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Exporting Law Reform—
But Will It Travel?
Inga Markovits†

Introduction

The law, it seems, is an experienced and eager traveler. As far as we can look, the migration of legal concepts, practices, and institutions has been a commonplace occurrence all around the world: from the "reception" of Roman law in medieval Germany to the spread of German Begriffsjurisprudenz to places as far away as Japan or as alien as the Soviet Union; from America’s constitutional exports to the defeated countries after World War II to the large-scale transfer of Western legal knowhow to the post-socialist countries of Eastern Europe. We will not find a legal system anywhere in the developed world that has not borrowed from another country’s laws. That much is undisputed.1

What comparative lawyers disagree about, however, is what forces propel those borrowings and—my topic in this essay—what happens to the borrowed laws and institutions as they are planted into foreign soil. On the far side of the debate, doctrinalists like Alan Watson see no problem with exporting law from one historical period to another or from one country to the next. Watson believes that law is not the natural outgrowth of a particular society, but the intellectual creation of clever lawyers, easily adaptable to local use by other clever lawyers elsewhere on the globe. What travels in the case of legal exports like those now washing over Eastern Europe are the “ideas” of experts: technical solutions that, like a hammer, one can put into a suitcase and take out wherever one would want to bang a nail into the wall. At the other end of the spectrum, post-modern scholars like Pierre Legrand reject the notion that legal transplants can successfully take root in foreign soil. According to this view, not just the law is socially determined, but also our thinking about the law: the interpretation of legal

† Friends of Jamail Regents’ Chair in Law, The University of Texas. I owe thanks to my colleagues Leif Clark and Jay Westbrook for helpful conversations about bankruptcy.


rules is "a function of the interpreter's epistemological assumptions, which are themselves historically and culturally conditioned." As a result, even those legal exports that appear to flourish in another legal culture must have fundamentally changed in character: the meaning of a legal rule "does not survive the journey from one legal system to another." And in between these two extreme positions, legal sociologists like Lawrence Friedman explain the law's migrations with the very fact that it is socially determined. Friedman, sees spreading modernity as the cause for successful transfers between otherwise profoundly dissimilar legal cultures. As modern industry, international trade, and global communications expand into the Second and Third World, traditional societies will experience legal problems that increasingly resemble those faced by the more advanced economies. To address these problems, both developing and advanced countries will use solutions that are very similar despite the fact that their respective legal histories are worlds apart.

In this essay, I want to look at the viability of legal transfers from Western capitalist countries to the new democracies of Eastern Europe. The difficulty is that post-socialist attempts to establish a rule of law do not quite fit the picture of spreading modernity described by Friedman. Most Eastern European law reforms, now undertaken in the reformers' hope of joining Europe, are not the consequence of social change. Rather, their purpose is to bring about that change, or to facilitate and speed up change that, in many instances, had been unleashed by reckless and abrupt privatizations. In this scenario, law is assigned the role of independent rather than dependent variable. Like Alan Watson's technical devices designed by legal experts (and in line with the old Soviet view of law as a "lever" or a "tool" for social change), new legal rules shall give rise to new institutions, practices, and convictions in the new democracies. Will they?

My paper will not look for a universally applicable answer to this question. Instead, I will, more modestly, consider existing instances of legal transplants in order to discover patterns of success or failure. Such patterns, in turn, might explain why some legal transplants take while others don't. Since patterns are the sum of many individual traits, my paper will be focused on the particular rather than the general. With luck, a pattern, once established, may also reveal the outlines of a theory. At this point, though, I simply want to know whether a particular legal innovation carries within itself the indication of its likely outcome: whether by looking at a reform proposition, we can say, "hmmm, that probably will or will not work," and articulate the reasons behind our suspicion.

4. Id. at 117.
6. See id. at 1075-76.
In a recent article called "The Transplant Effect," Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard have examined the fate of legal borrowings by comparing "levels of legality" achieved over the last two hundred years in forty-nine different countries. All of the countries in their sample either developed their legal systems through internal law creation (the "origins") or through the importation of another nation's law (the "transplants"). Based on their regression analysis, the authors concluded that the effectiveness of legal transplants is determined by the lawmaking process itself, rather than by the contents of the rules transplanted. Voluntary reforms initiated by the receiving countries ("receptive transplants") are more successful than reforms imposed by outside forces ("unreceptive transplants").

The authors' result seems plausible with or without the underpinnings of regression analysis. Countries that had their legal systems forced upon them tend to be in worse shape than countries capable of self-initiated law reform. But this insight is not particularly helpful in the case of Eastern Europe. For one, the authors' units of comparison—"legal systems," imposed upon in toto, or accepted by another country like an entire wardrobe from the rack—do not capture the current process of law reform in Eastern Europe. With the exception of East Germany, which upon reunification adopted the legal system of the Federal Republic literally overnight, post-socialist countries tend to mix and match their legal borrowings, importing, for instance, many of the requirements of the acquis communautaire from Europe, taking advice on corporate or financial legislation from the United States, and listening to voices at home in matters affecting distributional or political issues. Moreover, the authors' notion of "receptive transplants" assumes that the effectiveness of borrowed law depends upon its willing acceptance by the law's addressees in the receiving country. But this seems too romantic a view of current lawmaking in Eastern Europe, where democratically elected governments are eagerly adopting the law reforms that will ensure their entry into Europe, while disaffected populations stand aside and grumble. And finally, the authors' measuring stick for the effectiveness of legal imports—national "levels of legality"—presupposes a uniformity of success or failure that does not correspond to the Eastern European legal landscape, in which some transplants miraculously thrive (like the new constitutional courts), while others do not take at all. It is the very individual question—will this work?—that hovers over every instance of legal borrowing and requires an answer that must be as specific and concrete as possible.

