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Curious In-Laws: the Legal Connections Between Montana and Puerto Rico

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ARTICLE

CURIOUS IN-LAWS: THE LEGAL CONNECTIONS BETWEEN MONTANA AND PUERTO RICO

Jorge M. Farinacci Fernós*

I. Introduction

From the face of it, Puerto Rico and Montana seem to have very little in common. One is a former Spanish colony in the Caribbean whose legal system is mostly based on the civil law tradition. The other is one of the largest, yet most underpopulated, states of the United States, located on the Canadian border. Yet, as with many things related to law and history, appearances can be deceiving.

When I ask my students in Puerto Rico to name which United States state has greater similarities to Puerto Rico in terms of legal systems and content, many propose places like Louisiana or California. And they're not completely wrong. For example, Louisiana and Puerto Rico share civil law roots. In fact, when the United States acquired sovereignty over the island from Spain in 1898, the new rulers imported many legal sources from Louisiana in order to ensure a smooth transition.[1] As to California, many of the early twentieth-century statutes adopted in Puerto Rico were imported from that state.[2]

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1. David C. Indiano, *Federal District Court in Puerto Rico: A Brief Look at the Court and Federal Handling of Commonwealth Civil Law in Diversity Cases*, 13 Case W. Res. J. Int'l L. 231, 240–41 (1981).

2. *See* Peña v. García, 45 P.R. Dec. 44, 3–4 (P.R. 1953).

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But when I ask my students to continue the list, it usually takes them mentioning well more than half the states before they come up with Montana. But the truth is that Montana and Puerto Rico have many different legal connections that, as we are about to see, transcend mere chance or coincidence. Something else is afoot. Whether it is constitutional text, environmental protections, labor policy, or even condominium statutes, there seems to be sufficient trees to make up a forest. In other words, it appears that the legal connection between Puerto Rico and Montana is not a one-off, nor an anomaly. As a result, it would be normatively legitimate, convenient, and even required, that each jurisdiction gives preferential treatment to the other as a matter of comparative law. Montana and Puerto Rico have become in-laws.

In that sense, this Article is both descriptive and normative. As to the descriptive element, Part II of this Article will analyze the different meeting points between Puerto Rican and Montana law. These connections transcend mere comparative law techniques. They are organic connections that require each jurisdiction to look to the other as part of the *history* behind particular legal sources. In other words, ordinary tools of interpretation require this matchup. Regarding the normative argument, Part III argues that, precisely because of the repeating existence of a legal link between both jurisdictions, the use of Puerto Rican law in Montana—and vice-versa—should not be limited to the particular instances of actual relation as a matter of pure hermeneutics. On the contrary, I propose that these multiple connections require a more formal interaction between both jurisdictions, particularly regarding the interpretation and application of legal sources. Each should be the other's go-to jurisdiction when engaging in comparative law.

II. A Century of Connection: Dignity, Discrimination, Labor, and So Much More

A. First Contacts: Justice James Harvey McLeary and the California Connection

Montana came into Puerto Rico's life first. That is, chronologically, Puerto Rico law referenced Montana before Montana referenced Puerto Rico. This makes sense, as Puerto Rico became a possession of the United States a decade after Montana was admitted as the forty-first state.

Following the invasion of 1898, Puerto Rico gained civilian government in 1900.[3] At that time, the justices of the Puerto Rico Supreme Court

3. Antonio Fernós-Isern, Original Intent in the Constitution of Puerto Rico: Notes and Comments Submitted to the Congress of the United States 8 (2d ed., 2002).

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were appointed by the President of the United States.[4] As one might expect, many of these justices were United States born. Among the first was James Harvey McLeary, who had served previously as an Associate Justice of the Supreme Court of the Territory of Montana.[5] Appointed in 1886 to that bench, McLeary was appointed to the Puerto Rican court in 1901.[6]

As early as 1902, Puerto Rico began its connection with Montana. After shedding off much of the previous Spanish-colonial system, Puerto Rico embarked on a process of legal importation from the United States. Chief among these were California's Civil and Penal Codes. But Puerto Rico was not the only jurisdiction to follow in California's path. As Justice McLeary explained in a concurring opinion in 1903, Montana and Idaho also took their cue from the same California sources.[7] Likely guided by his previous experience as a judge in Montana, Justice McLeary referenced Montana's interpretation of the borrowed statutes as authority for the interpretation of the Puerto Rican versions.[8] Turns out that the Montana precedent was authored by none other *than Justice McLeary himself*.[9]

But Justice McLeary's reference to Montana was not based solely on the author's familiarity with that state or his own vanity. As it turns out, though Puerto Rico borrowed directly from California—as did Montana—*Montana's and Puerto Rico's versions of the laws were actually more similar to each other's*. As Justice McLeary explained in *Giménez, et al.,* a crucial provision of the California statute was left out of *both* of the Puerto Rican and Montana versions.[10] This required courts to skip California and use Montana directly as a source of legal meaning. Justice McLeary would continue his practice of citing Montana cases as authority.[11]

After Justice McLeary's retirement, Puerto Rican reference to Montana became more superficial, but nonetheless present.[12] The Puerto Rico

4. *Id*. at 10.

5. Claudia Hazelwood, *Handbook of Texas Online*, https://perma.cc/7EQR-VCUX (last visited June 18, 2018).

6. *Id*.

7. *Ex parte* Mauleón, 4 P.R. Dec. 123, 11 (P.R. 1903) (McLeary, J., concurring).

8. *Id*. at 11–12.

