

# The Spanish Craze in American Comparative Law and the Formation of Mixed Legal Systems in Puerto Rico and the Philippines, 1898-1918

Seth S. Brostoff\*

*The formation of mixed legal systems in Puerto Rico and the Philippines during the period 1898-1918 coincided with the emergence of American comparative law as an organized discipline. This Article explores the importance of the acquisition of overseas possessions as catalysts for early legal comparison, while recreating the comparative law milieu in which legal architects of the new mixed systems, especially U.S.-appointed territorial judges, operated. This Article argues that nineteenth-century trends in English legal history, as well as the American bar's growing anxiety about the common law's lack of organization and future viability, provided a historical-comparative basis for the judges' widespread receptivity to legal blending and assumptions of increasing civil law/common law compatibility. At the same time, belief in the common law's superiority does not seem as pervasive as later historians have suggested. This Article therefore argues that intellectual crosscurrents predating the immediate colonial context, rather than blanket legal chauvinism, better explain territorial judges' well-known indifference to the preservation of separate civilian spheres of private law during this critical formative period.*

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## I. INTRODUCTION

The Spanish-American War's role as a catalyst for early-twentieth century legal comparison has been little explored by historians of American comparative law.<sup>1</sup> The war ended with the transfer of Puerto Rico and the Philippines to the United States and the repeal of large portions of the islands' Spanish-era criminal law and codes of civil and criminal procedure.<sup>2</sup> However, Congress mandated the retention of Spanish private law, and the Spanish Civil Code of 1889 (governing family law, obligations, property, and inheritance) remained largely intact in both territories.<sup>3</sup> The juxtaposition of civilian and Anglo-American legal cultures in the new insular possessions soon came to define the agenda of the nascent comparative law movement in the United States.

This Article discusses the impact of the new legal encounters on American comparative thought, starting with the transfer of sovereignty in 1898 and continuing throughout the early years of the Comparative Law

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1. See, e.g., David S. Clark, *The Modern Development of American Comparative Law: 1904-1945*, 55 AM. J. COMP. L. 587 (2007) (discussing importance of European legal systems to American comparatists during formative years of Comparative Law Bureau). Compare John W. Cairns, *Development of Comparative Law in Great Britain*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 132, 134-42 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2012) (emphasizing role of imperial expansion as catalyst for British comparative law studies); see also W. Hug, *The History of Comparative Law*, 45 HARV. L. REV. 1027, 1064-66 (discussing the importance of overseas commerce for British comparative law).

2. See generally MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY chs. 6-7 (Vernon Valentine Palmer ed., 2d ed. 2012) [hereinafter MIXED JURISDICTIONS] (chapters on Puerto Rico and Philippines); Manuel Rodríguez Ramos, *Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico*, 23 TUL. L. REV. 1 (1948) (discussing early legal history of Puerto Rico); WAYNE D. BRAY, *THE COMMON LAW ZONE IN PANAMA: A CASE STUDY IN RECEPTION* (1977) (discussing the mixed legal system in the Panama Canal Zone during the 1904-1933 period).

3. There is some debate about the degree of revision during the early years. In the late 1970s, José Trías Monge claimed that the civil code "suffered significant modification." JOSÉ TRÍAS MONGE, *EL SISTEMA JUDICIAL DE PUERTO RICO* 67 (1978). But contemporaries appear to have thought that the code survived mostly intact. See, e.g., *Vélez v. Llavina*, 18 D.P.R. 634, 638 (1912) (de Aldrey, J.) ("As a result of these powers the Legislative Assembly of Porto Rico in 1902 passed, and the Governor of the Island approved, the Revised Civil Code which, barring a few modifications, was substantially the Spanish Civil Code . . .") (applying 1902 revised code to tort case); M. Gamboa, *The Meeting of the Roman Law and the Common Law in the Philippines*, 49 PHIL. L.J. 305 (1974) ("The Civil Code has been amended but very slightly.") (discussing pre-1950 Filipino code).

Bureau, 1907-1918. For two decades, Spanish law, Spanish legal history, and, later, Latin American legal systems, were primary objects of interest for American comparatists, who far from being academic specialists, often had practical experience with Spanish civil law as federally-appointed judges in Manila and San Juan.

Comparative law research from this period as well as judicial opinions from the insular courts reveal much about the comparatist milieu in which American judges operated. Perhaps surprisingly, the contemporary intellectual climate privileged the “scientific” civilian tradition over the “primitive” common law, while simultaneously (and somewhat contradictorily) anticipating the two legal traditions’ gradual assimilation.

The role of nineteenth-century trends in English legal history in shaping paradigms of civil law/common law compatibility was significant. During the preceding century, the British legal historian Sir Henry Maine had proposed that, as the common law developed, it would look increasingly similar to Roman law, ending in its codification, while Frederic Maitland’s emphasis on the Roman influence on medieval English law brought into focus earlier periods of common law borrowing from the Continent.<sup>4</sup> Meanwhile, the comparative jurist James Bryce predicted the global convergence of civil law and common law, a historical conclusion that fit comfortably with contemporary European comparatists’ aspirations for unification of law.<sup>5</sup>

Theories of legal development involving common law borrowing from civilian models were of special interest to American comparatists during this period. Throughout the second half of the nineteenth century, American lawyers had expressed increasing anxiety about the common law’s future viability, citing judge-made law’s perceived lack of uniformity and predictability. Some law reformers looked to foreign systems for solutions, and many were genuinely receptive to proposals for Roman-style codification. This may explain why, for a small coterie of

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4. See *infra* Part V; see also PETER STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* 86-88 (1980) (discussing Maine’s theory of English-Roman legal convergence); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* ch. V (1895) (discussing the Romanization of English law during the medieval period).

5. See 1 JAMES BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 72-123 (1901) (discussing the historical relationship of Roman and English law); see also K. ZWIGERT & H. KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 59-62 (T. Weir trans., 3d ed. 1998) (discussing early 20th century comparative law movement and its support for unification of European private law).

early comparatists, Spanish civil law, and its Civil Code, represented an attractive, albeit unexpected, development model.

For similar reasons, American comparative lawyers saw in Maine and Bryce's theories of legal development explanations for the ongoing process of legal mixing in the evolving colonial contexts.<sup>6</sup> Drawing on Maine and other English lawyers, American judges in the insular possessions expressed admiration for the Spanish codes they found in force in their new courtrooms; following Bryce, they anticipated that legal blending in Puerto Rico and the Philippines was leading to superior, hybrid systems combining the "strongest elements" of both English and Roman law, while also concluding that the two systems were in fact substantially similar.<sup>7</sup> Comparative analysis during the period often remained superficial, and the tension between admiration for Spanish private law and aspirations for its assimilation with Anglo-American legal norms was usually left unexplored.

Reflecting on the formative years of legal mixing, historians in Puerto Rico and the Philippines have generally assumed that American lawyers were hostile to the civil law tradition.<sup>8</sup> Most notably, José Trías Monge argued that American judges in Puerto Rico invented various "fantasies" of comparative law that emphasized a false compatibility of legal traditions and exaggerated the virtues of legal blending (the "wise mix" or *la mezcla sabia*).<sup>9</sup> According to Trías Monge, these fantasies were disingenuous "techniques" invoked as justification for adopting common law rules in areas reserved for civil law. They formed part of a general

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6. See *infra* Parts IV, VII-VIII.

7. See, e.g., HANNIS TAYLOR, *THE SCIENCE OF JURISPRUDENCE* (1908). According to Taylor, Latin American and Louisiana law were examples of the "blending now going on between the *strongest elements* of Roman and English law." *Id.* at xv (emphasis added); see also Charles Sumner Lobingier, *Civil Law Rights Through Common-Law Remedies*, 20 JURID. REV. 97, 97 (1908) (articulating similar theory of superior, hybrid legal systems).

8. See, e.g., Carmelo Delgado Cintrón, *Derecho y Colonialismo: La Trayectoria Histórica del Derecho Puertorriqueño*, 49 REV. JUR. U.P.R. 133, 133-34 (1980) (arguing that American policy of legal transculturation was part of a larger "movement directed at changing, little by little, our Hispanic-Puerto Rican customs for North American ones."); Luis Muñoz-Argüelles, *Puerto Rico*, in MIXED JURISDICTIONS, *supra* note 2, at 392 (stating that Puerto Rico's mixed legal system was a product of a wider program to undermine Puerto Rican culture, language, and legal system); see also Pacifico A. Agabin, *Philippines: The Twentieth Century as the Common Law's Century*, in A STUDY OF MIXED LEGAL SYSTEMS: ENDANGERED, ENTRENCHED OR BLENDED 61, 64 (Sue Farran, Esin Örüçü & Seán Patrick Donlan eds., 2014) ("The Americans superimposed common-law principles of judicial process on the existing civil-law tradition . . .").

9. See JOSÉ TRÍAS MONGE, *EL CHOQUE DE DOS CULTURAS JURÍDICAS EN PUERTO RICO* 38-40 (1991) (describing "la Fantasía de la Identidad de Derechos" and "la Fantasía de la Mezcla Sabia").

policy of legal transculturation, and their repeated use severely undermined (or “contaminated”) Puerto Rican private law.<sup>10</sup>

This Article argues, however, that contempt for the civil law tradition was not as pervasive as Trías Monge and others have suggested, at least during the first decades. Moreover, comparative assumptions about civil law/common law compatibility and aspirations for future legal convergence were not invented primarily as jurisprudential “fig leaves” for naked legal colonialism. Rather, the comparative “fantasies” identified by Trías Monge found support in nineteenth-century insights into the nature of legal development, insights that enjoyed wide currency on both sides of the Atlantic.

Precisely because American judges in the insular possessions assumed that civil law and common law were blending globally, they were not alarmed by the blurring boundaries between Spanish law and American law in their own jurisdictions. Indeed, this Article will show that many of their beliefs about legal difference were related to their assumptions about legal evolution. These beliefs usually had a British intellectual genealogy that antedated America’s colonial expansion. Paradoxically, these beliefs were also constructed largely on the assumption that the civil law was the more “developed” partner in the ongoing fusion of legal systems. The consequences of these preexisting comparatist paradigms for the mixed systems were profound and included the gradual weakening of separate civilian spheres of private law in the insular possessions.

## II. THE SPANISH CRAZE IN AMERICAN COMPARATIVE LAW

Acquisition of new territories came at an auspicious time for legal scholars interested in Spain and Latin America. Hispanists have described the period 1890-1930 as the “Spanish Craze,” a moment in American cultural history of intense fascination with Spain’s history and literature.<sup>11</sup>

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10. See *id.* at 127-34 (discussing the effect of “five fantasies” on Puerto Rican private law); see also José Trías Monge, *El Choque de dos Culturas Puertorriqueñas*, 27 REV. JUR. U. INTER. P.R. 579, 580 (1993) (“Mucha de la jurisprudencia de las primeras cuatro décadas es una contaminada.”).

11. For a general introduction to the Spanish Craze, see Richard L. Kagan’s overview in *The Spanish Craze: The Discovery of Spanish Art and Culture in the United States*, in SPAIN IN AMERICA: THE ORIGINS OF HISPANISM IN THE UNITED STATES (Richard L. Kagan ed., 2002); see also Richard L. Kagan, *The Spanish Craze in the United States: Cultural Entitlement and the Appropriation of Spain’s Cultural Patrimony, ca. 1890-ca. 1930*, 36 REV. COMPLUTENSE DE HIST. DE AMÉRICA 37, 38 (2010) [hereinafter Kagan, *The Spanish Craze in the United States*] (“The term [Spanish Craze] refers to a particular era in US history when seemingly everything Spanish—art, music, language, literature, architecture, and more—was in vogue.”); Stephen G. Payne,

Throughout the period, wealthy Americans visited Spain in growing numbers, high school students created a brief “Spanish Boom” in foreign language enrollments, and artists and architects invoked Spanish themes in their creative work (the Spanish colonial revival style of Florida and Southern California being perhaps the most iconic example).<sup>12</sup> Ironically, victory over Spain did little to dampen the appetite for Spanish culture; indeed, many Americans viewed themselves as heirs to Spain’s imperial legacy and selectively appropriated aspects of Spanish history.<sup>13</sup> Throughout the period, American historians de-emphasized the centuries-old Black Legend that associated Spain with political despotism and Catholic bigotry.<sup>14</sup> Instead, American scholars focused on Spain’s contributions to the “civilizing” of the New World, beginning with the voyages of Columbus, whose 400th anniversary they celebrated in 1892.<sup>15</sup> Historians such as Herbert Bolton emphasized the shared colonial history of the United States and Spanish-America,<sup>16</sup> and Pan-Americanism’s

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*Introduction*, in STEPHEN G. PAYNE ET AL., *WHEN SPAIN FASCINATED AMERICA* 5 (2010) (“It is no exaggeration to claim that, during those years, Spanish culture fascinated the American public.”).

12. See, e.g., Kagan, *The Spanish Craze in the United States*, *supra* note 11, at 45-49 (discussing activities of American art collectors and increasing tourism numbers); H. Jay Siskin, *Of Booms and Gold Bricks: The First Crisis in Spanish Enrollments*, 95 *HISPANIA* 151, 155 (2012) (“Interest in Latin America and the teaching of Spanish spiked after 1898. . . . Between 1916 and 1918, Spanish enrollments in American colleges grew by 452%.”); David Gebhard, *The Spanish Colonial Revival in Southern California (1895-1930)*, 26 *J. SOC’Y ARCH. HIST.* 131, 136 (1967) (analyzing Spanish colonial revival’s relationship to Pan-Americanism and the opening of the Panama Canal).

13. See Kagan, *The Spanish Craze in the United States*, *supra* note 11, at 52 (“In fact, the structural causes and consequences of the War actually appear to have contributed to the strength and momentum of the ‘craze,’ partly because it served to focus new attention on Spain and its historic relation to the United States.”); see also Christopher Schmidt-Nowara, *Spanish Origins of American Empire: Hispanism, History, and Commemoration, 1898-1915*, 30 *INT’L HIST. REV.* 32 (2008).

14. See, e.g., BERNARD MOSES, *THE ESTABLISHMENT OF SPANISH RULE IN AMERICA: AN INTRODUCTION TO THE HISTORY AND POLITICS OF SPANISH AMERICA* 10-12 (1898) (rejecting earlier scholars’ argument that “religious intolerance” and “royal absolutism” were inherent to Spanish national character and sufficient historical explanation for Spain’s imperial decadence); see also Richard L. Kagan, *From Noah to Moses: The Genesis of Historical Scholarship on Spain in the United States*, in *SPAIN IN AMERICA*, *supra* note 11, at 26 (describing Bernard Moses and contemporary historians’ revision of Black Legend); HELEN DELPAR, *LOOKING SOUTH: THE EVOLUTION OF LATIN AMERICANIST SCHOLARSHIP IN THE UNITED STATES, 1850-1975*, at 34-42 (discussing similar changes in emphasis in Latin American studies).

