

October 1992

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Antonio Fernós, *Trading Winds in Puerto Rico: The Dawn of Self-Determination Shines on a Legal System*, 1 Wm. & Mary Bill Rts. J. 285 (1992), <https://scholarship.law.wm.edu/wmborj/vol1/iss2/8>

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TRADING WINDS IN PUERTO RICO: THE DAWN OF SELF-DETERMINATION SHINES ON A LEGAL SYSTEM

by Dr. Antonio Fernós*

On November 22, 1963, President John F. Kennedy was assassinated. That event crushed a project to provide the people of Puerto Rico with a chance at self-determination. That project had been on President Kennedy's agenda since his letter of July 25, 1962 to the Governor of Puerto Rico, Luis Muñoz Marín.

Twenty-eight years to the day, on November 22, 1991, a former Central Intelligence Agency ("CIA") and Special Forces Officer testified before Puerto Rico's Senate Judiciary Committee that the Federal Bureau of Investigation ("FBI") knew of, provided cover for, protected, and still protects a death squad called "Forces for Democracy." The team consisting of FBI agents, a federal marshall, SWAT team officials, and members of Puerto Rico police intelligence elaborated a plan to commit acts of murder, sabotage, and terrorism. These actions included destroying National Guard planes and providing arms used to kill two marines, whose murders were then attributed to a pro-independence group. These actions were supervised by the FBI.¹ The CIA was "burning" the FBI and their Puerto Rico operatives with this testimony. Why? Why provide this information now?

The testimony came in a surprise parenthesis to a Special Committee assignment to investigate governmental involvement in the planning and cover-up of the now infamous "Maravilla Mountain Murders" of July 25, 1978.² A Senate investigation into the murders at Maravilla of Carlos Soto Arrivi and Arnaldo Dario Rosado, two pro-independence youths, would later establish that Alejandro Gonzalez Malave, an undercover agent provocateur, possibly a double agent for the FBI, led the youths into an ambush.³ A police intelligence squad ambushed, arrested, beat, and executed the two youths.⁴ The squad then spat and urinated upon the bodies. The police provided the squad with equipment and transportation, and then shadow-monitored the "rebel group" from the capital of San Juan, through the southern coastal city of Ponce, up to the central mountain area of Toro Negro, specifically to the target-point at Maravilla. All of these actions occurred in the presence of FBI agents from the San Juan office.⁵

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¹ *Investigation of Planning and Cover Up of Mt. Maravilla Murders: Hearings before the Senate Judiciary Committee*, Commonwealth of Puerto Rico (1991-92)[hereinafter *Hearings*]. This is an on-going investigation; its report is expected to be issued in January 1993.

² Hollywood has also addressed the subject; "Show of Force," a movie based on these facts, curiously "anticipates" the participation of an FBI agent, a fact unknown at the time the film was made.

³ See Manuel Suarez, *Ex-Puerto Rican Police Agent Guilty in Slaying of 2 Radicals*, N.Y. TIMES, March 19, 1988, at 33. The undercover agent, Alejandro Gonzalez Malave, was acquitted on March 19, 1986, by a jury on charges of kidnapping in connection with the murders. Mr. Malave was shot to death on April 29, 1986, by the Organization of Volunteers for the Puerto Rican Revolution, who vowed "to kill one by one" all of the policemen involved in the deaths. *Ex-Undercover Agent Slain*, FACTS ON FILE WORLD NEWS DIGEST, May 16, 1986, at 355 E3 (available on Lexis).

⁴ See Mireya Navarro, *Puerto Rico Gripped by Its Watergate*, N.Y. TIMES, Jan. 30, 1992, at A18.

⁵ See *id.*

Immediately after the executions, the Commander of the Police Intelligence Division relayed a radio message to the Police Chief of Field Operations over special band radio. The Chief then sent news of the murders to pro-statehood Governor Romero Barcelo of Puerto Rico, who was attending a parade celebrating the Anniversary of the Commonwealth.⁶ The Governor rushed to the podium and proclaimed the forces of democracy had prevailed over terrorism.⁷ Today, several police officers involved in the ambush at Maravilla are serving time in federal prisons for civil rights violations; others have been sent to Puerto Rican jails for murder.⁸ Why did all of these events happen?

After eight years of struggle with the government of Puerto Rico, the United States Department of Justice, and the FBI, involving fifty-nine successful suits for the production of official documents, the Senate Judiciary Committee obtained sufficient testimony and documentary evidence to indicate a conspiracy. The conspiracy intended to undermine the effect of President Jimmy Carter's proclamation of a self-determination process for the people of Puerto Rico. This process provided for "alternative futures" for Puerto Rico: 1) independence, 2) association with the United States, or 3) full statehood.

President Carter's proclamation was read at the Anniversary of the Commonwealth festivities, but was overshadowed by Governor Barcelo's announcement about the "heroic"⁹ action by the police against pro-independence communist terrorism and by subsequent events.¹⁰ A second White House document, a Carter letter, was later "erased" or edited from every government tape of the day, including the segments of the Governor's second announcement.¹¹

Now, over a decade later, in a period of forty-eight hours, the people of Puerto Rico learned, 1) of a letter by FBI Director Judge William S. Sessions, admitting that during 1978 the FBI local office in San Juan and its direct supervisors in Washington "committed mistakes"¹² in giving FBI assistance to the cover-up of the Maravilla executions, and 2) of the astonishing revelations by the aforementioned CIA officer. On the day of the revelations, a reporter for Puerto Rico's only English language newspaper contacted CIA headquarters in Langley, Virginia, and learned that the CIA not only had prior knowledge of the testimony, but surprisingly, had approved the testimony. In December, a "secret" memorandum directed to Carter Presidential Aide Al Stern, detailing FBI intervention with Puerto Rico's political parties from 1960 to 1969, was declassified and presented at the Senate hearings. This Domestic Council memorandum pointed to FBI misconduct and gross violations of law.¹³

Why did this happen? What is happening now? Why did all of this information become public on the eve of an island-wide referendum¹⁴ on future status negotiations with Congress? My hypothesis is that there has been a trade in the winds blowing from Washington to San Juan — the winds of self-determination and decolonization. The

⁶ The Anniversary of the Commonwealth is also the anniversary of the landing of U.S. forces in 1898 during the Spanish American War.

