POWER, LEGAL IMPERIALISM, AND DEPENDENCY

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This review essay integrates applicable elements of scholarly perspectives that in quite different ways deal with political and economic power, legal imperialism, and dependency. Representative examples of scholarly treatments of these subjects were chosen from analyses of families of law, critical legal studies, comparative legal systems, world system and dependency theory, and legal history. Most are modern or contemporary works, but a few were chosen from nineteenth- and early twentieth-century publications to trace changing modes and emphases upon the central theme of law and power.

For nearly one hundred years, conventional comparative law scholars have classified a variety of broad transnational legal cultural characteristics into categories called families of law. René David's *Major Legal Systems in the World Today: An Introduction to the Comparative Study of the Law* (in its English version, translated by J. E. C. Breirly, 1978) is a typical example of such a classificatory conceptualization. Despite considerable disagreement about the theoretical bases and criteria for distinguishing such families, the concept has been and continues to be employed by many comparative scholars. In the 1970s, Konrad Zweigert and Hein Kotz evaluated nearly eighty years of scholarly discussion and evaluation of families of law in their carefully researched book *1 An Introduction to Comparative Law: The Framework* (1977).

Among the criteria utilized by families of law scholars during those eight decades were factors as diverse as ideology, legal technique, race, inherent attributes, historical antecedents, and legal style (Zweigert and Kotz, 1977: 57–67). Unfortunately, a number of the contributors failed to provide precise, consistent, and measurable standards for application of these factors. Zweigert and Kotz emphasized another major weakness—that a nation's legal system often could be classified in one family of law in terms of one category of law and in another family in a different category (ibid.: 59).

Like most creators of conceptual frameworks designed to identify the purposes, organization, and fundamental attributes of judicial systems or legal professions, as well as the attributes of law in particular nations or groups of nations, virtually all fami-

LAW & SOCIETY REVIEW, Volume 23, Number 5 (1989)

lies-of-law contributors explicitly or implicitly accepted the assumption that law embodies the institutionalization of objective dispute resolution. With the possible exception of the inclusion of legal ideology, there is little consideration of the alternative assumption, posited frequently in domestic revolutions or in conflicts between nations, that law may be one of the means utilized to achieve or to deny factional or national policy objectives. The significance of domestic revolution, transnational military conquest, economic penetration, or cultural imperialism as key variables in the relationship of a nation or territory to a particular family of law was and is generally ignored. In short, the commitment by most families of law advocates to the concept of law as objective dispute resolution resulted in the minimization of the countervailing assumption that law may be utilized as an instrumentality of power. Conversely, many modern analysts of economic and political power, such as advocates of world-system and dependency theory perspectives, tend to ignore or significantly minimize law as a variable. Nevertheless, despite the conceptual limitations of families of law as a theoretical construct, the essential commitment of all of its advocates to a transnational perspective is an important intellectual contribution. Just as world-system theory and related dependency theory perspectives have contributed significantly to more challenging analysis of worldwide economic, social, and political change (Chirot and Hall, 1982), so has the families-of-law approach abandoned the parochialism of single-nation emphasis. Interestingly enough, world-system and dependency theorists such as Immanual Wallerstein have rather consistently ignored legal cultural factors as significant despite the fact that Wallerstein identified Fernand Braudel as his most influential scholarly role model. Braudel found evidence in Christian Europe and the Muslim Middle East for substantial elite lawyer support of the claims of monarchical prerogatives similar to the findings of Alexis de Tocqueville for Germany (1955: 222–23) and Perry Anderson for British centralization and absolutism (1974a, 1974b). As Braudel put it,

> The more one thinks about it, the more convinced one becomes of the striking similarities, transcending words, terminology and political appearances between East and West. . . . Experts in Roman law and learned interpreters of the Koran formed a single vast army, working in the East and the West to enhance the prerogative of princes. It would be rash and inaccurate to attribute the progress made by monarchy entirely to the zeal, calculations and denotions of these men. All monarchies remained charismatic. And there was always the economy. Nevertheless, this army of lawyers, whether eminent or modest, was fighting on the side of the large state. It detested and strove to destroy all that stood in the way of state expansion. (Braudel, 1972: 683–85)

The lack of continuity in the recognition of legal variables in

the evaluation of world-system theory from the multivariable historical perspective exemplified by Fernand Braudel's *The Mediterranean and the Mediterranean World in the Age of Philip II* (1972) to the major emphasis upon economic variables by Immanual Wallerstein and his disciples in works like *The Capitalist World-Economy* (Wallerstein, 1979) is, unfortunately, characteristic of some contemporary works dealing with power and law. The problem is related both to the conceptualization of legal imperialism and to the structure (or lack thereof) of social scientific inquiry in the subfield. With respect to conceptualization, this review essay examines the contributions of nineteenth- and early twentieth-century scholars and their contemporary counterparts to determine the manner in which they define legal imperialism and identify its major attributes. Regarding the mode of social scientific inquiry, the requirement for the cumulative development of a body of theory and related empirical findings is fundamental. The extent to which these contributors add to such development is also assessed.