This essay proposes some rules of thumb for judging whether a particular legal transplant is likely to succeed. Given the complexity of the issues involved, these suggestions are offered as speculations rather than predic-

8. See id. at 172–79.
9. See id. at 189.
10. See id. at 179–80.
tions. Think of this piece as a horticultural thought exercise: A gardener selecting a particular plant at a nursery considers the quality of her garden's soil, the plant's future exposure to sun and wind, its proximity to other plants, and similar factors when she makes her choice. Can a law reformer proposing the transfer of a particular solution from one country to another choose a legal rule in an equally deliberate and rational fashion?

I. Varieties of Transplants

It seems that Alan Watson may, at times, be right about the ease of legal transfers. Some legal innovations work indeed like clever mechanical contraptions that the law reformer can pack into a suitcase and unpack where needed. For instance, certain rules of election law such as the "five percent clause" or parliamentary devices such as the "constructive vote of no confidence" (both of German origin) have either been borrowed at the outset of East European constitution making or, as in the case of Bulgaria, have been added later when problems arose that could be solved by their adoption. But it is not their technical ingenuity that makes these rules so universally useful. Rather, these rules transfer easily because they do not need popular approval or compliance to gain effect. Take another legal proposition that has traveled like wildfire through Eastern Europe: the abolition of the death penalty. Unlike the "constructive vote of no confidence," this proposition does not take its strength from the cleverness of experts but from a society's basic moral principles. One would assume that legal culture plays an important role in its acceptance or rejection. But while you need legislative approval to repeal the death penalty, you do not need public compliance. The hurdles to abolition lie in parliament, not among the people. Since renouncing the death penalty is a prerequisite for joining the European Union (EU), Eastern European parliaments have been eager to comply with a reform requirement that at very little cost can signal their political maturity. Like their Western European role models, they have done so in the face of a strong public preference for retaining capital punishment. But as in the case of electoral reform, the public, in this case, cannot avoid, bypass, or undercut by daily acts of disassociation and defiance a liberalization of which it does not approve. No administrator needs to worry about the hangman going it alone. With luck, the public may eventually come around to share the abolitionists' convictions, as it

11. The Polish Constitution of 1997 (in Article 158) and the Slovenian Constitution of 1992 (in Article 116), for instance, contain rules on a constructive vote of no confidence. The Czech Election Law of 1990 (in Article 42) requires political parties to receive at least 5% of the vote to be represented in the legislature.


14. See, e.g., Alexander S. Mikhlin, THE DEATH PENALTY IN RUSSIA 171 (1999) (reporting that in Russia, only 6.6% of the population favors the complete abolition of the death penalty).
did in Germany. But it will not matter if that does not happen. In the case of self-executing law reforms, transplanting legal rules seems indeed, as Watson claims, "socially easy."  

2. Most law reform, however, requires the cooperation of its citizenry to be effective. Since the law's addressees are embedded in their specific legal systems, cultural dissonances between the donor and the recipient country may prevent a transplant from taking root. This seems least likely to occur in situations where a borrowed legal institution or procedure adds a component to a legal system that is not only new, but also self-contained—that is, where an innovation can largely function without the help or sustenance of the legal system into which it has been introduced. Alternative dispute resolution (ADR) of business conflicts may serve as an example: a novel legal commodity successfully exported by its mostly American proponents to many countries around the world. ADR is easy to sell because it does not need to mesh with the purchasing country's own legal system. True to its name, it serves as an alternative to whatever dispute resolving mechanisms are locally available. In the horticultural language of legal transplants, one might call these transfers "potted plants": self-contained organisms that carry their own foundation and sustenance with them and that, like a houseplant, can be placed anywhere the purchaser desires (and the light is right). Or take commercial arbitration: another method of dispute resolution that functions relatively independently of existing legal institutions and, in fact, whose which a conflict is resolved. Production sharing agreements are a third example of "potted" transplants: private agreements between foreign investors and a host state that bypass the local legal system and its pitfalls by rewarding the investor directly with a percentage of his revenue. All three legal innovations are born from the suspicions, often of foreigners, that local laws are clumsy and haphazardly applied. All three are based on private ordering as an alternative to public law reform. In a way, all are signs of failure. If legal reform imports are slow to take root in barren local soil, impatient customers bring their own solutions in self-contained planters, as it were, that do not have to rely on local irrigation systems.

