

# WATSON, WALTON, AND THE HISTORY OF LEGAL TRANSPLANTS

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	638
II.	THE EARLY HISTORY OF LEGAL TRANSPLANTS: THE BOOK AND ITS FIRST CRITICS .....	640
III.	FURTHER DEVELOPMENT: SOCIETY AND LEGAL CHANGE.....	649
IV.	REACTIONS IN THE LITERATURE, 1974–1985 .....	658
V.	THE TRIUMPH OF LEGAL TRANSPLANTS, 1986–2013.....	672
VI.	CONCLUSION: THE PREHISTORY OF LEGAL TRANSPLANTS.....	686

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## I. INTRODUCTION

In 1974, Alan Watson published his short work, *Legal Transplants: An Approach to Comparative Law*.<sup>1</sup> It was written in 1970, originating in lectures on jurisprudence given at the University of Virginia.<sup>2</sup> The delay in publication was due not only to lack of interest in the book from publishers, but also because a colleague had discouraged its publication.<sup>3</sup> Alan likes to say that it “fell stillborn from the press.”<sup>4</sup> Perhaps to some extent it did.<sup>5</sup> It certainly does not seem to have attracted many reviews. A quarter of a century later, however, Thomas Carbonneau could describe *Legal Transplants* as a “seminal” text in comparative law.<sup>6</sup> More than a decade after Carbonneau’s claim, a book on methods in comparative law included “Legal Transplants” as providing one of the standard methodological approaches to the discipline, devoting to it a “Part” described as “Legal Transplants and Transnational Codes: Questioning on Cultural Biases and Scientific Statements.”<sup>7</sup> The author of one of the chapters described *Legal Transplants* as a “magisterial book.”<sup>8</sup> Other chapters also routinely used Alan’s work as a reference.<sup>9</sup> But by 2012, the date of publication of this book, *Legal Transplants* had already long come in from the cold; or, to use Alan’s metaphor, the stillborn work had acquired life and grown up to be a vigorous adult.

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<sup>1</sup> ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974) [hereinafter *LEGAL TRANSPLANTS* (1st ed.)].

<sup>2</sup> ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW*, at xi (2d ed. 1993) [hereinafter *LEGAL TRANSPLANTS* (2d ed.)].

<sup>3</sup> *Id.* at 118 n.2.

<sup>4</sup> A. Watson, *Law and Society*, in *BEYOND DOGMATICS: LAW AND SOCIETY IN THE ROMAN WORLD* 9 (John W. Cairns & Paul J. du Plessis eds., 2007); *LEGAL TRANSPLANTS* (2d ed.), *supra* note 2, at 118 n.2; *see also* Gary Francione, *Alan Watson’s Controversial Contribution to Scholarship*, 31 GA. J. INT’L & COMP. L. 59, 61 (2002).

<sup>5</sup> *See infra* Part IV (describing scholarly reactions to *LEGAL TRANSPLANTS* (1st ed.), *supra* note 1).

<sup>6</sup> Thomas E. Carbonneau, Book Review, 48 AM. J. COMP. L. 729 (2000) (reviewing PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD, SUSTAINABLE DIVERSITY IN LAW* (1st ed. 2000)).

<sup>7</sup> *See* Geoffrey Samuel, *All that Heaven Allows: Are Transnational Codes a “Scientific Truth” or Are They Just a Form of Elegant “Pastiche”?*, in *METHODS OF COMPARATIVE LAW* 165, 169–70 (Pier Giuseppe Monateri ed., 2012).

<sup>8</sup> Chen Lei, *Contextualizing Legal Transplant: China and Hong Kong*, in *METHODS OF COMPARATIVE LAW*, *supra* note 7, at 192.

<sup>9</sup> Pier Giuseppe Monateri, *Methods in Comparative Law: An Intellectual Overview*, in *METHODS OF COMPARATIVE LAW*, *supra* note 7, at 7, 19–22; Simone Glanert, *Method?*, in *METHODS OF COMPARATIVE LAW*, *supra* note 7, at 61, 62–63; Gary Watt, *Comparison as Deep Appreciation*, in *METHODS OF COMPARATIVE LAW*, *supra* note 7, at 82, 82–84, 87, 93–94, 96–97.

In this Article in Alan's honor, I shall explore the nearly forty years of history of *Legal Transplants*, tracing reactions to it, until it became judged a classic of comparative law—a “landmark book,” as Frances Foster described it in 2010.<sup>10</sup> She considered Alan as having made with it “a major contribution to the field of comparative law,” one leaving “an indelible imprint on comparative law scholarship.”<sup>11</sup> But, of course, forty years of scholarship have meant that debates have developed far beyond Alan's initial discussion and, furthermore, gone in many different and unexpected directions. Much has recently been built on the foundations of the work, much—one suspects—that Alan did not anticipate. Indeed, one may deduce that an idea has been successful, and stimulated considerable work, when a scholar could suggest in 2010 that “the study of legal transplants seems to have reached its saturation point.”<sup>12</sup> But there is little to suggest that this is in fact the case. For instance, in the years since Meryll Dean subsequently refined Alan's transplant theory in her study of jury trial in Japan,<sup>13</sup> and Gilles Cuniberti commented in 2012 that “[s]ince the early work of Alan Watson, legal transplants have become central to the study of comparative law.”<sup>14</sup> In the same year, *Legal Transplants* could once more be cited as a “seminal book.”<sup>15</sup> The simplest search through standard data bases shows many more examples of continuing reliance on Alan's work. There is life in the idea yet.

I shall conclude this tribute, however, with an exploration of what one might call the “prehistory” of legal transplants. This will be a brief study of what is potentially a major topic. Examination of an earlier discussion of a similar idea, reflecting on what was similar and what different, helps point up the significance of Alan's work. It also leads to reflection on why the idea of “legal transplants” or “transplantation of laws” seems so obvious to some scholars, while others remain skeptical. The comparison will also throw light on the modern concept of legal transplants, reflecting on its force as a metaphor.

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<sup>10</sup> Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 MINN. L. REV. 602, 608, 610 (2010).

<sup>11</sup> *Id.*

<sup>12</sup> Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMP. L. 583, 583 (2010).

<sup>13</sup> See generally Meryll Dean, *Legal Transplants and Jury Trial in Japan*, 31 LEGAL STUD. 570 (2011) (analyzing jury trial in Japan using Watson's theory of legal transplants).

<sup>14</sup> Gilles Cuniberti, *Enhancing Judicial Reputation Through Legal Transplants: Estoppel Travels to France*, 60 AM. J. COMP. L. 383, 383 (2012).

<sup>15</sup> Maraina Pargendler, *Politics in the Origin: The Making of Corporate Law in Nineteenth-Century Brazil*, 60 AM. J. COMP. L. 805, 806 (2012).

## II. THE EARLY HISTORY OF LEGAL TRANSPLANTS: THE BOOK AND ITS FIRST CRITICS

The preface of *Legal Transplants* is dated Edinburgh, June 1973, and the title page bears the date 1974.<sup>16</sup> There is no need to rehearse the argument of the book in detail, but it will be helpful if some of the main points are outlined. Alan argued that the proper task of comparative law as an academic discipline was to explore the relationship between legal systems.<sup>17</sup> He claimed that there was no necessary and close connection between laws and the society in which they operated.<sup>18</sup> In fact, laws were usually borrowed from elsewhere, so that laws often operated in societies and in places very different from those in which they had initially developed. Laws were often strongly rooted in the past. Transplanting of laws was easy. All of this had major implications for our understanding of both legal history and sociology of law. The arguments were developed through detailed historical examples and argument.<sup>19</sup>

I have traced four reviews of *Legal Transplants* and one assessment in the "Books Received" section of a law journal. An examination of these will show the range of immediate responses to the work; moreover, it will also demonstrate what were to become persistent and regular criticisms of Alan's work on legal transplants.

The first review to appear was probably that penned by Marc Ancel, a distinguished French judge and comparative lawyer, published in a French legal periodical early in 1975.<sup>20</sup> Ancel described the contents of *Legal Transplants* and outlined Alan's arguments in a way that indicated he understood them. He noted Alan's view of that with which comparative law should be concerned. Ancel referred to the paradoxical phenomenon that, though law was often seen as closely related to the identity of a nation or people, in fact transplantation of laws had been common in the ancient world as well as in the modern. He appreciated the nature of Alan's arguments about transplants and the relationship between legal systems. He described some of the insightful observations made by Alan that he found interesting. He observed that the work raised the possibility of a unified legal system and debated some of the issues. In his generally favourable review, he only regretted that Alan had not developed his methodological positions further,

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<sup>16</sup> LEGAL TRANSPLANTS (1st ed.), *supra* note 1, at xi.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.* at 21–22.

<sup>19</sup> *Id.* at 21–30.

<sup>20</sup> Marc Ancel, Book Review, 27 REVUE INTERNATIONALE DE DROIT COMPARÉ 303, 303–04 (1975) (reviewing LEGAL TRANSPLANTS (1st ed.), *supra* note 1).

commenting that this was a work that mattered in the literature on comparative law.<sup>21</sup> In the summer of the same year, the work was reviewed by Charles Maechling.<sup>22</sup> He considered *Legal Transplants* as attempting not “to create an expansive new approach” but instead to bring a “sharper focus and more rigorous analytical approach” to a field hitherto eclectic and narrowly empirical.<sup>23</sup> He noted that Alan would narrow the discipline to the study of relationships between legal systems, made in a historical context. This would be done by studying the migrations or transplants of legal rules.<sup>24</sup> He seems to have been cautiously approving of Alan’s approach, though noting that it depended on his particular view of what constituted comparative law. He raised some general points of his own essentially about problems of teaching comparative law.<sup>25</sup> He wondered if Alan’s prescription was perhaps too narrow, before concluding that he wished the book were longer and that there had been a “greater wealth of historical example, and somewhat deeper elaboration of the social, political and economic context that must inevitably underlie his conclusions.”<sup>26</sup>

Robert B. Seidman, Professor of Law at Boston University School of Law, reviewed *Legal Transplants* at some length in his school’s law journal.<sup>27</sup> After setting out various propositions to be deduced from the book, he described Alan’s general “conclusions” as “either trivial or banal.” Seidman argued that the problem was the “positivist” methodology adopted that excluded consideration of “social variables”; the problem, he claimed, was that social factors could not be ignored, so that when they were in fact considered, it was “without any careful analysis or testing of hypotheses.”<sup>28</sup> He criticized Alan’s generation of propositions about law from specific historical instances. He concluded that the book failed because of Alan’s “acceptance of the categories and methodology of traditional legal scholarship.”<sup>29</sup> An anonymous short note in April 1975 in the *Stanford Law*

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<sup>21</sup> *Id.*

<sup>22</sup> Maechling was an international lawyer who had worked for the State Department, and who also briefly taught at the University of Virginia School of Law as a visiting professor. Patricia Sullivan, *State Department Lawyer Charles Maechling, Jr.*, 87, WASH. POST, July 3, 2007, at B8.

<sup>23</sup> Charles Maechling, Book Review, 15 VA. J. INT’L L. 1037, 1038 (1974–1975) (reviewing LEGAL TRANSPLANTS (1st ed.), *supra* note 1).

<sup>24</sup> *Id.* at 1037–38.

<sup>25</sup> *Id.* at 1038–39.

<sup>26</sup> *Id.* at 1039.

<sup>27</sup> R.B. Seidman, Book Review, 55 B. U. L. REV. 682, 682–83 (1975) (reviewing LEGAL TRANSPLANTS (1st ed.), *supra* note 1).

<sup>28</sup> *Id.* at 683.

<sup>29</sup> *Id.* at 685–87.

*Review* was also very hostile.<sup>30</sup> It quoted Alan's definition of legal transplant, and the fact that Alan thought it paradoxical that transplants of law were common when there was "a widespread notion" that law was an indicator of a people's identity. It noted that Alan used the idea of legal transplant to compare a number of legal systems. It concluded:

At its best . . . the book provides some not very startling insights into legal history that are consonant with the author's view that comparative law is the study of (mainly historical) relationships between legal systems. At its worst — and too frequently — the book falls prey to its own criticisms of comparative law: superficiality and lack of systematization.<sup>31</sup>

Siedman's reviews and the note in the *Stanford Law Review* establish what have proved to be repeated criticisms of Alan's work regularly made by sociologists of law and socio-legal writers. The most important review, however, was undoubtedly that by the distinguished labour lawyer, Otto (later Sir Otto) Kahn-Freund, who had recently retired as Professor of Comparative Law at Oxford.<sup>32</sup> This is an interesting, serious, and complex review, to which Alan responded. The debate between them then generated further discussion.

At one level, Kahn-Freund's review was full of praise: "this brilliant little book"; "it provokes thought"; "an extremely interesting book"; a book "replete with pungent and original observations."<sup>33</sup> But one suspects that, at another level, Kahn-Freund may have been quite disquieted by the book, and this, perhaps, in two ways.

First, Kahn-Freund had delivered the second Chorley Lecture at the London School of Economics on June 26, 1973, under the title *On Uses and Misuses of Comparative Law*.<sup>34</sup> It was published in January of the next year. There he had focused on comparative law as a tool of law reform. In this context, he raised the questions:

What are the uses and misuses of foreign models in the process of law making? What conditions must be fulfilled in order to

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<sup>30</sup> Book Note, 27 STAN. L. REV. 1203, 1208 (1975) (reviewing LEGAL TRANSPLANTS (1st ed.), *supra* note 1).

<sup>31</sup> *Id.*

<sup>32</sup> Otto Kahn-Freund, Book Review, 91 L.Q.R. 292 (1975) (reviewing LEGAL TRANSPLANTS (1st ed.), *supra* note 1).

<sup>33</sup> *See generally id.*

<sup>34</sup> Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) [hereinafter *On Uses and Misuses of Comparative Law*].

make desirable or even make it possible for those who prepare new legislation to avail themselves of rules or institutions developed in foreign countries?<sup>35</sup>

Kahn-Freund stated that, in the twentieth century, British legislation had become particularly open to foreign influences. He gave as examples commercial legislation of various types and family law. He also pointed to examples of “the use of foreign legal patterns for the purpose of producing rather than responding to social change at home,” commenting that “we cannot be surprised that it is this use of foreign models as instruments of social or cultural change which raises most sharply the problem I am discussing — the problem of transplantation.”<sup>36</sup>

In the late 1960s and the 1970s organ transplantation and organ rejection were common topics of discussion, particularly as the work of the charismatic and publicity-seeking Dr. Christiaan Barnard of Cape Town generated tremendous newspaper, radio, and television coverage, making the terminology of transplants popular and familiar.<sup>37</sup> Kahn-Freund alluded to organ transplantation in his lecture, also referring to exchanging mechanisms, such as carburetors, to develop ideas of varying transferability: he used the metaphor to discuss a spectrum of transplantable rules from mechanical (easy) to organic (difficult).<sup>38</sup> He cited Montesquieu’s views of the difficulty of transplanting (not of course Montesquieu’s term) the rules of one country to another.<sup>39</sup> He also referred to planting in soil; but he did not refer to plants in the context of transplantation, though he could have, instead alluding to a metaphor of roots and cultivation.<sup>40</sup>

One suspects that Kahn-Freund was pleased with his metaphor of transplantation, and disappointed to find that the same metaphor was employed at length in Alan’s book and featured in the title.<sup>41</sup> This would be perfectly understandable. Of course, as I have mentioned, discussion of organ transplantation was very much in the air in the late 1960s and early

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<sup>35</sup> *Id.* at 1–2.

<sup>36</sup> *Id.* at 2–5.

<sup>37</sup> See, e.g., *Progress on Transplants*, N.Y. TIMES, Dec. 27, 1969, at 2, available at <http://select.nytimes.com/gst/abstract.html?res=F50613FE38581B7493C5AB1789D95F4D8685F9>.

<sup>38</sup> *On Uses and Misuses of Comparative Law*, *supra* note 34, at 6–10.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 13.

<sup>41</sup> The use of the term in this way predates both Watson and Kahn-Freund. See John W. Cairns, *Development of Comparative Law in Great Britain*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 131, 146, 150, 170–71 (Mathias Reimann & Reinhard Zimmermann eds., 2006). This will be discussed further *infra* Part IV.

1970s.<sup>42</sup> That these two individuals should have come up with it as a metaphor to express the borrowing of legal rules and institutions in a discussion of comparative law is hardly surprising. Moreover, they were not alone. In 1972, Jean Rivero, a French administrative lawyer, had considered the utility of the metaphor, drawn from advanced surgery, as he put it, of “transplant of organs,” as a means of understanding borrowing of administrative law.<sup>43</sup> The next year, John Beckstrom of Northwestern University, an expert on law in Africa, published an article on western laws in Ethiopia, using the term “transplantation,” both in the title and the text.<sup>44</sup> While Beckstrom did not attempt to develop the term conceptually, simply using it as a synonym for reception, it appears neither Watson nor Kahn-Freund were aware of this article at the time they published.

Secondly, and more seriously, Kahn-Freund would profoundly disagree with Alan’s conclusions about the ease of transplanting rules. The whole thrust of *Legal Transplants* was to argue in particular that borrowing was the most common mode of legal development, and that it was unnecessary for the borrowing system to have any real understanding of the system from which rules or institutions were borrowed; moreover, Alan argued, the longevity of rules was astonishing. He also concluded that comparative law was properly about the study of the relationships between legal systems forged by such borrowing. Further, from this, conclusions could be drawn about both the nature of law and the complexity of relationship between law and the society in which it operated. The argument is careful, nuanced, and developed using examples; but I think the above description is not too crude and sums it up fairly well.

Kahn-Freund, however, drawing on Montesquieu’s assertion that it would only be “*un grand hazard*” that one country could ever use the law of another, tried to develop an analysis of when borrowing could take place and to establish its prerequisites.<sup>45</sup> He argued that the types of environmental factors that Montesquieu saw as discouraging transplanting were now much less significant, but that constitutional and political factors had become much more important.<sup>46</sup> Kahn-Freund claimed that anyone inclined to borrow laws

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<sup>42</sup> Roy Calne, *History of Transplantation*, 368 THE LANCET (SPECIAL ISSUE) S51 (2006); Thomas Schlich, *The Origins of Organ Transplantation*, 378 THE LANCET 1372, 1373 (2011).

<sup>43</sup> Jean Rivero, *Les phénomènes d’imitation des modèles étrangers en droit administrative*, in 2 PAGES DE DOCTRINE 459, 459 (1980).