Ideally, if each scholarly contributor to the literature on legal imperialism had provided conceptually equivalent answers to similar or identical questions, a cumulative body of knowledge would be readily available. Such questions might include the following: What are the major attributes of legal imperialism? Have these attributes been modified as historical circumstances and scholarly emphases have changed? If so, how? Are there elements of such imperialism that are common to all or most major instances of military conquest or economic domination? Are the legal and judicial elites of the defeated or dominated nations or regions replaced by those of the conquering or dominating nation? If not, what are the circumstances, and are such circumstances relatively consistent in the settings in which they occur? Are claims of the ethical intellectual superiority of the legal system of the dominant legal system consistently made to justify the removal and replacement of an indigenous legal and judicial elite and to eliminate or seriously limit an existing legal system? How? Is the law of the conqueror or the economically dominant invoked to reduce or eliminate the status and property of the subjugated or dominated inhabitants? How? Do these studies build upon the findings of their predecessors cumulatively?

The nineteenth- and early twentieth-century works examined comprise Sir Henry Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideals* ([1861] 1931); Lord James Bryce, *Studies in History and Jurisprudence* (1901); Albert Kocourek and John Henry Wigmore, *Formative Influences of Legal Development* (1918); Charles Phineas Sherman, *1 Roman Law in the Modern World* (1924); and John Henry Wigmore, *A Panorama of the World's Legal Systems* (1928). Although the authors of some of these works might prefer not to be catego-

rized as families-of-law scholars, they all provided significant contributions associated with the concept as well as to the analysis of legal imperialism.

I. FAMILIES OF LAW AS MANIFESTATIONS OF POWER OR CULTURAL SUPERIORITY

The concept of families of law was, in part, an intellectual product of the serious investigation of the origins and nature of law which received great impetus in the nineteenth century. Many aspects of that investigation, primarily by British and continental European scholars, were focused upon changes in the characteristics of and capabilities of individuals or groups under law in fundamentally different historical epochs. But, in fact, the major contributors to this investigation often made explicit judgments or emphasized real or purported findings that exhibited notions of national superiority or racial ascendancy of some sort. Sir Henry Maine is one of the most influential of such scholars. Because his often quoted aphorism—"The movement of the progressive societies has hitherto been a movement *from Status to Contract*" (Maine, 1931: 141)—has generally been cited alone, his broader generalizations about the distinctions between "stationary" and "progressive" societies have often been ignored. These generalizations were clearly supportive of the notion that only Western Europe or its direct colonial offspring comprised the "progressive" societies. Law was viewed by Maine as a determinant of the distinction between progressive and stationary societies, with the latter frequently described in rather unflattering terms. The progressive societies were, coincidentally, the major colonial powers of the nineteenth century.

According to Maine, the adoption and maintenance of a universal legal Code determined the development of progressive societies. His comments about Rome and India are illustrative:

> Ethnology shows us that Romans and the Hindus sprang from the same original stock, and there is indeed a striking resemblance between what appear to have been their original customs. Even now, Hindu Jurisprudence has a substratum of forethought and sound judgement, but irrational imitation has engraved in it an immense apparatus of cruel absurdities. From these corruptions the Romans were protected by their code. It was compiled while the usage was still wholesome, and a hundred years afterwards it might have been too late. The Hindu law has been to a great extent embodied in writing, but, ancient as in one sense are the compendia which still exist in Sanskrit, they contain ample evidence that they were drawn up after the mischief had been done. We are not of course entitled to say that if the Twelve Tables had not been published the

> Romans would have been condemned to a civilization as feeble and perverted as that of the Hindus, but this much at least is certain, that with their code they were exempt from the very chance of so unhappy a destiny. (Maine, 1931: 16)

Concerning the claimed superiority of Western European progressive societies, Maine concluded:

> When primitive law has once been embodied in a Code, there is an end to what may be called its spontaneous development. Hence forward the changes effected in it, if effected at all, are effected deliberately and from without. . . .
>
> . . . It is only with the progressive societies that we are concerned and nothing is more remarkable than their extreme fewness. In spite of overwhelming evidence, it is most difficult for a citizen of western Europe to bring thoroughly home to himself the truth that the civilization which surrounds him is a rare exception in the history of the world. The tone of thought common among us, all our hopes, fears, and speculations, would be materially affected, if we had vividly before us the relation of the progressive races to the totality of human life. It is indisputable that much the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the moment when external completeness was first given to them by their embodiment in some permanent record. (Maine, 1931: 16)

For Maine, law was a determinant of the static or progressive tendencies of a society rather than economics:

> There has been material civilization, but, instead of the civilization expanding the law, the law has limited the civilization. The study of races in their primitive condition affords us some clue to the point which the development of certain societies has stopped. (Maine, 1931: 17, 18)

Maine was totally committed to the proposition that the individual had replaced the family unit in progressive societies:

> The movement of the progressive societies has been uniform in one respect. *Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place.* The individual is steadily substituted for the family, as the unit of which civil laws take account. (Maine, 1931: 140)

Several decades after Sir Henry Maine published *Ancient Law*, James Bryce published the two-volume collection of writings and lectures entitled *Studies in History and Jurisprudence*, in which, like Maine, he equated the influence of ancient Roman and modern English law. Bryce actually included materials from lectures and writings completed several years before the book's publication in 1901, thus largely reflecting late nineteenth-century viewpoints. Unlike Maine, Bryce explicitly viewed race as a determinant of his claimed distinction between "advanced" and "back-

ward races." In October 1902, for example, he delivered the Romans Lecture in the Sheldonian Theatre, Oxford, "The Relations of the Advanced and Backward Races of Mankind," embodying these positions. In it he argued:

> Our own time stands eminent and peculiar for this: that it marks the completion of a process by which all the races of the world have been affected, and all the backward ones placed in a more or less complete dependence upon the advanced.