⁷ See Suarez, *supra* note 3, at 33.

⁸ See *id.*

⁹ *Puerto Rican Governor Seen as Hurt by Officer's Arrest*, N.Y. TIMES, Oct. 21, 1984, at 26 (quoting a televised address by Governor Romero Barcelo).

¹⁰ See Jon Nordheimer, '78 Killings Haunt Race in Puerto Rico, N.Y. TIMES, Oct. 26, 1984, at A16.

¹¹ Home video versions of the six-hour event are non-existent because such equipment was not sold in Puerto Rico until the following year.

¹² SAN JUAN STAR, Nov. 23, 1991 (quoting letter from FBI Director Sessions to the Honorable Miguel Hernandez-Agosto, President of the Puerto Rican Senate.)

¹³ See *Hearings*, *supra* note 1.

¹⁴ See *infra* notes 58-62 and accompanying text (discussing the referendum).

empire washes its hands of the Puerto Rican "colony" and redresses grievances. Can it succeed?

A secondary hypothesis is that the judicial and political institutions which normally emerge from the culture of a society, do not emerge in an economically underdeveloped country which completely lacks a system of self-government and has never exercised self-determination, but primarily has been under another country's governmental control. If this control is exerted not only judicially, politically, and economically, but also clandestinely by the controlling power, then the adoption or development of juridicio-political institutions will always be illegitimate or worse, *totally fictitious*. I believe this includes the present patently official institutions of the rule of law: the constitution providing for the republican form of government, the bill of rights, free elections, judicial review, freedom of the press, freedom of association, compliance with due process, and the equal protection of the laws.

The above is only an abstract, superficial "reality"; mostly unknown and not understood by a people who, in reality, do not live by it, under it, or feel protected by it. This occurs because the people did not partake, except cosmetically, at any moment, in establishing the legal system and governmental structure.

The only way the winds will change is if the demi-gods change them. Meanwhile, the people can only hold on, entrenched in their own "Masadas."¹⁵ They are a silent "resistance" that feels, loves, prays, and cries in their own language, and unknowingly, unconsciously, but naturally and spontaneously, generation after generation, pays only lip service to the "official institutions" imposed upon them. They wait and learn to drift along. One day, the demi-gods will tire, and the winds will change. A whole new process will be undertaken. Will the people then be able to assimilate and understand it? They will be required to act. Will they be able to?

I. HISTORICAL BACKGROUND: AN OFFICIAL HISTORY REVISITED AND BELATEDLY ACQUIRED IN ERROR

In 1898, the U.S. Navy battleship *Maine* exploded in Havana Harbor, Cuba, while on a "friendly"¹⁶ visit to that "overseas (Spanish) province."¹⁷ The fact that a civil war raged in Cuba, and that the United States had recognized the native Cuban forces as insurgents first and belligerents later, did not deter the War Department from recommending a second battleship be sent to Cuba. The U.S. government agreed and sent an old battleship of a design recognized as hazardous.

The *Maine* exploded, U.S. citizens died, and the U.S. press called for action against Spain. President McKinley asked, Congress obliged, and they had a "splendid little war." To no avail, Spain suggested international arbitration of the matter and offered scientific proof that internal combustion caused the explosion.¹⁸ The United States insisted that external factors caused the explosion. Decades later, in 1976, the distinguished Admiral Hyman Rickover, in a discreetly published, limited edition of his book

¹⁵ Masada was the last outpost of the Zealots in the Jewish war against Ancient Rome. After a prolonged attack led by the Roman Governor Flavius Silva, the 960 inhabitants of the fortress committed suicide rather than surrendering. 2 *ENCYCLOPEDIA JUDAICA* 1078-79 (1971).

¹⁶ HENRY CABOT LODGE, *THE WAR WITH SPAIN* 28-29 (1899).

¹⁷ This term is used in the Spanish Constitution of 1876, and the *Autonomic Charter for the Island of Puerto Rico of 1897*, reprinted in 1 *HISTORICAL DOCUMENTS OF PUERTO RICO, LAWS OF PUERTO RICO ANNOTATED* (L.P.R.A.) 1 (Equity).

¹⁸ See generally DAVID F. TRASK, *THE WAR WITH SPAIN IN 1898* 35-45 (1981).

How the Battleship Maine Was Destroyed,¹⁹ clearly established that internal combustion caused the Maine to explode; Spain was right all along. The United States, however, "remembered the Maine," as it had "remembered the Alamo," and later would "remember Pearl Harbor."²⁰

The United States invaded Puerto Rico on July 5, 1898, and on August 12, agreed to a cease-fire. On December 10, 1898, Spain signed the Treaty of Paris and "ceded" Puerto Rico, Guam and the Phillipines to the United States in exchange for twenty million dollars. The Treaty was ratified by the United States Senate on February 6, 1899, and was proclaimed April 11, 1899.²¹ A splendid little war indeed!

