

**Remarks of Judge José A. Cabranes, U.S. Circuit Judge
U.S. Court of Appeals (Second Circuit)
on the Occasion of the Publication of Prof. Guillermo A. Baralt's History of the
District Court of Puerto Rico
Clemente Ruiz Nazario U.S. Courthouse
Hato Rey, PR
March 3, 2004**

First, if I may, a word or two in Spanish.

Muy buenas tardes, apreciados amigos y colegas. Hoy me toca hablarles en inglés, pero permítanme antes que nada ofrecerles un saludo muy cordial a todos en español.

Su señoría Juez Presidente Héctor Laffitte; mi querido y distinguido amigo, Juan Torruella, juez del Primer Circuito; apreciables miembros de los tribunales federales, Profesor Guillermo Baralt, miembros de la Corte Suprema de Puerto Rico, y amigos y compatriotas.

Es siempre un enorme placer encontrarme entre buenos amigos como Uds. que administran la justicia con distinción y honor en esta Corte que lleva el nombre del primer puertorriqueño en actuar como juez del Distrito de Puerto Rico, Clemente Ruiz Nazario; corte vecina, además, a otro edificio federal importante, que a su vez lleva el nombre del hombre de estado Federico Degetau González, primer comisionado residente de Puerto Rico en Washington, y, por lo que he podido aprender, en mis propias investigaciones, primer puertorriqueño en pertenecer a la colegiatura de abogados de la corte federal de Puerto Rico.

No saben Uds. la emoción tan profunda que me causa siempre pisar tierra puertorriqueña.

Pero el placer es muy especial hoy por ser ésta la memorable ocasión del lanzamiento y dedicatoria del primer libro que narra la historia de la corte federal de Puerto Rico.

Quiero expresarles mi más sincero agradecimiento por la invitación a participar en esta ceremonia.

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Chief Judge Hector Laffitte, my good and much-admired friend Judge Juan Torruella of the First Circuit, distinguished members of the federal bench and bar, members of the Supreme Court of Puerto Rico, Professor Guillermo Baralt, and friends all:

It is always a pleasure to be among the good friends who administer justice with such distinction and honor in this courthouse named for the first Puerto Rican to serve as a United States District Judge for the District of Puerto Rico, Clemente Ruiz Nazario, and in the immediate vicinity of another federal building, named for the statesman Federico Degetau González, Puerto Rico's first Resident Commissioner in Washington and, as far as I have been able to determine, the first Puerto Rican member of the Bar of this District Court.

It is a particular pleasure to be with you on this memorable occasion, at the announcement and dedication of the first book-length history of Puerto Rico's federal court.

This ceremony prompts me to reflect briefly on the splendid publication we celebrate today; on the Court whose history we commemorate; and on the historiography of Puerto Rico—the way Puerto Rico's history has been studied and written. It also permits me to re-visit some themes familiar to students of that history.

Reflecting from time to time on Puerto Rico's history, which has interested me since my boyhood so far away, I am frequently drawn back to thoughts about colonialism generally, about the common experience of all colonial peoples, and especially their shared (and understandable)

sense of humiliation, marginalization and subordination. Among other things, I have worried that the aggrievement of colonial peoples might, without special attention and care, tend to distort their understanding and appreciation of their own history.

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Of all the “inferior courts” of the United States—that is, the federal courts below the Supreme Court—none has a more complex and interesting cultural and political setting, or is the product of more dramatic historical circumstances, than the United States District Court for the District of Puerto Rico.

Organized in the aftermath of the United States’s brief and successful war of 1898 with Spain as a U.S. legislative or territorial court in a Spanish-speaking land, the Court was implanted in the soil of a territory whose people generally had welcomed the arrival of United States forces.

The Court at first reflected the island’s own subordinate status within the American constitutional system. Through most of the first half of the twentieth century, the single U.S. District Judge in Puerto Rico, and the governor who likewise was appointed by the President of the United States, were the embodiment of United States authority—the embodiment of United States law—in a colonial setting.

By the middle of the Twentieth Century the District Court had been transformed, in line with Puerto Rico’s strides toward democratic home rule under the U.S. Constitution.

