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COMMENT

SIGNALING CONFORMITY: CHANGING NORMS IN JAPAN AND CHINA

David Nelken*

The transnational circulation of people and ideas is transforming the world we live in, but grasping its full complexity is extraordinarily difficult. It is essential to focus on specific places where transnational flows are happening. The challenge is to study placeless phenomena in a place, to find small interstices in global processes in which critical decisions are made, to track the information flows that constitute global discourses, and to mark the points at which competing discourses intersect in the myriad links between global and local conceptions and institutions.

—Sally Merry1

In the current restructuring of world order, scholars of international and comparative law encounter unprecedented opportunities to offer insights into legal and social change, as well as to debate how such developments should best be regulated. To what extent is the metaphor of transplanting law out of date in a global network society in which locations are so intertwined? What is the relationship between the role and the rule of law, across different cultures and at different stages of economic development? Why and how extensively is globalization producing a trend towards conformity in and through law? As scholars, advisers, and policymakers grapple with such questions, they discover that, in order to provide plausible answers, forms of scholarship themselves also must change. The disciplines of international and comparative law are at the front line in facing this challenge, but they often look for assistance to various branches of the social sciences.2 The

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2. Naturally, there are also significant disagreements between and within different social sciences. On the one hand, some scholars, inspired by economics, attempt to argue that international law has little or no independent constraining effect on a state’s decisionmaking. Others claim that international lawyers underestimate the range of ways in which state decisionmaking is being reshaped, as the articles in this special issue illustrate.
authors of the articles in this special issue seek in particular to offer insights into the interaction between domestic and transnational norms on the basis of in-depth accounts of recent legal developments in East Asia. Unlike them, I am not an area studies specialist, so I shall be mainly concerned with the theoretical implications of these articles. But if Sally Merry is right that globalization requires us to learn how to “study placeless phenomena in a place,” experts on different parts of the world and those scholars more concerned with general theorizing will each need to learn from each other.

Turning to the articles, what issues does each author address? Where do the authors agree and where do they disagree? Does placing their articles together create a whole that is more than the sum of its parts? What can be learned from these accounts with respect to processes of legal and normative change in general? Of the articles under review, two discuss recent legal developments in Japan and two consider current reforms in China. Charles Whitehead offers an original analysis of the way non-legally-binding norms developed by networks of regulators often compel states to show “public conformity without private acceptance.” He applies his model in the course of providing an account of how Japan

3. These articles are the fruit of years (or a lifetime) of first-hand observation of the states concerned. Even if the authors’ approaches come from and return to wider academic debates, I am well aware that many matters can only be fully appreciated by “being there.” See David Nelken, Being There, in LESSONS FROM COMPARATIVE CRIMINOLOGY 83-92 (Liqun Cao & John Winterdyk eds., 2004). I would thus like to acknowledge how much I have learned from them in preparing my comments.

4. See MERRY, supra note 1.

5. As Berman argues:

[The more recent focus on transnational law, governmental and non-governmental networks, and judicial influence and cooperation across borders, while a step in the right direction, still seems insufficient to describe the complexities of law in an era of globalization. Accordingly, it is becoming clear that “international law” is itself an overly constraining rubric and that we need an expanded framework, one that situates cross-border norm development at the intersection of legal scholarship on comparative law, conflict of laws, civil procedure, cyberlaw, and the cultural analysis of law, as well as traditional international law. Moreover, this new scholarship must be truly interdisciplinary, drawing on insights not only of international relations theorists, but also of anthropologists, sociologists, critical geographers, and cultural studies scholars. Such insights afford a more nuanced idea of how people actually form affiliations, construct communities, and receive and develop legal norms, often with little regard for the fixed geographical boundaries of the nation-state system.]

complied with the Basel Accord, which set out an international standard for minimum risk-weighted bank capital. He shows that, even in a period of serious economic difficulties, the Japanese state continued to signal its intention to conform. At the same time, Basel regulators extended considerable leeway so that Japan could continue to be considered compliant. This study is then followed by Eric Feldman's analysis of the very recent introduction in Japan of severe restrictions on smoking in public. He tells us how, after a long period of inaction, smoking has now come to be regulated in a variety of ways in Japan, including through health promotion laws, the limitation of youth access to cigarettes, taxation, litigation, warnings of dangers in advertising, and local government initiatives. Feldman seeks to explain why Japan made such a sudden switch in regulation. After examining a variety of relevant factors, he gives special importance to what he calls the "norm of conformity."

In contrast to the articles on Japan, the two studies on China paint with a broader brush. Randall Peerenboom, in his article on describing, predicting, and assessing legal reforms in China, analyzes the state of legal reform with special reference to criminal and administrative law. He gives careful consideration to the vexing question of whether the Chinese yet benefit from the rule of law. Takao Tanase, in his piece, summarizes a considerable literature in which Japan's scholars comment on recent developments in China. He notes the drawbacks of the current operation of legal institutions and the different demands on the law that social change in China—the strains of economic growth, rootless migrant workers in cities, and the need to accept plural values—has produced. The articles on China also give somewhat more attention to prescriptive questions. Peerenboom, for example, insists on the need to avoid repeating the mistakes of the earlier U.S. "law and development movement," which was too easily discouraged by slow progress. He also seeks to persuade us that, even if there are many matters open to criticism under a short-term view, China has made remarkable progress in the last 30 years toward functioning legal institutions. In terms of assessing reforms, Peerenboom reminds us that compliance, effectiveness, and efficiency are not sufficient measures in themselves but must join other values such as justice and human rights. Likewise, Tanase also dedicates much of his contribution to arguing that China can and should find its own path to legal modernization.

There are also some significant differences of approach and substance among these contributions. The disciplines the authors draw on, for example, reflect different assumptions about the role of law in social

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6. I shall have least to say about Tanase's sophisticated contribution, as his article is in many respects more of a commentary than a further descriptive account.
life and influence the conclusions they reach. Whitehead's analysis has much in common with the "law and economics" approach, whereas Feldman, though he also speaks of rational choice, tends to offer a more "thick" descriptive account of sociolegal change. The explanatory parts of Peerenboom's article, on the other hand, follow the protocols of mainstream political science. In terms of the literature of international relations, one could argue that Whitehead (and perhaps also Peerenboom) share more of the assumptions of the "realists," while Feldman, in contrast, leans more to the "constructivist side." As far as their findings are concerned, both articles on Japan argue that transnational norms play a crucial role in reshaping local laws and practices. Whitehead describes the "costs" Japan paid in order to remain in good standing. Feldman, for his part, argues that only the influence of foreign models can explain the rapid legislative changes he documents. The authors discussing China, on the other hand, give the impression that outside influences have less power to shape events in that state. In Boaventura de Sousa Santos's terminology, one could say the case studies on Japan provide examples of "localized globalism" (the way local patterns are restructured so as to respond to transnational imperatives), while the articles on China describe instances of "globalized localism" (in particular the spread of U.S. models of criminal justice). But it is unclear to what extent this contrast faithfully reflects the different stages of economic development and global integration in Japan and China, and to what extent it is rather a product of the varying degrees of "Orientalism" that affect the normal scholarly approach to these two states.

Whatever their differences, however, the articles also have much in common in addition to their regional focus. I shall discuss in turn three (related) theoretical issues that arise, to a greater or lesser degree, in all four contributions. In the first Part of this Comment, I consider the insights of these articles on the need to move from discussing transplants to focusing on transnational legal processes. In the second Part, I examine what the contributions tell us about culture, legal culture, and the so-called "norm of conformity." I shall concentrate in particular on the cultural sources of choices to conform. I conclude by discussing the contribution of these articles toward the further study of the processes

9. Of course, it would be unwise to draw too sharp a line between these two processes, and there are certainly examples of both in each country.
for spreading conformity. In my view, the articles' insights on these processes encompass many of their most valuable common elements. But, conversely, the significance of their claims can only be appreciated if placed in a larger framework.

I. FROM LEGAL TRANSPLANTS TO TRANSNATIONAL LEGAL PROCESSES

A conventional starting point for examining the interaction of domestic and international norms is the idea of legal transplants. But this metaphor has also been much criticized for the way it so often relies on or reproduces simplistic or misleading notions about the relationship between legal and social change. William Twining's recent, valuable critique of the legal transplant literature\(^{10}\) attempts to correct a number of false assumptions the metaphor implies. In contrast to the simple transplant model, Twining argues, legal transfers do not have any one final reception date and can be long, drawn-out affairs. Sources of reception are often diverse; transfers can take place between many kinds of legal order at and across different geographic levels. Pathways can be complex, indirect, and mutual. Transplants often move from the imperial center to the periphery—but it is not always so. Just as legal rules and concepts travel, Twining explains, various aspects of institutional practices migrate as well. The agents of change are not only governments but also include transnational networking by pressure groups, NGOs, and others. The role of local actors as mediators is crucial.\(^{11}\) In addition, it is important to avoid "exporter bias" in studying transplants and recognize that the introduction of innovations occurs on a continuum from informal diffusion to deliberate dissemination. Transplants change when they move; they rarely merely fill a vacuum or wholly replace the existing order. Relations between coexisting legal orders can take the form of complementarity, cooperativeness, cooptation, competition, subordination, symbiosis, convergence, repression, or imitation. It is wrong to think legal transplants are necessarily instrumental, technological, and modernizing; they can also be expressive or ideological. As far as the problem of whether transplants "take" or "work" successfully is concerned, Twining suggests the need for more detailed empirical studies. Apart from the

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difficulty of defining success, claims regarding outcomes require the proper monitoring of transfers. Measures of success, Twining adds, can also then become important in their own right as a resource for arguing for or against social change.