15. See, e.g., Kagan, *The Spanish Craze in the United States*, *supra* note 11, at 37-38.

16. See Herbert Bolton, *The Epic of Greater America*, 38 *AM. HIST. REV.* 448, 470-73 (1933) (emphasizing the Americas’ “larger historical unities and interrelations” and speculating about future convergence); see also Charles Gibson & Benjamin Keen, *Trends of United States Studies in Latin America*, 62 *AM. HIST. REV.* 855, 860 (1957) (discussing Bolton’s “doctrine of hemispheric homogeneity”).

focus on hemispheric convergence, including unification of law, suggested further opportunities for intellectual and cultural exchange.<sup>17</sup>

The Spanish Craze in American comparative law should thus be seen in the context of this reawakened interest in “all things Spanish,” mediated by new contacts with the crumbling Spanish Empire. Comparatist awareness of Spanish private law was heightened by acquisition of new territories in Cuba, Puerto Rico, and the Philippines, as well as the translation of the Spanish Civil Code of 1889 by the American military lawyer Clifford Walton (assisted by Cuban exile Néstor Ponce de León).<sup>18</sup> The initial impact of the new encounters on American legal scholarship is evident already in a comparison of the first and second editions of William Wirt Howe’s popular collection of Storrs Lectures, *Studies in the Civil Law*.<sup>19</sup> In the first edition (1896), Howe had struggled to justify the study of civil law on more than antiquarian grounds. While praising Roman law as “a broad foundation for the full appreciation of our own laws” and a “perpetual fountain of juristic wisdom,” Howe was clearly conscious of Roman law’s precarious status as an academic discipline.<sup>20</sup> During the last half of the nineteenth century, civil law studies had become increasingly isolated from mainstream jurisprudence, and American lawyers had largely ceased to view Roman and civil law as potential sources for substantive legal borrowing.<sup>21</sup> The academic isolation of Roman law coincided with the emergence of comparative law, which found civilian systems valuable primarily for purposes of historical-comparative inquiry; acquisition of new “laboratories” of comparison in the insular possessions also contributed to the change in emphasis.

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17. See John Bassett Moore, *The Passion for Uniformity*, 62 U. PA. L. REV. 525, 532 (1914) (discussing Pan-American movement’s relationship to uniform law movement). Unification of commercial law was a regular agenda item at the Pan-American Conferences. See, e.g., A. Curtis Wilgus, *The Third International American Conference at Rio de Janeiro, 1906*, 12 HISP. AM. HIST. REV. 420, 424 (1932) (listing subject areas of interest at the 1906 Rio de Janeiro conference, including hemispheric unification of private law).

18. See THE SPANISH CIVIL CODE (Clifford S. Walton & Néstor Ponce de León trans., 1899).

19. W.W. HOWE, *STUDIES IN THE CIVIL LAW* (1st ed. 1896).

20. *Id.* at 6, 56.

21. See M.H. HOEFELICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY* ch. 4 (1997) (discussing the decline of Roman law as a source for Anglo-American law’s development during the period 1875-1920). According to Hoeflich: “Other than as comparative material, Roman and civil law were divorced, both in the academic curriculum and in the minds of most jurists, from modern legal concern.” *Id.* at 104; see also TIMOTHY G. KEARLEY, *LOST IN TRANSLATIONS: ROMAN LAW SCHOLARSHIP AND TRANSLATION IN EARLY TWENTIETH-CENTURY AMERICA* 79 (2018) (arguing that early-twentieth century Roman law scholarship was primarily motivated by interest in classical past and professional status rather than by practical utility).

The new context was not lost on Howe. In his second edition (1905) of *Studies*, Howe included numerous citations to Spanish code articles using Walton's recent translation, and he noted the importance of the new acquisitions for his own discipline:

And coming down still more closely to the practical uses of legal history and comparative study, the events of the last six years have greatly emphasized their value. We find ourselves confronted with new problems. Porto Rico, Cuba, and the Philippines contain some twelve millions of people whom we control, more or less, and whose laws and jurisprudence we must, to some extent, at least, understand. To understand them even fairly, we must go back at least to the Roman law, trace its principles through the early history of the Spanish Peninsula . . . .<sup>22</sup>

Elsewhere, Howe noted that new legal encounters had become catalysts for a wider shift in attitudes to the civil law tradition:

Times change and we change with them. A few years ago a large majority of lawyers in England and in our own country were in conscious or unconscious sympathy with the views of Blackstone, and thought of the civil law as something closely associated with arbitrary power in government and persecution in religion. . . . The events of the last six years have changed all that. It has suddenly occurred to us that Roman and civil law lie at the basis of social life not only in Louisiana but in Porto Rico, Cuba, and the Philippines, as well as in Lower Canada, Mexico, Central America, and South America.<sup>23</sup>

The connection of colonial expansion to disciplinary transformation was acknowledged by other scholars with an interest in Spanish law. Hannis Taylor, former U.S. minister to Spain as well as comparative legal historian, claimed that interest in Roman law had been "quickened" by new relations with Cuba, Puerto Rico, and the Philippines, while Yale law professor Charles Sherman noted that the prospect of legal employment in the conquered territories had given American law students a "tremendous impulse to the study of Roman and Spanish law in American law schools."<sup>24</sup> Assessing recent developments, William Smithers, a vocal advocate of the nascent comparative law movement, stated that the

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22. W.W. HOWE, *STUDIES IN THE CIVIL LAW* 10 (2d ed. 1905).

23. *Id.* at 131.

24. TAYLOR, *supra* note 7, at 47; *see also* 1 CHARLES PHINEAS SHERMAN, *ROMAN LAW IN THE MODERN WORLD* § 310 (1917) (making similar observations about the role of new possessions in the revival of interest in Roman law).



acquisition of new territories had undermined America's "early provincialism" and stimulated an "enlarged view" of jurisprudence.<sup>25</sup>

The research activity of the recently formed Comparative Law Bureau reveals the extent of the new interest in Spanish civil law. Although the history of American comparison dates to the colonial period,<sup>26</sup> the "modern development" of American comparative law has rightly been traced to the Bureau's formation by the American Bar Association (ABA) in 1907.<sup>27</sup> The Bureau's two principal activities during its first decade were articles on comparative research (published in the *Annual Bulletin*, described by David Clark as the "first comparative law journal in the United States") and sponsorship of civil code translations by Bureau members.<sup>28</sup>

In both spheres of activity, the importance of Spain and the insular possessions for comparative research is clear. During the first few years, at least half of the articles in the *Annual Bulletin* concerned Spanish law or Spanish legal history, a greater proportion than concerned French or German law. Even after the initial flurry subsided, the Bureau continued to publish articles on topics as varied as medieval Spanish law, Puerto Rican law, Mexico's revolutionary constitution, the Spanish courts' interpretation of intestate succession for adopted children, and the Argentine civil code.<sup>29</sup>

The bulk of the early articles were closely tailored to Spanish law and legal history or more recent developments in the new mixed systems in Puerto Rico and the Philippines. Notable contributions were Clifford Walton's *The Spanish Law of Prescription*;<sup>30</sup> Charles Lobingier's *A Decade of Juridical Fusion in the Philippines* (Lobingier was an

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25. William W. Smithers, *Extraordinary Field of an American Lawyer*, 7 ANN. BULL. 24, 25 (1914) (discussing the promotion of Charles Lobingier to the federal bench in China).

26. See David S. Clark, *Comparative Law in Colonial British America*, 59 AM. J. COMP. L. 637 (2011).

27. See Clark, *supra* note 1, at 587.

28. See W.W. Smithers, *Proceedings of the Comparative Law Bureau*, 30 ANN. REP. A.B.A. 1001, 1004 (listing the Bureau's original objects as "publication of an annual bulletin" and "encouragement, supervision and editorship of translations"). With respect to the "first comparative law journal," see Clark, *supra* note 1, at 592; cf. A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 TUL. L. REV. 830, 839 (1980) (describing Gustavus Schmidt's short-lived *Louisiana Law Journal* (1841-1842) as the "first comparative law journal in the world.>").

29. E.g., Charles S. Lobingier, *Las Siete Partidas*, 6 ANN. BULL. 33 (1913); J. Hernández Usera, *Porto Rican Jurisprudence*, 7 ANN. BULL. 26 (1914); Phanor J. Eder, *The Argentine Civil Code*, 1 A.B.A. J. 91 (1915); Robert J. Kerr, *The New Constitution of Mexico*, 3 A.B.A. J. 105 (1917); Arthur L. Thompson, *The Right of the Adopted Child in Intestate Succession*, 3 A.B.A. J. 135 (1917).

30. Clifford S. Walton, *The Spanish Law of Prescription*, 2 ANN. BULL. 25 (1909).

American-born judge appointed to the Court of First Instance in Manila), *Codification in the Philippines*, and *The Spanish Law in the Philippines*;<sup>31</sup> and Samuel Parsons Scott's *Spanish Jurisprudence Comparatively Considered* and *Spanish Criminal Law Compared with that Branch of Anglo-Saxon Jurisprudence*.<sup>32</sup>

In the realm of code translations, the emphasis was similar. During its brief existence, the Bureau published six translations as part of its "Foreign Code Series." Apart from R.P. Shick's *Swiss Civil Code*, the other five translations concerned Spanish law or the law of Pan-American trading partners: Scott's *Visigothic Code*<sup>33</sup> and *Siete Partidas*,<sup>34</sup> Frank Joannini's *Argentine and Peruvian Civil Codes*,<sup>35</sup> and Joseph Wheless's *Brazilian Civil Code*.<sup>36</sup> Bureau members also translated the Spanish civil and criminal codes,<sup>37</sup> the Colombian Civil Code of 1887,<sup>38</sup> recent Colombian and Mexican mining legislation,<sup>39</sup> and various *fueros* of medieval Castile.<sup>40</sup>

Moreover, by 1915, the Bureau had begun publishing its annual bulletin as the second quarterly issue in the ABA's new *Journal*.<sup>41</sup> Thereafter, American comparative thought on Spanish civil law became widely accessible to the ABA's growing membership, including judges and lawyers in the insular possessions who were not otherwise involved in the Bureau's research activities.

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31. Charles S. Lobingier, *A Decade of Juridical Fusion in the Philippines*, 3 ANN. BULL. 38 (1910) [hereinafter Lobingier, *Juridical Fusion*]; Charles S. Lobingier, *Codification in the Philippines*, 3 ANN. BULL. 42 (1910); Charles S. Lobingier, *The Spanish Law in the Philippines*, 4 ANN. BULL. 32 (1911) [hereinafter Lobingier, *Spanish Law*].

32. S.P. Scott, *Spanish Jurisprudence Comparatively Considered*, 2 ANN. BULL. 14 (1909) [hereinafter Scott, *Spanish Jurisprudence*]; S.P. Scott, *Spanish Criminal Law Compared with that Branch of Anglo-Saxon Jurisprudence*, 3 ANN. BULL. 62 (1910) [hereinafter Scott, *Spanish Criminal Law*].

33. THE VISIGOTHIC CODE (S.P. Scott trans., 1910).

34. LAS SIETE PARTIDAS (S.P. Scott trans., 1931).

35. THE ARGENTINE CIVIL CODE (F.L. Joannini trans., 1917).

36. THE CIVIL CODE OF BRAZIL (Joseph Wheless trans., 1920).

37. SPANISH CIVIL CODE, *supra* note 18.

38. THE CIVIL CODE OF THE REPUBLIC OF PANAMA (F.L. Joannini trans., 1905).

39. PHANOR J. EDER, *THE MINING LAWS OF THE REPUBLIC OF COLOMBIA* (1912); ROBERT JOSEPH KERR, *TRANSLATION OF THE MINING LAW OF MEXICO* (1910).

40. See KEARLEY, *supra* note 21, at 124 (stating that Scott had given the Bureau a manuscript translation titled *The Laws of Ancient Castille*, as well as a draft Criminal Code of Spain, prior to his death; neither was apparently published).

41. Clark, *supra* note 1, at 592.

### III. COMMON LAW ANXIETY AND EARLY JUSTIFICATIONS FOR COMPARISON

A primary justification for comparative law during the period was improvement of domestic legislation, often through codification and (later) restatement. At the turn of the last century, American lawyers frequently expressed anxiety about their judge-made law.<sup>42</sup> Rapid increases in published opinions and high rates of appellate reversals created the impression that the law was both inaccessible and unpredictable. In some of the larger states, lawyers could no longer afford all the reports and statutes from their jurisdictions, and business lawyers were especially concerned about increasing divergence in the “common law” across state lines.<sup>43</sup>

According to Natalie Hull, early twentieth-century lawyers were a “generation groping with the increasing contradiction between data and paradigm.”<sup>44</sup> The common law was no longer unchallenged, and some doubted its long-term viability. Comments from Arthur Corbin in 1915 capture the mood. In *Case & Comment*, the contracts scholar told fellow lawyers that the common law’s increasing complexity, which he attributed to the “tremendous multiplications of decisions,” as well as a growing awareness of its lack of system, were undermining its coherence:

In the earlier history of the common law, when recorded precedents were far less numerous than they are to-day, and when learned glosses and commentaries were few, it was more nearly possible for an industrious lawyer to know them all. Just as Dr. Samuel Johnson ventured to write a dictionary of the English language out of his own head, so did William Blackstone and James Kent attempt to state the entire common law. *He would be a bold and ill-advised man who would attempt to do either today.*<sup>45</sup>

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42. See N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 *LAW & HIST. REV.* 55 (1990); see also Richard A. Danner, *James DeWitt Andrews: Classifying the Law in the Early 20th Century*, 36 *LEGAL REF. SERVICES Q.* 113 (2017) (examining ABA responses to legal classification problems created by rapid increase in legal literature).

43. See Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 *WASH. L. REV.* 239, 249-50 (1979) (describing factors leading to increasing anxiety); see also Arthur C. Pulling, *The Law Library of the Future*, 8 *LAW LIBR. J.* 72, 73 (1916) (“It seems to me that the time is coming and quickly when a lawyer will not have even the reports of his own state on his shelves.”) (observations of prominent law librarian).