This transformation occurred as a result of several developments, including the establishment of the Commonwealth of Puerto Rico in 1952. This broader movement toward local self-government brought in its wake the appointment of Puerto Ricans to the federal bench

of the island in the 1950s, and the following decade saw the full incorporation of the Court into the national judicial system organized under Article III of the Constitution.

By the late 1960s the District Court had become a federal court like any other in the American judicial system, and one that fully reflected the democratically-articulated aspiration of the island's people that Puerto Rico enjoy a permanent place within the American constitutional system.

Professor Guillermo Baralt, one of Puerto Rico's most accomplished historians and biographers, has written a remarkable history of a remarkable federal court, providing an account of the Court's first century as part of the broader panorama of Puerto Rico's spirited and democratic political culture. Unlike most of the published histories of the lower federal courts in the mainland United States, this is a history also of the territory in which the Court sits, and one that places its subject firmly in its vivid cultural and political context.

You do not have to agree with Professor Baralt's every portrayal of significant events in Puerto Rico in the Twentieth Century, or with every judicial act of this Court, to appreciate that the author's goal is to present an objective and balanced history of the U.S. District Court of Puerto Rico. Understandably, it will confirm many unhappy aspects of United States colonial rule in the first half of the past century. But I think it will also dispel some historical myths about the role of the United States in Puerto Rico, including some about this Court.

Misperceptions often survive, here and elsewhere, largely by the force of repetition and by the scarcity of serious work on a subject. The publication of this book is, therefore, not only a landmark in the history of the judiciary of the United States; it is also a landmark in the historiography of Puerto Rico.

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Allow me to turn, briefly, to what I believe is one widespread misperception of the history of Puerto Rico in the Twentieth Century, and of the history of this Court in particular—that the Court has been an instrument for the coercive Americanization of Puerto Rico.

Since the beginning of the Twentieth Century some of Puerto Rico's numerous lawyer intellectuals have adopted an adversarial stance toward the federal court of Puerto Rico. Almost invariably these lawyer intellectuals have been advocates of national independence or certain forms of political autonomy without obvious precedent in the American constitutional order.

This adversarial stance, I submit, is perfectly understandable, appropriate and principled, though its political sources and political motivations should be clearly understood and firmly underlined.

Defenders of Puerto Rico's permanent place in the American system, and defenders of the administration of justice by this Court, should not be surprised by this adversarial stance. After all, if you envisage a Puerto Rico not governed under the Constitution and laws of the United States you should not be expected to look with favor on the administration of justice by a court whose very existence and core function is to apply the laws of the United States.

But if you believe, or claim to believe, in a permanent place for Puerto Rico under the American flag and under the United States Constitution, you should concede happily that this Court's place in the scheme of things is appropriate, necessary and legitimate.

In the legal sector of Puerto Rico's lively intellectual life the term *transculturación* (in English, "transculturation") came into vogue about thirty years ago. Only in recent years has there been any sign of recognition that this term has generally been inadequately explained, if at all.

Usually, the term *transculturación* has been left undefined, or it has been explained by reliance on the definition offered by the dictionary of the Royal Academy of the Spanish Language as "the reception by one people or social group of the cultural norms of another, which more or less substitute for one's own."

The use of the term *transculturation* by the legal intelligentsia of a dependent territory, fortified by the misunderstanding of the word by the Royal Academy of the former colonial power, is apparently meant to suggest a destructive clash of two legal cultures, and more: it is meant to suggest a coercive dominance of one legal culture over another.

So it is, for example, that this Court, it has been argued, is an instrument for the imposition of United States culture—or, at least, the United States's legal culture—on the powerless people of Puerto Rico.

In a sense, this school of jurisprudence, if we may call it that, is merely part of a larger cultural perspective—one which cultivates the idea of the enervation, the passivity or (in the adjective made locally famous by the writer René Marqués) the *docility* of the Puerto Rican in the face of American political and cultural influence.

In this view, it seems to me, the Puerto Rican tends to be regarded as an unsuspecting or apathetic soul who is destined, in the absence of dramatic or revolutionary resistance arising from a source unknown, to be a victim forever.

I believe that this home-grown idea of the Puerto Rican as victim gained strength in the late Twentieth Century, partly (and ironically) as a result of *American* cultural influence here, especially the elevation to iconic status in American culture of concepts of victimization and victimhood.

