Noriega v. Hernández Colón[†]: Political Persecution Under Therapeutic Scrutiny

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I. INTRODUCTION

Therapeutic jurisprudence is a relatively young school of thought. One of its major attractions to the academic community has been its claim that society could use the law, both at the legislative and adjudicatory level, to promote the psychological well-being of those affected by the law. In this commentary, I want to share a little known decision of the Supreme Court of Puerto Rico regarding police persecution of political minorities. It is my contention that looking at this decision through the lens of therapeutic jurisprudence, one may discover a serious effort by the court to heal very divisive wounds on the Puerto Rican political body—an effort which no other branch or institution was ready, or willing, to undertake.

II. EXPANDING THE USE OF THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence is moving forward into new areas of academic interest. As David Wexler, one of the founders of the movement, states in the Introduction to this Symposium,[1] therapeutic jurisprudence has moved ahead into the world of practice, and, most recently, into the appellate level. In order to provide evidence regarding this recent development, Wexler mentions two recent articles in *Court Review*, the official journal of the American Judges Association.

Some time ago, I had the opportunity to read a draft version of one of those articles,[2] and found it fascinating. In the article, Professor Nathalie Des Rosiers, from the University of Western Ontario, dis-

† Noriega v. Governor, 122 P.R. Dec. 650, 1988 WL 580739, 1988 P.R.-Eng. 580, 739 (P.R. Sup. Ct.).

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1. David B. Wexler, *Therapeutic Jurisprudence in the Appellate Arena*, 24 SEATTLE U. L. REV. 217 (2000).

2. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority/Majority Conflicts*, CT. REV., Spring 2000, at 54.

cusses a Canadian Supreme Court case that involved issues regarding Québec's drive to secede from Canada.[3]

As a professor of International Law, I find this decision important and momentous for the future of complex issues regarding self-determination. As is often the case, it was a decision involving very important international law issues, yet decided in a domestic context, by an appellate court with a responsibility over domestic constitutional processes.[4] The issue the Canadian Supreme Court faced had enormous divisive potential within the country, something that would have invited many courts to dodge the issue, avoiding its crispy political overtones. The least we can say regarding this case is that the Canadian Supreme Court was ready to draw some preliminary lines as to a procedural[5] solution to a highly charged debate.

It may not be the last word on the issue; the political forces will still have to work it out among themselves. There may not be any way out of the conundrum, but at least there are now some proposed guidelines and a minimal attempt to sound rational and to "hear" the position of the Québecois regarding the balance of responsibilities among the different political branches and levels. The court thought that it had a constitutional role to play regarding the controversy and used an approach that it categorized as "therapeutic."[6]

III. NORIEGA V. HERNÁNDEZ COLÓN: THE PUERTO RICAN CASE

In America, a feeling often prevails that some issues, such as those regarding self-determination, which, as we have just seen, affects many foreign countries, even well-developed modern democracies

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3. Ref. Re Secession of Québec [1998] 2 S.C.R. 217.

4. Rosalyn Higgins, recognizing how often domestic courts will, in some legal cultures, feel some hesitation to decide issues involving international law, has made the following assertion:

> Although it is natural that the judicial decisions of the International Court of Justice will have a great authority, it is also natural in a decentralized, horizontal legal order that the courts of nation states should also have a role to play in contributing to the norms of international law.

ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 208 (1994).

Janis and Noyes, authors of a contemporary casebook on International Law, point out the importance of domestic courts in the following terms:

> We begin with municipal courts. The great majority of international law cases that are settled by formal judicial process are decided by municipal not by international courts. For most lawyers practicing international law, domestic law courts are the usual fora foreseen in negotiations and employed in litigation . . . .

MARK W. JANIS and JOHN E. NOYES, INTERNATIONAL LAW—CASES AND COMMENTARY 149 (1997).

5. *See* Des Rosiers, *supra* note 2, at 54-55.

6. *Id.*

close to our borders, such as Canada, are no longer and should never again be factors in our political reality.

