

# Knowing the Communities We Serve

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**W**hen courts and poor communities interact, they sometimes seem to move on different planes and speak different languages. The reality is that most judges are alienated from poor communities. We don't understand their problems, their needs, and their aspirations, because we don't generally have a background in poverty, whether personal or professional. But we are, after all, public servants and, as such, we must transcend this alienation and truly get to know the communities we serve.

This, however, is not an easy task, because these communities are not all the same nor do they have the same problems, characteristics, and ideals. In fact, the idea of the inclusive community, the supposedly homogeneous society whose common good was the law's goal and whose moral consensus was the content of the law, has been shown for the myth it is and always was. I think we have always known, but failed to acknowledge, that we live in myriad groups, whose members are united by common interests, sympathies, objectives, and, very often, by common struggles. These groups may be based on professional interests, and thus be more or less cohesive; they may be temporary, for instance, groups of students at a college or university; or they may respond to deep, life-conditioning and historical reasons, such as race, ethnicity, culture, sexual preference, or poverty. When these profound conditions are present, the bonds are not temporary nor are they taken lightly, and what we have is a true community. Society is, in effect, a cluster of different communities.<sup>1</sup>

## I. THE CONCEPT OF COMMUNITY

What really makes a "community"? Our social interactions are often not as one-on-one as we think: each of us interacts with the other from the perspective—and according to the paradigms—of a specific group. This is all complicated, of course, by the fact that we go in and out of different groups throughout our lives. For example, some of us live in big cities but were born in small towns. We have all been students at one

time; maybe we've also practiced a different profession before becoming lawyers—I have taught law students who were architects, engineers, and medical doctors. However, not all groups necessarily form communities.

The bonds that form a community are nurtured by a sense of collective commitment and a common identity.<sup>2</sup> Communities, however diverse their members, are shaped by their collective struggles to solve common challenges that often threaten their spatial integrity and cultural traits.<sup>3</sup> Poor communities may be composed of different individuals with distinct attitudes and lifestyles; varying in age, wealth, education, and social concerns, they may be part of other groups, but, as a cluster of human beings, they respond as a whole to certain cultural, economic, and historical events. Poverty implies social and economic inequality regarding, primarily, the possession of property and the exercise of political influence. It includes the acceptance of a relationship of dependence that is not necessarily an individual experience; instead, inequality and economic dependence in poor communities is a common condition experienced collectively.<sup>4</sup>

## II. FACING COMMUNITIES' ECONOMIC CHALLENGES

Throughout the years, we have slowly come to realize that sectors of society that control economic development have historically viewed poor communities as an obstacle to financial growth. In Puerto Rico, the thrust toward continuous financial and economic expansion is coupled with an incessant territorial invasion that has gradually shaken and torn apart poor communities. Gentrification has increased significantly in the last two decades—ironically, at the same time that more people, including poor people, dream of equal access to an economic utopia.<sup>5</sup>

Today, hundreds of thousands of Puerto Ricans live under conditions of poverty, without basic infrastructure, under difficult environmental conditions and with deficient housing. We are also experiencing extremely high levels of domestic

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## Footnotes

1. See Huntington Cairns, *The Community as the Legal Order*, in COMMUNITY 25-49 (Carl J. Friedrich ed., 1959); Stuart M. Brown, *The Community as the Legal Order Reviewed*, in COMMUNITY, *supra*, at 38-49.
2. See George E. Gordon Catlin, *The Meaning of Community*, in COMMUNITY, *supra* note 1, at 114-134.
3. See Talcott Parsons, *The Principal Structure of Community: A Sociological View*, in COMMUNITY, *supra* note 1, at 152-179; John

Ladd, *The Concept of Community: A Logical Analysis*, in COMMUNITY, *supra* note 1, at 269-293.

4. Linda Colón Reyes, past director of the Puerto Rico Special Communities Project, Address at the Judicial Academy of Puerto Rico (Academia Judicial Puertorriqueña): La pobreza y la desigualdad social contemporánea (Poverty and Contemporary Social Inequalities) (August 28, 2008).
5. *Id.* The same situation is seen in cities throughout the United States. See, e.g., Robert J. Sampson, *Racial Stratification and the Durable Tangle of Neighborhood Inequality*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 260 (2009); Parag Khandhar, *Where the Streets Have Many Names: Zoning, Community Power, and the Future of Shaw*, WASHINGTON D.C., 2 AM. U. MODERN AM. 25, 25-28 (2006).

violence, teenage pregnancy, and drug abuse, as well as an appalling crime rate, to which disadvantaged communities are particularly vulnerable.<sup>6</sup>

In 2006, a research group found that, even though wages had shown a slight improvement since the start of the decade, almost 40% of Puerto Rican families had earnings of less than \$15,000 per year.<sup>7</sup> Recently, the United States Census Bureau published that in 2010, the average income of families that receive wages in Puerto Rico was \$19,730. At that time, 45% of the population lived below the poverty level, according to federal standards. In 2011, the median income diminished to \$18,660 and the percentage of people living below the poverty level in Puerto Rico rose to 45.6%.<sup>8</sup> The current worldwide economic recession has had a direct effect on our population, leaving thousands homeless and without jobs.<sup>9</sup> Yet even as this economic crisis increases the percentage of families living under conditions of poverty, their struggle is also strengthening their sense of community and solidarity.<sup>10</sup>

In our more marginalized communities, neighbors are not just “individuals living in physical proximity.”<sup>11</sup> In these communities, people become indispensable to one another as small links in a wide support network essential for daily life. On many occasions, this social arrangement turns out to be as crucial for people’s survival, or even more so, than the family. Neighbors fulfill important roles as caretakers for children and the elderly, assist in house chores, and provide food and other important supplies during emergencies and natural disasters.

