is a second way in which the ideology of the rule of law has operated as a hegemonic mechanism for American rule. Just as a good number of Puerto Ricans associate many of the things they value with the American presence in the island, in the popular imagination, fueled by the legitimating discourses propagated by the ruling elites, the "freedom" that the rule of law guarantees is possible because of that presence. Whether that perception is justified or not, the fact is that it operates as a powerful force in the domain of consciousness. It acts as a forceful mechanism in the process whereby consent to the relationship with the United States is reproduced and American presence and rule are legitimated.

[168] *See* Sally Engle Merry, *Law and Colonialism*, 25 LAW & SOC. REV. 889, 890 (1991).