Reformers continue to offer models of both Anglo-American common law and civil law codes as transplants to states seeking to modernize or satisfy international requirements. And writers in the fields of international law and comparative law continue to make use of the metaphor of "transplants" and debate both the conditions for their implementation and the requirements for their success. The contributors to this issue also make reference to the literature on transplants. Feldman, for example, endorses the value of this idea when emphasizing the frequency with which states adopt laws from elsewhere rather than producing them domestically—which makes the Japanese situation less exceptional than it is often painted. But, Feldman adds, even if Japanese laws against smoking were "inspired" by foreign developments, they were not merely carbon copies of those found abroad. He argues that in order to understand the role of transplants in contributing to legal change, a focus on institutions and the role of rational actors is necessary. Peerenboom's article, however, devotes the most attention to the metaphor of transplants and its limits. He distinguishes between transplants from foreign sources and those from different parts of the same state (such transplants play an especially important role in such a vast state as China). To this distinction he then adds a further division between change achieved through top-down imposition and reform accomplished through bottom-up experimentation (which, somewhat awkwardly, he describes as the contrast between deduction and induction).

On the other hand, Peerenboom also insists that metaphors in themselves can give us only limited help in explaining the variability in the choice and outcome of transplants. In his judgment, the underlying movement toward more independent legal institutions in China should be largely explained in terms of an internal response to local problems, such

as corruption, rather than a reaction to foreign models or demands. The clearest case of change attributable to foreign influence is China’s move to the adversarial system and its other procedural reforms in criminal justice. But the Chinese provisions on administrative detention, the power of the adjudicative committee over the courts, and the possibility of individual case supervision are all examples of practices at odds with Western ideas of judicial independence. China has not given way to pressure from foreign critics to change these policies, and Peerenboom offers some explanation and even justification for such resistance.

In terms of Twining’s strictures, all four authors seek to avoid exporter bias, as they are particularly interested in analyzing the motives of those on the receiving end of transplants. They also effectively highlight the role of intermediaries—and the role of “transnational networks” and “epistemic communities” of policymakers—in the process of introducing legal change. Whitehead argues that states no longer interact as wholes but engage within “less well-defined constellation[s] of power structures, elites, bureaucrats, and other actors.”¹⁵ He also hints at the possible tensions to which members of regulatory networks are subjected and the double loyalties they may need to reconcile. Feldman likewise explains that foreign models may often become salient because of the difficulties government representatives encounter when attacked abroad or at home for a failure to maintain international standards. But the articles published in this issue also suggest that revision of the transplants approach can and should be taken further. According to Twining, the way to get beyond the transplant metaphor is through careful empirical investigations that use explanatory schemas drawing from the literature on the diffusion of technical or cultural innovations. Given the way the relationship between the global and the local is changing, however, there is a need for further rethinking of the theoretical frameworks that guide empirical research into the interconnection between international laws and domestic norms.¹⁶ In particular, in addition to studying single transplants, scholars must consider what some have called the making and acceptance of “global prescriptions.”¹⁷

¹⁶. For some authors, there are serious theoretical issues at stake that cannot be resolved merely by a shift of empirical focus. See, e.g., Guenther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences, 61 MODERN L. REV. 11 (1998); Pierre Legrand, What Legal Transplants?, in ADAPTING LEGAL CULTURES, supra note 5, at 55.
¹⁷. See GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay & Bryant Garth eds., 2002) [hereinafter GLOBAL PRESCRIPTIONS].
Increasing interdependence means that the most pressing questions do not just concern the various ways in which transplants or even global prescriptions move from place to place but how “place” itself is constructed and deconstructed. As the epigraph from Sally Merry suggests, a world characterized by “the space of flows” puts the very idea of “place” in doubt. Writing about human rights, she points to three such flows: transnational consensus building, the way international discourse shapes transnational program transplants, and the localization of transnational knowledge by national and local actors who participate in transnational events and bring their experiences home. Feldman offers illustrations of these flows, and he references a striking notice posted in his Tokyo condominium in 2005: “we observe New York City smoking law out of consideration for our customer’s health.” Given the importance of the mass media, scholars must also be alert to the possibility of “virtual” transplants. Individuals who watch U.S. imported films and television shows sometimes think they enjoy U.S. legal procedures even though those processes have not been introduced into their legal systems. Thus, German consumers of the Perry Mason television series sometimes assume their state has imported the accusatorial process, and Chinese villagers who have watched U.S. police films have been known to ask for their Miranda rights. In addition, those who keep closely in touch via the Internet with others who share their political, ethnic, cultural, and/or religious identities may sometimes feel it is they who are being transplanted.

Rather than fitting the articles reviewed here into the literature on transplants, they may be better appreciated if seen as contributions to the interesting, recent line of work in international law that studies transnational legal processes. Lawrence Friedman, for the purposes of sociology of law, describes transnational law as the “norms and institutions which span, are valid in, or apply to more than one country or jurisdiction.” He distinguishes imposed norms, planned voluntary norms, and unplanned evolutionary norms. Harold Koh, one of the pioneers of this field of

18. Consider Saddam Hussein’s claim that the Iraqi court trying him is an “American court” or the way the United States deliberately created the prison in Guantánamo as a non-space beyond all jurisdictions. More everyday examples concern the way states choose or feel obliged to sign conventions that allow courts based elsewhere considerable power over what happens in local jurisdictions. For an Italian example showing the interaction between the European Court of Human Rights at Strasbourg and the problem of delay in Italian courts, see David Nelken, Using the Concept of Legal Culture, 29 Australian J. Legal Phil. 1 (2004).


international law, is particularly interested in the way transnational norms modify behavior — "the theory and practice of how public and private actors—nation-states, international organization, multinational enterprises, non-governmental organizations, and private individuals internalize rules of transnational law."^{21}

Because of the increasing interchange of commerce, populations, and information, it makes less and less sense to think of "domestic" norms as forming part of distinct national jurisdictions that then interact with transnational norms. With reductions in national sovereignty, legal fields are increasingly internationalized, even if this process does not affect all fields to the same extent and varies by different areas of legal and social regulation.\(^22\) Instead of governments, the talk now is increasingly of "governance"—power exercised at a series of other levels and by other institutions, in collaboration or otherwise with state bodies. The "denationalization" of rulemaking\(^23\) means that transnational public and semipublic networks substitute, to an increasing extent, for national governments in building a "real new world order."\(^24\) Rule-formulation and settlement increasingly takes place within new agencies of transnational governance, such as NAFTA, the OECD, and the WTO,\(^25\) but also in many lesser-known public–private forums.

The language of transplants is not well-suited to studying new forms of norm-making, dispute-channeling and regulation, the growth of the \textit{lex mercatoria}, the use of "soft law" or other non-binding agreements and persuasive practices by international regulators, nor the private power of multinational companies. The use of \textit{lex mercatoria}, for example, is said to "break the frame" of national jurisdiction.\(^26\) It is one factor that

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\begin{itemize}
  \item \textsuperscript{22} The contrast is often made between, on the one hand, those areas of law that are relatively internationalized, such as international business contracts, antitrust and competition policy, Internet and new technology, labor law, social law, and environment law, and, on the other, family law and property law. Of course, one suspects that experts in the latter fields would also find much evidence of international and cross-cultural influences.
  \item \textsuperscript{23} Saskia Sassen, \textit{Opening Remarks: Producing the Transnational Inside the National, in Transnational Legal Processes, supra note 20, at 189, 195.}
  \item \textsuperscript{24} Anne M. Slaughter, \textit{The Real New World Order}, FOREIGN AFF., Sept. 1997, at 183–97.
  \item \textsuperscript{25} See GREGORY C. SHAFFER, \textit{Defending Interests: Public-Private Partnerships in WTO Litigation} (2003).
\end{itemize}
leads to what Santos calls "interlegality," a term that describes "a highly
dynamic process" where different legal spaces are "nonsychronic" and
thus result in "uneven and unstable combinations of legal codes (codes
in a semiotic sense)." Lawyers and accountants also play an increasing
role as entrepreneurs of new forms of dispute prevention and settle-
ment, mainly, if not entirely, so as to service the increasingly important
international business community. In turn, the opportunities for such ac-
tivity transform the legal profession(s). The importance of private actors
has also altered as a result of the growth of multinational and interna-
tional production networks, new technology, and changes in work
patterns.

We need, then, to study legal changes in the context of the larger
spatial transformations in the social relations and transactions of which
they are a part. As Snyder points out, this means examining transna-
tional processes of coordination, contract, hierarchy, networks, lex
mercatoria, and global legal pluralism so as to identify the key structures
of sites of production and consumption and the relations between them.
Both Whitehead's and Feldman's articles show the importance of what
Manuel Castells has called the "network society," where power is dif-
fused in global networks of wealth, power, information, and images that
circulate and transmute in a system of variable geometry. For Castells,
flows of capital, information, technology, organizational interaction, im-
ages, sounds, and symbols go from one disjointed position to another
and gradually replace a space of locales. The new power lies in codes of
information and in images of representation produced by people's minds
and constructed in identities. Likewise, in his continuing effort to de-
velop a satisfactory account of law and globalization, Wolf Heyderbrand
writes of the "generalization of procedural informalism to transnational
governance" and "the kinds of mechanisms and processes that link pro-
cedural informalism to the political economy of globalization," arguing
that "a key homology may be found between network society and flexi-
ble law." In this perspective, "the logic of negotiated process is that it is

27. Santos, supra note 8, at 473.
28. See Global Prescriptions, supra note 17.
29. David Nelken, Changing Legal Cultures, in Transnational Legal Processes,
supra note 20 at 41–58.
30. Francis Snyder, Economic Globalization and the Law in the 21st Century, in
31. Manuel Castells, The Rise of the Network Society (1996); Manuel Castells,
32. There are networks of production, distribution, financial circulation, power, informa-
tion, communication, images, and experience, both considered apart and taken together.
33. Wolf Heydebrand, Globalization and the Rise of Procedural Informalism in Europe
and America, in European Ways of Law (Volkmar Gessner & David Nelken eds., forthcoming).
organizationally anchored in minimally structured informal social networks." Moreover, Heydebrand suggests, "networks typically facilitate the formation, communication, and easy transfer of process-based decisions among organizational positions and institutional levels insofar as official decision makers typically participate in both formal settings and informal networks at the same time."

