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VALERIA M. PELET DEL TORO

Beyond the Critique of Rights: The Puerto Rico Legal Project and Civil Rights Litigation in America's Colony

ABSTRACT. Long skeptical of the ability of rights to advance oppressed groups' political goals, Critical Legal Studies (CLS) scholars might consider a U.S. territory like Puerto Rico and ask, "What good are rights when you live in a colony?" In this Note, I will argue that CLS's critique of rights, though compelling in the abstract, falters in the political and historical context of Puerto Rico. Although it may appear that rights have failed Puerto Ricans, rights talk has historically provided a framework for effective organizing and community action. Building on the work of Critical Race Theory and LatCrit scholars, this Note counters the CLS intuition that rights talk lacks value by focusing on the origins and development of the Puerto Rico Legal Project, an understudied but critical force for community development and legal advocacy on the island that was founded in response to severe political repression during the late 1970s and early 1980s. This Note draws on original interviews with Puerto Rican and U.S. lawyers and community activists to reveal fissures in the critique of rights and to propose certain revisions to the theory. By concentrating on the entitlements that rights are thought to provide, CLS's critique of rights ignores the power of rights discourse to organize marginalized communities. The critique of rights also overlooks the value of the collective efforts that go into articulating a particular community's aspirations through rights talk, efforts which can be empowering and help spur further political action. By analyzing twentieth-century Puerto Rican legal and political history and the Puerto Rico Legal Project, I demonstrate the value (and limits) of rights in a colonized nation.

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NOTE CONTENTS

INTRODUCTION	794
I. CRITIQUING THE CRITIQUE OF RIGHTS	801
A. CLS's Critique of Rights	801
B. CRT and LatCrit's Response to the Critique of Rights	804
II. PUERTO RICO'S COLONIAL STATUS UNDER THE U.S. LEGAL SYSTEM	810
A. Puerto Ricans, (Second-Class) U.S. Citizens	810
B. Repression on the Island	813
III. THE ADVENT OF CIVIL RIGHTS LITIGATION IN PUERTO RICO	817
A. Keeping Movements Alive	817
B. Lawyering for the People	822
C. A Project of Their Own	828
IV. TURNING TOWARDS RIGHTS TALK	832
A. Rights Talk as Restitution	832
B. CLS, Revisited	836
CONCLUSION	839

INTRODUCTION

On May Day 2017, thousands of Puerto Rican workers, students, and other groups demonstrated against draconian austerity measures ordered by the U.S.-appointed fiscal oversight board, a controversial creation of the PROMESA law.¹ PROMESA, short for Puerto Rico Oversight, Management, and Economic Stability Act, is a federal law designed to address Puerto Rico's ballooning debt crisis.² The law established an oversight board with the power to override local government decisions, highlighting the territory's status as a de facto U.S. colony.³ In March 2017, the oversight board voted unanimously in favor of cuts to the public pension system,⁴ considered a \$512 million cut in university funding,⁵ and endorsed a plan to fire government employees,⁶ transferring the weight of the island's public debt of \$72 billion onto the people of Puerto Rico.⁷ In response, thousands took to the streets, carrying signs with slogans against U.S.

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1. See *Puerto Rico National Strike Protests 'Colonial' Debt Crisis*, TELESUR (May 1, 2017) [hereinafter *Puerto Rico National Strike*], <https://www.telesurtv.net/english/news/Puerto-Rico-National-Strike-Protests-Colonial-Debt-Crisis-20170501-0014.html> [https://perma.cc/3BMY-YJZS].
 2. See Vann R. Newkirk II, *Congress's Promise to Puerto Rico*, ATLANTIC (May 19, 2016), <https://www.theatlantic.com/politics/archive/2016/05/congress-puerto-rico-bill-promise/483572> [https://perma.cc/DB3T-RLAR]. "Promesa" is also Spanish for "promise."
 3. See *Puerto Rico National Strike*, *supra* note 1. President Barack Obama appointed the seven members of the oversight board using a list of names crafted by Republican and Democratic leaders of Congress. See Patricia Guadalupe, *Who Are the Members of the Puerto Rico Fiscal Control Board?*, NBC NEWS (Aug. 31, 2016), <https://www.nbcnews.com/news/latino/who-are-members-puerto-rico-fiscal-control-board-n640811> [https://perma.cc/8CWK-QD33]; AJ Vicens, *These People Now Hold Puerto Rico's Purse Strings*, MOTHER JONES (Aug. 31, 2016), <https://www.motherjones.com/politics/2016/08/obama-presents-names-puerto-rico-control-board> [https://perma.cc/L36D-3G78].
 4. See *Puerto Rico Debt Control Board Orders Harsh Austerity Measures*, TELESUR (Mar. 13, 2017), <https://www.telesurtv.net/english/news/Puerto-Rico-Debt-Control-Board-Orders-Harsh-Austerity-Measures-20170313-0006.html> [https://perma.cc/4LE6-GU7Q].
 5. See Ed Morales, *Students Are Now Leading the Resistance to Austerity in Puerto Rico*, NATION (Apr. 27, 2017), <https://www.thenation.com/article/students-are-now-leading-the-resistance-to-austerity-in-puerto-rico> [https://perma.cc/XN7L-EGXM].
 6. See Joanisabel González, *La Junta aprueba el plan fiscal entre recortes e impuestos*, NUEVO DÍA (Mar. 14, 2017), <https://www.elnuevodia.com/negocios/economia/nota/lajuntaapruebaelplanfiscalentrecorteseimpuestos-2300482> [https://perma.cc/MWF3-TE89].
 7. See Michael Corkery & Mary Williams Walsh, *Puerto Rico's Governor Says Island's Debts Are 'Not Payable'*, N.Y. TIMES (June 28, 2015), <https://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html> [https://perma.cc/8BBR-6XD3].

colonialism and images of the Puerto Rican flag in black and white, a symbol of resistance amid crisis.⁸

A protest of that size and manifesting such palpable anticolonial sentiment is unheard of in Puerto Rico. The questions of Puerto Rico's political status—whether Puerto Rico should become a state, independent, or something else—and how best to describe Puerto Rico's relationship to the United States have divided the island for almost seventy years.⁹ Since the 1950s,¹⁰ two centrist political parties have dominated political discourse on the island: the *Partido Popular Democrático*,¹¹ which supports Puerto Rico's current relationship with the United States, and the *Partido Nuevo Progresista*,¹² which advocates for Puerto Rico's statehood.¹³ In general, both parties have avoided describing Puerto Rico as a “colony” for tactical, political reasons.¹⁴ Even the legendary organizing

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8. See *Puerto Rico National Strike*, *supra* note 1.
 9. For a more detailed treatment of the debates surrounding Puerto Rico's political status, see JORGE DUANY, *THE PUERTO RICAN NATION ON THE MOVE: IDENTITIES ON THE ISLAND AND IN THE UNITED STATES* 122–36 (2002); *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* 1–38, 167–212 (Gerald L. Newman & Tomiko Brown-Nagin eds., 2015); and JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 177–96 (1997).
 10. The Constitution of the Commonwealth of Puerto Rico, which established Puerto Rico's local governance structure, was adopted in 1952. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1869 (2016); CÉSAR J. AYALA & RAFAEL BERNABE, *PUERTO RICO IN THE AMERICAN CENTURY: A HISTORY SINCE 1898*, at 168 (2007).
 11. Spanish for “Popular Democratic Party.”
 12. Spanish for “New Progressive Party.”
 13. See R. SAM GARRETT, CONG. RES. SERV., R44721, *POLITICAL STATUS OF PUERTO RICO: BRIEF BACKGROUND AND RECENT DEVELOPMENTS FOR CONGRESS 6* (2017), <https://fas.org/sgp/crs/row/R44721.pdf> [<https://perma.cc/N7PC-ACUN>]. The pro-independence party, the *Partido Independentista Puertorriqueño* (Spanish for “Puerto Rican Independence Party”) “has not received sufficient electoral support to be certified a major party” in recent years. *Id.*
 14. See Emilio Pantojas García, *El Partido Popular Democrático: ¿Instrumento de cambio?*, 80GRADOS (Sept. 25, 2015), <http://www.80grados.net/el-partido-popular-democratico-instrumento-de-cambio> [<https://perma.cc/9WCD-X6TB>]; cf. Ángel Collado Schwarz, Opinion, *La cláusula territorial que nos rige*, NUEVO DÍA (Feb. 23, 2017), <https://www.elnuevodia.com/opinion/columnas/laclausulateritorialquenosrige-columna-2294141/> [<https://perma.cc/3YBN-7QPZ>] (noting that the difference between calling Puerto Rico a colony and a “free associated state,” which is the *Partido Popular Democrático*'s party platform, is a “question of semantics” (translated from Spanish)); Wilda Rodríguez, Opinion, *Colonia a perpetuidad*, NUEVO DÍA (Apr. 11, 2017), <https://www.elnuevodia.com/opinion/columnas/coloniaaperpetuidad-columna-2310858/> [<https://perma.cc/EGY4-NZP3>] (noting that the *Partido Nuevo Progresista* “intend[s] to describe [Puerto Rico] only as a ‘Territory’ on the ballot” (translated from Spanish)). After the 2017 hurricane season, the pro-statehood party began to directly describe Puerto Rico as a “colony” or a “territorial colony” of the United States. Rafael Bernal, *Puerto Rico Governor Asks Trump to Consider Statehood*, HILL (Sept. 19, 2018, 6:11 PM),

against the U.S. Navy's presence in Vieques,¹⁵ a situation with obvious colonial undertones, was careful "not to focus on Puerto Rico's political status in framing the political response to Vieques."¹⁶ The local movement in Vieques did not view itself as "an anti-imperialist mobilization," but rather "framed its struggle as one of social justice and human rights," priding itself on its ability to stay out of the island's partisan struggles.¹⁷ Any articulation of rights, the privileges that come with U.S. citizenship, or even the meaning of the nation's relationship with the United States, is inherently political in Puerto Rico.

The debates surrounding Puerto Rico's political status set the stage for a second, equally contested question: would a rights-based approach be effective at rectifying Puerto Rico's current socioeconomic and political condition? The federal government has long subjected Puerto Ricans to disparate treatment, which suggests that rights assertions may fall on deaf ears. Puerto Ricans, despite having U.S. citizenship, do not benefit from the same privileges as U.S. citizens living on the mainland. For instance, U.S. citizens living in Puerto Rico lack voting power in Congress,¹⁸ which permits the imposition of institutions like the oversight board without any input from the island. Congress has also implemented

<https://thehill.com/latino/407494-puerto-rico-governor-asks-trump-to-consider-statehood> [<https://perma.cc/A9Z8-W7VU>]; see also Jacqueline Serrato, *If Someone Had a Doubt, Puerto Rico Is a Colony of the United States*: Cruz, CHI. TRIB. (Apr. 27, 2018, 7:20 PM), <https://www.chicagotribune.com/voiceit/ct-puerto-rico-is-a-colony-of-the-united-states-20180427-story.html> [<https://perma.cc/AS4T-2WYN>] (quoting San Juan Mayor Carmen Yulín Cruz as saying, "If someone had a doubt before September 20, after September 20 they had to have come to the conclusion: Puerto Rico is a territory, a colony of the United States. To solve a problem[,] you have to accept it, and that means that we must wake up and stop allowing it.").

15. Vieques is an island off the southeast coast of Puerto Rico. See Katherine T. McCaffrey, *Social Struggle Against the U.S. Navy in Vieques, Puerto Rico: Two Movements in History*, 33 LATIN AM. PERSP. 83, 83 (2006). The U.S. Navy occupied Vieques starting in the early 1940s and used it as a bombing range and a site for military training exercises. *Id.* at 84-85, 87. After four years of concentrated grassroots organizing against the military's activities, the U.S. Navy left Vieques in May 2003. *Id.* at 83. I discuss the origins and significance of this mobilization in Section III.B.
16. Katherine McCaffrey, *Forging Solidarity: Politics, Protest, and the Vieques Support Network*, in THE PUERTO RICAN MOVEMENT: VOICES FROM THE DIASPORA 329, 334 (Andrés Torres & José E. Velázquez eds., 1998).
17. *Id.* at 335.
18. See Sandra Lilley, *Puerto Rico Is Part of the U.S.: Here's a Few Things to Know*, NBC NEWS (Oct. 03, 2017, 9:47 AM), <https://www.nbcnews.com/storyline/puerto-rico-crisis/puerto-rico-part-u-s-here-s-few-things-know-n807101> [<https://perma.cc/R797-5L6M>] ("Puerto Ricans in the island do vote for a resident commissioner who represents the island's interests in Washington, D.C., but is not a voting member of Congress.").

federal aid programs differently in Puerto Rico than in the fifty states.¹⁹ For example, Puerto Rico receives much less health-care funding than the states,²⁰ and “gets almost no help” from the U.S. government to support its disabled residents.²¹

The disparate treatment of Puerto Ricans became even more stark after the 2017 hurricane season, when Hurricanes Irma and Maria pummeled Puerto Rico. While President Trump said that his administration had done an “incredible” job responding to the crisis,²² Puerto Ricans were still not able to access meals,²³

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19. See Juan R. Torruella, *A Dissenting Concurrence: An Opinion About the Bicentennial*, 34 FED. B. NEWS & J. 352 (1987), reprinted in GUSTAVO A. GELPÍ, *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898-PRESENT)* 43, 48 (2017) (noting that the “non-incorporation” doctrine, as applied to Puerto Rico, has “permitted Congress to discriminate in the application of federal social aid programs by either excluding their application altogether to Puerto Rico or by applying them to Puerto Rican residents in a discriminatory manner”); see also *infra* Section II.A (discussing the second-class status of Puerto Ricans in the United States).
 20. See *infra* Section II.A (discussing the history of disparate treatment of Puerto Ricans and their differential access to certain government services, such as health-care funding).
 21. Robin Respaut, *The Disabled in Puerto Rico Fend for Themselves After Decades of U.S. Neglect*, REUTERS (Dec. 9, 2016, 12:00 PM GMT), <https://www.reuters.com/investigates/special-report/usa-puertorico-disability> [<https://perma.cc/HZY6-AKYL>]. Instead of getting Supplemental Security Income benefits, the disabled in Puerto Rico receive funding from a federal program called Aid to the Aged, Blind, or Disabled. See *id.* According to the Government Accountability Office, this program offers “just 1.3 percent of the money that would be provided if Puerto Rico were a state.” *Id.*
 22. Jenna Johnson & Ashley Parker, *Trump Hails ‘Incredible’ Response in ‘Lovely’ Trip to Storm-Torn Puerto Rico*, WASH. POST (Oct. 3, 2017), https://www.washingtonpost.com/politics/trump-praises-himself-for-administrations-great-job-in-puerto-rico/2017/10/03/fdb5eeb4-a83a-11e7-8ed2-c7114e6ac460_story.html [<https://perma.cc/ZA2Z-DBPB>].
 23. See Patricia Mazzei & Agustin Armendariz, *FEMA Contract Called for 30 Million Meals for Puerto Ricans. 50,000 Were Delivered*, N.Y. TIMES (Feb. 6, 2018), <https://www.nytimes.com/2018/02/06/us/fema-contract-puerto-rico.html> [<https://perma.cc/YQ42-J5B9>].

potable water,²⁴ or power²⁵ months after the hurricanes hit. According to Federal Emergency Management Agency (FEMA) data, victims of Hurricane Maria in Puerto Rico have, on average, received inferior economic assistance compared to those affected by most major storms in the United States since 2005.²⁶ FEMA aid given to Puerto Ricans was typically inferior, in some cases three times as inferior, to aid given to victims of Hurricanes Katrina, Rita, and Sandy, among others.²⁷ In addition, a study from the Harvard T.H. Chan School of Public Health placed the death toll of Hurricane Maria at nearly 5,000²⁸—a figure almost seventy times higher than the Puerto Rican government's then-official death count of sixty-four.²⁹ These tragic deaths served as yet another reminder of how downplaying the United States' disparate treatment of Puerto Ricans disregards the devastating, violent consequences of doing so.