Therefore, when economic expansion and particular interests have threatened to tear apart poor communities, to erase their support networks, and to lessen their quality of life by affecting the environment and their surroundings, the communities have raised their voices, demanding equality and protection not just from the State but, more significantly, from the law and the courts.

### III. GOVERNMENT STRATEGIES AND THE COMMUNITY-RIGHTS MOVEMENT

A strong community-rights movement is not a recent phenomenon in Puerto Rico. During the 1940s, government reforms were focused on a weakened agrarian economy that depended, basically, on the sugar industry. This dependence on one crop rendered the country vulnerable to changes in the market. Thus, during this period and into the 1960s, the government focused its attention not just on agricultural reform but on attaining a higher level of industrialization. A key to this industrialization program’s success was the migration to the United States of agricultural workers whose jobs were being lost or replaced. Some were truly migrant workers and returned periodically to Puerto Rico.<sup>12</sup> Others stayed and became the parents and grandparents of most of the Puerto Ricans currently living in the United States, who, according to the census data, outnumber the population of Puerto Rico today.<sup>13</sup>

In Puerto Rico, the immediate consequence of these government programs of the 1940s, 1950s, and 1960s was an increase in migration from rural to urban areas, where people settled in shantytowns. To prevent further growth of this informal housing movement, the government did not allow citizens to repair homes located in these areas. In spite of these restrictions, the growing urban population took over wetlands near mangroves. As a result, these communities were not only living on the peripheries of planned urban development, but were also unsanitary, lacking basic utilities such as water, electricity, and drainage systems, and were susceptible to flooding.<sup>14</sup>

To deal with this situation, the government of Puerto Rico developed a new strategy, a public urban-housing program

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6. Statement of Motives, Special Communities Act (Ley para el Desarrollo Integral de las Comunidades Especiales de Puerto Rico), Law No. 1-2001 (amended), P.R. Laws Ann. tit. 21, §§ 962-973f (Supp. 2012).

7. Colón Reyes, *supra* note 4, referring to the findings of a 2006 study called Puerto Rico Community Survey (Encuesta de la Comunidad de Puerto Rico).

8. U.S. Census Bureau, [www.census.gov](http://www.census.gov). See also CB Online, *Census: PR Poverty Up, Income Down*, CARIBBEAN BUSINESS, September 23, 2012, <http://caribbeanbusinesspr.com/news/census-pr-poverty-up-income-down-76580.html>. The Puerto Rico Center for the New Economy (Centro para la Nueva Economía) has warned that income inequality has increased: the poorest 20% of Puerto Ricans received only 1.7% of the total income in 2011 while the richest 20% received the 55.3%. See <http://grupocne.org> (last visited Sept. 29, 2012).

9. A 1999 study on the poverty rate among Puerto Rican families found that 46.3% had earnings of less than \$15,000 dollars per year. The study also showed that more than 50% of the families in 62.8% of the 78 municipalities had earnings of less than \$15,000. See also profiles of poor families in Puerto Rico prepared by Puerto Rico Legal Services Office and Office for Economic Opportunity

of Puerto Rico: Servicios Legales de Puerto Rico, *Perfil de las familias pobres de Puerto Rico* (1980); Oficina de Oportunidad Económica de Puerto Rico, *Perfiles de la pobreza en Puerto Rico* (1976).

10. Colón Reyes, *supra* note 4; LINDA COLÓN REYES, *POBREZA EN PUERTO RICO: RADIOGRAFÍA DEL PROYECTO AMERICANO* (2006).

11. Colón Reyes, *supra* note 4.

12. LILIANA COTTO MORALES, *DESALAMBRAR: ORIGENES DE LOS RESCATES DE TERRENOS EN PUERTO RICO Y SU PERTINENCIA EN LOS MOVIMIENTOS SOCIALES CONTEMPORÁNEOS* 27 (2006).

13. According to the United States Census Bureau, in 2010, the population of Puerto Rico was 3.725 million while the number of Puerto Ricans living in the United States was 4.6 million, which represented 9% of the Hispanic population. See U.S. Census Bureau, *2010 Puerto Rico Results*, [http://2010.census.gov/news/pdf/cb11cn120\\_pr\\_totalpop\\_2010map.pdf](http://2010.census.gov/news/pdf/cb11cn120_pr_totalpop_2010map.pdf); *The Hispanic Population: 2010 Census Briefs* 2, May 2011, <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

14. COTTO MORALES, *supra* note 12. They also contributed to the loss of mangroves that began in the 19th century as a result of the Spanish government’s policy of drying out mangroves.