On the other hand, there are dangers, as always, in assuming too radical a break with the past. The banking regulations that Whitehead describes are a good example of what could be considered the newly emerging international normative infrastructure. But there is a long history of agreements between states designed to maintain financial stability. How are the Basel accords different, if they are? We must also be wary of going too far in submerging the study of legal change in particular places into more general theorizing about globalization and the network society. Care must be taken to distinguish the various phenomena that fall under the rubric of globalization. In addition to seeking out homologies between changes in social relationships and changes in legal forms, we should keep in mind that law can also follow a relatively independent path or even serve to conceal dramatic social change. It is a tricky question to decide when and why law incorporates wider national or local patterns of cultural dispute settlement and when, instead, it offers—and seeks to offer—an alternative to these arrangements. And this issue is particularly acute at a time of rapid social change and legal reform. So we should be careful not just to "read out" or predict from theory any universal pattern of interaction between international and domestic norms; outcomes in each context will depend to a greater or lesser extent on negotiation and are open to contestation. As the detailed case studies discussed here demonstrate, outcomes include a large element of contingency and unanticipated consequences and are subject to larger unexpected developments in politics or the economy.

We also should bear in mind (as Merry reminds us) that crucial decisions regarding legal change take place in specific places and are shaped by reformers' anticipations of the forces they expect to encounter. States also differ in the ability or desire of their elites to shape or reshape international norms and in the willingness of their populations to imitate

34. *Id.*

35. In *Changing Legal Cultures*, I questioned whether the term "globalization" can capture all the processes of legal transfers without becoming too expansive. David Nelken, *Changing Legal Cultures*, in *TRANSNATIONAL LEGAL PROCESSES*, *supra* note 20. Is there really any connection between the worldwide spread of human rights, the development of "lex mercatoria," the spread and increased role of constitutional courts, and, more generally, the alleged "globalization of judicial power"? What really interests scholars about such developments? Is it the way the world is becoming more alike? Or is the point the fact that these developments all testify to the declining power of the local state?
foreign methods. Thanks to increased exchange of information, policymakers in some states will think twice about seeking to copy U.S. corporate law without also incorporating the Sarbanes-Oxley reforms. But others will buy privatization packages without the more recent adjustments U.S officials have found necessary. It will likely be within the United States that Microsoft decides it is obliged to reveal its code to Europeans or Google concedes the need to adopt a considerable degree of self-censorship so as to continue trading in China. As this suggests, the nation-state continues to serve as an important reference point, and law within national boundaries should not be underestimated. When it so chooses, China can more successfully employ this domestic influence to resist foreign models than most states. But it is not only in China, as Peerenboom shows, that we are likely to find that international trends have remarkably little effect on institutions engaging in everyday dispute settlement.

II. THE ROLE OF CULTURE AND THE NORM OF CONFORMITY

The controversial issue of the definition of culture and the role it plays in explanation is obviously highly relevant to any discussion of legal and social change. It involves examining a series of questions concerning the relationship between law and culture; the meaning of legal culture; the division between external and internal legal culture; the weight of cultural factors in explaining the genesis, shape, and limits of given changes; and the way to distinguish cultural factors from other influences. Those who study situations where foreign norms have been borrowed, imitated, or invoked seek to clarify how far this process necessarily involves importing part of the host culture along with the rule, institution, or idea transferred, as well as what it means for law to be "embedded" in a given culture. 36 Similarly, these writers strive to understand how innovations patterned on foreign institutions will be affected by prevailing norms and ideas in the places where they will be applied and interpreted. 37

37. For example, commenting on the introduction of U.S.-style business governance in Japan, John Ohnesorge argues:

[T]he proper functioning of that institutional framework depends upon what are, in essence, cultural norms, expectations and practices. Truly adopting US-style corporate governance thus becomes a matter of importing US business and professional culture more generally. This would be a much more daunting and controversial
For many scholars, the existence of problems such as these is the motivation for determining how international and domestic norms interact. But culture is even more important when we enlarge our horizons to include the study and explanation of transnational legal processes more generally. Transplants and attempted transplants can then be seen as part of the larger impact of the forces of globalization, with culture both shaping a state's willingness to take from elsewhere and determining what it takes. Thus, Koh in his writings focuses on "acculturation" as the key determinant of how actors learn international principles and standards. Nonetheless, many scholars argue for a reformulation of the discussion of culture. The boundaries of culture or of legal culture are now seen as much more porous than in the recent past. Given the extent to which cultures are influenced by global flows and trends, it makes little sense to take states or national jurisdictions as a starting point. The purported uniformity, coherence, or stability of given national cultures will often be no more than an ideological projection or rhetorical device, manipulated by elements within the culture concerned or by outside observers. On the other hand, increasing homogenization of social and cultural forms appears accompanied by a proliferation of claims to specific authenticities and identities. Much talk of culture may refer only to "imagined communities" or "invented traditions," but these concepts may be real in their effects. And it is important to bear in mind that the defensive idea of culture can be manipulated not only by those internal to a society but may also be fomented by external political and economic actors. In general, globalization can construct difference as well as promote similarity.

See John K.M. Ohnesorge, Politics, Ideology, and Legal System Reform in Northeast Asia, in Globalisation and Resistance: Law Reform in Asia since the Financial Crisis (Christoph Antons & Volkmar Gessner eds., 2006) [hereinafter Globalisation and Resistance].

38. Joanna Scott helped me see that the articles here offer illustrations of two different aspects of acculturation: one is a soft power aspect in the form of shaming before peers (accountability through peer review), and the other is more nebulous, associated with norm diffusion through the shifting preferences of the actors.


41. Consider, for example, the way multinational enterprises from the West offered self-interested support for Malaysia's campaign for "Asian values." See Michael Likosky, Cultural Imperialism in the Context of Transnational Commercial Collaboration, in Transnational Legal Processes, supra note 20, at 221–58.

42. Rosemary J. Coombe, Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference, 1 Law, Culture & Human. 32 (2005).
Amongst the many ways culture may enter into the argument about legal and social change, we should not forget the sheer difficulties of translating and understanding other cultures—what Clifford Geertz famously called the difficulty of grasping "local knowledge." Not surprisingly, one of the key metaphors of legal transfer is discursive, describing the process in terms of communication and miscommunication, translation and mistranslation, understanding and misunderstanding. But whereas the problem of interpreting another culture well enough to learn from it is well recognized, it is too easy to forget that we may often not understand our own culture as well as we think we do. One of the crucial tasks when discussing globalization and law is to decide how far globalization represents the attempted imposition of one particular legal culture on other societies. For those coming from Anglo-American cultures, however, it is easy to miss the fact that what reformers seem to be spreading—more than any particular feature of legal culture—is the very idea that law is something which does or should "work" and can or should be assessed in ways that are separable from wider political debates. Others experience this view as the common law ideology of "pragmatic legal instrumentalism," with the corresponding organization of state and society it presupposes. We are also unlikely to see the "strange connectors" that bind our legal and social arrangements together. For example, at the same time as exponents of Anglo-American legal culture spread the idea that law is for something, they also insist that the rule of law stands for the autonomy of courts from political and economic interference.

The contributors to this issue are writing, in English, about legal change in Japan and China, states that are heirs to ancient traditions of thought and practice that many have long considered different from the "West" and in some respects even impenetrable. Indeed, one of the debates in which "culture" tends to be most emphasized concerns "Asian values." Scholars regularly discuss the appropriate way to understand the sociologically distinctive aspects of Japanese legal culture, with its alleged discouragement of recourse to the courts, or the significance of

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43. **Clifford Geertz, Local Knowledge: Further Essays in Interpretive Anthropology** (1983).

44. Importing states can choose between the Anglo-American model, whose prestige is also spread by trade and the media, and national versions of the continental legal system, embodied in ready-packaged codes. The Anglo-American model usually emphasizes the link between law and economics (rather than law and the state), procedures that rely on orality, party initiative, and negotiation inside law, or more broad cultural features such as individualism and the search for "total justice." But only some of these elements are actually on offer in legal transfers, and much of this model does not accurately describe how the law operates at "home." For example, much of the U.S. legal and regulatory system actually relies on inquisitorial methods.
China’s Confucian heritage, with its historic opposition to “black letter” legalism and its social value of avoidance. So it is hardly surprising that the articles make considerable reference to the role of culture in describing, explaining, and assessing legal changes. But, of course, much more could have been said. For example, the articles on China say relatively little about everyday practices in the wider culture, such as guanxi,⁴⁵ that help shape legal culture. Nor do they spell out the possible implications for the rule of law of the Asian reluctance to criticize established authority. Conversely, in his discussion of the introduction of anti-smoking laws from the United States, it might have been helpful for Feldman to discuss how U.S. (Puritan) culture shaped the introduction of the United States’ own laws, rather than assuming U.S. authorities responded only to health concerns.

What is more interesting, however, is the variety of ways in which the four articles use or do not use the idea of culture. It is worth noting, above all, how even those contributors who place great emphasis on the role of culture are careful not to propose “culturalist” explanations of the sort that so easily become tautologies. Whitehead eschews generalizations about Japanese culture as such. He is much more interested in the processes of organizational acculturation within the working group that formulated and continues to apply the Basel Accord. But even if he confines them to footnotes, Whitehead does offer some comments on Japanese business practices, mentioning, for example, the strongly hierarchical relationships that govern them. The main thrust of Feldman’s article, by contrast, is devoted to isolating the local cultural norms that explain why the Japanese decided so abruptly to introduce anti-smoking laws patterned on those from the United States. For his part, Peerenboom, in his survey of recent Chinese legal reforms, gives a number of examples of ways in which Chinese cultural or legal cultural preferences shaped or reshaped China’s attempts at institutional change. Culture helps explain why plea-bargaining takes a different form in China than in the United States (being limited to crimes carrying up to three years imprisonment) and why appeals courts are retained despite their inefficiency. In addition to responding to the perceived need for political overview of the courts, Chinese reforms attempt to keep the system in touch with traditional notions of justice and are often popularly assessed by how far they meet substantive requirements rather than by whether they have introduced satisfactory formal procedures.