9. Lane v. Board of Cty. Comm'rs of Missoula Co., 13 P. 136 (Mont. 1887). Justice McLeary would cite this case as authority again in Giménez et al. v. Brenes, 10 P.R. Dec. 128 (P.R. 1906) (McLeary, J., dissenting).

10. *Giménez et al.*, 10 P.R. Dec. at 19. While the same phenomenon occurred in Idaho—another state that copied California—Justice McLeary focused more heavily on Montana as a source for the interpretation of the Puerto Rican version. The crucial difference between Montana and Puerto Rico, on the one hand, and the original California norm, on the other, was the character of a foreclosure, from an ordinary process to a summary one.

11. *See, e.g.*, *Ex parte* Diaz (a) Martillo, 7 P.R. Dec. 153 (P.R. 1904) (citing U.S. v. Sacramento, 2 Mont. 239 (1875)).

12. *See, e.g.*, Pueblo v. Collazo, 33 P.R. Dec. 49 (P.R. 1924); Vázquez v. Porto Rico Railway, Light & Power Co., 35 P.R. Dec. 62 (P.R. 1926).

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Supreme Court would again reference the similarity between both jurisdictions' adoption and modification of the California Civil Code in 1933.[13] More passing references continued.[14] But this was only the beginning.

B. Puerto Rico's Constitution and a Sneak Peek at Montana

When Puerto Rico wrote its Constitution in 1951–52, it looked to many comparative sources, including the federal Constitution, the constitution of other countries, as well as international sources such as the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man.[15] It also looked to state constitutions for guidance and inspiration.[16]

No single state stood out as the main or principal model. But, several key provisions of the constitutional text mirrored similar provisions in state constitutions, including Montana. Puerto Rico's constitutional provisions mimicked those in *many* state constitutions, including Montana's. Such is the case of clauses dealing with social security,[17] child labor,[18] and freedom of religion, and separation of church and state.[19] As to the provision establishing an eight-hour workday, the Puerto Rico provision mirrored eight state constitutions, including Montana.[20] As we can see, many of these shared provisions deal with issues of social and economic policy.

But Puerto Rico also adopted other constitutional provisions that resembled Montana's text. For example, Puerto Rico's constitutionally prescribed structure of legislative re-districting, which gives a central role to the Chief Justice of the Supreme Court and legislative leaders, is similar to those of nine states at the time Puerto Rico adopted its Constitution in 1952.[21] Puerto Rican scholars have noticed that Montana has a *similar*, though different, model.[22]

13. Peña v. García, 45 P.R. Dec. 44, 3–4 (P.R. 1953) (citing *In re* Davis' Est., 27 P. 342, 346 (Mont. 1891)).

14. Fournier v. González, 80 P.R. Dec. 262, 269 (P.R. 1958), referencing the absence of a requirement of unanimity of the jury in criminal trials.

15. FERNÓS-ISERN, *supra* note 3, at xi.

16. *Id.*

17. *Id.* at 33 n.1. The provision mirrored MONT. CONST. art. X, § 5.

18. *Id.* at 33–34 n.2 (citing MONT. CONST art. XVIII, § 3).

19. *Id.* at 36 n.11 (citing MONT. CONST. art. III).

20. *Id.* at 33 n.6 (citing MONT. CONST. art. VI).

21. *Id.* at 50–53 (citing MONT. CONST. art. XVIII, § 4).

22. Antonio García Padila, *La sección 4 del Artículo III de la Constitución del Estado Libre Asociado de Puerto Rico*, 65 REV. JUR. U.P.R. 489, 503–505 (1996).

C. The Tables Turn: Montana Starts to Copy Puerto Rico

1. Looking Upward and Lost in Translation

As we will see later on, one of the best-known examples of Montana borrowing Puerto Rican legal sources is the human dignity clause found in both Constitutions. Yet, the first instance of Montana taking a page from Puerto Rico was in the realm of property rights, particularly the statutory scheme applicable to condominiums.

As Robert Natelson explains, "[i]n 1958, Puerto Rico became the first United States jurisdiction to enact a condominium statute, relying heavily on a 1952 Cuban law."[23] This represented a trend that started in the civil law tradition of allowing individual ownership in a multi-unit housing complex. Just three years later, "Congress responded to a Puerto Rican lobbying effort by amending the Federal Housing Act to permit the Federal Housing Administration (FHA) to insure condominium mortgages."[24] As a result, the FHA issued the *Model Statute for the Creation of Apartment Ownership*, based on the Puerto Rican scheme.[25] And, in 1965, Montana adopted a statute whose "text largely traces the FHA Model Statute, which reflects in turn the 1958 Puerto Rico enactment."[26]

The extent of Montana's borrowing meant that Montana soon found itself lost in translation. As Natelson explains, the legislature had to amend the condominium statute because some of the text in the FHA Model was based on a civil law structure. For example, provisions relating to "juridical acts *inter vivos* or *mortis causa*" seemed like gibberish and wholly foreign to the common law tradition.[27] Any lawyer in a civil law jurisdiction, including Puerto Rico, would quickly identify this phrase and know that it merely made reference to legal transactions between living persons or as the result of an inheritance. The Montana statute also included other "[u]ncritical borrowing from civil law sources" that created anomalous results.[28] But this was just prelude. The main event came during Montana's 1971–72 Constitutional Convention.

23. Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 MONT. L. REV. 495, 500 (1997).

24. *Id.*

25. *Id.*

26. *Id.* at 502. This refers to the Montana Unit Ownership Act.

27. *Id.* Natelson suggests that this language includes "terms hardly common in American law." He suggests that the "reason for the oddity is that this section is almost a direct transliteration from the Puerto Rican text, which served a civil law, rather than a common law environment." *Id.* at 503.

