

Introduction

The term "legal transplantations" denotes efforts to transmit legal norms and institutions from one setting to another. This issue of *Theoretical Inquiries in Law* is made up of studies of histories of legal transplantations, mainly the relatively neglected transplantations occurring within the Anglo-American world.

The contributions to this issue comprise a spectrum of projects, with diverse focal points and varying levels of generality. The issue includes articles on transplantations of a particular statute or case law doctrine from one country to another; on transplantations of legal institutions, areas of law, legal culture, and legal education; on transplantation-based transformations of an entire state legal system; and on transplantation-based projects of legislative reform and the drafting of foundational documents. Also included are studies of episodes in the legal community's attitudes toward international and foreign legal systems, as well as more general, theoretical approaches to legal transplantation, legal imperialism, and legal change.

Whether broad or narrow in their core subject matter, the projects analyzed in this issue shed light on the significance and nature of legal transplantations, and on their centrality to legal systems and legal development. Research on histories of legal transplantations thus presents a key approach to the study of both comparative law and legal history, and offers important insights for legal theory more generally — particularly in today's increasingly globalized world.

The issue opens with James Q. Whitman's provocative argument on the historical roots of Western legal imperialism — i.e., the massive efforts, undertaken with missionary zeal, to transplant Western legal institutions to other parts of the world. According to Whitman, Western law's drive to expand significantly predates imperial colonization. A feature of Western law highlighted as key to its imperialistic tendency is its origin as city-state law, which only later spread to the countryside, particularly with the rise of Christianity and the shift of the West's cultural center of gravity from the Mediterranean to transalpine Europe. Whitman's argument suggests that reformers engaged in extending the reach of Western law represent a distinctly Western (and Christian) way of understanding the world, rather than some universal truth.

Jean-Louis Halpérin proposes that the very idea of the concept of law can be seen as a Western transplant. Halpérin's thesis is based on a positivist

definition of law; to Halpérin, social norms are not law without legal technology, i.e., secondary rules, and most importantly rules of change. Halpérin argues that the Romans were the first to develop explicit rules of change. This concept was then exported — first through Roman influence in Europe, then through colonial conquest — and implemented in other areas of the world, transforming social (and customary) rules into Roman-style law.

Joshua Getzler investigates the adaptation of English trust doctrines in nineteenth-century American law. The juxtaposition of the two systems of law reveals that English doctrines were modified substantially in the process of transplantation, in a way that poses a paradox for the legal historian: restrictions on alienability adopted in American trust law made republican America's property law more dynastic than that of aristocratic England. Getzler suggests that this paradox might be explained in terms of the social-economic context, namely the volatility of credit in America and the desire of the wealthy to escape market pressures.

Christopher Tomlins explores the roots of the slavery regimes created during the first two centuries of English colonization of America. Tomlins identifies three sources of transplants: "extrastructure," derived from the law of nature and nations, which served to explain the slavery regime as an institution; "intrastructure," borrowed from English law, which provided practical legal means aimed at managing the enslaved population; and local innovations, which spread from colony to colony and created commonalities among them. The combination of these types of transplants established and sustained a potent, efficient legal technology, which perpetuated the forced extraction of labor under extreme duress by constructing the terms and conditions of the enslaved population's life on the edge of death.

Amalia D. Kessler examines a largely forgotten episode in American legal history, the nineteenth-century debate over whether to adopt "conciliation courts" aimed at persuading disputants to embrace equitable compromises. Although conventional wisdom is that such institutions tend to flourish in hierarchical societies, Kessler shows that the United States, which was radically egalitarian by the standards of the time, seriously considered embracing conciliation. Kessler seeks a solution to this puzzle and an explanation for why conciliation was ultimately rejected. In the process, she touches on the roots of the modern, quintessentially American commitment to formal adversarial legal process.

Steven Wilf explores an often ignored body of legal literature depicting "legal primitivism," which emerged in the second half of the nineteenth century and in the early twentieth century. This genre, which included works by renowned authors such as Oliver Wendell Holmes, James Coolidge

Carter, and John Henry Wigmore, described an archaic legalism, sometimes originating in distant tribal societies, sometimes simply imagined. By holding legal primitivism up as a mirror to modern law, Wilf endeavors to uncover the anxieties of legal modernism.