Centripetal political tensions are perceived in the United States political folklore as "negative,"[7] even unthinkable propositions. At the same time, the possibility of collective violations of what are perceived as fundamental civil or human rights, such as the right to free speech, assembly, and citizen involvement in civic political action, are broadly seen as things of the past, unworthy of a modern state, and something that will not occur again in a jurisdiction under the American flag. Many Americans, judges included, tend to believe that what may be looked at today as normal or prevalent in Africa, Asia, Latin America, or the Caribbean, will only appear in America in individual cases, generally as something exceptional.[8] These same people tend to believe that tolerating the emergence of such centripetal forces within the confines of the United States constitutional model raises the danger of dissolving the cohesive element that holds together the fabric of American constitutional democracy.

Such an ethos has been prevalent for a long time. It is based on the notion that the United States is different, maybe exceptional. During the Cold War, political fireworks ignited in the United Nations General Assembly over the political status question of Puerto Rico. Communist governments, such as Cuba, denounced political repression in Puerto Rico. The response of prominent United States liberal academics, forceful defenders of human rights such as Thomas M. Franck, a past president of the American Society of International Law, was to dismiss the whole situation as merely another communist smokescreen.[9]

The book in which Thomas Franck's commentaries were made, *Nation Against Nation*, was published in 1985. In 1988, the Supreme Court of Puerto Rico entertained an appeal from a district court deci-

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7. In my opinion, this attitude may respond to both the generalized tendency after the Peace of Westphalia to support the consolidation of strong centralized states, as well as the particular trauma evoked in the United States by the Civil War. The attitude, however, is not specifically North American. The international community in general has expressed its preference regarding fixed states' borders, although important dissident voices are being expressed. One example of the dissident voice is that of Makau Wa Mutua, author of an article entitled *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

8. That it has not been so exceptional is a conclusion one could draw from one of the citations used by the Commonwealth of Puerto Rico Supreme Court in the *Noriega* case, 122 P.R. Dec. at 656, 1988 WL 580739 at *1. I am referring in particular to H.M. MITGANG, DANGEROUS DOSSIERS—EXPOSING THE SECRET WAR AGAINST AMERICA'S GREATEST AUTHORS (1988).

9. THOMAS M. FRANCK, NATION AGAINST NATION—WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT 195-204 (1985).

sion that found unconstitutional a practice that apparently had been followed for decades in the shades of the justice system by all government administrations in Puerto Rico.[10] Since the 1930s, the Puerto Rican police created files and dossiers on all individuals, groups, or organizations that professed a belief in independence as the final solution to the question of Puerto Rico's political status.[11] Most of those dossiers had been created based only on the citizens' political or ideological beliefs.[12] In almost all the cases, there was no evidence that connected those citizens with the commission of, or the attempt to commit, any criminal acts.[13] The lower court found the practice "illegal and unconstitutional, since it violates the rights to freedom of speech, association, and privacy and for being an affront to the dignity of a human being."[14]

In a second appeal by the government, the court[15] found that a few of the groups affected by the practice may have in effect been involved in clandestine operations that in turn may have justified police intervention. The court took measures to separate those instances of genuine police concerns from the rest of the cases.

At the time the district court received this case, there was already evidence of more than 25,000 dossiers and cards in existence, containing information on more than 135,000 individuals, or 3% of the total population of the Island.[16] There were, of course, instances of individuals who were not independence supporters who nonetheless had a dossier opened in their name, but those were clearly the exception.[17]

For more than a century, Puerto Rico has been a territory under United States jurisdiction.[18] When the case was originally presented

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10. *Noriega*, 122 P.R. Dec. at 701, 1998 WL 580739 at *27 (Hernández-Denton, J., concurring).

11. *Id.*

12. *Id.* at 693-94 (Negrón-García, J., concurring). This is a clear example of group "stigmatizing" or "labeling", a practice whose effects are described by Professor Bruce J. Winick, Scholar in Residence at the University of Miami School of Law in Coral Gables, Florida. *See* Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, *in* LAW IN A THERAPEUTIC KEY (David B. Wexler & Bruce J. Winick eds., 1996).

13. *Noriega*, 122 P.R. Dec. at 700-02, 1998 WL 580739 at *27.