<sup>44</sup> John H. Beckstrom, *Transplantation of Legal Systems*, 21 AM. J. COMP. L. 557, 558, 582 (1973).

<sup>45</sup> *On Uses and Misuses of Comparative Law*, *supra* note 34, at 6–7.

<sup>46</sup> Both Kahn-Freund and Watson use “environmental” and “environment” in a much broader sense, closer to their root meanings than the current contemporary uses that refer almost exclusively to the “natural” environment. This very narrow usage had not yet become



needed to reflect on the nature of the society that generated the borrowed rule. Kahn-Freund concluded:

[W]e cannot take for granted that rules or institutions are transplantable. . . . [A]ny attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection. The consciousness of this risk will not, I hope, deter legislators in this or any other country from using the comparative method. All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law.<sup>47</sup>

Alan was of course arguing for such an “abuse.”

Kahn-Freund argued in his review of *Legal Transplants* that “[f]rom Professor Watson’s own analysis there emerge two entirely different types of transplants,” commenting that it was “a pity that Professor Watson has not made their contrast more explicit.”<sup>48</sup> The first type, according to Kahn-Freund, was exemplified by the reception of rules on *traditio*; the second by the reception of Roman law in Scotland, which related to the politics of Scotland and its relationship with England in the Middle Ages.<sup>49</sup> He suggested that, had Watson distinguished these types of transplants, “he might . . . have modified his analysis of the ease with which rules move from society to society.”<sup>50</sup> One obvious point to make is that Kahn-Freund’s second example focused only on the borrowing system, not on the one borrowed form, which supports Alan’s general thesis, rather than questioning it. His first example at one level could be seen as supporting his own view of the difficulty of transplants, and, at another, as supporting Alan’s views of how transplants can vary. The review ended with two little teasing observations:

And it is good to read from the pen of the Professor of Civil Law at Edinburgh an acknowledgement that the rules of

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dominant in the 1970s. By “environment” Kahn-Freund and Alan mean surrounding circumstances.

<sup>47</sup> *On Uses and Misuses of Comparative Law*, *supra* note 34, at 27.

<sup>48</sup> Kahn-Freund, *supra* note 32, at 292–93.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

English and Scottish contract law are similar in practice and that nothing prevents their unification or harmonization except the dead hand of history and the habits of thought of academic scholars.<sup>51</sup>

And:

This is a short book — too short. One lays it aside with a vivid feeling of “*vivant sequentes*,” with a strong hope that Professor Watson will continue to use his immense learning for the elucidation of the methodological problems he has here approached.<sup>52</sup>

Alan responded to Kahn-Freund in a short article published in January of the next year.<sup>53</sup> He explained wherein he thought his and Kahn-Freund's differences lay. He described his own views thus:

[S]uccessful legal borrowing could be made from a very different legal system, even from one at a much higher level of development and of a different political complexion. What, in my opinion, the law reformer should be after in looking at foreign systems was an *idea* which could be transformed into part of the law of his country. For this a systematic knowledge of the law or political structure of the donor system was not necessary, though a law reformer with such knowledge would be more efficient. Successful borrowing could be achieved even when nothing was known of the political, social or economic context of the foreign law.<sup>54</sup>

Not unfairly, he summed up those of Kahn-Freund in the following way:

[His] principal thesis is that the degree to which any rule can be transplanted depends primarily on how closely it is linked with the foreign power structure. He sets out his conclusion: “All I have wanted to suggest is that its use [*i.e.*, the comparative

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<sup>51</sup> *Id.* at 293–94 (internal quotations omitted).

<sup>52</sup> *Id.* at 294.

<sup>53</sup> Alan Watson, *Legal Transplants and Law Reform*, 92 L.Q.R. 79 (1976).

<sup>54</sup> *Id.*

method] requires a knowledge not only of the foreign law, but also of its social, and above all its political context.”<sup>55</sup>

Alan pointed out that “Montesquieu badly — very badly — underestimated the amount of successful borrowing which had been going on, and was going on, in his day.”<sup>56</sup> He added:

[T]he Reception [of Roman law] shows that legal rules may be successfully borrowed where the relevant social, economic, geographical and political circumstances of the recipient are very different from those of the donor system. Indeed, the recipient system does not require any real knowledge of the social, economic, geographical and political context of the origin and growth of the original rule. . . .

[W]here a rule of Roman law was inimical to the political, social [*sic*: “geographical” intended?], economic or social circumstances of a later state, its chances of being borrowed by that later state would be greatly diminished. But this reduced possibility of being borrowed existed . . . usually only when the rule was inimical and not also when the Roman context of the rule was simply different from the circumstances prevailing in the later state. . . . [O]ne might deduce the proposition: “However historically conditioned their origins might be, rules of private law in their continuing lifetime have no inherent close relationship with a particular people, time or place.”<sup>57</sup>

Alan emphasized that his disagreement with Kahn-Freund was with the latter’s view that “the degree to which any rule can be borrowed depends on how closely it is linked with the foreign power structure and that the use of the comparative method requires a knowledge not only of the foreign law but also of its political context.”<sup>58</sup> He emphasized that the focus in borrowing should be on the system doing the borrowing.<sup>59</sup> He stated that he was “not entirely persuaded by the opinion that environmental factors are now less important, political factors more important, in determining difficulties for a

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<sup>55</sup> *Id.* at 79–80 (quoting *On Uses and Misuses of Comparative Law*, *supra* note 34, at 27).

<sup>56</sup> *Id.* at 80.

<sup>57</sup> *Id.* at 80–81 (quoting *On Uses and Misuses of Comparative Law*, *supra* note 34, at 2).

<sup>58</sup> *Id.* at 82.

<sup>59</sup> *See id.* (explaining that looking at Irish power structure would predict the failure of English-style divorce law in Ireland).

legal transplant.”<sup>60</sup> He further argued that general laws in large and diverse modern states may be more easily transplantable than those of the small jurisdictions with which Montesquieu was familiar.<sup>61</sup>

There was no further response from Kahn-Freund. While he was not to die until 1979, and remained active as a scholar, he did not return to the topic.<sup>62</sup> The debate was picked up in 1977, however, by Professor Eric Stein of the Law School of the University of Michigan in an article honoring a colleague, A. Brunson MacChesnay, who was retiring from the Law School of Northwestern University.<sup>63</sup> Stein summed up the views of the two scholars quite fairly. He drew a distinction between them, classifying the approach of Kahn-Freund as that of “a Lawyer-Sociologist” and that of Alan as that of a “Legal Historian.”<sup>64</sup> In drawing this distinction, Stein wished to emphasize that Alan tended to take a “macro-legal” view, contemplating “the massive transplants that loom as milestones on the large-scale canvas of world history,” while Kahn-Freund adopted a “micro-legal” view, concentrating on modern law reform.<sup>65</sup> He was evidently not inclined to accept the accuracy of Alan’s perception that transplants were easy: he gave as an example the attempts of modern industrial states to reform their company laws, focusing on Germany and France in the (then) European Economic Community. He also suggested that what may appear to be transplants may be examples of parallel developments.<sup>66</sup> He raised some appropriate questions about the definitions of “environmental” and “political” factors, and questioned how realistic would be the vision of the reformer “on a *tour d’horizon* of foreign legal systems plucking ideas from ‘black letter’ rules in complete ignorance of how such rules came to operate as ‘living law’ and where they fit into the legal system.”<sup>67</sup> He claimed that Kahn-Freund had shown that, had British legislators examined how collective bargaining worked in the U.S.A., they might have realized that transplanting certain American concepts into British law would lead to their rejection.<sup>68</sup> This example, however, is in many ways as much in favor of

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<sup>60</sup> *Id.* at 83.

<sup>61</sup> *Id.* at 83–84.

<sup>62</sup> W. [Lord Wedderburn of Charlton], *Professor Sir Otto Kahn-Freund*, 42 MOD. L. REV. 609 (1979). For a list of his publications, see *Schriftenverzeichnis-Bibliography*, in IN MEMORIAM SIR OTTO KAHN-FREUND 783 (Franz Gamillscheg et al. eds., 1980).

<sup>63</sup> Eric Stein, *Uses, Misuses and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198 (1977).

<sup>64</sup> *Id.* at 199–203.

<sup>65</sup> *Id.* at 203–04.

<sup>66</sup> *Id.* at 204–07.

<sup>67</sup> *Id.* at 207–09.

<sup>68</sup> *Id.* at 208–09.

Alan's as Kahn-Freund's opinion. Stein also wondered how much Turkish and Japanese borrowers knew about the systems from which they borrowed, concluding that: "It may well be that where the law maker lacks private or governmental institutional arrangements for a systematic use of the comparative method, his way of drawing on foreign law, if he considers it at all, corresponds to Watson's idea."<sup>69</sup> He concluded by questioning how common was the use of the comparative method in law reform, giving as instances practices in the United States, while ending with an emphasis on the significance of comparative studies for legal education.<sup>70</sup>

### III. FURTHER DEVELOPMENT: SOCIETY AND LEGAL CHANGE

In the same year as Stein's article appeared, Alan published *Society and Legal Change*, in which he further developed his ideas about the longevity of legal rules.<sup>71</sup> In the preface, dated April 1976, he noted that Kahn-Freund had read a draft and discussed it with him.<sup>72</sup> Alan's general thrust was that laws in the West were generally out-of-step with the needs and desires of society because of a general inertia. He argued that this showed that most current theories of law and society were implausible and that private law rules played little part in promoting the health and well-being of society.<sup>73</sup> Alan developed this argument through discussions of Roman law (notably of contracts and *patria potestas*), English real property, and libel and slander in England, before reflecting on what he described as "legal scaffolding" (elaborate systems of modification to support existing rules and make them workable), legal transplants, and divergence. In a chapter of conclusions he emphasized the implausibility of most current theories of law and society, and once more emphasized the general lack of a direct link between law and the society it served. He concluded with some remarks about the significance of codification as raising questions about whether it can abolish legal scaffolding and remove legal divergence.<sup>74</sup>

In a final chapter he set out two possible approaches to studying the causes of legal development. The first was to study a country's laws during a period when it underwent rapid change. The second would be to study the

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<sup>69</sup> *Id.* at 209.

<sup>70</sup> *Id.* at 209–16.

<sup>71</sup> ALAN WATSON, *SOCIETY AND LEGAL CHANGE* (1977) [hereinafter *SOCIETY AND LEGAL CHANGE*].

<sup>72</sup> *Id.* at xviii.

<sup>73</sup> *Id.* at 5–6.

<sup>74</sup> *Id.* at 136–37.

relationship through borrowing between legal systems. He gave as a brief example the development of law out of the Roman *actio de pauperie*.<sup>75</sup> He pointed out:

Every time a change is deliberately made a choice has been exercised. Often the retention of a legal rule is also the result of choice. To isolate the factors in the choices which are made is to go a long way towards understanding how law develops and also how law is in fact related to its society. . . . Yet the lesson of the preceding chapters is precisely that in explaining legal development the isolation of factors such as those just listed is in general not enough. That can tell us why the particular development occurred, and not some other; but it does not explain why development occurred at all, or at that precise time. For that we must search for the impetus which was strong enough to overcome the law's inertia.<sup>76</sup>

The reviews were uniformly unfavorable. J.N. (John) Adams, an English property lawyer and legal historian, described the work's "fundamental weakness" as attempting "to make a sociological thesis without using a sociologist's methodology," which he described as "a trap into which it is all too easy for a historian to fall."<sup>77</sup> He distinguished sociology from history, using the example of the work of Max Weber, and argued that Alan attempted "to generalise from [some sequences of historical events] a sociological theory. It does not work."<sup>78</sup> He suggested that Alan had misused a variety of sociological concepts in an atheoretical way, concluding that "[w]hen it is all boiled down, the defensible parts of the thesis of *Society and Legal Change* amount to very little."<sup>79</sup> He softened this at the end, writing that, "as a work of history, this book is stimulating, amusing, and sometimes brilliant. . . . It is not however an important contribution to the sociological study of law and society."<sup>80</sup>

Lawrence Friedman of the Stanford Law School also reviewed the book.<sup>81</sup> A well-known sociologist of law as well as historian of American law,

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<sup>75</sup> *Id.* at 140–44.

<sup>76</sup> *Id.* at 144.

<sup>77</sup> J.N. Adams, Book Review, 42 MOD. L. REV. 121, 122–23 (1979) (reviewing SOCIETY AND LEGAL CHANGE, *supra* note 71).

<sup>78</sup> *Id.* at 123.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Lawrence M. Friedman, Book Review, 6 BRIT. J.L. SOC'Y 127 (1979) (reviewing SOCIETY AND LEGAL CHANGE, *supra* note 71).

Friedman was in many ways an obvious choice as a reviewer, since he was noted for his treatment of American law as closely related to American society.<sup>82</sup> In the preface to the first edition (1973) of his *History of American Law*, he had written:

This is a *social* history of American law. I have tried to fight free of jargon, legal and sociological, but I have surrendered myself wholeheartedly to some of the central insights of social science. This book treats American law, then, not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society.<sup>83</sup>

This was apparently as far from Alan's approach as one could get. Further, in *Society and Legal Change*, Alan had even stated explicitly that his theory was directly in conflict with that of Friedman.<sup>84</sup>

Friedman's review of the book is, indeed, as one would have anticipated. He states that the book "sets forth a single, rather simple thesis," namely that "law can be and often is seriously out of phase with society."<sup>85</sup> This meant it "casts doubt on theories which suggest some kind of close organic connection between law and society. This puts Watson in opposition to most sociologists of law, and indeed to most current theorists of law."<sup>86</sup> The book, he noted, was largely made up of examples to prove the thesis. He commented: "To be blunt, I find the thesis quite unconvincing."<sup>87</sup> He suggested that Alan focused on trivial or fringe issues that no one bothered about. Friedman made some good points, suggesting, for example, that the reason the law ended up irrational and muddled was because it was "subject to conflicting social and economic pressures," with which Alan would

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<sup>82</sup> Lauren Edelman, *Lawrence Friedman and the Canons of Law and Society*, in *LAW, SOCIETY, AND HISTORY: THEMES IN THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN* 19 (Robert W. Gordon & Morton J. Horowitz eds., 2011); Tom Ginsburg, *Lawrence M. Friedman's Comparative Law*, in *LAW, SOCIETY, AND HISTORY: THEMES IN THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN*, *supra*, at 52; James L. Huffman, *From Legal History to Legal Theory: A Comment on the Work of Lawrence Friedman*, 63 *OR. L. REV.* 671 (1984); James L. Huffman, *From Legal History to Legal Theory: Or Is It the Other Way Round?*, 40 *TULSA L. REV.* 579 (2005).

<sup>83</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 12 (2d ed. 1985) (emphasis in original).

<sup>84</sup> *SOCIETY AND LEGAL CHANGE*, *supra* note 71, at 11 n.21.

<sup>85</sup> Friedman, *supra* note 81, at 127.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

probably have agreed.<sup>88</sup> He criticized Alan as having a rather narrow notion of law. He agreed that laws were borrowed, but that choice was often involved (which Alan would not have denied). Friedman finished with an attack on academic lawyers who tended, he thought, to focus on peripheral or freak topics. His attitude can readily be gathered by the metaphor he used:

The book, in my opinion, is fundamentally wrong: yet the error is quite understandable. If a person spends his life embroidering and decorating some little swatch of material, it is no use telling him he has wasted his time on a useless rag. The business of academic lawyers revolves about the minute dissection of rules only remotely connected with living, breathing law. These rules are found in the "general part" of the codes, or (in the common-law world) are often generalized from rare and wholly peripheral lawsuits, arising out of freak circumstances.<sup>89</sup>

Friedman's classification of academic law—and perhaps indeed, given his following paragraph about the *actio de pauperie*, especially of Roman law—as a kind of glass bead game, indicates his stance.

Aubrey L. Diamond, whose special field was consumer credit and hire purchase, was another reviewer, chosen no doubt because of his academic focus on a "practical" and contemporary field and his work as a member of the English Law Commission.<sup>90</sup> He was also Director of the Institute of Advanced Legal Studies in London. After a general description of the contents of the book, Diamond asked: "How far do the examples given by Professor Watson support his proposition that the law has been much out of step with society?"<sup>91</sup> He replied: "I would find it easier to answer that question if I knew what it meant to say that law is out of step with society."<sup>92</sup> He commented: "[I]t seems an unduly pretentious phrase to describe some of the defects in English or Roman law given by the author."<sup>93</sup> Like Friedman, he criticized Alan's focus on detail. To make sense, he argued, it would need to be "pitched at the level of . . . broad constitutional or political issues."<sup>94</sup> But he conceded much more to Alan than Friedman had. He thought that if

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<sup>88</sup> *Id.* at 128.

<sup>89</sup> *Id.* at 129.

<sup>90</sup> Aubrey L. Diamond, Book Review, 96 L.Q.R. 303 (1980) (reviewing SOCIETY AND LEGAL CHANGE, *supra* note 71).

<sup>91</sup> *Id.* at 305.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*



all that Alan meant was that the law is imperfect, then “his case is more persuasive.”<sup>95</sup> He added:

This book supports the views expressed in *Legal Transplants* (1974) and to some extent overlaps the earlier work. If the laws of one country can be adopted by another, it becomes difficult to argue that, for the adopting country at any rate, law arises from the common consciousness of the people. Would it make any substantial difference to the life of the man in the street if the whole of English law concerned with contracts, commerce, torts and property were replaced overnight by that of France or Germany?<sup>96</sup>

As late as 1982, *Society and Legal Change* rated a twenty-four page review essay by Richard Abel, a noted “law and society” scholar at U.C.L.A., much of whose work has focused on the legal profession and the provision of legal services.<sup>97</sup> Abel commented that Alan had “built upon his vast knowledge of legal history to offer a social theory of law.”<sup>98</sup> He suggested that Alan’s concept of law was vague and confused and that his “conception of society [was] even more problematic.”<sup>99</sup> He claimed that Alan rejected “the study of legal institutions and processes in order to concentrate upon substantive rules, and he personifies society so as to render unnecessary any analysis of the political ideas or behaviour of particular individuals or groups.”<sup>100</sup> Abel also attacked Alan’s “antitheoretical stance,” on the basis of which he considered Alan criticized three types of social theories. He judged that Alan showed what connects them: the assumption that “harmony between law and society is natural and attainable.”<sup>101</sup> But he claimed that Alan caricatured each theory in order to “expose their common error.”<sup>102</sup> He argued that, “in reacting against the prevailing theoretical framework, Watson has not escaped it but merely turned it upside down,” and that his own position “is a mirror image of the functionalism he attacks.”<sup>103</sup> He suggested that Alan seemed to be “an unconfessed

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<sup>95</sup> *Id.* at 306.