44. Hull, *supra* note 42.

45. Arthur L. Corbin, *Yale and the New Science of Jurisprudence*, 21 *CASE & COMMENT* 953, 954 (1915) (emphasis added).

Corbin advocated reform through isolation of general principles, and he proposed comparative law as an auxiliary science to ascertain the best methods for restatement:

We must indeed make a historical and initial study of our decisions to determine the principles upon which our courts have acted, and are now acting, but in addition we must reduce those principles into a logical and harmonious system. To do this, we must, among other things, make a comparative study of other systems, and criticize our own in the light of this greater knowledge . . . .<sup>46</sup>

The Bureau's founders largely shared Corbin's justifications for the new discipline. Smithers told fellow comparatists in 1907 that American lawyers could no longer consider English common law as "all-sufficient for the needs of modern civilization but must admit the necessity for legislative limitation or extension" (i.e., codification); according to the Pennsylvania lawyer, American jurisprudence needed "all the light which investigation and comparison will afford" in order to facilitate its "reconstruction" and "improvement."<sup>47</sup> After rehearsing complaints about the common law's increasing complexity, a strident Charles Sherman told *Green Bag* readers that American law's "startling bulkiness, redundancy, and prolixity" made it the "most intolerable in the world and perhaps the worst ever known in human history."<sup>48</sup> Sherman stated that the "way out" for the United States was codification of private law, citing as examples Rome, France, and most recently, Germany.<sup>49</sup>

By the end of the decade, comparatists were advocating for a study of Latin American law for similar reasons. The Colombian expatriate lawyer and dean of New York's Inter-American bar, Phanor Eder, claimed that codification of American private law was "essential," and he insisted that American lawyers "turn for preliminary guidance in the very necessary work of reclassification and restatement" to the civil codes of Argentina, Brazil, and Chile.<sup>50</sup>

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46. *Id.* at 954-55.

47. W.W. Smithers, *Report of the Committee on Comparative Law*, 30 ANN. REP. A.B.A. 744, 745 (1907).

48. Charles P. Sherman, *One Code for All the United States the Only Remedy to Cure American Law of Its Confusion and Uncertainty*, 25 GREEN BAG 460, 460 (1913).

49. *Id.* ("The logical succession to multitudinous precedents is codification.").

50. Phanor J. Eder, *Pan-Americanism and the Bar*, 43 ANN. REP. A.B.A. 338, 343 (1920); see also ENRIQUE GIL, IMPORTANCE OF THE STUDY OF ARGENTINE AND BRAZILIAN CIVIL LAW 1-8 (Feb. 1, 1921) (advocating study of the Argentine civil code as a potential model of codification for federal republics and encouraging its study by American law students). Gil was an Argentine law professor invited by Harlan Fiske Stone to deliver a series of lectures on South American law at Columbia Law School in 1921.

## IV. ATTRACTIONS OF SPANISH CIVIL LAW FOR EARLY COMPARATISTS

For many American comparatists, the Spanish civil law encountered in Puerto Rico and the Philippines presented a particularly compelling model of codification and unification. There were two reasons for the initial attraction. First, Spanish law was largely of Roman origin, and Roman law was strongly associated during this period with systematic legal rules.<sup>51</sup> Second, Spanish legal history suggested a potential model for American law reform. Prior to codification, Spain had been a country with a diversity of legal systems, reflecting the strong legal-cultural identities of the Spanish regions; with codification came a greater unification of national law. Thus, Spain's recent experience with codification suggested a template for American lawyers frustrated with their own legal system's perceived lack of geographic uniformity.

The first point of attraction was Spanish law's Roman pedigree. In the nineteenth century, English legal scholars had admired Roman law for its precise classification of legal phenomena and sophisticated technical vocabulary. Thus, John Austin embraced Roman law as a "greatly and palpably superior" legal tradition, its systematic approach to legal categories promising an "escape from the empire of chaos and darkness" (of English law) and a source of inspiration for the latter's improvement.<sup>52</sup> Likewise, in his 1857 Cambridge essay, *Roman Law and Legal Education*, the historian Sir Henry Maine stated, "Truths which the language of English law, at once ultra-popular and ultra-technical, either obscures or conceals, shine clearly through the terminology of Roman lawyers . . ."<sup>53</sup>

Such sentiments were still popular a half-century later. In his three-volume *Roman Law in the Modern World* (1917), Charles Sherman told students that "[t]he style of the Roman jurists is simple, clear, brief, terse, nervous and precise"; Roman jurisprudence was therefore "far superior to the Anglo-American, and worthy of imitation in this respect."<sup>54</sup>

For similar reasons, early Bureau members emphasized Spanish law's Roman origins. In *The Civil Law in Spain and Spanish-America* (1900), Clifford Walton described the Spanish Civil Code of 1889 as a "most excellent code, representing some twenty-four hundred years' development of the Roman Civil Law or from the Twelve Tables of Rome until the present time"; downplaying Germanic and Arab elements, he

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51. See, e.g., HOEFLICH, *supra* note 21, at 133-38 (discussing Roman law's attraction for common lawyers).

52. STEIN, *supra* note 4, at 71 (quoting Austin's *Lectures on Jurisprudence*).

53. H.S. Maine, *Roman Law and Legal Education*, in CAMBRIDGE ESSAYS 1, 8 (1856).

54. 1 SHERMAN, *supra* note 24, § 5.

claimed that “[n]either the ruin of the Western Empire, upon the success of the Northern barbarians, nor the Arabic domination was sufficient to displace the authority of the Roman laws . . . .”<sup>55</sup>

Lobingier, who had practical experience applying a revised Spanish code in the Philippines, stated of the original: “More than any of its Spanish predecessors, this civil code approaches closely to its Roman prototypes, the Institutes of Justinian and those of Gaius.”<sup>56</sup>

Not surprisingly, early comparatists praised the Civil Code’s system and structure, which they attributed to its Roman ancestry. The first American to review Walton’s translation observed that the Spanish Civil Code’s doctrine of easements possessed the “clear and logical method of the Roman code” and exhibited “the precision of algebraic formulae, as compared with the arithmetical detail and frequent confusion of the English common law.”<sup>57</sup>

Indeed, early comparatists could not help but make favorable comparisons with their own legal system, as Lobingier’s contrast of the Spanish Civil Code’s “art of condensation” and American law’s “ponderous tomes” suggests:

This is a model of concise, comprehensive, and systematic codification. Divided into four books it follows, in the main, the arrangement of Justinian’s Institutes and treats, in a volume of a little more than three hundred pages, the subjects of Domestic Relations, Property, Wills, Decedents’ Estates, Contracts, &c., whose exposition in our law requires more than a half-dozen ponderous tomes. Nor is this treatment of the Spanish Code superficial. By skilfully adopting the phraseology of the Roman Code and carefully studying the art of condensation the Spanish codifiers have been able to express the principles of their substantive law in a very small compass.<sup>58</sup>

Similarly, James F. Tracey, an American-born appointee to the Philippines Supreme Court, told fellow lawyers in *The Brief*:

The civil code, following closely the French model, possesses the logical development, the verbal precision and the complete grouping of particulars under their appropriate generalization characteristic of the Latin mind that have led to the acceptance of the Code Napoleon by the majority of civilized

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55. CLIFFORD S. WALTON, *THE CIVIL LAW IN SPAIN AND SPANISH-AMERICA*, at vii, 24 (1900).

56. Lobingier, *Spanish Law*, *supra* note 31, at 41.

57. W.H. Beckford, *The Spanish Civil Code*, 49 U. PA. L. REV. 89, 93 (1901) (reviewing WALTON, *supra* note 55).

58. Charles S. Lobingier, *Blending Legal Systems in the Philippines*, 1 L.Q.R. 401, 402 (1905).

peoples . . . . *It is my experience that among qualified lawyers in the islands, who have practiced under both dispensation, the preference is for the Spanish Civil Code, rather than our own common law modified by random statutes or by loose codification.*<sup>59</sup>

Spanish law's other point of attraction for early comparatists was its trajectory of recent historical development, ending in unification and codification. Here, the Roman connection was also important. Legal historians had earlier suggested that Roman law's development presented a universal model of legal evolution applicable to other systems, including English law. In his highly popular *Ancient Law* (1861), Maine had argued that as legal systems matured, they progressed through various stages, from legal fictions, to equity, to legislation.<sup>60</sup> According to Maine, the Romans had completed the entire cycle, and an "accurate knowledge of Roman law in all its principal stages" was thus indispensable to understanding the nature of legal development generally.<sup>61</sup> *Ancient Law* began with the crucial observation that "[t]he most celebrated system of jurisprudence known to the world begins, as it ends, with a Code," and Maine elsewhere described the *Corpus Juris Civilis* as a natural evolution of the "unwieldy body of Roman jurisprudence" that preceded it.<sup>62</sup>

Such descriptions were likely to invite comparisons with ongoing legislative attempts at law reform in England. Indeed, Maine had contrasted English jurisprudence unfavorably with Roman law on several contentious points: he argued that English law was "standing apart from the main current of legal modification"; he concluded that the common law's distinction between movables and immovables reflected "phenomena of archaic law"; and he stated, somewhat unflatteringly, that English property law was a mixture of barbarian law and uncoded Roman law.<sup>63</sup> In *Village Communities* (1871), Maine complained that English law "assuredly travels to its conclusions by a path more torturous and more interrupted by fictions and unnecessary distinctions than any system of jurisprudence in the world," a critique that suggested English law's lingering technicality as well as its failure to progress beyond the

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59. James F. Tracey, *Law in the Philippines*, 10 BRIEF 77, 78 (1910) (emphasis added).

60. H.S. MAINE, *ANCIENT LAW* chs. 2-4 (1861) (on legal fictions, equity, and modern legislation).

61. *Id.* at 14.

62. *Id.* at 1.

63. *Id.* at 283-84, 296-97; see also HOEFLICH, *supra* note 21, at 80-82 (discussing Maine's theory).

second stage of development (legal fictions) to the third and final one (legislation).<sup>64</sup>

The relationship between Roman law and codification of English law was revisited by W.A. Hunter in his 1875 article, *The Place of Roman Law in Legal Education*, in which the Scottish lawyer argued that Roman law offered a replicable model of historical development. According to Hunter, English law was rapidly approaching Roman law in maturity of system: “[A]t the present time, English law has reached a point similar to that at which the Roman law had arrived about a generation or less before the time of Justinian.”<sup>65</sup> By implication, the final step in English law’s development would be legislative “consolidation” (presumably through codification).

Following Maine and Hunter, American proponents of law reform saw a similar connection between their current predicament, the history of Roman law, and modern codification. Without any sense of anachronism, Hannis Taylor could liken the rapid growth in American case law with the profusion of imperial rescripts under the Emperor Diocletian and expect to be understood by contemporaries:

It is generally understood that the first cause of a tendency to codify Roman law and make it more accessible is to be found in the profusion with which Diocletian and his successors had used their legislative power, flooding the Empire with a mass of ordinances which few persons could procure or master. Certainly we now stand in a like situation.<sup>66</sup>

Maine’s suggestion that the common law had not yet reached the final stages of legal development also found a receptive audience with American civil law scholars. Following Maine, Sherman described Roman law as the “product of a highly civilised people secured for centuries in the enjoyment of peace within their borders,” while the common law was a “product of a people emerging from barbaric conditions of society.”<sup>67</sup> In a 1915 article discussing the value of Roman law studies, Lobingier quoted Maine extensively, before concluding that the “Roman legal system is the only one in all history which has completed the full normal stages of development—infancy, maturity, and decline”; by contrast, English law had “not yet reached even the second stage.”<sup>68</sup>

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64. HENRY SUMNER MAINE, VILLAGE COMMUNITIES IN THE EAST AND WEST 5 (1871).

65. W.A. Hunter, *The Place of Roman Law in Legal Education*, 4 LAW MAG. 66, 77 (1875).

66. Hannis Taylor, *The Unification of American Law*, 22 GREEN BAG 267, 269-70 (1910).

67. 1 SHERMAN, *supra* note 24, § 6.

68. Charles Sumner Lobingier, *The Value and Place of Roman Law in the Technical Curriculum*, 49 AM. L. REV. 349, 369 (1915).



Elsewhere, Lobingier criticized the technicality of the common law, offering as evidence “Dickens’ not wholly fictitious *cause célèbre* of *Jarndyce v. Jarndyce*.”<sup>69</sup>

For American scholars already receptive to Maine’s theories, Spanish legal history proved relevant and instructive. Like Roman law, pre-codification Spanish law had multiple, competing layers of legislation; Lobingier characterized Spanish private law in the period before codification as existing in a “chaotic condition” that “hung like an incubus over Spain,” six “ancient petty kingdoms” each preserving distinct legal patrimonies long after the country’s political unification, to great confusion.<sup>70</sup> According to Walton, Spanish codification represented both unification of law, as well as purification of non-Roman (feudal) elements: “At the beginning of the nineteenth century by virtue of the great spirit of codification which characterized it, there was separated from the civil law in the Peninsula the foreign elements which contaminated its true nature.”<sup>71</sup> For Lobingier, Spanish law’s transformation between medieval and modern times was nothing less than the victory of “*leges Romanae*” over “*leges barbarorum*.”<sup>72</sup>

Indeed, Lobingier was especially vocal in promoting Spanish civil law as a development model for American law reform. In a 1907 *Yale Law Journal* article entitled *A Spanish Object-Lesson in Code-Making*, the Manila trial judge argued that American law’s current situation was “analogous” to Spain’s private law prior to codification: too many jurisdictions, too little uniformity. Lobingier claimed that new encounters in Puerto Rico and the Philippines demonstrated possible paths for reform. Previously unappreciated, Spanish law and its historical development offered a template of successful codification and suggested what could be done at home:

When [the Code] first came to the attention of critical American judges and lawyers in our new possessions they were amazed at its comprehensiveness

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69. Lobingier, *supra* note 58, at 401.

70. Charles Sumner Lobingier, *A Spanish Object-Lesson in Code-Making*, 16 YALE L.J. 411, 411-13 (1907).

71. WALTON, *supra* note 55, at 85-86. While contemporaries stressed the role of codification in unifying Spanish law, in reality regional laws survived. For a discussion of the competing impulses of codification and legal diversity in Spanish legal history, see Aniceto Masferrer, *Plurality of Laws, Legal Traditions and Codification in Spain*, 4 J. CIV. L. STUD. 419 (2011). According to Masferrer, “The current Spanish legal system constitutes perhaps the clearest European model of codification without aiming at a complete unification of the law.” *Id.* at 428.

