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Michael Wallace Gordon

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## LEGAL CULTURES OF LATIN AMERICA AND THE UNITED STATES: CONFLICT OR MERGER

*Michael Wallace Gordon\**

When I joined the U.F. law faculty thirty-three years ago to teach, among other subjects, seminars on law and development in Latin America and trade and investment in Latin America, I was told by Professor Bill Macdonald that an anonymous donor made available a rather attractive cash prize each year for a paper based on the theory of “how Latin Americans would be better off if they would only adopt U.S. legal institutions.” I had come to this institution largely because of my affection for “things” Latin, and the reputation of its Center for Latin American Studies. It seemed a little strange to me that we would want to impose upon Latin American legal culture characteristics that had a very confined origin—the “felt necessities of the times” arising from incidents of a battle in 1066 on Senlac Hill just north of Hastings. I had taught Comparative Law at the University of Connecticut for two years—the first such course offered there. My students enrolled believing that comparative law would mean comparing Connecticut law with Rhode Island law. France to them meant Bordeaux, as in wine, and Germany meant war movies and helmets worn by scruffy Americans who rode Harley-Davidsons. We struggled through the terms with new concepts of *puissance publique*, *usufruct* and *delicts*, *preclusion* and *exequatur*. But we soon found the materials wanting—they dove headlong into substantive law with not a moment to think about the legal *culture* of France or Germany. The Spanish legal system was not ever referred to. After all—we were “ingleses” and had won the battle of the Armada—and so much for Spain.

I am uncertain about how LatCrits think about the legal cultures of Latin America and the United States, and what I might possibly add to this collection of America’s preeminent group of LatCrits. Perhaps what might be useful is to draw upon my thirty-five years of teaching law to note some examples where the two cultures have come in conflict or have merged. One might wish to know who “won,” or better, what survived, when they came in conflict or merged. An example of the former is when new states of this union in the 1800s were presented with an opportunity to choose the legal system for the state—civil or common law. An example of the latter is the more recent adoption of the North American Free Trade Agreement

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\* Chesterfield Smith Professor of Law, University of Florida, Levin College of Law, J.D., 1963, University of Connecticut; M.A., 1968, Trinity College; B.S., 1957, University of Connecticut.

(NAFTA),<sup>1</sup> when choices had to be made about legal processes. Let me begin with the former.

Much of the current United States was under the influence of Spanish legal culture prior to the Treaty of Guadalupe in 1848.<sup>2</sup> In 1850, the California Senate published a report on civil and common law.<sup>3</sup> The Bar of San Francisco petitioned the committee on the judiciary, which considered the future jurisprudence for the state as "the most grave and serious duty which the present Legislature will be called upon to perform."<sup>4</sup> The report considered various characteristics of the civil and common law.<sup>5</sup> The legal tradition of the area had been Spanish and, more recently, Mexican civil law.

It did not take long for the committee to disclose its preferences and prejudices. It stated that:

The Common Law is that system of jurisprudence which, deducing its origin from the traditionary customs and simple laws of the Saxons, becoming blended with many of the customs and laws of the Normans, enriched with the valuable portions of the Civil Law, modified and enlarged by numerous Acts of the English Parliament, . . . has grown up, . . . under the reformed religion and enlightened philosophy and literature of England, and has come down to us, amended and improved by American Legislation, and adapted to the republican principles and energetic character of the American people.<sup>6</sup>

This statement is incorrect—the common law did not absorb the valuable portions of the civil law. The reception of Roman law on the continent did not extend to England. The report also suggests that the Spanish and other forms of the civil law were based on unenlightened philosophy and literature, and a legal culture unimproved by legislation and attributable to a less than energetic people.<sup>7</sup>

The report considered several differences between the two systems. Did it do so fairly? Consider these comments:

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1. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

2. Treaty of Peace, Friendship, Limits, and Settlement With the Republic of Mexico, July 4, 1848, U.S.-Mex. 9 Stat. 922, 1948 WL 6374.

3. *Report on Civil and Common Law*, 1 Cal. 588, 588 (1850).

4. *Id.*

5. *See id.*

6. *Id.* at 592.

7. *Id.* at 592-93.

The Civil Law regards husband and wife . . . disunited in person, and with dissevered interests in property. It treats their union in the light of a partnership, no more intimate or confiding than an ordinary partnership in mercantile or commercial business. Whereas, the Common Law deems the bond which unites husband and wife, so close in its connection, and so indissoluble in its nature, that they become one in person, and for most purposes one in estate. . . . The result is, that in no country has the female sex been more highly respected and better provided for—nowhere has woman enjoyed more perfect legal protection, or been more elevated in society; and nowhere has the nuptial [sic] vow been more sacredly observed, or the nuptial tie less often dissevered, than in the Common Law countries—England and the United States.<sup>8</sup>

I am not a historian of the comparative role of women in Spanish and English legal cultures, but I sense that these comments would not be fully affirmed. If the nuptial tie is more often dissevered in civil law cultures, there cannot be many married couples in Latin America.

The report next comments on the male and majority.