⁴⁵ Guanxi can be defined as a network of contacts, which an individual can call upon when something needs to be done and through which he or she can exert influence on behalf of another. It can also describe a state of general understanding between two people: “he/she is aware of my wants/needs and will take them into account when deciding her/his course of future action.”
A particular strength of Peerenboom's article is his effort to show that China is not a homogenous culture but rather one where different (elite) groups fight over the appropriate role for law in their society. He distinguishes four such groups: the majority group, which favors a socialist rule of law state; those who support a neoauthoritarian state; those who want a more communitarian state; and those who look forward to some form of liberal democracy. Unfortunately, however, he does not tell us how (and how far) these options are linked to different political, economic, and other sponsors and interests. It would also have been interesting to hear more about competing groups and visions in the articles about Japan. In general, the articles could also have further described translation and other barriers to grasping the meaning of law, norms, sanctions, and conformity in Japan and China. In seeking to revive interest in the cultural aspects of Japanese legal culture, Feldman does point out how competing interpretations of Japanese legal culture over time owe less to changes on the ground than to changing rhetoric of explanation. He also describes the care with which the Japanese had to phrase their anti-smoking warnings in order to capture the type of distinctions that are taken for granted in English. Likewise, Peerenboom warns of the dangers of using broad terms such as "due process" for comparative purposes as if they had automatic equivalents, and he recommends giving more attention to the nuances of Chinese words for the rule of law.

It is striking how all the authors provide accounts that make Chinese and Japanese choices seem remarkably similar to those made in and by the West (the choices "we" would make if placed in the same circumstances). There is little sense here of culture shaping preferences—these are rather derived from a starting point of rational choice assumptions and pragmatic considerations. For Whitehead, this view is built into the language of the economics and political literature on which he draws. But even Feldman speaks of "cultural incentives." Peerenboom also describes the Chinese preference for flexible drafting, among other characteristics, not as a blind result of culture but as a pragmatic choice for flexibility. Similarly, he explicitly denies that "cultural difference" alone can explain the Chinese resistance to change. Rather, he argues,

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46. For area experts, this is probably a hurdle they feel they have already had to overcome.
48. By contrast, the desire to introduce legal transplants in some ex-communist or Latin American states does not always seem quite so rational and pragmatic, being motivated (and encouraged) in part by the hope that changing legal institutions will necessarily bring economic development and political liberty similar to that in the host states.
reforms encounter opposition from those in the judiciary and bureaucracy who will suffer because of the institutional change. Hence the answer (though one that, as so often, may be seen to restate the problem) is to devote more resources to institutional reform rather than seek broader assimilation to Western culture.

It is certainly important not to treat culture as all-constraining. But it can be difficult to navigate between the Scylla of "Orientalism" (the assumption that others are essentially different) and the Charibidis of "Occidentalism" (the presumption they are just like us). Consider Peerenboom's analysis of what influences Chinese decision-making. On the one hand, he tells us that "[t]he factors affecting the implementation of rule of law in China are likely similar to those affecting the implementation of rule of law elsewhere" and argues that China faces the same challenges as we do in meeting the often conflicting requirements of efficiency and justice, procedural and substantive justice, judicial independence and accountability. China's leaders are behaving pragmatically in handling such choices—again, much as "we" would react to similar dilemmas.

On the other hand, he spends much of his article justifying the lack of further progress to date by claiming that critics of China use double standards and fail to compare like with like. It is unfair, he says, to judge China by the standards of states that are more economically advanced. Progress toward the rule of law is always closely tied to economic resources, as shown by the high correlation (.82) between wealth and rule of law ranking on the World Bank index of the rule of law.50

But Peerenboom's effort to do justice to China can lead him to use what appear to be inconsistent arguments.51 He invites us to make allowances for the conditions in which China finds itself, as it "takes decades to create efficient, professional, and clean institutions."52 Far from being a plea for cultural relativism, however, this is a plea to consider the Chinese context. As an example, he points out that even liberal legal scholars "believe the rise in crime and the need to ensure social stability create a legitimate need for [education through labor] and other forms of

50. Id. at 841 n.51. This index, writes Peerenboom, attempts to measure the extent to which people have confidence in and abide by the rules of society, the fairness and predictability of rules, and the level of protection for property rights. The indicators include perceptions of incidents of crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts.
51. These may perhaps reflect the debates between the four schools of opinion in China he identifies.
52. Peerenboom, supra note 49, at 841.
Peerenboom believes progress toward the rule of law can be evaluated independently from the degree to which political democracy has been achieved. Again using World Bank indices of these two ideals, he points to examples of states that score well on the rule of law index but do not have democracy (such as Hong Kong, Singapore, and some Middle East states), as well as those that do have democracy but also have poor standards of rule of law (Kenya or Guatemala, for example). For states at its level of economic development, he claims, China scores much as we would—or should—expect.

At the same time, however, he also offers other arguments in which the need to make allowances for cultural difference play an important role. China, he asserts, has its own distinctive culture, which means it is likely to construct a different form of legality—a socialist legality. This can allow for what he calls "a thin rule of law" (which is procedural in nature), while leaving to an authoritarian state the pursuit of substantive justice. Finally, he notes, we must in any case be cautious about using our standards as a basis from which to evaluate China's achievements. Critical legal scholars and postmodern writers who have written about judicial decision-making have shown the hollowness of the much-vaunted rule of law in the West, illustrating that rules are indeterminate and do not fulfill their promise of impartiality and certainty.

Can all these claims be true? If we are to consider China as achieving a more or less acceptable level of rule of law for a society at its stage of development, this presupposes that we can evaluate it using our criteria. But this argument rests on the teleological assumption that China is going through predictable stages on its way toward a Western (or Japanese?) type of rule of law. Alternatively, therefore, Peerenboom suggests, we can imagine that China is moving on a different trajectory. But in that case our criteria may (at least to some extent) be irrelevant. Thus, for some scholars rooted in Chinese traditions, what the West describes as the welcome spread of "the rule of law" is actually the marginalization of the importance of quing, or the appeal to others' feelings, in favor of

53. Id. at 855.
54. This is an important point, given that the Communist Party in China has not moved toward political pluralism and free elections.
55. A strong counterargument could be made to the effect that these ideas are mutually interdependent and that transparency of law, reasonable administration of law, and effectiveness of judicial review must operate at uniform levels. Certainly, we can envisage situations where there could be democracy, in the sense of popular elections, even where there is poor achievement of the ideals of the rule of law and poor levels of judicial independence and protection of minorities. But it is harder to see the rule of law existing without a reasonable level of democracy, insofar as a foremost purpose of this ideal of law is to hold government to legal limits.
li, or reasonableness. The mistake here would be not so much using double standards but adopting too uncritically our standards. Peerenboom’s third claim puts all standards in doubt. If all legal rules are indeterminate, then what could justify the objectivism of the World Bank’s attempt to measure the achievement of the rule of law? Yet this is an index on which he is happy to rely. It is far from clear which of these claims Peerenboom wants us to take most seriously. How far we are persuaded by his arguments about China will certainly be bound up with what we think of the World Bank index as a satisfactory measure of the rule of law. Furthermore, as Peerenboom would surely acknowledge, many of the routine government actions in China that involve serious breaches of human rights have, arguably, little or nothing to do with problems of resources and everything to do with political choices intended to curb dissent and promote economic development, even at the cost of hardship to individuals.

What of Japan? If relative wealth and resources promote observance of the rule of law, as Peerenboom argues, then, if for no other reason, we would expect Japan to have reached a higher standard. Indeed, the articles on Japan do not even treat this as a matter worth debating. But the question of cultural specificity remains open in other respects. Of all the articles in this issue, Feldman’s study most explicitly addresses the need to use culture when explaining legal change. He notes that while in the 1950s it was conventional to adopt “harmony culture” explanations of Japanese legal culture, by the 1970s and 1980s this approach had fallen out of favor relative to more structural explanations. Feldman wishes to overcome “the taboo” on using the term culture and bring it back to the center of the study of Japanese law. Yet, at the same time, he is wary of stereotyping and Orientalism (in a previous work he argued strongly that there is a tradition of rights in Japan).

In fact, his reference to the importance of culture does not concern any substantive element of its patterns of behavior and ideas but rather what he calls “the norm of conformity,” which leads Japanese elites to desire modernity and seek conformity to the West.


To highlight the relative importance of this factor, Feldman discusses all matters that could plausibly be linked to Japan’s recent, sharp move to anti-smoking legislation. He points out, for example, that legal change did not simply register preexisting social changes in smoking behavior. A large number of people still smoked in Japan, and though this number was diminishing, it was not decreasing at such a rate that the law would target only an insignificant minority. Feldman also argues that the law did not result from the availability of information regarding the health issues at stake. This issue remains much less salient in Japan than it is in the United States, for example. He also rules out the importance of litigation as the motor of change, pointing to the reluctance of Japanese courts to find for plaintiffs (notwithstanding the successes achieved in the United States) and noting that some judges still denied the link between smoking and the diseases for which the litigants sought compensation. Feldman tells us there was no united public movement pushing from below and that the media largely ignored the link between health and smoking. There was no denunciation of the strong involvement of the Japanese government in the tobacco business. Nor was there any independent push for change from within government bureaucracies; only one maverick civil servant staked her career on the cause. On the other hand, government officials felt keenly the criticisms of foreign NGOs, and there was some activism at home (by the Japanese medical association, for example).

Feldman makes it clear that there were good economic reasons for taking action. The Institute for Global Tobacco Control at John Hopkins University, which included Japanese scientists, was funded by pharmaceutical companies who made products designed to reduce smoking. Most importantly, cigarette companies themselves saw the need to take over the protest against smoking—and he describes vividly how the manufacturers themselves came to produce adverts calling for the reduction of consumption. Feldman argues that the tobacco business preferred to have a settled domestic control agenda rather than public battles about the need for control. He explains that the largely nationally-owned Japanese Tobacco had anticipated the legal change as early as 1999, buying up foreign tobacco companies selling mainly in the developing world. Government restrictions on advertising saved the tobacco companies money without causing any of them to lose out relative to their

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competitors. Legal controls also helped protect companies from tort claims.