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consisting of apartment buildings called *caseríos*, which were similar to the public-housing projects in the United States. However, many residents of poor communities refused to move to these new apartment complexes because they realized that, by doing so, they would lose their property rights and would be made tenants of

the State.<sup>15</sup> As a result, the government decided to change strategies once again, removed previous restrictions on informal housing developments, and allowed home renovations, with cement and more durable materials.<sup>16</sup>

The new economic strategy based on industrialization resulted in a significant increase in the per capita income and consuming capacity of the general population.<sup>17</sup> But these social benefits were not evenly distributed. Poverty and unemployment were not eradicated by these programs, and the government's strategy completely lost its effectiveness by the 1970s. During this decade, Puerto Rican workers started to demand better salaries, and American manufacturing industries started to relocate in Taiwan and Singapore in search of greater economic and tax incentives and a cheaper workforce. This contributed significantly to high unemployment rates and social unrest. In response to this economic upheaval, a new phase of government assistance began in 1975, as massive transfers of federal funds, by virtue of the Food Stamp Program, were awarded to Puerto Rico. At the time, 60% of Puerto Rican families qualified for assistance. The result was an increased tendency toward economic and social dependence.<sup>18</sup> Also, in 1976, the United States Congress extended section 936 of the Internal Revenue Code as a means of encouraging economic activity on the Island. This tax exemption lasted until 1996.

During the 1980s and well into the year 2000, both the government and the private sector in Puerto Rico started an aggressive housing-construction program. However, many families could not afford to buy these new houses, and a new wave of low-income families began taking over public and

privately owned vacant lands.<sup>19</sup> There they created new communities. This new movement generated intense social battles between the land-owning sectors and the emerging communities. Marginalized groups began to organize and engage in social activism; they took legal actions in the courts and formed community organizations, with the assistance of political parties, social workers, intellectuals, and religious leaders.

Many citizens, as well as various political leaders, perceived these families as squatters and these community actions as "land invasions." On the other hand, members of these communities saw themselves as "land rescuers."<sup>20</sup> Eventually, private-property owners and the government filed for eviction of these newly formed communities, with some eviction proceedings ending in chaos, violence, and even the deaths of those who refused to leave.<sup>21</sup>

Today, as the population continues to grow, cities are expanding beyond their traditional limits. Unplanned urbanization is straining the cities' capacity for providing basic necessities like potable water, waste and garbage disposal, electricity, roads, and bridges. Environmental conditions in many communities are extremely difficult; some communities are in danger of vanishing as the result of natural disasters, like floods and landslides, or manmade disasters.<sup>22</sup> Urban sprawl presents another challenge for communities that were established years ago in what were then rural areas surrounding the urban centers. Eighty or ninety years later, these communities are now surrounded by wealthy neighborhoods. Some of these communities hold land titles to valuable real estate that is ripe for development. We are on the eve of a new wave of gentrification that will expose lower-income communities once again to the threat of eviction or the exercise by the government of its power of eminent domain. In this process, the citizens will probably look for relief in the courts. Are we, as judges, ready to assist them?

#### **IV. DELIVERING JUSTICE TO THE COMMUNITIES: THE ROLE OF THE COURTS**

Disadvantaged communities are entitled to justice in their living conditions, health, education, and job opportunities. They are also entitled to respect and support of their identity

15. *Id.* at 28.

16. *Id.* at 29.

17. See RAFAEL PICÓ, *EL DESARROLLO DE LA COMUNIDAD: LA EXPERIENCIA EN PUERTO RICO* 4-17 (1966).

18. Linda Colón Reyes, *Neoliberalismo, globalización y pobreza en Puerto Rico*, in *ENSAYOS SOBRE LA POBREZA EN PUERTO RICO* 28 (Francisco Catalá & Francisco Martínez eds., 2002).

19. *Id.* at 29-33.

20. Our translation for the phrase "*rescatadores de terrenos*." See Érika Fontáñez Torres, *La presencia del Derecho en el movimiento de rescates de terreno en Puerto Rico: rescatando entre leyes, tribunales y el discurso legal*, 68 *REV. COL. ABOG. PR* 351 (2007); COTTO MORALES, *supra* note 12.

21. See COTTO MORALES, *supra* note 13, at 38-108. See also Érika Fontáñez Torres, *La política jurídica de la propiedad en Puerto Rico: un abordaje crítico feminista en busca de igualdad y equidad para las*

*mujeres*, 79 *REV. JUR. U.P.R.* 915, 920-44 (2010).

22. Faulty or nonexistent urban planning has provoked catastrophes like the Mameyes mudslide in October 1985, which destroyed the Mameyes shantytown in the city of Ponce and killed more than a hundred people. Another community was extinguished in 1985, when residents of Ciudad Cristiana, a housing development established five years earlier in the municipality of Humacao, had to be evacuated because of their proximity to a canal that had been used to discharge industrial waste for thirteen years. Also, in 2009, the Caribbean Petroleum Corporation (CAPECO) petroleum depot, located between the cities of Cataño and Bayamón, exploded, affecting residential areas nearby. Furthermore, the residents of the island of Vieques off the east coast of Puerto Rico are still waiting for the lands near their houses to be uncontaminated after decades of being used as a bombing range by the United States' Navy.

as communities. How can the courts contribute toward this end? Perhaps our first question should be what conditions have to be in place before the courts can play a significant part in the solution of these problems. The first condition, as I see it, is required by the limits imposed by law and tradition on the role of the courts in our society, which frowns on the formulation of public policy by courts. I would state this condition more as something that is to be desired but is not always in place: a clearly legislated policy concerning the rights of these communities.