72. Lobingier, *supra* note 29, at 491 (“[T]he completion of the Partidas marks the beginning of the final struggle for supremacy in Spain between the ‘leges barbarorum’ and the ‘leges Romanae’ . . .”).

and completeness—charmed with its clearness, conciseness and simplicity. . . . Coming at an epoch when business interests as well as the legal professions are beginning to demand relief from

“*The lawless science of our law*  
*The Codeless myriad of precedent,*”

this discovery of the achievement of the hitherto unappreciated Spaniard is most timely and serviceable. It is one of the far-reaching consequences of the Spanish-American war which was never foreseen and is even now little suspected. Much has been said and rightly of the improvements of the courts of our insular possessions through the introduction of the simpler and more practical American system of procedure. The benefits will not be altogether one-sided if through this contact of legal systems the American people shall learn the merits of the Spanish *Código Civil* and from it the feasibility and gain of codifying their private substantive law.<sup>73</sup>

Predictably, Sherman concurred in Lobingier’s assessment: the Spanish Code, “which abrogated the centuries-old diversity of Spanish law,” represented the natural “final step” in the country’s legal development, and the Roman law professor predicted that increased study of Spanish law in law schools would “inevitably produce a reflex influence for the betterment of native American law.”<sup>74</sup>

Perhaps surprisingly, protagonists of Spanish law revisited Spain’s medieval history, too, and here the opportunities for favorable comparisons with English law were apparently plentiful. Early Bureau member Samuel Parsons Scott was a leader in the movement.<sup>75</sup> In the eighteenth and nineteenth centuries, English lawyers had expressed skepticism of the Continent’s civil law tradition, which they associated with despotism and the Papacy.<sup>76</sup> The Black Legend that painted Spain as a bastion of authoritarianism and religious intolerance (typified by the Inquisition) relied on similar stereotypes.<sup>77</sup> The connection between the two sets of associations is evident in Bishop Stubbs’ *Lectures on Early English History* (1906):

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73. Lobingier, *supra* note 70, at 415-16 (emphasis added).

74. 1 SHERMAN, *supra* note 24, §§ 305, 310.

75. For Scott’s biographical details and overview of his work, see Timothy Kearley, *The Enigma of Samuel Parsons Scott*, 10 ROMAN LEGAL TRADITION 1 (2014).

76. See Charles Donahue, *The Civil Law in England*, 84 YALE L.J. 1670 (1974) (reviewing BRIAN P. LEVACK, *THE CIVIL LAWYERS IN ENGLAND 1603-1641: A POLITICAL STUDY* (1973)) (discussing attitudes of early modern English lawyers to civil law tradition); see also H.F. Jolowicz, *Political Implications of Roman Law*, 22 TUL. L. REV. 62, 64-65 (1947) (discussing traditional English suspicion of civil law).

77. See B. Keen, *The Black Legend Revisited: Assumptions and Realities*, 49 HISP. AM. HIST. REV. 703 (1969).

Only please to remark that as in England, just as the national elements work their way through feudal law, and against the influx of the civil and canon law, liberty increases, the national genius for self-government expands and asserts itself, so unhappily in Spain the reverse takes place; as the influence of the civil law increases under Alfonso X and Alfonso XI, the Teutonic element fading out . . . absolutism increases.<sup>78</sup>

In contrast to historians such as Stubbs, Scott sought to rescue Spain and her legal system from the negative associations of despotism and Inquisition. Turning to the period before both, Scott set about finding convincing examples of medieval Spanish institutions that would satisfy Progressive Era benchmarks of social development, such as representative democracy and civil liberties. Thus, according to Scott, the Visigoths were, in contrast to their inquisitor descendants, “ardent lovers of liberty” who practiced “equality before the law,”<sup>79</sup> while the *Privilegio General* of 1283 was the Spanish equivalent of Magna Charta, a law by which “no one could be deprived of life, liberty, or property without due process of law.”<sup>80</sup> Elsewhere, Scott claimed that Spain possessed a writ of habeas corpus long before England and, echoing Lobingier, stated that Spanish property law was less complex than English law: “[T]he innumerable, perplexing, and often absurd tenures that clog the treatises of the Common Law have always been unknown.”<sup>81</sup> Scott also remarked that, though Catholicism remained the established religion, modern Spain allowed freedom of worship.<sup>82</sup>

For Scott, Spain’s subsequent descent into religious bigotry during the early modern period was inconsistent with its previous legal sophistication and represented “one of the most remarkable political anomalies to be met with in history.”<sup>83</sup> His reassessment of medieval Spanish institutions was intended as the necessary corrective. Indeed, in a novel twist, Scott insisted that England’s recently abolished ecclesiastical courts had in testamentary causes been “productive of abuses unknown in the Peninsula,” while contemporary Spain’s magistrates exercised their remaining inquisitorial functions with “dignity

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78. WILLIAM STUBBS, LECTURES ON EARLY ENGLISH HISTORY 258 (1906).

79. THE VISIGOTHIC CODE, *supra* note 33, at xv, xix.

80. Scott, *Spanish Jurisprudence*, *supra* note 32, at 15.

81. *Id.* at 22.

82. See Scott, *Spanish Criminal Law*, *supra* note 32, at 66 (“The Spanish laws . . . are singularly liberal, considering the former influences of the Inquisition . . .”).

83. THE VISIGOTHIC CODE, *supra* note 33, at xv.

and impartiality.”<sup>84</sup> Such contrasts presumably intended to transfer the stigma of the Inquisition to Victorian probate.

Reassessments of medieval Spaniards were popular with Scott’s fellow comparatists, as well. In Howe’s *Studies*, the Louisiana judge claimed that the Visigoths “came, after the fashion of the time, partly as invaders and partly as immigrants,” a depiction meant to strike a familiar and sympathetic note with contemporary Americans.<sup>85</sup>

Scott and Howe’s focus on the medieval period of Spanish legal history was far from accidental. Nineteenth-century English legal historians had traced the birth of the common law to the Middle Ages, and favorable comparison of Spanish and English law at this particular stage in Europe’s legal development was therefore crucial to arguments for Spanish law’s intrinsic merit. Moreover, by rehabilitating medieval Spaniards and their legal institutions, early comparatists cemented Spanish law’s status as a respectable partner for civil law/common law assimilation.

#### V. THEORIES OF LEGAL MIXING I: HENRY MAINE AND JAMES BRYCE

The intellectual apparatus that supported favorable comparisons of Roman-inspired Spanish law with the “feudal” or “primitive” common law also supported theories of legal mixing that emphasized increasing compatibility between legal systems. As mature legal systems were thought to resemble one another, there was a heightened expectation that English law would “catch up” with Roman law, and in fact, new evidence from Britain’s mixed legal systems suggested global convergence was already well-advanced. American comparatists soon applied these observations to their own hemispheric context. Once more, nineteenth-century British legal historians’ attitudes to Roman law indirectly, but decisively, influenced twentieth-century American attitudes to Spanish law in the insular possessions.

##### A. *The Historical Relationship of English and Roman Law*

In the nineteenth century, English legal historians had shown considerable interest in English law’s past and future relationship to Roman and civil law. According to Maine’s theory of legal evolution, legal systems increasingly approximated Roman law as they reached

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84. Scott, *Spanish Jurisprudence*, *supra* note 32, at 21, 24.

85. HOWE, *supra* note 22, at 140; WALTON, *supra* note 55, at 36 (praising Visigoths’ “religious tolerance”).

higher levels of development. As stated earlier, this assumption suggested that English law would eventually converge with the more developed and universal Roman law:

It is not because our own jurisprudence and that of Rome were once alike that they ought to be studied together—it is because they will be alike. It is because all laws, however dissimilar, in their infancy, tend to resemble each other in their maturity; and because we in England are slowly, and perhaps unconsciously or unwillingly, but still steadily and certainly accustoming ourselves to the same models of legal thought and to the same conceptions of legal principle to which the Roman juriconsults had attained after centuries of accumulated experience and unwearied cultivation.<sup>86</sup>

While Maine speculated about future legal convergence, English legal historians also looked backward to reconsider the extent of Roman influence on English law. Typical of a widespread consensus, Bishop Stubbs argued in 1882 that Roman law had been influential only “where expressly or accidentally it agrees with the law of the land [the common law]”; the Englishman’s “general antipathy” to foreign law was sufficient explanation for the civil law’s banishment to a few peripheral jurisdictions such as the ecclesiastical courts.<sup>87</sup> For Stubbs, English laws were among the “most ancient and purest specimens” of non-Roman law, and English jurisprudence had developed “by a process into which very little that is Roman had ever filtered.”<sup>88</sup>

Nevertheless, a different tradition favoring a more expansive influence of Roman law on the development of English law was also renascent throughout the period. The Roman lawyer William Morey, detecting a historiographical shift, observed in 1884 that “the theory is gaining ground that even the early common law was based upon, or at least greatly influenced by, Roman ideas”; according to Morey, “with the exception of certain provisions relating chiefly to the law of real property, the most important principles of the English law, not established by direct legislation, may be traced either directly or remotely to the laws of Rome.”<sup>89</sup> The following year, Stubbs’ contemporary, Thomas Scrutton, published *The Influence of the Roman Law on the Law of England* (1885), which argued for a similar civilian influence on English law, tracing elements of English chancery practice, admiralty, and successions to

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86. Maine, *supra* note 53, at 2.

87. STUBBS, *supra* note 78, at 257-58; William Stubbs, *The History of the Canon Law in England*, in SEVENTEEN LECTURES ON THE STUDY OF MEDIEVAL AND MODERN HISTORY 350-51 (1882).

88. STUBBS, *supra* note 78, at 251.

89. WILLIAM C. MOREY, OUTLINES OF ROMAN LAW 199-202 (1884).

Roman sources. Although Scrutton claimed that “the history of Roman Law in England has yet to be written,” his “inadequate sketch” was more popular with Sherman and Lobingier than Stubbs’, and both relied on Scrutton’s account to promote the impression of an extensive Romanization of English law.<sup>90</sup>

Ultimately, however, it was Frederic Maitland who proved the most influential in rekindling awareness of the Roman element in English jurisprudence. In his two-volume *History of English Law Before the Time of Edward I* (1895), Maitland (with Pollock) argued that Roman law’s influence on English legal thought during the medieval period had been substantial and lasting, especially the contributions of Vacarius and Bracton; from the time of the Norman Conquest, Maitland wrote, “a new and a different wave of Roman influence began to flow . . . shaping and modifying our English law.”<sup>91</sup> In his 1901 Rede Lectures, Maitland famously opined that only the yearbooks and the Inns of Court had checked a full Reception of Roman law during the Renaissance.<sup>92</sup> In Maitland’s time, there were still lingering associations of the civil law with ecclesiastical authority, royal despotism, and foreign influence. Now England’s greatest legal historian challenged orthodoxies. In chapter V on “Roman and Canon Law,” Maitland suggested that Roman law was not foreign, but a part of English law, and had played a greater role in its intellectual development than earlier lawyers had acknowledged:

Blackstone’s picture of a nation divided into two parties, ‘the bishops and clergy’ on the one side contending for their foreign jurisprudence, ‘the nobility and the laity’ on the other side adhering ‘with equal pertinacity to the old common law’ is not true. It is by ‘popish clergymen’ that our English common law is converted from a rude mass of customs into an articulate system, and when the ‘popish clergymen’, yielding at length to the pope’s commands, no longer sit as the principal justices of the kings’ court, the creative age of our medieval law is over.<sup>93</sup>

Although Maitland ultimately emphasized the Englishness of the common law, nineteenth-century civil law scholars (who overlapped considerably with comparatists) believed that Maitland’s findings

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90. T.E. SCRUTTON, THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND 195-96 (1885); see Lobingier, *supra* note 68, at 22-24 (relying on Scrutton as the basis for conclusions of extensive Romanization of English law during the medieval period).

91. 1 POLLOCK & MAITLAND, *supra* note 4, at xxxiii-xxxiv.

92. F.W. MAITLAND, ENGLISH LAW AND THE RENAISSANCE 23-24 (1901) (arguing that Inns of Court were the “opposing force” and “conservative principle” that prevented a Reception of Roman Law during the Renaissance).

93. 1 POLLOCK & MAITLAND, *supra* note 4, at 112 (footnote omitted).

consolidated earlier narratives of Romanization espoused by Scrutton and Morey.<sup>94</sup> In Lecture III of *Studies*, Howe relied on Pollock and Maitland as authorities for his conclusion of a vast Roman substrate of English law. Howe, who claimed to investigate English legal institutions in the “same spirit in which the paleontologist studies his fossils,” found few such “fossils” that did not possess a Roman genealogy, including the jury and corporations.<sup>95</sup> To Sherman, “[t]he opinion that English law has developed wholly freed from Roman ideas had been refuted by the works of Professor Maitland and Sir Frederick Pollock”; instead, the medieval period was a “Roman epoch of English legal history,” Bracton “the father of the English common law.”<sup>96</sup> Finally, Hannis Taylor claimed that “England cannot fairly be said to have an indigenous system of private law all her own, enriched as it has been, in all of its vital parts, from Roman sources.”<sup>97</sup> Undoubtedly, conclusions of early Romanization appealed to the anxieties of contemporary lawyers: for a generation prone to think of their own system as one in need of reform, extensive borrowing from Roman law in an earlier age must have seemed logical, though many of their proposed “legal transplants” are now rejected as exaggerations.

#### B. *James Bryce and Legal Convergence*

If Maitland’s work encouraged recognition of English law’s Roman ancestry, and Maine predicted the future assimilation of the two legal traditions, then the English lawyer James Bryce now proposed a theory that united paradigms. In *Studies in History and Jurisprudence* (1901), Bryce provided a framework for understanding the ultimate relationship of Roman and English law based on shared experiences as global empires.<sup>98</sup> In Essay II, *The Extension of Roman and English Law Throughout the World*, Bryce abandoned historical inquiry to explore present realities and future possibilities. Observing the effects of European colonial expansion, he noted that the world would soon be “practically divided between two sets of legal conceptions of rules, and two only,” the common law and civil law.<sup>99</sup> Rejecting the notion that one

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94. See, e.g., Charles P. Sherman, *Romanization of English Law*, 23 YALE L.J. 318 (1914) (relying on Maitland for a thesis of extensive Romanization); see also HOWE, *supra* note 19, at 118 (adopting Maitland’s rejection of Blackstone).

95. HOWE, *supra* note 19, at 48 (quoted material), 48-53 (discussing the law of corporations).

96. 1 SHERMAN, *supra* note 24, § 377; Sherman, *supra* note 94, at 326.

97. TAYLOR, *supra* note 7, at 196.

98. 1 BRYCE, *supra* note 5, ch. 1.

99. *Id.* at 142.

system might eclipse the other in geopolitical terms, Bryce followed Maine in asserting their likely assimilation:

At this moment the law whose foundations were laid in the Roman Forum commands a wider area of earth's surface, and determines the relations of a larger mass of mankind. But that which looks back to Westminster Hall sees its subjects grow more rapidly, through the growth of the United States and the British colonies, and has a prospect of ultimately overspreading India also. Neither is likely to overpower or absorb the other. But it is possible that they may draw nearer, and that out of them there may be developed, in the course of ages, a system of rules of private law which shall be practically identical as regards contracts and property and civil wrongs . . . .<sup>100</sup>

Bryce's predictions were particularly timely, for Britain's own mixed legal systems appeared to contemporaries to provide corroboration of his observations. The Roman-Dutch scholar, R. W. Lee, who had served as a magistrate in Ceylon and later as dean of McGill's law faculty, claimed to have witnessed the gradual "intrusion" of the common law in several British colonies with civil law systems, and he considered himself "at the end of time in which it is still possible to contemplate the Civil Law and the Common Law as separate and self-contained entities."<sup>101</sup> According to Lee, Roman and English law were "becoming assimilated, and the assimilation will, before very long, be complete."<sup>102</sup> The French lawyer Henri Lévy-Ullman predicted the same process based on his examination of Scots law, whose blending of Roman and English elements represented for him "a picture of what will be, some day (perhaps at the end of this century), the law of civilised nations, namely, a combination between the Anglo-Saxon and the continental system."<sup>103</sup>

By the early decades of the twentieth century, ideas of legal convergence had become popular in the United States, as well. The Louisiana lawyer Henry Plauché Dart told comparatist readers in the *Tulane Law Review* that "there are now and then lights upon the legal horizon that indicate the Common Law is slowly, almost inevitably, being drawn into harmony with [the civil law]," while the Roman law scholar Max Radin observed in his widely used *Handbook of Roman Law* (1927)

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100. *Id.* at 143-44.