Upon landing in Puerto Rico on July 25, 1898, Lieutenant General Nelson A. Miles, commander of the American Expeditionary Forces and later military governor of the Army of Occupation, published a proclamation to "the people of Porto (sic) Rico,"²² which Puerto Ricans later realized reproduced almost verbatim a previous proclamation issued by the Secretary of War to the people of Cuba.²³ In Cuba, the people were promised delivery from bondage and offered the institutions of American freedom; in Puerto Rico, a military governor ruled until 1942. The Commander of U.S. forces in Puerto Rico closely supervised Puerto Rican governors via a hot line, even under the 1952 Commonwealth Constitution. On January 2, 1965, his first day in office, Governor Sánchez-Vilella ordered the hotline finally stripped from his desk.

Sánchez was outcast by his party in 1968 and was not renominated. Running as the candidate of his own People's Party, he was not re-elected. The Domestic Council memo to Al Stern on FBI actions in Puerto Rico from 1960 to 1969 would later say the FBI San Juan office had "misread" Sanchez's platform on reforms to federal relations between the United States and Puerto Rico. C'est la vie!

II. CIVIL GOVERNMENT BY STAGES: THE IMPOSITION OF A "REPUBLICAN" FORM OF GOVERNMENT AND REFORMS TO THE STATUTORY CIVIL LAW SYSTEM

Gaius, the revered jurist of Imperial Rome, author of the oldest available treatise on early pre-Justinian Roman law, established that "in fact, only the law that a people give themselves can be called their own law. This is the fundamental theory of old and present civil law."²⁴ Custom is the oldest law: it will always be a source of law because it is the "longa inveterata consuetudo" (custom long observed and revered). Today custom is also upheld by democratic principles.

The recent fall of the Soviet Empire offers a new world order in the twenty-first century, one hopefully without the horrors of the destructive wars of the nineteenth and twentieth centuries, but rather with peaceful self-determination for all peoples. Almost every society observes the concept of the "rule of law" (Estado de Derecho), and very few peoples organize their societies without the benefit of its formal structure. Mankind is in the best position ever to scrutinize the *effective reality* of legal institutions in the

¹⁹ HYMAN G. RICKOVER, *HOW THE BATTLESHIP MAINE WAS DESTROYED* (Naval History Division, Dept. of the Navy 1976).

²⁰ For a chronology of the events and "mistakes" leading to the "surprise" or attack on Pearl Harbor, see Otto Friedrich, *TIME*, Dec. 2, 1991, at 30.

²¹ Trask, *supra* note 18, at 483.

²² Gen. Order 101, 25 July 1898 (appears in *Documents on the Constitutional History of Puerto Rico* 55 (2d. ed. P.R. Fed. Affairs Office, Washington D.C.)).

²³ See Executive Order of President McKinley, July 13, 1898; cf. Gen. Orders, Dept. of P.R., Bureau of Insular Affairs, War Dept. (1898).

²⁴ GAIUS, *INSTITUTIONIS*, quoted in IGLESIAS JUAN, *DERECHO ROMANO* 53 (5th. ed., Ariel, Barcelona, 1958).

daily lives of people. What are the fundamental elements of the rule of law to a people? Do they include:

- trial by jury, with counsel?
- procedural due process in both criminal and administrative government action?
- constitutional guarantees of freedom of speech, of *and from* religion, of the press *and from* the press?
- freedom of association and assembly?
- right to privacy?

Can we include self-determination?

What do each of these really mean? Keeping professor Gaius in mind and recalling General Miles' proclamation, let us examine the twentieth century self-government in Puerto Rico through "salami tactics"²⁵ by federal authorities.

In 1898, Puerto Ricans enjoyed a constitutional system under the monarchy of Spain and the Spanish Constitution of 1876. Under this system, Puerto Rico and Cuba were deemed to be "overseas provinces" and were not an integral part of the nation.²⁶ Spain ruled the "provinces" with extraordinary powers, and its national statutory laws were not automatically applicable to Puerto Rico; such required separate legislative action. Nevertheless, by 1898, all of the Spanish codes — Civil, Criminal, Commercial, and Procedural — applied in Puerto Rico, as did fundamental special acts, such as the Mortgage Act, the Notarial Act, and the Ports and Docks Act.²⁷

In government terms, a special "Autonomic Charter" provided for a local parliamentary government under a Governor General appointed by the Crown. By 1898, the Puerto Ricans were pleased with the system because it made them Spanish citizens with full civil rights under the Constitution. The Charter allowed for Puerto Rico's separate participation in international organizations and separate negotiation in international trade. Puerto Rico enjoyed its first election in early 1898, just before the Maine sank in Havana Harbor.²⁸

Military government in Puerto Rico really began with the cease-fire agreement of August 12, 1898, and lasted until 1900 when Congress approved the Foraker Act "to provide for a civil government and revenues for Porto (sic) Rico."²⁹ Since early 1899, however, an Insular Commission had been appointed. Its report revealed a clear conclusion and purpose: the best way to Americanize Puerto Rico was to derogate the basic Spanish statutes.³⁰ Months later, the Carroll Report and the Rowe Commission established a means to accomplish the derogation: create a special commission on codification. The commission was appointed, and consisted of two American attorneys with no knowledge of Spanish or the civil law system, and a Puerto Rican lawyer who had been Solicitor General in the Autonomic Government. The Puerto Rican member of

²⁵ "Salami tactics" is a popular phrase among politicians and legislatures; it refers to doing things piecemeal or step by step, e.g. undertake a big reform not in one bill, but via a series of bills in order to avoid a coalition of opposing forces. It is attributed on Capitol Hill to a Senator who served during President Truman's administration.