28. *Id.* at 504 (referencing the concept of 'manager' and the role of condominium bylaws).

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2. Constitutional Similarities

a. Shared Dignity and Prohibited Discrimination

Puerto Rico's 1952 Constitution was part of the new wave of constitutionalism that emerged from World War II. Its Bill of Rights was then, as it is today, a prime example of progressive constitutionalism.[29] The Constitution recognizes a whole series of individual rights that transcend the antebellum catalogue of liberal rights. Its attention to human dignity as a central feature of the constitutional order, the adoption of an expansive list of prohibited discrimination, the inclusion of several labor rights—both individual and collective—as well as other social policy provisions, makes Puerto Rico's Constitution a trailblazer.

Such is the case that the Montana Constitutional Convention of 1971–72 looked to Puerto Rico for guidance, inspiration, and plain-old textual borrowing. The most famous instance of textual borrowing—with all the normative consequences that entails—is the dignity clause, which also addresses discrimination.

Section 1, Article II of Puerto Rico's Constitution states:

> the dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.[30]

For its part, Article II, Section 4 of Montana's Constitution states:

> the dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.[31]

Let's break this down. First of all, note that the dignity clauses are textually identical. This is no coincidence. While it is true that "Montana is unique among the fifty U.S. *states* to so explicitly and generally protect

29. *See* Jorge M. Farinacci Fernós, *Originalism in Puerto Rico: Original Explication and its Relation with Clear Text, Broad Purpose and Progressive Policy*, 85 REV. JUR. U.P.R. 203, 247–48 (2016).

30. P.R. CONST. art. II, § 1. *See also* P.R. CONST. art. II, § 7 ("No person in Puerto Rico shall be denied the equal protection of the laws.").

31. MONT. CONST. art. II, § 4.

human dignity in its constitutional document[,]"[32] the same cannot be said about U.S. *jurisdictions*. In fact, Puerto Rico's text actually came first.[33]

More to the point, there is universal recognition that the language in Puerto Rico's clause was "ultimately borrowed and included in the Montana Constitution."[34] It was a direct, intentional, and conscious act of textual borrowing. As Amanda Eklund suggests, "[t]he dignity provision of the Montana Constitution was modeled largely after a similar provision in the Puerto Rico Constitution."[35] This fact has not been lost on Puerto Rican scholars,[36] although the Supreme Court of Puerto Rico has only made passing references to it. But the fact remains that Montana adopted Puerto Rico's dignity clause word-for-word.

This act of comparative lawmaking was made by a delegate to the Montana Constitutional Convention named Richard Champoux, who confirmed the Puerto Rican origin of the text.[37] The dignity clause of the Montana Constitution inspired "very limited debate" during the deliberations of the Montana Constitutional Convention.[38] Thus, there would seem to be little on which to build a separate, distinct, or independent construction of the Montana provision, as opposed to the content found in the Puerto Rican text. In other words, because the Montana drafters said so little about the content, meaning, and scope of the dignity clause, the fact that it was copied word-for-word from the Puerto Rican Constitution would lead us to the conclusion that Montana *also copied the conceptual content of that original*

32. Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 21 (2004). *See also*, Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's 'Dignity' Clause with Possible Applications*, 61 Mont. L. Rev. 301, 302 n.6 (2000) (emphasis added) ("Though the Montana Constitution's dignity clause is unusual, it is not unique. *See, e.g.*, P.R. Const. art. II, §1."). It is worth noting that both Illinois and Louisiana have some reference to the concept of human dignity in their respective constitutions. Both texts were adopted after Puerto Rico and Montana had approved their own versions. *See* Jackson, *supra* note 32, at 21.

33. This does not mean that Puerto Rico's dignity clause was the first of its kind. West Germany, the Charter of the United Nations, and the Universal Declaration of Human Rights also included references to human dignity as a legal concept. *See* Grundgesetz [Constitution] art. 2(1), 2(2) (F.R.G.); *see Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (Dec. 12, 1948).

34. Jackson, *supra* note 32, at 22; Clifford & Huff, *supra* note 32, at 321.

35. Amanda K. Eklund, *The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity*, 65 MONT. L. REV. 135, 136–137 (2004). It should be noted that the Constitution of Puerto Rico expressly prohibits the death penalty. P.R. CONST. art. II, § 7.

36. Carlos E. Ramos González, *La Inviolabilidad de la Dignidad Humana: lo indigno de la búsqueda de expectativas razonables de intimidad en el derecho constitucional puertorriqueño*, 45 REV. JUR. U.I.P.R. 185, 203 (2011). According to Ramos González, "[i]t is an inescapable part of the history of this section that the Constitution of Puerto Rico moved the citizens of Montana to adopt an identical provision." (translation by author). *Id.*

37. Jackson, *supra* note 32, at 22.

38. Clifford & Huff, *supra* note 32, at 317.

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source. As a result, the substantive content of the two provisions should be, at the very least, very similar, with the Puerto Rican text setting the pace.