<sup>96</sup> *Id.*

<sup>97</sup> Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785 (1982) (reviewing *SOCIETY AND LEGAL CHANGE*, *supra* note 71).

<sup>98</sup> *Id.* at 785.

<sup>99</sup> *Id.* at 787.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 789.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 790.

utilitarian.”<sup>104</sup> He saw part of the problem also lying in the restricted scope of Alan’s investigations.<sup>105</sup>

Abel concluded with an attack on Alan’s politics (as he deduced them from what he perceived to be Alan’s social theory). He claimed of Alan’s account of law: “What is singularly lacking in his view is any notion that law ought to lead society, ought to be an instrument for radical change, from which I infer that he opposes such change.”<sup>106</sup> The inference, of course, does not follow; but I think this explains why Abel reviewed this work in this fashion so many years after its publication. In the very year *Society and Legal Change* was published, Abel had been one of the founders of the Conference on Critical Legal Studies.<sup>107</sup> The quotation from Abel sums up much of what united the disparate groups that made up this very self-conscious and self-important movement.<sup>108</sup> By 1982, Alan was in the U.S.A., teaching at the prestigious Law School of the University of Pennsylvania, and the Critical Legal Studies movement was approaching its height. Abel and others who identified with Critical Legal Studies will have sensed that Alan’s scholarship was not sympathetic to their views and political aims. Abel’s review in many ways seems to adopt the technique of “trashing,” as it was called, ferreting out and exposing the “contradictions” supposedly in Alan’s theoretical approach. It was a technique much favored by scholars who identified with Critical Legal Studies.<sup>109</sup> On the basis of this, he described Alan as having a “basically conservative world view.”<sup>110</sup> According to Abel, this was connected with Watson’s “apolitical interpretation.” Indeed, “[t]hose who have denied the existence of pattern and necessity in history . . . have been political conservatives seeking to confute radicals, notably Marx and later Marxists, who maintain that historical trends do exist and should be used to further progressive causes.”<sup>111</sup> At the end of the review, Abel appears to return to a more traditional social science critique, analogous to those of *Society and Legal Change* that had already appeared. He wrote: “Recent social studies of law are impoverished by their parochial focus on contemporary legal institutions within a single country. Our theories could be enormously enriched by

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<sup>104</sup> *Id.* at 792.

<sup>105</sup> *Id.* at 788–802.

<sup>106</sup> *Id.* at 802.

<sup>107</sup> See John Henry Schlegel, *Notes Towards an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 397 (1984).

<sup>108</sup> See Jeremy Waldron, *Dirty Little Secret*, 98 COLUM. L. REV. 510 (1998) (reviewing ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996)).

<sup>109</sup> Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

<sup>110</sup> Abel, *supra* note 97, at 803.

<sup>111</sup> *Id.*

comparative and historical scholarship. But that scholarship must meet the canons of contemporary social science.”<sup>112</sup> But the agenda of Critical Legal Studies was further revealed when Abel wrote:

The starting point must be a statement of values, for the scholar’s vision of the good society influences not only what he deems worthy of study but also the kind of explanations he will entertain. Some epistemological position must also be chosen and adhered to rigorously. . . . These preliminary decisions will largely determine the theory of society with which the investigator begins. . . .

Comparative law and legal history no longer can be, indeed no longer are, content to confine themselves to doctrinal analysis of positive law. But the social theory of law cannot be a mere adjunct to doctrinal analysis, a series of qualifications tacked on to an enterprise that otherwise remains unchanged. Furthermore, social theory, if taken seriously, forces us to confront the political content that is inextricably involved in any account of law and, a fortiori, in any prescription for reform.<sup>113</sup>

Alan would have largely agreed with Abel’s final sentence: “Studies using historical and comparative materials to construct a social theory of when and why legal rules are preserved under changed social conditions, and assessing that persistence in terms of explicitly stated values, would be a major contribution.”<sup>114</sup> But he would have thought that this is what he had indeed achieved in these books and a number of related articles.

By placing Abel’s critique of Alan’s work in the context of the Critical Legal Studies movement, I should not be taken as thereby trying to devalue the critique; rather, I suspect it explains why the review appeared so long after the book had appeared. In a period when attitudes in the strongly politicized U.S. Law Schools—with stiff competition for jobs in elite institutions—were very polarized, Alan’s work presented a target, and the review offered Abel a way of making some points about the aims of Critical Legal Studies, while also criticizing a scholar who was not “one of us.”<sup>115</sup>

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<sup>112</sup> *Id.* at 807.

<sup>113</sup> *Id.* at 807–09.

<sup>114</sup> *Id.* at 809.

<sup>115</sup> For a perceptive critique of Abel’s views, see William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 504–08 (1995).

Several years before Abel's review, Alan had already developed his ideas further in two important articles. The first was devoted to improving law-making.<sup>116</sup> It was an example of what might nowadays be called "blue skies" thinking. He set out a basic agenda:

The extent to which a source of law is "satisfactory" should be judged . . . by three tests. First, how responsive is the law to the serious needs and desires of the community? The more easily a source of law allows law to change when society undergoes change, the better the source of law. Secondly, how comprehensible is the law to the persons affected by it? The more comprehensible the law, the more satisfactory the source of law. Thirdly, how comprehensive is the law? The more certainly the existing law can provide an answer to the legal problems that arise the more satisfactory is the source of law. Typically a tension exists between the ease of comprehension of law and its comprehensiveness.<sup>117</sup>

He argued that the way to secure this was to have "tiered law." The first rank law would be in the form of a code; the second rank would be both law and commentary. The front rank law, according to which legal decisions had to be made, had to be comprehensible, like the French *Code civil*, so that ordinary citizens could understand it. The second rank law provided the interpretation and detail, and had to be comprehensive, like commentaries on the German *Bürgerliches Gesetzbuch*.<sup>118</sup> Problems would be referred to an interpretative committee.<sup>119</sup> If a problem were novel, as Alan pointed out, precedents or analogies could be found in the civil law systems and the *Corpus iuris civilis* itself.<sup>120</sup> He applied the idea to an independent Scotland, no doubt because the article originated in an address to the Andrew Fletcher Society in Edinburgh.<sup>121</sup>

The second article, dedicated to Otto Kahn-Freund, was more obviously on point, and was very clearly a development and clarification of the themes

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Alan's own response to Abel can be found in Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1136-46 (1983) [hereinafter *Legal Change*].

<sup>116</sup> Alan Watson, *Two-Tier Law—A New Approach to Law-Making*, 27 INT'L & COMP. L.Q. 552 (1978) [hereinafter *Two-Tier Law*].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 553.

<sup>119</sup> *Id.* at 553-64.

<sup>120</sup> *Id.* at 564-66.

<sup>121</sup> *Id.* at 570-75.

found in *Legal Transplants*.<sup>122</sup> Starting with an explicit rejection of Friedman's position, Alan asserted:

Societies vary greatly, and so do legal rules. A perennial question is "Do legal rules reflect a society's desires, needs and aspirations?" The answer which is normally given or is just assumed is positive though minor qualifications are usually urged. And yet, the two most startling, and at the same time most obvious, characteristics of legal rules are the apparent ease with which they can be transplanted from one system to another, and their capacity for long life. With transmission or the passing of time modifications may well occur, but frequently the alterations in the rules have only limited significance.<sup>123</sup>

He gave the reception and spread of the Roman and English laws as obvious examples. They were applied to populations at different times and in different places without any real problems. The longevity of rules was "equally striking."<sup>124</sup> He argued that these two characteristics—transplants and longevity—could also be identified in the structure of legal systems.<sup>125</sup> He argued that comparative law should be the study of the relationship between systems created by borrowing. He compared it in this respect to the study of comparative linguistics, claiming it should lead to a theory about law, through study of transplants. He went on to isolate and identify the factors that he considered influenced borrowing. One of the most significant was that of the role of lawyers in shaping the law.<sup>126</sup>

Alan concluded this article by arguing that:

To isolate the general factors at work in legal change it might, in fact, be appropriate to seize a decisive moment, such as codification and explain why it occurred at all, why in that territory it occurred at the time it did and not before, why the code was either a new creation for that territory or was borrowed in large measure or virtually entire from elsewhere; and of the latter, why the particular model was selected.

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<sup>122</sup> Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 313 n.\* (1978).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 313–14.

<sup>125</sup> *Id.* at 314–15.

<sup>126</sup> *Id.* at 321–34.

Likewise it could be important to explain the absence of codification in other systems.<sup>127</sup>

Here he pointed to the potential significance of study of codification in Louisiana, also adding that study of codifying in Quebec would also be fruitful.<sup>128</sup> In Quebec, as in Louisiana, the code basically followed the structure of that of France, but the law to be codified was that of Lower Canada, that is to say law based on the *Coutume de Paris*. Alan raised a variety of questions, such as: Why were the codes of Louisiana and Quebec relatively independent in substance from the French code, while later European and Latin-American codes sometimes followed it “slavishly?” Why was the law not codified in systems such as South Africa, Texas, or Scotland?<sup>129</sup> Alan had already argued in *Legal Transplants* that study of the early legal history of Louisiana was potentially of great interest to a comparativist, because of the obviously massive borrowing found in the Louisiana Civil Code.<sup>130</sup>

#### IV. REACTIONS IN THE LITERATURE, 1974–1985

It is here necessary that I should interject a personal note. In October 1973 I matriculated as a law student in the University of Edinburgh. One of my first-year subjects was Civil Law—Civil law, of course, in the sense of the *ius civile*, the law of Rome. Alan then held the chair that I now have the honor to occupy, that of Civil Law. Alan, who has always relished teaching, taught much of the course, lecturing in the spell-binding and charismatic way his pupils recall. After an account of the law of Rome structured according to Justinian’s *Institutes*, the year-long course finished, as indeed it still does, with an introduction to the Reception of Roman law, with a particular focus on Scotland. In the year of my attendance, the lectures on the Reception—though I did not then realize it—were drawn from the discussion in *Legal Transplants*. As a third-year student, in 1975–1976, I took the honors course in Comparative Law. The theoretical part of the course was taught by Alan, debating the views on comparative law found in *Legal Transplants*. I, for one, was convinced, and indeed wrote an essay on the transplanting of

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<sup>127</sup> *Id.* at 335.

<sup>128</sup> *Id.* at 335–36.

<sup>129</sup> *Id.*

<sup>130</sup> LEGAL TRANSPLANTS (1st ed.), *supra* note 1, at 103–04. This massive borrowing in the Louisiana Civil Code most notably occurred in its first incarnation as the *Digest of the Civil Laws Now in Force in the Territory of Orleans, With Alterations and Amendments Adapted to its Present State of Government* enacted by the territorial government in 1808.

Roman water law to such different places as the Netherlands and then South Africa.<sup>131</sup> In my final undergraduate year, 1976–1977, I enrolled in the honors course in Civil Law, most of which was taught by Alan, with a section on the Reception taught by Sandy McCall Smith (who had also taught part of Comparative Law). A large part of the course was devoted to a detailed consideration of D. 9.2 (*ad legem Aquiliam*); there was also a section on the Twelve Tables. Alan had just published *Rome of the Twelve Tables*, and he had a definite liking for teaching what he was researching.<sup>132</sup> I wrote an essay tracing the development of *clause pénale* in the French *Code civil* out of the Roman *stipulatio poenae*, perhaps indicating I was developing more as a general legal historian than as a specialist scholar of Roman law.

I then decided that I wished to study for the degree of Ph.D. with Alan, examining the idea of legal transplants. Initially, I had thought of working on law in South Africa; but this was at a time when visiting there could be problematic. Alan instead suggested that I look at codification in Louisiana and Quebec, following up the observation he had made in *Legal Transplants*, and indeed reflecting what he was to say in his article on transplants in 1978. I enrolled in 1977, writing a thesis with the descriptive—if cumbersome—title of “The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change.” I made a detailed study of the composition of parts of the two codes, focusing on the activities and choices of the codifiers, drawing conclusions on what this told us about law. The dissertation was submitted in December 1980, and I graduated in 1981.<sup>133</sup> I did not then pursue this specific line of research further, though much of my subsequent work has clearly developed out of various themes in my doctoral dissertation, and I have published subsequently on the history of law in Louisiana.<sup>134</sup> I did not publish my dissertation, other than developing part as an article on employment in the Civil Code of Lower Canada in a special issue of the *McGill Law Journal* devoted to the history of the law in Quebec.<sup>135</sup> The publication of René David’s Tagore Law Lectures in 1980,

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<sup>131</sup> See Bernhard Grossfeld, *Geography and Law*, 82 MICH. L. REV. 1510, 1514 (1984) (explaining the relationship between geography and legal development using water laws).

<sup>132</sup> ALAN WATSON, *ROME OF THE TWELVE TABLES: PERSONS AND PROPERTY* (1976).

<sup>133</sup> John W. Cairns, *The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change* (1980) (Ph.D. dissertation, University of Edinburgh) (on file with author).

<sup>134</sup> John W. Cairns, *The de la Vergne Volume and the Digest of 1808*, 24 TUL. EUR. & CIV. L.F. 31 (2009).

<sup>135</sup> John W. Cairns, *Employment in the Civil Code of Lower Canada: Tradition and Political Economy in Legal Classification and Reform*, 32 MCGILL L.J. 673 (1987). I am currently preparing my dissertation for publication by the Lawbook Exchange, Clark, NJ.

however, did lead me to venture into the theoretical field of comparative law and legal transplants.<sup>136</sup> I wrote an essay disagreeing with David's argument for a new *ius commune* to be created at a doctrinal level by scholars of comparative law working together.<sup>137</sup> In many ways, although he was not talking specifically of what later become known as the European Union, his argument foreshadowed some current concerns in Europe. I was skeptical for a variety of reasons, arguing that study of legal transplants suggested that a variety of cultural factors might prevent this. I drew on my research in Louisiana and Quebec, as well as discussing two authors in whom I was to become very interested, Lord Kames and Sir William Blackstone.

As Alan's pupil, I might well be expected to take his ideas and insights seriously; but there are indications that Alan's ideas of legal transplants had some wider impact from the beginning. His perception may now be that *Legal Transplants* was either ignored or excoriated in the period immediately following its publication: hence his comment on its falling "stillborn from the press." This, of course, is an allusion to David Hume's famous comment that his Treatise "fell *dead-born from the press*."<sup>138</sup> Hume had added, however, that his work did not reach "such distinction, as even to excite a murmur among the zealots."<sup>139</sup> I think, however, that Alan would agree, judging by the reviews already discussed, that his work did excite murmurs among those whom he would class as zealots, and its successor, *Society and Legal Change*, perhaps even more so. But, if not completely ignored, *Legal Transplants* probably did not generate as much discussion as Alan had initially hoped in the first decade or so after publication; but it certainly generated some. Without claiming to make a comprehensive survey of discussion in this period, and without revisiting the highly critical and dismissive reviews already discussed, some trends may be identified. While there may have been doubters, much of what Alan said can be seen as having been accepted—increasingly so as the years went by—until it became simply received knowledge and "legal transplant" a normal term. This seems to have happened by the middle years of the 1980s.

Stein's distinction of Alan's and Kahn-Freund's approaches to legal transplants, as being between those of a "Legal Historian" and a "Lawyer-Sociologist," evidently resonated. And many subsequent scholars "read"

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<sup>136</sup> RENÉ DAVID, *ENGLISH LAW AND FRENCH LAW: A COMPARISON IN SUBSTANCE* (1980).

<sup>137</sup> John W. Cairns, *Comparative Law, Unification, and Scholarly Creation of a New Ius Commune*, 32 N. IR. LEGAL Q. 272 (1981).

<sup>138</sup> DAVID HUME, *THE LIFE OF DAVID HUME, ESQ.: MY OWN LIFE* 7–8 (1777) (emphasis in original).

<sup>139</sup> *Id.* at 8. The reference is to DAVID HUME, *A TREATISE OF HUMAN NATURE* (1739–1740).



their differences in a similar fashion.<sup>140</sup> We have noted the attitudes expressed in reviews of *Society and Legal Change* by Adams, Friedman, and Diamond, who could be classified as “Lawyer-Sociologists.” Thus, in 1982, Christopher Whelan explored the introduction of the emergency procedures under the Industrial Relations Act 1971 in an article on labor law very strongly influenced by the thinking of Kahn-Freund, who had recently died, and whom he acknowledged at the end.<sup>141</sup> As a case-study of transplants, Whelan argued that these provisions had been drawn from U.S. law, arguing that the differences between the two systems of labor law meant that the American provisions could not be transferred successfully. He pointed out that Alan’s views on legal transplants differed from those of Kahn-Freund, and that Alan had argued “that the domestic law reformer need only look for an *idea* which could be transformed into domestic law, for which a systematic knowledge of the law or political structure of the donor system was not necessary (though law reform might be more efficient if such knowledge was obtained).”<sup>142</sup> Whelan did not comment on whether he considered that Alan had been refuted; but his subtle and sophisticated study could lead to an argument either way. In 1984, Michael Bridge cited Kahn-Freund, but not Alan, on transplants, to the effect that it was “dangerous and disruptive to believe that the comparative legal method can be used to justify highly selective legal transplants without regard to the whole of a country’s legal tradition.”<sup>143</sup> This was more in the way of a passing remark than anything else, but it is evidently contrary to Alan’s view.

In contrast, legal historians seem often to have been more broadly sympathetic to Alan’s arguments or at least to have recognized the potential they held and to have demonstrated a willingness to engage with them. In 1975, Hans Baade suggested that “a study of the history of the form of marriage in Spanish North America [was] likely to afford new insights into the question of the comparative viability of ‘legal transplants.’”<sup>144</sup> In discussing the Roman law of guardianship in England in 1978, R.H. Helmholz asked whether it was possible to talk of a “legal transplant.”<sup>145</sup> In 1979, citing both *Legal Transplants* and *Society and Legal Change*, Charles

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<sup>140</sup> Stein, *supra* note 63, at 199–203.

<sup>141</sup> Christopher J. Whelan, *On Uses and Misuses of Comparative Labour Law*, 45 MOD. L. REV. 285, 300 n.\* (1982). The title is telling.