²⁶ Much, one would say, like Congress rules "un-incorporated territories" under the so-called Territorial Clause of the U.S. Constitution. U.S. CONST. art. IV, § 3, cl. 2.

²⁷ See EDWARD J. BERBUSSE, *THE UNITED STATES IN PUERTO RICO 1898-1900* 120 (1966).

²⁸ See *id.* at 58.

²⁹ Foraker Act, ch. 191, 31 Stat 77 (1900).

³⁰ REPORT OF THE INSULAR COMMISSION TO THE SECRETARY OF WAR, 4 (U.S. Government Printing Office 1899); *Reforms in the Civil and Criminal Codes*, in REPORT ON THE ISLAND OF PUERTO RICO [CARROLL REPORT] 284 (1899); REPORT OF THE COMMISSION TO REVISE AND COMPILE THE LAWS OF PUERTO RICO, H.R. Doc. No. 52, 57th Cong., 1st Sess. (1901). See also Comment, 1 U.P.R. L. REV. 75 (1932).

the commission strongly dissented from the commission's report recommending the revision of two codes and approval of three new codes "imported" from common law.³¹

A new penal "code," derived from U.S. state law, was adopted in 1902.³² The new codification was so structurally deficient that it was not a true code. Cockfighting, the favorite Puerto Rican folk sport, was deemed a crime. Another popular sport, soccer, became disfavored and quickly disappeared. Meanwhile, baseball was "introduced" to Puerto Rico. The civil and criminal procedural codes were replaced by poorly translated "codes" so hurriedly approved by the legislature that no one noticed the inadvertent inclusion of articles providing for furnaces in the judges' chambers during winter, an obvious oversight for an island country almost on the equator. The civil code was amended to eliminate those sections governing rules on conflict of laws. A special section was added, preferring the English version of any statute over the Spanish version. Under this section, the English version would prevail even if the statute was drafted and voted upon in Spanish, and only translated for the signature of the American governor.

In addition to these "codes," an official Language Act was approved. The Act established both English and Spanish as the official languages of government business.³³ A military commission established in 1899 was transformed into a "temporary" U.S. district court, and then into a full district court with "special jurisdiction" to hear any case where an American citizen was a party.³⁴

Under the Foraker Act, Puerto Ricans were considered "citizens of Puerto Rico" protected by the United States.³⁵ An act creating the Puerto Rico Bar Association was repealed by the military governor, and only lawyers trained in the United States were allowed to practice after 1900.³⁶

The Supreme Court of Puerto Rico was established with a majority of American justices. Without a specific legislative act, the Supreme Commander decreed that the court would be a court of appeals in the American system and not a court of cassation as it had previously been.³⁷ The civil code was interpreted according to American encyclopedias on case law; reported Puerto Rican decisions were not cited.

Former Supreme Court Chief Justice Dr. Don José Triás-Monge recently denounced this type of judicial interpretation as barbaric.³⁸ Yet, the system was the law for eighty years, and the spirit of that system still burdens the Puerto Rican legal mind. This article is not the place to detail court decisions, but it *is* the place to cry out against the effects on the credibility of legal institutions when those decisions distort a people's system of law in order to replace that system without consultation.

Ninety-three years after the "liberation" via invasion, the efforts to "Americanize" Puerto Ricans have proved fruitless. Puerto Ricans have been bombarded for decades by propaganda urging them to abandon their authentic identities and to acquire more American ones.³⁹ As a result, Puerto Ricans presently appear somewhat distorted in their

³¹ REPORT OF THE COMMISSION TO REVISE AND COMPILE THE LAWS OF PUERTO RICO, H.R.Doc. No.52, 57th Cong., 1st Sess. (1901). *See also* Comment, 1 U.P.R. L. Rev. 75 (1932).

³² *See* E. FERNANDEZ GARCIA, THE BOOK OF PUERTO RICO 217 (1923).

³³ *Id.* at 221.

³⁴ *See id.* at 181, 183.

³⁵ Foraker Act, ch. 191, 31 Stat. 79 (1900).

³⁶ For a thorough research on these subjects, see Eulalio Torres, *The Puerto Rico Penal Code of 1902: A Case Study in American Legal Imperialism*, 45 U.P.R. L. REV. 1 (1976).

³⁷ BERBUSSE, *supra* note 27, at 83.

³⁸ JOSÉ TRIÁS MONGE, EL CHOQUE DE DOS CULTURAS JURÍDICAS 401 et seq. (1991).

³⁹ ECUMENICAL PROGRAM FOR INTERAMERICAN COMMUNICATION AND ACTION, THE NATIONAL ECUMENICAL MOVEMENT IN PUERTO RICO & THE AMERICAN FRIENDS SERVICE COMMITTEE, PUERTO RICO: A PEOPLE CHALLENGING COLONIALISM 70 (EPICA Task Force) (1976).

own self-esteem, because, despite such propaganda, they cannot help but be themselves. The only satisfactory way for one people to assume the values of another is if the transfer of values is peaceful, amicable, and voluntary. Such has not been the case in Puerto Rico, and the attempt at transculturalization has been a failure.

Vital, strong, and sound institutions of true democratic government, by consent of the governed and by free elections, have not been established in Puerto Rico, and, therefore, have not been established in the legal system. In my judgment, they never will; thus, the proper standard for analysis should never be the degree to which the institutions of the United States Constitution and legal system have been adopted or established.