He candidly cited two economic and political power considerations as crucial to this transition, notably "the desire of civilized producers of goods to secure savage or semi-civilized consumers by annexing regions they inhabit, and rivalry of great civilized states" (Bryce, 1902).

Bryce's major contribution to the literature on legal imperialism was, of course, his two-volume *Studies in History and Jurisprudence*. In it he provided one of the clearest analyses of the use of law as an instrument of colonial rule. He was especially concerned with providing a comparison of ancient Roman and modern (i.e., nineteenth-century) British uses of law with relation to the region and people they had conquered, contending that the British achievement was greater. Bryce chose India as illustrative of "the phenomena of contact between the law of the conqueror and that of the conquered on the largest scale and in the most instructive form" (Bryce, 1901: 90). Recognizing that Indian law was not totally eliminated after British conquest and rule, Bryce criticized those portions of Indian law that he considered inadequate (i.e., commercial law) or primitive, (e.g., criminal law) and reemphasized the contemporary colonial attitude of the alleged superiority of British law:

> The Conquerors have given their law to the conquered. When the conquered had a law of their own which this (colonial) legislation has effaced, the law of the conquerors was better. Where they had one too imperfect to suffice for a growing civilization, the law of the conquerors was inevitable. (Bryce, 1901: 108)

The codification of English law for India was, according to Bryce, "done entirely by Englishmen. In this respect also the more advanced civilization has shown its dominant creative force" (1901: 117). Bryce's arrogant assertions of British superiority aside, his analysis in *Studies in History and Jurisprudence* provided verification for several important uses of law as an instrument of colonialism, such as (1) law as an essential element in maintaining civil order in a colonial society, (2) law as an important adjunct in the collection of colonial revenues, and (3) law as a key variable in the modernization of commercial activity in the colony. Lest it be thought that Bryce's pro-British views were expressed only in the context of Britain's colonial rule, he also

treated the distinction between the colonial expansion of the British common law and the legal imperialism of Britain's continental European colonial rivals, arguing that English common law would "prevail" over the civil law of those competitors. He did, however, feel constrained to modify his views of legal competitiveness by acknowledging that "rival" law systems "may draw nearer" because "within the domain of economic interest the rules (of any department of law) tend to become the same in all countries" (1901: 121–23). Charles Phineas Sherman's work of nearly a quarter of a century later than Bryce's embodied many of the colonial era assumptions of the latter but underscored the cultural and substantive superiority of ancient Roman and modern civil law over both the British common law and the non-European legal systems. Sherman's *1 Roman Law in the Modern World* (1924) described in considerable detail the development of ancient Roman law, its reception and adaption throughout Europe, the Middle East, and North Africa by conquest before and by invitation after the fall of Rome, and its extension by conquest and reception throughout the extensive colonial empires of the major European powers in the modern era. Like Bryce, Sherman seems incapable of crediting non-Europeans with the ability to develop viable legal systems of their own. The legal systems of Islam and Ethiopia were described as mere imitations of the superior Roman legal systems. Ethiopia's (nineteenth-century) legal system was, according to Sherman, based upon Justinian's system modified by 900 years of isolation after Muslim world expansion (1924: 177). The persistence and wide utilization of Islamic law from its region of origin in the Middle East to parts of Eastern Europe, much of North Africa, regions of eastern Africa, plus portions of India, Malaysia, Ceylon, Borneo, and the Philippines was difficult for both Bryce and Sherman to account for in the context of the claimed superiority of Western law. Bryce suggested that "Musulman law" would simply weaken in the face of Western law, but he did not explain its persistence (in 1901) after three centuries of British colonial rule in India. Sherman simply reaffirmed the claims of earlier Western scholars who argued that Islamic law merely imitated Roman law. He cited a British scholar of Roman law, Amos, in a passage which stripped Islamic religion *and* law of its originality:

> If . . . the Mohammedan religion is nothing but Hebraism adapted to an Arabian soil, it seems also true that Mohammedan law is nothing but the Roman law of the Eastern Empire adapted to the political conditions of the Arab dominions. (1924: 180)

Interestingly, Sherman preferred largely to ignore the combination of religion and law that is basic to modern as well as ancient Islamic law. Sherman did, of course, accurately document many instances in which continental civil law was introduced within the framework of national Islamic systems either by volun-

tary reception, such as Ottoman Empire adaptations of commercial and maritime codes based upon the Code Napoleon, or the introduction of Western law imposed by European capitulations forced upon some of the territories of the Ottoman Empire, such as Egypt in the nineteenth century. Under these foreign or mixed (Egyptian and foreign) tribunals, foreigners in Egypt were not subject to native Egyptian courts but to the consular extraterritorial courts (or mixed courts) provided for under the imposed capitulations (1924: 184–86). Bryce in treating India had limited his analysis of the use of law as an instrument of social and colonial control and power to conquest and its consequences. Sherman dealt with a much broader spectrum of uses of law and thus assessed extraterritorial courts as well as conquest. Both emphasized the superiority of Western legal systems.

Albert Kocourek and John H. Wigmore undertook a much more ambitious intellectual task than Bryce or Sherman. In their *Formative Influences of Legal Development* (1918) they assembled and assessed portions of the major nineteenth- and early twentieth-century contributions to comparative legal systems. Not surprisingly, many of these chapters treated law and power in the context of the prevailing colonialism and social conservatism of the era. Stewart Houston Chamberlin (1918) and James Bryce (1918), in separate chapters, emphasized race as the determinative variable, while Herbert Spencer's contribution emphasized the Social Darwinism embodied in his *Social Statics* (1954) in the context of legal development. Race and Social Darwinism have quite appropriately been rejected on both ethical and social scientific grounds, but their inclusion in the 1918 volume by Kocourek and Wigmore provides rather significant evidence of the limitations as well as biases in social scientific inquiry in that era.