3. There is a third type of legal transplant. It resembles my "potted plants" of the previous section, in the sense that it introduces a truly novel element into a legal system, but differs from self-contained reform-imports in that it cannot stay aloof from local legal culture. Antitrust and bankruptcy laws may serve as examples. On the one hand, antitrust and bankruptcy were unknown commodities in most former socialist countries for which "competition" meant "socialist competition" (understood as winning

18. See id. at 56.
together rather than against each other) and whose legal systems did not provide for the exit of failing enterprises but instead expected them to be bailed out at state expense. Without previous local models for their legislation, designers of Eastern European bankruptcy or antitrust laws can work on an empty canvas, as it were, and might not feel a need for fitting their creations into a pre-existing institutional structure. Western advisors, in particular, excited at the chance to cut new garments from whole cloth, might suggest bolder, more perfectionist solutions than they could get away with under the constraints that operate at home.19 Much of this kind of legislative work cannot yet be checked against post-socialist reality. The new laws are designed less to respond to existing market problems than to contribute to the creation of a market that then, in turn, should generate the problems that the legislators are addressing.20 The task is so gigantic and so novel that even those Eastern European countries with, for instance, some modest antitrust experience during Socialism have tended not to draw on that experience in designing their new laws but, like their less progressive neighbors, have essentially started from scratch.21

Starting from scratch means one must look for models. Usually, Western advisors push for the model they are most familiar with—that of their own respective legal system. With no previous lines marring the blank slate on which they work, the draftsmen must find it tempting to design laws that, like Pallas Athena, spring fully clothed and armed from the heads of their creators. Working from scratch also means that legislatures can provide their new laws with equally new supportive institutions, such as the antimonopoly commissions that have an important role in Eastern European antitrust law,22 the new Ukrainian “State Organ for Bankruptcy Cases,”23 or the Russian “Financial Monitoring Committee” set up in 2002 to back up the new anti-money laundering provisions of the Russian Criminal Code.24 Everywhere in Eastern Europe, a lot of effort, money, and foreign help is being spent on training new antitrust and bankruptcy experts to administer the reforms.

20. One example is the Russian Petroleum Legislation Project at the University of Houston Law Center; see the symposium on the project in 15 Hous. J. INT’L L. 263 (1993); T.W. Walde, Oil and Gas Legislation in Russia; From Texas to Siberia: Is a Russian Model Emerging?, University of Dundee Centre for Petroleum and Mineral Law Policy, Professional Paper, at 6 (1992).
22. See id. at 261 (noting that “[s]pecific features rooted in socialist heritage are quite scarce”).
23. See id. at 263.
That means that transplants such as antitrust, bankruptcy, or money laundering laws do not arrive like bare-root plants in their new surroundings but come with at least a little bit of soil clinging to their roots that may help them grow. Russia’s “Financial Monitoring Committee,” for example, employs more than 400 staff and has a budget of 30 million rubles.\(^{25}\) The more such soil there is, the more the new reforms are likely to take hold.

Nevertheless, unlike the “potted” transplants, which work by circumventing local institutions and officials, antitrust and bankruptcy reforms will take root only if they are successfully embedded into their surroundings. Take bankruptcy, for instance. Bankruptcy statutes do not deal only with the consequences of economic failure. They address many other questions (often implicitly relying on answers that a legal culture has provided elsewhere): questions about securing credit, concepts of property or contract, social fairness, and moral rights and wrongs. Like a tent fastened by the stakes that surround it on all sides, a bankruptcy scheme might begin to wobble if some of the stakes that uphold it break or are left ungrounded. That means that bankruptcy reforms cannot be designed in splendid isolation.\(^{26}\) They are much more susceptible to being undermined by cultural dissonances than my “potted plants.” Despite their “newness” to Eastern European citizens, bankruptcy or antitrust reforms still must mesh with the instincts and convictions that former Socialists carry over from their pasts. That makes the choice of the model from which these law reforms are copied crucial to their success.

Again, take bankruptcy. In times of fundamental economic change, the law might want to encourage new beginnings and reward entrepreneurial risk-taking that for so long had to lay dormant under Socialism. Thus, Eastern European countries might favor laws modeled after the American Bankruptcy Code of 1978, which is debtor-friendly and with its provisions on reorganization, consumer bankruptcy, and debt forgiveness, gives even ordinary citizens the chance to start anew after economic failure.\(^{27}\) The liberating aspects of America’s bankruptcy model also appeal to Western Europeans: the new German Insolvency Law of 1994, which after much debate entered force in 1999, introduced reorganization and, for natural persons, a court-managed procedure for debt release, in the Federal Republic.\(^{28}\)

But the German example also shows how tricky it can be to establish reforms that clash with deeply held cultural convictions. Because, to Germans, debt forgiveness looks very much like moral capitulation, German creditors have been reluctant to contractually agree to cancel unpaid


\(^{26}\) Id.

\(^{27}\) On the central role of bankruptcy as a field where many lines of legal concepts meet and connect, see Christoph G. Paulus, *Verbindungslinien des modernen Insolvenzrechts*, 21 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 2189 (2000).

Moreover, the path to court-managed debt forgiveness for natural persons under the new German law is littered with substantive and procedural obstacles. Already in the first year of the new law's application, commentators were calling for "a reform of the reform." Disagreement about how to judge a debtor's inability to pay—as evidence of moral failure or bad fortune—is as old as bankruptcy itself. It seems likely that the views that Eastern European businessmen hold regarding defaulting debtors come closer to those of their German counterparts than those of their American counterparts. But there are many other specifically post-socialist obstacles to bankruptcy reform that may require solutions deviating from both American and European legal models. Can bankruptcy function in an economic landscape in which a large number of state and privately owned enterprises technically are insolvent? How should the law deal with wage claims in legal cultures still committed to a right to work? What to do about enterprises that in the days of Socialism's "bigger is better" command economy provided jobs for an entire town? Will it undermine the curative purposes of bankruptcy law—to sift the reclaimable enterprises from the hopeless ones—if 90% of bankruptcies in Russia are creditor-initiated or if 70% of all bankruptcy proceedings in the Ukraine are brought by government authorities against defaulting taxpayers?