The Special Communities Act of Puerto Rico, approved in 2001, is one such statement.<sup>23</sup> Dubbing communities that are underprivileged in terms of poverty and other criteria as “special,” this act adopts a policy of empowerment for their residents. The Act was amended in 2004 to require, among other safeguards, the consent of 75% of the members of a “special community” before the government can exercise its power of eminent domain.<sup>24</sup>

Another important act, approved in 2004, created a land trust in San Juan modeled after the Dudley Street Initiative in Boston: the Martín Peña Canal Land Trust (Fideicomiso de la Tierra del Caño Martín Peña).<sup>25</sup> To fend-off land speculation and assure the permanence of the people living on the lands along the Martín Peña Canal, the titles to government lands in that area were transmitted to the trust, which was also authorized to receive title to private lands along the canal that were voluntarily transferred by the owners. The Act was adopted in response to the requests of eight communities organized as the G-8 group since 2002 to represent the interests of 26,000 persons who lived on both sides of a canal that joins the San Juan and San José Bays in Puerto Rico’s capital city. These tracts of land were created by decades of sinking dirt, garbage, and debris into swampland until they were firm enough to support modest houses.<sup>26</sup>

A clear and firm legislative statement of public policy, unfortunately, is not always enough. Political changes often introduce contradictory visions. This happened to the Martín Peña Canal Act, which was amended in 2009 to revert property titles back to the original owners, the Puerto Rican Government and the City of San Juan.<sup>27</sup> The land trust sued on the basis of illegal taking of property and illegal encroachment on private contractual rights. The United States Court for the District of Puerto Rico abstained under the Pullman Abstention doctrine and dismissed the case.<sup>28</sup> The land trust appealed. At first, the Court of Appeals for the First Circuit in Boston stayed the implementation of the 2009 amendment, but then, in April 2010, it dismissed with prejudice all the federal claims while dismissing without prejudice the claims under Puerto Rican law.<sup>29</sup>

The Martín Peña Canal Act was amended again in 2011, to authorize the government to confer individual property titles to these lands.<sup>30</sup> This, of course, weakened the original purpose of the land-trust act, which was to forestall speculation and maintain these properties for residential use by the G-8 families and their descendants. Nevertheless, another change of administration as a result of the 2012 elections is expected to bring back the original public policy. The newly elected mayor of San Juan has declared that, within her first 100 hours in office, she will take legal action to stop the granting of individual property titles in the eight communities and promote

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23. Special Communities Act (Ley para el Desarrollo Integral de las Comunidades Especiales de Puerto Rico), P.R. Laws Ann. tit. 21, §§ 962-973f (Supp. 2012). Although this law has not suffered important amendments, the project has experienced a dramatic reduction of funds and loss of resources.

24. Law No. 232-2004, P.R. Laws Ann. tit. 21, § 963(e) (Supp. 2012).

25. Statement of Motives, Act for the Integral Development of the Martín Peña Canal District (Ley para el Desarrollo Integral del Distrito de Planificación Especial del Caño de Martín Peña), Law No. 489-2004 (amended), P.R. Laws Ann. tit. 23, §§ 5031-5065 (Supp. 2012).

26. After ten years of fighting, the G-8 group has gained some victories but is still waiting for the dredging of the Martín Peña Canal to improve living conditions and development. See Libni Sanjurjo, *Prisioneros de aguas sucias*, PRIMERA HORA, September 6, 2012, at 38-39; Michelle Estrada, *El Caño celebra 10 años de autogestión*, EL NUEVO DÍA, October 27, 2012, at 20.

27. Law No. 32-2009, P.R. Laws Ann. tit. 23, § 5045 (Supp. 2012). The amendment responded to a change of policy when the administration changed after the 2008 elections.

28. Fideicomiso de la Tierra del Caño Martín Peña v. Fortuño *et al.*, 670 F. Supp. 2d 132 (D.P.R. 2009).

29. Fideicomiso de la Tierra del Caño Martín Peña v. Fortuño *et al.*,

604 F.3d 7 (1st Cir. 2008), available at <http://www.ca1.uscourts.gov/pdf/opinions/09-2569P-01A.pdf>. The court stated that:

Law 32, by its terms, revokes the transfer of public agencies’ lands to the Fideicomiso and returns the lands to public ownership through agencies of the Commonwealth and the Municipality. This transfer to public ownership reflects the Commonwealth’s judgment that the goals of rehabilitating and revitalizing the canal will be better served, and will be consistent with other missions of its public agencies, if these agencies, rather than the Fideicomiso and the [Martín Peña ENLACE Project] Corporation, again hold and administer the lands in the canal area they once owned. There can be no doubt that Law 32’s transfer to public ownership is for “public use” under the Takings Clause. *Id.* at 18-19.

The ENLACE Project Corporation was created by Law 489 to help the residents in the rehabilitation of the area and establish community development programs. It works together with the G-8 group.