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24. See Ana Campoy, *Puerto Ricans, Washing in Contaminated Water, Face the Spread of Disease*, QUARTZ (Oct. 28, 2017), <https://qz.com/1114413/hurricane-maria-puerto-ricans-washing-in-contaminated-water-face-the-spread-of-leptospirosis> [<https://perma.cc/MzZ7-83RK>]; Ed Lavandera & John Sutter, *Flirting with Another Disaster: Puerto Ricans Tap into Potentially Unsafe Water*, CNN (Oct. 20, 2017, 3:18 PM), <https://www.cnn.com/2017/10/16/americas/puerto-rico-superfund-water/index.html> [<https://perma.cc/B7KF-T9SM>]; Mekela Panditharatne, *FEMA Says Most of Puerto Rico Has Potable Water. That Can't Be True.*, WASH. POST (Dec. 21, 2017), https://www.washingtonpost.com/outlook/fema-says-most-of-puerto-rico-has-potable-water-that-cant-be-true/2017/12/21/cf8d8ceo-e511-11e7-a65d-1acofdf7f097e_story.html [<https://perma.cc/744J-72PB>].
 25. See Umair Irfan, *Puerto Rico's Blackout, the Largest in American History, Explained*, VOX (May 8, 2018, 3:27 PM EDT), <https://www.vox.com/2018/2/8/16986408/puerto-rico-blackout-power-hurricane> [<https://perma.cc/6H4B-NFGL>].
 26. See Benjamín Torres Gotay, *Ayuda para la isla tras María fue inferior a otros territorios de EE.UU.*, NUEVO DÍA (Mar. 26, 2018), <https://www.elnuevodia.com/noticias/locales/nota/ayudapara-laislatrasmariafueinferioraotrosteritoriosdeeeuu-2409397> [<https://perma.cc/E6PC-NDJD>].
 27. *Id.* The agency denied roughly sixty percent of 1.2 million applications for FEMA Individual and Household grants in Puerto Rico. Adrian Florido, *Unable to Prove They Own Their Homes, Puerto Ricans Denied FEMA Help*, NPR (Mar. 20, 2018 3:47 PM ET), <https://www.npr.org/2018/03/20/595240841/unable-to-prove-they-own-their-homes-puerto-ricans-denied-fema-help> [<https://perma.cc/688P-HNJP>].
 28. Nishant Kishore et al., *Mortality in Puerto Rico After Hurricane Maria*, 379 NEW ENG. J. MED. 162, 162 (2018).
 29. See Karen Kaplan & Amina Khan, *Hurricane Maria's Death Toll Was 70 Times Higher than Puerto Rican Officials Have Reported, Study Says*, L.A. TIMES (May 29, 2018, 5:25 PM), <http://www.latimes.com/science/sciencenow/la-sci-sn-hurricane-maria-deaths-20180529-story.html> [<https://perma.cc/C3BW-VCHN>]. Local residents of Puerto Rico had long been skeptical of the government's official death toll. See Omayra Sosa Pascual, *María's Death Toll in Puerto Rico Is Being Underreported*, LATINO REBELS (Sept. 28, 2017, 3:04 PM), <http://www.latinorebels.com/2017/09/28/marias-death-toll-in-puerto-rico-is-being-underreported> [<https://perma.cc/3ADM-NKUW>]; Julio Ricardo Varela, *Puerto Ricans Knew the Official Hurricane Maria Death Toll Was Fake. We Saw Too Many Dead to Believe It.*, NBC NEWS: THINK

After the hurricanes, some made demands on the federal government to respond to the crisis unfolding on the island. In particular, some Puerto Rican politicians,³⁰ as well as stateside politicians and journalists, invoked Puerto Ricans' status as U.S. citizens to condemn the United States' neglect of Puerto Rico and demand better for "Americans."³¹ These journalists and politicians engaged in rights discourse – the act of invoking rights to secure social change.³² Their calls for "American" solidarity, however, did little to increase or expedite federal aid to Puerto Rico. Despite the fact that Puerto Ricans have a number of formal rights through their relationship to the United States, assertion of these rights by politicians and journalists did not lead to better treatment in this instance.

This inefficacy of rights discourse will come as no surprise to Critical Legal Studies (CLS) scholars. CLS scholars espouse the critique of rights theory, which rejects engaging in rights talk³³ at all. CLS contends that rights – and the legal work done to secure them – operate in very limited spaces that ultimately cannot benefit oppressed communities. According to the critique of rights, having people mobilize against colonial laws by demanding and articulating their rights would ultimately be pointless, as broader power structures limit what those rights can secure.

(May 31, 2018, 1:11 PM ET), <https://www.nbcnews.com/think/opinion/puerto-ricans-knew-official-hurricane-maria-death-toll-was-fake-ncna878901> [https://perma.cc/GR7J-C7WH]. Several months after the Harvard study was published, the Puerto Rico government raised the official Hurricane Maria death toll to 2,975. See Leyla Santiago et al., *Puerto Rico's New Hurricane Maria Death Toll Is 46 Times Higher than the Government's Previous Count*, CNN (Aug. 28, 2018, 6:25 PM ET), <https://www.cnn.com/2018/08/28/health/puerto-rico-gw-report-excess-deaths/index.html> [https://perma.cc/J3HV-AQC8].

30. See Katie Zezima, *Puerto Rico Pushes for Statehood, Calling It a Civil Rights Issue*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/national/puerto-rico-pushes-for-statehood-calling-it-a-civil-rights-issue/2018/06/27/717c5092-7a43-11e8-93cc-6d3becdd7a3_story.html [https://perma.cc/RT4U-X9F7].
31. See Frances Negrón-Muntaner, *Our Fellow Americans: Why Calling Puerto Ricans "Americans" Will Not Save Them*, DISSENT (Jan. 10, 2018), https://www.dissentmagazine.org/online_articles/our-fellow-americans-puerto-rico-hurricane-maria-colonialism-rhetoric [https://perma.cc/7DYS-9RR6]. It should be noted that a significant number of Americans do not realize that Puerto Ricans are U.S. citizens. See Kyle Dropp & Brendan Nyhan, *Nearly Half of Americans Don't Know Puerto Ricans Are Fellow Citizens*, N.Y. TIMES: UPSHOT (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/upshot/nearly-half-of-americans-dont-know-people-in-puerto-ricoans-are-fellow-citizens.html> [https://perma.cc/UZ3Q-PG9U].
32. For a discussion on rights discourse and the critique of said discourse, see *infra* Section I.A.
33. Jennifer Gordon describes "rights talk" as "a phrase that encompasses all the ways people develop their identities in relation to rights" and make claims based on a rights framework. JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 150 (2005).

In this Note, I will argue that the CLS critique of rights, though compelling in the abstract, falters in the political and historical context of Puerto Rico. Although it may appear that rights have failed Puerto Ricans, particularly after the hurricanes and the United States' indefensible response, rights talk has historically provided a framework for effective organizing and community action. This Note counters the CLS intuition that rights talk has no value for Puerto Rico by focusing on the origins and development of the Puerto Rico Legal Project, an understudied but critical force for community development and legal advocacy on the island.³⁴ By concentrating on the entitlements that rights are thought to provide, the CLS critique of rights ignores the power of rights discourse to organize marginalized communities. The critique of rights also overlooks the value of the collective efforts that go into articulating a particular community's aspirations through rights talk, efforts that can be empowering and help spur further political action.³⁵ Further, the critique of rights fails to provide a framework for interpreting shifts in political dialogue, such as the changes that occurred between the measured Vieques organizing and the recent protests against the U.S.-sanctioned oversight board.³⁶

I argue in this Note that the critique of rights does not easily map onto Puerto Rico because the critique does not account for the role that rights talk can play for oppressed colonial communities. Part I provides a background on the critique of rights as well as Critical Race Theory (CRT) and LatCrit, the schools of thought that first responded to its implications. Part II elaborates on Puerto Rico's colonial relationship to the United States to better explain the long history of legal and political repression in Puerto Rico. It also draws on original interviews with Puerto Rican and U.S. lawyers and community activists to reveal fissures in the critique of rights and to propose certain revisions to the CLS theory. Part III then uses the case study of the Project to illustrate how the critique of

34. The Project was active from 1977 to 1982 and inspired decades of public-interest lawyering on the island that continues to this day. See *infra* Sections III.C, IV.A.

35. As Jennifer Gordon argues, rights education can be used as a "path to collective action" to improve individuals' daily living conditions. GORDON, *supra* note 33, at 6. "[L]earning about rights . . . can galvanize people to see themselves as legitimate actors, those with a right to claim rights." *Id.* at 7.

36. Similar protests also took place in May 2018, and they were as, if not more, anticolonial in tone as the 2017 protests. See Patricia Mazzei, *Protest in Puerto Rico over Austerity Measures Ends in Tear Gas*, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/us/Puerto-rico-protests.html> [<https://perma.cc/L6QX-GZH>]. The protests were met with clashes between Puerto Ricans and the local police force. See AJ Vicens, *After Violent May Day Protests, a Federal Judge Orders an Investigation into Puerto Rican Police*, MOTHER JONES (May 4, 2018, 2:53 PM), <https://www.motherjones.com/politics/2018/05/after-violent-may-day-protests-a-federal-judge-orders-an-investigation-into-puerto-rican-police> [<https://perma.cc/7TJ8-87UP>].

rights fails to provide a full account of the relationship between law and organizing in Puerto Rico. Finally, Part IV argues that, contrary to CLS's predictions, civil rights litigation and rights talk have been successful in Puerto Rico. The Project and its progeny catalyzed community lawyering on the island and enabled Puerto Ricans to organize their own locally based movements. Instead of undermining community organizing, litigation and rights talk galvanized domestic reformers.

I. CRITIQUING THE CRITIQUE OF RIGHTS

Before delving into the critique of rights and responses to that theory, I will provide a brief history of the development of CLS. CLS emerged in the late 1970s, led by progressive scholars like Mark Tushnet, Peter Gabel, Frances Olsen, and Duncan Kennedy.³⁷ CLS denounced U.S. liberalism by injecting Marxian social theory, structuralism, and deconstructive techniques into mainstream perceptions of liberal rights consciousness, the objectivity of judicial interpretation, and other aspects of liberal American legal theory.³⁸ CLS argues that the law is not neutral, as it tilts in favor of maintaining self-reinforcing structures of power and domination. For CLS theorists, the law's lack of neutrality means that rights have no inherent value, particularly because rights, by themselves, do not guarantee social change. In this Part, I first describe the theory undergirding CLS's rejection of litigation and rights talk. I then describe the two major theoretical schools responding to CLS—CRT and LatCrit—and explain how their critiques cast doubt on the critique of rights theory.

A. CLS's Critique of Rights

Through the critique of rights, CLS set out to demystify U.S. legal culture's fascination with rights and with legal victories. Mark Tushnet's seminal articles, *An Essay on Rights* and *The Critique of Rights*, are representative of CLS's take on rights.³⁹ Without discrediting the impulse toward litigation-based strategies, Tushnet "caution[s]" lawyers against relying too heavily on legal victories as

37. See Elizabeth M. Iglesias, *LatCrit Theory: Some Preliminary Notes Towards a Transatlantic Dialogue*, 9 U. MIAMI INT'L & COMP. L. REV. 1, 9 (2000-2001); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178, 183-90 (Wendy Brown & Janet Halley eds., 2002).

38. See Iglesias, *supra* note 37, at 9-10.

39. See Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1993) [hereinafter Tushnet, *The Critique of Rights*]; Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) [hereinafter Tushnet, *An Essay on Rights*].

surefire methods of contributing to progressive social change.⁴⁰ Tushnet points to the persistence of segregation after *Brown v. Board of Education*⁴¹ to highlight how even successful litigation may result in limited real-world changes.⁴² He separates the significance of *Brown* as an ideological victory from its material effects, focusing on the latter.⁴³ Although the U.S. Supreme Court ruled that school segregation was unconstitutional, Tushnet notes that *Brown* meant little in terms of material change because almost no schools in the South were desegregated in the decade following the legal victory.⁴⁴ On the material front, the critique of rights illustrates that the *Brown* decision left much to be desired.

Going beyond *Brown*, Tushnet establishes a taxonomy of the various combinations of legal and political outcomes that can result when communities opt for rights-based approaches to social change.⁴⁵ Tushnet argues that sometimes losing a case actually may be better than winning one.⁴⁶ After winning a case, lawyers might direct less attention and resources to protecting a particular claim.⁴⁷ Opponents, incensed by the legal victory, might “devote even more energy than before to opposing social change.”⁴⁸ Tushnet reasons that courts, facing unrelenting pressure from opponents, might subsequently “whittle away” at the prior legal victory.⁴⁹ It follows that, in the long run, winning a legal victory might result in the loss of a political war.⁵⁰ Losing a case can thus be more beneficial to a cause because it deters complacency and foments mobilization. For Tushnet, political mobilization is the primary way of achieving material change.⁵¹

40. Tushnet, *The Critique of Rights*, *supra* note 39, at 25.

41. 347 U.S. 483 (1954).

42. See Tushnet, *The Critique of Rights*, *supra* note 39, at 24-25.

43. See *id.* at 24; see also *id.* at 28 (“More generally, ideological victories in court can constitute the entry of previously excluded groups into one of the most important forms of discourse in United States society, that is, the discourse of rights.”).

44. See *id.* at 24.

45. Tushnet’s taxonomy includes the following four categories: “winning a legal victory and winning politically,” “losing in court but winning politically,” “winning a legal victory but losing politically,” and “losing in court and in politics, too.” *Id.* at 24.

46. Tushnet calls this “winning by losing.” *Id.* at 30.

47. See *id.*

48. *Id.*

49. *Id.*

50. Tushnet calls this “losing by winning.” *Id.*

51. Tushnet never makes this assumption explicit in *The Critique of Rights*, but he does elaborate on the importance of mobilization in later works. According to Tushnet, “It’s politics, not ‘the Constitution,’ that is the ultimate—and sometimes the proximate—source for whatever protection we have for our fundamental rights *What the Supreme Court says our rights are*

Of course, Tushnet recognizes that losing cases can also have adverse effects. He states, “[W]hen [a movement’s] claims of rights are rejected, the public may think that the claims need not be considered *at all*; rather than becoming ordinary political claims like any other, the rejected claims of rights simply drop out of political consideration.”⁵² But Tushnet argues that this adverse outcome is not necessarily always the case.⁵³ Where it is the case, however, this outcome reinforces the danger of rights talk and litigation under Tushnet’s theory.

In short, for Tushnet and for CLS more broadly, litigation is likely to undermine progressive goals in the long run. This is especially true when litigation is successful. The observation about the relative impotence of legal victories ties into Tushnet’s broader “indeterminacy thesis.” According to the indeterminacy thesis, legal victories cannot replace organizing or other forms of political mobilization; social change depends on the existence and perpetuation of social movements.⁵⁴ Tushnet thus postulates that the codification of a particular legal rule says nothing about how it should be enforced, which could ultimately work against the groups the progressive rule was meant to protect. Put differently, because rights are indeterminate – meaning that they do not acquire a set meaning unless enforced – there is a risk that a legal victory can be applied in a way that distorts and erodes the progressive articulation of a right.⁵⁵ With this warning, Tushnet suggests that “lawyers should not expect too much from what they do.”⁵⁶

Notably, there are both stronger and weaker formulations of the critique of rights. As Tushnet explains, in “its weakest version,” the critique of rights theorizes that “there is no necessary connection between winning legal victories and advancing political goals.”⁵⁷ In its stronger formulation, the critique “argues that . . . winning legal victories either does not advance political goals or actually

depends in a complicated way on the state of our politics.” MARK TUSHNET, WHY THE CONSTITUTION MATTERS 1, 4 (2010). Tushnet’s vision of mobilization relies on formal political apparatuses like the legislature, not necessarily social movements. *Id.* at 155, 169-72 & n.14.

52. Tushnet, *The Critique of Rights*, *supra* note 39, at 29.

53. *Id.*

54. See *id.* at 32-34; see also Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 341-45 (1996) (defining the indeterminacy thesis).

55. See Tushnet, *The Critique of Rights*, *supra* note 39, at 33. Tushnet notes, “For example, conservatives have used the rhetoric of rights to obstruct progressive regulation of property and – in a directly related field – to challenge campaign finance regulation on the ground that it violates free speech rights.” *Id.*

56. *Id.* at 34.

57. *Id.* at 23.

impedes them.”⁵⁸ This Note predominantly responds to the stronger formulation of the critique of rights. Though it is true that legal victories need not necessarily result in political victories, I argue that litigation can and often does advance political goals. At the very least, the history of litigation in Puerto Rico shows that rights talk is in many instances beneficial to oppressed minorities in a colonial context.

B. CRT and LatCrit’s Response to the Critique of Rights

CRT and LatCrit scholars met the CLS critique of rights with some skepticism, primarily because the theory seemed to erase – or at the very least ignore – the lived experiences of oppressed groups. CRT, which was heavily influenced by CLS as well as the civil rights movement, acknowledged the potential of the CLS critique but did not embrace its vision entirely. CRT scholars instead argued for reconstructing, rather than deconstructing,⁵⁹ the relationship between the law and racialized power, particularly as it implicated longstanding white-supremacist ideology in the United States.⁶⁰

CRT scholars like Patricia J. Williams and Kimberlé W. Crenshaw visualize rights through a very different lens than their CLS peers. Focusing on race and racial oppression, Williams and Crenshaw dissect how the critique of rights and the proposed alternatives to rights discourse do not comport with the experience

58. *Id.*

59. While CLS aimed to disrupt and do away with rights and rights discourse, CRT responded by defending the historical value of rights and proposing that, rather than be destroyed, rights should be reformed. For instance, Patricia J. Williams argues against the abandonment of rights because “rights rhetoric has been and continues to be an effective form of discourse for [B]lacks,” and notes, “[t]he vocabulary of rights speaks to an establishment that values the guise of stability, and from whom social change for the better must come The subtlety of rights’ real instability thus does not render unusable their persona of stability.” Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 410 (1987).

60. See, e.g., Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893 (discussing the sources, characteristics, and aspirations of CRT); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 988 (1990) (arguing that King’s Beloved Community concept “may provide valuable insight to those CLS scholars interested in not merely explicating an unjust social order, but reconstructing a just community”); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994) (“I argue that a tension exists within CRT . . . between ‘modernist’ and ‘postmodernist’ narratives. The success of what I call a ‘jurisprudence of reconstruction’ lies in CRT’s ability to recognize this tension and to use it in ways that are creative rather than paralyzing.”).

of Blacks⁶¹ in the United States.⁶² In particular, Williams and Crenshaw take issue with CLS's suggestion that rights discourse be abandoned for a more informal, more "pragmatic" articulation of "needs."⁶³ For Williams, rights have been useful despite their limits for the political advancement of Black people in the United States.⁶⁴ Responding to CLS's indeterminacy thesis, she explains that the fact that rights might be unstable does not rob them of their power to secure some stability, especially as applied to the lived experiences of Blacks.⁶⁵ Williams counters CLS's critique of rights by stating that the grimmest chapters of U.S. history are a consequence of "a failure of rights-*commitment*," not a failure of rights-assertion.⁶⁶ Rights are not limited in and of themselves; rather, they are products of the restricted universe from which they were conceived.