Other economic aspects more directly linked to politics, according to Feldman, include the falling number of tobacco farmers. Declining public revenues and an aging population made the costs of caring for those with smoking-related disease another important consideration. Feldman also emphasizes a number of purely political changes, including a new prime minister, a new minister of finance, and significant alterations to the role of the health ministry’s advisory committee. Historical contingency also played a part, as when a leading political powerbroker was jailed on charges of corruption, thus removing from the scene one of the main actors who had worked to block previous reforms. Feldman also sees the embarrassment of Japan’s representatives at health conferences abroad and at home as a triggering factor. But he denies that the change in the law reflects the general importance of external political pressure on Japan to change its practices (even though this phenomenon is sufficiently important in Japan to merit its own Japanese term). Feldman mentions, for example, the creation of the Framework Convention on Tobacco Control, but he underlines the point that no real intergovernmental action was ever launched against Japan. Rather than any of these factors as such, it was, Feldman argues, the norm of conformity that set the process of legal change in motion.

Exploring and clarifying the role of so many relevant factors is a considerable achievement. But Feldman’s argument leaves a number of matters unclear. In the first place, there is the notorious difficulty of distinguishing cultural from other structural, economic, and political factors. Feldman asserts that the haphazard, incoherent, and uncoordinated nature of the bouquet (his metaphor) of Japanese laws against smoking demonstrates the crucial role of the norm of conformity. But it could be argued that many sets of laws are equally haphazard, especially when, as so often, they must to respond to conflicting interests and priorities. He adduces further proof from the pace of change, asserting that the “timing and intensity” of the campaign against smoking reflects reaction to foreign models rather than gradual evolution within Japan itself. It does seem likely that the move against smoking came about mainly through imitation (this is not unusual in processes of law reform). But there does seem to have been an independent desire in Japan to move toward such laws. Feldman himself shows us how even the earlier anti-tobacco laws, which were mainly permissive, achieved remarkable

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compliance among taxi drivers, school officials, and the general public that went well beyond what might have been expected from a cost-benefit calculation. Feldman's effort to show the importance of culture by eliminating other contenders is also open to criticism. He insists culture is not a "residual" explanation to adopt when other explanations run out. And any argument by elimination cannot prove the validity of a remaining explanation, given the possibility of some yet-undiscovered factor. So why do we need to choose? Why not accept the necessity of a number of factors? What Feldman succeeds in showing is that other factors cannot by themselves provide a full explanation; there is need to also refer to culture, whatever difficulties are inherent in using this term.

Perhaps in the end this is all he wishes to prove. But if we are to follow through on his analysis we need to explain how these various elements work together. Feldman mainly tends to treat economic and political factors as merely providing the necessary background conditions for the norm of conformity. But at other times he argues that culture itself adds something to the influence of these other factors. He argues, for example, that culture (in the shape of the norm of conformity) "put on the agenda" the issue of anti-smoking laws. He also writes that the "conformity norm shadowed each of these concerns" and put its "imprint" on them. Should we say, then, that culture is manifested through political action and subject to economic constraint? Or is there some other combination of choice and constraint at work?

Feldman's account shows there was resistance from both political and economic forces in the years before the anti-smoking laws were passed—so apparently the cultural norm of conformity could not then have been sufficiently strong to come into play. So the removal of these sources of economic/political resistance is surely as significant as the role of the norm of conformity (unless it is the conformity norm that has strengthened in the meantime—but this is not asserted and risks being a circular argument). In terms of the "pull" factor, much more needs to be understood with respect to when the norm of conformity operates. The desire to copy other states is cyclical. In Japan, periods of autarchy alternate with periods of greater openness. As with the banking norms discussed by Whitehead, economic difficulties certainly influence behavior as well.

Feldman's effort to show the special role of culture also raises other interesting problems. In what sense is the norm of conformity a matter of culture? He is keen to encompass the literature of rational choice so as to

63. Id. at 787.
overcome the view that sees culture as the realm of the irrational. But he does not want to reduce culture entirely to rational choice. What does Feldman mean by “norm” when he uses the term “norm of conformity” to refer to a propensity to adopt foreign models? Norms can both indicate ideal rules of practice and point to normal or average rules. The normative can also signify the realm of the prescriptive. Feldman employs all these nuances. Thus, he speaks of the adoption of an anti-smoking “norm” (and here the term norm describes the result, not the trigger, of behavioral change). He also describes what he calls the “de-normalization” of smoking in the West, which was then copied in Japan. This process has more to do (albeit somewhat ambiguously) with normal or average behavior than with the ideal. He also locates this change as part of a general normative transformation, writing that “legal change reshapes social practice, and ... new social practices reconfigure culture” and that the “the entire normative framework of smoking has undergone a profound shift.”

What, if anything, is specifically Japanese about this shift? Feldman points out, it is true, that in other countries as different as South Korea or France anti-smoking norms have not been adopted with the same enthusiasm. But there are certainly other places that do seem to have followed a similar path to that taken in Japan. By Feldman’s own admission, Japan’s norm of conformity is selective: in other spheres of behavior, Japan resists foreign models, and historically, Japan has not always been a willing importer. Thus, his argument appears to be that current Japanese identity encompasses a desire to be like the West. How then does this claim relate to the common stereotype that Japan’s culture induces conformity in its population? Feldman explicitly denies he is rolling out this old truism. Indeed, there is little consistency in an assertion that the Japanese conform to the norms of other Japanese while also seeking to emulate different norms from abroad. The first impulse should encourage conservation of existing patterns whereas the latter would suggest a willingness to break with tradition. On the other hand, some of the

64. Id. at 810.
65. Id. at 753.
66. Girolamo Sirchia, the Minister of Health in Italy, introduced strict laws against smoking in public places in 2005. These have produced remarkable levels of compliance in a country not usually noted for its willingness to follow state laws. According to a members’ survey in the January 2006 issue of the Bar Giornale, 90% of Italians in bars refrain from smoking. A ministerial circular also asked bar tenders to remonstrate smokers and report them to officials. But this has not been necessary.
67. As I wrote to Feldman when he kindly sent me an early draft of his article, “I did not completely grasp what you mean by saying that ‘conformity’ explains the Japanese desire to borrow normative patterns from elsewhere. Is this the same as wanting to conform to one’s own norms? On one view it seems the opposite. How does one lead to the other?”
Japanese writers Feldman himself quotes do "confuse" these two types of conformity. Can both somehow be true?

Even if the Japanese do act on the basis of the norm of conformity, whose norm is it? Feldman describes the norm as an expectation that shapes the behavior of lawmakers and other members of the elite, and he thoroughly describes the reactions of government officials to patterns of anti-smoking laws elsewhere. But he also refers to the norm as "a broadly-held social" belief and brings evidence from literary works and the experience of ordinary Japanese, who encountered different smoking norms firsthand—as a result of mass tourism to the U.S. state of Hawaii, for example. Media discussion of Japanese backwardness, including in the "popular" sports newspapers, was also important. Feldman also shows how many companies (including the one running his condominium) emphasized their adoption of foreign, and especially American, models of behavior as a selling point. He states that while the norm of conformity is part of Japanese culture, it is not the whole of it. How, then, does this norm relate to other cultural characteristics? In what ways is it shaped by and how does it help shape other cultural practices, ideas, and values? Feldman provides us with many clues. He shows us the distinctive way the Japanese display their disapproval of smoking and its consequences (with smell, even more than health risks, as the key issue both in public and in closed spaces). He tells us that some aspects of Japanese culture modify the effects of the law, as where the importance of showing respect for superiors means that senior members of business or other hierarchies still do not ask permission of subordinates to smoke. Interestingly, one of the sports newspapers Feldman cites as supporting anti-smoking laws actually manages to provide a local cultural justification for Japan's copying of anti-smoking laws from abroad. The newspaper complains that whereas in Europe anti-smoking is a matter of government policy, the problem in Japan is that it is left to the individual to choose!

We are left with the question of when the norm of conformity leads Japan to embrace other approaches and when and why it fails to overcome Japanese resistance to the introduction of foreign models. To answer this question it is crucial to examine the types of areas where the norm of conformity succeeds in causing change and contrast them with other, more resistant areas. Feldman indicates a wide range of sectors where Japan is coming into line: he offers the examples of international development aid and immigration policy, the training of lawyers, lay participation in trials, women's rights, freedom of information, products liability, and corporate law. But he also mentions other sectors where

68. Feldman, supra note 62, at 749.
change has been less forthcoming. For instance, despite regular pressure, Japan has dragged its feet on implementing bans on whaling, and it has resisted regulation of gambling, prostitution, and the use of motorcycle helmets. Even in the case of anti-smoking measures, there were some attempts to protest against the change. Feldman cites university professors as arguing that banning smoking would cut down their productivity! But the norm of conformity easily trumped such resistance. Should we assume that in the other cases Feldman mentions resistance was more successful because of the power of the groups involved? (After all, professors are not that powerful.) Feldman prefers, instead, to explain the success or failure of resistance in terms of the force of the other cultural norms at stake. The practice of whaling, he writes, plays a central role in signaling Japanese identity. But once again, this argument runs the risk of being tautological.