III. 1917: THE GRANTING OF AMERICAN CITIZENSHIP

The Second Organic Act of the U.S. Congress organizing the civil government of Puerto Rico was enacted in 1917, and became known as the Jones Act.⁴⁰ The Act, which included a bill of rights,⁴¹ suspended the 1916 elections, and established a bicameral system of government with representatives elected for four-year terms.⁴² It provided for an "at large" legislator,⁴³ and declared that all citizens of Puerto Rico, as defined by the Foraker Act, would be considered "citizens of the United States."⁴⁴ Later, in 1940, the Nationality Act would be amended to provide that Puerto Ricans born after that date would be deemed "native" American citizens. Thirty years went by after the approval of the Jones Act, however, before Congress would act to reform the organization of the Puerto Rican government.

The most significant impact of the Jones Act was the grant of American citizenship. Many thought that Puerto Ricans were now "Americans." In 1923, however, the U.S. Supreme Court held in *Balzac v. Porto Rico*⁴⁵ that citizenship did not mean incorporation into the nation. The Court also held that the U.S. District Court in Puerto Rico was not an Article III court, but rather a court authorized under Article IV, Sec. 3. Such a court has the power "of making all needful rules and regulations respecting the territory of the United States."⁴⁶ Furthermore, the Supreme Court held that the Bill of Rights did not protect American citizens in Puerto Rico and that Puerto Rico was still an "unincorporated territory" of the United States.⁴⁷ From these holdings, the Court unanimously concluded that the plaintiff, Mr. Balzac, had no right to a jury in a trial for misdemeanor libel.⁴⁸ Why?

The Court reasoned:

The jury system needs citizens trained to exercise the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which is hard for people not brought up in fundamentally popular government at once to acquire . . . Congress has thought that a people like the Filipinos or the Puerto Ricans, trained to a complete judicial

⁴⁰ Jones Act, ch. 145, 39 Stat. 951 (1917).

⁴¹ *Id.* at 951, 952.

⁴² *Id.* at 958, 959.

⁴³ *Id.* at 959.

⁴⁴ *Id.* at 953.

⁴⁵ 258 U.S. 298 (1923).

⁴⁶ *Id.* at 305.

⁴⁷ *Id.* at 306, 307.

⁴⁸ *Id.* at 309.

system which knows no juries, living in compact and ancient communities, with which definitively formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.⁴⁹

This is strong language. It expresses value judgements about a people and its institutions, and is based on misconception, not facts. Filipinos and Puerto Ricans are entirely dissimilar; it is absolutely false that Puerto Rico did not know trial by jury under Spanish law, or that the institution was alien to the people and the legal system. In fact, trial by jury in Puerto Rico was abrogated by the American military governors, the civil government, and ultimately the Supreme Court!⁵⁰ The court in *People v. Bird* even overlooked the fact that a jury trial was a statutory right for felony cases.⁵¹ What was alien to Puerto Ricans was not trial by jury but rather the penal code imposed in 1902 to "Americanize the island." Clearly "Americanization" meant fewer rights and freedoms for Puerto Ricans, not more.

Regarding the legal effect of American citizenship on the rights of Puerto Ricans, the Court stated simply: "It enabled them to *move* into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political."⁵² The legal effect of American citizenship thus only gave Puerto Ricans the "right" to leave their country if they wanted to become "full Americans." Very few Puerto Ricans left; only after World War II did perceptible emigration occur,⁵³ and then only of impoverished people looking for wages as seasonal workers.

The message sent by the *Balzac* decision was that Americans did not want Puerto Ricans to have the jury trial, and further, that Puerto Ricans were second-class citizens. The Puerto Rican legislature did not act in the face of this message.

In 1980, long after the establishment of the Commonwealth of Puerto Rico and its Constitution, the Supreme Court again held that Puerto Rico was under congressional absolute and discretionary rule under the Territorial Clause of the U.S. Constitution.⁵⁴ The presence of absolute rule creates an inquiry into the definition and purposes of the commonwealth structure. What is a commonwealth?

IV. PUBLIC LAW 600 OF 1950

In 1946, in the closing days of World War II, a war of the forces of democracy and self-determination against forces of totalitarianism, United States President Harry S. Truman appointed Puerto Rico's non-voting Congressional delegate as the island's first Puerto Rican governor.⁵⁵ That same year, the President vetoed a bill providing for a plebiscite in Puerto Rico and a bill providing for Spanish to be the instructional language in public schools. Both bills had been approved by well over the two-thirds majority required to override a gubernatorial veto.⁵⁶

⁴⁹ *Id.* at 310.

⁵⁰ See generally BERBUSSE, *supra* note 27.

⁵¹ *People v. Bird*, 5 P.R.R. 387 (1902).

⁵² *Balzac*, 258 U.S. at 308 (emphasis added).

⁵³ CLARENCE SENIOR & DONALD O. WATKINS, US-PUERTO RICO COMMISSION ON THE STATUS OF PUERTO RICO, TOWARD A BALANCE SHEET OF PUERTO RICO MIGRATION 703 (1966).

⁵⁴ See *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam).

⁵⁵ See ARTURO MORALES CARRION, PUERTO RICO: A POLITICAL AND CULTURAL HISTORY 264 (1983).

⁵⁶ See SURENDRA BHANA, THE UNITED STATES AND THE DEVELOPMENT OF THE PUERTO RICAN STATUS: 1936-1964 97, 100 (1975). In general, any bill that would reach President Truman would have been

What sense are a people supposed to make of these actions in their socio-political process of deciding how to "establish" a legal system?