Crenshaw, on the other hand, is not as quick to discredit the critique of rights, but she ultimately posits that the critique is incomplete because it does

61. Though "Black" as a racial category tends to appear in lowercase in most mainstream writing, I will capitalize the word as a reference to it not only being a proper name, but a reference to a cultural, ethnic, and diasporic group. This choice further emulates the stylistic choice of CRT scholars like Crenshaw, whose work is crucial to this Note. See, e.g., Lori L. Tharps, *The Case for Black With a Capital B*, N.Y. TIMES (Nov. 18, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html> [<https://perma.cc/F2LX-QHJU>].

62. Williams best encapsulates this point of view in the following quote:

For [B]lacks, therefore, the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather, the goal is to find a political mechanism that can confront the *denial* of need. The argument that rights are disutile, even harmful, trivializes this aspect of [B]lack experience specifically, as well as that of any person or group whose genuine vulnerability has been protected by that measure of actual entitlement which rights provide.

Williams, *supra* note 59, at 413.

63. Compare Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1364-66 (1988) (critiquing Tushnet's pragmatism), and Williams, *supra* note 59, at 412-13 (opposing CLS's focus on needs instead of rights), with Tushnet, *An Essay on Rights*, *supra* note 39, at 1391 ("But there do seem to be substantial pragmatic reasons to think that abandoning the rhetoric of rights would be the better course to pursue for now. People need food and shelter now, and demanding that those needs be satisfied—whether or not satisfying them can today persuasively be characterized as enforcing a right—strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced.").

64. Williams, *supra* note 59, at 410.

65. *Id.* at 409-10. This stability is also part of an internal process. Williams states, "[T]he experience of rights-assertion has been one of both solidarity and freedom, of empowerment of an internal and very personal sort; it has been a process of finding the self." *Id.* at 414. I will discuss the significance of such a process in Part IV.

66. *Id.* at 424.

not tackle racial domination. Crenshaw recognizes that engaging in rights discourse has allowed conservatives to deradicalize and co-opt challenges to oppressive paradigms.⁶⁷ She reminds critics, however, that, in a world that circumscribes Blacks as “other,” it is unlikely that Black people’s calls for inclusion and equality will be heard if Blacks do not phrase their demands using rights discourse.⁶⁸

Crenshaw refutes CLS’s dismissive take on rights, asserting that Blacks’ limited options in this sphere are a direct consequence of the “ideological power of white race consciousness” and the siloing of their interests and experiences from American society.⁶⁹ Citing the work of Antonio Gramsci and Roberto Unger, Crenshaw argues that liberalism offers “transformative potential” because it affords Black people an opportunity not only to articulate their aspirations, but also combat the oppression they face.⁷⁰ She notes that, in the context of white supremacy, “[a]ttempts to harness the power of the state through the appropriate rhetorical/legal incantations should be appreciated as . . . calculated political acts” and “act[s] of self-defense.”⁷¹

In a similar vein, “LatCrit theory responds to the invisibility of [Latinxs] in North American law and society despite [their] longstanding presence within the lands now known as the United States.”⁷² Fittingly, LatCrit was conceived at a 1995 colloquium held in Puerto Rico addressing the relationship between CRT and Latinx communities.⁷³ It subsequently evolved and now stands as a network

67. Crenshaw, *supra* note 63, at 138.

68. *Id.*

69. *Id.*

70. *Id.* at 1357, 1386-87.

71. *Id.* at 1382; *see also id.* at 1336 n.19 (“[W]hite supremacy is used to refer to a formal system of racial domination based on the explicit belief that Blacks are inferior and should be subordinated.”); *id.* at 1336 n.20 (“[A] society once expressly organized around white supremacist principles does not cease to be a white supremacist society simply by formally rejecting those principles. The society remains white supremacist in its maintenance of the actual distribution of goods and resources, status, and prestige in which whites establish norms which are ideologically self-reflective. The phenomenon is ideological because it is a fantasy, because it is not real.”).

72. Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education—A Curricular Study with LatCritical Commentary*, 13 LA RAZA L.J. 119, 120-21 (2002) (discussing the lack of Latinxs in U.S. law school curricula and how to use LatCrit in curricular reform).

73. *See id.* at 120 n.3.

of scholars committed to a vision of anti-essentialism⁷⁴ and antisubordination.⁷⁵ LatCrit adds a particularly salient layer to this discussion by taking issue with the U.S. civil rights paradigm.⁷⁶

Contrary to CLS's skepticism of the value of rights, LatCrit disputes how substantive rights are framed or articulated in the United States, not the rights paradigm as a whole. LatCrit theory criticizes the U.S. civil rights paradigm for solely focusing on domestic or mainland issues⁷⁷ and ignores how U.S. policy perpetuates injustices against designated "alien[s]"⁷⁸ as well as people living under twenty-first-century colonialism in U.S. territories.⁷⁹ In addition, LatCrit questions the U.S. civil rights paradigm's tendency to essentialize issues of subordination into a Black/white binary of race and race relations. LatCrit complicates the Black/white binary of racial subordination in the United States by cat-

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74. Anti-essentialism is a term that is generally associated with feminist legal theory, but its rationale has been applied to other oppressed groups. See, e.g., Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995). Anti-essentialists oppose the view that, for instance, "all women share the same inherent characteristics" and "challenge the use of fixed characteristics, such as biology and psychology, in defining women." Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 275 (1999). Anti-essentialism thus "seeks to reveal intragroup differences . . . to expose relations of subordination and domination that may exist within and among the members of any particular group." Iglesias, *supra* note 37, at 3 n.5.
75. As a general matter, antisubordination is concerned with eradicating socially constructed hierarchies. See Bell, *supra* note 60, at 900-01; see also Crenshaw, *supra* note 63, at 1370-76 (describing the subordination of Black people in the United States); Francisco Valdes, *LatCrit 2013 Conference Symposium Afterword: Theorizing and Building Critical Coalitions: Outsider Society and Academic Praxis in Local/Global Justice Struggles*, 12 SEATTLE J. SOC. JUST. 983, 1013 (2014) ("Standing in contrast to the antidiscrimination principle of the 1960s that produced the formal equality status quo, the anti-subordination perspective focuses specifically on social results and material realities; moving beyond the limits of formally equal 'opportunity' without regards to actual social change, the anti-subordination principle measures the efficacy of equality policy specifically by reference to actual social progress.").
76. See Iglesias, *supra* note 37, at 15-16.
77. *Id.* at 15-17.
78. *Id.*; see Elvia R. Arriola, *LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245 (1996-1997); Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-1997).
79. See generally Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000) (discussing how Puerto Rico's colonial status is inconsistent with both contemporary law and theories of justice and morality).

egorizing communities along indigenous, ethnic, and multiracial lines.⁸⁰ Although these two focal points differ in subject, they point to LatCrit's broader critique of structural power and how it operates against the interests of oppressed communities.

By looking beyond the confines of the United States, LatCrit theorists are able to expose the critique of rights' inapplicability to people and nations outside the U.S. mainland. Similar to CRT, LatCrit advises against importing the more radical implications of the CLS rights critique (e.g., dissociating from litigation and rights-based strategies altogether), particularly in contexts where the "rule of law" is not a dominant, or even cultivated, ideology.⁸¹ LatCrit looks to the histories of countries like Guatemala, Nicaragua, Colombia, Peru, and Haiti to counter notions that "the wholesale deconstruction and delegitimation of rule of law ideologies" will liberate the oppressed.⁸² In particular, Elizabeth Iglesias posits that the "continuing instances of gross human rights abuses, impunity, and corruption" in those countries reveal the potential consequences of abrogating rule of law ideologies.⁸³ In highlighting these tensions, Iglesias argues that although law alone is not enough to change existing power structures, any liberating movement "must seek to render power at least minimally accountable, and to do so, it will need law, and more specifically, it will need rights."⁸⁴ This Note's historical discussion of the Puerto Rico Legal Project offers one example of Iglesias's argument.

Although Tushnet's take is modest in tone, the critique of rights compels lawyers to reexamine the capacity of litigation for social change when rights-centric work is so often plagued by consequences that are actually counterproductive to achieving progressive goals. Recent scholarship on the critique of rights tends to agree with Tushnet, noting that rights discourse "presents itself as a means of achieving social justice while at the same time legitimating and

80. See Iglesias, *supra* note 37, at 17; see also Robert S. Chang, *The Nativist's Dream of Return*, 9 LA RAZA L.J. 55 (1996) (commenting on the marginalization of Asian Americans and Latinos due to the Black/white racial paradigm in the United States); Rachel F. Moran, *Neither Black nor White*, 2 HARV. LATINO L. REV. 61, 68-69 (1997) (arguing that Latinx Americans' limited success in upward mobility was in part a product of the Black/white model of race relations); Francisco Valdes, *Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 5-6 (1996) (arguing that CRT works have left some important racial intersections unexplored).

81. See Iglesias, *supra* note 37, at 17-18.

82. *Id.* at 18.

83. *Id.* at 17-18.

84. *Id.* at 18.

perpetuating the status quo.”⁸⁵ The critique of rights, however, tends to define these progressive goals in myopic terms. Even Roberto Unger, himself a CLS proponent, recognizes the limits of CLS. Unger has contended that “[CLS] largely failed in its most important task: to turn legal thought into a source of insight into the established institutional and ideological structure of society and into a source of ideas about alternative social regimes.”⁸⁶ Unger saw this CLS failure in the inability to reestablish any sort of “consensus in legal theory and method.”⁸⁷ At the time, CLS disrupted the consensus in legal thought, but perhaps inadvertently portrayed similar approaches to the law, or matching views on the law’s role in social change, as being diametrically opposed.⁸⁸

I contend that the history of rights discourse in Puerto Rico supports the arguments of CRT and LatCrit scholars, who recognize that the critique of rights needs some modifications. The CRT and LatCrit literature provides some helpful frameworks for better understanding the limits of the critique of rights. As prior scholars have explained, the critique of rights ignores the role that rights or rights talk can play in the lives of people of color and other marginalized groups.⁸⁹ This Note argues that the critique of rights addresses neither how rights talk can assist in mobilizing marginalized communities, nor how rights can be reconstructed to secure protection from repressive government forces.⁹⁰ These considerations will be at the forefront of our analysis when discussing rights in the colonized nation of Puerto Rico.

The Project and its progeny, contrary to what the critique of rights would predict, enabled Puerto Ricans to imagine and fight for alternatives to their colonial reality. But in order to appreciate that development, we must first understand the history of legal and political repression in Puerto Rico, and how it has defined rights discourse on the island. As the next Part will show, the conception of rights in Puerto Rico depends on—and is necessarily limited by—the colonial and racial context that first brought these rights to life.

85. Jennifer Hendry & Melissa L. Tatum, *Human Rights, Indigenous Peoples, and the Pursuit of Justice*, 34 YALE L. & POL’Y REV. 351, 357 (2016); see also Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2190–98 (2013) (explaining how *Gideon v. Wainwright*, 372 U.S. 335 (1963), demonstrates that rights are indeterminate and repressive).

86. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK* 32 (2015).

87. *Id.* at 32, 42.

88. *Id.* at 42.

89. See Iglesias, *supra* note 37, at 17–18; Williams, *supra* note 59, at 413.

90. See *infra* Parts III, IV.

II. PUERTO RICO'S COLONIAL STATUS UNDER THE U.S. LEGAL SYSTEM

In this Part, I will build on the LatCrit observation that the critique of rights overlooks the unique needs of colonized people.⁹¹ I will first give an overview of the United States' colonization of Puerto Rico and the U.S. Supreme Court's role in not only legitimizing that process, but also codifying Puerto Ricans' status as colonial subjects. I will then recount the long history of both local- and federal-government repression of pro-independence thought and political activity on the island.

A. Puerto Ricans, (Second-Class) U.S. Citizens

Although Puerto Ricans⁹² have been U.S. citizens since 1917 due to the Jones Act,⁹³ “they do not have full legal, political, and cultural citizenship rights.”⁹⁴ Puerto Ricans cannot vote for the U.S. President in the general election (though they can participate in presidential primaries),⁹⁵ have no voting power in Congress,⁹⁶ and receive much less health-care funding than the states.⁹⁷ These legal

91. See Malavet, *supra* note 79.

92. Because the term “Puerto Rican” also refers to a diasporic group, I will note that, when I refer to Puerto Ricans throughout this Note, I mean those who were born and continue to reside in Puerto Rico. Becoming part of the diaspora by moving to the mainland United States removes many of the legal burdens on voting and access to government services described in this Section.

93. Jones-Shafroth Act, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953 (1917).

94. See PEDRO A. MALAVET, *AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* 22 (2004).

95. See Kenya Downs, *Puerto Rican Voter Surge in Florida Is No Surprise*, PBS NEWS HOUR (Nov. 8, 2016, 8:51 AM), <https://www.pbs.org/newshour/politics/is-puerto-ricans-movement-to-mainland-swaying-elections> [<https://perma.cc/BG32-G4AW>].

96. Puerto Rico has a nonvoting member in the House of Representatives, a resident commissioner who is essentially a congressional lobbyist for the island's interests in Washington, D.C. While the commissioner can vote in committee on bills and has the power to introduce legislation, the commissioner cannot participate in floor votes. See *Delegates and Resident Commissioners*, KIDS HOUSE (Nov. 9, 2018, 11:10 AM), <https://kids-clerk.house.gov/high-school/lesson.html?intID=36> [<https://perma.cc/8AZM-9NEY>].

97. On average, the federal government covers 57% of state Medicaid programs. Due to a cap on total Medicaid funding for U.S. territories (whose residents do not pay federal income taxes), the federal government only pays for 15% to 20% of Puerto Rico's Medicaid programs. Almost half of the island's population participates in Medicaid. See Paige Winfield Cunningham, *The Health 202: Puerto Rico's Problems Include a Medicaid Shortfall*, WASH. POST (Oct. 4, 2017), <https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2017/10/04>

and political deficiencies have consequently legitimized social and cultural markers of difference between Puerto Ricans and their nominal fellow citizens in the United States.⁹⁸

A history of colonialism undergirds the second-class status of Puerto Ricans. In 1898, the United States invaded and seized the island from Spain, which had ruled Puerto Rico since 1493. A U.S.-appointed civilian government then controlled the island from 1900 until 1917, when it was replaced by the Jones Act.⁹⁹ At the same time, the U.S. Supreme Court decided the Insular Cases, a series of opinions regarding the status of U.S. territories acquired in the Spanish-American War.¹⁰⁰ It should be noted that many of the Justices who decided the first of these cases, *Downes v. Bidwell*,¹⁰¹ were the same Justices who upheld the segregationist “separate but equal” doctrine in *Plessy v. Ferguson*.¹⁰² That same worldview pervades the Insular Cases.¹⁰³

/the-health-202-puerto-rico-s-problems-include-a-medicaid-shortfall/59d3d9613ofbo468cea81d2d [https://perma.cc/8YKC-MQCV]; see also Vann R. Newkirk II, *The Historical Exclusion Behind the Puerto Rico Bankruptcy Crisis*, ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/medicaid-funding-cap-puerto-rico/524973 [https://perma.cc/S6Y4-V5JK] (arguing that Congress could help Puerto Rico’s bankruptcy crisis by funding the island’s Medicaid system the way it funds the states’ Medicaid systems); Vann R. Newkirk II, *What Health Reform Means to the American Territories*, ATLANTIC (Aug. 26, 2017), https://www.theatlantic.com/politics/archive/2017/08/what-health-reform-means-to-the-american-territories/538056/ [https://perma.cc/RK2E-NQEJ] (explaining that U.S. territories are seldom considered in the calculus of national health-policy decisions).

98. LatCrit scholar Pedro A. Malavet contends that this partly has to do with how Puerto Ricans have been constructed as “foreigners” despite their legal citizenship. MALAVET, *supra* note 94, at 22. Malavet suggests that, in this manner, the United States has legally racialized Puerto Ricans as nonwhite to further marginalize them. See *id.* at 23.
99. See *id.* at 37; see also Jones-Shafroth Act, Pub. L. No. 64-368, 145 Stat. 951 (1917) (changing the legal regime). The Foraker Act of 1900, which established the initial regime that was replaced by the Jones Act, also created the Federal District Court of the United States for Puerto Rico. See MALAVET, *supra* note 94, at 37.
100. Some scholars argue that there are only nine Insular Cases, decided by the Supreme Court in 1901-1902. See *id.* at 38. Others contend that the cases cover a much broader period, starting with *Dred Scott v. Sandford*, 60 U.S. 393 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV, which they argue “created the imperial United States with its inherent constructs of citizens and noncitizens within U.S. territorial control,” and ending with *Balzac v. Porto Rico*, 258 U.S. 298 (1922). See MALAVET, *supra* note 94, at 38.
101. 182 U.S. 244 (1901).
102. 163 U.S. 537 (1896). Only one Justice was replaced between the two decisions.
103. See, e.g., Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57, 68 (2013) (“The rules established in the *Insular Cases* were simply a more stringent version of the *Plessy* doctrine: the newly conquered lands were to be treated not only separately, but also *unequally*.”); Doug Mack, *The Strange Case of Puerto Rico: How a Series of Racist Supreme Court Decisions Cemented the Island’s Second-Class Status*, SLATE (Oct. 9, 2017, 5:45

Downes is crucial to understanding the current state of U.S. citizenship in Puerto Rico.¹⁰⁴ In *Downes*, the Court considered whether the U.S. Constitution applied to Puerto Rico. The Court held that the Constitution did not fully apply to U.S. territories because they were not incorporated, and it was up to Congress to decide when or whether to incorporate them.¹⁰⁵ This rule inspired a cryptic line from Justice White, who stated that even though Puerto Rico was “not a foreign country, . . . it was foreign to the United States in a domestic sense.”¹⁰⁶ The Court justified the existence of a territory that is simultaneously foreign and domestic by reasoning that, because Puerto Rico and the other territories “[were] inhabited by alien races,” governing them “according to Anglo-Saxon principles, [might] for a time be impossible.”¹⁰⁷ The decision codified Puerto Ricans’ status as unincorporated “others” living under the rule, but not the protection, of the United States and its Constitution. Despite the racism underlying *Downes* and the cases that followed,¹⁰⁸ they remain good law.