While Champoux did not elaborate on his proposal on the floor of the Constitutional Convention to adopt the dignity clause of the Puerto Rican Constitution in Montana, he did comment on his motivations, albeit years later and in a most informal manner.[39] As a result, the only direct source of meaning for the Montana dignity clause is the Puerto Rican text and its sources of meaning. As Clifford and Huff suggest, "[t]herefore, as a simple matter of constitutional interpretation one can look to the body of case law interpreting Puerto Rico's dignity clause, *as it existed at the time of the framing of the Montana Constitution in 1972*, to shed light on what our constitution's framers intended Montana's dignity clause to mean."[40] While this Article will later argue that post-1972 Puerto Rico case law is also relevant as a source for the development of the meaning and scope of the Montana provision, a strong case exists for using the pre-1972 Puerto Rican sources.[41]

Unfortunately, the Montana Supreme Court has not actively used Puerto Rican sources to interpret the dignity clause.[42] Scattered references to Puerto Rican sources have surprisingly been used to restrict or limit the application of the clause.[43] In fact, even though there are multiple legal connections between Montana and Puerto Rico, Puerto Rican sources are very scant in the decisions of the Montana Supreme Court.[44] It should be

39. *See* Clifford & Huff, *supra* note 32, at 321 n.92, describing a phone conversation with Champoux and his poignant story about how his mother faced discrimination as a woman, as well as the history of mistreatment of the native peoples in Montana. The authors also express that there was "very limited debate" as to this clause. *Id*. at 317. Clifford & Huff, *supra* note 32, at 317.

40. *Id*. at 321 (emphasis added).

41. Puerto Rican scholars have also echoed this call. *See* Ramos González, *supra* note 36, at 203.

42. *See* Baxter v. State, 224 P.3d 1211, 1239 n.4 (Mont. 2009) (Rice, J., dissenting). ("The historical origins of the dignity clause are enlightening. At the Constitutional Convention, delegates reviewed two foreign constitutions, the 1949 West Germany Constitution and the 1951 [1952] Puerto Rico Constitution"). Yet, the dissent *ends* its inquiry here, instead of diving into comparative sources, particularly Puerto Rico, which differs from the West German approach.

Curiously enough, the dissent in this case disagreed with the majority as to the interpretation of a Montana statute related with a terminally ill patient's right to a dignified death. This could be in tension with a Puerto Rico Supreme Court decision that strengthened the right of patients to refuse medical treatment that would result in death. *See* Lozada Tirado v. Tirado Flecha, 177 P.R. Dec. 893 (P.R. 2010). *See also* Patricia Silva Musalem, *La Fe ante la Muerte: Perspectivas sobre la eutanasia desde el catolicismo, islamismo, hinduismo y judaísmo*, 5 Rev. Clave, Rev. Estudios Críticos Der. 151, 162 (2010) (When discussing the right to die and assisted suicide in Puerto Rico, the author only references one U.S. State: Montana).

43. *See Baxter*, 224 P.3d at 1239 n.4; Walker v. State, 68 P.3d 872, 888–89 (Mont. 2003) (Gray, C.J., dissenting).

44. *See* Dorwart v. Caraway, 58 P.3d 128, 134 n.1 (Mont. 2002). Curiously enough, both the Montana and Puerto Rican Supreme Courts have addressed very similar issues and have come to very similar conclusions. Unfortunately, they have not cross-referenced each other. *See, e.g.*, Oberg v. City of Billings, 674 P.2d 494 (Mont. 1983) and Arroyo v. Rattan Specialties, 117 P.R. Dec. 35 (P.R. 1986) (both

noted that Montana has made some recent appearances in Puerto Rican case law.[45] In Part III, I will return to this issue to address normative considerations that would require both jurisdictions, particularly their respective Supreme Courts, to cross-reference each other.

The Montana Constitutional Convention's practice of textual borrowing from Puerto Rico did not end with the dignity clause. Montana's discrimination provision also took a page from the Puerto Rico Constitution. The Puerto Rican Constitution prohibits discrimination on account of "race, color, sex, birth, social origin or condition, or political or religious ideas."[46] For its part, Montana prohibits discrimination on account of "race, color, sex, culture, social origin or condition, or political or religious beliefs."[47] Note that the lists of forbidden discriminations are almost identical and, more strikingly, follow the same order. This is hardly a coincidence. On the contrary, it is another example of direct textual borrowing on Montana's part.

Also note that the only difference between both lists is that Puerto Rico mentions *birth* while Montana opted for *culture*. Is it a real difference or just a matter of lost in translation? The answer to this question requires further analysis, which is outside the scope of this Article.[48] However, this contrast reveals that the Puerto Rican approach to the concept of "birth," which focused on the issue of illegitimate children,[49] has actually been unnecessarily narrow, since the concept of 'birth' can also include *where* one was born; in other words, national origin or culture.

As a result, a comparative analysis of Montana and Puerto Rico can help re-examine Puerto Rico's provision. Such is the promise of cross-referencing both jurisdictions.

Finally, I wish to address both Constitutions' prohibition on discrimination on the basis of social condition. The Montana Supreme Court's discussions about this concept reveal the urgent necessity of a comparative approach. It seems that the Montana Supreme Court has not articulated a

cases deal with the use of polygraph examinations for employees). Also, in his dissent in Sanchez et al. v. Srio. de Justicia, 152 P.R. Dec. 643 (P.R. 2000) regarding the constitutionality of the prohibition on same-sex intimate relations, then Associate Justice Hernández Denton cited as authority the Montana Supreme Court's decision in Gryczan v. State, 942 P.2d 112, 120 (Mont. 1997). *Sanchez et al.*, 152 P.R. Dec. at 650 (Denton, J., dissenting).

45. *See, e.g.*, P.P.D. v. Ferré, Gobernador, 98 P.R. Dec. 338, 456–57 (P.R. 1970) (Rigau, J., dissenting); Colegio de Abogados de P.R. v. Schneider, 112 P.R. Dec. 540, 547 (P.R. 1982); El Vocero de P.R. v. ELA, 131 P.R. 356, Dec. 399 (P.R. 1992).