14. *Id.* at 655. Direct quotations from the Puerto Rico Supreme Court opinions cited throughout this article are my own translations, since the official translations were not available at the time this Article was written.

15. *See* Noriega-Rodríguez v. Hernández Colón, 130 P.R. Dec. 919, 1992 WL 755596 (1992) (Negrón-García, J., opinion).

16. *Id.* at 945, 1992 WL 755596 at *11.

17. *Id.*

18. For a brief and sound discussion of Puerto Rico-U.S. relations *see* JÓSE TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997). Hon. Trías Monge served as Chief Justice of the Supreme Court of Puerto Rico from 1974 to 1985. *Id.* at xii. Another interesting account is offered by Hon. Juan R. Torruella, Chief Judge of the United

in court in 1987, the government of Puerto Rico immediately admitted that it had been involved in the practice of creating files and dossiers, that the practice was illegal, and that it would renounce use of the practice in the future.[19] Although at that time the United States had not yet ratified the United Nations Convention on Civil and Political Rights,[20] a document that guaranteed most of the rights admittedly violated, it had signed the Convention in 1966. Thus, the United States had the responsibility of acting in good faith regarding its commitments.

Furthermore, it could be argued that most of the rights violated were already part of general customary international law, which, as we know from *Paquete Habana*, "are part of the law of the land."[21] Those were obligations that the United States had toward the international community and, some will argue, toward the individuals themselves. If a local government (such as the government of the commonwealth) had been responsible for violating those rights for more than 40 years (at least since the charter of the United Nations came into place), the

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States Court of Appeals for the First Circuit, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (Universidad de Puerto Rico ed., 1985).

19. *Noriega*, 122 P.R. Dec. at 665.

20. The United States finally ratified it in the 1990s. In the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), Section 702 provides:

> A state violates international law if, as a matter of state policy, it practices, encourages or condones
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> (a) genocide,
> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) prolonged arbitrary detention
> (f) systematic racial discrimination, or
> (g) a consistent pattern of gross violations of internationally recognized human rights.

Comment b of the Restatement provides the following:

> *State policy as violation of customary law.* In general, a state is responsible for acts of officials or official bodies, national or local, even if the acts were not authorized by or known to the responsible national authorities, indeed even if expressly forbidden by law, decree or instruction. The violations of human rights cited in this section, however, are violations of customary international law only if practiced, encouraged, or condoned by the government of a state as official policy.

In Comment m, which refers to instances of consistent patterns of violations, the Restatement includes the following analysis:

> All the rights proclaimed in the Universal Declaration and protected by the principal International Covenants are internationally recognized human rights, but some rights are fundamental and intrinsic to human dignity. Consistent patterns of violation of such rights as state policy may be deemed "gross" *ipso facto*. These include, for example, systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention.

See also Louis Henkin et al., HUMAN RIGHTS 349-54 (1999).

21. The Paquete Habana, 175 U.S. 677, 700 (1900).

United States was responsible internationally for those violations. There was no credible argument to be made that could provide the federal government with an escape from its responsibilities.

But there was more involved in the case. No issue has divided Puerto Ricans more than the issue of self-determination. The independence minority was, and still is, a legitimate alternative in any decision regarding Puerto Rico's ultimate political status. United States presidents have, on a number of occasions, articulated that publicly.[22]

Yet, supporters of independence were subject to persecution similar to that suffered by other groups in Eastern European dictatorships—something other Puerto Rican domestic political groups did not have to endure. Those events involving differentiated repression had created a serious situation of mistrust within Puerto Rican society.[23] On many occasions, even relatives were used to provide or collect information regarding their brothers' and sisters' activities.