101. R. W. Lee, *Civil Law and the Common Law—A World Survey*, 14 MICH. L. REV. 89, 94, 100 (1915).

102. *Id.* at 100.

103. Henri Lévy-Ullmann, *The Law of Scotland*, 37 JURID. REV. 390, 390 (1925).



that the “most obvious trend” in contemporary law was the “gradual assimilation” taking place globally between Roman and English law.<sup>104</sup>

#### VI. THEORIES OF LEGAL MIXING II: HANNIS TAYLOR

Trends in English legal history might have been of no consequence to developments in the insular possessions, except that American comparatists enamored with Maine and Bryce sought to extend the English jurists’ theories of convergence to recent developments in the Americas, a shift in geographical emphasis that would influence judges in the overseas territories. The movement’s chief apostle was Hannis Taylor, who wrote that Maine’s *Ancient Law* “proved to be almost a revelation.”<sup>105</sup> Yet it was Bryce’s hypothetical assimilation of civil law and common law that most interested Taylor. Something of a “borrower” himself (he was famously accused of plagiarism by Henry Goudy), Taylor extrapolated from Maine, Maitland, and Bryce to foretell the entire legal development of the Western Hemisphere.<sup>106</sup>

The gist of Taylor’s theory was that the Americas were playing stage to a drama of hemispheric legal blending, in which state systems were gradually combining English public law and Roman private law. As evidence, Taylor noted that Latin American countries were increasingly adopting Anglo-American principles of representative self-government, while nevertheless preserving their Roman-influenced codes of private law.<sup>107</sup> Like his predecessors, Taylor assumed that English law had borrowed extensively from Roman law, so that American private law was already substantially civilian.<sup>108</sup> According to Taylor, the result of parallel developments in private law and constitutional government in both the United States and Latin America was an evolutionary *modus vivendi* in which English constitutional law eclipsed continental models, but Roman civil law gradually replaced “Teutonic” private law:

Jurists who view the existing state system of the world as a connected whole cannot fail to perceive, when their attention is specially directed to that subject, that, within a century, in the blending of Roman and English law there has occurred a phenomenon that marks a turning point in the history

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104. Henry Plauché Dart, *The Place of the Civil Law in Louisiana*, 4 TUL. L. REV. 163, 177 (1930); MAX RADIN, HANDBOOK OF ROMAN LAW 101 (1927).

105. TAYLOR, *supra* note 7, at 24.

106. See J.W. Cairns, *Henry Goudy, Hannis Taylor, and Plagiarism Considered as a Fine Art*, 30 TUL. EUR. & CIV. L.F. 1 (2015) (describing plagiarism allegations).

107. See Hannis Taylor, *The Science of Jurisprudence*, 22 HARV. L. REV. 241 (1909).

108. Hannis Taylor, *A Comparative Study of Roman and English Law, in the Old World and the New*, 7 AM. LAW. 473, 475-76 (1899).

of legal development. After centuries of growth Roman public law, constitutional and administrative, perished, leaving behind its inner part, the private law, largely judge-made, which lives on an immortality and universality—as the fittest it survives. In the same way and for the same reason English public law, the distinctive and least alloyed part of that system, is living on and expanding as the one accepted model of popular government.<sup>109</sup>

Taylor first previewed his theory of legal mixing at the annual meeting of the Louisiana Bar Association in 1899, presumably to a receptive audience. According to Taylor, Louisiana was a “typical illustration” or “index finger” pointing to the “ultimate form” that state systems would take in both Europe and the Americas, a jurisdiction where the civil law and common law worked together in “perfect harmony.”<sup>110</sup> Indeed, the Louisiana precedent would be crucial to Taylor’s successors. He returned to the same theme in his 1913 article on the *Jurisprudence of Latin America*, the first ever published by the new *Virginia Law Review*.<sup>111</sup> Far from expressing concern about the civil law’s survival in Latin America, Taylor predicted that this “immortal and universal system of private law will wax stronger in the great and growing empire to the south of us.”<sup>112</sup>

Finally, in his *Science of Jurisprudence* (1909), Taylor connected his theory of hemispheric legal mixing with the objects of the new science of comparative law. For Taylor, comparison’s ultimate purpose was to discover the “immortal” and “universal” ideas behind all private law:

After the lapse of twenty centuries a new system of codes, far greater in number and far more voluminous in detail, have come into existence, from which the jurists of to-day should be able to extract, through a reapplication of the Roman method, the comparatively few basic principles which underlie them all. As more rapid intercommunication draws the nations of the world closer together, the longing increases for a uniform conception of legal right, capable of embodiment in a code of substantive and adjective law . . . .<sup>113</sup>

By comparing foreign codes, Taylor hoped to identify the “fundamental conceptions which, as essentials, lie at the base of all legal systems, such as obligation, duty, right, law, liability, custom.”<sup>114</sup> Taylor’s aspirations

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109. Taylor, *supra* note 107, at 245-246.

110. Taylor, *supra* note 108, at 476.

111. Hannis Taylor, *Jurisprudence of Latin America*, 1 VA. L. REV. 1 (1913).

112. *Id.* at 18.

113. TAYLOR, *supra* note 7, at 41.

114. *Id.*

were consistent with those of early twentieth-century comparatists in the United States and Europe who emphasized the discipline's utility as a vehicle for codification through identification of universal juristic principles.<sup>115</sup>

Importantly, Taylor's predicated assimilation of civil law and common law also assumed the continuing compatibility of the two legal traditions. As Lee's observations in British colonies had confirmed Bryce's theory of assimilation, so, too, did Taylor's thesis about the contours of legal mixing fit with contemporary developments in the insular possessions, where Anglo-American codes of civil procedure and constitutional norms, including *habeas corpus*, were introduced alongside the existing Spanish private law.<sup>116</sup> Indeed, most contemporary legal scholars who considered the consequences of colonial expansion in Puerto Rico and the Philippines assumed without comment that private law would remain unchanged, as Taylor's theory predicted, while those with an interest in reform generally focused attention on alleged weaknesses in the islands' Spanish-era remedial law, penal codes, and codes of criminal procedure.<sup>117</sup>

#### VII. VIEWS FROM THE TERRITORIAL BENCH: LEGAL MIXING IN THE PHILIPPINES

Just as Taylor had told Louisiana's lawyers that common law and civil law were "working together in perfect harmony,"<sup>118</sup> American judges in Puerto Rico and the Philippines increasingly told readers back home that the two legal traditions were "blending" in their own courtrooms

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115. See ZWEIGERT & KÖTZ, *supra* note 5.

116. MIXED JURISDICTIONS, *supra* note 2, chs. 6-7 (discussing the introduction of American public law in Puerto Rico and the Philippines).

117. See, e.g., C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1898) (assuming acquisition would have no effect on private law); Clifford S. Walton, *Change of Sovereignty of a People and the United States Constitution*, 48 AM. L. REG. 580, 581-82 (1910) (stating that it was a "well known principle of international law" that a change in sovereignty altered political relations, not municipal law); Lobingier, *supra* note 58, at 404 ("Sentiment has been somewhat divided as to the merits of [the Spanish] Penal Code, but the prevailing American opinion seems to be that its penalties are, on the whole, too severe, and that it leaves too little to the discretion of the trial judge."); Lloyd McKim Garrison, *Penal Code of Cuba and Porto Rico*, 13 HARV. L. REV. 124, 131 (1899) (criticizing the Spanish penal code that left private persons "powerless as against official persecution" and advocating its repeal); Luis E. González Vales, *Apuntes Para Una Historia del Proceso de Adopción del Código Penal Luego del Cambio de Soberanía*, 1 REV. ACAD. P.R. JURIS. Y LEGIS. 141 (1989) (acknowledging both American and local Puerto Rican concerns with the Spanish penal system's harshness of punishments and lack of protections for the accused).

118. Taylor, *supra* note 108, at 476.

without incident. The judges embraced Taylor's assumptions about the contours of legal mixing (i.e., the simultaneous survival of Roman law alongside new American procedural law), and they increasingly viewed successful blending as confirmation of the fundamental compatibility of civil and common law.

Two judges stationed in Manila, Charles Lobingier and George Malcolm, epitomize the approach. In the Philippines, the Spanish-era code of civil procedure had been repealed and replaced with legislation borrowed from California.<sup>119</sup> In a series of articles, the two jurists considered the benefits of the new, hybrid arrangement. Reviewing the practical results of mixing American procedure with Spanish civil law, Lobingier touted the emergence of a new jurisprudence superior to that of either parent system:

One of the interesting results of the American annexation of the Philippines promises to be the development of a unique system of laws, differing alike from those of each contributing nation, yet combining some of the strong features of both.

. . . .

Such then, is the new jurisprudence forming in the Philippines through the blending of diverse legal systems—the Spanish, preserving and continuing the law of old Rome with the garnered wisdom of its mighty juriconsults—the American, inheriting and contributing the great principles of the English common law, won by the struggles of sturdy yeomen, formulated by a long line of illustrious judges, and tempered with the practical common sense of the Anglo-Saxon . . . .<sup>120</sup>

Towards the end of his tenure, Lobingier revisited the theme of legal mixing. In the *Annual Bulletin*, he told fellow comparatists that the job of American judges in the Philippines had been to “adjust, harmonize and blend” Spanish law and common law.<sup>121</sup> Quoting Bryce and Howe, Lobingier claimed that the “experiment” in legal mixing had proved successful: “Finally, the experiment has demonstrated the feasibility of blending segments of the Civil and Common (Anglo-American) law, the two systems which divide the civilized world, thus confirming the view that at root the two are really one . . . .”<sup>122</sup>

Malcolm, then dean of the University of Philippines Law School, affirmed Lobingier's findings of compatibility. Relying on R.W. Lee,

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119. Lobingier, *Juridical Fusion*, *supra* note 31, at 40 & n.2.

120. Lobingier, *supra* note 58, at 401, 407.

121. Lobingier, *Juridical Fusion*, *supra* note 31, at 38-39.

122. *Id.* at 41-42.

Malcolm told *Illinois Law Review* readers that “the two great streams of the law, the civil, the legacy of Rome to Spain coming from the west, and the common, the inheritance of the United States from Great Britain coming from the east, have here in the Philippines, met and blended.”<sup>123</sup> Clearly, for Malcolm, this blending represented an unusual opportunity for judicial improvement of law, as earlier examples of mixed jurisdictions in both Britain and the United States amply attested: “How strategic a position this is for the Philippines! The concise, scientific precision and perfection of civil codification strengthened in its weakest parts by modern progressive procedural acts! Rome and England, not to mention Quebec, Louisiana, and the Pacific states, all justify the admirable results of this policy.”<sup>124</sup>

A few years later, Malcolm was appointed to the Philippines Supreme Court. In *In re Shoop* (Phil. 1920), he revealed his characteristic lack of concern with the tidy divisions of civil and common law:

The concept of a common law is the concept of a growing and ever-changing system of legal principles and theories, and it must be recognized that due to the modern tendency toward codification (which was the principle of the Roman and Civil Law), there are no jurisdictions to-day with a pure English Common Law, with the exception of England itself. In the United States the English Common Law is blended with American codification and remnants of the Spanish and French Civil Codes. There a legal metamorphosis has occurred similar to that which is transpiring in this jurisdiction to-day.<sup>125</sup>

Elsewhere, Malcolm claimed that American law was a “much modified common law, coming even to approach the exactness and symmetry of the civil law.”<sup>126</sup>

Indeed, for Malcolm and Lobingier, the progressive assimilation of Roman and English law was neither theoretical nor futuristic, but a present reality, and even the definition of common law was increasingly pliable. Moreover, the disintegration of conceptual boundaries between the two traditions and their different methodologies was understood as the logical consequence of an ongoing process of global legal development.

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123. George A. Malcolm, *Philippine Law*, 11 ILL. L. REV. 331, 332 & n.4 (1916) (quoting Lee, *supra* note 101, at 89).

124. *Id.* at 333 (citing José C. Abreu, *The Blending of the Anglo-American Law and the Spanish Civil Law in the Philippines*, 3 PHIL. L. REV. 285 (1914)).

125. *In re Shoop*, 41 PHIL. REP. 216 (1920) (Malcolm, J.).

126. George A. Malcolm, *Philippine Law*, 11 ILL. L. REV. 387, 389 (1917).

## VIII. THE DEVELOPMENT OF A NEW MIXED JURISPRUDENCE: PUERTO RICO

The idea that legal systems were largely compatible was not unique to Americans in the Philippines. The Roman law professor Joseph Drake early concluded that Puerto Rico's Civil Code gave "interesting proof of the fact that the two systems of law, the Roman and the English, which control most of the nations of the civilized world and their dependencies, are, in their essence, but slightly different enunciations of the same principles of natural justice."<sup>127</sup> And Howe claimed that study of the codes of France, Louisiana, and Spain revealed that "the difference between the civil law and common law is by no means so great as some persons imagine" and that the "leading doctrines are found to be much the same."<sup>128</sup>

In addition to presumptions of civil law/common law compatibility, a belief in the potential virtues of legal mixing permeated the early jurisprudence of the new mixed systems. In *Vega Baja v. Smith* (P.R. 1919), Justice Harvey Hutchison of the Puerto Rico Supreme Court, relying in part on Taylor's *Science of Jurisprudence*, stated the following:

Few tribunals are so unfettered by precedent, or, in matters not governed by statute, so free to follow the dictates of conscience and common sense as are the courts of this Island. To build, upon the fundamental principles so often found at bottom in both American and Spanish jurisprudence, a composite structure embodying the best elements of the two great systems and, in so far as may be, unmarred by the defects of either, is our peculiar privilege if we will but grasp the opportunity that lies before us.<sup>129</sup>

Similarly, Hutchison's colleague on the Court, James MacLeary, extolled the island's "composite legal system," which promised to blend legal rules from "all available sources" while adopting "the defects of none."<sup>130</sup>

Indeed, American judges on the territorial supreme courts frequently disregarded divisions between public and private law when they saw an opportunity to jettison an "anachronistic" rule applicable to one legal tradition or graft a more "progressive" doctrine onto the other. For example, American judges in the Philippines freely applied Spanish

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127. Joseph C. Drake, *The Old Roman Law and a Modern American Code*, 3 MICH. L. REV. 108, 108 (1904).