The racist reasoning behind the Insular Cases also influenced the very legislation that granted Puerto Ricans U.S. citizenship, the Jones Act.¹⁰⁹ During the

AM), http://www.slate.com/articles/news_and_politics/politics/2017/10/the_insular_cases_the_racist_supreme_court_decisions_that_cemented_puerto.html [<https://perma.cc/8ZYY-GWGK>] (recounting the history and legacy of the Insular Cases); Rose Cuison Villazor, *The Insular Cases Are a Cautionary Tale in the Citizenship Debate*, N.Y. TIMES: ROOM FOR DEBATE (Dec. 22, 2015, 12:00 PM), <https://www.nytimes.com/roomfordebate/2015/08/24/should-birthright-citizenship-be-abolished/the-insular-cases-are-a-cautionary-tale-in-the-citizenship-debate> [<https://perma.cc/KC6U-SD97>] (arguing that the Insular Cases perpetuated inequality on the basis of racist premises).

104. Recent scholarship suggests that *Downes*, though still a critical case on this question, should be read in conjunction with *Gonzales v. Williams*, 192 U.S. 1 (1904), to fully understand the Insular Cases’ evolution. For further reading on this topic, see Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181, 1234-40 (2014).
105. See *Downes*, 182 U.S. at 339 (White, J., concurring) (“[I]ncorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.”).
106. *Id.* at 341. For a deconstruction of this phrase and takes on American imperialism vis-à-vis the U.S. territories, see generally FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001).
107. *Downes*, 182 U.S. at 287.
108. The last of the Insular Cases, *Balzac v. Porto Rico*, 258 U.S. 298 (1922), reiterated the notion of second-class citizenship for U.S. territories that *Downes* first articulated. The case held that only fundamental rights guaranteed by the Due Process Clause would apply to U.S. citizens living in the territories, but personal freedoms (like the right to a trial by jury and the right to uniform taxation) would not. *Balzac* thus “constitutionally constructs the United States citizenship of Puerto Ricans as second class, as long as they remain on the territory of Puerto Rico.” Malavet, *supra* note 79, at 30.
109. Jones-Shafroth Act, Pub. L. No. 64-368, 145 Stat. 951 (1917).

congressional debate on the Act, U.S. Representative Joseph Cannon proclaimed that “the racial question” made Puerto Ricans unsuitable for statehood, and openly debated whether they were “people competent for self-government.”¹¹⁰ Cannon’s crude testimony aligned squarely with the reasoning and language of the Supreme Court’s Insular Cases: the assimilation of “alien,” “mixed race,” or “African” Puerto Ricans was not only impossible; it was normatively undesirable. The last of the Insular Cases, *Balzac v. Porto Rico*,¹¹¹ qualified the citizenship afforded to Puerto Ricans through the Act by specifying that not all constitutional protections applied to Puerto Rico.¹¹² Curiously, the U.S. Supreme Court rationalized this form of second-class citizenship by distinguishing Alaska, which was settled “by American citizens,”¹¹³ from the “difficulties”¹¹⁴ of incorporating the Philippines and Puerto Rico into the Union.¹¹⁵ The origins of U.S. citizenship of Puerto Ricans reveal that any analysis of rights in Puerto Rico cannot be divorced from ideas of racial domination as a general matter and colonialism in particular, as the next Section will demonstrate.

B. Repression on the Island

As the century wore on, many Puerto Ricans grew disaffected with U.S. rule. Generally speaking, accounts of this era in Puerto Rico tend to focus on democratic wins like the election of Governor Luis Muñoz Marín in 1948,¹¹⁶ industrial

110. The congressman then presented “statistical” analysis claiming that “Porto Rico is populated by a mixed race . . . [which is a]bout 30 per cent pure African . . . [And] 75 to 80 percent of the population . . . was pure African or had an African strain in their blood.” Malavet, *supra* note 79, at 52 n.221 (citations omitted); see also RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 346 (Juan F. Perea et al. eds., 2000) (summarizing Cannon’s racial argument). Congress did not get the island’s name right until 1932, when it changed the incorrect “Porto Rico” used in statutes and judicial opinions to “Puerto Rico.” Malavet, *supra* note 79, at 32; see also 48 U.S.C. § 731 (2018).

111. 258 U.S. 298.

112. See *id.* at 304-09 (holding that the Jones Act did not apply the entirety of the Federal Bill of Rights to Puerto Rico); Malavet, *supra* note 79, at 29.

113. *Balzac*, 258 U.S. at 309.

114. *Id.*

115. See Malavet, *supra* note 79, at 30-31.

116. See e.g., A.W. MALDONADO, LUIS MUÑOZ MARÍN: PUERTO RICO’S DEMOCRATIC REVOLUTION 270-71, 421-23 (2006); Joanne Omang, *Luis Muñoz Marín, 4-Term Governor of Puerto Rico*, *Dies*, WASH. POST (May 1, 1980), <https://www.washingtonpost.com/archive/local/1980/05/01/luis-munoz-marin-4-term-governor-of-puerto-rico-dies/06ecd114-edb1-4908-98ab-4de668ee3f2d> [<https://perma.cc/8EXH-3D4H>]. Until 1948, the United States appointed all governors that ruled over Puerto Rico. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868

growth on the island,¹¹⁷ and the adoption of the Constitution of the Commonwealth of Puerto Rico in 1952.¹¹⁸ However, the twentieth century is also significant for being a time of cultural indoctrination, political control, and violent repression against *independentista*, or pro-independence, nationalist forces in Puerto Rico.¹¹⁹

Black/Afro-Latinx lawyer and politician Pedro Albizu Campos,¹²⁰ who presided over the Puerto Rican Nationalist Party from 1930 until his death in 1965,¹²¹ was the face of a small but growing independentista sentiment on the island. In 1936, Albizu Campos was imprisoned on conspiracy and sedition charges after leading a successful island-wide agricultural strike in 1934.¹²² In response, peaceful protests organized across Puerto Rico, the most notable of which occurred in Ponce, on March 21, 1937, on Palm Sunday.¹²³ After a shot of “undetermined origin,”¹²⁴ police fired into a crowd of pro-independence Puerto

(2016). All of these governors, except for native Puerto Rican Jesús T. Piñero, were American. See Piñero, *Jesús T.*, HIST., ART & ARCHIVES: U.S. HOUSE REPRESENTATIVES, <https://history.house.gov/People/Detail/19726> [<https://perma.cc/3ALF-9UTN>].

117. See AYALA & BERNABE, *supra* note 10, at 179-200 (explaining Puerto Rico’s postwar economic transformation).

118. See *id.* at 162-78 (describing the background for the adoption of Puerto Rico’s Constitution).

119. See Malavet, *supra* note 79, at 71-74.

120. Albizu Campos was the first Puerto Rican to graduate from Harvard College and the first Puerto Rican to graduate from Harvard Law School. See NELSON A. DENIS, WAR AGAINST ALL PUERTO RICANS: REVOLUTION AND TERROR IN AMERICA’S COLONY 26, 153, 155 (2015). He was class valedictorian at Harvard Law School. *Id.* at 57. His professors, however, delayed two of his exams so he would not graduate on time in an effort to avoid the “embarrassment” of having a Puerto Rican valedictorian. See MARISA ROSADO, LAS LLAMAS DE LA AURORA: ACERCAMIENTO A UNA BIOGRAFÍA DE PEDRO ALBIZU CAMPOS 50-52 (1998).

121. See *War Against All Puerto Ricans: Inside the U.S. Crackdown on Pedro Albizu Campos & Nationalist Party*, DEMOCRACY NOW! (Apr. 21, 2015) [hereinafter *War Against All Puerto Ricans*], https://www.democracynow.org/2015/4/21/war_against_all_puerto_ricans_inside [<https://perma.cc/HLN7-PQ39>].

122. See *Albizu v. United States*, 88 F.2d 138, 139-40 (1st Cir. 1937); AJ Vicens, *The Lost History of Puerto Rico’s Independence Movement*, MOTHER JONES (Apr. 21, 2015, 10:00 AM), <https://www.motherjones.com/media/2015/04/puerto-rico-independence-albizu-campos> [<https://perma.cc/7EDN-8T68>]; *War Against All Puerto Ricans*, *supra* note 121. It is also worth noting that J. Edgar Hoover sent FBI agents to surveil the Nationalist leadership after the strike. See DENIS, *supra* note 120, at 64.

123. See *War Against All Puerto Ricans*, *supra* note 121.

124. Malavet, *supra* note 79, at 71 n.325.

Ricans, killing twenty-one and wounding over two hundred.¹²⁵ The event became known as the Ponce Massacre.¹²⁶

The United States was not the sole perpetrator of these violent tactics. Puerto Rican political elites and law enforcement also used the island's colonial relationship to the United States to quell dissent. Governor Muñoz Marín and the Puerto Rican legislature approved Public Law 53, known as "*la Ley de la Mordaza*" ("the Gag Law"), in 1948, which made it a felony to advocate the overthrowing of the insular government.¹²⁷ The Gag Law criminalized speaking in favor of Puerto Rican independence, organizing groups or assemblies of people for that purpose, owning or displaying a Puerto Rican flag, and even singing "*La Borinqueña*," the island's national anthem.¹²⁸ This law proved especially useful after Nationalist Party uprisings took hold of the island on October 30, 1950.¹²⁹ That day, Muñoz Marín called in the Puerto Rico National Guard and bombed the two towns where the armed revolts were the most intense, Jayuya and Utuado, and the nationalists surrendered.¹³⁰ Albizu Campos was among the arrestees. He spent most of the rest of his life in prison, where he was subjected to inhumane living conditions, torture, and radiation experiments.¹³¹

The government repression in Puerto Rico did not end with a bomb. From 1936 to 1995, the FBI tracked thousands of independentistas, keeping secret files

125. See *War Against All Puerto Ricans*, *supra* note 121.

126. See MALAVET, *supra* note 94, at 91.

127. See Nelson A. Denis, *How Luis Muñoz Marín (and His Addiction to Opium) Enslaved Puerto Rico*, LATINO REBELS (Feb. 24, 2015, 3:36 PM), <http://www.latinorebels.com/2015/02/24/how-luis-munoz-marin-and-his-addiction-to-opium-enslaved-puerto-rico> [https://perma.cc/3WLX-UYVL]; Marisol LeBrón, *Puerto Rico and the Colonial Circuits of Policing*, NACLA (Sept. 27, 2017), <https://nacla.org/news/2017/09/27/puerto-rico-and-colonial-circuits-policing> [https://perma.cc/J5YJ-N3TD] ("La Mordaza was adapted from parts of the U.S. Alien Registration Act of 1940, or the Smith Act, a wartime measure to prevent domestic acts of sabotage and subversion through targeting communist and anarchist organizers, and remained in effect until 1957").

128. See Ivonne Acosta-Lespier, *The Smith Act Goes to San Juan: La Mordaza, 1948-1957*, in PUERTO RICO UNDER COLONIAL RULE 59, 59 (Ramón Bosque-Pérez & José Javier Colón Morera eds., 2006); LeBrón, *supra* note 127.

129. See MALAVET, *supra* note 94, at 92-93.

130. About twenty-five people were killed and between one and two thousand people were arrested after the failed insurrection. See Juan González, *Puerto Rico Marks 60th Anniversary of Jayuya Uprising*, DEMOCRACY NOW! (Oct. 29, 2010), https://www.democracynow.org/2010/10/29/puerto_rico_marks_60th_anniversary_of [https://perma.cc/7TED-MUR9]; *War Against All Puerto Ricans*, *supra* note 121.

131. See DENIS, *supra* note 120, at 320, 324-26; *War Against All Puerto Ricans*, *supra* note 121.

on their every move.¹³² This joint effort between the Bureau and the Puerto Rico Police Department produced almost two million pages of surveillance documents that provided information about independentista political activity, student demonstrations, and worker strikes.¹³³ The dossiers, known as “*carpetas*” in Spanish, were routinely used to blacklist and discredit independentistas, their sympathizers, and other ordinary Puerto Ricans.¹³⁴ In addition, the Puerto Rican labor movement, whose striking activity peaked in the early 1970s,¹³⁵ was seriously weakened by cases brought before the National Labor Relations Board (NLRB).¹³⁶ The struggle of the Cementworkers Union against Puerto Rican Cement Company, owned by former pro-statehood Puerto Rican governor and multimillionaire Luis A. Ferré, is instructive.¹³⁷ In January 1975, after the union’s contract with Puerto Rican Cement expired, the company suspended sick pay and pay to disabled workers, tried to cut retired workers’ pension payments, and wanted to cut worker’s health-insurance plans.¹³⁸ On January 31, 1975, the union went on strike, but the company refused to negotiate with its workers, instead hiring strikebreakers, creating an anti-union media campaign, and bringing criminal charges against more than thirty union members.¹³⁹ In what some considered to be a politically motivated move, the NLRB allegedly engaged in procedural delays, undermining the union’s case against Puerto Rican Cement and

132. Debbie Nathan, *X-Rays or X-Files? The FBI and the Independentistas*, NACLA (Sept. 25, 2007), <https://nacla.org/article/x-rays-or-x-files-fbi-and-independentistas> [<https://perma.cc/E56P-DA46>]; Mireya Navarro, *New Light on Old F.B.I. Fight; Decades of Surveillance of Puerto Rican Groups*, N.Y. TIMES (Nov. 28, 2003), <http://www.nytimes.com/2003/11/28/nyregion/new-light-on-old-fbi-fight-decades-of-surveillance-of-puerto-rican-groups.html> [<https://perma.cc/QA7C-AWS9>].

133. Navarro, *supra* note 132.

134. *See id.* In an interview, Judith Berkan stated that the Puerto Rico Police Department’s Intelligence Unit would use information from the *carpeteo* process to discourage schools from admitting students and employers from hiring “communists.” The Inter-American University, a private university where Berkan still teaches, had a dean who acknowledged that the police had to approve those who were being admitted to the school. Telephone Interview with Judith Berkan (Nov. 10, 2017).

135. *See* AYALA & BERNABE, *supra* note 10, at 233.

136. *See* Telephone Interview with Paul Schachter (Nov. 17, 2017); *NLRB—A Repressive Tool*, FREEDOM ARCHIVES (1976), https://www.freedomarchives.org/Documents/Finder/DOC512_scans/512.PR.NLRB.web.pdf [<https://perma.cc/46PZ-T6N7>].

137. *See* AYALA & BERNABE, *supra* note 10, at 233; *see also* Luis A. Ferré, 99; *Ex-Governor Sought Puerto Rico Statehood*, L.A. TIMES (Oct. 22, 2003), <http://articles.latimes.com/2003/oct/22/local/me-ferre22> [<https://perma.cc/58SX-EEVJ>] (describing Ferré’s business and political activities).

138. *See* *NLRB—A Repressive Tool*, *supra* note 136.

139. *Id.*

forcing an end to the strike.¹⁴⁰ It was in this context of acute and evolving political repression that the Puerto Rico Legal Project was born.

III. THE ADVENT OF CIVIL RIGHTS LITIGATION IN PUERTO RICO

To illustrate how the evolution of rights talk in Puerto Rico diverges from the CLS critique of rights, this Part tells the story of the Project. Here, I draw from original interviews with Puerto Rican and U.S. lawyers and community activists to describe the significance of the Project's rights-based approach to social change, and how the Project inspired generations of Puerto Ricans to engage in nation-building work.

A. *Keeping Movements Alive*

The Project emerged from conversations between independentista labor leaders and U.S.-based attorneys involved with the Center for Constitutional Rights (CCR) in New York City. In the early 1970s, Pedro Grant, union leader and head of the *Movimiento Obrero Unido* (MOU),¹⁴¹ and other Puerto Rican labor leaders contacted CCR to help fend off the assaults being made against the island's fledgling independentista labor movement.¹⁴² CCR then put them in touch with David Scribner, a "patriarch" of the labor and civil rights movements, who was on CCR's board of trustees at the time.¹⁴³

140. It took the NLRB three months to decide whether the union had a case against the company, in contrast to the NLRB's typical time period of one month. After the NLRB rejected the union's charges against the company, the union appealed, but the NLRB did not decide whether a hearing regarding the company's alleged unfair labor practices should be held for another six months. On December 15, 1975, the NLRB once again decided against the union. During the six-month delay, the NLRB also held up elections that would have decided whether the Cementworkers Union had a right to represent the company's workers. Typically, elections are held even if an appeal is pending. *Id.*

141. Spanish for "United Labor Movement," the *Movimiento Obrero Unido* was a coalition of progressive labor movements in Puerto Rico. See Telephone Interview with Paul Schachter, *supra* note 136; *Reconocen aportaciones de Pedro Grant al sindicalismo*, NOTICEL (Mar. 4, 2012, 10:06 AM), <http://www.noticel.com/ahora/reconocen-aportaciones-de-pedro-grant-al-sindicalismo/608067951> [<https://perma.cc/JP2H-MBCG>].