If legitimate political divisions were not enough, now it was evident that the Puerto Rican society suffered the objective criminalization of legitimate political activities. Arguments were raised regarding the serious damage done to many of the affected individuals and families. Due to those dossiers, there was the potential for many supporters of independence to find themselves jobless and discriminated against.[24]

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22. *See* Statement of Jeffrey L. Farrow, Co-Chair, President's Interagency Group on Puerto Rico, to the Senate Committee on Energy and Natural Resources on H.R. 856 and S. 472, July 15, 1998. As recently as 1998, Jeffrey L. Farrow expressed the following views in his testimony to the Senate Committee on Energy and Natural Resources:

> President Clinton firmly believes that after a century under the U.S. flag, Puerto Ricans should be enabled to choose among all of the real options: national sovereignty, either independence or in free association with the United States; membership in the Union of States; and continuing the present arrangement. This is his highest priority regarding Puerto Rico. He will strongly support nationhood or statehood if Puerto Ricans vote for either status, and he will continue to work to make the current arrangement work better for them as long as they do not. Again, he has no preference among the options, believing the decision should be Puerto Ricans'.

Id.

23. In the 1992 Supreme Court opinion, Justice Hernández Denton makes the following description of the police activities:

> Police investigators would seat in courses at the University in order to hear the teachers, participated in students strikes in order to identify leaders and collaborators, and looked through the windows of the houses of the parents of the participants in order to find out what they were reading and what television programs they followed.

See Noriega-Rodríguez, 130 P.R. Dec. at 964, 1992 WL 755596 at *24.

24. Again, Judge Hernández Denton provides a vivid description of the psychological context within which persecution took place. Quoting from the Commonwealth of Puerto Rico Civil Rights Commission Report, he describes the climate:

> Persecution and discrimination became part of our daily diet. Supporters of inde-

It was obvious that the state was using its resources and organisms to persecute this group. Every individual suspected of favoring independence was categorized as a potential subversive and subject to constant surveillance. That is the evidence that the courts had before them.[25]

Now came the moment for the supreme court, as well as the district court, to provide a remedy. All the dossiers involved had been prepared by police agents in collaboration with informers. The names of each were part of the dossiers.[26] Some of the people who provided information for the dossiers had not been aware of the ways they would be used.

At this stage, the Commonwealth of Puerto Rico suddenly realized the many interests affected, and tried to establish a council under its supervision to take control over the circumstances in which citizens could gain access to the dossiers. The supreme court, in rejecting the government proposal, openly characterized the foundations over which Puerto Rican democracy was being played out as somewhat "paranoiac" as a result of those constitutional violations.

> If we revoke the decision and sustain the authority of the Council to put in effect the remedies, we will be further promoting a state of distrust and suspicion within the 74,000 people directly affected by the practice and within the rest of the citizens which believe and support the notion of a democratic government which must always respect and preserve the fundamental rights which rule our social life.[27]

At this stage, it seems that the supreme court was not ready to accept a proposition from the government that might give further ground to increasing distrust on the part of the affected parties. The supreme court was aware that only the courts were in a position to provide for a transparent process through which a "healing" effect could be felt. In addition to Judge Peter Ortiz, who offered the court's opinion, other judges expressed themselves in even stronger terms. Judge Negrón García, for example, characterized the practice as, "a

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> pendence were close to accept this practice as part of their destiny, as the necessary and logical conclusion of the ideological position they had taken. It looked as if there was no social will capable of convincing persecutors that they should leave alone the persecuted in order for them to live in peace.

Id. at 965, 1992 WL 755596 at *23.

25. *Id. See also id.* at 21.

26. *See id.* at 926-28, 1992 WL 755596 at *5-9 (discussing in great detail the issues raised regarding the identification of the informers).

27. *Noriega*, 122 P.R. Dec. 650, 689, 1988 WL 580739, at *23.

sad face of our history as a People" and as "a chapter in which the country constitutionally underdeveloped itself".[28]

Judge Negrón García understood that he needed to go a step further in order to dignify as citizens those who had been persecuted.