Social arrangements, expectations, and notions of right and wrong will also influence the suitability of antitrust reforms. Spencer Waller points out that the Sherman Act, much pushed by the American government as a template for Eastern European law reform, is blind to considerations of public welfare and therefore, at least in this respect, is ill-suited to serve new countries in the midst of social upheaval and dislocation. And could an antitrust model that scrutinizes only private market conduct (like the Sherman Act) work for an economy in which the main threat to
competition will likely come from the government? Will antitrust rules curb the behavior of businesses accustomed to the informal give-and-take of an economy steeped in clientelism?

The answers to questions such as these depend upon the vagaries of economic upturns and downturns, on the speed with which people and institutions will adjust to new conditions, and on the political support a country's laws enjoy—all as unpredictable as the weather. Rather than try to design doctrinally sophisticated and exhaustive laws that could live up to Western expectations, it might be preferable to aim for what Thomas Waelde and James Gunderson have called "interim law": Legislation that in a process of trial and error addresses issues provisionally and partially as they arise and that reconsiders its solutions and expands its reach as practical experiences and developments suggest. Much Eastern European reform legislation seems to have followed this strategy. To return to my two examples: After enacting a first generation of antitrust laws in the early 1990s, most Eastern European countries passed a second generation of antitrust laws in the second half of the decade. The Ukraine has already produced two bankruptcy laws; Russia has reached its third. It took this North German expatriate, transplanted to the United States, twenty years to learn what would and would not grow in her Texas garden. Eastern European legal systems may need even more time.

4. It is easier to explain or predict the success of yet another group of law reforms in Eastern Europe that one might call "hybrids." Actually, the horticultural language of transplants does not quite fit the innovations that I have in mind. They are not necessarily transplants from the West; they can also be homegrown breeds from the days of Socialism, now domesticated by rule of law constraints and reclaimed for post-socialist use. One Czech and two Russian institutions can serve as examples: Arbitrazh Courts, the Russian Procuracy, and the new Commissioner for Civil Rights of the Czech Republic.

Arbitrazh Courts are the successors of the former Soviet State Arbitrazh, a part judicial, part administrative institution that not only resolved disputes between state-owned enterprises, but also improved their overall performance by helping to sort out the many administrative muddles that were seemingly inevitable in a planned economy. Beginning in 1991, a series of new laws transformed State Arbitrazh into a system of commercial courts. The administrative functions of the arbitrators were abolished,

38. Id. at 586.
43. Sidney Brooks, supra note 34.
their investigating powers reduced, and the procedural rights of litigants expanded. Today, the remodeled courts, staffed with many of the judges who served as arbitrators under Socialism, adjudicate commercial disputes, bankruptcy cases, and business complaints against administrative decisions such as fines, the denial of licenses, or confiscations of property. At first, Westerners observed the metamorphosis of Arbitrazh with deep suspicion. But according to recent accounts, it appears that the erstwhile arbitrators are doing a good job as commercial judges. Commercial disputes are decided very quickly, caseloads are increasing, the parties' trust in the commercial courts is higher than the public's trust in ordinary courts, and even foreign litigants seem to be treated fairly and in an increasingly sophisticated fashion.

To bring the Soviet Procuracy into the new age seemed an even more questionable proposition. A Rechtsstaat would need prosecutors to represent the state in court, especially since Russian criminal procedure would be enriched with new adversarial elements. But the old Soviet procurators' other function—"general supervision" over the legality of administrative decisionmaking—seemed too closely tied to Lenin's monolithic and repressive view of "legal culture" and too much at odds with the new emphasis on individual autonomy and citizen control over the state to fit into the rule of law. For a while, the procuracy's days seemed numbered. In the end, however, the Russian defenders of the procuracy carried the day. They argued (persuasively, I think) that given Russia's current instability, it would be reckless to dismantle the country's most experienced machinery of law enforcement. The procuracy was cleansed of its repressive features but retained its supervisory authority. Americans might have preferred to assign the role of watchdog over law and order to the courts alone. But Russian citizens, as yet, are inexperienced and reluctant litigants. They believe in authority, are more interested in substantive outcomes than procedures, view the state at least as much as a resource as a threat, and are used to bringing their grievances to the procu-

45. See id. at 98.
46. See Kathryn Hendley, Remaking an Institution: The Transition in Russia from State Arbitrazh to Arbitrazh Courts, 46 AM. J. COMP. L. 93, 93 (1998).
47. See Hendrix, supra note 43, at 94.
48. See Kathryn Hendley, "Demand" for Law in Russia—A Mixed Picture, 10 E. EUR. CONST. REV. No. 4, at 77 n.30 (2001) (reporting that Arbitrazh courts resolve the vast majority of contractual disputes within two months of filing.)
49. See Hendrix, supra note 43, at 98 (increasing from 208,081 cases in 1994 to 398,622 cases in 1998).
rator from the old days. While litigation in Russia is increasingly lawyer-driven and expensive, complaining to the procuracy is "convenient, simple, accessible, and free." In 1996, the procuracy received about one million applications from the public that resulted in the discovery of 210,000 violations of the law, 55,000 of them by central and local government bodies. No wonder that, in a meeting in January 1997 between representatives of the Council of Europe and high-level Russian procurators, the Russians managed to persuade the Europeans of their continued usefulness. It would be wasteful to cut down a well-established plant that can instead be pruned to suit the gardener's needs.