142. See Telephone Interview with Paul Schachter, *supra* note 136.

143. *Id.*; see Telephone Interview with Franklin Siegel, Distinguished Lecturer, CUNY School of Law (Mar. 30, 2018). Scribner was perhaps best known for being the general counsel of the United Electrical, Radio, and Machine Workers of America during the 1940s and 1950s. He was also part of the defense team that represented the Scottsboro Boys, and was a founder of the National Lawyers Guild. See Glenn Fowler, *David Scribner, 84, Lawyer for Unions and in Rights Cases*, N.Y. TIMES (Apr. 13, 1991), <http://www.nytimes.com/1991/04/13/obituaries>

Grant and the other leaders met with Scribner and told him that they were essentially “under attack by the big corporations.”¹⁴⁴ Labor was vulnerable to these attacks for two reasons. First, because of their nationalist orientation, the labor leaders did not want to recognize the jurisdiction of the United States over the labor movement in Puerto Rico.¹⁴⁵ Refusing to acknowledge the United States’ jurisdiction over Puerto Rico was certainly a powerful way to protest colonialism, as well as to challenge people’s notions of authority. For years, progressive and independentista lawyers followed the anticolonial principle that one could not use the instrumentalities of the colonial power, and thus refused to recognize the federal courts in Puerto Rico.¹⁴⁶ For them, Puerto Rico’s problems could not be solved until imperialism was defeated.¹⁴⁷ Some lawyers even refused to learn federal law, and instead went to law school in Puerto Rico and focused on learning the island’s civil code system.¹⁴⁸

Second, repressive cases against Puerto Rican workers were being brought through the NLRB, which meant that, to challenge administrative decisions, you had to go into federal court.¹⁴⁹ Many of the unions’ members spoke no English, and their lawyers did not have experience in federal court, which disadvantaged them greatly.¹⁵⁰ Additionally, grand juries were used to investigate the Puerto Rican Left, an abusive move taken by the FBI to identify the movement’s players

</david-scribner-84-lawyer-for-unions-and-in-rights-cases.html> [https://perma.cc/MV5J-WQ6G].

144. Telephone Interview with Paul Schachter, *supra* note 136.

145. *Id.*

146. See Telephone Interview with Franklin Siegel, Distinguished Lecturer, CUNY School of Law (Nov. 8, 2017).

147. See Miles Galvin, *The Early Development of the Organized Labor Movement in Puerto Rico*, 3 *LATIN AM. PERSP.* 17, 33 (1976).

148. See Telephone Interview with Ellen Chapnick, Lecturer in Law, Columbia University (Oct. 31, 2017).

149. See Telephone Interview with Paul Schachter, *supra* note 136.

150. *Id.* Puerto Rico’s local courts operate in Spanish, using the civil system inherited from Spain. In contrast, federal courts use common law and operate in English. The federal courts presented progressive and independentista lawyers with a completely different kind of law from what they were taught in law school or usually practiced.

and chill dissent.¹⁵¹ Some independentistas were incarcerated for not cooperating with these targeted grand-jury investigations.¹⁵²

As a result of these repressive and incessant tactics, most independentista leaders were forced to rethink their ideological stance.¹⁵³ At the time, however, maintaining that position left these movements vulnerable to repressive legal tactics, particularly ones that benefited from the independentista leaders' lack of expertise in federal court. The recurring attacks on unions and the independence movement became so intense that "everyone recognized that the conditions on the ground had changed."¹⁵⁴ As a result, progressive and independentista leaders resorted not only to rights-based strategies, but also to *federal* rights-based strategies, in order to insulate their movements from some of the repressive tactics used by the Puerto Rican government and the federal government.

At the request of the MOU, and with the help of a recent law school graduate named Paul Schachter,¹⁵⁵ Scribner set up the Puerto Rico Emergency Labor Law Project (PRELLP).¹⁵⁶ While in Puerto Rico, Scribner and Schachter supported

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151. Progressive union leaders, among others, would be subpoenaed by federal grand juries and asked "to provide exemplars—samples of their hair, handwriting, voice demonstrations or participation in a line-up." Judith Berkan, *The Federal Grand Jury: An Introduction to the Institution, Its Historical Role, Its Current Use and the Problems Faced by the Target Witness*, 17 REV. JURÍDICA U. INTERAMERICANA P.R. 103, 112 (1983). Refusing to do this would end in an arrest on the basis of contempt. *Id.* In addition, while the institution of the grand jury exists in Puerto Rico, it is not used in local courts. *Id.* at 104.
152. See Judith Berkan, *La década del 70 y el National Lawyers Guild*, CLARIDAD (Oct. 21, 2013), <http://www.claridadpuertorico.com/content.html?news=963A6147C23AA70E734CBBCA30FE71F6> [<https://perma.cc/W9R5-E76N>].
153. According to some of the people I interviewed, there was little resistance from independentista leaders regarding this change in strategy. See Telephone Interview with Paul Schachter, *supra* note 136; Telephone Interview with Franklin Siegel, *supra* note 146; *infra* Part IV. It should be noted that the people I interviewed were either much younger than the activists who devised this strategy or did not recall specific details about this decision. Because much of this strategizing occurred during a time of intense repression in Puerto Rico, little was documented. This Note attempts to piece together parts of that missing history, but has not been able to recover everyone's stories.
154. Telephone Interview with Franklin Siegel, *supra* note 146.
155. Schachter noted that, although he was not involved in Puerto Rico's struggle until he met Grant, he had already come into contact with Puerto Rico and issues related to its political status. For instance, as a high schooler in New York, Schachter had gone to lectures featuring Puerto Rican Socialist Party founder Juan Mari Brás. They later worked together at a law firm in Puerto Rico. See Telephone Interview with Paul Schachter, *supra* note 136.
156. *Id.* Before the PRELLP took shape, Schachter and Scribner would travel back and forth between New York City and San Juan to teach a series of seminars meant to teach a whole cadre of lawyers how they could defend themselves. The *Instituto de Seminarios de Leyes Obreras*

independentistas and other community activists through varied legal work.¹⁵⁷ For instance, Scribner taught federal labor law to a group of lawyers who later founded the *Bufete Sindical*.¹⁵⁸ Schachter also worked on the criminal contempt defense of local union leaders,¹⁵⁹ protested the requirement that grand jurors speak English as constraining the socioeconomic diversity of the grand jury,¹⁶⁰ and supported strikes like those at Puerto Rican Cement, among other initiatives.¹⁶¹ Schachter helped vindicate the rights of Federico Cintrón Fallo, an MOU officer who, in July 1975, was falsely accused of robbing \$30,000 from a bank.¹⁶² The case against Cintrón Fallo was ultimately dismissed after the FBI used questionable tactics to lead eyewitnesses to pick Cintrón Fallo from a series of photographs (the move was questionable because the robbers were wearing

(ISLO) (Spanish for “Institute for Seminars on Labor Law”) was headquartered in San Juan, and was funded by a few churches, some unions, and CCR. *Id.*

157. See Judith Berkan & Paul Schachter, *Puerto Rico Legal Project*, CLARIDAD (Oct. 21, 2013), <http://www.claridadpuertorico.com/content.html?news=9D111AE60AC8047B7B429361BCC1CAAB> [https://perma.cc/7ZL3-BZZ4].
158. Spanish for “Union Law Firm.” The *Bufete Sindical* law firm took on workers’ rights cases and challenged repressive Puerto Rican and U.S. labor laws. See Pedro Grant Chacón, 1920-2012, MOVIMIENTO INDEPENDENTISTA NACIONAL HOSTOSIANO (Mar. 9, 2012, 1:44 AM), <http://minhpuertorico.org/index.php/noticias/55-noticias/1131-pedro-grant-chacon-1920-2012> [https://perma.cc/FT5V-ZCLQ]; Paul Schachter, *Mensaje del Lcdo. Paul Schachter, Miembro Fundador del Bufete Sindical*, CLARIDAD (Mar. 7, 2012), <http://www.claridadpuertorico.com/content.html?news=EE7CF71905042479E89D5B3DCE5EDC84> [https://perma.cc/DMT6-P2MU].
159. Schachter defended Arturo Grant and Radamés Acosta from the NLRB’s “extremely rare” use of criminal contempt to try to convict the union leaders. See E-mail from Paul Schachter to author (July 11, 2018, 8:14 PM EST) (on file with author). Schachter and his team succeeded in knocking out potential five-year terms of imprisonment and were able to get the courts to rule that the maximum penalty was a misdemeanor. See *id.* Even though the court denied the defendants a jury trial and sentenced Acosta to three months incarceration, it was seen as a positive result that “gave hope to the labor movement.” *Id.* For more details on the case, see *United States v. Union Nacional de Trabajadores*, 576 F.2d 388 (1st Cir. 1978).
160. Some of this work is reflected in cases like *United States v. Marcano*, 508 F. Supp. 462 (D.P.R. 1980), and *United States v. Ramos Colon*, 415 F. Supp. 459 (D.P.R. 1976). See Berkan, *supra* note 151, at 113 n.42 (noting that, at the time, there had been “a number of challenges to the grand jury in the United States District Court for the District of Puerto Rico” because the “English-language requirement [was] seen as greatly limiting the breadth of composition of the juries”).
161. See Berkan & Schachter, *supra* note 157. Other notable cases that Schachter led include *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1 (1st Cir. 1976); *In re Maury Santiago*, 533 F.2d 727 (1st Cir. 1976); and *Crown Cork de Puerto Rico, Inc.*, 273 N.L.R.B. No. 45, 243 (1984). See E-mail from Paul Schachter, *supra* note 159.
162. See E-mail from Paul Schachter, *supra* note 159.

masks).¹⁶³ The government and some newspapers like *El Nuevo Día* used this case to try to discredit the labor movement by associating it with “criminal activity and violence.”¹⁶⁴ The vindication of Cintrón Fallo was important for uncovering government abuses and bolstering the labor movement in Puerto Rico.

The National Lawyers Guild eventually took over the ad hoc PRELLP and turned it into the Puerto Rico Legal Project, which opened in Puerto Rico in March of 1977.¹⁶⁵ The Project was modeled after an office that the Guild opened in Mississippi that operated from 1962 to 1965, during Freedom Summer.¹⁶⁶ That office similarly focused on public education, legal training, and rotating volunteer lawyers who came from the North.¹⁶⁷ The Project would bring one or two lawyers down to Puerto Rico for about a year at a time, and they would train local lawyers in federal practice, bring them onto cases as co-counsel, and connect them to other training resources.¹⁶⁸ When the Project began, its litigation docket was mostly reactive, focusing on responding to federal grand-jury investigations of labor leaders, pursuing labor law cases before the NLRB, and engaging in other antirepression work.¹⁶⁹ Through these initiatives, the Project responded to local leaders’ efforts to reexamine their relationship to the law of the colonial oppressor and aimed to give Puerto Ricans the tools they needed to have their movements speak for themselves.

163. *Id.*

164. *Id.*

165. CCR attorney José Antonio “Abi” Lugo, CCR legal worker Georgina Cestero, and members of the Guild, including Carl Broege, Paul Schachter, Richard Wagner, and Franklin Siegel, organized the Guild’s creation of the Project. See Telephone Interview with Judith Berkan, *supra* note 134; E-mail from Paul Schachter, *supra* note 159; Telephone Interview with Franklin Siegel, *supra* note 146.

166. This Guild office aided the local Black population during Freedom Summer. See *National Lawyers Guild*, in *POVERTY IN THE UNITED STATES: AN ENCYCLOPEDIA OF HISTORY, POLITICS, AND POLICY* 487 (Gwendolyn Mink & Alice O’Connor eds., 2004); Telephone Interview with Franklin Siegel, *supra* note 146.

167. See Telephone Interview with Franklin Siegel, *supra* note 146. Other lawyers like Michael Withey, Jane Rasmussen, Jeffrey Fogel, and Rina Biaggi helped kick-start the Project. See Berkan & Schachter, *supra* note 157.

168. Telephone Interview with Franklin Siegel, *supra* note 146; see also Telephone Interview with Ellen Chapnick, *supra* note 148.

169. See Telephone Interview with Judith Berkan, *supra* note 134; see also Berkan & Schachter, *supra* note 157 (specifying that the Project “also collaborated with local activists in denouncing the federal COINTELPRO program” and published a “law journal entitled Puerto Rican Journal of Human Rights,” which included contributions by Guild “members and local activists”).

B. Lawyering for the People

Judith Berkan and Ellen Chapnick were among the lawyers first recruited by the Project who came from the mainland to serve a rotation in Puerto Rico. Chapnick, whom I interviewed for this Note, used her expertise to take up environmental and worker-safety issues,¹⁷⁰ as well as grand-jury work. Although Chapnick left Puerto Rico after her one-year commitment ended,¹⁷¹ Berkan stayed. As a young lawyer, Berkan was already active in the Puerto Rico solidarity movement in the United States.¹⁷² Berkan's arrival to the island coincided with two seminal moments in modern Puerto Rican history: the blockade of the U.S. Navy by Vieques fishermen and the Cerro Maravilla murders.

Although Vieques, a municipality of Puerto Rico, is best known for the highly publicized protests that occurred in the early 2000s,¹⁷³ the campaign to oust the U.S. Navy from the island began many years earlier, in the 1970s. Since World War II,¹⁷⁴ the Navy had used Vieques to conduct military training exercises and test chemical weapons.¹⁷⁵ Besides exposing the island's delicate ecosystem to toxic chemicals, the Navy's bombing of Vieques severely interfered with locals' ability to engage in commercial activities, such as fishing and promoting tourism.¹⁷⁶ In response to Navy operations on the island, on February 6, 1978, a

170. In particular, Chapnick worked to combat the lack of safety in Puerto Rico's pharmaceutical industry. Since worker health and safety laws were lax or nonexistent in Puerto Rico, island workers were not given safety gear. See Telephone Interview with Franklin Siegel, *supra* note 146.

171. See Telephone Interview with Ellen Chapnick, *supra* note 148.

172. In law school, Berkan was involved in Puerto Rican study groups and was an active member of the Guild. She also worked for the community-based *Centro Puertorriqueño para la Justicia en Hartford* (Spanish for "Puerto Rican Center for Justice in Hartford"). See Telephone Interview with Judith Berkan, *supra* note 134.

173. See McCaffrey, *supra* note 15, at 83; Dana Canedy, *Navy Leaves a Battered Island, and Puerto Ricans Cheer*, N.Y. TIMES (May 2, 2003), <https://www.nytimes.com/2003/05/02/us/navy-leaves-a-battered-island-and-puerto-ricans-cheer.html> [<https://perma.cc/B483-R92U>].

174. See McCaffrey, *supra* note 15, at 83.

175. Napalm, depleted uranium, and other heavy metals were deployed in training exercises. See Sarah Emerson, *The Puerto Rican Island the US Military Destroyed Has Been Forgotten After Hurricane Maria*, VICE: MOTHERBOARD (Oct. 20, 2017), https://motherboard.vice.com/en_us/article/ywbznm/the-puerto-rican-island-the-us-military-destroyed-has-been-forgotten-after-hurricane-maria [<https://perma.cc/7QBJ-U7ML>].

176. See *Fishermen Protest U.S. Navy Exercises*, N.Y. TIMES (Jan. 28, 1979), <http://www.nytimes.com/1979/01/28/archives/fishermen-protest-us-navy-exercises-fishins-at-an-island-off-san.html> [<https://perma.cc/VQ2M-AVF3>].

group of Vieques fishermen navigated their eighteen-foot fishing boats into military-occupied waters and stopped Navy warships from engaging in a thirty-day military exercise.¹⁷⁷ This “fish-in”¹⁷⁸ was part of a bigger strategy initiated by Vieques residents to drive the Navy off the island altogether.

A few months after the direct-action campaign in Vieques began, two young independentistas were shot by Puerto Rican police on Cerro Maravilla, a remote mountain in the Toro Negro Forest.¹⁷⁹ The police claimed that they acted in self-defense,¹⁸⁰ and that the young men – Carlos Soto Arriví and Arnaldo Darío Rosado¹⁸¹ – were radical left-wing terrorists who were planning to sabotage a television relay tower.¹⁸² Carlos Romero Barceló, then Governor of Puerto Rico, lauded the police officers as “heroes.”¹⁸³ Investigations conducted by both the Puerto Rico Department of Justice and the U.S. Department of Justice between 1978 and 1980 did not find the police culpable.¹⁸⁴ Local media noted inconsistencies in the official version of the case, but they could not definitively prove anything.¹⁸⁵

The Vieques blockade and the Cerro Maravilla incident caused the Project to change its previously reactive stance and engage in more affirmative litigation

177. See McCaffrey, *supra* note 16, at 329.

178. See *Fishermen Protest U.S. Navy Exercises*, *supra* note 176.

179. See Mireya Navarro, *Puerto Rico Gripped by Its Watergate*, N.Y. TIMES (Jan. 30, 1992), <https://www.nytimes.com/1992/01/30/us/puerto-rico-gripped-by-its-watergate.html> [https://perma.cc/Q995-FGBL].