In 1947, Congress amended the Jones Act to allow Puerto Ricans to elect their governor. The amendment, however, was passed with a rider providing for a Presidentially appointed supervisor.⁵⁷ A supervisor was never appointed, fortunately, but the provision remained on the books like an albatross.⁵⁸

In 1950, under pressure from the United Nations, Congress approved Public Law 600 to "provide for the organization of a constitutional government by the people of Puerto Rico."⁵⁹ The Act was "adopted in the *nature of a compact* so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."⁶⁰ The Act had to be submitted to the people for "acceptance or rejection through an island wide referendum" and upon its approval "by a majority of the voters participating in such referendum, the Legislature of Puerto Rico [was] authorized to call a constitutional convention to draft a constitution for the . . . island of Puerto Rico. The said constitution [was to] provide a republican form of government and [was to] include a bill of rights."⁶¹

No alternatives were offered to the people of Puerto Rico. Their only choice was to remain under the previously established system. A plurality of Puerto Ricans participated in the vote, and a majority voted for adoption.⁶² Yet, advocates of independence were persecuted.⁶³

Are these conditions for self-determination? Are people subjected to these conditions qualified to validate a legal system as one "of a people?" Are we to accept these facts and the statutes enacted by the resulting government, as valid to any serious study explaining why some "legal" institutions are adopted or rejected by a people or by certain societies? Is the ballot alone validation enough? Is a carefully worded Constitution validation enough? What makes a legal system one that belongs to a people? Is it the fact that the system is legislated or enacted by their elected officials? Is that all the rule of law requires? Is that all self-determination requires?

V. THE LEGAL-POLITICAL STRUCTURE TODAY

Many Puerto Ricans vote out of fear: fear of punishment, fear of abandonment, fear of being devoured by the cyclops of international communism, fear of expressing their true self and being punished for it, and fear of freedom, the unknown which they have been taught to fear for so long.

In this sociological climate, true democracy, truly free elections, and legitimate legislative representation are practically a myth. The legal system and its statutory structure upholds the situation in Puerto Rico. The legal system, however, is not really a system under the rule of law. Daily behavior contradicts the official legal order.

passed by the Puerto Rican Congress by enough votes to override a gubernatorial veto. *See Tugwell Vetoes Puerto Rico Bill*, N.Y. TIMES, March 3, 1946, at 6.

⁵⁷ See CARRION, *supra* note 55, at 270.

⁵⁸ See BHANA, *supra* note 56, at 106 n.70. The provision was repealed in 1950.

⁵⁹ Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (1950).

⁶⁰ *Id.* at 319 (emphasis added).

⁶¹ *Id.*

⁶² 1 HISTORICAL DOCUMENTS OF PUERTO RICO, LAWS OF PUERTO RICO ANNOTATED (L.P.R.A.) 138 (Equity). *See also* BHANA, *supra* note 56, at 143.

⁶³ *See generally* BHANA, *supra* note 56, at 137 (244 nationalists arrested following uprisings in opposition to the vote).

Spontaneous expressions of popular will resemble more closely those characters and institutions of some other system of values.

In the areas of family law, folk contract negotiation and performance, and inheritance and estate, great variations between law and actual practice can be noted. One hundred years after the adoption of the Spanish Civil Code in Puerto Rico, Puerto Ricans are not familiar with it, nor do they really know what it is. In my opinion, their "spirit" (Volksgeist) is more attuned to the centuries old previous order. That order is the true law (Recht, Droit) of the people. It is similar to the Code, but different in detail.

Regarding public law institutions, Puerto Ricans simply do not live by a Republican form of government having separation of powers. It exists only in theory, not in "official" government action. Political behavior and discourse in Puerto Rico is still patterned after a monarchical, parliamentary system, of government subordinate to considerations of party, friendship, family, group or regional relationships, humanity and charity.⁶⁴

The bonds and values are there, but they are not the official bonds and values. Can this schizophrenic socio-legal system last any longer? Should it? Is it in the best interests of the United States and the Western world?

This customary system is the real one, because the great institutions of the democratic, constitutional system of government were: (1) imposed, but not taught, consulted, or developed by the people themselves, for themselves; and (2) because those who brought it and proclaimed it did not practice it, and then later only pretended to observe it. That is why the old system still exists, yet that is also why this state of affairs cannot last longer, and the winds must change. How can it be done?

The institutions of free government must be created by the people. The creation process begins with individuals and their internal "selves." The individuals develop and integrate until a collective "self" is born. That "self" will create its own system. Only then will the legal structure follow. Americans, however, follow an opposite pattern. In Japan, for example, after World War II, "it was part of a pattern that persists to this day, that of Americans fitting Japanese behavior into pre-existing ideas of how people should behave, while Japanese observe more carefully and accurately what Americans actually do."⁶⁵

Silently, the Puerto Ricans observed as the Americans demeaned them and their Puerto Rican traditions, values, holiday celebrations, and language. The Americans "opened" the system by imposing their own values on the Puerto Rican people. The system was "opened" for the benefit of the Americans, who with them brought cultural discrimination into society, while professing the opposite in politics.

Questioning why an institution flourishes in some societies and not in others, or why some solid institutions of law are adopted by some peoples and not others, ignores the fact that the crucial factor is not the law, *but the human being*. Phrasing the question in terms of law and institutions exposes an imperialist attitude.

Puerto Ricans have been tempted by Mammon and fallen into the illusion that it is the law they should love. That is idolatry! The law is to serve man. Man should not serve the law. It is the man or woman, the being (ser, ente) who cries, feels, hopes, dreams, hungers, and hurts. A proverb advises, "Give a hungry man a fish and he will eat for a day; teach him to fish, and he will eat all of his life." Do not give legal systems

⁶⁴ Some say that a Puerto Rican will more easily understand mercy than justice; perhaps because "mercy" has come to their aid sometimes, while *justice* never has, and the rule of law was promised, but not delivered.