Finally, the new Czech ombudsman. Ombudsmen are not socialist inventions. Originally Scandinavian, the office of ombudsman was first imported to the U.S. by Hawaii in 1969; since then, a number of other states have followed suit. Today, all kinds of ombudsmen with varying tasks and privileges represent citizens' interests in all kinds of settings, both in the United States and in Europe: in cities, government bureaucracies, corporations, housing authorities, schools, and elsewhere.

But despite their successes under capitalism, there is something decidedly socialist about ombudsmen. Their office is based on the assumption that ordinary citizens often will be better helped if someone with authority pushes for their rights than if they have to do so on their own. Ombudsmen are most often found in institutions aspiring to some sort of community based on shared goals: universities, hospitals, armies—what socialists would have called collectives. As under socialist complaint procedures, a citizen needs no attorney to state her case but can raise a grievance informally, at no cost, and often simply by using the telephone; as under socialism, most complaints submitted to ombudsmen reflect the dependence and often helplessness of those too weak or too unentitled to use the courts.

What makes an ombudsman so useful as a go-between and broker between capitalist and socialist legal values, however, is his commitment to the rule of law. An ombudsman raises legal issues that an ordinary citizen might not be able to articulate. He is independent of the authorities that he investigates. He uses his office to enforce the law. The institution of the ombudsman is a true hybrid: capitalist in its insistence on legality, socialist in its parental concern for the weak.

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56. See id. at 50.
That is why ombudsmen could be equally useful to pre-capitalist Poland (which introduced the office in 1988, just barely before curtain-fall, in a last attempt to curb abuses of power by an apathetic administration) as for the post-socialist Czech Republic (which in 1999 inaugurated its first "Public Protector of Rights" to assist citizens "lost in the thicket of bureaucracies"). Poland's socialist ombudsman (or rather, ombudswoman: the first commissioner for civil rights was the energetic and fearless law professor Ewa Letowska) was equipped with the right to sue the state—in the final days of socialism, a necessary and important tool to advance a fledgling rule of law. The Czech ombudsman of 1999 uses not litigation but other means of pressure to advance his clients' interests—by now, access to court is common enough in the Czech Republic to no longer appear as the wonder weapon as it did to socialist reformers. Both institutions were and are well suited to assist disoriented and helpless citizens caught in the midst of social transformations. They are grounded not necessarily in legal institutions of the past, but in the habits and experiences of people who are used to be taken care of by the state.

5. That brings me to a final type of legal transplant: imports so little grounded, so out of sync with their new cultural surroundings, that they seem as likely to take root as an orchid in a cabbage field. A very good example is the Russian jury. After the experimental introduction of juries in nine of Russia's 89 regions in 1993, the new Russian Code of Criminal Procedure of 2001 expanded the right to a jury trial for "very grave offenses" to all regional courts. What are the chances that American-style juries will grow in Russian soil?

Comparativists should be grateful for the Russian jury because it demonstrates so perfectly what can go wrong with legal transplants. Already, the initial diagnosis of a problem may be distorted by our inclination to exaggerate the merits of our own legal culture and to disparage those of other legal systems. Russian lawyers thus like the idea of juries because it allows them to draw upon reforms from their own legal past—although it is not self-evident why the juries of 1864, which challenged the repressiveness of an autocratic rule with at times spectacular acquittals, should equally be needed in a democratic state. American observers like the idea of juries because they mistrust the "shocking no-acquittal policy" of Russian criminal courts and the apparently too eager "cooperation" between ...

60. Hill reports that 30% of all complaints to Hawaii's ombudsman are brought by prison-convicts, by far the largest group of complainants. Id. at 28. But even the complaints of ordinary citizens mostly concern the needs and worries of people dependent on the government: welfare clients, tenants in public housing, and the like. Id.


63. Letowska, supra note 60, at 64.

Russian judges and prosecutors\textsuperscript{65} and because they hope that the performance of jury duty may foster in Russian citizens a "legal consciousness that, in turn, benefits the evolution of the rule of law."\textsuperscript{66} Judicial statistics seem to support this view. In 1995, Russian criminal courts acquitted 1.4\% of all defendants,\textsuperscript{67} compared to an acquittal rate of 14.3\% by Russian juries\textsuperscript{68} and an acquittal rate of 14.5\% by American juries.\textsuperscript{69}

But if we consider that only about three percent of American criminal cases are decided by jury trial and that the vast majority of prosecutions result in plea bargains, or in what John Langbein calls "condemnation without adjudication,"\textsuperscript{70} the American figures just listed change their meaning. My own calculation, based on a study of felony dispositions in thirty U.S. counties that includes plea bargains as well as bench and jury trials, arrives at an overall acquittal rate of 1.4\%\textsuperscript{71}—exactly the same as the acquittal rate of Russian criminal courts in 1995.\textsuperscript{72} Given the precision of modern forensic science, high conviction rates should not be a surprise. Even in criminal justice systems known for their leniency, acquittals are becoming increasingly rare. In Germany, for instance, the percentage of acquittals fell from 4.5\% in 1976 to 2.7\% in 1998.\textsuperscript{73} The figures suggest that the 14.3\% acquittal rate of Russian juries (which rose to 22.9\% acquittals in 1997!)\textsuperscript{74} is less a sign of rule of law maturity than, as Stephen Thaman’s report makes seem likely, of ordinary Russians’ empathy with drunkards and the down-and-out.\textsuperscript{75} The Russian Supreme Court regularly reverses about a third of all jury acquittals.\textsuperscript{76} The Court has also limited the reach of juries by defining anything but “naked historical facts” as questions of law, including \textit{mens rea}.\textsuperscript{77}