128. HOWE, *supra* note 19, at 149.

129. *Municipio de Vega Baja v. Smith*, 27 D.P.R. 582, 587 (1919) (Hutchison, J.).

130. James MacLeary, *The Administration of Justice in Porto Rico*, 7 ILL. L. REV. 77, 96 (1912).

principles to criminal law matters in two Filipino cases, *United States v. Cuna* (Phil. 1908) and *United States v. Abiog* (Phil. 1916), after concluding that Spanish rules were more consistent with common sense and progress than traditional English ones.<sup>131</sup> Likewise, in Puerto Rico, jurists (both Americans and Puerto Ricans) advocated interpretations of civil code articles in tort cases that would reach results consistent with the common law, as occurred in Justice del Toro's majority opinion in *Díaz v. San Juan Light & Transit Co.* (P.R. 1910) and Justice MacLeary's dissent in *Vélez v. Llavina* (P.R. 1912).<sup>132</sup>

Moreover, judges during this period frequently engaged in a two-step legal analysis, applying first the Spanish rule to a particular legal problem, and then performing the same analysis using common law doctrines, regardless of the area of law involved.<sup>133</sup> In Puerto Rico, Justice Louis Sulzbacher had a practice of telling Spanish or Puerto Rican litigants that outcomes according to American legal principles would have been identical under Spanish-era rules. For example, in *Bravo v. Franco* (P.R. 1902), Sulzbacher preferred to apply American precedents to questions of proof of adultery arising under a new divorce law enacted by Congress, but he also cited a recent Spanish court case addressing a crucial question

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131. *United States v. Cuna*, 12 PHIL. REP. 241 (1908) (Carson, J.) (“We the more readily accept the doctrine laid down by the Spanish authorities, because it leads to a conclusion which appears to be in consonance with the dictates of good sense and sound judgment . . .”) (adopting Spanish rule in a criminal case); *United States v. Abiog*, 37 PHIL. REP. 137 (1917) (Malcolm, J.) (“Neither English law nor American common law is in force in these Islands, nor are the doctrines derived from them binding upon our courts, save only in so far as they are founded on sound principles applicable to local conditions . . .”) (citing *Cuna*). Malcolm went on to say that the American judges in the Philippines could “properly refuse to take a rule which would estop other courses of reasoning and which, because of a lack of legal ingenuity, would permit men guilty of homicide to escape on a technicality.” *Id.* (justifying the departure from traditional English rule in a homicide case).

132. *Díaz v. San Juan Light & Transit Co.*, 17 D.P.R. 64 (1911) (del Toro, J.) (advocating the common law interpretation of “damages” in article 1803 of the Puerto Rico Civil Code because it would be “more ample and liberal, more just and equitable”); *Vélez v. Llavina*, 18 P.R.R. 634, 653 (1912) (MacLeary, J., dissenting) (“[T]he doctrine *respondeat superior* is in force in this island under the entirely harmonious authority both of the Spanish and the American jurisprudence.”) (quoting Spanish commentaries).

133. This “double act” in Puerto Rican private law methodology continues to attract the attention of comparatists. See José Puig Brutau, *La acción recíproca del Derecho español y del Derecho norteamericano en Puerto Rico*, 11 REV. DER. P.R. 499, 503-05 (1972) (“[L]a penetración de elementos del Common Law en Puerto Rico produce un fenómeno que exige profundos estudios de Derecho comparado, con la particularidad de que no es objeto de discusión académica, como en Europa, sino que es auténticamente vivido en la aplicación judicial del Derecho. Ello produce el curioso fenómeno de las argumentaciones que de momento llamará <por partida double>, en el sentido que los Tribunales veces creen obligados a razonar a base de ideas básicas de ambos sistemas: civil law y common law.”).

of evidence and concluded that “Spanish jurisprudence in cases of adultery does not differ very much from that of the United States.”<sup>134</sup> Sulzbacher employed the same tactic in *Chevremont v. United States* (P.R. 1903). In *Chevremont*, local purchasers of Spanish-era lottery tickets sued the government after Congress abolished lotteries in Puerto Rico, while the island’s American-appointed attorney-general, James Harlan, argued on behalf of the colonial administration that the change of sovereignty had ended any obligation of refund. The Court nevertheless found for the ticketholders. In a concurrence, Sulzbacher relied on American case law to demonstrate to Harlan that the ticketholders would have had a valid cause of action under both Puerto Rico’s civil code, as well as “several decisions of the highest courts of the United States.”<sup>135</sup> One can speculate that institutional motivations played a role in Sulzbacher’s approach in both *Bravo* and *Chevremont*: namely, improving the reputation of the new court’s jurisprudence by impressing upon losing parties (whether local litigants or colonial administrators) that the results reached by the Court were not arbitrary and outcomes would not have been different had Spanish-era law been applied instead.

In some cases, however, the American judges could not agree on the civilian rule, thus requiring extensive comparative analysis with other civil law jurisdictions. In *Rakes v. Atlantic, Gulf & Pacific Co.* (Phil. 1907), Justice James Tracey searched Spanish, French, and Quebec opinions, the Austrian, Portuguese, and Swiss civil codes, and American admiralty cases for the “theory of the civil law” on the question of comparative versus contributory negligence.<sup>136</sup> Tracey and his fellow Filipino justices concluded that comparative negligence represented the civilian approach, but the majority opinion also suggests that the doctrine was favored largely because it was thought to be more progressive.<sup>137</sup> Even here, two dissenting justices (both Americans) argued for the traditional common law defense of contributory negligence and found support for their position in both Spanish authorities and the Roman *Digest*.<sup>138</sup>

In reality, American judges in the overseas possessions were rarely surprised to find that civil law and common law rules were similar, or that civilian doctrine was amenable to harmonization with Anglo-American

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134. *Bravo v. Franco*, 2 D.P.R. 422 (P.R. 1902) (Sulzbacher, J.).

135. *Chevremont v. El Pueblo de P.R.*, 3 D.P.R. 114 (P.R. 1903) (Sulzbacher, J., concurring).

136. *Rakes v. Atl. Gulf & Pac. Co.*, 7 PHIL. REP. 359 (1907) (Tracey, J.).

137. *Id.*

138. *Id.*



norms: wider intellectual crosscurrents left them predisposed to such conclusions. Furthermore, over the years, competing emphases on improvement of law, harmonization, and compatibility coexisted and blurred. Typical is Malcolm's statement that Filipino courts often applied American case law to questions arising under the revised civil code both "for the purpose of showing that Spanish law and the Anglo-American law is the same" as well as "for the purpose of amplifying or extending the Spanish law."<sup>139</sup>

In other words, by the end of the formative period of legal blending, legal comparison of Spanish and American authorities could serve any number of purposes: "amplification" of Spanish private law, subversion to reach common law results, harmonization of two rules, or simple demonstration of a preexisting compatibility. In all likelihood, the prevailing assumptions about the civil law and common law's shared histories and future convergence, and the virtues of legal blending, meant that these objectives were not seen as mutually exclusive or even in tension with one another.

#### IX. THE FIVE FANTASIES OF JOSÉ TRÍAS MONGE REVISITED

This Article has argued that comparatists and American judges during the first decades of legal mixing had largely positive attitudes to Spanish civil law, especially its civil code, while simultaneously championing the blending of legal systems.

Legal historians from Puerto Rico and the Philippines, however, have argued that legal mixing was merely one part of a wider program of transculturation, in which colonial officials sought to "Americanize" the local Hispanic populations by imposing their language and alien legal institutions.<sup>140</sup> According to these historians, American judges in the insular possessions viewed the civil law as inferior and hoped to supplant it with common law rules, which they achieved indirectly through creative

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139. *In re Shoop*, 41 PHIL. REP. 216.

140. See, e.g., Carmelo Delgado Cintrón, *La Transculturación del Pensamiento Jurídico en Puerto Rico*, 45 REV. JUR. U.P.R. 305, 307 (1976) (arguing that North American judges intentionally imposed a foreign legal system on Puerto Rico as part of a larger project of transculturation); Alfonso L. García Martínez, *La Americanización de Filipinas: La Justicia—La Imposición del Idioma Inglés en el Período 1898-1906*, 17 REV. JUR. INTER. U.P.R. 419, 425 (1983) (discussing changes in rules of civil procedure in the Philippines as evidence of an "American scheme of juridical-linguistic transculturation"); José Trías Monge, *La Crisis del Derecho en Puerto Rico*, 49 REV. JUR. U.P.R. 1 (1980) (drawing similar conclusions).

judicial interpretation of civil code articles using the paradigms of compatibility and harmonization discussed above.<sup>141</sup>

The final part of this Article attempts to reconcile these incompatible assessments, first by revisiting the American judges' techniques of judicial interpretation and placing these techniques within the appropriate intellectual-comparative context, and, second, by exploring the ways in which legal comparison and transculturation mutually, often unconsciously, supported one another.

The most notable proponent of the thesis of intentional "Americanization" of Spanish-era civil law was José Trías Monge, former chief justice of the Puerto Rico Supreme Court. In *El Choque de dos Culturas Jurídicas en Puerto Rico* (1991), Trías Monge argued that American judges in Puerto Rico "contaminated" the island's private law by adopting disingenuous "techniques" of interpretation that favored substitution of common law rules for Spanish doctrines.<sup>142</sup> In particular, Trías Monge argued that the judges applied various "fantasies" of legal comparison that de-emphasized civil law/common law difference to legal problems arising under the civil codes.<sup>143</sup> These fantasies included the "Fantasy of the Identity of Laws," which posited that American and Spanish legal rules were broadly similar and could be applied interchangeably, as well as the "Fantasy of the Wise Mix" (or *la mezcla sabia*), which assumed that mixed jurisdictions presented unique opportunities to select the best rules from either tradition, regardless of the area of law concerned.<sup>144</sup> In theory, either fantasy could justify application

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141. See, e.g., Ennio M. Colón García et al., *Puerto Rico: A Mixed Legal System*, 32 REV. JUR. U. INTER. P.R. 227, 291 (1998) ("Common Law was considered superior to our already existent Civil Law.") (criticizing the "general vision" of the Puerto Rico Supreme Court during this period); J.A. Morales, *Puerto Rico: Two Roads to Justice*, 20 REV. DER. P.R. 293, 295, 304 (describing legal mixing in Puerto Rico during the first half of the twentieth century as an "unwholesome project of social engineering" and criticizing American "judicial assertiveness against naïve legal traditions"); Pacifico Agabin, *The Philippines*, in MIXED JURISDICTIONS, *supra* note 2, at 477 (stating that American judges in the Philippines "encouraged common law encroachments.").

142. TRIÁS MONGE, *supra* note 9, at 108 (describing the early jurisprudence as "contaminated"), 127 (introducing the theory of judicial subversion of civil law through the application of "fantasies of legal comparison.").

143. *Id.* ch. 5.10.

144. *Id.* at 39-40 (discussing the Fantasy of Identity of Law and the Fantasy of the Wise Mix). Trías Monge describes the Fantasy of Identity of Law as "one of the most important justifications for facilitating common law penetration in areas supposedly reserved for civil law"; American judges, without support, would hold that civilian and common-law rules applicable to a particular legal problem were substantially similar and then proceed to decide the question using only Anglo-American legal authorities. *Id.* The Fantasy of the Wise Mix, meanwhile, was "the most refined and insidious" of the comparative myths. This fantasy assumed that courts in mixed

of civilian rules instead of common law ones, but in reality, Trías Monge argued, after rehearsing the appropriate myth, the American judges almost always adopted the common law approach. Thus, comparative myths became instruments for bringing about the “reception of American law,” which, according to Trías Monge, was “basically complete by 1914.”<sup>145</sup>

In support of his argument, Trías Monge canvassed early Puerto Rican and Filipino decisions for instances in which American judges articulated theories of legal mixing that assumed compatibility of legal systems or desirability of harmonization, or in which judges applied common law rules in a civil law context because they believed themselves free to choose the best rule as part of the creation of a superior, hybrid jurisprudence. Judicial opinions in the former category included Justice MacLeary’s majority opinion in *Parés v. Ruiz* (P.R. 1918), in which the American judge reviewed several Puerto Rican cases before announcing that “the legal principles governing torts are substantially the same in the Spanish and American systems of jurisprudence.”<sup>146</sup> In the latter category may be included two cases that have already been examined: *Vega Baja*, in which Justice Hutchison argued that the courts in Puerto Rico had a wide discretion to choose from either American or Spanish doctrines, and the dissent in *Vélez*, in which MacLeary stated that legal “progress” in Puerto Rico would only occur through “harmonization” of the island’s civil code with common law rules.<sup>147</sup>

In Trías Monge’s account, the regular use of comparative fantasies about legal compatibility and *la mezcla sabia* served to obscure the common law-trained judges’ collective contempt for civil law, which he described as an overarching “Fantasy of Superior Law.” As evidence for this third, more sinister, fantasy, Trías Monge relied on several early cases, especially Sulzbacher’s opinions in *Marimón v. Pelegrí* and *Bravo v. Franco*, in which the Court disregarded Spanish precedents in favor of American ones, and his concurrence in *Chevremont*, in which Sulzbacher

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jurisdictions had the “happy” discretion to compare legal rules from either tradition and “to choose the [legal] solution most appropriate to each case.” *Id.*

145. José Trías Monge, *Legal Methodology in Some Mixed Jurisdictions*, 78 TUL. L. REV. 333, 344 (2003).

146. *Parés v. Ruiz*, 19 P.R.R. 323, 326 (1913) (quoted also in Manuel Rodríguez Ramos, *Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico*, 23 TUL. L. REV. 345, 358 (1949)).