III. TRANSNATIONAL NORMATIVE SIGNALING: AN AGENDA FOR RESEARCH

Even if the norm of conformity explains why Japan introduced anti-smoking laws, we are left with the question of how we should explain the norm itself. Some of the most valuable ideas in the articles in this special issue address the importance of norms as a form of communication—what Whitehead calls the signaling of conformity. Peerenboom's contribution, at first glance, is the least focused on this issue. The process of signaling conformity in China, it seems, is much less evident as compared to Japan. But in a wider sense, as Peerenboom shows, what is important is the fact that such "variable geometry" in the spread of Western norms now requires justification. The Chinese, Peerenboom writes, explain their caution toward copying Western norms by arguing that they wish to avoid political and social turmoil. And even he notes that China does ratify some conventions so as to send the right signals. For example, in order to strengthen their Olympic bid, Chinese leaders introduced a hooligan statute even though the measure was unnecessary. He also claims these leaders moved away from the inquisitorial type of criminal procedure in order to conform to new ideas about organizing the criminal process—despite the fact that this change was not to their advantage. Thus, even the Chinese do not always consider it possible or desirable to resist pressure from abroad.

69. More generally, international bodies, such as the appellate body of the WTO, require reasoned divergence from international standards rather than insisting on the letter of the standard as such.
The articles on Japan by Whitehead and Feldman, on the other hand, are centrally concerned with conformity. But the content of the norms, in their view, is not what is crucial—in some sense they may even be arbitrary. What matters is the way they function to signal willingness to cooperate or the desire to be similar. For Whitehead, increased interaction among the world's regulators has reinforced norms within cross-border regulatory networks. This affects levels of state compliance because the network develops norms that define what actions are expected of states. States send signals, then, as a means of reaffirming their global power and credibility. Likewise, Feldman argues that the Japanese adopt norms so as to show they are keeping up with Western standards. The Japanese do not take on new norms because they seen them as superior; the norms are superior simply because they are more widely accepted. The Whitehead and Feldman articles also have much in common in the way they explain the spread of conformity. Both write about the role of elites and bureaucrats, and both attempt to relate changes in specific behavior (either banking reserve rules or smoking) to wider strategies. Both authors see norms as a matter of signaling to one's own reference group, as well as the outside world. Both also see norms as deriving from and reshaping culture.

But at this point their analyses diverge somewhat. There are important differences in how the authors conceive of norms and the work norms do (and should do). For Whitehead, the norms in question emerge from "the culture of the regulators," a result of similar socialization and a wish to maintain face with one's peers. The norms agreed upon in this subculture may—or may not—coincide with what is prescribed in the culture from which the regulators are drawn: in the case of Japan, they did not. Norms regulate behavior by taxing and subsidizing actions associated with defection and compliance. But the culture of regulators may allow noncompliance as long as a state signals its willingness to comply (though even this allowance was eventually stretched beyond the limit). For Feldman, on the other hand, things are more complicated. Participation in common work groups played some part in producing the legal change he examines and, no doubt, even the content of the anti-smoking laws that were passed. But the norm of conformity that primarily interests him is the one that requires the elite to keep abreast of foreign practices. This norm of conformity is an expectation—it is what prompts a state to harmonize with external practices.

In terms of the theory of norms,70 Whitehead's view has much in common with Eric Posner's approach.71 Posner argues that norms serve

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70. Such agreements, he claims, are more robust than bilateral treaties and have a legal function, if not a legal form. See Whitehead, supra note 15.
71. See ERIC POSNER, LAW AND SOCIAL NORMS (2000).
to signal a willingness to accept short-term costs so as to provide evidence of commitment to a long-term relationship (in which quick advantage will not be taken of others)—it is only such a relationship that would make the initial costs worthwhile. Whitehead tells us as well that by continuing to send the “right” signal, states may be excused for their defection under a network norm. States may, therefore, legitimately signal compliance by implementing the relevant standard, even when their actual compliance is imperfect. The signal is credible to other network members, in part, because of the commitment costs associated with sending it. What is not entirely clear, however, is whether it is the Japanese regulator or the Japanese banks that are paying the price of adhesion to the Basel regulations. Feldman’s idea of the norm of conformity, in contrast, does not seem to belong to Posner’s theoretical tradition. Posner, after all, argues that norms “do not explain anything.” They are just “behavioral regularities” that scholars account for by pointing to the presence of underlying rules, and he has little to say about norms as an explanation of legal change.

Some of the differences between the messages of Whitehead and Feldman may stem from the fact that the authors are interested in different types of conformity and distinct phases in the norm-forming process. Whitehead examines the process of creating norms that then have lawlike effects. Feldman explains how the existence of a norm can be deduced from its power to shape behavior and change the law. Agreeing upon rules for international banking is not the same as copying foreign methods for restricting smoking practices. Whitehead’s case study has more to do with coordination, whereas Feldman’s is more about imitation. Moreover, whereas reconciling domestic and international norms is of the essence for Feldman, Whitehead notes that local banking practices remain different from those norms that apply only in international exchanges. Whitehead sees signaling a willingness to conform as an end in itself—because of the “cost” the signaling actor incurs in foregoing other behavior. Feldman, in contrast, sees the actual adoption of laws and practices from other places as the conformity signal. Whitehead admits that conformity may not be perfect; he speaks of balancing between network norms and competing domestic interest(s). Feldman has less to say about how closely Japanese rules track foreign ones, perhaps because Japan’s attitude toward itself, not the judgment of outside actors, weighs most heavily in its norm adoption process.

72. There is a now a vast literature on this issue. For some interesting commentary, see Andrea McDowell, Real Property, Spontaneous Order and the Norms in the Gold Mines, 29 LAW & SOC. INQUIRY 771 (2004).
The signaling of conformity is one illustration of the new significance, in an era of globalization, of communicating a willingness to conform to or copy outside laws (which was a major topic of the older transplant literature). And the implications go well beyond the states and case studies presented in this issue. The pace of exchanging contacts and information increasingly unearths previously unknown patterns and attitudes of legal culture. Politicians and expert elites begin to cite relative rates in the use of courts—or the use of prisons—and these statistics even come to be known by some of the legal officials whose daily behavior produces them. These comparisons produce classifications that serve as proxies for the actual situation (and create the possibility of arguing that universal standards can and must be applied). Examples include the World Bank indices of rule of law and democracy cited by Peerenboom, Transparency International’s corruption index, or measures of observance of children’s rights, respect for the environment, and so on. As internal and external assessments of a legal culture become more difficult to separate, indices of difference begin to wield a reflexive influence in their own right. Legal culture becomes what we might call “relational,” defined even by participants in terms of similarities with and differences from other places (which can either serve as models to emulate or avoid). As what counts is others’ view of our law, we choose or are obliged to see ourselves as others see us in order to relate to them. Thus, for example, as comparative European prison rates began to be published in the 1980s, many states sought to move their rates closer to the standard “norm.” Finland, which originally came out high in the list, decided to cut back on prison building, whereas the then Dutch justice minister justified a prison-building program by claiming it would allow The Netherlands to reach the European level.

The strength of the articles in this issue, read in the light of these considerations, is the way they offer a close view of these new pressures to conform. While we need to be cautious in building generalizations from studies of only two states, these well-documented accounts invite us to consider more generally the processes of formulating conformity and the specific role of signaling norms in these processes. I shall end this Comment, therefore, by setting out several issues that may require

73. As Tanase argues in his article, the increasing flow of information stimulated by globalization makes law both more and less important. By rendering characteristics more visible, it also brings contradictions to the surface.

74. Conversely, an important part of the explanation for the recent, ever-increasing rate of punishment in the United States (shown also by its failure to sign international agreements on criminal law) must therefore include an account of why its political elite does not feel the same need for its criminal justice system to be seen as “normal.” See David Nelken, Patterns of Punishment, 69 Modern L. Rev. 263–77 (2006).
further examination. I shall consider, in turn, how processes of signaling conformity relate to wider aspects of globalization, how conformity is spread, who produces the standards of conformity and who conforms to them, and what is involved in the discussion of outcomes. I shall then address such normative issues as whether there can be too much conformity and the appropriateness of the means often used to produce agreement.

The first issue requiring further clarification is the role of signaling conformity in relation to other transnational developments more generally. Moves toward conformity may make less noise than dramatizations of political, religious, or cultural differences, but their significance should not be underestimated. There are certainly many regions of the world experiencing a convergence of patterns of behavior, Latin America and Eastern Europe being the most obvious candidates. On the other hand, for any specific issue it is possible to point to places that are not (yet) coming into line. Rather than seeing divergence simply as the absence of conformity, however, we should note that there may be various direct and indirect connections between these phenomena. Demonstrations of dissent are often justified by the experience of imposed similarities or the fear that foreign models will be imitated. Emphasizing points of disagreement is often a way of concealing more profound conformities. Or the use of similar technologies may become an instrument for creating difference.

Conformity to common standards may be promoted by and through law (both hard or soft law), but it takes place as part of the larger trend toward interdependence that globalization produces. We should not assume the homogeneity of norms is an inevitable consequence of processes that involve signaling conformity. Globalization involves processes of both homogenization and integration, but integration usually presupposes and accentuates difference. Likewise, common standards are often encouraged so as to allow more, not less, competition. We should also remember that globalization can, and often does, have quite different or sometimes opposite consequences, even in the same state.

75. The issues may be slightly different when pressures for harmonization come from a collective enterprise such as the European Union.
76. The increasing use of the Internet to consolidate differences, rather than overcome them, is the most obvious example. See Antonio Roversi, L’ODIO IN RETE (2006).
78. In Thailand, for example, Fiona Haines points to the considerable influence of global standards on the regulation of worker safety, while David Engel describes the way globalization has led to a decline in resort to law for tort claims. See Fiona Haines, Globalization and Regulatory Character: Regulatory Reform after the Kader Toy
The norm of conformity, then, may not necessarily produce conformity, even if it apparently aims at this result. Similar laws, in different places, may produce or presuppose different social conditions. Because pressures for conformity are so bound up with processes of economic and political inclusion and exclusion, it can be especially important to distinguish between different types of common standards. Heinz Klug argues that “the deployment of global forms whether as norms or success or failure stories sets limits of available options on pain of global marginalization and isolation imposed by capital markets, governments or the human rights community.” But are the same factors in play in all these cases? As the Chinese experience shows, it is possible for a state to be highly integrated economically even while suffering considerable criticism for its human rights violations.