30. Law No. 70-2011, P.R. Laws Ann. tit. 23, § 5045 (Supp. 2012). This amendment also established limits to the possibility of resale by requiring the new owners to pay certain sums if the properties are sold within a period of 10 years after the transfer.

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the amendment of Law 489 to reinforce the Martín Peña Canal Land Trust.<sup>31</sup>

So our first condition for the role of courts in protecting communities—a clearly legislated policy—is not always met. The question of the role of the courts is then best posed in terms of “access to justice.” In other words, are poor communities really able to make their case in our courts? Access to justice has been defined as the set of conditions that facilitate or hinder the equal use of established procedural mechanisms

to prevent the violation of rights, to secure legal remedies, and to resolve controversies.<sup>32</sup> Many circumstances, external to the courts, can limit access to justice—among them, the type of legal education provided by law schools and the commercialization of the legal profession.

#### LEGAL EDUCATION

In general, our law schools teach positive law: the law that is, not necessarily the law that should be. And the analytical skills typical of lawyering are developed mostly to understand and apply the law as it is and not necessarily as it could or should be. Most professors do not include sociological discussions of the law in their analysis. Duncan Kennedy said it best: “[T]he trouble with the legal system is that it fails to put the state behind the rights of the oppressed, or that the system fails to enforce the rights formally recognized. If one thinks about law this way, one is inescapably dependent on the very techniques of legal reasoning that are being marshaled in defense of the status quo.”<sup>33</sup> In his words, the conservative approach taught in law schools is “willfully blind to *substantive* inequal-

ity.”<sup>34</sup> This willful blindness allows or justifies the eagerness of legal practitioners to defend those who can afford legal representation and ignores the communities’ need for legal assistance. In that sense, justice has a price: the cost of legal representation.<sup>35</sup>

#### THE COST OF LEGAL SERVICES

The high cost of legal representation is a significant hindrance to justice. According to Deborah L. Rhode, millions of Americans lack access to justice, let alone equal access. In civil proceedings, most low- and middle-income citizens do not have any affordable access to legal services, while in the criminal justice system, government-funded services for the indigent accused are evidently inadequate. Rhode states that about “four-fifths of the civil legal needs of the poor, and two to three-fifths of the needs of the middle-income individuals, remain unmet.”<sup>36</sup> As she indicates, “Only one lawyer is available to serve approximately 9,000 low-income persons, compared with one for every 240 middle- and upper-income Americans.”<sup>37</sup>

In Puerto Rico, several organizations provide legal representation to the indigent, both in criminal and civil cases, and law-school students can participate in legal clinics that represent low-income clients.<sup>38</sup> Nevertheless, as professor Russell G. Pearce states, these initiatives by themselves have a very limited impact in advancing equal justice since they address “only a small portion of the inequality within the legal system and do not recognize that our society cannot provide the vast resources necessary to equalize the access to justice for low-income people.”<sup>39</sup>

#### QUALITY OF LEGAL SERVICES

Costs have implications not only on the availability but on the quality of legal representation for poor communities.<sup>40</sup> The American judiciary system, within which Puerto Rico operates, is based on an adversary system that assumes that the parties’ pursuit of their individual interests results in an outcome that

31. Gerardo E. Alvarado León, *Cruz auditará las finanzas de la capital*, EL NUEVO DÍA, November 12, 2012, at 8; Antonio R. Gómez, *Carmen Yulín se compromete con el Caño Martín Peña y el grupo G-8*, PRIMERA HORA, November 1, 2012, available at: <http://www.primerahora.com/carmenyulinsecomprometeconelcanomartinpenayelgrupog8-717938.html>. The new mayor will take office in January, 2013.

32. Efrén Rivera Ramos, *Las múltiples caras del acceso a la justicia (The Many Faces of Access to Justice)*, in PRIMER CONGRESO ACCESO A LA JUSTICIA (XXII CONFERENCIA JUDICIAL, 2 Y 3 DE MAYO DE 2002) 8 (2005).

33. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 61-62 (David Kairys ed., 1998), available at [http://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20Hierarchy\\_Politics%20of%20Law.pdf](http://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20Hierarchy_Politics%20of%20Law.pdf).

34. *Id.* at 62. See generally DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, A CRITICAL EDITION (2004).

35. Rivera Ramos, *supra* note 32, at 13.

36. DEBORAH L. RHODE, ACCESS TO JUSTICE 47 (2004), cited in Russell G.

Pearce, *Redressing Inequality in the Market of Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 973 (2004).

37. Deborah L. Rhode, *The Social Responsibility of Lawyers: Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POLY 47, 47-48 (2003).

38. For example, the Puerto Rico Legal Services Corporation (Corporación de Servicios Legales de Puerto Rico) assists the poor in civil proceedings, while the Legal Assistance Society (Sociedad para la Asistencia Legal) represents the indigent in criminal cases in Puerto Rico. The Civil Action and Education Corporation (Corporación de Acción Civil y Educación), which provided legal assistance in civil cases to people in prisons since 1996, had to cease operations in July 2011 due to lack of funding. See Rama Judicial de Puerto Rico, Servicios Legales Gratuitos, <http://www.ramajudicial.pr/servicios/servicioslegales.htm>.