<sup>142</sup> *Id.* at 286 n.9.

<sup>143</sup> Michael J. Bridge, *Does Anglo-American Contract Law Need a Doctrine of Good Faith?*, 9 CAN. BUS. L.J. 385, 414 (1984).

<sup>144</sup> Hans Baade, *The Form of Marriage in Spanish North America*, 61 CORNELL L. REV. 1, 5 (1975).

<sup>145</sup> R.H. Helmholz, *The Roman Law of Guardianship in England, 1300–1600*, 52 TUL. L. REV. 223, 257 (1978).

Donahue simply accepted that “[l]egal ideas can be transplanted from societies with one set of legal institutions and social structures to societies with quite different institutions and structures.”<sup>146</sup>

In this period, one of the most important discussions of transplants, which foreshadowed much more recent debate, was by John Henry Merryman, the distinguished comparative lawyer and expert on cultural property. In May, 1977, in a colloquium devoted to the possibility of a “Common Law of Europe,” at the newly established European University Institute at Badia Fiesolana just outside Florence, Merryman presented a paper entitled “On the Convergence (and Divergence) of the Civil Law and the Common Law.”<sup>147</sup> In this he turned to the debate involving Kahn-Freund and Alan (Merryman also was aware of Beckstrom’s piece), devoting a subsection to legal transplants in his section on “Strategies of Convergence.”<sup>148</sup> Citing *Legal Transplants* in general fashion, Merryman commented that “[l]egal transplantation has a long history.”<sup>149</sup> He cited a series of examples of transplantation, including from Beckstrom’s work, before commenting that “[l]egal transplants across the Civil law-Common law boundary obviously lead in the direction of convergence of the two systems.”<sup>150</sup> He concluded his discussion of transplants by commenting that “[m]ost fundamental is the completely unresolved question whether ‘successful’ transplants are beneficial or detrimental in their impact.”<sup>151</sup> He noted that:

The entire topic has recently been revived by Professors Beckstrom and Watson and by the colloquy between Professor Watson and Professor Kahn-Freund. One important, and fundamental, aspect of that debate involves a differing assessment of history. Enthusiasts for transplantation point to the reception of West European codes in China, Japan, Turkey and Ethiopia. Skeptics argue that these “receptions” were only partially successful at best, took an enormous effort and investment of resources, and may have been both less effective

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<sup>146</sup> Charles Donahue, *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 60 (1979).

<sup>147</sup> John H. Merryman, *On the Convergence (and Divergence) of the Civil and the Common Law*, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 195 (Mauro Cappelletti ed., 1978).

<sup>148</sup> *Id.* at 207–10.

<sup>149</sup> *Id.* at 207.

<sup>150</sup> *Id.* at 209.

<sup>151</sup> *Id.*

and more costly than alternative strategies of law reform.  
There is no obvious way to resolve this issue.<sup>152</sup>

His point is in many ways intellectually akin to that made by Eric Stein about whether one is a “Legal Historian” or a “Lawyer-Sociologist.”<sup>153</sup> Different disciplines were predisposing scholars to different answers.

A number of writers were obviously familiar with the debate between Alan and Kahn-Freund, but did not follow Stein’s and Merryman’s attempts to engage with it. Thus, in 1981, Pnina Lahav, raised as a question: “What are the effects of transplantation on the development of indigenous constitutional law?” A footnote commented: “The debate about the feasibility of organic as compared with mechanic transplantation had begun with Montesquieu and continues to this day,” citing Kahn-Freund’s article of 1974, and Alan’s of 1976.<sup>154</sup> While not substantially relying on Kahn-Freund or Alan’s works, Lahav’s article fruitfully used the concept of a legal transplant throughout to make a powerful analysis of the transplantation and rejection of American law in Israel. The author concluded that:

Transplantation of American law, however, has been less than successful. The transplantor’s solid knowledge of the donor system, sensitivity to the need of organic integration of foreign law into the recipient system and mastery of judicial decisionmaking [*sic*] techniques, may help in building resistance to rejection, but they are not enough. It is one thing to compress the jurisprudence of the First Amendment into one Israeli decision and weave it into the local system so that it gains a potential to become an organic part of it. It is another thing to persuade other judges or to follow the same route. Judicial philosophies — legal formalism or sociological jurisprudence — are decisive determinants. Political visions, as molded by the particular history of the recipient, inevitably affect the choice of the transplantor.<sup>155</sup>

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<sup>152</sup> *Id.* at 209–10.

<sup>153</sup> Stein, *supra* note 63, at 199–203. It is worth noting that Merryman, though he does not cite Stein’s article, which would not have appeared at the time he penned this, nonetheless expressed his gratitude to Stein for reading a draft and making helpful suggestions for improvement. Merryman, *supra* note 147, at 195 n.\*.

<sup>154</sup> Pnina Lahav, *American Influence on Israel’s Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21, 27 n.19 (1981).

<sup>155</sup> *Id.* at 108.

But Lahav did not reflect on the debate between Kahn-Freund and Alan, nor did she draw general conclusions about transplants and transplanting as a phenomenon.

Other scholars simply accepted the lessons of *Legal Transplants* apparently without examination. For example, in 1979, Basil Edwards, after making glancing references to transplants in the footnotes to an article on choice of law in delict, finally relied on Alan's arguments on transplants to support the view that it should be possible to integrate law of an origin other than Roman-Dutch into the law of South Africa.<sup>156</sup> Another South African scholar, Ben Beinart, referred to *Legal Transplants* in a posthumously published, unfinished paper (of 1979) printed in 1982.<sup>157</sup> As Alan had recognized, southern Africa provided fertile ground for the study of transplants, and in 1982 an article on divorce reform in Botswana made that point clearly.<sup>158</sup> But study of Federal rules of procedure could also be influenced by the ideas in *Legal Transplants*. This, in 1982, Stephen Burbank, in a lengthy historical and contemporary analysis of the (Federal) Rules Enabling Act of 1933, published in May 1982, noted that a model had been used with a tradition quite different from that of the Federal system.<sup>159</sup> Quoting *Legal Transplants*, he commented:

[T]he lessons of comparative law should make us wary of a hasty conclusion that the supporters' choice of a model doomed their effort to confusion. For "usually legal rules are not peculiarly devised for the particular society in which they now operate and . . . this is not a matter of great concern."<sup>160</sup>

Burbank acknowledged Alan's assistance in reading a draft of this article.<sup>161</sup> In another article on procedure published in December of that year, Burbank

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<sup>156</sup> A.B. Edwards, *Choice of Law in Delict: Rules or Approach*, 96 S. AFR. L.J. 43, 71 n.239, 73 nn.253, 255, 80 n.277 (1979). For a contrasting view, arguing against transplantability, see J.C. SONNEKUS, ENKELE OPMERKINGS NA AANLEIDING VAN DIE AANSPRAAK OP BONA VACANTIA AS SOGENAAMDE REGALE REG (1984).

<sup>157</sup> Ben Beinart, *The English Legal Contribution to South Africa: The Interaction of Civil and Common Law*, ACTA JURIDICA 7, 14, 54 (1981).

<sup>158</sup> A.J.G.M. Sanders, *Ten Years of the Botswana Matrimonial Causes Act—Further Proposals for Divorce Reform*, 26 J. AFR. L. 163, 164–66 (1982).

<sup>159</sup> Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

<sup>160</sup> *Id.* at 1186 (citing LEGAL TRANSPLANTS (1st ed.), *supra* note 1, at 74). Burbank also noted that "there is evidence in the 1926 Senate Report that the New York model was altered to suit the perceived needs of the federal system." *Id.* at 1186 n.735.

<sup>161</sup> *Id.* at 1015 n.†.

again drew on insights from *Legal Transplants*, noting that “borrowing impeded procedural innovation.”<sup>162</sup>

Of course, some authors simply cited *Legal Transplants* for a point it contained on comparative law or legal history, rather than for any general or theoretical claims it may have contained. In this way, Gregory Alexander cited it in 1976 for the observation that language difficulties can cause problems for the unwary in comparison.<sup>163</sup> Likewise *Legal Transplants* could be cited for the observation that the interpretation of rules can vary over time.<sup>164</sup> An author could rely on it for Alan’s comments on codification and despotism.<sup>165</sup> David Carey Miller cited Alan’s discussion of the interrelationship of the laws of New Zealand and England in 1980.<sup>166</sup> Sometimes *Legal Transplants* could be referred to for its perceptive historical observations.<sup>167</sup> It provided one author with part of a footnote on the laws of colonial Massachusetts.<sup>168</sup> R.J. Schoeck could enjoy Alan’s pithy reformulation of a famous apothegm of Holmes.<sup>169</sup> In a debate on the future of public international law, both Kahn-Freund and Alan could be cited on transplants for a debate on the evolutionary development of law.<sup>170</sup> While not involving an engagement with the theoretical issues raised by *Legal Transplants*, these uses show the growing level of currency in the literature that the book was achieving, a currency underlined by its choice as a book, “selected at random” in 1978, as an exemplar of books that are “valuable sources of inspiration and authority for the creative lawyer and jurist.”<sup>171</sup>

One notable effect was the slow but sure spread of the terminology of “legal transplant,” sometimes without a mention of the work of either Alan

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<sup>162</sup> Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 313 (1982).

<sup>163</sup> Gregory Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 NW. U. L. REV. 602, 629 n.121 (1976).

<sup>164</sup> *Id.* at 633 n.139.

<sup>165</sup> David Friedman, *On the Interpretation of Modern Israeli Legislation*, 5 TEL AVIV U. L. REV. 463, 479 n.80 (1977) (in Hebrew).

<sup>166</sup> David Carey Miller, *Rights of the Surviving Spouse: A Distinct System in Scotland and Developments in England*, ACTA JURIDICA 49, 56 (1980).

<sup>167</sup> Alejandro M. Garro, *Recording of Real Estate Transactions in Latin America: A Comparison with the Recording System in the United States*, 1984 ARIZ. J. INT’L & COMP. L. 90, 97; John W. Cairns, *Blackstone, An English Institution: Legal Literature and the Rise of the Nation State*, 4 OXFORD J. LEGAL STUD. 318, 320 (1984).

<sup>168</sup> George A. Zaphiriou, *Use of Comparative Law by the Legislator*, 30 AM. J. COMP. L. SUPP. 71, 72 n.8 (1982).

<sup>169</sup> R.J. Schoeck, *The Aesthetics of the Law*, 28 AM. J. JURIS. 46, 56 n.30 (1983).

<sup>170</sup> Sanford R. Silverburg, *Pale and Wan, Comatose Maybe, But Not Dead: A Response to Bleimaier*, 25 CATH. LAW. 237, 238 n.8 (1980).

<sup>171</sup> Jack A. Hiller, *The Law-Creative Role of Appellate Courts in the Commonwealth*, 27 INT’L & COMP. L.Q. 85, 120 (1978).

or Kahn-Freund (or indeed Beckstrom). The term was used by Torres in 1976, in a study of the Puerto Rican penal code: neither author was mentioned, and there were no citations of their works.<sup>172</sup> In 1981, Daniel Coquillette, in an article on the English Civilians, described them as believing that “ideas about law were eminently suitable for transplanting.”<sup>173</sup> In the same year, Julio Menezes, in an article on the support of legal institutions in an impoverished society, talked of “ill-fated and pernicious legal transplants” also without any reference.<sup>174</sup> Three years later, Douglas Hay, discussing the history and historiography of criminal prosecution in England, wrote that Canadian historians “are more apt to be aware of legal transplants, imposition of law, recourse to martial law, and the slow and contradictory way English law became part of our culture.”<sup>175</sup> Another author simply remarked that the term “legal transplants” was used “virtually interchangeably” for “reception theory,” “borrowing,” and incorporation.<sup>176</sup> The author shared Kahn-Freund’s view of the feasibility of transplants, however, rather than Alan’s.<sup>177</sup> There is no way of knowing whether or not these authors were conscious or aware of the debate between Alan and Kahn-Freund—it is difficult to believe that at least some of them were not. Given the topics of their respective articles, a discussion of the matter would have been illuminating. But what these uses of the terminology demonstrate is its increasing familiarity and the comfort of writers in its use, reflecting the way discussions of legal transplants were starting to become routine in the later 1970s.

Alan himself had continued to contribute on the topic. In 1977, he published *The Nature of Law*, a book in which he argued that what distinguished law was the existence of processes to resolve disputes and promote order that could be backed by force.<sup>178</sup> In the work he devoted a chapter to the importance of the legal profession in any understanding of law and society. He there argued that law was often developed by borrowing,

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<sup>172</sup> Eulalio A. Torres, *The Puerto Rico Penal Code of 1902–1975: A Case Study of American Legal Imperialism*, 45 REV. JUR. U.P.R. 1, 2, 42, 71 (1976).

<sup>173</sup> Daniel R. Coquillette, *Legal Ideology and Incorporation I: The English Civilian Writers, 1523–1607*, 61 B.U. L. REV. 1, 4 (1981).

<sup>174</sup> Julio Menezes, *Law and Absolute Poverty*, 15 VAL. U. L. REV. 343, 368 (1981).

<sup>175</sup> Douglas Hay, *The Criminal Prosecution in England and Its Historians*, 47 MOD. L. REV. 1, 24 (1984).

<sup>176</sup> Eugene Cerruti, *The Demise of the Aguilar-Spinelli Rule: A Case of Faulty Reception*, 61 DENV. L.J. 431, 457 (1984).

<sup>177</sup> *Id.* at 458 (citing GYULA EÖRSI, *COMPARATIVE CIVIL (PRIVATE) LAW: LAW TYPES, LAW GROUPS, THE ROADS OF LEGAL DEVELOPMENT* 423 (1979)).

<sup>178</sup> ALAN WATSON, *THE NATURE OF LAW* (1977) [hereinafter *THE NATURE OF LAW*].

and explained the factors that influenced this practice in specific cases.<sup>179</sup> The book received some reviews, but otherwise did not generate much discussion.<sup>180</sup> Alan next published *The Making of the Civil Law* in 1981.<sup>181</sup> In this he explored why the civil law countries differed from one another, despite the common foundation of their legal systems in Roman law; but he again saw the answer to this question as rooted in the activities of lawyers, and the historical traditions of particular systems, rejecting what one might call instrumental explanations of legal change. This book was much more extensively reviewed, particularly in North America, perhaps reflecting its publication by Harvard University Press and Alan's move to the Law School of the University of Pennsylvania. It is too crude to say that legal historians liked it, while others did not; but reviews were certainly mixed.<sup>182</sup> In the same year, he summarized in a short article his main points about the "forces that control legal change."<sup>183</sup> He concluded that "[w]hile the legal tradition plays a fundamental role in legal change, legal rules, structures, and institutions are often greatly out of step with western society," and that this had important implications in undertaking satisfactory law reform.<sup>184</sup> A much more developed argument was presented in 1983, in which he synthesized his views, answered critics, and stressed the importance of the specific culture of legal élites.<sup>185</sup> All of these themes were developed in two further books, *Sources of Law*, *Legal Change and Ambiguity* and *The*

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<sup>179</sup> *Id.* at 99–113.

<sup>180</sup> G.D. MacCormack, Book Review, 23 JURID. REV. (N.S.) 85 (1978) (reviewing THE NATURE OF LAW, *supra* note 178); Hans Oberdiek, Book Review, 130 U. PA. L. REV. 229 (1981) (reviewing THE NATURE OF LAW, *supra* note 178).

<sup>181</sup> ALAN WATSON, THE MAKING OF THE CIVIL LAW (1981) [hereinafter THE MAKING OF THE CIVIL LAW].

<sup>182</sup> See John P. Dawson, Book Review, 49 U. CHI. L. REV. 595 (1982) (reviewing THE MAKING OF THE CIVIL LAW, *supra* note 181); Shael Herman, *Some Reflexions on the Making of the Civil Law*, 17 R.J.T. (N.S.) 313 (1982–1983) [hereinafter Herman, *Reflexions*]; Guy Pratte, *The Relevance of Comparative Law: A Critique of Alan Watson's The Making of the Civil Law*, 115 U. TORONTO FAC. L. REV. 115 (1982); F.H. Lawson, Book Review, 31 AM. J. COMP. L. 535 (1983) (reviewing THE MAKING OF THE CIVIL LAW, *supra* note 181); Shael Herman, Book Review, 18 ISR. L. REV. 490 (1983) [hereinafter Book Review] (reviewing THE MAKING OF THE CIVIL LAW, *supra* note 181); Joseph W. McKnight, Book Review, 28 AM. J. LEGAL HIST. 86 (1984) (reviewing THE MAKING OF THE CIVIL LAW, *supra* note 181).

<sup>183</sup> Alan Watson, *Society's Choice and Legal Change*, 9 HOFSTRA L. REV. 1473 (1981).

<sup>184</sup> *Id.* at 1484.

<sup>185</sup> *Legal Change*, *supra* note 115.

*Evolution of Law*.<sup>186</sup> These received fewer reviews; but again these were mixed and varying.<sup>187</sup>

If these further developments of Alan's ideas continued to receive often skeptical reviews, by the date of the publication of these last-mentioned two books, the idea and terminology of legal transplants had become standard. In 1978, the reviewer of *The Impact of American Law on English and Commonwealth Law* (1978) wrote that "transplantation of law is a common historical occurrence," citing Alan, Kahn-Freund, and Stein.<sup>188</sup> As the string of citations for the propositions suggests, he did not feel the need to investigate the issue further. In 1981, Merryman's paper of 1977 that in part discussed transplants was reprinted in an American law review.<sup>189</sup> By 1982, Edward Wise could open an article on comparative law with the Watsonian comment: "Comparative law is concerned with relationships between legal systems. It has been said: no relationship, no comparative law."<sup>190</sup> His authority for this was *Legal Transplants*.<sup>191</sup> In the same year, Paul Jackson commented that "[t]he longevity and capacity of legal rules to take root in alien soil have been made commonplace by Watson," also citing *Legal Transplants*.<sup>192</sup> Again in 1982, Judith Wegner, seemingly unaware of others' use of the term, in discussing Islamic jurists' borrowing from Talmudic law, asked whether this was "in a word, an instance of what Alan Watson has felicitously called 'legal transplants'?"<sup>193</sup> When Maurice Tancelin used the

<sup>186</sup> ALAN WATSON, *SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY* (1984) [hereinafter *SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY*]; ALAN WATSON, *THE EVOLUTION OF LAW* (1985) [hereinafter *THE EVOLUTION OF LAW*].