180. See Nydia Bauzá, *A 38 años del caso Maravilla*, PRIMERA HORA (July 23, 2016), <http://www.primerahora.com/noticias/puerto-rico/nota/a38anosdelcasomaravilla-1166164> [https://perma.cc/VP7D-UR8G].

181. Carlos Soto Arriví, son of famed Puerto Rican author Pedro Juan Soto, was eighteen at the time of his murder. Arnaldo Darío Rosado was twenty-four years old. See Navarro, *supra* note 179.

182. Papo Coss, *Días antes y días después de Cerro Maravilla*, 80GRADOS (July 22, 2016), <http://www.80grados.net/dias-antes-y-dias-despues-de-cerro-maravilla> [https://perma.cc/QV6C-E9UZ].

183. Laura Rivera Melendez, *Romero: Mistake to Call Police ‘Heroes’ in Cerro Maravilla*, P.R. HERALD (Sept. 15, 2003), <http://www.puertorico-herald.org/issues/2003/vol7n38/RomeroMistake-en.html> [https://perma.cc/4W5Y-Z4C6].

184. See *Moreno-Morales v. United States*, 334 F.3d 140, 143 n.1 (1st Cir. 2003); Anne Nelson, *Cerro Maravilla Deaths: Police Cover-up Rock [sic] Puerto Rico*, NACLA (Sept. 25, 2007), <https://nacla.org/article/cerro-maravilla-deaths-police-cover-rock-puerto-rico> [https://perma.cc/4C2N-YT6S].

185. See *Soto v. Romero Barceló*, 559 F. Supp. 739, 744 (D.P.R. 1983); Nelson, *supra* note 184.

and legal work. For instance, in *Romero-Barcelo v. Brown*,¹⁸⁶ Berkan represented the Vieques fishermen, who sought to enjoin the Navy from using Vieques lands to carry out military training exercises.¹⁸⁷ The Vieques fishermen alleged harm to “all residents of Vieques, to its fishing and agricultural industries, to certain endangered species of plant and wildlife, to officially designated and unidentified historical sites,” and to private property due to the Navy’s activities.¹⁸⁸ Although the litigation ultimately did not secure an injunction against the Navy’s activities,¹⁸⁹ the district court found that the Navy was in violation of several environmental statutes.¹⁹⁰ More importantly, however, the extensive discovery stemming from the case, which the district court described as a “legal marathon,”¹⁹¹ gave Berkan and her team a wealth of materials relating to Navy operations on Vieques.¹⁹² These materials fueled Vieques organizing and other suits against the Navy for several years.¹⁹³

Through the Project, Berkan also enlisted Guild lawyers from the United States, including police-misconduct experts Michael Avery and Richard Soble, to uncover what truly happened atop Cerro Maravilla.¹⁹⁴ Subsequent investigations later revealed that the Cerro Maravilla murders were the result of a local and federal cover-up.¹⁹⁵ Ten officers were convicted of various crimes.¹⁹⁶ Berkan and other Project attorneys, representing the victims’ families, brought suit in federal court against former governor Romero Barceló and other defendants in

186. 478 F. Supp. 646 (D.P.R. 1979) (denying an injunction), *rev’d*, 643 F.2d 835 (1st Cir. 1981) (vacating and ordering the district court to issue an injunction under the Federal Water Pollution Control Act and holding that the Act withdrew the district court’s equitable discretion to issue alternative relief), *rev’d sub nom.* *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (holding that the Federal Water Pollution Control Act did not require the district court to issue an injunction).

187. *See id.* at 651.

188. *Id.*

189. *Id.* at 708 (noting that the Navy’s use of Vieques for military training exercises was “essential to the defense of the Nation and that the enjoining of said activities [was] not an appropriate relief for the correction of the cited statutory violations”).

190. *Id.* at 705.

191. *Id.* at 652.

192. *Id.*; *see also* Telephone Interview with Judith Berkan, *supra* note 134.

193. *See* Telephone Interview with Judith Berkan, *supra* note 134.

194. *See Law for the People*, NAT’L LAW. GUILD 2 (Oct. 2013), <https://www.nlg.org/wp-content/uploads/2017/03/DinnerJournal2013-FULL-FINAL-reduced.pdf> [<https://perma.cc/5XHL-6RQP>]; Telephone Interview with Franklin Siegel, *supra* note 143.

195. *See* Navarro, *supra* note 179.

196. *Id.*

January 1979.¹⁹⁷ In their complaint, they alleged that the former governor was “directly responsible”¹⁹⁸ for the independentistas’ deaths, “participated in a conspiracy with the police to ambush and kill the[] two men, for his own political purposes,”¹⁹⁹ and that he and other defendants “fail[ed] to properly train and supervise”²⁰⁰ the officers involved in the incident. The complaint was the island’s first Section 1983 claim against police brutality.²⁰¹ In July 1979, the case proceeded to discovery.²⁰² After three-and-a-half years of litigation, the district court granted Romero Barceló’s motion for summary judgment.²⁰³ In *Soto v. Romero Barceló*, which awarded attorneys’ fees to the former governor, District Judge Juan Pérez-Giménez stated that the plaintiffs’ case was “frivolous, unreasonable,”²⁰⁴ and “without foundation at its inception.”²⁰⁵ The judge accused the plaintiffs of only wanting to “creat[e] publicity and obtain[] political advantage.”²⁰⁶ The judge further complained that plaintiffs’ counsel routinely “publicized information obtained through discovery” and had been in “frequent contact” with the media.²⁰⁷

Even though the case seemed like another loss for the Project, the Project’s Cerro Maravilla litigation was critical in creating the conditions necessary to reveal the truth about that infamous day. A few months after *Soto*, the Puerto Rican

197. See *Soto v. Romero Barceló*, 559 F. Supp. 739, 740 (D.P.R. 1983); Rina Biaggi, *The National Lawyers Guild Puerto Rico Legal Project*, CLARIDAD (Oct. 21, 2013), <http://www.claridadpuertorico.com/content.html?news=9CEA8584D4E8410F1B6FC6DE92E78452> [<https://perma.cc/E7RB-HJ9B>].

198. *Soto*, 559 F. Supp. at 740.

199. *Id.*

200. *Id.*

201. The U.S. lawyers involved in this effort included Michael Avery, Catherine Roraback (who was well known for her work on the right to privacy and the New Haven Black Panther trials of 1971), and Richard Soble. They worked alongside Puerto Rican lawyers José Antonio “Abi” Lugo, Peter Berkowitz, and Rina Biaggi García. See Telephone Interview with Franklin Siegel, *supra* note 143.

202. See *Soto*, 559 F. Supp. at 740.

203. The plaintiffs did not appeal this decision. *Id.* at 740-41.

204. *Id.* at 744.

205. *Id.*

206. *Id.* at 741. According to the court, the plaintiffs wanted to depose former governor Romero Barceló on July 24, 1979, at the Puerto Rico Bar Association. See *id.* The court noted that this was “obviously calculated to create maximum publicity since it was immediately before the first anniversary of the shootout at which Soto [Arriví] and Rosado were killed.” *Id.*

207. *Id.*

Senate held public, televised hearings about the incident.²⁰⁸ The legislative sessions were primarily based on the discovery materials gathered through the Project's case.²⁰⁹ In those hearings, several officers confirmed what the Puerto Rican media, the victims' families, and the Project suspected.²¹⁰ Police officers testified that an undercover agent had infiltrated the youths' independentista group, convinced the two young men to go to Cerro Maravilla to broadcast "a revolutionary message,"²¹¹ and tipped off police.²¹² As many as twenty officers later ambushed Soto Arriví and Rosado.²¹³ Despite the young men's surrender, the police beat and killed them.²¹⁴

The officers' confession reopened the case, and in February 1984, ten officers were indicted on charges of conspiracy, perjury in two previous federal investigations, and obstruction of justice.²¹⁵ After trial, the majority of accusations resulted in guilty verdicts,²¹⁶ and one officer was later convicted of second-degree murder.²¹⁷ Romero Barceló lost his bid for reelection in 1984.²¹⁸ "That was a critical moment in Puerto Rican history," University of Puerto Rico (UPR) political science professor Javier Colón Morera told me.²¹⁹ Because of the Project's work, it was revealed that the Puerto Rican government, with the help of the federal government, had conspired to kill two young independentistas.²²⁰ Puerto Ricans had to contend with government-sponsored repression that, though central to the island's history, seemed long forgotten.

208. See Bauzá, *supra* note 180.

209. See Biaggi, *supra* note 197; Telephone Interview with Judith Berkan, *supra* note 134.

210. See Navarro, *supra* note 179. These officers were granted immunity from prosecution.

211. Nelson, *supra* note 184.

212. See Navarro, *supra* note 179.

213. See *id.*

214. See *id.*

215. See Reginald Stuart, *10 From Puerto Rico Police Indicted in Cover-up of '78 Killings*, N.Y. TIMES (Feb. 7, 1984), <https://www.nytimes.com/1984/02/07/us/10-from-puerto-rico-police-indicted-in-cover-up-of-78-killings.html> [<https://perma.cc/ZG4Y-LTU5>].

216. See *United States v. Reveron Martinez*, 836 F.2d 684, 685-86 (1st Cir. 1988).

217. See *Moreno-Morales v. U.S. Parole Comm'n*, No. 96-2358, 1998 WL 124718, at *1 (1st Cir. Jan. 20, 1998).

218. See Navarro, *supra* note 179.

219. Telephone Interview with Dr. J. Javier Colón Morera, Professor, University of Puerto Rico (Mar. 26, 2018).

220. See Jim McGee, *Ex-Justice Official Cites 'Coverup' by FBI in '78 Puerto Rico Shootings*, WASH. POST (May 9, 1992), <https://www.washingtonpost.com/archive/politics/1992/05/09/ex-justice-official-cites-coverup-by-fbi-in-78-puerto-rico-shootings/722ead3e-b875-461d-957e-9ef43f1c481b> [<https://perma.cc/CHG4-F94X>].

The visibility that accompanied the Project's shift in strategy put activists' and attorneys' lives at risk. For example, in May 1979, twenty-one people were arrested for protesting on Vieques land claimed by the Navy. Seventeen of the "Vieques 21," as they were known, were convicted and sentenced to prison.²²¹ One of the protesters, Ángel Rodríguez Cristóbal, was sent to Florida to serve his six-month prison sentence. He was later "found hanging" in his cell with a large gash on his face.²²² Although Berkan was part of the "Vieques 21," she was able to appeal her conviction and have the charges against her and three other protestors dismissed.²²³

Berkan's involvement with the "Vieques 21" and the movement in Vieques more generally led to a series of politically motivated maneuvers meant to stop her from practicing law in Puerto Rico. The U.S. District Court for the District of Puerto Rico first shut down Berkan's pro hac vice practice.²²⁴ Then, despite Berkan's obtaining the highest possible score on the Puerto Rico Bar Examination (which was conducted entirely in Spanish at the time), the district court blocked her admission to the local federal bar for almost three years.²²⁵ The district court gave no reason for this decision; it sent Berkan a letter which had only one sentence: "I am sorry to inform you that your application for admission to

221. See *Historic Cases: United States v. Berkan*, CTR. FOR CONST. RTS. (Oct. 9, 2007), <https://ccrjustice.org/home/what-we-do/our-cases/united-states-v-berkan> [https://perma.cc/E498-ASUT].

222. *Id.* Officials of the federal detention center in Tallahassee described his death as suicide by hanging; Puerto Rican activists claimed, and continue to maintain, that Rodríguez Cristóbal was murdered while in solitary confinement. See *Historic Cases: United States v. Berkan*, *supra* note 221; *Puerto Ricans Vow to Avenge Death in U.S. Prison*, N.Y. TIMES (Nov. 18, 1979), <https://www.nytimes.com/1979/11/18/archives/puerto-ricans-vow-to-avenge-death-in-us-prison.html> [https://perma.cc/F884-3HTN]; Telephone Interview with Judith Berkan, *supra* note 134.

223. See *Historic Cases: United States v. Berkan*, *supra* note 221. The defendants could not be convicted of trespassing on naval land because the case established that there was not enough evidence of U.S. ownership of the Vieques beaches where the 21 protested. See *id.*

224. See Telephone Interview with Franklin Siegel, *supra* note 143.

225. See *id.*; *Law for the People*, *supra* note 194, at 2.

the bar has been denied.”²²⁶ Berkan also received threats that, at times, forced her to move from her house.²²⁷

The Project’s lawyers were under extreme surveillance by the Intelligence Division of the Puerto Rico police, particularly during the Cerro Maravilla litigation.²²⁸ Additionally, there were bombings of *Claridad*, a local independentista-leaning newspaper,²²⁹ and the Puerto Rico Bar Association, known for its defense of human rights and “commitment to decolonization.”²³⁰ Berkan was aware of plans to bomb Vieques Air Link, a small airline that connects Vieques and Culebra to mainland Puerto Rico, particularly when lawyers like her were on their planes.²³¹ In an interview, Berkan said that those plans were devised “to kill [her and her colleagues].”²³² She added, “Those particular years under [Governor] Romero [Barceló] were very intense . . . any dissidence was really not tolerated. There was a lot of violence; it was a scary time.”²³³

C. *A Project of Their Own*

Despite the criminalization of dissent and targeting of independentistas, progressives, and those trying to help them, the Project continued its work. The

226. *In re Berkan*, 648 F.2d 1386, 1388 (1981). Berkan and the U.S. Attorney involved in the case suggested that Berkan was denied admission because of the “Vieques 21” arrest and her failure to obey a civil injunction entered by the district court. *Id.*; see Telephone Interview with Judith Berkan, *supra* note 134. The U.S. Court of Appeals for the First Circuit insisted:

In our supervisory capacity, we are entitled—in fact we think we are obliged—to insist that a district court in this Circuit do more than play at cat and mouse with a rejected but seemingly qualified bar applicant, with respect to providing a statement of reasons for her rejection and offering such hearing procedures as may be appropriate in her situation. A federal court, by its silence, may not foist upon one in Berkan’s position the burden of somehow compelling it to grant the process to which she is entitled as a matter of fundamental right.

Berkan, 648 F.2d at 1390.

227. See Telephone Interview with Judith Berkan, *supra* note 134.

228. Project attorneys’ phones were tapped and their social activities were infiltrated by police. See Biaggi, *supra* note 197.

229. See Berkan, *supra* note 152; Telephone Interview with Judith Berkan, *supra* note 134; see also ALFREDO LÓPEZ, DOÑA LICHA’S ISLAND: MODERN COLONIALISM IN PUERTO RICO 146 (1987) (noting numerous attacks on independentista organizations).

230. *Law for the People*, *supra* note 194.

231. See Telephone Interview with Judith Berkan, *supra* note 134.

232. *Id.*

233. *Id.*

Project garnered the support of many in the Puerto Rican community, and expertise eventually began to accrue to Puerto Rican lawyers.²³⁴ By 1982, the Project converted itself into an organization that was governed and staffed by Puerto Ricans.²³⁵ The *Instituto Puertorriqueño de Derechos Civiles*,²³⁶ as it rebranded itself, became the island's first public-interest law firm.²³⁷ Although much of the Instituto's work involved litigation, its work was also comprised of community and public education,²³⁸ media work, and community organizing.²³⁹ Like the Project before it, the Instituto came out of a time that was rich with community and political activity—student, labor, and independentista movements were particularly energized.²⁴⁰ Colón Morera, who worked at the Instituto from 1984 to 1986 after attending law school, remembers that the Instituto was in the middle of it all as a “much-needed legal resource for . . . concrete community and political activities.”²⁴¹ The Instituto took on several projects, which included work on issues like women's rights, the U.S. Navy's occupation of Vieques and Culebra, the local government's forced evictions of communities like *Villa Sin Miedo* from public land,²⁴² police brutality,²⁴³ and political repression.²⁴⁴

234. See Telephone Interview with Franklin Siegel, *supra* note 146.

235. See Berkan & Schachter, *supra* note 157.

236. Spanish for “Puerto Rican Institute for Civil Rights.”

237. See Telephone Interview with Franklin Siegel, *supra* note 146. The Instituto's staff initially included Rina Biaggi García and Peter Berkowitz. See Telephone Interview with Franklin Siegel, *supra* note 143. Berkowitz collaborated with Berkan, who remained in Puerto Rico after leaving the Project, and with José Antonio “Abi” Lugo, who moved from New York to San Juan. See *id.* Attorneys like Berkan and Berkowitz remained involved with the Instituto even when they were not part of its formal staff, acting as volunteer attorneys for the organization. See Telephone Interview with William Ramírez (Mar. 23, 2018).

238. See Telephone Interview with Nora Vargas Acosta (Mar. 27, 2018).

239. See Telephone Interview with William Ramírez, *supra* note 237.

240. See Telephone Interview with Dr. J. Javier Colón Morera, *supra* note 219.

241. *Id.*

242. See *id.*; see also *Villa Sin Miedo, destruida*, PAÍS (May 20, 1982), https://elpais.com/diario/1982/05/20/internacional/390693623_850215.html [<https://perma.cc/7DE4-7Y7G>] (describing how the forced eviction of *Villa Sin Miedo* residents was “very violent”—multiple people were injured and one police officer died on the scene—and the Puerto Rican government blamed the violence on “subversive leftists” (translated from Spanish)).