In addition to contributors such as Bryce and Chamberlin, who with a few others in the volume represented the intellectually biased in the collection, several other authors made serious attempts at breaking new ground conceptually. Wigmore himself attempted to adapt a theoretical model from the natural sciences to construct a new conceptual basis for the investigation of comparative legal systems, a "planetary" hypothesis that did not prove persuasive among his contemporaries. A nineteenth-century Italian scholar, Achille Loria, rejected the then-influential theories of Savigny regarding law as a product of national consciousness or of those like Bryce and Chamberlin who argued that national legal systems were distinguished by racial superiority or inferiority. Utilizing cross-national empirical evidence from family law, laws of property, inheritance, and contract, as well as criminal law, Loria concluded:

> If the law then constitutes the sanction that society, or more strictly, its ruling classes, accords to existing economic conditions, it must then of necessity reflect these

> same conditions, and docilely follow in the train of their successive transformations. The law, in other words, proceeds from the economic constitution and changes as it changes. The theory of Savigny and the historical school, which regards the law as the product of the national conscience, or the result of the peculiar inheritance and habits of a people, is thus entirely erroneous. On the contrary, the legal systems of the most widely separated races and nations must be the same whenever the prevailing economic conditions are identical. On the other hand, every nation must undergo a change in its legal system when the onward march of its civilization has brought about radical changes in its legal system and economic institutions. . . . Thus legal history shows us that instead of being the product of abstract reason, or the result of national consciousness, or a racial characteristic, the law is simply the necessary outcome of economic conditions. For this reason a definite legal system may pass on from one nation to another and leap from an earlier to a later century, whenever its corresponding economic system is transmitted from this people to that and from one historical epoch to another. (1918: 240–60)

Loria's work, originally published in the nineteenth century, which cited John Locke in its introduction, anticipated in a number of respects twentieth-century analyses of legal development based on Marxian economic determinism.

The real or alleged scientific contributions to the explanation of legal development thus included a very wide cross section of nineteenth- and early twentieth-century works ranging from contemporary anthropological investigations to mere restatements of positions taken as early as the eighteenth century by Montesquieu in his *Spirit of the Laws* ([1748], 1977) such as Henry I. Randall's rehash of law and climatic variations in "Law and Geography" (1918). Some, like Loria's economic determinism, anticipated some current emphases. Others, like Randall, merely restated the past. One additional contribution by John H. Wigmore completed a significant intellectual transition to the modern era for comparative law and legal development scholars.

In his *Panorama of the World's Legal Systems*, Wigmore provided a detailed analysis on a region-by-region basis of the current status of what he defined as "the three living world-systems (of law)" (1928: 1106); as well as a historical summary of older significant legal systems such as that of Egypt before the Roman conquest. The three current systems were essentially those emphasized most seriously by contemporary families of law analysis such as David and Brierly (1978). Wigmore not only provided the basic definitions of the common law system, which he denominated Anglican; the civil law system, which he called Romanesque; and the Islamic law system (simply called Mohammedan); but he also assessed the geographic and political scope of each system or fam-

ily. In addition he addressed in forthright fashion the problem of legal pluralism by developing his own system for categorizing the extent to which a nation's or a region's legal system is indigenous or adopted from or imposed by an external nation. Conceding that by modern times, all legal systems are to some extent "mixed in origin and history," Wigmore nevertheless argued that classification based upon "present dominant characteristics" was possible. These classes consisted of (1) "pure" systems such as Great Britain and France, (2) "national blends," where a people having a native system have adopted in part an alien system, such as Japan, (3) "colonial composites," where "an alien power . . . has its own political or public law," but continues to preserve and enforce "some elements of the native system" such as Algeria (in 1928), and (4) "colonial duplex composites" which are identical to regular "colonial composites" but involve situations in which the alien power enforces two or more native (legal) systems "such as the elements of private law for Hindus and Moslems in colonial India" (Wigmore, 1928: 1133–34).

Just as some of his predecessors in this sampling of nineteenth- and early twentieth-century law and power literature suggested one or more determinants of legal development, so did Wigmore. In contrast to Maine's emphasis upon "early" codification, Bryce's focus upon race, Randall's (from Montesquieu) insistence upon climate and geography, or Loria's economic determinism, Wigmore argued that careful historical analysis of the fate of sixteen ancient and modern major legal systems suggested that "the rise and perpetuation of a legal system is dependent on the development and survival of a highly trained professional class." (1928: 1127). Assessing the sixteen legal systems (ancient as well as contemporary) which he deemed most significant, Wigmore found ample empirical evidence to eliminate race as a determinant.

A summary of the key positions of nineteenth- and twentieth-century scholars from Maine ([1861] 1931) to Wigmore (1928) indicates the following: (1) All recognized that military conquest and other manifestations of external power replaced or modified the indigenous legal systems of conquered or dependent nations or regions; (2) Most suggested some sort of stages of legal development sequence, with the legal systems of Western Europe accorded the most advanced classification on the basis the criteria chosen by each author—for Maine, earliest code; Bryce, race; Randall, climate and geographic location; or Wigmore, development and perpetuation of a professional lawyer elite. (3) Some took very seriously social scientific goals of building upon (and citing properly) previous research endeavors. Thus the collection and evaluation of the work of the scholars of the previous century by Kocourek and Wigmore (1918) and Wigmore (1928) represents, despite some of its serious bias, a very significant contribution to some substantive areas as well as to social scientific investigative goals. Unfortunately,

this tradition of investigative continuity was not maintained by all of the contemporary writers reviewed in the second portion of this review essay.