<sup>187</sup> Peter G. Stein, Book Review, 46 *LA. L. REV.* 189 (1985) (reviewing *SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY*, *supra* note 186); Walter A. Rafalko, Book Review, 14 *U. BALT. L. REV.* 614 (1985) (reviewing *SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY*, *supra* note 186); Bruce W. Frier, *Why Law Changes*, 86 *COLUM. L. REV.* 888 (1986) (reviewing *THE EVOLUTION OF LAW*, *supra* note 186).

<sup>188</sup> Igor I. Kavass, Book Review, 11 *VAND. J. TRANSNAT'L L.* 853, 856 (1978) (reviewing JEROME B. ELKING, *THE IMPACT OF AMERICAN LAW ON ENGLISH AND COMMONWEALTH LAW* (1978)).

<sup>189</sup> John Henry Merryman, *On the Convergence (and Divergence) of the Civil and the Common Law*, 17 *STAN. J. INT'L L.* 357 (1981).

<sup>190</sup> Edward M. Wise, *Comparative Law and the Protection of Human Rights*, 30 *AM. J. COMP. L. SUPP.* 365 (1982).

<sup>191</sup> *Id.* at 365 n.1 (citing *LEGAL TRANSPLANT*, *supra* note 1, at 7).

<sup>192</sup> Paul Jackson, *Alluvio and the Common Law*, 99 *L.Q.R.* 412, 413 (1983).

<sup>193</sup> Judith Wegner, *Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts*, 26 *AM. J. LEGAL HIST.* 25, 64 (1982). Wegner noted that Alan did not mention the transplanting of parts of Talmudic law into Islamic law in *Legal Transplants*, even though it provided many better examples than those he gave in the book. *Id.* at 64 n.169.



term “legal transplant” in 1984, it required no citation or explanation.<sup>194</sup> The book itself was simply becoming regarded as a standard or classic work on comparative law.

Assisting the spread of the influence of Alan’s thinking on transplants was the fact that, almost contemporaneously, some continental European scholars had started to develop a very similar approach. In 1972, Jean Rivero had pointed out that a state, whether historic or modern, could create its own administrative legal structures or could copy those of another state. The latter was the most common practice, he stated.<sup>195</sup> He debated how this should be characterized, having already noted that, as a phenomenon it was easier to describe than to give an adequate juridical name. He debated the terms, “exchange,” “borrowing,” and “imitation,” or whether, as noted above, one should borrow “the language of advanced surgery” and talk of “transplantation of organs,” though the donor kept the organ and it was a facsimile that was attempted to be integrated into a new *milieu*. But the problem would be to know if the organ was accepted into the body or was rejected. Rivero decided that the terminology was not important, but description of the phenomenon was.<sup>196</sup> But his flirting with the terminology of legal transplant is significant in indicating the type of phenomenon of which he was thinking, as he put it:

The entire history of constitutions, except for a few rare original prototypes, was made up of imitations, adaptations and rejections. The history of civil law itself offers classic examples, whether it be Ataturk’s Turkey importing the Swiss Civil Code, or the diffusion of the Code Napoléon.<sup>197</sup>

His whole paper is full of the language of borrowing (*emprunte*), transplanting (*greffe*), and rejection. He mentioned the “fundamental

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<sup>194</sup> Maurice Tancelin, *Comment on Michael Bridge’s Paper: Does Anglo-American Contract Law Need a Doctrine of Good Faith?*, 9 CAN. BUS. L.J. 430, 431 (1984).

<sup>195</sup> Rivero, *supra* note 43, at 459.

<sup>196</sup> *Id.* (“Si l’on pouvait emprunter le langage de la chirurgie avancée, c’est à la greffe d’organes qu’on aurait recours, à cette nuance près — qui est d’importance! — que l’organe administrative, institution ou règle, possède sur l’organe vivant l’enviable supériorité de pouvoir être greffé sans dépossession du donneur: celui-ci grave l’original, et c’est un facsimile qui va tenter de s’intégrer dans son nouveau milieu. Mais dans les deux cas, le problème est de savoir si la greffe prendra, si l’organe va s’incorporer dans le tissu qui l’a reçu, ou si, au contraire, un phénomène de rejet se produira.”).

<sup>197</sup> *Id.* at 459–60 (“[T]oute l’histoire des constitutions, à partir de quelques rares prototypes originaux, est faite d’imitations, d’adaptations et de rejets. Les droits civils, eux aussi, offrent des exemples classiques, qu’il s’agisse de la Turquie d’Ataturk important le Code civil Suisse, ou du rayonnement de Code Napoléon.”).

problem posed by all transplants: the success or failure of the operation.”<sup>198</sup> He explored the contexts of transplants that were successful and those that were rejected. Seemingly unaware of Rivero’s paper, in 1976, Jean Gaudemet, a noted French historian of medieval civil and canon law, published an article entitled “Les transferts de droit.”<sup>199</sup> In it he pointed out that lawyers, sociologists and historians all viewed law differently. He thought it possible nonetheless to draw on these different approaches to explain the juridical experience of which history furnished many examples that had very varied origins and causes, namely: “the introduction into a society of law or specific legal rules that had been developed in a different social situation and sometimes in an already distant era.”<sup>200</sup> Gaudemet noted that one could discuss the effects of European colonization and influence in the Americas, Africa and Asia; but he limited his discussion to ancient Rome, medieval and modern Europe, and the spread of the Code Napoléon in the nineteenth century.<sup>201</sup> He explained successful “receptions” as due to the technical qualities of the borrowed law, especially if local customs were undeveloped, particularly in face of a transforming society. He also noted the significance of the prestige of a culture, the technical qualities of a code, and its style as factors. He also isolated problems in reception. But he focused on the significance of practitioners and legislators in a successful reception. His factors and mechanisms were in many ways comparable with those isolated by Alan.<sup>202</sup> Other French scholars, drawing on similar ideas, developed the concept of “migration of legal systems.”<sup>203</sup> Thus, in French, the terminology of “transfert,” “migration,” “greffe,” “imitation,” “importation,” and “circulation” became used to deal with the type of phenomena already discussed by Alan.<sup>204</sup>

In 1974, Rodolfo Sacco, an Italian comparativist, had linked the type of phenomena Alan labelled transplants with methodological issues of comparative law.<sup>205</sup> Sacco continued to develop these ideas through the

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<sup>198</sup> *Id.* at 468 (“[Le] problème essentiel posé par toute greffe: la réussite ou l’échec de l’opération.”).

<sup>199</sup> Jean Gaudemet, *Les transferts de droit*, 27 L’ANNÉE SOCIOLOGIQUE 29 (1976).

<sup>200</sup> *Id.* (“[L]’entrée dans une société d’un droit ou de certaines règles juridiques qui ont été élaborées dans un milieu social différent et parfois à une époque déjà lointaine.”).

<sup>201</sup> *Id.* at 31.

<sup>202</sup> Cf. *Two-Tier Law*, *supra* note 116.

<sup>203</sup> René Rodière, *Approche d’un phénomène: les migrations des systèmes juridiques*, in MÉLANGES DÉDIÉES À GABRIEL MARTY 947 (1978).

<sup>204</sup> For the last two, see Éric Agostini, *La circulation des modèles juridiques*, 42 REVUE INTERNATIONALE DE DROIT COMPARÉ 461 (1990).

<sup>205</sup> Rodolfo Sacco, *Les buts et les méthodes de la comparaison du droit*, in RAPPORTS NATIONAUX ITALIENS AU IX CONGRÈS INTERNATIONAL DE DROIT COMPARÉ 113, 127–31 (1974).

1970s. In 1977, he contributed to the colloquium at Badia Fiesolana on a “Common Law of Europe.” His title was “Droit commun de l’Europe, et composantes du droit.”<sup>206</sup> In it he discussed the “circulation des modèles jurisprudentiels” as a factor in unifying law.<sup>207</sup> “Composantes du droit” seems to be a French rendering of his now well-known idea of “formanti” or “legal formants.”<sup>208</sup> The theory of “legal formants” is that the “legal landscape consists of components not necessarily coherent with each other,” rather than of a hierarchical set of norms, in style a pyramid, deriving from a “sovereign at the top directed to the subject at the bottom.” It has recently been described as “probably the most important and lasting contribution of Italian scholarship to the discipline of comparative law.”<sup>209</sup> Sacco accepted the idea of transplants or (in French) “circulation.”<sup>210</sup> In 1980, he published a very influential textbook on comparative law,<sup>211</sup> in which, by the fifth edition, he had an extensive discussion of Alan’s work in his development of his ideas of transplants in line with his theory of legal formants.<sup>212</sup> The influence of Sacco in Italy and France helped further popularize Alan’s work on transplants in these two countries and make it familiar to continental Europeans. As a result, in 1984, *Legal Transplants* was published in an Italian edition.<sup>213</sup>

By 1985 *Legal Transplants* was becoming routinely cited on topics such as the borrowing of an exclusionary rule in criminal evidence, or legal thought in Upper Canada.<sup>214</sup> It may be pointed out that Whelan, who in 1982 had been strongly influenced by Kahn-Freund, now cited *Legal Transplants* in 1985 in a string of citations to support the proposition that there “has been for some time a substantial but largely theoretical body of literature

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(found cited in Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 41, at 441, 442).

<sup>206</sup> Rodolfo Sacco, *Droit commun de l’Europe, et composantes de droit*, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 95 (Mauro Cappelletti ed., 1978).

<sup>207</sup> *Id.* at 97–107.

<sup>208</sup> See Pierre Legrand, *Questions à Rodolfo Sacco*, 47 REVUE INTERNATIONALE DE DROIT COMPARÉ 943, 965–67 (1995). In French, the term “formants” later became standard.

<sup>209</sup> Elisabetta Grandi, *Development of Comparative Law in Italy*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 41, at 107, 115.

<sup>210</sup> Legrand, *supra* note 208, at 970.

<sup>211</sup> RUDOLFO SACCO, INTRODUZIONE AL DIRITTO COMPARATO: SOMMARIO DELLE LEZIONI DI DIRITTO PRIVATO COMPARATO TENUTE NELL’UNIVERSITÀ DI TORINO NELL’ANNO ACCADEMICO 1979–80 (2d ed. 1980).

<sup>212</sup> RODOLFO SACCO, INTRODUZIONE AL DIRITTO COMPARATO 132–54 (5th ed. 1992).

<sup>213</sup> ALAN WATSON, IL TRAPIANTO DI NORME GIURIDICHE: UN “APPROCCIO” AL DIRITTO COMPARATO (1984).

<sup>214</sup> Walter Pakter, *Exclusionary Rules in France, Germany, and Italy*, 9 HASTINGS INT’L & COMP. L. REV. 1, 34 (1985); G. Blaine Baker, *The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire*, 3 LAW & HIST. REV. 219, 247, 260, 284 (1985).

proposing ground rules for proper application of the comparative method.”<sup>215</sup> In the same year, in a bibliographical survey of comparative law, Kurt Schwerin could write:

Much of Watson’s thesis as to the impact of Roman Law on the civil law systems and its transplantability is well-known and undisputed by every comparatist. What is disputable is the emphasis on pure legal history as against social, economic, philosophical, and political influences. Watson’s approach is noteworthy.<sup>216</sup>

He was commenting on Alan’s later book, *The Making of the Civil Law*, which explains the focus of the quotation, though he did acknowledge the relationship to *Legal Transplants*.<sup>217</sup> But it should be noted, this was no longer a blunt rejection of Alan’s views; but rather it was a claim that Alan’s emphasis on the forces behind legal change is wrong—the basic thesis of *Legal Transplants* was now claimed as accepted by *all* comparative lawyers. As a scholar working on public law contemporaneously put it: “There is now a substantial literature concerned with the problems of seeking to transfer or ‘transplant’ a rule or technique developed in one culture to another.”<sup>218</sup>

#### V. THE TRIUMPH OF LEGAL TRANSPLANTS, 1986–2013

It is not possible to treat this period with the same level of detail. This is because use of the term “legal transplant” has become so universal in the last quarter-century that it is simply not feasible to discuss the literature other than in a highly selective fashion. And the volume of discussion generated has indeed been enormous, as a general acceptance of Alan’s approach, at least in part, as having value and utility has developed (although some scholars have remained hostile). As a quick demonstration, one can point to the recent *Oxford Handbook of Comparative Law* as having devoted a chapter to transplants in considering, “Approaches to Comparative Law.”<sup>219</sup> The extent to which Alan’s arguments have provided a standard means of analysis in comparative law is underscored by the remark on the opening

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<sup>215</sup> Christopher J. Whelan, *Labor Law and Comparative Law*, 63 TEX. L. REV. 1425, 1426 (1985).

<sup>216</sup> Kurt Schwerin, *Comparative Law Reflections: A Bibliographical Survey*, 79 NW. U. L. REV. 1315, 1329 (1985).

<sup>217</sup> *Id.* at 1328.

<sup>218</sup> John Goldring, *Public Law and Accountability of Government*, 15 FED. L. REV. 1, 16 (1985).

<sup>219</sup> Graziadei, *supra* note 205, at 441.

page of the even more recent *Cambridge Companion to Comparative Law* that one way of understanding comparative law is “as the study of legal transplants — that is, of the borrowing of ideas between legal cultures and/or systems. . . .”<sup>220</sup> To demonstrate the triumph of legal transplants, we may first consider some very recent articles, from differing areas of the law, which draw in some way on Alan’s theories, and show how varied the use of Alan’s theorizing has become, before considering the developments in this period.

The distinguished company lawyer John H. Farrar published an article in 2011 on the liability of company directors, arguing that a transplant within the Anglo-American company law world had caused problems. He suggested that had more attention been paid to the operation of a rule in the United States, it might not have been transplanted to Malaysia and Australia. It did not fit well with Australian practice.<sup>221</sup> Even though his point might arguably be seen as supporting Kahn-Freund’s approach, it was Alan’s work that was cited.<sup>222</sup> In the same year Meryll Dean argued that her study of jury trial in Japan showed the basic accuracy of Alan’s theory of transplants.<sup>223</sup> In 2010, the distinguished French legal historian, Jean-Louis Halpérin, applied the ideas of transplants to colonial India.<sup>224</sup> The year before, Eric Gillman had published a paper on the transplanting of trade and investment law from the United States to Latin America.<sup>225</sup> *Legal Transplants* has also been seen as providing a means to analyze U.S. trust law in China.<sup>226</sup> Scholars have also looked at transplantation of legal ideas through private contracting, as distinct from through the activities of the state.<sup>227</sup> These topics are far from Alan’s own particular interests, again demonstrating the success of *Legal Transplants*.

By 1985 the tide had very definitely started to turn in favor of *Legal Transplants*; to trace its subsequent rise to being a dominant idea in comparative law, it is worth starting with a review in 1987 of *The Evolution*

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<sup>220</sup> Mauro Bussani & Ugo Mattei, *Diapositives versus Movies — The Inner Dynamics of the Law and its Comparative Account*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 3, 3 (Mauro Bussani & Ugo Mattei eds., 2012).

<sup>221</sup> John H. Farrar, *Directors’ Duties of Care: Issues of Classification, Solvency, and Business Judgment and the Dangers of Transplants*, 23 SING. ACAD. L.J. 745, 761 (2011).

<sup>222</sup> *Id.* at 761 n.52.

<sup>223</sup> Dean, *supra* note 13.

<sup>224</sup> Jean-Louis Halpérin, *Western Legal Transplants and India*, 2 JINDAL GLOBAL L. REV. 12 (2010). I am grateful to Professor Halpérin for supplying me with a copy of his article.

<sup>225</sup> Eric Gillman, *Legal Transplants in Trade and Investment Agreements: Understanding the Exportation of U.S. Law to Latin America*, 41 GEO. J. INT’L L. 263, 282–300 (2009).

<sup>226</sup> Foster, *supra* note 10, at 621–37.

<sup>227</sup> Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711 (2009).

of *Law* (1985) found in the influential “Survey of Books Relating to the Law” that the *Michigan Law Review* publishes each year—the same annual survey in which Abel’s “trashing” review of *Society and Legal Change* had appeared a few years earlier. The reviewer was Michael Hoeflich, a leading U.S. legal historian, then of the University of Illinois College of Law.<sup>228</sup> Hoeflich’s careful and scholarly review is important as perhaps the best in explaining Alan’s thinking. Hoeflich described the book thus:

It is a brief but brilliant exposition of two basic questions. First, to what extent is the development of law autonomous and independent of societal needs and demands? Second, how can one explain, within the context of this relationship between law and society, why so many legal systems borrow extensively, in the matter of specific substantive rules as well as broad jurisprudential categories, from other *alien* legal systems?

It is clear that Professor Watson’s concerns stem, to a large extent from a question that has troubled legal historians and legal philosophers for centuries. That is: how does one explain the puzzling phenomenon of legal reception?<sup>229</sup>

Hoeflich’s perceptive analysis went to the core of Alan’s thinking:

Central to Professor Watson’s theory is the notion that where a professional class develops (and he — like I — would argue that such a class develops early in Western Europe) it is this group’s professional traditions and professional concerns which shape the law — especially private law — far more than any social input.<sup>230</sup>

Hoeflich analyzed Alan’s account of the reception of Roman law in western Europe in the early middle ages. He pointed out that, to a point, most scholars would have agreed with much of Alan’s analysis.<sup>231</sup> He added, however, that:

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<sup>228</sup> Michael H. Hoeflich, *Law, Society and Reception: The Vision of Alan Watson*, 85 MICH. L. REV. 1083 (1987) (reviewing *THE EVOLUTION OF LAW*, *supra* note 186). As noted above, the book developed Alan’s earlier arguments.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 1085.

<sup>231</sup> *Id.* at 1085–88.