These case studies of banking rules, smoking legislation, or judicial procedures in Japan and China may all be taken as useful illustrations of processes of coordination, imitation, and diffusion. But they are not necessarily representative. As far as coordination is concerned, for example, organizing international cooperation against the threats of terrorism, organized crime, and illegal immigration may have something in common with Whitehead's study. The role of liaison officers in helping coordinate the response to organized crime in different European states would be another fruitful area in which to study the creation of “third cultures” and regulatory networks. But it may also raise different questions than coordination over bank reserves. Unlike in Whitehead's study, where local and international banking rules were distinct, states tend to divert improved policing capacity to more domestic policing problems.


80. But the regulation of banking reserves and crime fighting are not entirely independent:

The world's top financial regulator on Thursday issued proposals to tighten its global scorecard for banking supervisors, highlighting the fight against terror finance as a core principle... The Basel Committee on Banking Supervision, the global standard-setter, revised the 1997 “core principles” in an effort to reflect increasing importance of cross-border ties and said modern risk management techniques needed to play a central role for supervisors. The committee is seeking public comment before issuing a final version of the principles, which will be used by the World Bank and the International Monetary Fund to rate the effectiveness of national banking supervisors.

More broadly, the signaling of conformity can play a role in all three of the "flows" identified by Merry—those oriented toward building consensus, copying programs, or localizing innovation. Signaling may also start at an earlier stage than the authors in this issue discuss. Inge Markovits, for example, suggests that states in Eastern Europe have abolished the death penalty (whatever their populations may actually think or want) as a way of signaling their desire for acceptance into the European Union. Such cases do seem to fit the paradigm, as they involve "costs" as tokens of willingness to cooperate.

A second set of issues concerns how new standards are spread—and resisted. Who are the actors involved? We would expect that NGOs and social movements would be among the most important players (though Feldman argues they were not too important in changing smoking law). Who gains and loses through such changes? Whitehead shows the differences between what we could call the national and cosmopolitan bureaucrats, and Peerenboom claims that some Chinese judges often have reason to want to block institutional reforms. Likewise, there will be those who want more or less leeway in banking reserves or stricter or less strict tobacco legislation. How far do the interests of the elites and the population at large coincide? Uncertainty in this area complicates any effort to overcome the paradox of generating "civil society" through reliance on initiatives that civil society itself must produce. Tanase tells us that pressures from below, more than global market pressures, have produced the growth of legal expectations that is transforming the "people's consciousness." We should expect, he thinks, not only the rise of greater demand for consumer goods but also the emergence of a new moral sensibility. But studying popular legal consciousness is certainly more difficult than describing the actions and attitudes of the elites, though Feldman provides fascinating aperçus on the way the news media, books, and plays discussed the issue of smoking.

81. Markovits, supra note 13, at 98.
82. Sometimes the term describes messages to states concerning the need to conform, as when European Union leaders sent "a strong signal" to Libya, warning that it must adopt European norms for human rights. This discussion has concentrated on those states that want to be accepted. But perhaps there is some "cost" even for the senders of such messages, inasmuch as they risk the loss of potentially valuable future collaboration.
What does conformity require in any given case? Is it about reaching a certain standard or more about not being out of line? Commentators often express worry about the need to prevent globalization from leading to a "race to the bottom." Will pressures to conform necessarily lead to improvements, or could they also mean a lowering of standards? It may be helpful to distinguish three types of "races": those that produce pressures to aim at higher standards, those that induce pressure to aim at the mean, and those that, unfortunately, lead to lowering levels of behavior. Many observers would see the battle for human rights as an example of the first of these races. Efforts toward similarity in bank reserves or money laundering rules could be taken as examples of the second. In such cases, standardization is often more important than the particular standard chosen. Laws increasing job insecurity are an essential component of the third type of race, where the aim is to cut production costs. Despite these differences, the same social or economic sectors may involve more than one of these races. In addition, it is rarely possible to allocate any given race to only one of these categories, and even when they do not overlap, each race may also "interfere" with others. The "standard" or average for one state or set of states is, of course, not the mean for others; for the latter states, the standard may represent a goal they hope to achieve. Moreover, what one state (or group of states) may present as a certain kind of race may seem different to another state. This is all the more likely where, as is often the case, it is in the objective economic interests of more advanced states to insist that their competitors observe similar worker or environmental standards. On the other hand, a requirement to observe such standards—as a prerequisite for membership in a trading group, for example—may be the only way to achieve improvements in internal standards. According to the Western media, India is currently quite concerned about improving food standards; even if done mainly "for external consumption," with a view to attracting investment, this undertaking will have more general implications.

Who actually formulates and judges what conformity requires? Often this process will be directed by stronger states, which take their own standards as norms and act either directly or indirectly to impose them.

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85. This discussion returns us to the two types of norm mentioned previously: the ideal and the average.
86. Talk of the "advanced" world or "progressive" states itself employs the metaphor of a race.
87. Whitehead explains this concept with regard to the choice of the 8% rule for bank reserves.
88. In practice, even strong states may have to settle for very broadly defined standards, as in the recent moves in the ILO toward core labor standards.
through their dominance of international organizations. The attempts of the WTO to impose the introduction of GMO seeds and produce provides a good example of this dynamic, with much of the struggle depending on who should be made to carry the burden of proof. But much conformity evolves without explicit coordination. Neo-Marxists such as Hardt and Negri now admit that even the strongest states are unable to control the flows of the international economy. And system theorists such as Gunther Teubner likewise argue that "global law will grow mainly from the social peripheries, not from the political centres of nation-states and international institutions." On Whitehead's reading of the literature, examples of a state's defection from an agreement in one area (for example, environment) jeopardizing its reputation in every other area (for example, trade and security) are virtually nonexistent. But there is certainly need for more empirical research on this question. The WTO, for example, is a package deal, where it is not possible to defect from one part—but it may be possible to retaliate under different agreements.

It is always worth asking how a particular standard emerged, as well as how any index for measuring compliance was constructed, accepted, and understood—or misunderstood. To which actors a state compares itself, and why, when, and how, is as important here as it is with deliberate transplants. Tanase urges policymakers in China not to take an uncritical view of Western models. But Peerenboom describes a template that seems very much linked to Anglo-American styles of law. Even if Japan might in some respects be a better model for China to follow, historically-based resentments would make it difficult for the Chinese to look to the Japanese experience. And, after all, this is true of Japan itself. As Tanase says in his article, "the usual course for us in Japan is to condemn our own system after looking to Europe and United States and measuring the gaps between their systems and ours." As far as banking norms are concerned, to a large extent the United Kingdom and the United States make the rules with which others must agree.

91. Part of the problem is defining "area." It is hard not to believe the United States' notorious treatment of prisoners at Guantánamo and Abu Ghraib, as well as its reluctance to sign the International Criminal Court agreement, will have implications for the credibility of its promotion of human rights in general.
92. The Transparency International index of corruption became an international standard apparently as a result of one local newspaper running a story about it twice, by mistake.
93. Tanase, supra note 83, at 875.
influence is not always one-way. Whitehead tells us only part of the story. After the recent Sarbanes-Oxley reforms, it is now increasingly the case that Japan asks for more "self discipline" from banks and other foreign companies working in its private sector.

A variety of public and private agencies and rating institutes (which are not openly identified with states) seek to shape international standards and prevent international risks, whether the issue is dumping products under cost price, food safety, or shared computer and telecommunication codes. Such standards typically emerge in the process of seeking agreement rather than being pre-standing. Learning of the failures of conformity may also be important (though ignorance has its uses too); hence, the agencies that set and vet standards play a crucial role, although the growth of domestic civil society is another and often better route to increasing information. But the problem of who guards the guardians can never be fully resolved—witness accounting standards after Enron or the way the rating agency Standard and Poor failed to spot the Italian mega-company Parmalat's lack of credit-worthiness (a case of poor standards?). Standard-setting agencies can easily work at cross-purposes. Do those who compile IMF surveys know of the leeway Basel bank regulators are prepared to concede to those who are part of the club?

A further point for consideration concerns outcomes. We may leave aside such large questions as the endpoint of globalization—the extent to which we are witnessing the growth of "global legal culture" or "modern legal culture." It is also beyond our task here to decide whether the implicit teleology of these trends is toward a global civil society or a global consumer society. (Where exactly lies the difference?) The emphasis of the articles in this special issue is, in any case, more on the causes than the consequences of pressures to conform. But we can still ask: What are the specific outcomes sought through the spreading and signaling of conformity—for example, when adopting common standards or introducing local versions of peculiar institutions and procedures of the United States? How should we measure compliance? And how easy is it to fake commitment? While it is possible to disagree with those scholars who argue that we can never predict outcomes, we should also anticipate that many results will indeed be unexpected. If reforms designed to introduce privatization or enlarge the role of the judiciary as compared to the

95. Lawrence Friedman, Is There a Modern Legal Culture?, 7 RATIO JURIS 117 (1994).
96. A concern discussed extensively in the literature on norms is how to recognize those who use signaling to mimic the commitments of good future collaborators without actually committing to cooperation.
97. This is implicit in Teubner's arguments concerning "legal irritation." See David Nelken, Beyond the Metaphor, supra note 14.
legislature are successful, then one of their intended consequences is to make larger social outcomes less easy to predict.