Many Russian judges, law professors and attorneys have shown “a decided lack of enthusiasm”\textsuperscript{78} for the jury. But their objections may be based on grounds other than lingering Soviet-style disrespect for defendants’ rights. Rather, Russian lawyers might simply find the idea of juries

\begin{itemize}
  \item \textsuperscript{65} See Sarah J. Reynolds, \textit{Drawing Upon the Past: Jury Trials in Modern Russia}, in \textit{Reforming Justice in Russia} 374 (Peter H. Solomon ed., 1997)
  \item \textsuperscript{67} See Stefan Hedlund, \textit{Can Property Rights Be Protected by Law?}, 10 \textit{E. EUR. CONST. REV. No. 1}, at 51 (2001).
  \item \textsuperscript{69} See id. at 257.
  \item \textsuperscript{70} My calculations are based on a study of felony dispositions in 30 counties between 1980 and 1997. See Paula L. Hannaford-Agor, et al., \textit{Are Hung Juries a Problem?} 21 (National Institute of Justice, 2002).
  \item \textsuperscript{72} See Hannaford-Agor, \textit{supra} note 69.
  \item \textsuperscript{73} See Thaman, \textit{supra} note 67, at 257.
  \item \textsuperscript{75} See Thaman, \textit{supra} note 67, at 257.
  \item \textsuperscript{76} See Thaman, \textit{supra} note 63, at 130.
  \item \textsuperscript{77} See Thaman, \textit{supra} note 67, at 257.
\end{itemize}
jarring—going against the grain of the countless unarticulated assumptions, reflexes and habits that make up a legal culture. The Russians would not be the first civilists to balk at the introduction of adversarial elements into inquisitorial criminal procedure. In Italy, the 1988 replacement of the old 1930 code of Criminal Procedure by a new, adversarial model led to what one critical observer called “the worst of both worlds.” In Spain, the new jury system introduced in 1995 was opposed by many lawyers and has led to “remarkably few jury trials.

I do not want to suggest that civil procedure and common law procedure are so rigidly entrenched in national culture that they can never learn from one another. For example, exclusionary rules—originally the hallmark of common law procedure which needs to guard against lay jurors’ misjudging the reliability of evidence—can, and have been, integrated into continental European criminal procedure. “Extrinsic” exclusionary rules, in particular, have been successfully transplanted: restrictions that are not meant to improve the probity of evidence (which civil law procedure is not concerned about because it is dominated by a professional judge) but that protect more universal values outside the criminal justice process, such as family cohesion or the privacy of telephone conversations. Plea bargaining, another central feature of American criminal procedure, has also spread to Europe, where negotiations and “understandings” between prosecution and defense increasingly are used to manage growing caseloads.

Such transplants will be successful only if they do not attack the central convictions of a legal system: its answers to such questions as what is meant by justice, who can be trusted to achieve it, and what role the individual should play in its pursuit. Americans, coming from what Mirjan Damaska calls a “coordinate model of authority” and a “reactive state,” do not expect to find the “truth” in criminal court. What they want is procedural fairness. They think it the individual’s own business to stand up and fight for his rights, believe in the “importance of private over public social norm enforcement,” see nothing wrong with bargaining over justice, and mistrust the state. Continental Europeans (both East and West) are likely to share the values reflected in the “hierarchical” authority structures of an “activist” state. They hope for substantive rather than formal justice and expect a good state to provide that justice. Although in many

79. See Thaman, supra note 67, at 257.
81. See Thaman, supra note 67, at 259.
86. See Stephen N. Subrin, Discovery in Global Perspective: Are We Nuts?, 52 DePaul L. Rev. 299, 299 (2002).
ways more cynical than Americans, Europeans believe that truth can be uncovered and that it is the court’s task to do so. They find bargains over justice morally offensive. And they trust the state far more than Europe’s totalitarian experiences would lead one to expect.

As a result, adversarial law reform in continental Europe has often been diverted and undermined by those who apply it in the field. Local gardeners are trimming back the imports from abroad to make them fit into the European landscape. Italian judges, for example, believing it their personal responsibility in a criminal trial to aim for a “just and accurate result,” interpret extensively rules of criminal procedure that allow a judge to *sua sponte* ask for additional evidence.87 Russian Arbitrazh judges, who could save time and effort by granting default judgments against unprepared defendants, prefer instead to send them home with the instruction to produce better evidence for a rescheduled hearing.88 German courts curtail “agreements” in criminal court to ensure that a plea bargain, German style, will not undercut the “central goals of criminal procedure”: to “uncover the truth as completely as possible”89 and to ensure that every punishment truly “matches guilt.”90 The Italian Constitutional Court conditions the validity of plea bargains upon the “proper balance between the crime and the bargained punishment.”91