René David and J. E. C. Brierly (1978), for example, provide a much narrower perspective for their classifications of families of law than did John H. Wigmore and largely ignore the cumulative contributions of many of their predecessors in the extensive families-of-law literature. Particularly important among the many omissions were the variety of discussions of explanatory variables. David and Brierly, in short, provide, as perhaps the most widely cited and utilized contemporary work on the concept, merely a limited descriptive historical treatment largely innocent of citations of the approximately nine or ten decades of conventional law investigation and use of the subject. Especially serious is their failure to discuss or test the wide variety of claimed determinants for the expansion of several of the particular families. Zweigert and Kotz (1977), conversely, provided, as was suggested in the introduction to this review essay, an empirical investigation and a series of conceptual analyses that fulfill in many important respects the criteria for the development of the rigorous comparative cross national scholarly perspective. After assessing the variety of goals, approaches, and methods recognized and employed by legal comparativists, the two authors provided a very useful introductory section to the historical development of the comparative law approach and an additional introductory section on doctrinal style for the major portion of the book, consisting of six major chapters on major families of law. Both David and Brierly and Zweigert and Kotz shared the tendency of earlier scholars to designate legal systems originating outside of Europe as less important. But here the similarity gives way to major differences. Zweigert and Kotz not only identified a larger number of families, eight, but also devoted a great deal more analysis to the distinctions between them, the variables that have captured the attention of early as well as contemporary comparativists, the history and current status of the legal and judicial elites in each family, and the prospects for further development. A serious effort was made to identify and classify in a conceptually equivalent manner the variables that provided the basis for the similarities and differences between five European (Romanistic, Germanic, Anglo-American, Nordic, and Socialist) and three non-European (Far Eastern, Islamic, and Hindu) families of law. This is a very substantial contribution to the examination of the relations of power and law between major and dependent nations and regions because it built upon the significant contribution of scholars of earlier decades. What Zweigert and Kotz did not do (nor did David and Brierly) was to propose testable hypotheses regarding the variables considered important in the families-of-law literature, as had John H. Wigmore (1928).

The remaining contemporary books reflect the significant ad-

vances as well as problems in the analysis of law and power. The books comprise an excellent contribution by Martin Shapiro entitled *Courts: A Comparative and Political Analysis* (1981); a serious attempt at defining the comparative judicial and legal approach by Theodore L. Becker, *Comparative Judicial Politics: The Political Functionings of Courts* (1970, 1987); M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (1975); Hans S. Pawlisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (1985); Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (1985); and Richard L. Abel and Philip S. C. Lewis (eds.), *Lawyers in Society: The Common Law World* (1988a) and *Lawyers in Society: The Civil Law World* (1988b).

To date, two volumes of *Lawyers in Society*, a projected three-book analysis, have been edited by Richard L. Abel and Philip S. C. Lewis. The first of these, *The Common Law World*, consists of seven chapters dealing with legal professionalism in Great Britain, which is the source of the common law system, and in six national professions of Scotland, Canada, the United States, Australia, New Zealand, and India. A preface and an introductory chapter set the stage for the examination of these national legal professions. In the introduction Philip S. C. Lewis provides an excellent and comprehensive analysis of the major contributions to and problems persisting within the study of comparative cross-national legal professions. But the second chapter offers the organizing hypotheses and social scientific framework for a book in which eight scholars contributed, either singly or in combination, data and conceptual analysis on seven different national legal professions. Richard L. Abel's investigation of England and Wales as well as his chapter on the United States (Chapter 5) are based on the view that professionalism is "a specific historical formation in which the members of an occupation exercise a substantial degree of control over the market for their services, usually through an occupational association" (Abel and Lewis, 1988a: 23). According to Abel, this characteristic of legal professions is common to other professions because "all occupations under capitalism are compelled to seek control over their markets" (ibid.).

The advantage derived from focusing upon one theme is that the other contributing authors may be asked to concentrate upon the central hypothesis rather than presenting chapters that may be based upon unrelated concepts. The disadvantage is that other potential explanatory perspectives (such as unique competence, relationship to ruling elites) are ignored or minimized.

In Chapter 3, Alan A. Paterson marshals considerable historical and contemporary evidence in the Scottish legal experience to reject the notion that market control should be "the defining characteristic" of the legal profession. Indeed, he argues that this variable fails to distinguish any profession "from guilds, trade unions,

or many other occupations" (ibid.: 77). In contrast, Chapter 4, on Canada, by Harry Arthurs, Richard Weisman, and Frederick Zemans generally confirms Abel's hypothesis, as does Abel's chapter on the United States. In Chapter 6, David Weisbrot concludes that the fragmented Australian legal profession has made market control uncertain as an explanatory variable. Georgine Murray did not seriously address the applicability of the market control thesis for New Zealand, preferring to assess other factors such as race, class, and gender which she concluded to be more determinative of the profession in New Zealand. Similarly, J. S. Gandhi's chapter on the lawyers of India (Chapter 8) ignores market control and stresses the profession's emergence from colonialism, its disconnection from traditional society, and its "bleak" outlook (ibid.: 379). With the exception of Gandhi's brief but critical chapter, each contributor addresses rather fully a wide range of issues concerning these national legal professions, notably their individual historical development; socioeconomic composition; institutional organization; relationship to the public, the state, and the universities; their control of entry and discipline; and the nature of their professional practices and activities (Abel and Lewis, 1988a). The contributors to the second volume similarly provide empirical data on the legal professions of the civil law nations evaluated.