147. *Vega Baja*, 27 D.P.R. 632 (in TRIÁS MONGE, *supra* note 9, ch. 7.4); *Vélez*, 18 D.P.R. 656 (discussed by TRIÁS MONGE, *supra* note 9, at 132-34).

stated (somewhat cryptically) that the “doctrines of the United States” were “more progressive” than those of the “old system.”<sup>148</sup>

As further evidence of legal chauvinism, Trías Monge also emphasized that the first American judges lacked familiarity with the civil law and rarely cited to Spanish authorities.<sup>149</sup> Upon arrival in Puerto Rico, they introduced common law methods of judicial reasoning, such as separate written opinions (dissents and concurrences) and reliance on precedent for binding authorities.<sup>150</sup> Trías Monge was particularly critical of Sulzbacher and MacLeary, whom he identified as the two justices most responsible for the “wholesale introduction of American doctrine.”<sup>151</sup> Meanwhile, he described Puerto Rican justices on the Court as, variously, silent collaborators in the destruction of Puerto Rico’s civilian tradition or passively “addicted” to the new American style of jurisprudence.<sup>152</sup>

Trías Monge’s thesis of common law hostility to Spanish-era civil law, and disingenuous substitution of American legal norms under the guise of legal comparison, has proven popular with both Puerto Rican and Filipino legal historians, and the idea that American judges in the insular possessions believed that the civil law was inferior, and worked to undermine it, is now widely accepted.<sup>153</sup>

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148. See TRÍAS MONGE, *supra* note 9, ch. 5.10 (discussing *Marimón, Bravo, Ex parte Bird*, and *Chevremont* as evidence of a common-law fantasy of superiority); see also Trías Monge, *supra* note 145, at 347 & nn.116-17 (discussing *Chevremont* and *Ex parte Bird*).

149. Trías Monge, *supra* note 145, at 335 (“As a rule, the American justices appointed to the Supreme Courts of Puerto Rico and the Philippines did not speak Spanish, the official language of the islands, nor were they sufficiently acquainted with the civil law.”). Similarly, the American judges “cited nothing but American cases and authorities, a practice that became common by 1903.” *Id.* at 340.

150. See TRÍAS MONGE, *supra* note 9, chs. 5.4 (reviewing the introduction of dissenting opinions), 5.7 (discussing the growing practice of citing Spanish and American legal authorities in judicial opinions).

151. Trías Monge, *supra* note 145, at 343.

152. See, e.g., TRÍAS MONGE, *supra* note 9, at 107-08, 165 (stating, alternatively, that the Puerto Rican justices played a muted role in the early years but were also “adictos al empleo de jurisprudencia y doctrina norteamericanas en la interpretación de los artículos del Código Civil referentes a la responsabilidad civil extracontractual”); see also Trías Monge, *supra* note 145, at 339 (arguing that Puerto Rican justices “saw themselves as leaders in a crusade to improve the legal system of the island, a task that they identified with the adoption of American institutions wherever possible.”).

153. See, e.g., Morales, *supra* note 141, at 304 (stating that after the Foraker Act the Supreme Court of Puerto Rico became the “leading instrument of Americanization”); Carmelo Delgado Cintrón, *Presupuestos Históricos Para Formar el Derecho Nacional*, 61 REV. JUR. U.P.R. 3 (1992) (positively reviewing Trías Monge’s thesis of the Five Fantasies and legal transculturation); Colón García et al., *supra* note 141, at 304-305 & nn.27-29 (relying on Trías Monge’s *Choque de dos Culturas* for many of their conclusions about the early years of legal mixing); Agabin, *supra* note 141 (describing American judges’ similar role in the introduction of common law doctrines into Filipino private law).

Despite its popularity, however, Trías Monge's interpretation requires reconsideration. First, much of the evidence for explicit legal chauvinism is ambiguous or context-specific. Sulzbacher's concurring opinion in *Chevremont*, for example, is open to multiple interpretations, including the possibility that his dual approach was part of a pattern intended to secure the court's reputation; at the very least, the American justice reached the same conclusion (in favor of local Puerto Rican litigants) as had his civilian colleagues, so there was hardly a reason to appeal to the common law as a superior system to reach a desired result.<sup>154</sup> Similarly, *Marimón* addressed a question of conflict of laws, not private law, while *Bravo* concerned the interpretation of American-style legislation.

Second, evidence that American judges were indifferent to the civil law's methodology is far more equivocal than Trías Monge suggested. Sulzbacher himself was well acquainted with the civil law, as he had been born in Germany and received his legal education there, as did several other American judges in Puerto Rico.<sup>155</sup> Moreover, despite Trías Monge's statements, Justices Wolf and MacLeary *did* cite Spanish legal authorities.<sup>156</sup> (Malcolm and Lobingier stated that Spanish authorities were highly persuasive in the Philippines in matters concerning the interpretation of the civil code, and there is no reason to think that this was

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154. In his concurring opinion in *Chevremont*, Sulzbacher had stated that “[w]e are always inclined to adduce the doctrines of the United States, when applicable, to the judicial problems in the courts of this Island, considering them more progressive and as an evolution of the old system.” See *Chevremont v. El Pueblo de P.R.*, 3 D.P.R. 114 (P.R. 1903) (Sulzbacher, J., concurring). Trías Monge assumed that the “old system” in question was the Spanish civil law, and that Sulzbacher’s comment was therefore evidence of a “Fantasy of Superior Law.” TRÍAS MONGE, *supra* note 9, at 129. However, Sulzbacher’s limitation “when applicable” suggests an awareness that private law matters were normally to be resolved without recourse to American doctrine. Furthermore, his practice of referring to civil law and common law rules interchangeably appears to have been for the purpose of demonstrating absence of conflicts, rather than to reach results not possible under civil law.

155. See Carmelo Delgado Cintrón, *Pensamiento Jurídico e Idioma en Puerto Rico*, 10 REV. JUR. U. INTER. P.R. 200, 210 & n.40 (1976) (stating that Sulzbacher was educated in Germany, possessed a sound knowledge of Spanish law, and was fluent in Spanish). Sulzbacher had also practiced law in New Mexico, which Joe McKnight described as a mixed system prior to 1901. See J.W. McKnight, *Some Historical Observations on Mixed Systems of Law*, 22 JURID. REV. (n.s.) 177, 183 (1977). Peter Hamilton, a federal judge in San Juan, had studied at Leipzig, and Adolph Wolf had spent time studying law in Berlin, as well.

156. See, e.g., *Redinger v Crespo*, 18 D.P.R. 110 (1912) (MacLeary, J.) (citing Manresa and the American legal encyclopedia for similar principles in negligence case); *Julbe v. Guzmán*, 16 D.P.R. 530 (1910) (Wolf, J.) (citing Scaevola in the matter of a widower’s right under Spanish Civil Code to inherit on intestacy).

not the case in Puerto Rico, as well.)<sup>157</sup> Moreover, according to Delgado Cintrón, Sulzbacher was early on in hot water with North American lawyers in San Juan for defending Puerto Rican private law in the press, making him an unlikely co-architect of a reception.<sup>158</sup> Finally, the introduction of separate written opinions, as well as treatment of single Spanish court opinions as binding precedent, appear to have been innovations of the Puerto Ricans justices, not the Americans: Trías Monge's first examples, *Iglesias v. Bolívar* and *Valdés v. del Valle*, both date to 1899, prior to the appointment of the first American (Sulzbacher) to the bench in 1900.<sup>159</sup>

At the same time, Trías Monge's proposed examples of American judges applying "fantasies" of interchangeable laws and *la mezcla sabia* are generally amenable to comparative, rather than chauvinistic, explanations. MacLeary's dissent in *Vélez* (attempting to "harmonize" Spanish tort doctrine with the common law doctrine of *respondeat superior*) is not very different in its application to Justice del Toro's majority opinion in *Díaz v. San Juan Light & Transit Co.*, in which the Puerto Rican jurist argued that the Court was obligated to harmonize the Spanish concept of "daños" with the "damages" of English law, perhaps suggesting that comparative approaches could serve purposes equally appealing to local judges.<sup>160</sup>

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157. See, e.g., Lobingier, *supra* note 58, at 405 ("The reports of the Supreme Court of Spain, which number about one hundred volumes, are authority in the interpretation of the Spanish Codes . . ."); Malcolm, *supra* note 126, at 400 ("In any number of cases their opinions have been accepted without argument, as decisive."). Malcolm predicted that "for a long time to come Spanish jurisprudence will be worthy of special notice." *Id.*

158. Delgado Cintrón, *supra* note 8, at 154.

159. According to Trías Monge, "On December 15, 1899, the first dissent was published." TRÍAS MONGE, *supra* note 9, at 111 & n.23 (citing *Iglesias v. Bolívar*, 1 D.P.R. 21 (1899) (Martínez, J., dissenting); *Valdés v. del Valle*, 1 D.P.R. 25 (1899) (Acuña, Díaz Navarro, JJ., dissenting); and *Ex parte Mauleón*, 4 D.P.R. 123 (1903) (MacLeary, J., concurring)). Trías Monge also stated that "Sulzbacher, MacLeary, and Wolf were the ones who at first began handing down separate votes, in the form of either concurring or dissenting opinions." *Id.* at 111. This has created an erroneous impression that Sulzbacher and the other Americans introduced the practice of separate opinions. Cf. Colón García et al., *supra* note 141, at 303 ("Dissident opinions in Puerto Rico were first used in 1899. The first judges to use separate votes, dissident or concurrent, were Sulzbacher, MacLeary and Wolf.") (relying on Trías Monge). In fact, the separate opinions in *Iglesias* and *Valdés* were authored by Puerto Rican justices prior to the appointment of any Americans. Correctly, Trías Monge identified *Barnés v. Mora* as the first time the Court relied on a single Spanish case as precedent, but like *Iglesias*, *Barnés* was authored by a Puerto Rican justice, José Severo Quiñones, not an American-born appointee. Cf. TRÍAS MONGE, *supra* note 9, at 120 & n.53 (citing *Barnés*, 1 D.P.R. 179 (1901)).

160. *Díaz v. San Juan Light & Transit Co.*, 17 D.P.R. 64, 69 (1911) (del Toro, J.).

Likewise, while Hutchison's majority opinion in *Vega Baja* attempted to fill an alleged gap in the civil law (by importing the American doctrine of dedication into Puerto Rican property law), the American judge relied heavily on Louisiana authorities to reach his decision, and he justified findings of legal compatibility by recourse to Hannis Taylor's *Science of Jurisprudence*, as well as common law cases and Spanish commentaries.<sup>161</sup> Arguably, Hutchison's mix of sources was more consistent with his comparative interests than with a latent contempt for the civil law tradition.

Significantly, the civilians who lived through the early period do not seem to have viewed the new jurisprudence as immediately threatening. Jorge Bocobo was unlikely to have stated in 1915 that the civil law had "demonstrated a remarkable stability and firmness" in the Philippines if he or his fellow civilians had viewed the legal mixing of the previous decade as a "contamination."<sup>162</sup> Nor does it seem probable that a civilian "purist" such as José Laurel would have championed Louisiana as confirmation of the "practicability of a more perfect fusion of the two great systems of law" if he perceived the ongoing process of legal mixing in the Philippines as an existential threat to the civil law tradition.<sup>163</sup> Indeed, many of the instances of pollution identified by Trías Monge are found in unanimous opinions or opinions written by Puerto Rican justices, which may indicate a lack of awareness or contemporary alarm at the degree of ongoing blending.<sup>164</sup>

Moreover, American appointees invoked the same myths of legal mixing in the Panama Canal Zone when applying provisions of the Colombian Civil Code, which remained in effect in the Isthmus until 1933.<sup>165</sup> Surely, there was no need to resort to disingenuous "fantasies" of legal comparison in a territory with no substantial native population (very early on, most Zone residents were either American officials or West Indian laborers, both groups presumably accustomed to the common law),

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161. See also *Colón v. Registrador*, 22 D.P.R. 369 (1915) (Hutchison, J.) (praising Louisiana's mixed jurisprudence).

162. See Jorge Bocobo, *Civil Law Under the American Flag*, 1 PHIL. L.J. 284 (1915).

163. José P. Laurel, *What Lessons May Be Derived by the Philippine Islands from the Legal History of Louisiana*, 2 PHIL. L.J. 63, 92, 95 (1915). For identification of José Laurel as a "purist," see Agabin, *supra* note 141, at 477.

164. See, e.g., TRÍAS MONGE, *supra* note 9, ch. 7 (listing cases authored by Puerto Rican justices).

165. See, e.g., *Kung Ching Chong v. Wing Chong*, 2 C.Z. 25 (1910) (harmonizing revendication and common law resulting trust); *Fitzpatrick v. Pan. Rr. Co.*, 2 C.Z. 111 (1914) (reviewing Colombian, Puerto Rican, and Louisiana cases and concluding that both civil and common law recognized doctrine of *respondeat superior*).

nor a significant civilian legal profession (the last Panamanian judge left the Canal Zone bench in 1909).<sup>166</sup>

Instead, what emerges from the early judicial opinions are trends that, far from suggesting uniform contempt for civil law, are equally consistent with comparatist assumptions of similarity and compatibility. Judges frequently emphasized that Spanish and Anglo-American legal rules were sufficiently identical to engage in analysis of civil code problems using both traditions' authorities, sometimes interchangeably. Judges also selectively appropriated Spanish doctrines when they felt the common law needed improvement, and vice versa. But judges were also capable of arguing a question of private law using a variety of civilian sources, suggesting a lively intellectual interest in the subject matter, and they even demonstrate an awareness of the possibility of common-law "contamination" in the jurisprudence of other civilian jurisdictions, such as Quebec.<sup>167</sup>

No doubt, Trías Monge and others were correct in asserting that the balance of harmonization was ultimately, and substantially, in the common law's favor. And the possibility that animus to the civil law motivated some proponents of legal blending cannot be ruled out. Indeed, it would be surprising if official support for transculturation in other areas of political life, such as imposition of English in public education, did not affect American judges' attitudes to legal mixing.<sup>168</sup>

And yet, these same judges had no reticence about criticizing social and political institutions inherited from Spain, while also proclaiming the civil law's comparative advantages.<sup>169</sup> It would appear that many of them

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166. BRAY, *supra* note 2, at 68 (citing demographic statistics from 1912), 86-88 (Francisco Durán's years of service).

167. *See Rakes v. Atl. Gulf & Pac. Co.*, 7 PHIL. REP. 320 (1907) (acknowledging displacement of traditional negligence rules in Quebec by common-law dominated appellate courts).

168. *See, e.g.,* Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 67-71 (2000) (discussing various manifestations, especially in language policy and public education, of American cultural imperialism in Puerto Rico during the immediate post-transfer period); *see also* Delgado Cintrón, *supra* note 155 (presenting numerous examples of American military officials and North American lawyers' efforts to replace Puerto Rican legal institutions during the period after occupation); *cf. Cruz v. Domínguez*, 8 D.P.R. 580 (declaring that the English translation of a statute should be the official one).

169. *See, e.g.,* Tracey, *supra* note 59, at 77 ("In facing as its assigned task the upbuilding of an oriental people on western republican lines, the Philippine administration in many instances found at its hand only raw material.") (discussing islands' perceived lack of political development and primary education). Nonetheless: "Not so, however, in the structure of the law. The Spaniard had founded in the islands the legal system prevailing throughout Continental Europe . . ."; *see also* MacLeary, *supra* note 130, at 77 ("In comparing the two great systems the thoughtful lawyer, be he American or Portorican [sic], must concede that, while the palm may be yielded to the civil



genuinely believed that civil law and common law could be fused into one system.