Plea bargaining brings us back to the Russian jury trial. In the United States, the jury trial could not survive if it were chosen by more than a tiny number of defendants. Jury trials are too expensive and too time-consuming for everyday use. In fact, it is the very cost of jury trials that makes guilty pleas such valuable bargaining chips for American defendants. In Russia, too, jury trials consume huge amounts of money. The experimental juries of the 1990s swallowed up to 25% of their regional courts’ budgets,92 even though less than half of the defendants eligible for jury trial chose to use that right.93 But the American answer to the high cost of jury trials—almost unrestricted plea bargaining—flies in the face of civil law beliefs about uncovering the truth and correctly matching crime and punishment. Plea bargains would curtail the investigative powers of the court and threaten the growth of another tender plant of Russian law reform: the presumption of innocence. Although the new Russian Code of Criminal Procedure provides for summary proceedings with bargaining elements, these rules apply only to lesser offenses not eligible for jury trial.94 And I

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87. See Damaška, supra note 84, at 80.
88. See Grande, supra note 79, at 228.
89. See Hendley, supra note 45, at 104.
90. Bundesverfassungsgericht, supra note 82, at 136 (“möglichst vollständige Wahrheitsermittlung”).
91. Bundesgerichtshof, supra note 83, at 198 (“schuldangemessene Strafe”).
93. See Peter H. Solomon, The Persistence of Judicial Reform in Contemporary Russia, 6 E. EUR. CONST. REV. No. 4, at 52 (1997).
94. See Thaman, supra note 67, at 257.
have not even begun to talk about the problems of finding jurors among an
exhausted and suspicious citizenry. How did the Russian jury ever
advance so far on the law reformer’s drawing boards? In part, I think,
because introducing the jury into continental criminal procedure seemed
like such a noble and romantic goal, conjuring up images of new world
freedom; of self-confident citizens, walking tall; of twelve men good and
true; maybe even of “Twelve Angry Men,” because I see no reason to
exclude film and television from the list of inspirations that drive a nation
to remake itself. In Siberia, Stanislaw Pomorski tells us, the participants in
a criminal trial now address the judge as “your honor.”

II. Outlook

So where does all this leave us? With some fairly banal and unreliable
rules of thumb about the likely viability of legal transplants. Legal rules
requiring no individual compliance are easily incorporated into foreign
legal systems. Reforms that carry with them their own surroundings (“potted
plants”) will do better, the more institutional support and personnel
they have and the less dependent they are on local cooperation and
approval. Law reforms that are inconsistent with deeply held moral and
political beliefs may work if they only slightly affect convictions at the
periphery of the local value system. But their success is doubtful if they
contradict fundamental cultural gut reactions. The more complex and mul-
tilayered a particular environment, the greater the danger that legal imports
will irritate local sensibilities. For this reason, procedural changes might
be riskier than substantive reform because procedure is based on repeti-
tion, role-playing, and tradition (“we’ve always done it like this”) and is
saturated with unspoken assumptions and conditioned reflexes. Finally,
law reform that corresponds to common habits and beliefs or that can con-
nect with institutions and procedures that have performed reasonably well
in the past—grounded change—seems much more promising than change
that had to start from scratch.

The last assertion strikes me as a cause for optimism because I would
count Eastern European courts and the Eastern European legal profession
among the grounded institutions most susceptible to rule-of-law reforms.
Conventional wisdom has it that socialist courts were travesties of justice—
dominated by Party politics, corrupted by telephone law, and mistrusted
by the public—and that it will take a lengthy learning process for Eastern
European citizens to regain faith in their judicial systems and to respect the
law. Kathryn Hendley, for instance, explains what she calls the “meager
demand” for law in Russia with Russians’ everyday experiences under
Socialism: “The idea that law could be used by ordinary citizens . . . to
advance their own interests . . . was viewed as unrealistic in the post-Soviet

95. See Irina Dline & Olga Schwartz, supra note 77, at 107.
96. See Stanislaw Pomorski, In a Siberian Criminal Court, 11 E. EUR. CONST. REV.
Nos. 1/2, at 112 (2002).
context." This statement would be obviously true for the years of Stalinism. But I think it incorrectly describes Eastern European expectations about the law, both in the years immediately preceding the collapse of Socialism and in the years that followed the collapse. True, pre-1989 civil litigation rates stayed low in Eastern Europe despite the fact that, under Socialism, courts usually were easily accessible, cheap, fast, and fairly user-friendly. But it was not distrust that kept potential plaintiffs out of court. It was the fact that, in a planned economy (in which money is not very valuable), businesses did not care all that much about enforcing debts against defaulting citizens and that ordinary citizens (who did care about their rights) had little property to sue about and could not contest administrative decisions in court. Large numbers of ordinary citizens did use the avenues by which socialist citizens could lodge complaints against those in authority—the procuracy, the Party, newspaper complaint desks, and the like—but again, not, as I assume, because they trusted any of these institutions, but because complaints are useful legal mechanisms by which someone dependent can implore, persuade, and pester someone in control into satisfying his requests.