The second of the three projected volumes on the comparative sociology of the legal profession examines attorneys in eleven nations in which the civil law family of laws is dominant: Belgium, Brazil, West Germany, France, Italy, Japan, the Netherlands, Norway, Spain, Switzerland, and Venezuela. Entitled *Lawyers in Society: The Civil Law World*, this volume was introduced by an exceedingly balanced and perceptive chapter, "Lawyers in the Civil Law World," by coeditor Richard L. Abel. He not only reviewed much of the existing literature on lawyers in civil law nations, but he also identified the serious problems of cross-national comparison between common and civil law systems, such as basic differences in the defined external boundaries of a legal profession, the nature of internal subdivisions of the profession, and the major tasks of the profession. Abel rejected the theory of market control based upon professional self-regulation of the boundaries of and competition within the legal professions, which he proposed as central to professionalization of law in the common law world. Abel's rejection of his own hypothesis in the first volume is difficult to reconcile because of the all-embracing sweep of his original proposal: "All occupations under capitalism are compelled to seek control over their markets" (Abel and Lewis, 1988a: 23). If this proposition is true, the presence or absence of a capitalistic economic system would presumably determine the major purposes and mode of organization of legal professions in any nation having such an economic system rather than the family of law.

The extent to which a variable like the economic system de-

termines the organization and purposes of national legal professions may be demonstrated by indicators other than market control. Indeed, one of the contributors to the civil law volume treated professional market control as secondary to other important influences of capitalism. Jon T. Johnsen, in his chapter "The Professionalization of Legal Counseling in Norway," indicates that Norwegian advocates "are part of a wider . . . professional culture of jurists." As such, they "feel less pressure to control the market." He concludes that the Norwegian "legal system gradually becomes increasingly biased in favor of the interests of capital" (Abel and Lewis, 1988b: 91). Every one of the eleven national legal professions assessed in the volume devoted to civil law systems is capitalistic. Only Abel and Johnsen directly address the relationship of capitalism and national legal profession, albeit with different emphasis. Neither has attempted to explore the possible relationship of capitalism to the partial convergence of the common law and civil law families of law briefly described by Abel (Abel and Lewis, 1988b: 42–43).

Except for Gandhi's brief treatment of the relationship of colonialism to the development of the Indian legal profession, these two volumes generally ignore the relationship between law and political and economic power so well documented by Barbara and Allen Isaacman on colonial and postcolonial Mozambique in *The Politics of Informal Justice*, edited by Abel in 1982 (see Isaacman and Isaacman, 1982: 281–323).

Martin Shapiro's *Courts* is not concerned with the traditional and conventional emphasis upon families of law, but his comparative cross-sectional approach and his reexamination of four fundamental assumptions about judicial independence, the adversary court prototype, and the judicial traditions of objective decision-making procedures and "winner-take-all" decisions effectively challenges a number of long-accepted conceptions that have been an integral part of families-of-law tradition and description. Shapiro's reanalysis of the role of courts in conflict resolution is firmly based in the conceptual approach of Lon Fuller and builds upon the logical analysis of conflict resolution structured upon a triad in which two of the three parties in conflict agree to call upon a third uninvolved party to resolve the dispute. The variety of consequences of this virtually universal phenomenon are treated logically in the first chapter, "The Prototype of Courts." But the remaining four chapters are constructed from historical experience rather than logic. Consequently, his chapters "English Courts and Judicial Independence," "The Civil Law System and Preexisting Legal Rules," "Judging and Mediating in Imperial China," and "The Courts of Islam and the Problem of Appeal," respectively, clarify the important distinction between judicial and political independence in Great Britain, the extent to which continental civil judges actually exercise more judicial discretion than the tradition

of codified law systems implies, the reality of bureaucratic formal legal rules and penalties in an ostensibly mediation-centered Far Eastern judicial system, and the relationship of the appeals process to the presence or absence of stable, long-lasting governmental systems in Islam. Based upon rich historical analysis, these portions of Shapiro's investigation are a valuable and well-reasoned critique of conventional families-of-law prototypes of the common law, civil law, Far Eastern, and Islamic families.

A consistent emphasis in Shapiro's study (in addition to its treatment in Chapter 2) is the concept of independence of the judiciary. He summarizes the variety of definitions of such independence from the elementary absence of monetary dependence upon one of the parties in litigation to the much more significant, and rare, freedom from the political sovereign. For the most part, the definitions of judicial independence are based upon the relationship of a judge to king in Parliament in different eras in British constitutional and political history. But Shapiro also recognizes, especially in his introductory chapter, "The Prototype of Courts," that external intrusion into nations or regions by military conquest brought, in a phrase similar to Bryce's colonial terminology of the nineteenth and early twentieth centuries, the law of the conqueror. This either replaced indigenous law, or the latter was adapted to the purposes of the new ruler. In this respect, Shapiro shares an intellectual reawakening of interest in the variety of forms of legal imperialism with Zweigert and Kotz (1977), Theodore L. Becker (1970, 1987), and the contributors to a reanalysis of the forms and consequences of imposition of law edited by Sandra B. Burman and Barbara E. Harrell-Bond (1979).

