

Michigan Law Review

Volume 82
Issue 5 *Issue 5&6*

1984

Geography and Law

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Recommended Citation

Bernhard Grossfeld, *Geography and Law*, 82 MICH. L. REV. 1510 (1984).
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GEOGRAPHY AND LAW

*Bernhard Grossfeld**

I. INTRODUCTION

The central questions of comparative law are still unsolved: Which legal institutions in what legal cultures can be compared with each other in a meaningful way? What can we learn from comparative law for the solution of our own problems?¹

These questions are even more acute today than they were only a few years ago when comparative law was still in its age of optimism. Comparative law was then widely regarded as an efficient tool for finding solutions to our own legal questions within foreign legal systems. Today such optimism has faded and has even given way to a deep skepticism. This is indicated by speculations about "the law of the non-transferability of law."² We are thus confronted with a new challenge, which makes it necessary to discuss again the possibilities and limits, the powers and failures of comparative law.³

The general trend today is to view the transferability of law as a function of political and economic similarities between legal cultures. The emphasis is on the social and political power structure, on the East-West and North-South conflicts.⁴ Other authors emphasize the communality of cultural values,⁵ or the similarity of the "Weltbild."⁶ All these aspects certainly have their merits, but they have even more serious limits. They

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1. On the use of comparative law, see M. RHEINSTEIN, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 37 (1974); 1 K. ZWIEGERT & H. KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 12 (1971); Ancel, *Valeur actuelle des études de droit comparé*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW; LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA* 15 (1961) [hereinafter cited as *YNTEMA LEGAL ESSAYS*]; Schmitthoff, *Die künftigen Aufgaben der Rechtsvergleichung*, 33 *JZ* 495 (1978).

2. See, e.g., Hiller, *Language, Law, Sports and Culture: The Transferability or Non-Transferability of Words, Lifestyles, and Attitudes Through Law*, 12 *VAL. U.L. REV.* 433 (1978); Wróblewski, *Problems of Incomparability in Comparative Law*, 53 *RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO* 92 (1976).

3. See generally L. FRIEDMAN, *DAS RECHTSSYSTEM IM BLICKFELD DER SOZIALWISSENSCHAFTEN* (1981).

4. O. KAHN-FREUND, *ON USES AND MISUSES OF COMPARATIVE LAW* 37 (1974); McWhinney, *Toward the Scientific Study of Values in Comparative Law Research*, in *YNTEMA LEGAL ESSAYS*, *supra* note 1, at 29.

5. See, e.g., Constantinesco, *Der Rechtsbegriff in der Makro-Vergleichung*, 80 *ZVGLRWISS* 177 (1981); Constantinesco, *Ideologie als determinierendes Element zur Bildung der Rechtskreise*, 19 *ZFRV* 161 (1978); Constantinesco, *Über den Stil der "Stiltheorie" in der Rechtsvergleichung*, 78 *ZVGLRWISS* 154 (1979); Drobnič, *The Comparability of Socialist and Non-Socialist Systems of Law*, 3 *TEL AVIV U. STUD. L.* 45, 56 (1977).

6. See Wahl, *Klimatische Einflüsse auf die Entwicklung des Rechts in Ost und West*, in *FESTSCHRIFT FÜR PHILIPP MÖHRING* 1, 6 (1975).

cannot explain why comparative law is so difficult even between Europe and the United States, or between Continental Europe and England. Here we find similar political structures, similar economic standards, shared cultural values — yet still very great difficulties when it comes to comparative law.

George Bernard Shaw's view that England and the United States "are two countries separated by a common language" is more true today than ever. An American observer recently mentioned "the radical differences between the legal systems of the United States and those of the Continent."⁷ Or to put it in poetry: "Born on the other side of the sea, we are as different as people can be."⁸ The same feelings prevail between the Continent and England. Both sides regard the other's law as "very different" — to put it mildly — not to say "strange." The North Sea is probably no longer "the best thing I know between France and England," as Douglas Jerrold once said, but at least in law it might still be regarded, in Lewis Carroll's words, as true that "the further off from England the nearer to France."

So far, the present methods in comparative law have not sufficiently explained these tensions. This leads to the suspicion that important factors are often overlooked — probably because they are too apparent. These factors include primarily the natural environment (particularly the geographical situation of a country), the climate, population density, and language and religion.⁹ These factors are of utmost importance in comparative law. They are normally the first differences we are confronted with when going abroad; as legal scholars, we must give them our intensive attention.