> For decades, the State, which paradoxically was the one called to promote and assure a pacific and orderly living had been silently acting at the margins of the constitution.
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> The so-called "subversive lists" were a threat to Puerto Rican democracy. They constituted keys which would provide official access to subtle, direct or indirect, and indiscriminate repression. Beyond being a catalogue of documents, in its essence, the lists and catalogues maintained a degrading and offending stigma, one which is a transgression against the dignity, privacy, and the rights to expression and free association of thousand of citizens.
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> If this decision has any value, it is being able to stop the practice through which the movement for independence in Puerto Rico was necessarily associated with acts of violence and criminal conduct . . .
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> This old practice should have never taken root. Although it is typical of fascism or castrating dictatorships, on occasions it has appeared in countries with a democratic tradition. Puerto Rico has not been an exception. It constitutes a spot in our collective life as a people which will be difficult to erase. In order to achieve its total extirpation, avoid its repetition and in order for it not to reappear in future generations, it deserves our most energetic and unanimous condemnation.[29]

Judge Federico Hernández Denton made reference to a Commonwealth of Puerto Rico Civil Rights Commission Report published in the 1970s that condemned this practice, but the Government of Puerto Rico did not pay any attention.[30] He concluded:

> Notwithstanding these recommendations, the attitudes which facilitated the preparation of the lists have persisted into our days and have generated at the same time the repressive acts on the part of the state as a result of which some of the youngest supporters of independence have lost their life. It has not been until this case had been filed, that the State, for the first time,

28. *Id.* at 693-94.
29. *Id.* at 696-97.
30. *Id.* at 702.

> has accepted the unconstitutionality of the practice and has established a mechanism to deal with the situation.[31]

In another related appeal in 1992, one that also dealt with governmental objections to the procedure established by the court to provide free access to the files of those affected by the practice, Judge Jaime Fuster Berlinger, a former Commonwealth Resident Commissioner in Congress in his first year as an associate Judge, offered his own advice as to what the Commonwealth government should do:

> One of the measures that the Governor and the Legislative Assembly should consider would be an official public apology on the part of the State, offered with great lucidity and solemnity; one with profound educational content, which both, islandwide and also in front of the eyes of the world, will accept the wrong done, that would help us increase our collective understanding regarding the rights of minorities and that would open the way to reconciliation with those whose rights had been trampled.[32]

The tone, as well as the substance, of Judge Fuster's recommendations did not go unheeded. Eventually, a number of cases were presented at the district court level. In a partial judgment issued on May 1999, the Court of First Instance found the government of the Commonwealth responsible for the practices.[33] On December 14, 1999, Governor Pedro Rosselló sent an executive order that extended an offer of compensation to the victims.[34] The wording of the executive order follows the broad contours of the language in Judge Fuster's opinion.

The executive order, in its dispositive first and second paragraphs, "publicly" recognizes the injustice caused by the Commonwealth of Puerto Rico's preparation and pursuance of files and dossiers of citizens based exclusively on ideological considerations.[35] It also

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31. *Id.*

32. Noriega-Rodríguez v. Hernández Colón, 1992 WL 755596 at *23-25.

33. *See* Boletín Administrativo Num. Oe-1999-62, Orden Ejecutiva Del Gobernador De Puerto Rico Para Reconocer Públicamente La Injusticia Ocasionada Por La Confección Y Mantenimiento Por El Estado Libre Asociado De Puerto Rico De Expedientes Y Carpetas De Ciudadanos Unica Y Exclusivamente Por Razones Ideologicas; Presentar A Los Ciudadanos Afectados Y A Todos Sus Familiares Una Solemne Y Sincera Disculpa Del Gobierno De Puerto Rico Por La Confeccion Y Mantenimiento De Estos Expedientes Y Carpetas; Y Asignar Recursos Del Fondo Presupuestario A Fin De Promover La Compensacion A Los Ciudadanos Afectados Por La Descrita Practica.

34. *Id.*

35. *Id.*

"presents to the affected citizens and their families a sincere and solemn apology" for this practice.[36]

IV. CONCLUSIONS

The judges' opinions in *Noriega v. Hernández Colón*, as well as the related cases that followed, show that the Supreme Court of Puerto Rico was aware that there was much more than a miscarriage of justice in the issues involved. Violations of complex principles regarding human dignity, self-esteem, and collective self-identity were directly involved. The controversy concerned the foundations by which the Puerto Rican social fabric could structure an enduring minimal political consensus that could ensure democratic governance in Puerto Rico. Once the Commonwealth government admitted to engaging in the practices, the domestic appellate courts felt liberated from the potential political dissonances and fall-out that may have befallen them as they entered into the uncertain world of politics. There were still, of course, some angles that were not considered.