39. Pearce, *supra* note 36, at 970.

40. The First Canon of the Puerto Rico Legal Ethics Code states: “[T]he lawyer shall accept and carry out every reasonable assignment requiring free legal services to indigents . . . . The lack of monetary compensation in those cases does not exempt lawyers

is fair, for them and for society as a whole. As a result, the parties control the major aspects of a case, such as determining the issues to be solved and the evidence to be presented. In such a system, the quality of the lawyers' work "undoubtedly has a major influence on the outcome."<sup>41</sup>

Unfortunately, there is an undeniable correlation between the cost and the quality of available legal services. For this reason, it has been said that "our legal system largely distributes legal services through the market and justice through an adversary system where the quality of legal services has a major influence. As a result, to a significant degree, justice is bought and sold and the inevitable result is unequal justice under the law."<sup>42</sup>

### COMPLEXITY OF ISSUES

The complexities of legal controversies involving poor communities make it even harder for them to receive adequate legal representation. Many communities are socially diverse in terms of things like race, jobs or unemployment, level of education, health, age, and family structure. This means that their members, while united with respect to certain issues, are not necessarily so with respect to many others. Also, sustaining a community effort requires participation, and not all of the members participate in meetings and working groups. It is often very difficult to achieve consensus among community members regarding legal actions; communication between lawyers and their multiple clients can be difficult, and many members of the community may grow tired of waiting for a case to end and may refuse to support the community action. Numerous community litigations involve intricate issues and require extensive discovery, expert reports and testimony, and on-site inspections, all of which are expensive and complicated.

Even if the community obtains the necessary funds to start a legal action, in many cases the long process drains its limited economic capacity, thus forcing a settlement or a withdrawal without achieving the desired result. Likewise, a restricted budget can limit access to complete and crucial information regarding the judicial system and alternatives available to assert civil rights. Community members often do not understand the judicial process or have inadequate access to information, and this affects their willingness to participate.

### V. ACCESS TO JUSTICE AND THE JUDGES

What does all this mean to the individual judge in whose

courtroom this real-life drama is often played? Acquiring a law degree and fulfilling the minimum requirements for serving as a judge does not guarantee that the person seated at the bench fully comprehends the needs of our impoverished communities and his or her responsibility toward the members of these communities. The scenario I have very broadly described forces us to do our utmost as judges to understand these communities and redefine our role in the daily process of delivering justice. Along the way, we must reject abstract neutrality and acquire a different kind of objectivity, assume our role as guardians of procedural fairness, and learn to value the feelings and ideas of others, even those who seem most different from ourselves.

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### THE QUEST FOR REASONABLE OBJECTIVITY

Under the Constitution, the primary function of a judge is to guarantee the fundamental constitutional rights of every person. This duty is based on the conviction that judges, as citizens who are aware of the value of these rights in a democratic society, choose their profession knowingly, and they willingly assume responsibility for protecting those rights. They are committed to this end, and part of this commitment is to be aware of the great adversities faced by communities that have limited access to the courts, whose members hope to find a helping hand among legal professionals and many times are forced to go to court without legal assistance, in a desperate effort to be heard.

The traditional ideal of the "objective judge" does not help us in this process. Complete objectivity and neutrality have been shown to be unattainable ends. Judges, as human beings, are the sum of their own diverse experiences, ideas, situations, expectations, and realities. Therefore, when a judge neglects to recognize her own subjectivity, her judgments will be inevitably biased. We must become aware of our own subjectivities, ideologies, and paradigms.<sup>43</sup> By doing so, we may

from the obligation to always provide competent, diligent, and enthusiastic legal services." Rama Judicial de Puerto Rico, Canon 1, Cánones de Ética Profesional, <http://www.ramajudicial.pr/leyes/imp-canon-es-etica-profesional.html>. Even though lawyers have to provide the same quality of legal assistance when they work pro bono, many pro bono cases do not receive adequate representation, often resulting in their dismissal.

41. Pearce, *supra* note 36, at 971, citing JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 1-2, 8-9 (2003); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283 (1976).

42. Pearce, *supra* note 36, at 970.

43. "[T]hese forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man . . . . There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167-168 (1937). See RONALD DWORKIN, LAW'S EMPIRE, 73-86 (1986).

**Procedural fairness is essential, but the perception of procedural fairness is equally important.**

be able to exercise our judgment more effectively and move closer to a truly impartial assessment of events. Our goal, then, is not neutrality but a reasonable objectivity.

**GUARDIANS OF PROCEDURAL FAIRNESS**

Judges must go beyond the idea that they are umpires in a contest between equal parties. They must be involved in the process to prevent

the abusive use of procedures, especially in those cases where one party clearly possesses more resources than the other to pay for legal expenses. In this type of case, lawyers representing high-income parties can bog down the process with motions and petitions, while the lawyers representing poor communities most often cannot afford adequate discovery, expert advice, or the time and human resources needed to confront these strategies. In these situations, judges must intervene to guarantee that both parties enjoy equal opportunities to ensure a just outcome.

