

2-25-2013

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Recommended Citation

Christian G. Fritz, *The Perils and Promise of Teaching Margaret Montoya's Máscaras Article in the First Year Law School Curriculum*, *Harvard Journal of Law and Gender* 1 (2013).

Available at: https://digitalrepository.unm.edu/law_facultyscholarship/628

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The Perils and Promise of Teaching Margaret Montoya's *Máscaras* Article in the First Year Law School Curriculum

Christian G. Fritz*

A Reflection on Margaret Montoya, *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L. J. 185 (1994), 15 CHICANO-LATINO L. REV. 1 (1994)

Margaret Montoya's article *Máscaras, Trenzas y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*¹ is rightly considered an icon in the literature of Critical Race Theory. Twenty years after its publication it continues to offer insights and serves as a quintessential example of the power of personal narrative to decode embedded assumptions and structural features of law. Montoya's article is built, in part, on John Noonan's insight, in *Persons and Masks of the Law* (1976), about the tendency of legal discourse to obscure or mask the humanity that underlies all case law.² While Noonan looked at the more generic "masking" tendencies of the law, Montoya connected that process with the more specific project of "racing" the law through a mediation of her experience as a Latina first year law student at Harvard. The result was a powerful piece that has ongoing relevance to the jurisprudential theories seeking to describe and better understand the interior connections of race and law. At the same time the article provides a critique that predictably

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¹ Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L. J. 185 (1994), 15 CHICANO-LATINO L. REV. 1 (1994).

² John T. Noonan, Jr., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* 6–9 (1976). Noonan's insistence on the importance of taking into account the inevitable "back story" of appellate cases—the daily diet of first year law students—was poignantly underscored by Professor Montoya's experience with her criminal law class discussion of the tragic circumstances that led to the manslaughter prosecution of Josephine Chavez. See Montoya, *supra* note 1, at 201–06, 18–23.

raises the hackles of readers who are unfamiliar with or who might discount some of the basic premises of Critical Race Theory.

I suspect that most of the readers of the *Máscaras* article—particularly those teaching in law schools and who assign the *Máscaras* article to their students—do so in the context of a second or third year elective course or seminar. As such, the law students who encounter the article are invariably a self-selected group composed of people who have an interest in, or at least have some intellectual curiosity about, the implications of race and the law. In many cases they may well already be persuaded by the literature of which *Máscaras* forms a part. A different audience for the article—a tougher crowd perhaps—would be composed of first year students reading the piece as part of a mandatory course. In this comment, I share my experience in teaching the *Máscaras* article to every entering class of the University of New Mexico law school since 2005—aided by the article’s author, Margaret Montoya. That experience highlights the challenges of introducing Professor Montoya’s article to first year law students, but also suggests the value and powerful force of sharing *Máscaras* with students at the start of their legal career.

First, some background is needed to place in context the experience of teaching *Máscaras* and the viability of doing so as part of the first year law school curriculum. In 1987 the faculty of the University of New Mexico law school decided to introduce a required component of legal history into the Fall semester of its first year curriculum and hired me to develop such a course. Initially entitled “Historical Introduction to Law,” the course and the materials developed for it reflected the title: an initial exposure to the historical context of the common law. Gradually, however, the focus of the course evolved and by Fall 2005, when the *Máscaras* article was first added to the course materials, the course had been renamed “Comparative and Historical Legal Perspectives” (CHLP). In this iteration, and continuing up to the present, CHLP has the objective of helping the entering class develop effectiveness and proficiency as law students and ultimately lawyers. A dual approach is used to advance this intensely practical objective of CHLP notwithstanding the use of readings that inevitably strike the students as very different from the sources being used to learn the “law” in their other first year classes.