⁶⁵ U.S. NEWS & WORLD REP., Dec. 2, 1991, at 41.

to people. Let people govern themselves, so they can develop their own legal system according to their culture, values, and perceptions of punishment and justice.

Old Spanish law is good for Puerto Ricans because they *are* old Europeans; old Spaniards, Corsicans, Catalunyas, and even Africans, who speak, dance, and pray together in a distinct Afro-Caribbean-European way!⁶⁶ The old system evolved and works in Puerto Rico in the same way the common law and representative government evolved and works in the United States. The early settlers in the United States brought their system of government with them on the Mayflower. Others that followed integrated themselves into the existing system and created their own "melting pot." Puerto Rico did not "melt" into the United States; it had been molded and formed already, and the Puerto Rican people did not feel the need or desire to acquire another, more Americanized "self."

True rule of law is to be measured by the way the statutory law and governmental institutions and structure follow the spirit and the will of the people they govern. Looking into each country's legal indexes and checking for the presence of certain institutions or procedures will not reveal the true rule of law, no matter how enlightened these institutions and procedures may appear. A legislative act alone will never make true law. Law must be legitimized by the collective will of a people. This is a fundamental tenet, originally embodied in custom, the first source of law. Legitimization by the collective will is still required, for only representatives of the people can really make the law of or for the people. *Democracy is the fundamental rule of a legal system.* A sound institution, that is imposed upon, rather than explained or taught to people, will not be adopted or followed. Even the strongest institution will merely rest in the law books and the statutory collections.

Civil republican government came slowly and unjustly to Puerto Rico. It came first in the guise of a military governor who replaced an elected parliamentary government. A new ruling class evolved that was comprised of the unconditional supporters of the new, foreign regime; a regime that spoke another language and imposed itself on the people. The federal court system was likewise established unjustly. The system crushed civil resistance, reduced the authority of Puerto Rican courts, and created a forum for "carpetbagger" attorneys and their clients.

The United States applied similar methodology to economic activity. This application of methodology also failed, but its failure is more palatable to Puerto Rico due to federal transfers, such as welfare and food stamps. These transfers created an artificial economy. This artificial economy disguised the failure of the economic development. The methodology used by the United States goes to the heart of the true system of American government: *free enterprise for U.S. companies.*

In the early 1940s, American think tanks and advisors "suggested" that development could be promoted in underdeveloped or developing countries if the United States initiated a process of industrialization in that country.⁶⁷ During the 1960s, National Security Advisor Walter Rostow and his brother Eugene insisted the process would spread until eventually, every country would have developed industrially.⁶⁸ In Puerto Rico, this program was known as "operation bootstrap." The program consisted of capital investments by non-taxed corporations that receive governmental "incentives."⁶⁹

This theory is the economic equivalent of legal transplant and is ineffective. No country can truly develop unless it is developing itself. The money invested in the industrial enterprises of a country will never develop the economy of that country. The

⁶⁶ See generally CARRION *supra*, note 55, at 319-321.

⁶⁷ Robert Pastor, THE NEW REPUBLICAN, Nov. 12, 1984, at 38.

⁶⁸ See WALTER W. ROSTOW, THE STAGES OF ECONOMIC GROWTH (1960).

⁶⁹ James Cook, *Operation Bootstrap*, FORBES, Aug. 17, 1992, at 50.

benefits of the investment will enrich the investor and help develop *his* country's economy. The people of the "host" country will be employed; however, the people also become guaranteed consumers of the other country's products. Long-lasting development will occur only if the underdeveloped country controls or shares control as a partner in the investment.

This economic policy was followed in Puerto Rico for over forty years. The failure of the policy was evident by the 1980s. That decade brought the reality that approximately two-thirds of Puerto Rican families were dependent on food stamps.⁷⁰ Many more Puerto Ricans were leaving their jobs for easier lives in which they live off food stamps while enjoying the sun, ocean, and horse racing.⁷¹ Illegal immigration of people from the neighboring Dominican Republic was a daily headache to U.S. immigration officials. Scores arrived every day, landing in the western coast of this "land of plenty," as one said on arrest.⁷² What had happened?

Almost a century after the "splendid little war," Puerto Rico annually produces over ten billion dollars worth of trading goods for U.S. corporations, while costing federal taxpayers five billion dollars a year.⁷³ There is no return of this expenditure because Puerto Rico does not pay federal taxes.

No matter how much money Congress pours in Puerto Rico, development will not occur, because the money is spent, not invested. This is basic economics, which I believe Washington knows and understands. What does all this mean?

VI. UNTYING THE GORDIAN KNOT

In his first address to a joint session of Congress, President George Bush stated:

There is another issue I decided to mention here tonight. I have long believed that the people of Puerto Rico should have the right to determine their own political future. Personally, I strongly favor statehood. But I urge the Congress to take the necessary steps to let the people decide in a referendum.⁷⁴

Then, surprisingly perhaps, he added:

Certain problems, the result of decades of unwise practices, threaten the health and security of our people. Left unattended, they will only get worse — but we can act now to put them behind us.⁷⁵

Had President Bush read the Stern memo on FBI practices in Puerto Rico or a larger file he may have known about while at the CIA? Had the time for self-determination arrived?

⁷⁰ See Victoria Irwin, *Vision of Prosperity in Puerto Rico is Tempered by Reality*, THE CHRISTIAN SCIENCE MONITOR, Feb. 4, 1987, at 3.

⁷¹ See generally Bello Stumbo, *Charismatic Nationalist, Free Spirit of Puerto Rico Politics*, L.A. TIMES, April 21, 1989, at 1 (stating that only 42% of Puerto Rico's unemployed are actively searching for work).