The responsibility of presiding over a fair proceeding entails not only being aware of what occurs during the trial but also the outcomes produced by settlements, which are the most common results of lawsuits brought by or against disadvantaged communities.<sup>44</sup> As for self-represented or *pro se* parties, judges should be responsible for ensuring that they have the greatest possible opportunity to be heard.<sup>45</sup> Professor Russell Engler suggests that in those cases, judges should be responsible for developing a full and fair record, as well as providing assistance to the unrepresented litigants on matters of procedure, evidence, and questions of law.<sup>46</sup> This may include explaining the proceedings at every step and assuring that the parties understand these instructions and explanations. Judges may also refer a self-represented party to a self-help center or other similar services for advice.<sup>47</sup>

An important study done by the American Judges Association, called *Procedural Fairness: A Key Ingredient in Public Satisfaction*, establishes that “[j]udges can alleviate much of the public dissatisfaction with the Judicial Branch by paying critical attention to the key elements of procedural fairness: voice, neutrality, respectful treatment, and engendering trust in authorities. Judges must be aware of the dissonance that exists between how they view the legal process and how the public before them views it.”<sup>48</sup> This means that judges should not only try to create fair outcomes, “they should also tailor their

actions, language, and responses to the public’s expectations of procedural fairness.”<sup>49</sup> Procedural fairness is essential, but the perception of procedural fairness is equally important. For this reason, a fair process often requires a judge who can explain the trial, in understandable language, to litigants, witnesses, and jurors. Judges need to accept that it is their responsibility to ensure that people comprehend the legal process, the court’s orders, and generally what is happening in their cases.<sup>50</sup>

**EMPATHY: VALUING THE OTHER’S FEELINGS AND IDEAS**

Empathy was once a strange word, at least in traditional legal venues. Lawyers, and particularly judges, aren’t supposed to empathize; our tool is the rule of law, and that is as abstract and impersonal as it gets. If we are to transcend this neutrality-abstraction ideal that is force-fed to us in law school, judges must get to know the communities that seek redress in the courts. It is important to acquire a balanced perspective that provides hope of justice to the communities and deepens trust between the communities and the judiciary. An essential aspect of this process is learning to be better listeners.<sup>51</sup> Really listening will help us identify those things that color our impartiality, and it will help us recognize our subjectivities, improve our patience, and strengthen our judicial temperament.

To ensure equal access to justice, we must democratize our perception of the way our society really is. We’ve come a long way from adhering to the formal notion of equality developed when the idea of “being free and equal under the law” had at its center a certain type of individual: masculine, white, heterosexual, belonging to the middle or high socioeconomic class. We know the detrimental effects that these concepts of equality have on marginalized groups. In the end, justice depends on our capacity to see and feel with the silently excluded and the socially invisible.

**VI. ACCESS TO JUSTICE: JUDICIAL BRANCH INITIATIVES**

**JUDICIAL EDUCATION**

Continuing education and professional development is essential in this process. The Judicial Academy of Puerto Rico, created in 2003, has developed some innovative judicial-education opportunities to help judges meet this challenge. Some are aimed at new judges and are mandatory. Others are optional opportunities for personal and professional growth in the adjudication of community problems.

Relevant topics for new judges, both at the lower and appellate levels, include management of sexual harassment, domes-

44. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2011-26 (1999).

45. Pearce, *supra* note 36, at 976, citing Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 *GEO. J. LEGAL ETHICS* 423, 442 (2004).

46. Engler, *supra* note 44, at 2028-30, 2059-63. Engler draws on precedents established in small-claims courts and administrative social-

security proceedings.

47. *Id.* at 2022-27.

48. Judge Kevin Burke & Judge Steven Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction: A White Paper of the American Judges Association* 3 (2007), available at <http://aja.ncsc.dni.us/htdocs/AJWhitePaper9-26-07.pdf>.

49. *Id.*

50. *Id.* at 17, 20.

51. *Id.*

tic violence, environmental law, and employment-discrimination cases. Other entry-level topics are: *Communication in the Courtroom*; *Control of the Courtroom*; *Judicial Temperament*; *Dealing with Stress*; and *Effective Decision-Making*. All of these are aimed at fostering an attitude of sensitivity to the situations judges must deal with in the courtroom daily. Also available to judges at our Judicial Academy are a course on *Therapeutic Jurisprudence*, a multidisciplinary look at the history and sociology—as well as legal aspects—of Puerto Rican prisons, and a course on immigration in Puerto Rico. Most importantly, there is a multi-course curriculum focused on access to justice, which discusses topics such as *Growing Old in Puerto Rico*, *Law and Poverty*, and *Discrimination Against Vulnerable Groups*.<sup>52</sup>

Additionally, every semester our Judicial Academy offers our judges the opportunity to develop empathy and understanding by listening to what the more vulnerable groups of society have to say. For instance, in a course titled *Law and Poverty*, judges have met with members of the Coalition of Community Leaders and with lawyers who provide assistance to the communities, as well as law and sociology professors and heads of several government programs. They have also met with homeless people and community organizations that work with them.

Community leaders have spoken quite frankly about their perception of justice and the judicial system; they have explained why they perceive judges, lawyers, and some court personnel as distant, arrogant, and uncaring about the plight of the communities. They have addressed the need for judges to understand about collective or group rights, such as the right to the integral development of a community and the right of a community to manage its own development, under the Special Communities Act of 2001. They have spoken about the lack of knowledge, and even disdain, that some judges show toward the culture and lifestyles of marginalized communities, and they have discussed why community members do not feel welcomed in the spaces inhabited by judges. These are eye-opening conversations which consistently receive the highest evaluations from participating judges.