What is crucial to Professor Watson's view of law . . . comes after this initial reception. These Roman rules, once adopted, continued to be included in Germanic legal compilations, and these compilations themselves tended to be adopted and adapted cross-nationally for centuries throughout Western Europe. Were they *at all times* fulfilling a perceived and current societal need? Professor Watson would argue that they were not. Rather, by virtue of having become established legal rules, they became the property of legists and as such came to have a life independent of immediate social demands. Indeed, this would seem to have been the case. They continued to be compiled and adopted because they had become part of a legal canon accepted by legal professionals. The legal history of early medieval Europe in this regard tends to bear out Professor Watson's theories.<sup>232</sup>

He explained that what this means is that "the interconnection between law and society is not so close as to preclude borrowing from alien systems. Reception is both possible and explicable so long as one recognizes that the most important group for reception of legal rules is the legal elite."<sup>233</sup> In sum, what matters most is the attitude of the lawyers and the law-making elite, who may "act as a filter of social demands;" indeed they may, for reasons of their own deliberately ignore them.<sup>234</sup>

Other than one or two of the reviews of *The Making of the Civil Law*, this was the first really sympathetic and sensitive review of Alan's work on comparative law to appear in the United States since Maechling's original assessment of *Legal Transplants* twelve years earlier.<sup>235</sup> But there are many other indicators of a general change of attitude Alan's work on transplants. Thus, he was now cited approvingly even in Kahn-Freund's field of labor law. In the introduction to *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945*, Bob (now Sir Bob) Hepple, one of Britain's most distinguished labor lawyers, wrote in 1986: "The generalization that 'borrowing (with adaptation) has been the usual way of legal development' is at least as true for labour law as it is for other branches of law."<sup>236</sup> The quotation was from *Legal Transplants*, which he

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<sup>232</sup> *Id.* at 1088–89.

<sup>233</sup> *Id.* at 1089.

<sup>234</sup> *Id.* at 1093.

<sup>235</sup> See, e.g., Herman, Book Review, *supra* note 182.

<sup>236</sup> Bob Hepple, *Introduction*, in *THE MAKING OF LABOUR LAW IN EUROPE: A COMPARATIVE STUDY OF NINE COUNTRIES UP TO 1945*, at 1, 2 (Bob Hepple ed., 1986); see also Lorraine M.

cited.<sup>237</sup> Indeed, authors developed hypotheses from *Legal Transplants* and drew on its thinking in fields as diverse as feminism and pornography<sup>238</sup> and the possibility of reforming American criminal justice with selective borrowing from French law.<sup>239</sup> Curiously enough, it could still sometimes be cited simply for some information it contained, such as the development of the law on legitimation by subsequent marriage in New Zealand and England.<sup>240</sup> Given how many other sources there must have been for this information, the citation is testimony to the success of the book as a standard work, being treated now almost as one of reference rather than of opinion. Of course, detractors remained,<sup>241</sup> but they were fewer.

If by the later 1980s Alan's idea of legal transplants was becoming very well-known, two events made his work resonate even more for contemporaries through the 1990s. The first was the destruction of the Berlin wall and the consequent astonishingly rapid collapse of the Soviet Empire. A whole series of new states emerged or old states re-emerged in central and Eastern Europe, seeking modern legal systems and laws.<sup>242</sup> The second was the intensification of the debate over harmonization or unification of private law in Europe, a debate made more urgent by the European Parliament's quite extraordinary issue of resolutions calling for a code of European Law.<sup>243</sup>

In 1990, given how current the issue was becoming, it is no surprise that the XIIIth Congress of Comparative Law, held in Montreal in 1990, devoted

McDonough, *Transferability of Labor Law: Can an American Transplant Take Root in British Soil?*, COMP. LAB. L.J. 504 (1992) (returning to the debate with Kahn-Freund).

<sup>237</sup> LEGAL TRANSPLANTS (1st ed.), *supra* note 1, at 7.

<sup>238</sup> See Charlotte L. Bynum, *Feminism and Pornography: A New Zealand Perspective*, 65 TUL. L. REV. 1131, 1133 (1991).

<sup>239</sup> See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 547-50 (1990).

<sup>240</sup> See, e.g., Lau Kok Keng et al., *Towards a Singaporean Jurisprudence*, 8 SING. L. REV. 1, 22 (1987).

<sup>241</sup> B. Jordaan & D. Davis, *The Status and Organization of Industrial Courts: A Comparative Study*, 8 INDUS. L.J. 199, 201-02 (1987) (rejecting Alan's views of transplants in favor of Kahn-Freund's on the ground that the field of labor law required recognition of the inextricable link between the development of the law and prevailing power relations).

<sup>242</sup> See, e.g., Steven J. Heim, *Predicting Legal Transplants: The Case of Servitudes in the Russian Federation*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 187 (1996) (detailing how post-collapse of the Russian Federation is an important time to study legal transplants).

<sup>243</sup> Resolution on Action to Bring into Line the Private Law of the Member States, 1989 O.J. (C 158) 400; Resolution on the Harmonisation of Certain Sectors of Private Law of the Member States, 1994 O.J. (C 205) 518; see also G. Alpa, *European Community Resolutions and the Codification of "Private Law,"* 2 EUR. REV. PRIVATE L. 321 (2000) (examining the problems with and prospects for the development of a European private law).



a section to “Circulation des modèles juridiques,” in other words, to legal transplants. The American scholar Edward Wise provided an important discussion, published in the supplement to the *American Journal of Comparative Law*, that started with a full and very detailed analysis of Alan’s work on transplants. Drawing a contrast with Montesquieu and Friedman, Wise stressed Alan’s arguments in favor of the relative autonomy of law, largely due to the significance of the legal profession in developing the law, and the importance of borrowing in this development.<sup>244</sup> A discussion of the historiography of U.S. legal history followed.<sup>245</sup> Wise then noted that borrowing was a common cultural experience: it was not restricted to law, developing a critique of Alan’s views that accepted much of what he said, but arguing that influences on borrowing were wider than Alan suggested.<sup>246</sup>

The next year, Sacco’s Italian textbook was published in French.<sup>247</sup> Though never published in an English translation as a book, much of its substance appeared in the same year in two lengthy articles translated from the Italian. These were edited by the legal historian and comparative lawyer Jim Gordley and printed in the *American Journal of Comparative Law*.<sup>248</sup> This version rather underplays the very extensive attention given to Alan’s work on transplants found in the fourth edition of Sacco’s textbook; nonetheless this prominent and much cited publication inevitably engendered further consideration of Alan’s work, both in Europe and North America. An overt consideration of the correspondence between their ideas appeared a couple of years later.<sup>249</sup> In 1994, Alan participated in the ceremony in the University of Turin when Sacco was presented with his *Festschrift*, delivering a paper entitled “From Legal Transplants to Legal Formants.”<sup>250</sup> The popularity of Sacco’s work both at home and elsewhere, combined with his and his pupils’ dominant position in comparative law in Italy, inevitably

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<sup>244</sup> Edward Wise, *The Transplant of Legal Patterns*, 38 AM. J. COMP. L. SUPP. 1, 1–7 (1990).

<sup>245</sup> *Id.* at 7–15.

<sup>246</sup> *Id.* at 16–22. For the French report, see Agostini, *supra* note 204.

<sup>247</sup> RODOLFO SACCO, LA COMPARAISON JURIDIQUE AU SERVICE DE LA CONNAISSANCE DU DROIT (1991).

<sup>248</sup> Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1 (1991); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343 (1991).

<sup>249</sup> Silvia Ferreri, *Assonanze transoceaniche: tendenze a confronto*, QUADRIMESTRE 172 (1993). I am grateful to Professor Ferreri for supplying me with a copy of her article.

<sup>250</sup> Alan Watson, *From Legal Transplants to Legal Formants*, 43 AM. J. COMP. L. 343, 343 n.2 (1995); see also PAULO CENDON, SCRITTI IN ONORE DI RODOLFO SACCO: LA COMPARAZIONE GIURIDICA ALLE SOGLIE DEL 3. MILLENNIO (1994).

promoted further reflection on Alan's scholarship on *Legal Transplants*.<sup>251</sup> The work of Michele Graziadei has proved particularly insightful and important in developing our understanding of legal transplants.<sup>252</sup>

Interest in Alan's work was now such that a second edition of *Legal Transplants* was published by the University of Georgia Press in 1993. It consisted of a reproduction of the first edition with an "Afterword."<sup>253</sup> Perhaps it was this publication with the continuing debate that stimulated William Ewald in 1995 to publish a fundamentally sympathetic evaluation and interpretation of Alan's work (which does not mean Alan should be taken as accepting all of Ewald's analysis).<sup>254</sup> This was part of Ewald's general project on comparative law.<sup>255</sup> Ewald did not reflect, for example, on the relationship between the theorizing of Alan and Sacco, but instead investigated Alan's corpus of writings. His aim was to synthesize Alan's views on comparative law and set them out in a logical and much more abstract form, divorced from the detailed historical discussions in which Alan had developed them.<sup>256</sup> Ewald argued that there was "Weak Watson" and "Strong Watson."<sup>257</sup> Alan would dispute this.<sup>258</sup> But Ewald's analysis has exerted considerable influence on further discussion of the possibilities of transplants.<sup>259</sup> In particular his description of approaches such as that of Friedman as "mirror theories" has resonated.<sup>260</sup> He also convincingly

<sup>251</sup> For some interesting reflections on Sacco's influence, see BASIL MARKESINIS, *COMPARATIVE LAW IN THE COURTROOM AND THE CLASSROOM: THE STORY OF THE LAST THIRTY-FIVE YEARS* 22–23, 100–02 (2003); Ugo Mattei, *The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 238, 244–50 (Annelise Riles ed., 2001).

<sup>252</sup> See, e.g., Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 *THEORETICAL INQUIRIES* L. 723 (2009).

<sup>253</sup> *LEGAL TRANSPLANTS* (2d ed.), *supra* note 2, at 107.

<sup>254</sup> Ewald, *supra* note 115.

<sup>255</sup> William Ewald, *Comparative Jurisprudence I: What Was it Like to Try a Rat?*, 143 *U. PA. L. REV.* 1889 (1995).

<sup>256</sup> Ewald, *supra* note 115, at 491.

<sup>257</sup> *Id.*

<sup>258</sup> But for Alan's generally favorable view, see Alan Watson, *Introduction to Law for Second Year Law Students*, 46 *J. LEGAL EDUC.* 430, 434–35 (1996). The two do disagree, however. See William Ewald, *The Jurisprudential Approach to Comparative Law: The Field Guide to "Rats,"* 46 *AM. J. COMP. L.* 701, 702–03 (1998).

<sup>259</sup> Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 *U. PA. J. CONST. L.* 325, 334–37 (1998); Nicholas H.D. Foster, *Company Law Theory in Comparative Perspective: England and France*, 48 *AM. J. COMP. L.* 573, 609–11 (2000); William Twining, *A Post-Westphalian Conception of Law*, *LAW & SOC'Y REV.* 199, 206–12 (2003); Michal S. Gal, *The Cut and Paste of Article 82 of the EC Treaty in Israel: Considerations for a Successful Transplant*, 9 *EURO. J.L. REFORM* 467, 468–71 (2007).

<sup>260</sup> Ewald, *supra* note 115, at 491–96, 500–04.

demonstrated the mistaken nature and weakness of aspects of Abel's critique.<sup>261</sup> Some scholars, however, have rejected Ewald's privileging of an essentially philosophical approach to comparative law, and have found more merit in Alan's arguments themselves.<sup>262</sup> Indeed others have attempted to develop the idea in quite different and also interesting ways.<sup>263</sup>

But a renewed line of debate over Alan's theory of legal transplants has developed, linked to some extent to Ewald's discussion. Partly similar to the views early expressed by Kahn-Freund, this might loosely be described as focused on the concept of "legal culture," and it has become a fairly dominant mode of criticism. The fundamental idea is the obvious one that focusing on the rules of positive law misses much that is important about any legal system. The deployment of legal culture as an analytical category in sociological approaches to law has been strongly associated since 1969 with the work of Lawrence Friedman.<sup>264</sup> In that year he commented: "Much of the working law of a mature, industrial society is comparatively specific to its country."<sup>265</sup> He also commented that "only recently have societies borrowed codes, legal systems, and whole bodies of law."<sup>266</sup> In a paper from 1985, but published in English in 1990, the German legal historian, Franz Wieacker, drawing on historical evidence, argued that there was a European legal culture, and attempted to identify its features.<sup>267</sup> Some have found Friedman's concept of legal culture fragmented and vague;<sup>268</sup> Wieacker's account was so abstract that it is difficult to assess the significance of his claims. Despite this, however, a relatively early deployment of this approach in comparative law is found in Bernhard Grossfeld's study, published in English in 1990, where the author argued that legal systems were very closely linked to culture generally, including religion, language, and geography.<sup>269</sup> Grossfeld accepted some of what Alan argued;<sup>270</sup> but

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<sup>261</sup> *Id.* at 504–08.

<sup>262</sup> ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 109–14 (2006).

<sup>263</sup> Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 *AM. J. COMP. L.* 839 (2003).

<sup>264</sup> Lawrence M. Friedman, *Legal Culture and Social Development*, 4 *LAW & SOC'Y REV.* 29 (1969) [hereafter Friedman, *Legal Culture*]; LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 15, 193–94 (1975).

<sup>265</sup> Friedman, *Legal Culture*, *supra* note 264, at 35.

<sup>266</sup> *Id.* at 42.

<sup>267</sup> Franz Wieacker, *Foundations of European Legal Culture*, 38 *AM. J. COMP. L.* 1, 20–25 (1990).

<sup>268</sup> COTTERRELL, *supra* note 262, at 83–88.

<sup>269</sup> BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* 41–49 (Tony Weir trans., 1990).

<sup>270</sup> *Id.* at 43.

disagreed with what he considered as Alan's optimism "about the possibility of transplanting legal institutions."<sup>271</sup> The nature of law as a cultural phenomenon created such constraints and linked it so closely to the culture within which it developed that transfer of laws from one culture to another was unlikely and very difficult. This is not the place to rehearse a critique of the details of Grossfeld's argument,<sup>272</sup> but others developed it to encompass criticism of Ewald's attempt to reformulate Alan's views of transplants in a more abstract fashion.<sup>273</sup> It is important to point out, however, that Alan himself draws on ideas of culture, but ones significantly less broad than those of Grossfeld, instead concentrating on the significance of the legal culture of the lawyers;<sup>274</sup> but the early association of "legal culture" with the work of Friedman, understanding the concept as being about a "totality" of culture, has tended to lead more theoretically-focused scholars to embed in the concept his assumptions about law and society, particularly given the potential vagueness and flexibility of the idea.<sup>275</sup>

What Grossfeld argued has been developed in its extreme form by Pierre Legrand in a number of papers from the mid-1990s onwards, the most important of which claimed that legal transplants were impossible.<sup>276</sup> Legrand's argument was elaborated from what were essentially epistemological premises and anthropological theory. He argued that law simply could not be separated from its context. Indeed the law only existed as interpreted and applied "within an interpretative community."<sup>277</sup> Law was "a matter of myth and narrative," which, if belonging to another culture, we could only grasp "imperfectly through translation rather than expect to find a method of reproducing its 'effects.'"<sup>278</sup> To put it crudely, in other words, law only has a meaning in context; change the context and the law changes. It is, of course, far from a foolish argument; but one astute, although not unsympathetic, critic of Legrand states:

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<sup>271</sup> *Id.* at 45.

<sup>272</sup> See Herbert Bernstein, Book Review, 40 AM. J. COMP. L. 261 (1992) (reviewing GROSSFELD, *supra* note 269).

<sup>273</sup> See, e.g., Roger Cotterrell, *Is There a Logic of Legal Transplants?*, in ADAPTING LEGAL CULTURES 70 (David Nelken & Johannes Feest eds., 2001).

<sup>274</sup> *Legal Change*, *supra* note 115, at 1152–57.

<sup>275</sup> Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 RATIO JURIS 117, 119 (1994); David Nelken, *Using the Concept of Legal Culture*, 29 AUSTL. J. LEGAL PHIL. 1, 3–7 (2004).

<sup>276</sup> Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EURO. & COMP. L. 111 (1997); see also Pierre Legrand, *What "Legal Transplants"?*, in ADAPTING LEGAL CULTURES, *supra* note 273, at 55.

<sup>277</sup> David Nelken, *Introduction*, in ADAPTING LEGAL CULTURES, *supra* note 273, at 3.

<sup>278</sup> *Id.*

A number of points could be made in reply to Legrand's objections to legal transplants. Much depends on the meaning given to this term. Alan Watson for example uses his data about transplants to refute Legrand's claims about the relationship between law and its context but is willing to concede that a legal transplant cannot be expected to engineer a determined solution but will take on a life of its own in its new host. Legrand may be battling with his own chosen interpretation of the transplant metaphor. He also appears at times to treat empirical claims as if they were logical ones—and risks the contradictions of cultural relativism.<sup>279</sup>

Alan's own response to Legrand is similar, and grounded in the documented empirical claim "that massive successful borrowing is commonplace in law." In the face of Legrand's arguments, he has reasserted that "borrowing is usually the major factor in legal change," and that legal borrowing is to be equated with "legal transplants."<sup>280</sup>

Much of Legrand's argument against transplants arises from his opposition to the calls for a European Civil Code.<sup>281</sup> In the very different context of the early 1970s, Alan had argued that the fact of transplants meant that it should be possible "to frame a single basic code of private law to operate throughout [the whole of the Western world]."<sup>282</sup> When read in 1974, this will have seemed an interesting observation about an unlikely eventuality; when a new edition appeared twenty years later, however, after the call for codification of a European private law, it took on a different appearance.<sup>283</sup> Much effort has now been devoted to various projects of harmonization or even unification of law in Europe.<sup>284</sup> Hence Legrand's opposition to Alan's idea of legal transplants: if transplants were easy, then it would be easy to create and enforce a new European code of private law. Of course, Alan would acknowledge the potential problems, but he would argue that there are simply no technical problems in doing this, provided that there was "a uniform system of adjudicating differences within a standard

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<sup>279</sup> *Id.* at 3–4.

<sup>280</sup> Alan Watson, *Legal Transplants and European Private Law*, ELECTRONIC J. COMP. L., Dec. 2000, at 12.

<sup>281</sup> Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997); Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52 (1996).

<sup>282</sup> LEGAL TRANSPLANTS (1st ed.), *supra* note 1, at 100–01.

<sup>283</sup> LEGAL TRANSPLANTS (2d ed.), *supra* note 2, at 100–01.