This view of Puerto Rico and its history is, I think, unduly harsh, and unduly dark. It tends to discredit the creativity, the possibilities, the accomplishments and the yearnings of the people of Puerto Rico. And it tends to discredit the profoundly democratic political culture of Puerto Rico.

This perspective, in my view, tends to reject the possibility of Puerto Rican accomplishment. It tends to denigrate the possibility—or the living reality—of Puerto Rican vitality and Puerto Rican heroism. It departs from the premise that Puerto Ricans are passive, and uncreative, participants in the evolution of their own culture and in the shaping of their historical destiny.

Narrowing our focus again to the term and concept of “transculturation,” I submit that this term of art has been largely misused in Puerto Rico’s intellectual and political discourse.

First of all, the word “transculturation” is not at all home grown. This term of art originated elsewhere and it has been given a special, and different, meaning here.

Although few commentators seem to have noted it, Puerto Rican works that describe the federal court as an agent of transculturation—including works by law professors, practitioners and eminent judges—generally show little awareness of the origins and significance of the term “transculturation.” This somewhat fancy term originated in the field of historical anthropology

and generally has been used here in a way totally at odds with its origins, its meaning and its intended usage.

The word “transculturation,” first and most significantly, appears in the work of the great Cuban historical anthropologist Fernando Ortiz. The book in which the term “transculturation” made its debut is Ortiz’s classic work of 1940, entitled *Contrapunteo Cubano del Tabaco y El Azúcar*. In English, it is *Cuban Counterpoint: Tobacco and Sugar*.

It is relevant, I think, that the author of this great and creative work of historical anthropology (or, as some say, historical *sociology*) was fully familiar with the law and how the law reflects a culture and simultaneously shapes a culture. Fernando Ortiz was not only a Spanish-trained lawyer, but also a revered professor of law at the University of Havana.

The significance of Fernando Ortiz’s work, and his invention of this new word *transculturación*, is reflected in the fact that the introduction to the first edition of 1940 was written by no less a world figure than the great Polish social anthropologist Bronislaw Malinowski, then at Yale University.

At the instant of its publication, Malinowski declares *Contrapunteo Cubano* a masterpiece—to be exact, “a masterpiece of historical and sociological investigation.” Malinowski handsomely acknowledges Fernando Ortiz’s brilliance, insight and originality in inventing this new word, this new *concept*, “to replace various expressions in use such as ‘cultural exchange,’ ‘acculturation,’ ‘diffusion,’ ‘migration or osmosis of culture,’ and similar ones” that Ortiz (and Malinowski) considered linguistically inadequate.

The explanations of “transculturation” by Fernando Ortiz (and by Bronislaw Malinowski) make it clear that this elegant academic term, as appropriated in Puerto Rico (usually without much explanation), has frequently been misunderstood or misapplied.

I quote from Malinowski:

“Every change of culture, or, as I shall say from now on, every transculturation, is a process in which something is always given in return for what one receives, a system of give and take. It is a process in which both parts of the equation are modified, a process from which a new reality emerges, transformed and complex, a reality that is not a mechanical agglomeration of traits, nor even a mosaic, but a new phenomenon, original and independent. To describe this process the word trans-culturation, stemming from Latin roots, provides us with a term that does not contain the implication of one certain culture toward which the other must tend, but an exchange between two cultures, both of them active, both contributing their share, and both cooperating to bring about a new reality of civilization.”

For example, one point made by Fernando Ortiz, and underscored by Malinowski, is that the Spaniards who migrated to Cuba did not bring with them “their Spanish culture in its totality, complete and intact.” However, century after century there was an exchange of cultures on that sister island with every wave of migration and every interaction among peoples.

The same, of course, can be said of Puerto Rico’s own rich history.

The transformation of cultures, as Malinowski’s own work in Africa and the Pacific revealed, “cannot be conceived as the complete acceptance of a given culture by one ‘acculturated’ group.”

The vision of Cuba in the work of Fernando Ortiz is optimistic and proud. Ortiz rejected the idea that in Cuba's contacts with various cultures of the Old World, the New World, and Africa, Cubans were merely passive recipients of the standards or prescriptions of other cultures.