The first approach is to help students develop an appreciation of the intrinsic nature, characteristics, and particularities of the common law tradition—what might be called the development of a “legal cultural competency” in that legal tradition. American law students are invariably told that the principal objective of their training and education is to be able “to think like a lawyer.” While this platitude has an element of truth, it is, of course, not strictly accurate and begs a corrective. The statement should be

modified to assert that American law students need “to think like a (common law) lawyer.” A reminder that the legal system students are being trained to enter is derived from a particular legal tradition underscores the easily overlooked fact that there are significantly different understandings of the nature of “law” and the role that lawyers and judges play within a host of other cultures and legal traditions. For law students, acquiring the capacity to “think like a lawyer” in the common law tradition is akin to developing fluency in a new and complex language. The ability to communicate effectively and persuasively rests on a mastery of vocabulary, grammar, syntax as well as an appreciation of subtleties of pronunciation, context, dialects, and specialized argot. CHLP challenges students to immerse themselves and develop a sophisticated understanding of the conventions and byways of particular legal culture within which American lawyers and judges operate. Acquiring such a “legal cultural competence,” it is asserted, is crucial to the effectiveness of would-be practitioners within the American legal tradition.

The second approach in helping students develop into effective legal practitioners involves instilling a critical and self-conscious approach to the study and understanding of law. Such a critical perspective is needed to resist the tendency of students to take what they are encountering for granted, as something that is inevitable and inexorable. I offer the metaphor that first year law students (under the conventional pedagogy followed by American law schools) are dropped into an ocean of “law” where they quickly encounter a bewildering array of strange denizens in that watery legal world and in which they are largely left to their own devices to navigate and understand. Notwithstanding the fact that as sentient creatures law students *know* they have been dropped in this ocean, there is a strong tendency to lose sight of this fact and begin to take the process of legal education and the content of law for granted and at face value. Much like the air we breathe, the legal “water” that surrounds first year law students can easily become invisible to their eyes. CHLP challenges students to become “flying fish” who rise above the legal sea they find themselves in and attain a critical perspective from which they are encouraged to ask *what* they are doing in their other first year classes, *how* they are doing it, and *why* they are doing it. In addition to becoming critical consumers of their legal education, students are urged to embrace the central insight and legacy of legal realism: that legal rules and doctrines are not inevitable, that law rests on underlying and often implicit assumptions, reflects particular values, and ultimately is a construct that is shaped, not something that is inexorably or neutrally developed. Developing a self-critical mindset in their approach to studying law is the essence of the call for first year law students to strive to become “flying fish.”

CHLP seeks to advance these dual approaches in five interrelated units of readings. The first unit provides an overview of the common law and civil law tradition and starts with three appellate judicial opinions drawn from the highest civil court in France, the highest civil court in Germany, and from the Michigan Supreme Court. All three courts address an identical issue (the applicability of the principle of joint and several liability in the context of a tort suit) and each reaches the same result in applying the principle. Even so, the form of the judicial opinions varies widely. Considering the judicial opinions as “artifacts” of the legal systems that produced them—the first two from the civil law tradition and the last from the common law tradition—offers dramatic contrasts in terms of length, sources of law relied upon, and the nature of judicial persona and argumentation. Differences in the shape of the opinions invite an exploration of how the history and nature of the civil law tradition helps account for the shape of the French and German opinions. Although the first unit serves to introduce students to the civil law tradition, the purpose of the comparative approach is to highlight features of the Michigan decision that are characteristic of the common law approach to judicial law-making and that students might otherwise take for granted. The Michigan case serves as a typical example of the appellate opinions that form the staple of what students are reading for their other classes, but allows them to reflect upon how the American opinion suggests a different world-view of the nature of law and the legitimate sources of law.

The second CHLP unit turns to selected aspects of the history of the common law tradition, including the unification of law in England through the rise of the royal or central courts operating under the writ system and the emergence of the court of Chancery, along with the legacy of the law/equity distinction and the ultimate procedural “merger” of law and equity. The readings dealing with medieval English legal developments and American law reform in the 19th century do not pretend to offer an overview of English and American legal history. Rather, they serve as a means through which students can identify contributing factors that have shaped the common law tradition and imparted it with particular characteristics and features. The comparison of the three judicial opinions that open the class continue to provide benefits as students are able to identify further parallels between the Michigan opinion and the appellate opinions they are studying in criminal law, torts, and contracts.