It would be unrealistic to assume state behavior could ever completely conform to international commitments, especially as global pressures are ongoing and changeable.98 Peerenboom and Feldman also demonstrate that the degree of conformity with external standards will depend on the interests and values at stake. China, for example, is often determined to go its own way. Feldman suggests that Japan, too, will not give way on those matters it defines as culturally central.99 The need for selectivity, therefore, is crucial. As John Ohnesorge puts it:

[I]n conversations with Japanese legal scholars . . . one regularly encounters the idea that Japan does not really want or need US-style legal culture, but that Japan none the less needs to become more “American” with respect to law emerging from the legislative process, that will bring Japan to some happy medium, achieving just the right amount of “rights consciousness,” without going “too far.”100

The extent to which conformity is a state’s chosen goal will vary from period to period. Was Japan competitive in the 1980s despite or because of its emphasis on personal relationships in business? As Tanase points out in his contribution, the current Japanese economic situation may still be unstable, insofar as Japan cannot yet capitalize (his words) on the new stress on individualism. Even where the level of compliance is poor, however, what may be more important (as in domestic regimes) is the symbolic message—whose norms are being violated.101

But how useful is it to simply define these outcomes descriptively? Is compliance always a value? Is greater conformity and standardization necessarily good? (The articles concerned with Japan especially might further have discussed these normative issues.) The answer will obviously depend largely on the issues in question and the implications for the parties involved. In many situations, the interests of the state under pressure to conform will simply not be the same as for the states seeking the change. Tanase argues that Japanese doing business in China


99. The same applies to those states, such as Turkey, being considered for membership in the European Union who would rather risk rejection than accept what they view as dishonor. Ibrahim Kabogklu and Baskin Oran are currently on trial for having brought Turkey into disrepute by providing information for an international report on human rights in Turkey.

100. See Ohnesorge, supra note 37.

encounter too much government interference and that the Chinese legal system allows too much discretion for purposes of economic protection. But practices that constitute a "problem" for the Japanese may be quite useful for the Chinese (or for the Japanese themselves in other circumstances). The challenge, as Tanase himself indicates, is ensuring that conformity to foreign models is not overly deferential, thus sacrificing more successful domestic practices. His advice to the Chinese, then, is to avoid thinking that "success" lies in closely conforming to currently dominant models drawn from the West and, in particular, the United States. He warns against importing a false idea of rights as having exclusive boundaries, and he emphasizes the need to preserve social norms outside of the law (which he sees at risk in current developments in Japan). He notes that some European states may provide better models for mixing public and private provision and concerns for solidarity. He also notes the implications for the global North-South divide of building more bridges with the West.

Across a whole range of "common" problems—such as environmental protection or forestry conservation—the (continuing) failure to attain conformity or achieve coordination can produce a series of negative consequences. But continuing disagreement will likely remain as to who should pay the price for the general good. And the effort to impose standards can sometimes be counterproductive. The Enron debacle showed that the U.S. financial services industry's methods of self-regulation were far from ideal. Now, predictably, some are criticizing the Sarbanes-Oxley Act for imposing too large a burden of compliance, especially on smaller firms. But while, for most commentators, the problem is how to avoid another Enron-like collapse, others may be as worried by what similar multinational corporations can achieve when they thrive. We cannot take it for granted that ensuring international financial stability is an obvious value independent of the conduct of international companies. The new international economic order allows the acquisition and exploitation of resources such as water and energy sup-

102. In an earlier article, he reflected on the "hollowness" some Japanese feel because of their need to transform Japan into a "modern" state by introducing foreign models. See Takao Tanase, The Empty Space of the Modern in Japanese Law Discourse, in ADAPTING LEGAL CULTURES, supra note 5, at 187.

103. For a recent well-documented study, see Radoslav S. Dimitrov, Hostage to Norms: States, Institutions and Global Forest Politics, in GLOBAL ENVTL. POL. 1 (2005).

104. Dimitrov argues that his case study shows that "good" social norms can have negative effects on institutionalized policy; global environmental norms can facilitate the construction of hollow "decoy" institutions; and the connection between institutions and governance is highly problematic, as institutions are sometimes deliberately designed to prevent governance. Id.

plies in poorer states—as part of what some have called “the second enclosure movement.” The same ambiguity afflicts many of the “standards” the institutions of international neoliberalism encourage. Laws and agreements protect the greater distribution of goods and capital but seek to limit the greater circulation of peoples. The IMF and, to a lesser extent, the World Bank are accused of placing some states in a double-bind: by insisting on unpopular policies of economic retrenchment, they oblige governments to act in authoritarian and undemocratic ways in order to promulgate such measures.

But normative issues emerge not only when considering the ends of signaling and spreading conformity but also when reflecting on the means themselves. Irrespective of the ultimate goal, objectionable means or methods of producing conformity produce collateral problems that must be borne in mind in assessing the success of achieving harmonization. In particular, there is the question of the appropriateness of soft law, seen most clearly at work in Whitehead’s account of the coordination of banking practices (though he does not offer a rounded discussion of this problem). What is the difference, if any, between using law (or norms) flexibly or using soft law (or norms)? Are the soft or flexible norms involved in the spreading of conformity consistent with the rule of law? How should we evaluate their employment? Do they have a different status when used in domestic, as opposed to international, contexts?

Other issues are more case-specific. For example, could the “cost” of signaling commitment ever be too high or otherwise unfair? Were the regulators in Whitehead’s study over-generous? How large is the difference between the adoption of rules as a prerequisite for participating in coordination networks or gaining access to markets and the more or less freely-chosen imitation Feldman describes?

Because the use of soft law seems to be a growing phenomenon, it may be too early to draw up a balance sheet. As with criticizing or embracing either formal or substantive approaches to law, the politically correct answer here, too, is likely to depend on the wider, changing circumstances of the struggle. There do seem to be large doses of opportunism in choices to criticize a given instance of soft law or


flexible use of law. But there are several important points to bear in mind. For Wolf Heydebrand, the move to soft law as part of legal development has serious normative implications. Procedural informalism and soft law are the hallmarks and bearers of neoliberalism, as they lack features such as obligation, uniformity, justiciability, sanctions, and/or enforcement. The growing asymmetry of power and resources in the current phase of globalization aggravates the imbalance between the rule of law and the political economy. It promotes the further decline of legalism (whether bureaucratic or adversarial). The rise of procedural informalism and the flexibility associated with the growing privatization, denationalization, and commercialization of law have, in his view, rendered the nineteenth and early twentieth century forms of adversarial legalism either obsolete or have given them an enforcement role in extreme and exceptional circumstances or as a matter of last resort. By contrast, soft law is often chosen, he argues, precisely because it is less visible, more equivocal, and essentially unaccountable in terms of conventional criteria of formal responsibility. On the other hand, other scholars (and not necessarily only those with different political sympathies) are more willing to acknowledge the advantages of proceeding by means of soft law. Berman, for example, argues that such agreements characterize transnational networks of government bureaucrats, trade-promoting groups, human rights NGOs, and the like, who form de facto cosmopolitan communities—affiliations of people who see the welfare of their state as interlinked with the welfare of others and view evaluations of "utility" or "interest" as interdependent. In Berman's view, this is an enlarged vision of a state's interests, organically evolved from agreements motivated by more short-term and immediate objectives.

David Trubek and his co-authors have provided excellent, recent surveys of criticisms of soft law that set out both the risks and possible advantages of this regulatory strategy. They note that soft law, in contrast with "hard law," lacks clarity and precision. It is also less able to forestall a "race to the bottom," is unaccountable, and can create expectations it cannot fulfill. At the same time, Trubek and his colleagues also insist on soft law's (corresponding?) advantages. It has simplicity and speed, involves participation, and permits an incrementalist approach. The employment of soft law allows tolerance and, as

108. When Asian or other governments use informal means to block foreign competition, this represents a betrayal of law, but the same means are apparently acceptable when adopted as part of international "flexible regulation."
109. Berman, supra note 5.
110. David M. Trubek & Louise G. Trubek, Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination, 11 EUR. L.J. 343 (2005); see also Trubek et al., supra note 7.
compared to hard law, requires less knowledge and is easier to change. Being less linked to sovereignty, it can more effectively cope with diversity. Because soft law agreements do not require legal ratification, it is easier to get even the least committed states to sign on. Trubeck and his co-authors also suggest that soft law has lower contracting costs.\textsuperscript{111} Especially in the international sphere, they see it as a boon to sustainable development and the global environment. They conclude that "soft law may be better equipped to promote transformative processes of norm diffusion, persuasion, and learning that have a positive impact on policy outcomes by allowing a wider spectrum for deliberation in the governing process."\textsuperscript{112}

Doubts remain, however, about exactly how such processes do or should work and how much acculturation is a condition precedent for the efficacy of soft law norms.\textsuperscript{113} In addition, soft law is rarely the only instrument in use, and the fact that it is normally employed in tandem with hard law only takes the argument a step further. Whereas Trubek and his collaborators see this as a further strength (adding flexibility to flexibility)—which allows regulators to create what they term "hybrid instruments"—Heydebrand sees this as a recipe for yet further manipulation.\textsuperscript{114} For soft law to be acceptable, trust in regulators is essential—but not always warranted.\textsuperscript{115}

This Comment thus returns to the larger questions with which it began. Is the type of transnational law being constructed for economic relationships compatible with or opposed to the simultaneous export of

\textsuperscript{111}. This may be true for any single transaction, but, as we have seen in discussing norms, the costs must reflect the requirements for convincing potential partners of commitment to long-term collaboration.

\textsuperscript{112}. Trubek et al., \textit{supra} note 7, at 13.

\textsuperscript{113}. As in the work of Koh, Trubek and his co-authors argue that sustained interaction over time results in the "creation of inter-subjective knowledge and a 'norms cascade' where a critical mass of states subscribe to new norms and rules." \textit{Id.} The obvious objection involves what happens when (as is typical) the parties involved in such processes have differential power to influence it.

\textsuperscript{114}. As Heydebrand argues:

\begin{quote}
Its continued significance in the contemporary round of globalization derives from the fact that the strategic combinations of hard and soft law as well as formal procedures and informal bargaining tend to expand the scope of discretion in legal, political and economic decision making and governance. It is therefore of critical interest to organizational policy makers in law (e.g., administrative and international law), government, and corporations who seek to expand the scope of control and discretion while trying to reduce uncertainty and transaction costs in their respective institutional spheres.
\end{quote}

Heydebrand, \textit{supra} note 33.

rule of law and human rights? How far is the idea of rule of law itself out of date due to the role of transnational business and the phenomenon of social acceleration?116 Only by considering these problems will we begin to understand what would be involved in trying to constitutionalize117 new forms of social and economic relationships.

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