Indeed, the very reason that Fernando Ortiz invented the word "transculturation," and why Malinowski celebrated him for doing so, was precisely the inadequacy of terms like "acculturation," which (Ortiz and Malinowski believed) clearly implied a moral or political hierarchy and the subordination of one culture to another.

Transculturation properly understood describes a dynamic process—a process of cultural interaction in which cultures necessarily and understandably influence each other: in sum, a cultural two-way street—and, more than that, a fertile cultural encounter, with fruitful results.

It is noteworthy, for example, that Fernando Ortiz, in conversations with Malinowski in the late 1930s, did not reject or express hostility to American cultural or educational influence in Latin America. Quite to the contrary. Fernando Ortiz lamented that American institutions of higher learning could be found in Istanbul, Cairo, China, Beirut and Damascus and the Pacific but not, alas, in Latin America.

Of course, in this respect, there was an oversight here on the part of Fernando Ortiz, because by 1903 the new American colonial government of Puerto Rico had founded Puerto Rico's first institution of higher learning, the University of Puerto Rico. The existence and development of the University of Puerto Rico over the next century reveal in full measure the very process of "transculturation" Ortiz describes. For that institution was (and is) modeled on American state universities; it was (and is) financed substantially by funds appropriated by the Congress of the United States.

But it is a university built and made great by Puerto Ricans.

Whether some of its denizens believe it or not, the University of Puerto Rico is not merely an altogether Puerto Rican university; it is also an altogether American university.

As Fernando Ortiz wrote, “the result of every union of cultures is similar to that of the reproductive process between individuals: the offspring always has something of both parents but is always different from each of them.” In the formulation of Malinowski, “in every phase or phenomenon of transculturation, the influences and understanding [are] mutual, as [are] the benefits.”

So, in a sense, it can be said that those who have adopted a principled stance in opposition to Puerto Rico’s place in the constitutional order of the United States, and in opposition to the role of the federal courts in the life of Puerto Rico, have indeed understood the general story line here, or at least part of the story line—even if some misunderstood or misapplied the concept of *transculturación*.

Yes, it is true that the history of this Court is the history of the application of United States law.

Yes, it is true that in applying United States law and American legal concepts, this Court necessarily played, and plays, a role in the “Americanization” of Puerto Rico.

And yes, it is true that the Court, over time, has been fully integrated into the judicial system established under Article III of the United States Constitution.

All of this is true—obviously true and indisputably true.

But it is likewise true that when this Court exercises its jurisdiction over cases on the basis of diversity of citizenship—which it does so often when one litigant is from Puerto Rico, and another hails from another part of the United States, and the case does not involve federal law—the Court is required to apply the domestic law of Puerto Rico.

And it is likewise true that the judges who every day apply the laws of Puerto Rico in this courthouse, as well as federal law, are Puerto Ricans. And so, by and large, are the clerks, the marshals, and the probation officers who work closely with them.

This, I submit, is nothing more and nothing less than the *Puerto Ricanization* of an American judicial institution.

If you will permit an observation by this distant, but sympathetic and not totally alien, observer: to borrow an expression from Puerto Rico's political history, I would conclude that this Court's Puerto Rican character is *neto, completo y auténtico*.

As I have noted on an earlier occasion, the political connection to the United States requires the application of American law, and the application of American law requires a United States district court.

It cannot be denied that this Court exists—here and now and permanently—so long as the people of Puerto Rico, in the exercise of their democratic rights and aspirations, approve the permanence of Puerto Rico's place in the American constitutional system.

So, yes: what we have in the history of this Court, as Professor Baralt's history suggests, is *not* an example of Puerto Rican passivity, subservience or docility; it is *not* an example of Puerto Rican inertness and ineffectiveness.

We do not have to agree, I repeat, with this judge or that judge, or with the result of this case or that case, to understand that we have in the history of this Court a creative encounter of two legal cultures.

What we have here is indeed *transculturación*—*transculturación* as understood by the great Cuban scholar who coined the word: a process in which something has indeed been given in return for what one has received, “a system of give and take”—not an undesirable, or an undesired or an overbearing clash between legal cultures.

Our thanks go to Prof. Guillermo Baralt for his revealing and important historical portrait of this significant American institution—one that is certainly of Puerto Ricans, by Puerto Ricans, and for Puerto Ricans.

Thank you.