46. P.R. CONST. art. II, § 1.

47. MONT. CONST. art. II, § 4.

48. *See* Clifford & Huff, *supra* note 32, at 322. The authors also comment on the apparent difference between the Montana and Puerto Rican texts as to the issue of state action.

49. *See* Díaz v. Ocasio, 88 P.R. Dec. 676 (P.R. 1963).

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clear doctrine as to this classification.[50] At the very least, they recognize that it is meant to protect poor people from discrimination.[51] But that is not enough.

This lack of definition is understandable. Most of the Puerto Rican classifications were, in turn, borrowed from international sources, particularly the Universal Declaration of Human Rights. But that text only makes reference to social *origin* and the separate concept of *economic position*.[52] Yet, a Socialist delegate to the Puerto Rican Constitutional Convention proposed a floor amendment to adopt *social condition* in addition to social origin.[53] In other words, social condition is an original Puerto Rican proposal. Because Puerto Rico originated protection based on "social condition," it is essential to analyze the Puerto Rican source to better understand the meaning of Montana's provision.[54]

b. Other Constitutional Links: privacy, environmental protection and a few more

The preceding discussion was based on a single section of both Constitutions' Bill of Rights. But the shared constitutional values and objects between Montana and Puerto Rico transcend dignity and discrimination.[55] For example, both Constitutions have an express right to privacy.[56] Moreover, it

50. *Compare* Gazelka v. St. Peter's Hosp., 347 P.3d 1287 (Mont. 2015) *with* McClanathan v. Smith, 606 P.2d 507 (Mont. 1980). In *McClanathan,* the Court seems to adopt a narrow approach to social condition, limiting it to protections against the poor. However, in *Gazelka*, the Court seems open to a broader articulation. Puerto Rico has adopted a slightly more thorough doctrine on this point, compared to other prohibited classifications.

51. *McClanthan,* 606 P.2d at 514.

52. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948)).

53. *See* Rosario v. Toyota, 166 P.R. Dec. 1 (P.R. 2006).

54. *Rosario*, 166 P.R. Dec. at 35–37. In *Rosario*, the Puerto Rico Supreme Court held, by a plurality, that the concept "social condition" protects both poor people and persons whose social status carry some sort of stigma. In that particular case, the Court held that an employer could not refuse to hire or fire an employee because of a previous criminal record. For a more comprehensive discussion of the Puerto Rican concept of "social condition," *see* José Roqué Velásquez, *Apuntes hacia una definición del discrimen por 'origen o condición social'*, 39 Rev. Jur. U.I.P.R. 183 (2004).

55. I began with a separate analysis of the dignity clause because, at least as to Puerto Rico, it is clear that the dignity provision serves as an over-arching constitutional value that gives content and meaning to the entire constitutional structure. In other words, it is not just another clause. *See* Jackson, *supra* note 32, at 24–25 ("The Puerto Rican courts have emphasized statements by the drafters to the effect that the right to human dignity was the foundational and most important element of that Bill of Rights, one from which all others could be inferred even if they had not been express.").

56. Puerto Rico's privacy provision states: "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life." P.R. Const. art. II, § 8. Montana's Constitution states: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10.

seems that the Montana Constitutional Convention actually looked to the Puerto Rican text for inspiration.[57] As Mary Helen McNeal explains, "[l]ike Montana's Constitution, the Puerto Rican Constitution has an explicit right to privacy, which has been interpreted in light of its dignity clause."[58] Once more, we see an instance of Montana borrowing from Puerto Rico's Constitution.

Although the Montana Supreme Court has referenced Puerto Rico's dignity clause while Puerto Rico has not mentioned Montana's, Montana has remained silent on Puerto Rico's privacy clause while Puerto Rico has referenced Montana's interpretation of privacy. While the Montana Supreme Court has referenced Puerto Rico's dignity clause while the latter's Supreme Court has not, regarding the privacy clause it has been the other way around. In *Pueblo v. Díaz, Bonano*,[59] the Puerto Rico Supreme Court held that the use of sniffing police dogs to inspect objects does not constitute a search. The majority opinion cited as authority the decision by the Montana Supreme Court in *State v. Scheetz*,[60] noting that both jurisdictions have an express privacy provision.[61]

Both the Montana and Puerto Rico Constitutions explicitly adopt environmental policy provisions and protect historical and cultural treasures. Puerto Rico's text states that:

> It shall be the public policy of the Commonwealth to conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the community; to conserve and maintain buildings and places declared by the Legislative Assembly to be of historic or artistic value.[62]

Montana's Constitution has an entire Article dedicated to the issue of environmental protection and the conservation of historical and cultural treasures.[63] Unlike the dignity and discrimination clauses, there is no evidence of textual borrowing here. Yet, it is very telling that both Constitutions opted for an express and affirmative policy of environmental protection. I will come back to this issue from a normative perspective in Part III. For now, it's enough to identify yet another constitutional similarity between Puerto Rico and Montana.

57. William C. Rava, *Toward a Historical Understanding of Montana's Privacy Provision*, 61 ALB. L. REV. 1681, 1717 n.85 (1998), noting that the Montana Constitutional Convention Commission studied at least five states' privacy provisions, including Puerto Rico. The other states were Alaska, Hawaii, Michigan, and New Jersey.

58. Mary Helen McNeal, *Toward a 'Civil Gideon' under the Montana Constitution: Parental Rights as the Starting Point*, 66 MONT. L. REV. 81, 137 n.114 (2005).

59. 176 P.R. Dec. 601, 605 (P.R. 2009).

60. 950 P. 2d 722, 727–28 (Mont. 1997).