CHLP’s unit three is entitled, “The Role of Law and Lawyers” and shifts gears by introducing some “non-Western” concepts of law, including dimensions of Chthonic legal traditions and Navajo justice concepts. The unit offers the opportunity to contrast the common law and civil law traditions with other cultural contexts in which the meaning of “law” and

the role of lawyers—if any—is rather different from what lawyers within either common law or civil law tradition would take for granted. This third unit also explores expectations about law and lawyers in the American common law tradition, the contours of an ideology of advocacy, and the broad trends in the rise of “Alternative Dispute Resolution.” Inevitably, cultural understandings about the nature of “law” not only shape the potential role for lawyers, but have implications for how law is taught.

Unit four turns to the question that many first semester law students tend to ask themselves at this point: where did the pedagogy for the legal education they are experiencing come from? The unit permits a brief exploration of the arc of legal education from a practical, apprentice-based approach, exemplified by training in the Inns of Court and by “reading law,” to a combination of academic study and apprenticeships to Christopher Columbus Langdell’s concept of law as a “science.” Exploring the rise of the modern law school in terms of the study of law introduced with Langdell’s deanship at Harvard Law School in 1870 helps satisfy the curiosity of students about the birth of the “socratic method.” At the same time, that story permits an introduction of a jurisprudential perspective of American law by exploring the premises, methods, and purposes of Langdell’s legal education. The philosophy and understanding of law that underlay Langdell’s 19th century “revolution” in legal education set the stage for the ultimate rejection of “Langdellism” in the critiques of the Legal Realists.

The final unit of the course, entitled “Changing Perceptions of Law in America,” traces the emergence of the Legal Realists and some of their intellectual heirs including the Critical Legal Studies movement, Feminist Jurisprudence, and Critical Race Theory. Rather than an abstract discussion of some of the schools of post-realist jurisprudential thought, the final unit explores this thought through narratives focusing on accounts of the first year law school experience and their significance for understanding the nature of law. Prior to 2005, CHLP featured Duncan Kennedy’s critique of law school as training for hierarchy as well as Ann Scales’ feminist critique of legal education.³ After 2005, Margaret Montoya’s *Máscaras* was added to round out three very personal, but different takes on legal education and in particular each author’s reflection on the law school experience at Harvard. The materials in the final unit inevitably trigger strong reactions among the students, particularly as they respond to the experiences

³ Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW*, 40 (David Kairys, ed., 1982) (critiquing the law school curriculum); Ann C. Scales, *Surviving Legal De-Education: An Outsider’s Guide*, 15 *VERMONT L. REV.* 139 (1990) (providing a feminist perspective on the law school curriculum and suggestions on how to get more out of legal education).

characterized by the authors in the light of their own experience and reactions to their first semester of law school. The presentation of Professor Montoya's *Máscaras* article in this context has proved challenging, but it has also provided evidence of the promise of generating candid classroom discussion by first year law students on difficult questions raised by race and the law.

From the time the *Máscaras* article was included in the course materials, Professor Montoya has routinely given a guest lecture on the ideas raised in *Máscaras*. Her presentation and the *Máscaras* article—along with the Kennedy and Scales pieces—has triggered both positive and negative reactions. Invariably some students express their gratitude for finally hearing “their voice” and experiences echoed in the *Máscaras* article, while others sometimes react skeptically and at times dismissively. The tendency of some students, particularly white males, to react defensively to the themes in *Máscaras* and thus to stifle an open consideration of its ideas has lessened over time. Part of that tendency I attribute to a clearer articulation of how the *Máscaras* article relates to CHLP's objective of developing among students a self-critical perspective of law and legal education. While to some individuals the themes of *Máscaras* is like “singing to the choir,” there has been a discernable shift in the willingness of potential skeptics of its message to give it serious consideration after emphasizing its place in the enterprise of maintaining a self-critical perceptive about law and the legal system. The final unit—including the *Máscaras* article—has worked better over the years after I began challenging any member of the class to deny that they were not in a real sense “post-Langdellians.” In other words, virtually no students at this stage of the course are apt to express the view that law is inexorable, simply destined to be and inherently neutral in nature. And I point out that if that is not the case, then all of them have to be willing to concede the need to examine *what* has shaped law and the legal system. The forces potentially shaping law are manifold, including power, class, economics, gender, and race, among a wealth of other things. If students are forced to acknowledge the need to think about law in that wider critical context, there is a greater potential for *Máscaras* to be seen as introducing the dimension of race and gender as part of the development of a critical perspective rather than as a political manifesto that speaks to a like-minded subset. It is within this analytical framework (along with the fact that the entire first year class is part of the discussion) that *Máscaras* has enormous potential to contribute to legal education.