The Civil Law holds the age of majority in males, for most of the ordinary purposes of life, at twenty-five years. . . . This system retains man in a continued state of pupillage and subordination from earliest infancy, until, in some cases, his locks become hoary with age. But the Common Law absolves the age of twenty-one from parental restraint, and clothes it with the complete panoply of manhood. It bids the youth go forth into the world, to act, to strive, to suffer—an equal with his fellow man—to put forth his energies in the service of his country, or in the eager strife for the acquisition of wealth or the achievement of renown. Hence, under the latter system, the activity, the impetuosity, the talents of early manhood, stimulated by fresh aspirations of ambition, or love of gain, are, at the earliest period, put under requisition and brought into exercise, in developing the resources, and adding to the wealth and glory of a State; whilst, under the former, they stagnate for lack of sufficient inducement to action, and are to a great degree lost.<sup>9</sup>

This is a marvel of overstatement, if not misstatement. The report goes on

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8. *Id.* at 594.

9. *Id.*

to mention other "obvious" benefits from the common law.<sup>10</sup> I end with one I can relate to better from my experience with commerce.

The Civil Law holds, under the doctrine of implied warranty, that where one article eventually proves to be of different material from, or of inferior quality to, that which the purchaser intended to buy, and supposed he was buying, he may require the vendor to refund the whole or a portion of the consideration received . . . . On the other hand, the Common Law more wisely says, that if B wished to guard against the contingency of a possible defect, he should have made it a part of the contract of sale, that A gives his express warranty of the merchantable quality of the goods. Its doctrine is *caveat emptor*; . . . the Civil Law looks upon man as incapable of judging for himself . . . .<sup>11</sup>

Has not the commercial law of the common law system changed its opinion about *caveat emptor*, and has not the civil law notion of implied warranty become an essential feature of modern society, whether civil or common law based?

I will not dwell upon this aged report longer, nor repeat its less than generous specific comments about Mexico, which we must remember we had just been at war with for invading its own territory. There were good reasons for absorbing and preferring the common law in these Southwestern states, but they did not usually include such uncertain distinctions as related above. In reality, the Spanish legal culture was and continued to be part of the legal culture of these states, in both substantive law (e.g., real property) and procedural law (e.g., civil procedure). How interesting might these states be today had the opportunity to truly merge the best of two legal cultures been addressed.

It is that issue of merger which I would like to comment on with regard to the adoption of NAFTA.<sup>12</sup> The modesty of NAFTA, in contrast to the European Union, has not presented many opportunities to debate and select or merge legal concepts. Much of NAFTA is influenced by the earlier rules established in the General Agreement on Tariffs and Trade (GATT) in 1947.<sup>13</sup> But there are several dispute resolution mechanisms in NAFTA where the legal cultures presented conflicts. For example, Chapter 19 was created to establish a binational panel review of specific agency decisions in each of the parties.<sup>14</sup> The parties might have adopted a common standard

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10. *Id.* at 594-96.

11. *Id.* at 595.

12. *See supra* note 1.

13. General Agreement on Tariffs and Trade, Jan. 1, 1948, T.I.A.S. No. 1,700.

14. United States-Canada Free-Trade Agreement Implementation Act of 1988, PL 100-449,

of review, but they instead preserved the standards of review of each nation.<sup>15</sup> Thus, in a case I will soon sit on with one other American and three Mexicans to review the correctness of a dumping decision (involving fertilizer exported from the United States to Mexico), our panel must apply Mexican law and review the decision just as a Mexican tribunal would do.<sup>16</sup> This is in contrast to another NAFTA dispute panel I am currently sitting on challenging not a Mexican agency decision, but a decision of the United States Department of Commerce. Two Mexicans, two other Americans, and I will determine whether the U.S. agency properly applied U.S. law.

NAFTA could have adopted the United States standard of review for all hearings, or that of Mexico or Canada. I think that the experience I am having, as are other Americans and Mexicans, is valuable. We are looking at the same concepts and sitting once to apply the standards of Mexican law, and sitting another time to apply the standards of U.S. law. When the Free Trade Agreement of the Americas (FTAA)<sup>17</sup> is adopted, there will very likely be a dumping dispute process. Will a single standard be adopted? If so, there will be some rich experience to make a better judgment than was made by the legislature in California a century and a half ago.

Time prevents me from further comments on these areas, although much could be said. I do not fully understand the LatCrit movement, but I think that some of what it wishes to achieve is not unlike what I have been talking about to my students for many years, such as the comments earlier about the California report, which I have been using since I first taught Comparative Law to my University of Connecticut students in the fall of 1966. It has never made much sense to me to continue to do something my way solely because it is my way, when my neighbor's way seems better. That is certainly appropriate when my neighbor is making Paella and flan and I am having a hot dog and jello. It also seems true when my neighbor's legal culture has characteristics that seem more appropriate than my own. Unfortunately not many of our students are touched by comparative legal culture in the usual curriculum, but this old gringo may be a little bit of a LatCrit, or maybe more a "CivCrit," when he continues to teach about amparo, courts of cassation, and prescripción and exequatur. Thanks for including me—if only just for a day.

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102 Stat. 1851 (1988).

15. *Id.*

16. Dumping involves the sale of goods by a company, for example a U.S. fertilizer company, for less in the exporting country (the United States) than in the importing country. Such sales are said to be for Less Than Fair Value (LTFV).

17. See generally Free Trade Area of Americas (Proposed Official Draft 2001), available at [http://www.ftaa-alca.org/ftaadraft/eng/draft\\_e.doc](http://www.ftaa-alca.org/ftaadraft/eng/draft_e.doc). [Rule 12.8.5 for proposed draft].