61. *Pueblo*, 176 P.R. Dec. at 624–25.

62. P.R. CONST. art. VI, § 19.

63. MONT. CONST. art. IX.

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This similarity has been recognized by Montana scholars and Puerto Rican justices. Barton H. Thompson, Jr. states that Montana's Constitution includes a "right to a clean and healthful environment."[64] According to the author, the Montana Supreme Court "has broken league with other state supreme courts and taken an activist approach to the [environmental] provisions."[65] Curiously, Thompson mentioned Puerto Rico's similar provision concerning the environment.[66] And while "[n]ot surprisingly, state courts have concluded that such provisions are not self-executing,"[67] this is not the case in Puerto Rico, where, like in Montana, this constitutional provision is wholly enforceable in court.[68] In other words, while few state constitutions have environmental policy provisions and even fewer enforce them in court, Puerto Rico and Montana seem to take a similarly different direction. Meanwhile, in his concurring opinion in *Blassini v. Depto. Rec. Naturales*, then Associate Justice Hernández Denton directly referenced the Montana-Puerto Rico connection respecting the adoption of a constitutional environmental policy provision in the context of hunting regulations.[69] In particular, he cited as authority the Montana Supreme Court's decision in *State v. Boyer*.[70]

Finally, it's worth noting that in her concurring opinion in *Pueblo v. Sánchez Valle*, Chief Justice Fiol Matta proposed that the Puerto Rican double jeopardy clause impeded state prosecution after a prior federal prosecution, independent of the dual sovereignty doctrine.[71] In her analysis, Fiol Matta referenced Montana, noting that Puerto Rico and Montana both share the same dignity clause,[72] and, more importantly, that the Montana Constitution's double jeopardy clause applies to subsequent state prosecutions after a federal one.[73]

64. Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provision*, 64 MONT. L. REV. 157, 158 (2003).

65. *Id.* at 159.

66. *Id.* at 161. *See also* Richard J. Ansson, Jr. & Dalton L. Hooks, Jr., *Protecting and Preserving Our National Parks in the Twenty First Century: Are Additional Reforms Needed Above and Beyond the Requirements of the 1998 National Parks Omnibus Management Act*, 62 MONT. L. REV. 213, 265–266 (2001).

67. Thompson, Jr., *supra* note 64, at 161.

68. Paoli Méndez v. Rodríguez, 138 P.R. Dec. 449, 460 (P.R. 1995); Misión Ind. P.R. v. J.P., 146 P.R. Dec. 64, 171 (P.R. 1998).

69. Blassini v. Depto. Rec. Naturales, 176 P.R. Dec. 454, 498 (P.R. 2009) (Denton, C.J., concurring).

70. *Blassini*, 176 P.R. Dec. at 498 (citing State v. Boyer, 42 P.3d 771, 776 (Mont. 2002)).

71. Pueblo v. Sánchez Valle, 192 P.R. Dec. 594 (P.R. 2015). The majority held that the dual sovereignty doctrine did not apply to Puerto Rico because it lacks an independent source of sovereignty. Only Chief Justice Fiol Matta, joined by then Associate Justice Oronoz Rodríguez, proposed that, independent of the dual sovereignty doctrine, the Puerto Rican Constitution barred the subsequent state prosecution.

72. *Pueblo*, 192 P.R. Dec. at 723 n.249 (Fiol Matta, C.J., concurring).

73. *Id.*

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The double jeopardy example is revealing. It shows us that, even if not done intentionally, the similarities between Montana and Puerto Rico will inevitably lead courts of one jurisdiction to the other. This is because those apparent coincidental similarities are actually a manifestation of a shared legal DNA.

3. Back to Basics: The Montana-Puerto Rico Labor Connection

As we saw in the constitutional context, when it comes to issues of labor and employment law, Puerto Rico and Montana share similar approaches. The constitutions of both jurisdictions address labor issues. In particular, we saw that, in 1952, Puerto Rico mirrored some of Montana's provisions, though not directly. But the labor connection did not stop there.

Most U.S. states have adopted the employment-at-will doctrine. At the same time, "[s]cholars have also constantly reminded themselves that only three U.S. jurisdictions serve as exceptions to the at-will rule. Many legal articles routinely reference Montana, Puerto Rico, and the U.S. Virgin Islands as alternatives to the at-will model."[74] Both Montana and Puerto Rico prohibit unjust or unfair dismissals.[75]

This means that Puerto Rico and Montana share an important policy judgment that no other jurisdiction—save the U.S. Virgin Islands—has made. This is remarkable, as it suggests that while nearly the entire United States has embraced at-will employment, Montana and Puerto Rico have both decided, separately, to take a different path. This path, in relative terms, tends to protect workers from employer abuse and arbitrary dismissal. In particular, both statutory regimes require a showing of good cause for a dismissal, include public policy exceptions, and allow for greater protections by way of employee manuals.[76] They are also quite similar when it comes to the definition of a discharge, "particularly with respect to constructive dismissals."[77] The statutes do differ as to the burden of proof and exhaustion requirements.[78]

74. Jorge M. Farinacci Fernós, *The Search for a Wrongful Dismissal Statute: A Look at Puerto Rico's Act No. 80 as a Potential Starting Point*, 17 EMPLOYEE RTS. & EMP. POL'Y J. 125, 127 (2013). *See Id.* at 127 n.8 for a list of scholars that have made similar assertions.

75. *See* Farinacci Fernós, *supra* note 74, at 127 and Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge From Employment Act (WDEA)*, 57 MONT. L. REV. 375 (1996).