Not surprisingly, there has been considerable disagreement about this renewed interest in the relationship of law, conquest, and other impositions of external power or internal power (in the context of national judicial systems and legal professions) and the oft-mentioned sequential development of legal systems from so-called lower to higher organizational and procedural forms. Modern comparative judicial scholars often treat these areas of inquiry as relatively novel. Becker, for example, described recent studies of the relationship of societal complexity to legal development as "exploration into a new area" (1970: 109) despite the fact that major controversies over issues of this sort had occurred during the nineteenth century when Sir Henry Maine's hypotheses were subjected to searching intellectual scrutiny (e.g., Randall, 1918: 209–13). Among modern American scholars, this question has often been treated in the context of the relationship of societal complexity to the evolution of legal institutions. The contemporary contributions of Schwartz and Miller (1964) and Stuart Nagel (1962) are thus heirs to studies of the nineteenth- and early twentieth-century investigators. Both studies would have avoided recapitulation of old positions if they had reviewed and built upon the

earlier findings while rejecting those they found unsound or unacceptable. John H. Wigmore, either alone (1928) or in collaboration with others (Kocourek and Wigmore, 1918), represents an intellectual bridge between the older group of investigators such as Maine ([1861] 1931) and James Bryce (1901, 1902) and the modern, but generally conventional, advocates of a "families of law" mode of classifying national or regional legal systems such as David and Brierly (1978), as well as the modern investigators of law and external or internal power (Becker, 1970, 1987; Burman and Harrell-Bond, 1979; Zweigert and Kotz, 1977; Shapiro, 1981).

In the Harrell-Bond collection, a clear, contemporary statement of the rejection of law as an instrument of power was made by Vilhelm Aubert. His contribution to a conference on imposition of law, "On Methods of Legal Influence," emphasizes two seemingly contradictory traditions in legal theory. One, either positivist or Marxian in conceptional origin, emphasizes law as the instrument of the state. As such, Aubert categorizes law from this perspective as imposed law. Conversely, Aubert views democratically based, consensual conventual law as dependent upon the will of the people. Such law is, by definition, not imposed law. Interestingly enough, Aubert rejects the most direct form of imposed law, war and the conquest of territory and its population, on the ground that such imposition had "relatively little to do with law:

> War cannot be construed as a way of imposing law, although it may result in drastic legal change in the conquered country, or, in the case of a war of liberation, in the liberated and unified society. Likewise, economic penetration into new regions may expose populations to new forces against which they cannot effectively defend their interests when they conflict with those of the imposers. Imposition takes place but is it the imposition of law? (Aubert, 1979: 29)

Most contributors to the conference, as well as most of the modern contributors cited previously, reject Aubert's position presumably because every factor that may have a significant impact upon the development of a legal or judicial system must be included in any realistic assessment of transnational as well as intranational law systems. As regrettable as war, conquest, colonial aggrandizement, or economic penetration may be as possible determinants of the characteristics of legal and judicial systems, it would be analytically myopic to ignore them.

The extent to which the imposition of law is accepted as a factor in explaining the characteristics of the variety of national and regional legal systems is, of course, still a matter of serious professional debate with opposition ranging from definitional objections such as Aubert's to bitter legal ideological objections such as those provided by the most vocal of the opponents to the American critical studies movement. The denunciations by Dean Paul D. Car-

rington (1984, 1985) and Richard Posner (1981) and responses such as those of critical studies advocates Mark Tushnet (1981) or Roberto Unger (1987) are illustrative. It is obvious that the investigation of the relationship between external political, military, or economic power and the development of judicial and legal systems is often the subject of scholarly ideological conflict. But this sort of conflict should not hide the fact that perhaps the greatest obstacle to disciplinary scientific advances in this area is not ideological disagreement but the sort of intellectual inertia that is the result of excessive repetitiveness. For example, Tigar and Levy's 1977 *Law and the Rise of Capitalism* adds little conceptually and omits some of the rich historical analysis contained in Achille Loria's nineteenth-century "The Economic Foundations of Law" (republished in Kocourek and Wigmore, 1918), just as David and Brierly's 1978 edition of *Major Legal Systems in the World Today* recapitulates many earlier and more comprehensive treatments of families of law such as John H. Wigmore's 1928 *Panorama of the World's Legal Systems*.

For those who seriously sought to break new analytical ground, such as Martin Shapiro, their continued and often illuminating investigations of enduring issues about judicial-political relationships and roles have set the stage for the development of appropriate categories for conceptually equivalent classification of attributes of national judicial and legal systems. Solely national investigatory goals should be distinguished, where necessary, from cross-national attributes derived from external intrusions or influences. Thus, for example, internal domestic constitutional and political relationships between a judiciary, a legislature, or an executive will continue to be one of the major areas of scholarly inquiry about the concept of judicial independence when the investigation is completely within the confines of a single nation. Consequently, the identification of and testing of variables for such a conception of judicial independence (such as life tenure on good behavior in the American system) would follow the investigative strategy recommended by Dietrich Rueschemeyer in his 1986 article entitled "Comparing Legal Professions Cross-Nationally: From a Professions-Centered to a States-Centered Approach" and utilized by him in his *Lawyers and Their Society: A Comparative Study of the Legal Profession in Germany and in the United States* (1973). Conversely, as worthwhile as such an approach may be with respect to detailed comparison of national legal institutions, professions, and modes of decisionmaking, their conceptual frameworks are often deficient with regard to external influences. The indicators for the latter must also be developed to provide conceptually equivalent data to distinguish transnational judicial and legal systems as criteria different from research within the nation. For example, some variables may be valuable to differentiate (1) national judicial systems that have been adapted for imposed

legal imperialistic purposes, (2) systems that have become transnational role models for voluntary adoption by other nations, or (3) national systems that, on some sort of continuum, have become largely dependent upon the judicial and legal systems of a more influential or powerful nation for its structural characteristics, professional standards, doctrinal emphases, and legal cultural norms. Currently, the nation-centered literature is considerably more developed than its transnational counterpart, but fortunately there is an extensive and exceedingly well documented literature on power and law developed by modern historians. Their key findings established the major characteristics of national legal policies toward conquered nations, territories, and populations.