⁷² See William Branigan, *Across Deadly Waters, A Better Life Beckons: Dominicans Risk Lives to Get to Puerto Rico*, WASH. POST, Nov. 14, 1989, at A3.

⁷³ See Stumbo, *supra* note 71, at 1. See also *Leading Business into the 21st Century*, INSTITUTIONAL INVESTOR, Dec. 1990, at S4.

⁷⁴ *Transcript of the President's Speech to a Joint Session of the House and Senate*, N.Y. TIMES, Feb. 10, 1989, at 17.

⁷⁵ *Id.*

Furthermore, can a colonial power "steer" a colonial people towards true self-determination?

The national and international political implications were perhaps the driving forces behind bringing forth this issue. Yet, the issue of self-determination may have become predominate as a result of the colonial dream becoming the nightmare of the controlling power: the colonized people do not want independence, but refuse to melt into the metropolitan social "self."

On Sunday, December 8, 1991, in a special referendum, Puerto Ricans voted *NO* on the question of (1) petitioning Congress to approve legislation for a status plebiscite, or (2) requesting a special referendum on an amendment to the Commonwealth Constitution reflecting the right to choose their political status from among three valid, noncolonial alternatives, while guaranteeing U.S. citizenship. The margin of those voting *NO* over those voting *YES* exceeded 100,000.⁷⁶

What now?

The vote came as a direct result of a stalemate in Congress over a plebiscite bill proposed in late 1991.⁷⁷ The Senate could not agree on allowing Puerto Ricans to vote on the three alternatives: (1) statehood as the fifty-first state of the U.S., (2) independence under certain agreements for defense and aid, and (3) an improved Commonwealth relationship (a type of free association outside of Congress' power under the Territorial Clause of the Constitution). The Republican minority, and some Democratic conservatives, were not willing to offer statehood. Requiring a "super majority" vote for statehood was discussed. No agreement, however, was struck, no bill was written, and no plebiscite resulted. A Republican Senator ended the stalemate by proposing Puerto Rico hold the special referendum on its own instead of Congress approving a bill to hold the plebiscite.

The no vote prevailed in Puerto Rico. What now? Let us look at the critical question: why did the Puerto Rican people vote for a strong relationship with the United States after ninety-three years of government control, and the failure of American legal institutions to take root? Is this not a contradiction? How can Puerto Ricans want American citizenship, American passports, social security benefits, U.S. military presence, federal government presence, federal judiciary presence, and federal funds for welfare programs, when at the same time Puerto Ricans do not speak English, are unfamiliar with American folklore and history, and do not understand American institutions of government, particularly its legal system?

Our answer is a painful one. It lies in the "portrait of a colonized person," by Frantz Fanon.⁷⁸ A comparison of the two lists points to a clear contradiction on matters of principle which defies logic. In analyzing human behavior, logic always plays a distant third. It is always defeated by emotions, real and imagined, and reactions, conscious and unconscious. Most often, it is the unconscious reactions that dominate.

VIII. CONCLUSION: THE GODS LOOK IN THE MIRROR AND ARE HORRIFIED

Colonialism is essentially a state of mind, a state or condition of being. This state produces a special sort of human being. A society composed of colonized persons cannot produce, create, or establish a free society under the rule of law. Worse yet, a process of decolonization that includes a process of creating a genuine legal system cannot happen suddenly, even if urgently needed by the colonial metropolitan power.

⁷⁶ Jorge Casuso, *Puerto Rico Rejects Rules on Political Status Votes*, CHI. TRIBUNE, Dec. 9, 1991, at 10.

⁷⁷ *Senators Fail to OK Puerto Rico Plebiscite*, CHI. TRIBUNE, Feb. 28, 1991, at 17.

⁷⁸ FRANTZ FANON, *THE WRETCHED OF THE EARTH* (Constance Farrington trans., 1963)

Puerto Rico may well be the wax museum of American hegemony, not the grave of colonialism and underdevelopment. Congress may find itself unable to get rid of the corpse and unable to bring it back to life. It will not live, nor will it go away. Must it be taken care of for the rest of eternity? Is there a solution?

Elementary principles are important because they are fundamental, they are the basis of the structure for any given system. This basis holds true with regard to the political and legal-constitutional-statutory system of a people. Rule by the people themselves is the fundamental principle. Rule by the people, however, can only happen through knowledge and “*information*,” that basic element of self-determination the United Nations practice calls “*due*” knowledge of every available alternative.

Moses said to Pharaoh “make us equal, or make us free”; and when Pharaoh refused, Moses said “Let my people go!”⁷⁹ The people of the United States of America, through Congress, *must* tell the people of Puerto Rico the truth — the truth that will make them free. Then, and only then, can the process of decolonization and self-determination occur, and a legitimate legal system be adopted.

An effective legal system only develops in freedom, and freedom grows in the inner self. Freedom can never be “awarded” or delivered, because freedom begins in the realm of the soul, and the desire for freedom is not material or physical.

This is only dawn; day is not here yet. Will Congress allow the light of information and freedom to shine on Puerto Rico? It should, and it must. If it does not, Congress will be burdened with the upkeep of its wax museum. Freedom will require a massive infusion of all the available information on how Puerto Rico has been controlled for over ninety years. The truth must be strong enough to hurt so deeply that the sleepwalk will end.

The process of gaining freedom will inevitably be intense. Indeed, it has to be intense; if it is delayed longer, it could be tragic for everyone. For the United States, it may be a matter of cutting its losses. As a shrewd advisor suggested, the United States should say goodbye with a “golden handshake.” That could well be the only feasible way to provide for a process that we can all live with . . . under the rule of the law.

⁷⁹ Exodus 9:1.