76. Farinacci Fernós, *supra* note 74, at 154. This Article offers a more in-depth comparison between both regimes.

77. *Id.* at 155.

78. *Id.*

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There are other instances of shared labor and employment policy, including protection to pregnant workers and working mothers,[79] as well as an apparent shared skepticism as to the use of the Federal Arbitration Act in the labor context.[80] This signals a shared labor-law DNA that is beyond mere coincidence.

4. Additional Connections

I have already identified the most important legal connections between Montana and Puerto Rico. But before we dive into this Article's main normative proposal, it is worth mentioning some minor additional connections between both jurisdictions. It is curious that when Alberto Bernabe-Riefkohl discusses the issue of "access to courts" from the Puerto Rican perspective, one of his go-to comparative jurisdictions is Montana, directly referencing the Montana Supreme Court's decision in *Madison v. Yunker*.[81] For his part, Judge José Alberto Morales Rodríguez also quoted from the Montana Supreme Court when analyzing the issue of the *constitutional right to access information*, referencing that Court's decision in *Yellowstone Cty. v. Billings Gazette*.[82]

In *Defendini Collazo et al. v. E.L.A., Cotto*,[83] the Puerto Rico Supreme Court addressed the issue of sovereign immunity and the right to damages. The opinion there cited as authority the Montana Supreme Court's decision in *Meech v. Hill Haven West, Inc.*[84] Finally, Puerto Rican courts have also referenced how Montana has entrenched in its Constitution the issue of university autonomy.[85]

79. *See* Luis Antonetti, *A Modern Approach to Pregnancy Discrimination: Puerto Rico's Working Mothers Protection Act*, 29 U. MEM. L. REV. 531 (1999).

80. *See* Farinacci Fernós, *supra* note 74, at 147; Bryan L. Quick, *Keystone, Inc. v. Triad Systems Corporation: Is the Montana Supreme Court Undermining the Federal Arbitration Act?*, 63 MONT. L. REV. 445 (2002).

81. Alberto Bernabe-Riefkohl, '*Perdón, si es que te he faltado': retracciones en casos de difamación*, 68 REV. JUR. U.P.R. 635, 656–57 (1999) (citing Madison v. Yunker, 589 P.2d 126 (Mont. 1978)).

82. José Alberto Morales Rodríguez, *Transparencia: Derecho Fundamental y Antídoto contra la corrupción*, 55 REV. DER. P.R. 35, 61–62 (2016) (citing Yellowstone Cty. v. Billings Gazette, 143 P.3d 135, 139 (Mont. 2006)).

83. 134 P.R. Dec. 28 (P.R. 1993).

84. *Defendini*, 134 P.R. Dec. 28 at 69 (citing Meech v. Hill Haven West, Inc., 776 P.2d 488, 491 (Mont. 1989)). The *Defendini* opinion also quoted J.A. Kutzman, *The King's Resurrection: Sovereign Immunity Returns to Montana*, 51 MONT. L. REV. 529, 536–37 (1990).

85. *See, e.g.*, C.E.S. U.P.R. v. Gobernador, 137 P.R. Dec. 83, 117 n.13 (P.R. 1994).

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III. From Coincidental to Normative: A How-to Guide

A. Introduction

Part II of this Article was mostly descriptive. It identified the numerous legal connections between Puerto Rico and Montana. Many of these connections result from direct and intentional borrowing. Others are less direct but still reveal a common conceptual approach. As we saw, there are multiple connections. In other words, we are not dealing with an anomaly or pure random coincidence. As such, there is room to propose a normative model of comparative law between Montana and Puerto Rico.

At the very least, this model requires a comparative approach when dealing with the many instances of direct borrowing. That is the result of basic hermeneutics. But, the model can also transcend the specific instances of connection and allow for a more general comparative approach between both jurisdictions. In other words, the specific leads to the general.

B. Available Tools

From a purely hermeneutic point of view, the origin of borrowed legal material is highly relevant to the interpretation and application of a legal norm. This includes the doctrinal developments of that legal norm adopted before the borrowing took place. When one jurisdiction borrows from the other, it not only imports the text, but also the interpretations and constructions that were given to it prior to adoption. This also includes its conceptual background and premises. As a result, the imported product is a combination of text and pre-adoption gloss.

This is known as the *borrowed-statute doctrine*, which states that "when a legislator copies a statute from a foreign legislator, it can be presumed that she was aware of the way in which the statute had been construed by the foreign courts."[86] As a result, this doctrine "establishes a presumption that a legislature that borrows statutory language from another jurisdiction intended to adopt the judicial interpretations of the highest court of the other jurisdiction."[87] This can apply to both statutory and constitutional borrowing. As Taavi Annus explains, "[t]he very fact that a constitutional provision has been borrowed, or that the legal system more generally has roots in a foreign system, makes the courts in this other system an au-

86. Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 Int'l J. Const. L. 269, 275 (2003).

87. Alex B. Long, *'If the Train Should Jump the Track. . .': Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 Ga. L. Rev. 469, 478 (2006) (citing Lenaerts v. D.C. Dep't of Employment Servs., 545 A.2d 1234, 1238 n.9 (D.C. 1988)).

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thority."[88] Of course, one must take care to effectively take into consideration the "unique values and conditions of the borrowing state."[89]

As to the doctrinal developments that occur *after* importation, the situation is a little different. The jurisdiction that borrowed the legal norm cannot anticipate doctrinal developments and interpretations in the original jurisdiction that may happen in a later time. Yet, when two jurisdictions share the same legal norm, sound hermeneutics would suggest that they arrive at similar conclusions. As such, cross-reference and comparative analysis for developments that take place after borrowing seem in order. As a result, while not automatically binding, the judicial interpretations and doctrinal developments that take place after importation are highly relevant and persuasive.