Alan Christelow's *Muslim Law Courts and the French Colonial State in Algeria* (1985) is an excellent example of the kind of contemporary legal historical scholarship which, like Hans S. Pawlisch's *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (1985), documents and evaluates the uses of law as an instrument of cultural imperialism whether as a means of subjugation, a means of keeping civil order, a mode of property redistribution from the indigenous population to the settlers from France, or a means of religious or racial discrimination. A concomitant and sensitively treated dimension was Christelow's description of the colonial judicial and legal institutions created to accomplish one or more of these purposes, such as the Conseil de Jurisprudence Musulman and the Conseil Superieur de Droit Musulman.

Christelow provided a careful examination of French judicial colonial policy and its occasional ambivalence between the colonial goal of control and subsequent expropriation of lands desired by the French colons and the other colonial goals of modernizing the indigenous Algerian Islamic population.

Pawlisch's study of British legal imperialism in Ireland documents the deliberate Tudor policy of employing British judicial means to reduce Irish resistance to British rule by (1) replacing Irish or "Old English" jurists with British jurists, (2) increasing the number of judges to facilitate more British judicial appointees in Ireland, (3) the development of a civil law of conquest derived from Roman law, and (4) the application of this law of conquest to eliminate indigenous Irish landownership and inheritance law, to reduce the influence of Catholicism, and to eliminate the remaining elements of ancient Irish law and its indigenous professional elite. Regarding the first policy, indigenous Irish were virtually barred from roles in Great Britain's judicial system in Ireland. "Old English" lawyers, who were descendants of Norman invaders of Ireland of the era after William the Conqueror ruled Anglo-Saxon England, were, after 1603, considered untrustworthy. A resulting wholesale purging of the Irish bench created a judiciary

composed almost entirely of English rather than "Old English" lawyers (Pawlisch, 1985: 41).

In addition to the careful examination of British legal imperialism in Ireland, Pawlisch linked Western European legal development of canon law of warfare and conquest from its thirteenth-century origins to its fifteenth-, sixteenth-, and seventeenth-century applications by the succession of European colonial nations to justify destruction and replacement of indigenous non-European legal cultures. The strategy of Sir John Davies was to modify and apply Spanish and canon law applied to non-Europeans to the Irish.

In short, Sir John Davies utilized Jean Bodin's argument that "a king is not sovereign where others give law without reference to him" (Pawlisch, 1978: 45) to legitimate total British control of Ireland and British elimination of indigenous Irish legal institutions and elites. By and large the laws and customs of the native Irish were treated as if they were as allegedly barbarous and inferior to the British as those of American Indians were considered to be by the Spanish. Contrary to the interpretation of many modern scholars, the British were not relatively isolated from continental European uses of Roman law. Sir John Davies, solicitor general (1603–06) and attorney general (1606–19) for Ireland, selectively used Roman law to fashion a law of conquest under which "all laws and customs repugnant to the laws of the conquering power, particularly land holding and succession, were either destroyed or subject to modification" (Pawlisch, 1985: 11). Significantly, the law of conquest devised from European practice and Roman legal tradition for Ireland by Sir John Davies in the seventeenth century became the prototype of British colonial legal imperialism throughout its expanding empire, as similar adoptions of Roman law served Spain and Portugal in the fifteenth and sixteenth centuries and later continental European colonial powers in the seventeenth, eighteenth, and nineteenth centuries. Pawlisch's work is an excellent addition to the modern works on legal imperialism, documenting the relationship of warfare and conquest to the expansion of the families of law originating in Western Europe.

The persistence of colonial imposition of particular families of law is demonstrated by the continuity of the elements of the imposed legal systems from the colonial era (see Bryce, 1901; Sherman, 1924; Wigmore, 1928) to the contemporary postcolonial era. M. B. Hooker's *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975) not only provides evidence of this continuity, but also examines the relationship of the imposed legal systems to existing indigenous legal systems in former British, Dutch, and French colonies, in the Soviet Union, and in selected situations where Western families of law were voluntarily adopted, notably Ethiopia, Turkey, and Thailand. Hooker himself was interested in the continuity of the colonial imposed legal system but

he traced such persistence while emphasizing the interaction of indigenous law with imposed external law.

II. CONCLUSION

This sampling of some of the challenging contemporary literature of power and legal imperialism underscores the significant value of broadening the interdisciplinary investigations. The contributions of contemporary scholars like Shapiro and others have set the stage for the development of indicators of considerably greater precision for transnational relationships, such as conquest, economic penetration, and law. Similarly, conceptually equivalent mapping surveys of major uses of law as an instrument of power should be conducted for each significant era of conquest and economic penetration. Such surveys would be universal—that is, not limited to ethnocentric concentration upon European or Western examples. Experimentation with a variety of other indicators is also appropriate. The analytical goal is the determination of whether there are universal patterns of imposed law, or, conversely, whether such uses are subject to predictable societal, regional, or national variations, or, finally, simply random.

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