Critics still question what role, if any, the federal government played in encouraging or supporting those policies for more than 50 years.[37] Questions still remain regarding the extent to which some of the persecuted groups participated in a conspiracy with foreign countries, thus creating a credible threat to United States security. With regard to both questions, the solutions found may have been, in one case, overinclusive and, in another, underinclusive.

The supreme court, however, realized that it had to look beyond the past and into the future. It is at this stage where we understand that therapeutic jurisprudence analysis could be useful to us in following the court's position. The court had to provide a therapeutic encounter that would offer a new opportunity for a more inclusive Puerto Rican society. The court was not ready to leave that task in the hands of the state, which was seen by many as eminently responsible for what had happened.[38] Other than the courts, there was no one to

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36. *Id.*

37. Recently, Senator Manuel Rodríguez-Orellana, a former professor of Public International Law at Northeastern University, filed a resolution at the local legislature that may open the door to such an inquiry in the future. In a House Committee Hearing, Louis Freeh, FBI Director, admitted that the FBI had, in fact, persecuted supporters of independence in the 1970s. *See* Mario Santana, *Nuevo para Romero el Carpeteo del FBI*, EL NUEVO DÍA, March 21, 2000, at 25.

38. In *Noriega-Rodríguez v. Hernández Colón*, Judge Ortiz, quoting *Silva v. Hernández-Agosto* says:

> Our structures of government do not tolerate that the political branches of government become arbiters of their own actions.

Noriega-Rodríguez, 130 P.R. Dec. at 971.

provide a process, a framework for a solution, and the will to supervise that process. The court also took into its hands the task of making sure that a new legal process would restore social and psychological sanity in those who had been brutally affected by decades of political persecution. This is the context in which some of the words used by the judges, as well as the language of executive order, must be seen. Judge Foster talks about "reconciliation," "apology," and "acceptance." The executive order uses the terms "solemn and sincere apology."

The "subversive lists" cases requested from the courts in their appellate role a language that took them *beyond* the role of "listeners," "translators," and "facilitators," which Professor Des Rosiers identified in the Canadian Supreme Court context. This time, the state itself, after more than 50 years, was ready to concede the wrong inflicted. Yet, the avenues for correction, which the state offered, were not enough considering the nature and extent of the damage done. The executive branch on its own could not insist on keeping control of the process. The state could not insist on hiding the identities of the informers. Even then, the state wrestled with the courts, moving slowly, until the court, in another related decision, finally declared that the informers would not be found responsible for any wrongdoing.[39] Yet, the dossiers were still distributed to the claimants with the names of the informers included in them, which was, in effect, a moral victory for the plaintiffs. It was after that decision that the Governor approved the executive order.

As the reader may realize, in this situation, contrary to the Canadian case, neither healing nor solace of the victims was obtained just by the fact that the courts provided attentive ears as listeners, nor by the fact that the courts played the role of "translator" between two communities that did not understand each other well enough, although the language used by the court could have had that effect. Nor was the role of mediator at this stage of great value either. This time, there was a need to move a step further, a need for a "scolding" as well as a restorative approach—a clear, transparent message by the judicial branch.

From now on, perpetrators of this conduct should know that what they did was unacceptable in terms of democratic governance and there will be no tolerance for it in the future. A small slap on the wrist is not enough anymore. As with many other examples of immature conduct, direct governmental accountability for the human rights violations involved may be necessary—a public, "transparent"

39. Medina-Morales v. Cruz-Manzano, 96 J.T.S. 126.

accountability, with direct financial impact on the principal violator, the Commonwealth of Puerto Rico.

The court in this case had to play an active role, which no other governmental institution, local or federal, was able or ready to play—the role of a balanced facilitator ready to let the full weight of responsibility fall upon those constitutionally responsible, condemning the acts and protecting and publicly restoring the human dignity of those affected by it. The court had to act with both firmness and love. Societal therapy would claim no less. Consciously or not, a therapeutic approach may have provided the rationale.