Today, aspirations for legal assimilation and respect for legal diversity are not easily reconciled values; a preference for the former usually suggests indifference to the survival of distinct legal traditions. Indeed, it is tempting to view early comparatists' purported respect for Spanish civil law as disingenuous, as Trías Monge may have done. But historians should distinguish between the well-known cultural chauvinism of colonial officials and the insular judges' comparative aspirations for productive legal blending. The latter aspirations for convergence were grounded intellectually in contemporary trends in English legal history, comparative law, and domestic law reform, as much as in American colonial policy. In fact, aspirations for global legal mixing often assumed the civil law's parity with the common law. In time, these same aspirations became rote justifications for the reception of common law doctrines in two mixed jurisdictions, where they survive long after the original intellectual-comparative context has faded.

## X. CONCLUSIONS

Every mixed legal system develops within a specific comparatist milieu. Legal actors, including colonial judges, arrive on the scene with preexisting assumptions about the nature of legal difference. These assumptions often have substantial intellectual histories independent of the immediate political context. Nevertheless, comparative paradigms inform participants' understandings of new legal encounters and influence the nature and style of mixed jurisprudence during formative periods.

From the viewpoint of historians of mixed systems, however, the significance of internal developments in Anglo-American legal thought may not be as obvious as the unequal power dynamic inherent in the new political relationship, especially if a transfer of political control proves longer lasting than the comparatist milieu in which the system was born. This will be particularly true in subnational jurisdictions, such as Quebec or Puerto Rico, where legal mixing is inextricably linked to larger questions of language policy and cultural survival.<sup>170</sup> Indeed, in these

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law in the matter of contracts and the rights of property and the rules of commercial intercourse, the common law can justly claim superiority in the protection which it throws around the liberty and the life of the individual citizens.”).

170. See, e.g., TRÍAS MONGE, *supra* note 9, at 79 (“The clash of legal cultures in Puerto Rico was only one aspect of a larger clash of values between Puerto Ricans and Americans, visible in almost every manifestation of daily life during this period.”); Delgado Cintrón, *supra* note 168, at

systems, legal mixing may be understood as one aspect of a wider process of political subordination.<sup>171</sup> Typical of the approach is Trías Monge's conclusion that "mixed jurisdictions normally feature a tension between two legal cultures, one politically dominant and the other or others living in a subservient state."<sup>172</sup>

As a result, the threat of "contamination" and "pollution," in which the civil law assumes the role of endangered species, becomes decisive in examining the motivations of legal actors, current and past.<sup>173</sup> The possibility that trends in Anglo-American jurisprudence at the moment of first contact may have had a significant influence on the shape of early legal blending is not always explored. The fact that architects of the new system may have described their activities with more neutral terms such as "blending," "fusion," or "assimilation," or that local jurists may have shared similar understandings, is usually left unexamined.<sup>174</sup>

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306 ("El idioma y el derecho hispano-puertorriqueño son dos de las áreas culturales que más sufren por razón de los intentos de norteamericanizar a los puertorriqueños.").

Scholars of legal mixing in other jurisdictions have made similar observations: Sophie Morin, *Quebec: First Impressions Can Be Misleading*, in MIXED LEGAL SYSTEMS, *supra* note 8, 166-69 (reviewing interpretations of Quebec's legal history as a process of colonial conflict between Anglophone officials and the Francophone population); Jean-Louis Baudouin, *Mixed Jurisdictions: A Model for the XXIst Century*, 63 LA. L. REV. 983, 991 (observing that in the 19th century, "for political reasons linked to cultural survival, at least in Quebec, the civil law tradition was viewed as a means of resisting linguistic and cultural assimilation"); A.N. Yiannopoulos, *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913*, 53 LA. L. REV. 5, 22-23 (1992) (associating the decline in Louisiana's civilian methodology with post-bellum "Fading of the French Language and Culture"); David Gruning, *Bayou State Bijuralism: Common Law and Civil Law in Louisiana*, 81 U. DET. MERCY L. REV. 437, 445-46 (2004) (also attributing the weakening of the "civilian character of [Louisiana's] legal system" to the French-English "change in language habits").

171. See, e.g., T.B. Smith, *The Preservation of the Civilian Tradition in 'Mixed Jurisdictions,'* in CIVIL LAW IN THE MODERN WORLD 12-13 (A.N. Yiannopoulos ed., 1965) ("It is doubtful whether the civilian tradition in any mixed jurisdiction can survive indefinitely, isolated in a country where adherents of the 'common law' exercise predominant political power. Such a group has always used this power directly or indirectly to weaken the rival legal tradition . . .").

172. Trías Monge, *supra* note 145, at 333.

173. See MIXED JURISDICTIONS, *supra* note 2, at 41 (for a non-polemical description of "pollutionists"); see also A STUDY OF MIXED LEGAL SYSTEMS, *supra* note 8, at 4-5, 7 (examining the applicability of an "endangered species" paradigm to various mixed legal systems); Olivier Moréteau, *An Introduction to Contamination*, 3 J. CIV. L. STUD. 9, 10 (2010) (neutral discussion of the concept of "legal contamination").

174. See, e.g., William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 725 (2000) ("[M]ixed jurisdictions are created when one culture, with its law, language and style of courts, imposes upon another culture, usually by conquest."); cf. Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 28 (2003) (describing mixing as a more balanced process in which common law is both "imposed" by political actors as well as "desired" by civilian jurists); see also Edgardo Rivera García, *El Andamiaje Legal de Puerto Rico: Fusión Enriquecida del Derecho Común Anglosajón y la*

According to Vernon Palmer, a typical mixed system develops in two stages: a “first reception” of common law, defined by a brief period of intense legislative activity, usually affecting public law, and a “second wave,” recognized as a “long evolutionary process” involving the “gradual mixing of the common law into the civil law on a case-by-case basis.”<sup>175</sup> According to Palmer, this second wave is replete with “stereotypical justifications” for legal mixing; appellate judges’ “restraint or their activism, their training and expertise or their lack” become “crucial to the nature and style of the jurisdiction.”<sup>176</sup>

Nineteenth-century Anglo-American assumptions about legal evolution and the comparative strengths of civil and common law should be understood as part of the territorial judges’ “training and expertise,” which in turn influenced the “nature and style” of the early mixed jurisprudence of Puerto Rico and the Philippines. In both territories, American-born judges arrived with a common set of assumptions about the compatibility of civil and common law, beliefs apparently confirmed or reinforced by their experiences in Manila and San Juan. Nevertheless, they also viewed the Spanish private law they encountered in the new possessions positively, because they were already looking for foreign models as potential sources for the improvement of American law.

Had American comparatists and judges had a less favorable attitude to Spanish private law during the formative years of legal mixing in the insular possessions, or been less zealous in critique of their own judge-made law, the shape of mixing may have been very different. Indeed, one only has to look at their negative assessment of Spanish public law, and Spanish public law’s rapid demise in both territories, to see that an alternative course of development was still possible. On the other hand, had American comparatists not been so confident that legal development involved the breakdown of separate civilian and common law spheres, they may not have been so aggressive in pursuit of assimilation of the two legal traditions in the area of private law.

Finally, it would be wrong to conclude that American comparatists of the period were already trapped in the “Law and Development” paradigm of the 1960s. As this Article has shown, early comparatists were

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*Tradición Civilista*, 82 REV. JUR. U.P.R. 687, 690 (2013) (arguing that legal mixing in Puerto Rico is “más que un fantasía, constituye la realidad innegable de nuestro quehacer legal”).

175. Vernon Valentine Palmer, *Descriptive and Comparative Overview*, in MIXED JURISDICTIONS, *supra* note 2, at 65.

176. *Id.*; see also Vernon Valentine Palmer, *Quebec and Her Sisters in the Third Legal Family*, 54 MCGILL L.J. 321, 343-45 (2009).

far from uninterested in foreign models of codification, at least with respect to private law, nor were they unable to appreciate the Roman or civilian influence on Anglo-American law's development.<sup>177</sup> (Indeed, a vocal subgroup tended to exaggerate the extent of the latter). There is a danger in projecting back to an earlier period the failings of more recent "development" efforts in Latin America.<sup>178</sup> And there is a corresponding value in acknowledging a moment in the history of American comparative law when Spanish and Latin American legal systems were not entirely neglected.<sup>179</sup>

#### XI. EPILOGUE: THE END OF THE SPANISH CRAZE IN AMERICAN COMPARATIVE LAW

Interest in Spanish law and legal history dwindled after 1918. The United States' transformation from a regional superpower to world leader created new impulses in comparative thought that did not usually involve Latin American law or that of the insular possessions. In 1936, Francis Deák examined the most important articles on foreign and comparative law in six leading American law journals, and the shift in focus in comparative research away from Spanish law to developments in international law, East Asia, and the Soviet Union's new legal system is clear.<sup>180</sup> Likewise, introductory American textbooks on comparative law or world legal systems were published with little mention of the Spanish law of the insular possessions, something unthinkable twenty years before.<sup>181</sup>

Moreover, comparative law as a whole suffered during the Depression: the Bureau was dissolved and the *Annual Bulletin* ceased

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177. Cf. Jedidiah Kroncke, *Law and Development as Anti-Comparative Law*, 45 VAND. J. TRANSNAT'L L. 477, 479 (2012) (arguing that American self-perception as primarily an "exporter" of legal knowledge is already evident by the time of the Spanish-American War).

178. See generally J.H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 481 (1977) (discussing weaknesses of the "Law and Development" paradigm, particularly proponents' lack of familiarity with target legal cultures).

179. Cf. Jan Kleinheisterkamp, *Development of Comparative Law in Latin America*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 1, at 261, 262 (observing that "Latin American law has largely been neglected by mainstream comparative law"); see also Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008) (discussing the effects of American comparison's long-established perception of Latin American law as "failed law").

180. See Francis Deák, *The Place of Foreign and Comparative Law in the American Law Reviews*, 23 VA. L. REV. 22, 33-37 (1936) (appendix of leading articles). The number of articles about Spanish law declines rapidly after the early 1920s.

181. See, e.g., JOHN H. WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS (1928).

publication.<sup>182</sup> After the 1930s, the discipline recovered, but civil law scholars focused increasingly on Europe. The Spanish Craze itself was undermined by negative political developments in Spain and Latin America that largely discredited theories of political convergence, while Latin Americans themselves increasingly preferred Pan-Hispanism to Pan-Americanism.<sup>183</sup> Spanish language enrollments in colleges and high schools also dropped precipitously.<sup>184</sup>

Comparison of Spanish and American law did not entirely end after 1918, but it soon acquired a different hermeneutic. Peter Hamilton, a federal judge in San Juan, may be representative, for he struck a more pessimistic tone about themes of convergence than had his predecessors. In a *Harvard Law Review* article in 1922, Hamilton began by questioning some of the foundational orthodoxies of civil law/common law compatibility, including the shared Roman history of Spanish and English law.<sup>185</sup> He also claimed that Americans had not yet codified their law because it was “still in a vigorous state of growth,” a triumphalist contortion of Maine’s proposed stages of legal development, and one that challenged the principal appeal of Spanish civil law and legal history: its status as a potential model for American codification.<sup>186</sup>

More importantly, Hamilton saw civil law and common law as “essentially different” in terms of their substantive principles; the earlier, more-positive, presumption in favor of compatibility has vanished.<sup>187</sup> His ultimate conclusion that the “underlying distinction between the two systems is in the individualism of the common law and the importance of kindred in the civil law” was, in essence, a rejection of Scott’s depiction of Spaniards as Yankee individualists in Iberian dress, and left little room for assimilation.<sup>188</sup> In a series of lectures given at the University of Puerto Rico Law School and subsequently published as *The Origin and Growth*

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182. Clark, *supra* note 1, at 592.

183. See Kagan, *The Spanish Craze in the United States*, *supra* note 11, at 38-39 (discussing the effect of Franco’s rise to power and political instability in Latin America on enthusiasm for Spanish craze); RICARDO D. SALVATORE, DISCIPLINARY CONQUEST: U.S. SCHOLARS IN SOUTH AMERICA, 1900-1945, at 3 (2016) (“By the mid-1930s, support for Pan-Americanism reached a peak of enthusiasm.”); C.H. Haring, *South America and Our Policy in the Caribbean*, 132 ANN. AM. ACAD. POL. & SOC. SCI. 146, 147-51 (1927) (acknowledging the increasing unpopularity of Pan-Americanism in Latin America).

184. See Siskin, *supra* note 12, at 161 (“By 1927, the wave of interest in Spanish began to ebb, reaching a low-water mark in the mid-1930s.”).

185. See Peter J. Hamilton, *Civil Law and the Common Law*, 36 HARV. L. REV. 180 (1922).

186. *Id.* at 185.

187. *Id.* at 181.

188. *Id.* at 187.

of the *Common Law in England and America* (1921), Hamilton stated that “during the years on the bench and now as a professor and as practitioner the differences of the Common Law and the Civil Law have struck me forcibly.”<sup>189</sup> Indeed, the very civil law doctrines that had only recently been regarded by contemporaries as analogous to common law rules were described by Hamilton as incompatible.<sup>190</sup>

Elsewhere, American officials and legal scholars were beginning to concede that legal mixing in the insular possessions was largely proceeding in one direction.<sup>191</sup> For Hamilton, the proposed assimilation of legal systems that had consumed the imaginations of earlier scholars now lay distant and elusive:

Perhaps some day there will be a union of the two in some favored land on the firing line of the Saxon and Latin civilizations; certainly there are modifications of the one by the other in progressive countries even now; nevertheless, for the present we must think of them as different if not opposing systems.<sup>192</sup>

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189. PETER HAMILTON, *THE ORIGIN AND GROWTH OF THE COMMON LAW IN ENGLAND AND AMERICA*, at v (1921).

190. Compare *Santos v. Reyes*, 10 PHIL. REP. 125 (1908) (for American justice in the Philippines holding that “the ‘consideration’ of the American law and the causa of the civil law, although somewhat different in theory, work out equivalent effects in practical jurisprudence”), with HAMILTON, *supra* note 189, at 52 (criticizing common lawyers for interpreting or translating civilian “causa” as “consideration”). Perhaps significantly, earlier reliance on Spanish authorities appears to have also declined in the insular possessions after 1918. See Malcolm’s list in *In re Shoop*, 41 PHIL. REP. 216 (1920) (Malcolm, J.).

191. See, e.g., ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 2 (1921) (predicting that “[i]n the Philippines and in Porto Rico there are many signs that common-law administration of a Roman code will result in a system Anglo-American in substance if Roman-Spanish in its terms”); Eugene A. Gilmore, *Philippine Jurisprudence—Common Law or Civil Law?*, 16 A.B.A. J. 89, 134 (1930) (“The Common Law has entered very largely [in Filipino jurisprudence] and its influence is increasing.”).

192. Hamilton, *supra* note 185, at 180.