At the same time, because *Máscaras* is discussed in a session involving the entire entering class of around 115 students, the dynamics of personal vulnerability and risk work against meaningful and candid

discourse. Each time Professor Montoya has given her joint lecture, we have tried to think of ways to encourage a more open and fruitful discussion. In the past, Professor Montoya has given her presentation (sometimes using a power point presentation that was subsequently shared with the class) prefaced with an invitation to ask questions during and after the presentation. In addition, we have invited students who might have a particular interest in the ideas of *Máscaras* to raise questions ahead of time or meet with Professor Montoya before the presentation. While these approaches were useful, they never generated the type of discussion we both really hoped for—until, that is, Fall 2012.

At the end of last year, Professor Montoya and I met with a half dozen students before the joint session to discuss *Máscaras* in anticipation of those students serving as a volunteer panel that might help stimulate class discussion. At that preliminary meeting someone posed the question, “How might or could white males participate in discussing *Máscaras* without themselves feeling silenced?” The underlying assumption was that the intent of the article was not to silence white males and turn the tables on them after years of being the dominant voice in the legal dialogue. That question prompted a useful discussion about how hard and difficult the questions raised by *Máscaras* were to discuss—particularly in a large classroom with students speaking in front of all their peers.

What transformed this year’s presentation on *Máscaras*, however, was what Professor Montoya did in class—essentially throwing away the script of her traditional lecture presentation. Instead of describing the ideas in the article, she asked the panel members for their personal reactions to *Máscaras*. After a few of the panelists spoke, hands started raising in the class. What ensued thereafter was a remarkable fifty-minute discussion in which several dozens of students proved willing to express views and experiences that took considerable personal courage. What underlay the occasion was the tone set by Professor Montoya, who underscored the emotional risks that make discussions of race so difficult. Her moderation of the discussion was a tour de force that included a gentle but firm corrective to one female student of color who expressed skepticism towards a white male who declared himself to feel vulnerable during these kinds of discussions. “When someone says they feel vulnerable and at risk,” Professor Montoya said, “we need to take that concern seriously.” Recognizing the feelings of vulnerability and acknowledging how hard it was to share honest feelings in such a context encouraged an unprecedented amount of student discussion. Numerous students prefaced their comments with, “I’m going to be hated for saying this...” The poignancy and authenticity of the conversation prompted one first-year law student to exclaim toward the end of the session, “These are the kinds of conversations

we should have been having from the start of the semester!” True enough, I had to agree, but all in all, the discussion led by Professor Montoya was one of the most remarkable conversations I have witnessed in the formal law school classroom setting. For hours after the class was over, students continued the discussion in the Forum outside the lecture hall, with intense conversations among students who normally did not talk to one another.

This extraordinary exchange prompted by the reading of *Máscaras* could be attributed to the fact that it was Margaret Montoya who led the discussion of her article. However, while Professor Montoya was a truly impressive presence in the class room that day, I believe that a consideration of *Máscaras* has the potential to stimulate similar conversations in other law schools even without her physical presence. Placing *Máscaras* squarely in the context of challenging students to engage in a critical analysis of law and their legal education, as well as frankly acknowledging how hard it is to talk about race honestly, would seem to be a good prescription for encouraging such discussions. The article has a relevance that goes far beyond the literature of Critical Race Theory. In the end, *Máscaras* has remarkable potential as a catalyst for discussing important questions about the nature of law in America.