This Article will discuss the relations between geography and law. I have already discussed the subject of language and law elsewhere;¹⁰ with regard to religion and law, I refer the reader to the extensive writings of Harold Berman.¹¹

II. THE PIONEERS

The influence of geography on law was first emphasized by the French legal philosopher Montesquieu.¹² He saw the main hindrance for legal transplants in the geographic-climatic character of any law. Pascal depicted the geographic character of law more sarcastically:

[W]e see neither justice nor injustice which does not change its nature with

7. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 935 (1982).

8. R. RODGERS & O. HAMMERSTEIN, *SOUTH PACIFIC* 79 (act 1, scene 1) (1949).

9. See Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198, 199, 207 (1977).

10. Grossfeld, *Sprache und Recht*, 39 JZ 1 (1984).

11. See H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974); Berman, *Theological Sources of the Western Legal Tradition*, 46 REV. JUR. U.P.R. 371 (1979); Berman, *The Religious Foundations of Western Law*, 24 CATH. U.L. REV. 490 (1975); Berman, *The Influence of Christianity Upon the Development of Law*, 12 OKLA. L. REV. 86 (1959).

12. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, Books 14-18 (T. Nugent trans. 1949) (1st ed. n.p. 1748).

change in climate. Three degrees of latitude reverse all jurisprudence; a meridian decides the truth. . . . A strange justice that is bounded by a river! Truth on this side of the Pyrenees, error on the other side.¹³

Despite these early recognitions and the later authority of Eugen Ehrlich,¹⁴ the idea that geography conditions any legal culture faded into the background.¹⁵ This was probably caused by the increase in traffic, the rise of technology, and the industrial revolution in general. These developments made the natural assumptions and limitations inherent in a legal order less visible. In today's age of environmental concerns, however, they appear again before our eyes. Not too long ago, for instance, the West German Minister of the Interior explained that the use of unleaded gas could not be made compulsory in West Germany, as it had been in the United States and Japan. He pointed out that because the United States occupies most of a continent and Japan is an island, neither country has to worry so much about trips of its citizens into neighboring states and the availability of leaded gas there. Thus, differences in geography help account for different legal rules.

Lately, Horst Neumann-Duesberg¹⁶ and Eduard Wahl¹⁷ have pointed more specifically to the significance of geography for law, Wahl relying heavily on suggestions made by Tetsuro Watsuji in his book *A Climate*.¹⁸ Hans Baade has applied similar ideas to problems of constitutional law.¹⁹ Other pioneers include Langhans-Ratzeburg, who in 1928 coined the term "geojurisprudence" (*Geojurisprudenz*),²⁰ which mainly, but not exclusively,²¹ referred to the cartographic presentation of law, and Merk, who spoke of "legal geography" (*Rechtsgeographie*) in 1926.²²

III. PRELIMINARY REMARKS

Indeed, geography is fate. Fate not only for a country but also for its

13. B. PASCAL, *PENSÉES* Fragment 294, at 83-84 (W. Trotter trans. 1931) (1st ed. Paris 1670).

14. E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 505 (W. Moll trans. 1936) (referring to the work of Frédéric Le Play, which was based on investigations of the local conditions of social life).

15. *But see* E. VON LASAULX, *NEUER VERSUCH EINER ALTEN, AUF DIE WAHRHEIT DER TATSACHEN GEGRÜNDETEN PHILOSOPHIE DER GESCHICHTE* 82 (E. Thurner ed. 1952).

16. H. NEUMANN-DUESBERG, *SPRACHE IM RECHT* 20 (1949).

17. Wahl, *supra* note 6, at 1.

18. T. WATSUJI, *A CLIMATE; A PHILOSOPHICAL STUDY* (1961); *see also* N. DJUVARA, *CIVILISATIONS ET LOIS HISTORIQUES* (1975); Y. NODA, *INTRODUCTION TO JAPANESE LAW* 58 (1976); K. WITTFOGEL, *DIE ORIENTALISCHE DESPOTIE* (1962); von Bar, *Die Entwicklung des südafrikanischen Zivilrechts dargestellt an Fragen des Haftungsrechts*, 42 *RABELSZ* 87, 98 (1978).