Jane Dailey's contribution centers on the public struggle over state anti-miscegenation laws in mid-twentieth century America. This story highlights early reactions to international human rights law, imported into American law by treaties and case law. Civil rights activists employed United Nations materials to work towards racial equality; champions of white supremacy who saw the potential danger posed by human rights norms to racial conventions triggered a debate about the perils of international law to the American federal system, and particularly to "states' rights." This debate shaped America's behavior in the international arena, as well as legislative battles over the domestic authority of international law.

Morton J. Horwitz offers a wide-ranging, multi-themed exploration of constitutional transplants. After discussing methodological problems inherent to the study of this topic, Horwitz examines the relationship between constitutional transplants and judicial review, and that between judicial independence and judicial review. These broad themes are brought to bear on analyses of the process of the Americanization of Canadian constitutional culture, and of global constitutional revolutions — particularly the spread of judicial review — since World War II.

Ron Harris and Michael Crystal investigate the transplantation of British company law into post-Ottoman Palestine, and argue that it was not a simple, straightforward matter. The law enacted was the result of political considerations, personal relationships, and the British Empire's relationship with its periphery more generally, and these factors led to some differences between the law of Palestine and that of England. Harris and Crystal's discussion highlights the role played by company law — often treated as "objective" and indifferent to social context — in the complex environment of the time and amidst fragile relationships between Jews, Arabs, and the British in Palestine.

Yoram Shachar traces the roots of the Israeli Declaration of Independence of 1948 to the American Declaration of Independence, composed by Thomas Jefferson in eighteenth-century America. Shachar shows that the American Declaration served as a starting point for the original draft of the Israeli version, composed by a low-ranking civil servant, Mordechai Beham. Although most of the original content was lost in a long process of adaptation and translation, the final text still bears some of its progenitor's influence. Shachar presents the Israeli Declaration as a remarkable exercise in choosing contemporary, locally valid answers to fundamental questions posed by the American Declaration,

in another time and place, regarding national identity, statehood and the role of divinity in politics.

Assaf Likhovski draws attention to an overlooked facet of projects of legal transplantation: their role as signaling devices, which send messages to various audiences, beyond any practical considerations involved. This perspective is illustrated through the stories of two projects of legislative cooperation established by the Israeli Ministry of Justice in the 1950s and 1960s, with Harvard University and with nascent African states, respectively. In both cases, legal transplantation was used (among other objectives) to communicate Israel's progress, stability and strength to foreign friends and enemies. More broadly, the signaling perspective shifts the focus of the discussion of legal transplantation from legal norms to social acts.

Pnina Lahav tells the story of the transplantation of U.S.-style legal education into Israeli law schools, a process which began in 1967. Lahav identifies American influence on Israeli legal education in three main fields: the establishment of student-run law reviews, curricular reforms, and the adoption of new teaching methods. Several factors are then proposed as partial causes of this (successful) transplant, including the Israeli Supreme Court's interest in American law, the proliferation of U.S.-style law firms, the privatization of Israeli law schools, broader trends of globalization and Americanization, and diplomatic relations between Israel and the U.S.

Jani Kirov discusses legal transfer following the foundation of the Bulgarian state in 1878. In the Bulgarian case, the state relied at first on traditional practices of self-government and on modern Ottoman law. Later on, Western law was imported (eclectically); but Kirov shows that Western law did not simply replace existing law — Bulgarian courts continued to apply local customs and Ottoman law, creating discrepancies between new legislation and legal practice. Kirov argues that since foreign law has to be interpreted, understood, and applied in a new social environment, the outcome of legal transfers is the formation of a "new law," which is different from both the foreign law and the old local law.

In the final contribution to this issue, Michele Graziadei suggests an innovative approach to the study of legal transplantation. Though he does not advocate abandoning the more common "macro" view of legal transplantations, Graziadei proposes that it be supplemented by a "micro"-level analysis, which focuses on legal transplantations as social acts performed by individuals. Drawing on various contributions to this volume, Graziadei explores how the micro approach contributes to elucidating the process through which ideologies pave the way to the legitimization of norms — including transplanted norms — and confronts questions of justice that arise in the case of legal transplantations.

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The Associate and Assistant Editors