<sup>284</sup> See, e.g., Jan M. Smits, *Convergence of Private Law in Europe: Towards a New Ius Commune?*, in COMPARATIVE LAW: A HANDBOOK 220 (Esin Örüçü & David Nelken eds., 2007) (arguing for a convergence through doctrinal scholarship).

framework of the necessary sources of law.”<sup>285</sup> He would add: “Authority is paramount, because it alone can constitute the common element.”<sup>286</sup>

Gunther Teubner, best known as a system-theorist, intervened in this debate in a much-cited and powerful article, focusing on attempts to unify law within the European Union. He saw Legrand as offering a “contemporary reformulation of Montesquieu’s culturalist scepticism. . . .”<sup>287</sup> He raised a number of theoretical difficulties and empirical observations against Legrand’s work, also commenting (in 1998) that “Legrand’s still rather modest efforts stand in somewhat strange contrast to the sweeping claims of his general programme.”<sup>288</sup> Teubner noted that Alan’s arguments on transplants had foundations in rich and detailed historical evidence showing that “transferring legal institutions between societies has been an enormous historical success,” despite a “bewildering diversity of socio-economic structures.”<sup>289</sup> He summed up Alan’s claims thus:

He explains the success of legal transplants by a highly developed autonomy of the modern legal profession. He confronts functionalist comparativists with the theoretical argument that convergence of socio-economic structures as well as functional equivalence of legal institutions in fact do not matter at all. Neither does — and this is his message to the culturalists—the totality of a society’s culture.<sup>290</sup>

Teubner saw these claims as based on three arguments that he set out with a careful evaluation of their strengths and weaknesses: “[C]omparative law should no longer simply study foreign laws but study the interrelations between different legal systems”,<sup>291</sup> “[T]ransplants [are] the main source of legal change”,<sup>292</sup> and “[L]egal evolution takes place rather insulated from social changes, that it tends to use the technique of ‘legal borrowing’ and can be explained without reference to social, political, or economic factors.”<sup>293</sup> Teubner was sympathetic to much that Alan had written, but saw Alan’s

<sup>285</sup> Alan Watson, *Guest Editorial: A Common Private Law for Europe?*, 9 MAASTRICHT J. EURO. & COMP. L. 329 (2002).

<sup>286</sup> *Id.*

<sup>287</sup> Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 14 (1998).

<sup>288</sup> *Id.* at 15.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 15–16.

<sup>292</sup> *Id.* at 16.

<sup>293</sup> *Id.* at 16–17.

theorization as limited and in need of development. He argued that Alan “seems to be obsessed with the somewhat sterile alternative of cultural dependency versus legal insulation, of social context versus legal autonomy, an obsession which he shares, of course, with his opponents.”<sup>294</sup> Teubner suggested that “legal transplant” was a misleading metaphor, and argued engagingly for his own idea of “legal irritant.”<sup>295</sup>

In the context of the debates over law in Europe, there can be no doubt but that Legrand’s very strongly phrased “culturalist” critique of Alan’s theory helped considerably to spread and indeed to renew interest in legal transplants; Teubner’s important contribution also stimulated reflection on Alan’s work, and was reprinted in a leading collection on the legal effects of European integration.<sup>296</sup> Likewise, the developing debate over legal culture in the 1990s also raised important questions about transplants; it also had to take into account Alan’s own view of what legal culture was and how it had a determining effect on legal change.<sup>297</sup> Friedman has remained very dismissive of Alan’s work on transplants; other scholars examining the concept legal culture have not been so dismissive, and have continued to find it necessary to address the theory of legal transplants.<sup>298</sup> Alan’s narrower focus on lawyers and legal elites generally has been viewed as highly plausible, though inchoate as lacking detailed empirical historical study.<sup>299</sup>

One of the most significant scholars in promoting studies of legal culture and comparative law since the mid-1990s is David Nelken, a sociologist of law. In 1995, he organized a conference devoted to legal cultures at the University of Macerata.<sup>300</sup> Helping further spread interest was a series of workshops held in the later 1990s at the International Institute for the

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<sup>294</sup> *Id.* at 17 (citing Abel, *supra* note 97). FRIEDMAN, *supra* note 83, also supports this argument.

<sup>295</sup> *Id.* at 12.

<sup>296</sup> Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, in *THE EUROPEANISATION OF LAW: THE LEGAL EFFECTS OF EUROPEAN INTEGRATION* 243 (Francis Synder ed., 2000).

<sup>297</sup> *Legal Change*, *supra* note 115, at 1154.

<sup>298</sup> See, e.g., Lawrence Friedman, *Some Comments on Cotterrell and Legal Transplants*, in *ADAPTING LEGAL CULTURES*, *supra* note 273, at 93, 93 (“Cotterrell’s critique of Watson is devastating.”). But Cotterrell, *supra* note 273, at 71–87 in fact gives a measured assessment, and in *Comparative Law and Legal Culture*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 41, at 709, 719 he remarks that “Watson is better placed than Friedman in that his conceptualisation of legal culture as an effective cause is narrower and more focused than Friedman’s.”

<sup>299</sup> Cotterrell, *supra* note 273, at 718–21.

<sup>300</sup> Works from this conference can be found in the December 1995 issue of *Social & Legal Studies*.

Sociology of Law in Oñati. These generated a number of publications.<sup>301</sup> One of the main organizers of these was Johannes Feest.<sup>302</sup> From our point of view most significant was the workshop “on piecemeal adaptation of legal cultures,” organized at Oñati by Nelken and Feest.<sup>303</sup> A central issue of the workshop was legal transplants, and after some more theoretical discussions of it, a number of papers were devoted to specific studies of legal borrowing and adaptation.<sup>304</sup> In the resulting book, Nelken summed up the discussion of Watson’s and Ewald’s work, reflecting on transplants from the perspectives provided by sociology.<sup>305</sup> Chapters by Legrand, Cotterrell, and Friedman have already been noticed here: the first presenting his usual argument on the impossibility of transplants, the second assessing transplants in the light of his ideas of community, and the third basically dismissing the idea.<sup>306</sup> Andrew Harding, however, in one of the empirical studies in the volume, commented that “it seems as if Watson’s theory of legal transplantation, according to South East Asian experience, is made out to a remarkable extent . . . [L]aw in South East Asia has evolved out of legal transplantation, which has on the whole been successful.”<sup>307</sup> While he thought there might be particular local factors at play, he concluded:

[I]n broad terms the Watsonian thesis that the idea of a law can be readily transplanted is, in relation to South East Asia, clearly made out. The strictures of Montesquieu and Kahn-Freund do not in general apply in South East Asia, and in fact their theories are disproved by the South East Asian experience. This is not the same as saying that all “repotting” of legal ideas will result in instant blooms. South East Asia shows that, under conditions of legal pluralism, absorption of legal ideas, even imposed ones, takes place over time, slowly and even

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<sup>301</sup> E.g., JOHANNES FEEST ET AL., *CHANGING LEGAL CULTURES* (1997); JOHANNES FEEST & VOLKMAR GESSNER, *INTERACTION OF LEGAL CULTURES* (1998); JOHANNES FEEST, *GLOBALIZATION AND LEGAL CULTURES* (1999).

<sup>302</sup> Johannes Feest & David Nelken, *Preface*, in *ADAPTING LEGAL CULTURES*, *supra* note 273, at i, vii.

<sup>303</sup> *Id.*

<sup>304</sup> David Nelken, *Towards a Sociology of Legal Adaptation*, in *ADAPTING LEGAL CULTURES*, *supra* note 273, at 7, 8.

<sup>305</sup> *Id.* at 8–20.

<sup>306</sup> Legrand, *supra* note 276; Cotterrell, *supra* note 273; Friedman, *supra* note 298.

<sup>307</sup> Andrew Harding, *Comparative Law and Legal Transplantation in South East Asia: Making Sense of the “Nomic Din,”* in *ADAPTING LEGAL CULTURES*, *supra* note 273, at 199, 213.



painfully. The evidence of successful legal transplants of almost every conceivable kind is powerful.<sup>308</sup>

Yves Dezalay and Bryant Garth concluded their study of transplants, focusing on developments in Central and South America by acknowledging that “[t]he idea that legal transplants came from an autonomous group of elite lawyers, as suggested by Alan Watson, is not implausible for this kind of process.”<sup>309</sup> In a study of debt, John Flood concluded that “[i]nsolvency does, however, demonstrate Watson’s thesis that comparative lawyers should study the interrelations of legal systems rather than the operation of foreign laws.”<sup>310</sup>

By the end of the 1990s, the idea of legal culture was becoming a commonly used analytical category in comparative law, along with notions such as legal tradition, as scholars tried to get beyond simple positivism, functionalism and concepts such as that of “legal family.”<sup>311</sup> The debates that had already developed thus meant that when a sociologist of law, such as Roger Cotterrell, in reflecting on social theory and culture, turned to consider comparative law, he inevitably discussed legal transplants.<sup>312</sup> But the concept of legal culture continued to be relied on and developed by comparative lawyers in the new century.<sup>313</sup> That there was sometimes seen to be an incompatibility between culture and transplant must have made the topic all the more compelling, raising potentially interesting theoretical issues. Perhaps this led to the session on “Legal Culture and Legal Transplants” (“La culture juridique et l’acculturation du droit”) at the XVIIIth Congress of Comparative Law in 2010, held in Washington, D.C. It is interesting to note, however, that the National Reports tended to assume that the concept of legal culture was quite obvious and unproblematic, and did not consider there to be any problems of the type identified by Grossfeld,

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<sup>308</sup> *Id.* at 218–19.

<sup>309</sup> Yves Dezalay & Bryant Garth, *The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars*, in ADAPTING LEGAL CULTURES, *supra* note 273, at 241, 251.

<sup>310</sup> John Flood, *The Vultures Fly East: The Creation and Globalisation of the Distressed Debt Market*, in ADAPTING LEGAL CULTURES, *supra* note 273, at 257, 261.

<sup>311</sup> See, e.g., Mark van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms, and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT’L & COMP. L.Q. 495 (1998) (espousing the comparison of the “legal discourse” prevalent in different systems); H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 41, at 421; PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD. SUSTAINABLE DIVERSITY IN LAW (4th ed. 2010) (2000). The CAMBRIDGE COMPANION TO COMPARATIVE LAW, *supra* note 220, makes much use of the concept of tradition.

<sup>312</sup> COTTERRELL, *supra* note 262, at 109–26.

<sup>313</sup> DAVID NELKEN, COMPARING LEGAL CULTURES (2007); David Nelken, *Defining and Using the Concept of Legal Culture*, in COMPARATIVE LAW: A HANDBOOK, *supra* note 284, at 109.

Legrand, Nelken, or Friedman in relating it to legal transplants. This, of course, may be the result of the questions put to the delegates; but no difficulties were reported, and the concept of legal transplant drawn on by the delegates was largely understood as that developed by Alan, used without any questioning or indication that it might be debatable.<sup>314</sup>

Thus, though critics remain, by the end of the first decade of the twenty-first century, the concept of legal transplant as developed and utilized by Alan has become a standard way to approach comparative law. The pressures of globalization and, within Europe, harmonization, have continued to ensure its continuing relevance to debates on law.<sup>315</sup> During the first decade of the twenty-first century, a discussion in German added to the already extensive discussions of transplants in other languages.<sup>316</sup> In 2008, a research group on “Histories of Common Law Legal Transplants” met in the Institute for Advanced Studies in Jerusalem and a joint conference on the theme was held at the Faculty of Law in Tel Aviv in June of that year.<sup>317</sup> The papers were published in a special issue of a journal. Only one essay was devoted to theoretical issues, and, in a sophisticated discussion, it accepted the utility of the concept as offering a dynamic approach to comparative law;<sup>318</sup> but the other essays accepted legal transplants largely as a simple given. The ultimate success of legal transplants as an approach to comparative law is clear.

## VI. CONCLUSION: THE PREHISTORY OF LEGAL TRANSPLANTS

Mark Freedland, in his sensitive and touching evocation of the character and scholarship of his *Doktorvater*, Sir Otto Kahn-Freund, writes that his

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<sup>314</sup> The collection of reports from this session, edited by Jorge A. Sánchez Cordero, can be found in Vol. 1, Issue 2 of the ISAIDAT Law Review, a special issue entitled “Legal Cultures and Legal Transplants.” The reports are available at <http://isaidat.di.unito.it/index.php/isaidat/issue/view/5>.

<sup>315</sup> Holger Fleischer, *Legal Transplants in European Company Law: The Case of Fiduciary Duties*, 2 EUR. COMPANY & FIN. L. REV. 378 (2005); Leone Niglia, *Of Harmonization and Fragmentation: The Problem of Legal Transplants in the Europeanization of Private Law*, 7 MAASTRICHT J. EUR. & COMP. L. 116 (2010).

<sup>316</sup> Holger Fleischer, *Legal Transplants im deutschen Aktienrecht*, in NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 1129 (2004); Gebhard M. Rehm, *Rechtstransplantate als Instrument der Rechtsreform und –transformation*, 72 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1 (2008); see also André Jansen & Reiner Schulze, *Legal Cultures and Legal Transplants in Germany*, 19 EUR. REV. PRIVATE L. 225 (2011).

<sup>317</sup> Theoretical Inquiries in Law, *Introduction*, 10 THEORETICAL INQUIRIES L. 299, 303 (2010).

<sup>318</sup> Graziadei, *supra* note 252, at 726–30.

mentor's "most significant contribution to the general theory of comparative law" was made in his Chorley Lecture of 1973:

It is here that he evokes and analyses "the problem of transplantation." The notion of "legal transplant" has become so firmly part of the vocabulary of comparative legal studies that it is now profoundly exciting to be reminded of its origin in this lecture. For Kahn-Freund, the "problem of transplantation" was the inappropriateness of assuming that a legal norm or structure which had been seen to work well in one jurisdiction could be successfully introduced into another. This he saw as the heeding and re-stating in a modern idiom of Montesquieu's warning that: *Les lois politiques et civiles de chaque nation . . . doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir à un autre.*<sup>319</sup>

Of course, Kahn-Freund's notion of "legal transplant" was indeed born in that lecture on June 26, 1973; but as we have already seen the term or idea was used almost contemporaneously—if not earlier—by Alan,<sup>320</sup> by Beckstrom,<sup>321</sup> and by Rivero.<sup>322</sup> As argued, the term was ripe for such metaphoric usage in this period; there can be no surprise that these four scholars adopted it at much the same time.

Indeed, as I have pointed out elsewhere, the term had been used earlier by a number of British scholars.<sup>323</sup> Thus in 1950, B.A. Wortley had reported that the UNIDROIT conference in Rome had concluded that "the time was [not] ripe for the transplanting of the Trust into other countries."<sup>324</sup> In 1955, C.J. Hamson had noted that the Istanbul conference of the International Committee of Comparative Law in 1955 had considered "the conditions and circumstances under which a foreign system of law has in modern times been received in a country having a cultural background and tradition different

<sup>319</sup> Mark Freedland, *Otto Kahn-Freund (1900-1979)*, in *JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN* 299, 311–12 (Jack Beatson & Reinhard Zimmermann eds., 2004).

<sup>320</sup> *LEGAL TRANSPLANTS* (1st ed.), *supra* note 1. The preface of *Legal Transplants* is dated June 1973, and the work is based on lectures from 1970.

<sup>321</sup> Beckstrom, *supra* note 44, at 557 (using the term "transplantation" in an article in the 1973 summer issue of the *American Journal of Comparative Law*).

<sup>322</sup> Rivero, *supra* note 43, at 451 (writing in France in 1972).

<sup>323</sup> Cairns, *supra* note 41, at 146, 150, 170–71.

<sup>324</sup> B.A. Wortley, *Report on the Rome Conference, 1950*, 32 *J. COMP. LEGIS. & INT'L L.* 3d ser. 91 (1950).

from that of the country in which the system originally developed.”<sup>325</sup> He noted that the Istanbul Conference was interested not so much in receptions within Europe, but in those instances of reception where it was possible to examine “the possibility and the effect of the transplantation of a system of law into a significantly different culture.”<sup>326</sup> Prominent examples of such “transplantation” were “in those European colonies where the indigenous populations remain the predominant cultural element.”<sup>327</sup> The future of these colonies “was likely to be of capital significance to our own civilization and in that course the success or failure of the transplantation of a European system of law will be a critical factor.”<sup>328</sup>

The modern scholar<sup>329</sup> who first (as far as I have been able to trace) seems to have used the metaphor of “transplant” or “transplantation” to explain legal development was, however, the Scots advocate, Frederick P. Walton, in 1927. Born in England, Walton had studied classics at Oxford and law at Edinburgh and Marburg, before being admitted as an advocate of the Scots bar in 1886. In 1894, he was appointed Lecturer in Civil (i.e., Roman) Law in the University of Glasgow and became Secretary to the Lord Advocate, J.B. Balfour, the appointment ending in June 1895 when Balfour lost office with the defeat of the Rosebery Government. He was next appointed Professor of Roman Law and Dean of the Faculty of Law at the McGill University in Montreal in 1897. He moved to Egypt in 1915 to become Director of the Khedivial School of Law in Cairo in succession to Maurice Sheldon Amos. He returned to Britain and settled in Oxford in the mid-1920s. Sociable and hospitable, Walton was Secretary to the Law Club, a dining club of academic lawyers in Oxford. Following the death of his wife in 1932, he retired to Edinburgh, where he lived in Great King Street until his own death.<sup>330</sup> Walton’s grasp of the idea of legal transplantation developed out of the experiences of his imperial academic career combined with his training in Scots law and Roman law. In the later nineteenth

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<sup>325</sup> C.J. Hamson, *The Istanbul Conference of 1955*, 5 INT’L & COMP. L.Q. 26, 26 (1956).

<sup>326</sup> *Id.* at 27.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> Jeremy Bentham had also used the term. Andrew Huxley, *Jeremy Bentham on Legal Transplants*, 2 J. COMP. L. 177 (2007). I am grateful to Munin Pongsapan for bringing this to my attention.