This cross-reference goes both ways. That is, it's not limited to the jurisdiction that does the borrowing. Similar cross-reference should be made by the original jurisdiction regarding the developments in the borrowing jurisdiction. In other words, if a jurisdiction copies a legal norm from an original source, the original source cannot simply ignore what the second jurisdiction does with the imported legal norm. How other jurisdictions interpret and apply the norm can aid the original jurisdiction in its own future development of the norm.

The preceding analysis applies to instances of direct and particularized borrowing. Yet, precisely because of the existence of multiple instances of direct borrowing, jurisdictions can share enough legal DNA to warrant other uses of cross-reference and comparative analysis in a more general sense. In other words, cross-reference is not limited to specific instances of legal borrowing. At some point, there are enough single instances to conclude that there are general connections that warrant comparative analysis. When this happens, one jurisdiction can serve as the go-to comparative source for the other.

C. Specific Areas

1. Direct Borrowing

As discussed, Montana has borrowed directly from Puerto Rico on several occasions. The most evident are the dignity and anti-discrimination clauses of that state's constitution. As to the dignity clause, it is a verbatim reproduction. Regarding the anti-discrimination provision, while there is apparent daylight due to a particular choice of words—culture as opposed

88. Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Strategy*, 14 DUKE J. COMP. & INT'L L. 301, 336 (2004).

89. *Id.* at 336.

to birth—the Montana list of outlawed discrimination is identical to the Puerto Rican text, even mimicking the order of classifications. This was not happenstance or chance; it was the product of intentional borrowing after research, analysis, and deliberation.

As such, the borrowed-statute doctrine applies full force. We saw that authors like Clifford and Huff have already suggested that, "as a simple matter of constitutional interpretation one can look to the body of case law interpreting Puerto Rico's dignity clause, as it existed at the time of the framing of the Montana Constitution in 1972, to shed light on what our constitution's framers intended Montana's dignity clause to mean."[90] Thus, as a *normative matter*, Montana courts should treat the Puerto Rico Supreme Court's interpretations of these clauses as authoritative. As a *descriptive matter*, that has not happened yet. There is no reason why that practice should continue.

And what about Puerto Rico Supreme Court decisions issued *after* 1972? While not authoritative, they should still be considered persuasive. By the same token, the Puerto Rico Supreme Court should *also* turn to Montana case law as part of its interpretive analysis when applying the Puerto Rican clauses. The same would apply to other current circumstances where one jurisdiction borrowed directly from the other.

2. Similar Paths

Montana and Puerto Rico have more in common than discrete instances of direct borrowing. Whether independent of, coincidental, caused by, or an effect of this reality, the fact remains that Puerto Rico and Montana share many similar approaches to critical areas of law, both constitutional and statutory. Whether it is the environmental and privacy provisions adopted in their respective constitutions or the shared approach to unjust dismissals, there is enough common ground on critical issues to warrant cross-reference and comparative analysis. That common ground is highlighted by the vast differences between these two jurisdictions and the rest of the states in the United States, most of which lack a dignity clause, environmental provisions entrenched in the Constitution, or statutory protections against unjust dismissals.

This creates a perfect storm in favor of preferential cross-reference. Unlike instances of direct borrowing, where pre-adoption developments are seen as authoritative, while post-adoption events are seen as persuasive—in both directions, here the approach is different, but no less real. Montana and Puerto Rico's shared legal DNA on these issues warrant a most-preferred jurisdiction status as to comparative law.

90. Clifford & Huff, *supra* note 32, at 321 (emphasis added).

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D. A More General Approach

1. Constitutional Law

So far we have seen instances of borrowing or shared approaches to many different issues between Puerto Rico and Montana. But, the constitutional link seems to be the strongest, whether through direct borrowing, like the dignity and discrimination clauses, or by way of similar policy judgments, as in the case of the environmental and labor provisions. As to the former, the borrowed statute doctrine applies. As to the latter, it is a matter of first preference cross-reference.

But what about the rest of the Bill of Rights in Puerto Rico's and Montana's Constitutions? Or the rest of the Constitutions for that matter? I propose that the previously discussed instances of direct borrowing and shared approaches to several constitutional issues warrant a model of cross-reference and comparative analysis that includes the rest of the provisions of the Montana and Puerto Rico Bills of Rights. Unlike the previous issues, I am not arguing in favor of authoritative or persuasive cross-reference. But, the instances of legal connection between the Montana and Puerto Rico approaches to constitutional rights have created a shared space that can also include other constitutional provisions that are not as directly similar as the ones we have discussed until now.

My proposal is proportional. Regarding direct borrowing, pre-adoption developments are authoritative. As to post-adoption events, these are persuasive. For shared approaches in discrete instances, I've proposed a strong first-preference model. For the rest of the Bill of Rights, considering the many instances of direct borrowing and shared approaches in the respective constitutional texts, I propose a less stringent version of the first-preference model.

2. General Law

What about *other* areas of law? Here the distance may be greater between Montana and Puerto Rico law. After all, Puerto Rico is still a mixed system that is mainly founded on the civil law tradition, while Montana is a common law jurisdiction. More to the point, Montana and Puerto Rico are separate societies with different problems and potential solutions. Each jurisdiction should exercise their democratic tools to carve out their own policy choices. They are not bound to each other and I'm sure there are many areas of real and direct disagreement or clash between Montana and Puerto Rican law. However, it never hurts to find out and simply give each other a look. As we have seen in this Article, we might be very surprised as to what we find.