## JUDICIAL BRANCH INITIATIVES

Of course, there is more to the administration of justice than what goes on in the courtroom. The Judicial Branch as a whole faces great challenges in the years ahead. A study submitted to the Supreme Court of Puerto Rico in 2000 recognized that in the future, courts will face increased litigation, a more diverse clientele, and new issues relating to economic development, as well as intensified awareness of environmental issues. The courts will have to deal with the implications of technological advances and demographic changes in our society, caused not

only by the continuing movement of the rural population to the cities but also by increased immigration into Puerto Rico, particularly from the Dominican Republic. This will result in a more diverse Puerto Rican society where racial and ethnic differences, a topic which has still not been dealt with too clearly in

Puerto Rico, will become more pertinent. An aging population, coupled with worrying numbers of young professionals settling in the United States, will bring new issues to the courts not only concerning age and gender discrimination but also health and welfare services and the right to die with dignity. Unfortunately, the study also foresees that the gap between the rich and the poor will continue to grow. Moreover, people will turn more and more to the judicial system to solve their problems, increasing the need for alternative methods of dispute resolution and problem-solving courts.<sup>53</sup>

The Strategic Plan of the Judicial Branch of Puerto Rico took these facts into account and incorporated data and other input from a Judicial Conference on Access to Justice held in 2002.<sup>54</sup> As a result, community relations have been given high priority, a *pro se* program was instituted, and problem-solving courts, such as drug courts, domestic-violence courts, and unified family and juvenile courts, have been established. Court improvement programs are also in place.

Another important initiative is the creation of special procedures and guidelines for cases involving homeless people. The approval of these guidelines illustrates what can happen when we truly listen and empathize with people we otherwise would not know. There were no procedures in place regarding the homeless when a newspaper article reported that a homeless citizen appeared in court and asked to be put in jail. He admitted to using drugs and asked the court for help but, since he had not committed a crime, the judge believed there was nothing he could do and sent him back to the streets. Eventually, police officers found him and placed him in an institution so he could receive the help he needed. The special procedures, adopted after this situation was known, recognize that attention must be given to the homeless who go the courts looking for help; that a person does not have to break the law in order to be noticed by the court; and that we bear some responsibility even if what is needed is not necessarily within the scope of the judicial system's traditional mandate.<sup>55</sup>

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52. See Puerto Rico Judicial Branch, Judicial Academy of Puerto Rico, <http://www.ramajudicial.pr/academia/index.htm>.

53. Puerto Rico Judicial Branch, *Visión en ruta al futuro: Informe de la Comisión Futurista de los Tribunales* 41-100 (2000).

54. See PRIMER CONGRESO ACCESO A LA JUSTICIA (XXII CONFERENCIA JUDICIAL, 2 Y 3 DE MAYO DE 2002) (2005); Puerto Rico Judicial Branch, *Strategic Plan 2012-2015, Justicia y servicio: servicio y justicia* (2012), available at <http://www.ramajudicial.pr/orientacion/informes/rama/Plan-estrategico-2012-2015.pdf>; Puerto Rico

Judicial Branch, *Strategic Plan 2007-2011, Obra de justicia* (2007); Puerto Rico Judicial Branch, *Strategic Plan 2002-2006* (2002), available at <http://www.ramajudicial.pr/orientacion/informes/rama/estrategico.pdf>.

55. Puerto Rico Judicial Branch, Protocol for the Attention, Orientation, and Referral of Homeless Persons at the Courts (2010), available at <http://www.ramajudicial.pr/leyes/protocolo-orientacion-y-referido-personas-sin-hogar-presentan-tpi-feb-2010.PDF>.

## VII. CONCLUSION

Judges are human beings; we all have opinions and fears, and we are not immune to prejudices. As individuals, we must recognize these weaknesses and overcome them to pass judgment over others. In the case of disadvantaged and vulnerable communities, the only way we can solve their claims objectively and fairly is by recognizing that these communities are composed of citizens who, like us, struggle with numerous problems daily and whose only agenda is to exercise their right to live in a dignified manner. Our commitment to justice should give us the introspection necessary to neutralize the prejudices that limit our capacity to listen to and to understand their claims. As judges, our objective should be to understand and comprehend each community's reality and the obstacles they each face to obtain justice. True access to justice can only be achieved when a judge uses the law, not as an end in itself, but as a tool for justice.

If society is to be more than a space for competition and survival of the fittest, it is not enough to have faith in justice; we must seek it out, nurture it, harvest it, and be willing to share it with others. A former Associate Justice of the Supreme Court of Puerto Rico, Carlos Irizarry Yunque, referring to the fact that justice is always shown blindfolded, said it best: “[N]ever forget that under the blindfold there must be eyes that can be opened to detect the injustice of human inequality. Remember, that though blindfolded in order not to see, Lady Justice must have very sensitive ears to listen . . . to the clamor of the humble who cannot always be heard.”<sup>56</sup>



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56. Statement made during Chief Justice Víctor M. Pons Núñez's Swearing-In Ceremony, 116 D.P.R. XLVIII (1985).