<sup>330</sup> H.G. Hanbury, rev. Eric Metcalfe, *Walton, Frederic Parker (1858–1948)*, OXFORD DICTIONARY NAT’L BIOGRAPHY, <http://www.oxforddnb.com/view/article/36720> (last visited Mar. 12, 2013); *F.P. Walton, Esq., Advocate, Professor of Roman Law in the McGill University of Montreal*, SCOTS L. TIMES (NEWS) 21 (1914); *Appointments*, (1894) 10 SCOTTISH L. REV. & SHERIFF CT. REP. 230, 298 (1894); F.H. Lawson, *Dr. F. P. Walton*, 31 J. COMP. LEGIS. & INT’L L. 3d ser. 98, 98 (1949).

century, Scots lawyers were coming to see their legal system as having a “mixed and varied character.”<sup>331</sup> This was because of its “large debt to the jurisprudence of other countries, especially to the Roman and English law.”<sup>332</sup> In other words, Walton’s training as a Scots lawyer will have led him to realize that law could be successfully imported and need not be “indigenous.” His experiences of Quebec and Egypt will have reinforced this view. In the former, he found another jurisdiction in which “the law occupies a position midway between the Common law and the Civil law.”<sup>333</sup> In 1913, he wrote that “the two countries whose legal systems present the closest analogy to that of Quebec are Louisiana and Egypt.”<sup>334</sup> This was because of the shared background in French law and the influence in all three of the French code. But he also recognized a similarity to Scotland.<sup>335</sup>

Walton was also alive to the significance of the historical relationships between legal systems. While at McGill, he published for the law students *Historical Introduction to Roman Law*, because, in “a country of the Civil Law, like the Province of Quebec,” it was important “to show the way in which the Roman Law has grown into the modern Civil Law.”<sup>336</sup> He was likewise alive to the relationship between the law of France and that of Scotland, because they were “to a great extent derived from the same sources,” though there was “little evidence” of “direct borrowing.”<sup>337</sup> He noted that Scotland had “long ceased to be a system of civil law in the same sense as the law of France, Germany, or Italy,” since, “[l]ike the laws of Lower Canada and of Louisiana, the Scots law has been profoundly modified by contact with the English common law.”<sup>338</sup> He nonetheless surveyed the historical resemblances and differences explaining how they had come about. In another study he had noted that:

[A] great part of the Common law of Scotland is still Roman law, not more modified than the *Heutiges Römisches Recht* of Germany or the *Droit Civil* of France. The law of obligations, except where changed by legislation, or the law of servitudes, is very much the same in Scotland as in France. Moreover

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<sup>331</sup> J. Dove Wilson, *The Sources of the Law of Scotland*, 4 JURID. REV. 1, 4 (1892).

<sup>332</sup> Henry Goudy, *Prefatory Note*, 1 JURID. REV. 1, 1 (1889).

<sup>333</sup> F.P. Walton, *The Civil Law and the Common Law in Canada*, 11 JURID. REV. 282, 291 (1899).

<sup>334</sup> F.P. Walton, *The Legal Systems of Canada*, 5 LAW LIBR. J. 55, 57 (1913).

<sup>335</sup> Walton, *supra* note 333, at 291.

<sup>336</sup> F.P. WALTON, *HISTORICAL INTRODUCTION TO ROMAN LAW*, at v (1903).

<sup>337</sup> F.P. Walton, *The Relationship of the Law of France to the Law of Scotland*, 14 JURID. REV. 17, 17 (1902).

<sup>338</sup> *Id.* at 18.

Scotland has preserved the same technical phraseology. A French lawyer, turning over a Scots law book, would be astonished to meet at every turn terms with which he was familiar. When the Civil Code of Lower Canada was being prepared, the commissioners were sometimes hard put to it to turn into English some term of the old French law. . . . By a happy thought the commissioners turned to the Scots law and found sometimes there the very words they wanted . . . .<sup>339</sup>

Walton's experience of Egypt during the "Veiled Protectorate" would have introduced him to a complex and plural system of courts and laws. "Mixed Courts" had been introduced to deal with matters involving the substantial foreign community; "Native Courts" dealt with matters exclusively involving Egyptians. Mixed Courts had a bench consisting of Egyptian judges and jurists from sixteen western countries. Similar codes, based on those of France, but which also gave scope for equitable development, were employed in both sets of courts.<sup>340</sup> In particular, Walton made a significant study of the Egyptian codes, publishing a major, two-volume comparative study of the Egyptian law of obligations.<sup>341</sup> A second edition appeared in 1923.<sup>342</sup> Again, he would have increased his knowledge of borrowing of laws.

Drawing on these experiences, Walton addressed the International Academy of Comparative Law on August 1, 1927 on "The Historical School of Jurisprudence and Transplantations of Law."<sup>343</sup> The address was published as an article the same year, with the first part devoted to a reassessment of F.C. von Savigny's views on law, particularly as expressed in his famous pamphlet of 1814, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*.<sup>344</sup> He described Savigny's view thus:

Savigny's theory is that the law of any country grows up naturally by customary usage and without legislation. It is a

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<sup>339</sup> Walton, *supra* note 333, at 291-92.

<sup>340</sup> Mark S.W. Hoyle, *The Mixed Courts of Egypt: An Anniversary Assessment*, 1 ARAB L.Q. 60 (1985); Mark S.W. Hoyle, *The Mixed Courts of Egypt, 1875-1885*, 1 ARAB L.Q. 436 (1986); JASPER YEATES BRINTON, *THE MIXED COURTS OF EGYPT* (rev. ed., 1968); Maurice S. Amos, *Legal Administration in Egypt*, 12 J. COMP. LEGIS. & INT'L L. 3d ser. 168 (1930).

<sup>341</sup> F.P. WALTON, *THE EGYPTIAN LAW OF OBLIGATIONS: A COMPARATIVE STUDY WITH SPECIAL REFERENCE TO THE FRENCH AND ENGLISH LAW* (1920).

<sup>342</sup> F.P. WALTON, *THE EGYPTIAN LAW OF OBLIGATIONS: A COMPARATIVE STUDY WITH SPECIAL REFERENCE TO THE FRENCH AND ENGLISH LAW* (2d ed. 1923).

<sup>343</sup> F.P. Walton, *The Historical School of Jurisprudence and Transplantations of Law*, 9 J. COMP. LEGIS. & INT'L L. 3d ser. 183, 183 n.1 (1927).

<sup>344</sup> *Id.* at 183-88.

product of the peculiar genius of a particular people. It may be compared with a language. The law of a people, like their language, has an organic connexion with their peculiar being and character.<sup>345</sup>

Savigny, according to Walton, saw the ancient customs of a nation as “almost part of the blood and bone of a people.”<sup>346</sup> He noted, however, that “most unfortunately for Savigny’s theory, there was, besides this old *Gewohnheitsrecht*, a great deal of German law which had not grown up in this rather mysterious way.”<sup>347</sup> As well as “plenty of enacted law . . . there was also the great body of law—the so-called modern Roman law, or *Pandektenlehre*—of which certainly it could not be said that it grew out of German consciousness or that it reflected their peculiar national mind and character.”<sup>348</sup> To overcome this problem, Savigny argued that, at a certain stage in the history of a nation, “a class of professional jurists arises.”<sup>349</sup> This led to law developing in a different fashion. In Germany, however, the lawyers “went back to Roman law, and devoted all their energies to introduce a body of laws which had been evolved in a society profoundly different from that of Germany.”<sup>350</sup> The “fatal point” was that in Germany this law was “of foreign origin.”<sup>351</sup> Savigny’s “arguments in favour of keeping inviolate laws which are the heritage of the race, and in which the national character finds its expression . . . lose much of their force when we face the facts.” Indeed:

The truth of the matter is that a very large part of the German law did not grow out of the consciousness of the German people, and does not bear the marks of their national genius, but, on the other hand, it grew out of the consciousness of the Roman people, and bears the stamp of the Roman mind.<sup>352</sup>

This meant that Savigny’s argument against codification in Germany—that “it checks the natural and unconscious growth of law”<sup>353</sup>—is unfounded. “Savigny’s famous theory did not square at all well with the facts of German

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<sup>345</sup> *Id.* at 183–84.

<sup>346</sup> *Id.* at 184.

<sup>347</sup> *Id.* at 185.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at 185–86.

<sup>352</sup> *Id.* at 187.

<sup>353</sup> *Id.* at 185.

law, and his arguments altogether failed to prevent the making of codes, which has gone on merrily since his time.”<sup>354</sup> Walton argued, however, that Savigny was owed a great debt, as he had shown the importance of the study of legal history, which, as a result of his endeavors, had advanced greatly in the pasty fifty years in every European country.<sup>355</sup>

Walton thought that Savigny would have been “shocked . . . profoundly” by some recent events of “an entirely novel character.”<sup>356</sup> He thinks it “a new phenomenon in the legal world.”<sup>357</sup> This was when “a people possessing an ancient customary law, which had grown up ages ago out of their legal consciousness, has deliberately thrown overboard this heritage of the race, and has introduced at one blow a legal system entirely foreign.”<sup>358</sup> He described this as “Transplantation of a Legal System.”<sup>359</sup> This was not the imposition by a conqueror of his laws on a conquered race, nor was it “the case of one country copying a particular rule or a particular piece of legislation which has been found to work well in another place,” which “kind of legislative borrowing is much commoner than it used to be.”<sup>360</sup> Rather, the examples he was thinking of were the “transplantations of a legal system, or a large part of a legal system, from one country to another.”<sup>361</sup> In particular he was considering where:

[W]e see an oriental country with a system of law of great antiquity, and, moreover, a system of law which is closely bound up with the national religion, casting all, or a great part of this old law away, and adopting the law of a western people, far removed in race, religion, history and culture. And yet this has happened in our time in Egypt, in Japan and in Turkey.<sup>362</sup>

He then discussed briefly these examples of what he had called “transplantation.”<sup>363</sup> He expressed the view that “the foreign law which has been so violently introduced will serve the needs of the people just as well as if it had grown out of their own legal consciousness.”<sup>364</sup>

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<sup>354</sup> *Id.* at 188.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 189.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 189–91.

<sup>364</sup> *Id.* at 192.



Walton has confined the term “transplantation” to full-scale modern transplants; but it is worth noting that he thinks borrowing of rules common, perhaps even easy.<sup>365</sup> Indeed, how could he think otherwise given his experience and his studies of codification? He had already written in 1916 that “[c]odifiers are arrant thieves, and every new civil code ought to contain some articles which the legislators of other countries will make up their minds to steal so soon as a favorable opportunity occurs.”<sup>366</sup> In an assessment of the law of Czechoslovakia, as represented in a recently produced volume, he remarked in 1934, using an interesting horticultural metaphor, that it showed that “new laws, very modern in spirit, have been grafted on the old stocks of Austrian law and Hungarian law.”<sup>367</sup> In the same paper, however, he was fascinated with a volume on Romania, but he regretted that the authors had passed “very lightly over what is to a foreign student the most interesting question, namely how the French law has flourished in Rumania [*sic*] after it was transplanted there.”<sup>368</sup> The adoption of French law in Romania started in 1839 with the Code of Commerce; in 1864, the Civil Code followed. All of this modernized the law and social practices.<sup>369</sup> It is clear that he thought this full-scale type of transplantation must have been difficult; but his only evidence was a highly romanticized remark about the “Rumanian [*sic*] soul” being absent from the code.<sup>370</sup>

With his observations about the frequency of borrowing of legislation and his discussions of full-scale transplants, such as those in Romania, Turkey, Japan, and Egypt, Walton is approaching Alan’s theory of transplants; but he does not quite get there. He was not willing to put the whole package together. He thought borrowing modern; but this was because he did not seem to think of the reception of Roman law as being about borrowing. He saw some types of borrowing as easy; but he assumed that major transplants, as in Romania, were not easy. He did not see the taking of European law to the colonies as involving transplantation; only the substitution of one sophisticated law system for another was viewed as such. Perhaps all of this was because he focused too much on legislative borrowing. He did not recognize that there must be significant implications for our understanding of law and its development. But the metaphor and the ideas were there.

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<sup>365</sup> See *id.* at 189 (giving the example of worker’s compensation laws).

<sup>366</sup> F.P. Walton, *Civil Codes and Their Revision. Some Suggestions for Revision of the Title “Of Ownership,”* 1 S.L.Q. 95, 116 (1916).

<sup>367</sup> F.P. Walton, *The Study of Foreign Laws*, 46 JURID. REV. 1, 9 (1934).

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* at 9–12.

<sup>370</sup> *Id.* at 12–13.

Indeed, the metaphor was then taken up and perhaps extended by other comparative lawyers. In 1930, R.W. Lee, another British comparative lawyer with an imperial career, deployed it to take into account European law taken to a colony when he talked of Roman-Dutch law as “a body of laws transplanted from its native land to distant dependencies overseas.”<sup>371</sup> Interestingly enough, he drew a comparison with the friend who had gone to the colonies, been lost sight of, and returns: much is changed, but some things have remained the same.<sup>372</sup> But he noted that Roman-Dutch law had “borrowed from [English law] much that has helped it to adapt itself to a new age, much too that harmonizes imperfectly with what was there before”.<sup>373</sup> remarks that potentially fit with the ideas of *Legal Transplants*. In 1937, Hermann Mannheim, a German refugee of Jewish descent, published a study of the use of the jury in criminal trials in continental Europe, which he described as a “transplantation” from England; he also used the verb “to transplant,” discussing a statute.<sup>374</sup> Henri Lévy Ullmann, a friend of Walton, referred to his usage of transplantation in discussing Turkey in 1939.<sup>375</sup> This, of course, leads to the use by Wortley and Hamson already noted for the 1950s.

Given the common usage of the metaphor of “transplant” in many types of situation, it would be very odd if there were no other scattered examples of the employment of the term in this period to refer to the adoption of rules or procedures from another legal system; and it is easy indeed to discover these with a simple word-search in a data base.<sup>376</sup> But Walton’s discussion

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<sup>371</sup> R.W. Lee, *What Has Become of Roman-Dutch Law?*, 12 J. COMP. LEGIS. & INT’L L. 3d ser. 33, 33 (1930).

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 42. For more information on R.W. Lee, see Tony Honoré, *Lee, Robert Warden (1868–1958)*, OXFORD DICTIONARY NAT’L BIOGRAPHY, <http://www.oxforddnb.com/view/article/34469?docPos=2> (last visited Mar. 12, 2013).

<sup>374</sup> Hermann Mannheim, *Trial by Jury in Modern Continental Criminal Law*, 53 L.Q. REV. 99, 99, 116 (1937); Hermann Mannheim, *Trial by Jury in Modern Continental Criminal Law [Part II]*, 53 L.Q. REV. 388, 391 (1937); see also Roger Hood, *Hermann Mannheim (1879–1974) and Max Grünhut (1893–1964)*, in JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN, *supra* note 319, at 709 *passim* (providing biographical information on Mannheim).

<sup>375</sup> Halpérin, *supra* note 224, at 12 n.3.

<sup>376</sup> See, e.g., W.S. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431, 437 (1916) (“[W]ere so different from those prevailing in our own country and law, that we cannot fairly transplant it from one to the other. . . .”); William R. Vance, *A Proposed Court of Conciliation*, 1 MINN. L. REV. 107, 110 (1917) (“[T]o transplant to American soil this European exotic. . . .”); Eki Hioki, *A General Survey of the Judicial System of Japan*, 10 CHINESE SOC. & POL. SCI. REV. 581 (1926) (“[A] very difficult task to transplant Occidental ideas of jurisprudence to the East. . . .”); Carl Wheaton, *Jurisdiction of Justices’ Courts in Actions of Attachment in the City of St. Louis*, 14 ST. LOUIS L. REV. 25, 31 (1928) (“[B]y transplanting the provision of Section 2838 . . . into the city of St. Louis.”); Thomas D.

of “transplantation” is still unique and important. He has taken the term as providing a metaphor with which we can understand a legal phenomenon, and given it significant explanatory power, just in the way Alan was to do in the early 1970s for “legal transplants.” Of course, Walton has not worked the idea out so fully as Alan did half a century later; nor would his views and Alan’s be at one on all points. Moreover, Walton’s metaphor was presumably horticultural rather than surgical. But the similarities are still striking: borrowing is playing a central part in legal development; the culture of lawyers is central to the legal system and the adoption of rules; law is not closely linked with society in a necessary fashion (even if Walton’s target was Savigny’s idea of law as an expression of the *Volksgeist*).

Some classic cases of transplants and receptions, as singled out by Michele Graziadei, include: the reception of Roman law; the diffusion of some civil codes; diffusion of the common law; and mixed legal systems.<sup>377</sup> Walton, like Watson, was interested in all of these. Both men also discussed to some extent, if in differing ways, the factors Graziadei identifies as significant in promoting receptions and transplants.<sup>378</sup> Both recognized that “transplants can be unsettling to those who believe law must reflect the culture and mores of a particular society.”<sup>379</sup>

What is interesting is the way Walton’s interests were later echoed by those of Alan: Roman law, Scots law, codifications, and mixed legal systems. This suggests that to have been educated in a legal system like Scotland’s that is not a dominant one—and which cannot trace or rely on claims (even if pretended) of immemorial antiquity—may well help a scholar to develop a predisposition to accept the idea of transplants. Just as the idea of legal transplants obviously makes sense as a theory to many Italian and Israeli scholars, so it will resonate powerfully for Scots lawyers, such as Alan and Walton, since their legal system has quite evidently borrowed much. Scots lawyers cannot see Scots law as an intellectual system closed off from the influence of other laws, and whose development can be made subject to a narrow explanation solely in terms of Scottish politics, economics and society. Such a limited set of explanations will make no sense.

By 2013, the forty years of history of legal transplants has led the theory from a position of being either largely ignored or rejected to one of being generally accepted—often enthusiastically—as a standard approach to comparative law—indeed one judged worth developing further. The same

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Thacher, *Aid Asked in Bankruptcy Investigation*, 16 A.B.A.J. 641, 643 (1930) (“[W]e cannot transplant the English statute.”). Others can be traced.

<sup>377</sup> Graziadei, *supra* note 205, at 445–53.

<sup>378</sup> *Id.* at 455–61.

<sup>379</sup> *Id.* at 465.

forty years have correspondingly seen Alan's book, *Legal Transplants*, turn from an often harshly criticized work into a classic of comparative law. Frederick Walton is a minor figure, now largely forgotten, except for a few scholars of the history of comparative law. One suspects that, after the Second World War, with the end of the British Empire, and the stimulus it had very definitely given to the study of comparative law in Great Britain, his type of global thinking about law and his type of experience of a wider world ended. By 1970, however, the world was opening again; broader perspectives allowed connections that had fallen from sight to be seen once more. A scholar with broadly similar interests to those of Walton, with a similarly extensive and detailed knowledge of the legal history of a whole variety of societies, could again see that there must be something very significant about borrowing, both historical borrowing and borrowing between contemporary jurisdictions, and thus about the transplantation of laws, whether the transplant was major or small. The idea of legal transplants was at some level the same as the now forgotten usage of fifty years earlier. But scientific developments meant the metaphor took on a new coloring and could be extended in different ways, a means was offered to explain much through the organization and imagery provided by the "transplant" metaphor; and so it was that *Legal Transplants: An Approach to Comparative Law* came to be written.