243. At the time, police were engaging in criminal behavior, including kidnappings and extrajudicial killings. People commonly referred to this group as the “*escuadrón de la muerte*,” or “death squad.” See Telephone Interview with William Ramírez, *supra* note 237. Though there is no longer a death squad, Ramírez told me that the American Civil Liberties Union of Puerto Rico continues to work on police-abuse cases. See *id.*

244. See *id.*

Puerto Rican lawyer Charles Hey Maestre, the Instituto's second Executive Director, was crucial to the Instituto's growth.²⁴⁵ As Nora Vargas Acosta, a clinical professor at the UPR School of Law and a civil rights attorney who began her legal career at the Instituto, explained, "You can't talk about the Instituto without talking about Charlie."²⁴⁶ Hey Maestre recruited Puerto Ricans like Vargas Acosta, William Ramírez – who now serves as the Executive Director of the American Civil Liberties Union of Puerto Rico – and others he identified as having a commitment to human and civil rights.²⁴⁷

Under Hey Maestre's leadership, the Instituto became the force behind litigating the carpetas cases, which denounced the decades-long practice of both local- and federal-government surveillance in Puerto Rico.²⁴⁸ The Puerto Rican Supreme Court declared the practice unconstitutional in 1987,²⁴⁹ and Hey Maestre's efforts allowed thousands of Puerto Ricans to sue the government seeking redress for being spied upon and discriminated against because of the dossiers.²⁵⁰ Despite facing pressure from local and federal authorities to drop the case, Hey Maestre did not waver in his commitment.²⁵¹ In 1998, the government released files on thousands of Puerto Ricans and eventually compensated the vic-

245. See Nydia Bauzá, *Muere el abogado Charles Hey Maestre*, PRIMERA HORA (Feb. 6, 2017), <http://www.primerahora.com/noticias/puerto-rico/nota/muereelabogadocharlesheymaestre-1204771> [<https://perma.cc/T8GL-JMXH>]; Telephone Interview with Judith Berkan, *supra* note 134. José Antonio "Abi" Lugo was the Instituto's first Executive Director and William Ramírez was the Instituto's third Executive Director. See Telephone Interview with William Ramírez, *supra* note 237.

246. Telephone Interview with Nora Vargas Acosta, *supra* note 238. Before law school, Vargas Acosta was involved in civil rights work as an activist. See *id.*

247. See *id.*; Telephone Interview with William Ramírez, *supra* note 237.

248. See John Marino, *Apology Isn't Enough for Puerto Rico Spy Victims*, WASH. POST (Dec. 28, 1999), <https://www.washingtonpost.com/archive/politics/1999/12/28/apology-isnt-enough-for-puerto-rico-spy-victims/1d5d3e6a-805d-4919-963b-8bof6a2ebod7> [<https://perma.cc/GD3D-AJHR>]; Telephone Interview with William Ramírez, *supra* note 237.

249. See *Noriega Rodríguez v. Hernandez Colón*, 130 P.R. Dec. 919, 926 (1992); *Noriega Rodríguez v. Gobernador*, 20 P.R. Offic. Trans. 285 (1988); Marino, *supra* note 248.

250. See Marino, *supra* note 248; Telephone Interview with William Ramírez, *supra* note 237; see also Josefina Pantoja Oquendo, *En Memoria: Las Huellas de Charlie*, CLARIDAD (Feb. 14, 2017), <http://www.claridadpuertorico.com/content.html?news=688B1C79D2DA7F9B602A1607009285B3> [<https://perma.cc/96WW-DA8F>] (noting how a portion of the case's damages were donated to *Claridad* so that the newspaper could buy an office for its operations).

251. See Jennifer Altmann, *Lives: Charles Hey-Maestre '77*, PRINCETON ALUMNI WKLY. (Feb. 7, 2018), <https://paw.princeton.edu/article/lives-charles-hey-maestre-77> [<https://perma.cc/8HXM-5KSU>].

tims.²⁵² After Hey Maestre’s successful litigation, Colón Morera, the UPR professor who worked at the Instituto after graduating from law school, found out that the government had a carpeta on him, and noted that some of the activities recorded on his carpeta involved activities he engaged in while he was at the Instituto.²⁵³

The carpetas litigation provides another example of how rights talk provided a space for activism in Puerto Rico. Fortunately, the carpetas win was not a one-off occurrence. Building from their work at the Instituto, Hey Maestre, Vargas Acosta, and other attorneys later engaged in pivotal impact litigation related to police brutality, discrimination on the basis of gender and sexual orientation, and sexual harassment through private civil rights practice.²⁵⁴ The impetus for the Instituto and progressive lawyering on the island finally came from Puerto Ricans themselves.²⁵⁵ The importance of this development cannot be understated. As colonial subjects, much of Puerto Ricans’ legal and political reality is defined by the United States. Having Puerto Ricans be their own advocates on these issues disrupted Puerto Ricans’ subjugation to, and dependence on, the United States. To be sure, Puerto Ricans were still litigating in federal court, using U.S. civil rights laws—they did not divorce themselves from the United

252. See *id.*; Pedro Reina Pérez, *Puerto Rico’s Imperial Hangover*, BOS. GLOBE (Mar. 23, 2016), <https://www.bostonglobe.com/ideas/2016/03/23/puerto-rico-imperial-hangover/TAhLIIPPzMCQMl1GFAoghO/story.html> [https://perma.cc/XXZ9-YRLT].

253. See Telephone interview with Dr. J. Javier Colón Morera, *supra* note 219.

254. Some of the most notable cases taken on by *Bufete De Jesús, Hey y Vargas* (Spanish for “Law Offices of De Jesús, Hey and Vargas”) were *Otero-Burgos v. Inter-American University*, 558 F.3d 1 (1st Cir. 2009), *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), and *Sánchez de León v. Secretario de Justicia*, 157 P.R. Dec. 360 (2002). See Carlos del Valle Cruz, *R.I.P. Charles Hey Maestre*, 80GRADOS (Feb. 24, 2017), <http://www.80grados.net/r-i-p-charles-hey-maestre> [https://perma.cc/BUR6-G46Z]; Telephone Interview with Adalina De Jesús (Nov. 14, 2017).

255. Hey Maestre’s work was renowned in Puerto Rico, noted for its impact on the lives of the persecuted, the poor, and other vulnerable groups on the island. See del Valle Cruz, *supra* note 254. After running his own private civil rights firm from 1989 to 2006, Hey Maestre served as the Executive Director of *Servicios Legales de Puerto Rico* (Spanish for “Puerto Rico Legal Aid”), popularly known as the “*bufete de los pobres*,” or “the poor man’s firm,” until 2016. *Id.* His dedication to providing legal services for the poor and other vulnerable populations continued up until his untimely death. In February 2017, Hey Maestre passed away after battling an aggressive cancer for over a year. See Bauzá, *supra* note 245; Pantoja Oquendo, *supra* note 250. In his final months, he worked to found the *Fundación Fondo de Acceso a la Justicia* (FFAJ), Puerto Rico’s own IOLTA program. See Bauzá, *supra* note 245. FFAJ recently named a scholarship after Hey Maestre, meant to support recipients for one or two years to engage in projects that address the legal needs of the island’s most vulnerable. See *La Fundación Fondo De Acceso a la Justicia anuncia la apertura de su nuevo programa de becas “Charles Hey Maestre,” FUNDACIÓN FONDO DE ACCESO A LA JUSTICIA* (Nov. 7, 2017), <https://fundacionfondoaccesoalajusticia.org/la-fundacion-fondo-de-acceso-la-justicia-anuncia-la-apertura-de-su-nuevo-programa-de-becas-charles-hey-maestre> [https://perma.cc/ZWU2-BK4N].

States completely. But it is important to recognize the role of rights talk here: as a gateway to political engagement. Puerto Ricans were fighting for their voices to be heard, challenging those who told them to step aside, and devising new political visions for their society. In other words, they were engaging in nation building, key to ensuring any type of decolonization.

IV. TURNING TOWARDS RIGHTS TALK

Up to this point, this Note has argued that litigation and rights talk, best illustrated by the work of the Project and its progeny, were beneficial in Puerto Rico because they facilitated movement lawyering; produced concrete, beneficial results, such as revealing the repressive tactics of the FBI and the Puerto Rican government in the Cerro Maravilla and the carpetas cases; and trained local lawyers in federal and civil rights practice, creating a foundation for Puerto Rico-based lawyering on a wide variety of issues. In this Part, I further elaborate on the importance of rights talk for colonized people. I argue that the results of the Project and its progeny rebut CLS's critique of rights, proving that rights-based advocacy is valuable in the colonial context.

A. *Rights Talk as Restitution*

Puerto Ricans' interpretation of the legacy of the Project and its progeny shows the error of CLS in underappreciating the benefits of litigation and rights discourse for oppressed minorities. Explaining why one might choose to engage with a rights framework in a colonized nation like Puerto Rico, Ramírez pointed to the tremendous political repression and access-to-information issues that lawyers and activists had to surmount. Ramírez posited that, as an advocate, you might opt for litigation not because it will give you the outcome you want, but because it will give you the exposure you need to educate the public on a given issue.²⁵⁶ Ramírez's comment echoes Tushnet's concern about lawyers expecting too much from their legal work.²⁵⁷ At the same time, Ramírez suggests that, borrowing Tushnet's terminology, you can still win by losing.²⁵⁸ When taking a high-profile case, Ramírez argued, even if you do not win in court, you can still win because "the issue is out there, people are being educated, [and] you gave it a fight."²⁵⁹ This is particularly true in the context of a colony, where the act of speaking up in the face of severe political repression is profoundly consequential.

256. See Telephone interview with William Ramírez, *supra* note 237.

257. See Tushnet, *The Critique of Rights*, *supra* note 39, at 34.

258. See *id.* at 30.

259. Telephone Interview with William Ramírez, *supra* note 237.

The legal work of the Project and the Instituto was instrumental to uncovering censored, concealed, or inaccessible information and to keeping conversations about those secrets alive.

The Project and the Instituto operated with the knowledge that Puerto Rico is a colony. Even though that might seem indisputable today, at the time of these efforts, that reality was not openly articulated.²⁶⁰ For most of Puerto Rico's history, talking about colonialism was not only politically unpalatable, it was also met with discrimination and violent repression. Unlike any organization at the time – and some would say since²⁶¹ – the Instituto was very conscious of how the United States controlled the island in every respect.²⁶² According to Ramírez, when issues or cases were taken, that reality was always kept in mind and the Instituto was “a lot more forceful and a lot more direct in taking on these issues [It was] fearless.”²⁶³ The Project and the Instituto's work regarding incidents like Cerro Maravilla prevented those politically motivated murders, among other injustices, from being forgotten, thereby defending and validating the kind of dissent that was lethal in Puerto Rico. Vargas Acosta believes that the Cerro Maravilla case also left its mark in that it forced the government to acknowledge and respond to its participation in political repression and state violence.²⁶⁴ For her, like Ramírez and Colón Morera, the case brought forward to the people of Puerto Rico that this kind of repression on the island, inconceivable to many, was not over.²⁶⁵ Once this repression became a public issue, Puerto Ricans had to think about how that repression and subsequent cover-up were al-

260. Before the advent of the Internet Age, information in Puerto Rico tended to be disseminated along party lines. *El Nuevo Día* is associated with the pro-statehood party, *El Mundo* was associated with the pro-commonwealth, or status quo, party, and *Claridad* is associated with the pro-independence party. See *id.* Carlos Romero Barceló, who served as the island's Governor during the Cerro Maravilla incident, is an avid supporter of Puerto Rican statehood. See José A. Delgado Robles, *Pro-Statehood Campaign Revived*, NUESTRO DÍA (Jan. 11, 2018, 8:35 AM), <https://www.elnuevodia.com/english/english/nota/pro-statehoodcampaignrevived-2389191> [<https://perma.cc/64QF-PX6U>]; see also Carlos Romero Barceló, *Puerto Rico, U.S.A.: The Case for Statehood*, FOREIGN AFF. (Fall 1980), <https://www.foreignaffairs.com/articles/puerto-rico/1980-09-01/puerto-rico-usa-case-statehood> [<https://perma.cc/3XGN-9X8Q>] (“I am convinced, both as a Latin American and a U.S. citizen, that statehood for Puerto Rico would constitute a boon for the nation, as well as for the island.”).

261. See Telephone Interview with Nora Vargas Acosta, *supra* note 238.

262. See Telephone Interview with William Ramírez, *supra* note 237.

263. *Id.* The Instituto continued its work on the Cerro Maravilla case despite having both its offices and its staff's homes trashed by the police on multiple occasions. See *id.*

264. See Telephone Interview with Nora Vargas Acosta, *supra* note 238.

265. See *id.*

lowed to happen in the first place, whether such actions would be acceptable to their society, and how to address those conflicts going forward.²⁶⁶

Generally speaking, the goal of the Project, the Instituto, and other progressive lawyers was not exclusively to win cases, but to support ongoing movements in Puerto Rico. Unlike Tushnet's theory, which suggests that rights discourse is an obstacle to progressive change, these narratives account for the value of rights discourse in the context of a colony. Tushnet's take on rights discourse is incomplete because it does not capture how rights discourse could be an instrument for progressive movements in Puerto Rico. By considering Puerto Rico's history with colonialism and the Project's rights-based strategies, we can start to see how rights talk helped give Puerto Ricans the impetus to articulate new demands, visions, and realities for themselves. This process facilitated a public space for Puerto Ricans to debate and contend with issues like government repression, censorship, politically-based murders, and sexual harassment, among others. Guided by local leaders and activists, the Project and its progeny successfully used rights discourse strategically to respond to and evolve with those turbulent times.

The Project and its progeny also changed the face of lawyering in Puerto Rico. Pushing back against CLS's critique of rights, Colón Morera said that "notwithstanding all the limitations of the legal system," this kind of legal work signaled that "there was a space [to confront] some of the[] injustices" in Puerto Rico.²⁶⁷ In addition, the fact that a legal organization in Puerto Rico could recognize the island's colonial situation while leaning on the assistance of lawyers with "the legal professionalism and the scope" of Judith Berkan, Peter Berkowitz, José Antonio "Abi" Lugo,²⁶⁸ and Hey Maestre, gave people the "idea that there could be another type of lawyer."²⁶⁹ Lawyers in Puerto Rico could try to use legal mechanisms to propose social change; not all lawyers were trying to maintain the status quo.²⁷⁰ "I think that was a powerful message," Colón Morera said.²⁷¹ Colón Morera added that the Project and its progeny led to there being a more

²⁶⁶. *See id.*

²⁶⁷. Telephone Interview with Dr. J. Javier Colón Morera, *supra* note 219.

²⁶⁸. *See* En Rojo Editors, *José Antonio (Abi) Lugo: A Lawyer with an Abundant Legacy*, CLARIDAD (Oct. 21, 2013), <http://www.claridadpuertorico.com/content.html?news=9CC5B49DF6E2C8D2B88307AFCDDBF096> [<https://perma.cc/Z7Q9-H46T>].

²⁶⁹. Telephone Interview with Dr. J. Javier Colón Morera, *supra* note 219.

²⁷⁰. *See id.*

²⁷¹. *Id.*

diverse group of litigation that has continued to supplement movements and organizing on the island.²⁷²

Although Puerto Rico's colonial status remains unchanged after all of these efforts, as CLS would remind us, Vargas Acosta views this work as "a matter of survival."²⁷³ Ultimately, one would aim to work on changing the colonial status through political action, and perhaps some human-rights forums.²⁷⁴ For the time being, however, Vargas Acosta believes that "you have to work on the reality of the people here."²⁷⁵ This is at the core of what CLS's critique of rights is missing when applied to Puerto Rico. CLS's goal – to do away with the dependence on rights – omits the other reasons litigation or rights discourse might be necessary in a place like Puerto Rico. The Project and its progeny's use of litigation and rights talk introduced a kind of space and stability that allowed Puerto Rican advocates to engage with the law and develop the work that their communities needed most.²⁷⁶ It is important to note that although litigation was the Project's

272. See *id.*; see also Carmen Concepción, *Justicia, Ambiente y Movilización Social en Puerto Rico*, in *PUERTO RICO Y LOS DERECHOS HUMANOS: UNA INTERSECCIÓN PLURAL 193, 200-09* (José Javier Colón Morera & Idsa E. Alegría Ortega eds., 2012) (describing how rights discourse has been used to support environmental-justice campaigns in Puerto Rico).