After the fall of the Berlin Wall, Eastern European litigation rates shot up. Many of the new users of the courts were business people. In Hungary, first-instance contract disputes increased by 60% between 1990 and 1992. In Russia, litigation in the new Arbitrazh courts doubled between 1997 and 2002. Ordinary people have used new ways of fighting for their rights as they have become available (for instance, since Russian courts acquired the authority to review the legality of pre-trial detentions, 17% to 19% of all detainees have contested their arrests) and have stayed with the old and familiar ways of looking for redress if they seem cheaper and less onerous (such as complaining to the procuracy). As Erhard Blankenburg suggests, the explanation for the frequency of litigation is more likely found on the supply side than on the demand side of the law. Trust does not seem to have a lot to do with it. Americans trust their courts less than the medical profession and the police but more than the media, with lawyers ranking near the bottom of the scale of various professions, scarcely more respectable than car sales people. Eastern Europeans' trust in courts is also in the middling range, with courts generally doing better than the police or the unions, worse than the army or the

98. See id. at 89.
church, and very much better than "foreign experts." Nowhere, it seems, does the law inspire much consumer satisfaction. Over 62% of Americans are convinced that courts favor corporations over individual plaintiffs and most believe that they treat wealthy people better than the rest. Trust or no trust, Americans will use the law whenever they expect it to advance their interests. We can assume Eastern European citizens to do the same.

Rather than their popularity, it is their frame of mind that makes lawyers of all kinds rank among the most promising allies for reform in Eastern Europe. Capitalism comes more naturally to lawyers than to other former socialists. The rule of law and capitalism are based on many of the same assumptions: a belief in individual autonomy, in the security of rights, and in playing by the rules; a preference for negotiated over state imposed solutions; and distrust of the government. Even lawyers coming from modest doctrinal training programs will have learned skills that are badly needed in the Rechtsstaat: close reading of texts, analogical reasoning, bargaining, following procedure, and looking at an issue from both sides. Lawyers were somewhat amphibious creatures under Socialism. They were more closely linked to political power than many other servants of the state but were also equipped with intellectual tools that enabled them to question the state’s power better than others could; part ideologues and part professionals; neither quite fish nor fowl.

My own research on East German legal history suggests an inverse relationship between socialist lawyers’ political and legal faith. In the early years of the German Democratic Republic (GDR), when utopian hopes for a new type of society ran high, East German lawyers and judges (then, mostly minimally trained “people’s judges”) had little use for careful legal argument. But as the image of a socialist utopia faded, legal professionalism gained strength. If you no longer believe that your ideology can provide the answers to important social questions, you need to rely on formal rules to find them. Doubt in the predictability of outcomes breeds trust in procedure. By the early 1980s, when barely anyone in the GDR seemed any longer to believe in Socialism, East German courts and lawyers had become far more finicky about the law than ever before. They worried about the reliability of proof in criminal proceedings, false confessions, and the unwarranted pre-trial detention of alleged offenders.

107. For preliminary results, see Inga Markovits, Justice in Lüritz, 50 AM. J. COMP. L. 819 (2002).
In East Germany, the rule of law grew its first shoots before the collapse of Socialism.

The same, I think, is true for Eastern Europe. As political faith decreased, legal faith grew stronger. In Poland, judicial review of administrative decisions was introduced a decade before the fall of Socialism in a time of political unrest and disappointment.\textsuperscript{110} Also in the 1980s, high courts in Russia began to push for the greater "exactitude"\textsuperscript{111} of trial court decisions and to use their supervisory authority to limit the percentage of prison sentences for criminal defendants.\textsuperscript{112} Liberalization efforts such as these could fill the void left by crumbling ideological convictions with pride in professional craftsmanship. The most likely proponents of reform were those best educated: high court judges, senior prosecutors, and law professors. As it is today, law reform under Socialism was initiated from above. But it left Eastern European courts, on the eve of capitalism, far more susceptible to rule-of-law reforms than they would have been in earlier decades. This may explain why Russian Arbitrazh judges appear to be doing a good job in their new roles as commercial judges,\textsuperscript{113} why Russian judges in general seem less corrupt than is normally assumed,\textsuperscript{114} and why the biggest success stories of post-socialist law reform are the new constitutional courts in Eastern Europe,\textsuperscript{115} staffed with the legal elite of Socialism. Yet—to return to transplants—the triumph of Eastern European constitutional courts can also be explained with their "potted" quality: they came as new, self-contained institutions, equipped with separate budgets, staffed with judges that did not belong to the traditional judicial bureaucracy, and charged with many tasks (such as abstract review) that did not require the cooperation of ordinary citizens.

In any case, Eastern European courts and lawyers, I believe, are among the most promising allies of post-socialist reform. Eastern European governments seem to share this view.\textsuperscript{116} Those that do not may find themselves put on the defensive by new and imaginative uses of the law. Here is

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  \item 113. See id. at 289.
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In 1996, the Belarus Constitutional Court, which under President Lukaschenka has to bear more than its share of troubles, lost a number of its previous rights through a Lukaschenka-initiated referendum. The Court's remaining caseload began to shrink. But Belarus citizens continued to submit to the Court socialist-style complaints asserting the violation of rights that the Court had no actual power to protect. Initially, the justices would write a letter to the offending office or institution, suggesting reasons why it should honor the citizen's request. Then, in 1998, the Court began to publicize those responses: first, just by including them in its register of cases; then—since 2000—by formally publishing the decisions in the Belarus Official Gazette. The Court still does not have the power to enforce its rulings. But it combines a traditional Soviet device (the paternalistic response to a citizen's essentially toothless complaint) with a rule of law device (publicity) to assert its authority and, thereby, perhaps make inroads into the lawlessness of Eastern Europe's most autocratic state. This combination of old and new, homegrown and imported, strikes me as a good example of how transplants may slowly and fitfully turn around an entire legal system.

117. See, e.g., Solomon, supra note 114, at 122. "Taken as a whole, the Putin reforms of 2001 represent a remarkable vote of confidence from the political leadership in the courts and their future development." Id.