273. Telephone Interview with Nora Vargas Acosta, *supra* note 238.

274. See *id.*

275. *Id.*

276. Cf. Williams, *supra* note 59 (describing the real-world importance of rights talk and rights assertion for Black communities). See generally *supra* Section III.C (describing the importance of rights-based advocacy for Puerto Ricans as seen by the effects of the Project and its progeny). For example, Siegel notes that working with the legal system was particularly beneficial to independentistas when dealing with nationalist prisoners. See Telephone Interview with Franklin Siegel, *supra* note 146. Because obtaining clemency oftentimes requires legal advocacy, Siegel argues that it was advantageous for Puerto Rican self-determination that "a group of [Puerto Rican] lawyers felt comfortable enough that [they would] work on freedom for the nationalists" through Congress. *Id.* More recently, Puerto Ricans pushed President Obama to release Oscar López Rivera, a Puerto Rican nationalist who was in U.S. custody for thirty-six years for "seditious conspiracy" charges. See Carlos Rivera Giusti & David McFadden, *Puerto Rican Militant Oscar Lopez Rivera Freed from Custody After 36 Years; Will Be in Chicago Thursday*, CHI. TRIB. (May 17, 2017, 8:54 AM), <http://www.chicagotribune.com/news/local/breaking/ct-oscar-lopez-rivera-freed-20170517-story.html> [https://perma.cc/4HX9-EDJZ]; Ed Pilkington, *'I'm No Threat' – Will Obama Pardon One of the World's Longest-Serving Political Prisoners?*, GUARDIAN (Oct. 16, 2016, 9:00 AM), <https://www.theguardian.com/world/2016/oct/16/obama-pardon-mandela-puerto-rico-oscar-lopez-rivera-> [https://perma.cc/BXC5-38ER]. Hey Maestre and other progressive attorneys were active in the campaign for López Rivera's freedom. See Alejandro Torres Rivera, *Tribuna Invitada: Charles Hey: Ángel de los perseguidos*, NUEVO DÍA (Feb. 9, 2017), <https://www.elnuevodia.com/opinion/columnas/charlesheyangeldelosperseguidos-columna-2289797> [https://perma.cc/395H-3BRQ]. While beyond the scope of this Note, the Project's legal defense and representation of the Vieques fishermen was also arguably a key moment for Vieques organizers, who needed as

primary goal in Puerto Rico, the Project, and the Instituto that sprang from it, also became the cradle of movement lawyering in Puerto Rico.²⁷⁷ These efforts housed a generation of civil rights lawyers, progressives, and advocates who defined the fight for social justice in Puerto Rico for decades. CLS's critique of rights, classifying rights as ineffectual, provides little, if any, space for the significance of that history and the mobilization it enabled.

The Project's history encapsulates how attorneys successfully imported civil rights and social justice expertise to Puerto Rico in order to facilitate movement lawyering on the island. In Berkan's opinion, the Project helped motivate political activism in Puerto Rico during the politically repressive time of the late 1970s.²⁷⁸ Berkan indicated that, back then, there "had to be a legal response" in order to supplement local organizing efforts from people like the Vieques fishermen.²⁷⁹ Having attorneys defend local organizers and advocates in federal court bolstered their causes and put them into the mainstream of Puerto Rican politics. Simultaneously, the Project attracted and trained progressive and independentista Puerto Rican lawyers so that they would no longer be dependent on U.S.-based attorneys for representation in federal courts. This helped break with a longstanding feature of Puerto Rico's colonial status vis-à-vis the United States, in which Puerto Rico was dependent on the United States in the context of commerce, employment, and services. Franklin Siegel, a professor at City University of New York School of Law who was one of the founders and coordinators of the Project,²⁸⁰ said that the Project did not necessarily "d[o] anything heroic," but "it helped create a capacity within a subsection of progressive lawyers in Puerto Rico" to eventually be able to do civil rights cases and social justice lawyering.²⁸¹

B. *CLS, Revisited*

At the same time, for all that the Project accomplished, it was not without its drawbacks. CLS scholars would be correct if they asserted that the Project was not able to overcome the colonial structure at the root of many of the island's problems. Indeed, some of the more militant independentistas would agree with

much exposure as possible to strengthen their movement into a long-term, ideologically diverse strategy to eventually push the U.S. Navy out of Vieques.

277. See del Valle Cruz, *supra* note 254.

278. See Telephone Interview with Judith Berkan, *supra* note 134.

279. *Id.*

280. See *Faculty Directory: Franklin Siegel*, CUNY SCH. L., <http://www.law.cuny.edu/faculty/directory/siegel.html> [<https://perma.cc/82QA-MQK8>].

281. Telephone Interview with Franklin Siegel, *supra* note 146.

this critique. Even though the decision to engage with U.S. courts was led by many progressives and independentista union leaders like Grant, “dissonant philosophical strains” coexisted while the Project was active.²⁸² Details of this continued disagreement are scarce,²⁸³ but it should be noted that two of the “Vieques 21” arrestees, Pedro Baiges Chapel and Ángel Rodríguez Cristóbal, did not defend themselves against charges of trespassing on naval land because they did not recognize the jurisdiction of the U.S. district court in Puerto Rico.²⁸⁴ That debate, critical to larger discussions about Puerto Rico’s political status and future, likely had to be set aside in order to engage in rights discourse and work within the U.S. civil rights paradigm. The Project’s penchant for litigation arguably legitimized the United States’ hold over Puerto Rico, as several of the Project’s high-profile cases resulted in unfavorable judgments for the independentistas.²⁸⁵ Spending the Project’s limited resources on litigation that confirmed what Puerto Ricans already knew from experience could be seen as counterproductive at best.

The Project’s prominent litigation also risked having people put too much faith in the legal system, which is one of Tushnet’s principal concerns in *The Critique of Rights*.²⁸⁶ Although Berkan recognizes that much of the legal activity that occurred in the late 1970s helped amplify the response to the Vieques blockade, for instance, at the time she was troubled that the focus on litigation would “take the oxygen out of movements.”²⁸⁷ She did not want people to misconstrue the role of the legal system and have them believe that litigation alone had a totalizing power for sociopolitical change.²⁸⁸

Adalina De Jesús, a Puerto Rican civil rights attorney who was part of the Instituto and later worked as Hey Maestre’s law-firm partner, shares Berkan’s

282. *Id.*

283. Besides what I gathered from conducting interviews, I have not come across other accounts of this disagreement. I have not been able to interview older Puerto Rican independentistas who would be able to provide more information about the “dissonant philosophical strains” that Franklin Siegel told me about.

284. Baiges Chapel was a member of the Central Committee of the Puerto Rican Socialist Party. See *Puerto Ricans Vow to Avenge Death in U.S. Prison*, *supra* note 222.

285. See, e.g., *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989) (affirming the dismissal of a lawsuit brought by independentistas against a telephone company for helping the federal government to spy on them); *Soto v. Romero Barceló*, 559 F. Supp. 739 (D.P.R. 1983) (awarding attorney’s fees to the Governor of Puerto Rico after he won a civil rights case brought by independentistas against him).

286. See Tushnet, *The Critique of Rights*, *supra* note 39.

287. Telephone Interview with Judith Berkan, *supra* note 134.

288. See *id.*

concern. De Jesús argues that while rights discourse is important in that it both lets people know what they are entitled to and helps people make demands of the necessary authorities, this value is limited.²⁸⁹ De Jesús contends that having a community look solely to the legal system for relief might distract from a government's broader "lack of commitment" to educate and provide for its own people.²⁹⁰ Meanwhile, Ramírez also agrees that the value of litigation can be narrow—it is specific to one moment, one client. He would not go so far as to say that people engaged in political organizing solely due to their relationship with the Instituto.²⁹¹ These concerns echo Tushnet's concern about lawyers overestimating the potency of a legal victory.²⁹² In that way, the Project and its progeny might have forsaken community development to get their day in court.

While it is important to keep those limitations in mind, one should not lose sight of the historical forces at play in Puerto Rico. It is difficult to imagine what would have happened to independentista and progressive causes on the island had Grant and the other union leaders not approached CCR and the Guild in the 1970s. The government-sponsored attacks against these groups would have likely continued to silence progressives and independentistas through court orders, threats, and outright violence. It is useful to recall Crenshaw's take on rights discourse, and how she describes Black people's decision to engage with the American legal apparatus, though stemming from a position of "self-defense," as a radical, "calculated political act[]." ²⁹³ Though the colonial context in Puerto Rico is not identical to the experiences of Black America, there similarly needed to be a legal response on the island as Grant and his colleagues indicated, and attorneys like Berkan, Schachter, and others later realized. Not doing so likely would have further compromised Puerto Ricans' ability not only to defend themselves from these attacks, but also to fight back.

Furthermore, in fixating on what the Project was or was not able to accomplish by engaging with the courts, one runs the risk of ignoring the community ties that the Project facilitated. For instance, people like Berkan, Colón Morera, Hey Maestre, Ramírez, and Vargas Acosta continued to collaborate with young Puerto Ricans. As advocates, professors, and mentors, they promoted the importance of working in the public interest long after leaving the Project and the Instituto. That being said, many of the Puerto Ricans whom I interviewed for this Note remain deeply skeptical of the power of litigation *alone* to achieve social

289. See Telephone Interview with Adalina De Jesús, *supra* note 254.

290. *Id.*

291. See Telephone Interview with William Ramírez, *supra* note 237.

292. See *supra* Section I.A.

293. Crenshaw, *supra* note 63, at 1382.

change.²⁹⁴ Ramírez, for one, believes that “litigation does not change anything” on its own.²⁹⁵ Contrary to proponents of CLS, however, Ramírez considers that multifaceted advocacy – which includes community education, local forms of organizing, *and* litigation – has the potential to create the consciousness that can bring about social change. Ramírez’s view mirrors the legacy of the Project, and of rights discourse more generally, in Puerto Rico. Litigation and other forms of legal work were not only useful, but also necessary, to defend and support other forms of activism. Thus, Ramírez and others see what CLS does not: how litigation and rights talk can help educate and empower a colonized people.

CONCLUSION

The history of Puerto Rico and the Project stand at odds with the critique of rights theory and its resistance to engaging with an inherently defective court system. Working in a context of legal, political, and social repression, Puerto Ricans were forced to ask not simply whether they should use courts, but instead, “[h]ow do we defend our movements that are under attack?”²⁹⁶ The question facing progressive and independentista advocates in the 1970s complicated whether they could continue to afford prioritizing anticolonial principles when their causes were effectively being shredded by repressive colonial apparatuses. Puerto Ricans thus took a chance on litigation to safeguard their causes from systemic subjugation.

On the one hand, the critique of rights is advantageous in that it helps explain why U.S. citizens in Puerto Rico have suffered from legal and political repression due to Puerto Rico’s colonial status. On the other hand, Puerto Ricans have had to leverage the limited benefits or guarantees that come with rights based on citizenship to insulate their own ideas and movements from sabotage at the hands of the United States. I do not mean to suggest that we should do away with the critique of rights completely. The critique of rights is useful to a point; however, as CRT and LatCrit scholars argue, it does not fully capture Puerto Ricans’ lived realities, or how they have had to be resourceful and flexible to survive.

More importantly, Puerto Ricans were able to galvanize enough legal and political pressure to interrupt colonial tactics that were relentlessly repressing parts of Puerto Rico’s political identity. It is precisely because the Project and its attorneys looked beyond winning legal victories that we can learn from what

294. See, e.g., Interview with Adalina De Jesús, *supra* note 254; Telephone Interview with William Ramírez, *supra* note 237; Telephone Interview with Nora Vargas Acosta, *supra* note 238.

295. Telephone Interview with William Ramírez, *supra* note 237.

296. Telephone Interview with Franklin Siegel, *supra* note 143.

happened leading up to, and following, the litigation. The Project's value lay not necessarily in producing a favorable court decision, but in bringing independentista and progressive Puerto Ricans together through rights discourse to openly articulate and fight for ideas that were being brutally targeted. Going into court was only part of a larger process that let Puerto Ricans in that moment shift from living in a defensive state to getting closer to envisioning new realities for their communities. Contrary to the CLS position, in the case of Puerto Rico, engaging and working with the law as an agent for mobilization was inherently valuable. Doing law gave Puerto Ricans the community-based capacity and skill they needed to be their own advocates, a deeply disruptive development in the history of a colonized nation.

As Puerto Rico finds itself in another difficult juncture in its history,²⁹⁷ networks based on collaboration and solidarity will prove crucial to its recovery. Although the circumstances that first engendered the Project do not mirror Puerto Rico's current crisis, Puerto Ricans can use some of the Project's strategies to engage in nation-building work. Through rights-based strategies, lawyers can hold governmental and institutional actors accountable, obtain and disseminate information, and provide legal services to those who lack access to them. That tactic has not been lost on Puerto Ricans after the 2017 hurricane season. Days after Hurricanes Irma and Maria ravaged the island, Puerto Ricans, members of the Puerto Rican diaspora, and U.S. legal organizations mobilized to provide disaster-relief legal support in areas like FEMA claims, unemployment and labor issues, and housing and insurance needs.²⁹⁸ On September 21, 2017, two days after Hurricane Maria hit Puerto Rico, a group of community lawyers and U.S. entities started a legal support initiative called *Ayuda Legal*

297. See Arelis R. Hernández, *FEMA Admits Failures in Puerto Rico Disaster Response*, in *After-Action Report*, WASH. POST. (July 12, 2018), https://www.washingtonpost.com/national/fema-admits-failures-in-puerto-rico-disaster-response-in-new-after-action-report/2018/07/12/b7900228-8636-11e8-9e80-403a221946a7_story.html [<https://perma.cc/4A2N-VZRT>]; Ian J. Seda-Irizarry & Heriberto Martínez-Otero, *Puerto Rico's Not-So-Natural Disaster*, JACOBIN (Oct. 24, 2017), <https://www.jacobinmag.com/2017/10/puerto-rico-natural-disaster-hurricane-maria> [<https://perma.cc/SH3U-878R>].

298. See Malaka Gharib, *Worry and Confusion as Puerto Ricans Scramble to Apply for FEMA Aid*, NPR (Oct. 28, 2017, 5:00 AM ET), <https://www.npr.org/2017/10/28/560393378/worry-and-confusion-as-puerto-ricans-scramble-to-apply-for-fema-aid> [<https://perma.cc/4BRX-Z6TP>]; Ayuda Legal Huracán María, FACEBOOK, <https://www.facebook.com/ayudalegalhuracanmaria> [<https://perma.cc/24HZ-TXLP>] (last visited Aug. 24, 2018); *Ayuda Legal Huracán María (Hurricane Maria Legal Assistance) CLE*, NYSBA PRO BONO PORTAL, <https://nysbaprobono.org/event/ayuda-legal-huracan-maria-hurricane-maria-legal-assistance-cle> [<https://perma.cc/DTZ3-9MHQ>].

Huracán María (ALHM).²⁹⁹ ALHM, now called *Ayuda Legal Puerto Rico, Inc.*, was the first disaster-relief initiative in Puerto Rico dedicated to providing free and accessible legal information about disaster relief, developing capacity among Puerto Rican legal professionals to supply legal aid in this context, and offering legal advice to Puerto Ricans affected by the storm.³⁰⁰ Ariadna Godreau-Aubert, a human-rights lawyer and community activist, was the coordinator of ALHM and now serves as the Executive Director of *Ayuda Legal Puerto Rico*.³⁰¹ She describes the initiative's role as providing comprehensive help to communities in need, doing its work via community leaders and community-based organizations.³⁰² Echoing the philosophy of the Project and its progeny, Godreau-Aubert said that it has been "a process of building solidarity in this moment of need[]." ³⁰³

Like when the Project began, the legal support is not happening in a vacuum. Berkan, who continues to live on the island, said that now, "[w]e really have to rethink everything."³⁰⁴ She described post-Maria Puerto Rico as having "a very conscious process going on, with a lot of people thinking about the Puerto Rico that we want to construct There is no solidified movement, but there's a lot of . . . effervescence." ³⁰⁵

Perhaps more salient after Hurricanes Maria and Irma, Puerto Ricans are focused on creating better working conditions, handling housing problems, dealing with the distribution of water, electricity, and other basic services, and addressing gender violence and violence in society more generally.³⁰⁶ Vargas Acosta does not think that tackling those individual issues necessarily means that you

299. Spanish for "Hurricane Maria Legal Aid." ALHM's main office, located in San Juan, Puerto Rico, features a portrait of Hey Maestre in one of its meeting rooms. Hey Maestre was the mentor of Ariadna Godreau-Aubert, the coordinator of ALHM.

300. See *Apoyo legal gratuito para personas afectadas por el Huracán María*, 80GRADOS (Oct. 6, 2017), <http://www.80grados.net/apoyo-legal-gratuito-para-personas-afectadas-por-el-huracan-maria> [<https://perma.cc/P7YX-LTW9>].

301. See Raquel Reichard, *100 Days After Hurricane Maria this Puertorriqueña Continues Helping Her People in a Major Way*, FIERCE: MITÚ (Dec. 28, 2017), <https://fierce.waremitu.com/fierce-boss-ladies/meet-the-woman-behind-a-brigade-providing-free-legal-services-to-puerto-ricans-impacted-by-hurricane-maria> [<https://perma.cc/JGB4-SWYT>].

302. See LatinoJustice PRLDEF, *#RebuildPR and the Challenges Puerto Rico Faces Post Maria*, FACEBOOK (Mar. 29, 2018), <https://www.facebook.com/latinojustice/videos/1742547332504865>.

303. *Id.* at 2:15-19.

304. Telephone Interview with Judith Berkan, *supra* note 134.

305. *Id.*; see also Naomi Klein, *Puerto Ricans and Ultrarich "Puertopians" Are Locked in a Pitched Struggle Over How to Remake the Island*, INTERCEPT (Mar. 20, 2018, 12:30 PM), <https://theintercept.com/2018/03/20/puerto-rico-hurricane-maria-recovery> [<https://perma.cc/75YS-QCRY>].

306. See Telephone Interview with Nora Vargas Acosta, *supra* note 238.

have to let go of tackling the broader colonial question. She admitted, “It’s not easy. I can’t not do this work because . . . we have to . . . focus on resolving the colonial status [W]e need to do that, but, in the meantime, we have to work on all these other things, too.”³⁰⁷ Though the changes that Puerto Rico needs will not all happen in court, by pairing community lawyering with organizing, Puerto Ricans will be able to look to their own and, once again, envision, fight for, and build their own fate.

307. *Id.*