19. H. BAADE, *DAS VERHÄLTNISS VON PARLAMENT UND REGIERUNG IM BEREICH DER AUSWÄRTIGEN GEWALT DER BUNDESREPUBLIK DEUTSCHLAND* 19, 21 (Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel No. 46, 1962).

20. M. LANGHANS-RATZEBURG, *BEGRIFF UND AUFGABEN DER GEOGRAPHISCHEN RECHTSWISSENSCHAFT (GEOJURISPRUDENZ)* (1928). My acknowledgements to Hans W. Baade, of Austin, Texas, for this pointer.

21. *See* M. LANGHANS-RATZEBURG, *supra* note 20, at 62.

22. *See* W. MERK, *WEGE UND ZIELE DER GESCHICHTLICHEN RECHTSGEOGRAPHIE* (1926).

culture and its law. A paradigmatic example of geographic-climatic influence is the fact that the Islamic colonization in Spain has never passed the boundary line of olive tree cultivation (41° latitude).²³ Beyond that, the geographic environment colors the law and enables or hinders the transfer of legal institutions. This is obvious when looking at the extremes — for example, the law of the Eskimos²⁴ or of desert peoples. The Supreme Court of the Philippines expressed this in a very picturesque way by saying that law often acquires “a characteristic coloring from the change of environment.”²⁵

I became aware of this environmental context when investigating the question of why English law is so “different.” When I spoke to Kurt Lipstein in Cambridge about this issue, he answered: “Please don’t forget — there is always the Channel!” Certainly English law is influenced by the Roman law and by the European *ius commune* of the Middle Ages,²⁶ but its character is defined by the insular situation. That character is also a consequence of the early centralization brought about in London by the Normans, a result of the strategic position of that city. The significance of an insular position can be seen even more clearly in Japanese law.²⁷

Once the idea of geography’s significance has come up, the immediate question is whether there is a general underlying principle. One first recalls the claims of the anthropologists concerning the early territorial stamping of human beings²⁸ and the territorial principle in modern law. One is reminded of the geographically defined legal proverb in Frisia: “Wer nicht will deichen, muss weichen” (whoever does not want to build a dike must go). We think about construction codes in areas with earthquakes, or different zoning ordinances in areas with many or few sunny days, for example in Naples and Hamburg. But the influence of geography on law goes even further. A classic example is the change English law underwent when it was transferred to the United States.²⁹

23. See 1 C.W. PREVITÉ-ORTON, *THE SHORTER CAMBRIDGE MEDIEVAL HISTORY* 372 (1952).

24. See E. HOEBEL, *THE LAW OF PRIMITIVE MAN* 67 (1954).

25. *Javellana v. Mirasol*, 40 Phil. Rpts. 761, 775 (Phil. Sup. Ct. 1920).

26. See A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* 110-15 (1971); Coquillette, *Legal Ideology and Incorporation* (pts. I & II), 61 B.U. L. REV. 1, 315 (1981); see also Merzlyman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INTL. L. 357 (1981).

27. See Kim & Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INTL. & COMP. L.Q. 491, 492-93 (1979).

28. See Abbas, *Earliest hunters staked out boundaries*, FORUM—SOUTHERN METHODIST UNIVERSITY, Feb. 28, 1983, at 5, in which such research by Professor Sampson is reported. See also J. WOHLWILL & G. WEISMAN, *THE PHYSICAL ENVIRONMENT AND BEHAVIOR: AN ANNOTATED BIBLIOGRAPHY AND GUIDE TO THE LITERATURE* 152 (1981); Cashdan, *Territoriality Among Human Foragers: Ecological Models and an Application to Four Bushman Groups*, 24 CURRENT ANTHROPOLOGY 47 (1983).

29. See, e.g., G. BAKKEN, *THE DEVELOPMENT OF LAW ON THE ROCKY MOUNTAIN FRONTIER: CIVIL LAW AND SOCIETY, 1850-1912* (1983); Wengler, *Die Anpassung des Englischen Rechts durch die Judikatur in den Vereinigten Staaten*, in 1 FESTSCHRIFT FÜR ERNST RABEL 39 (1954); see also M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663 (1982); Williams, Book Review, 25 UCLA L. REV. 1187 (1978); Winship, Book Review, 31 SW. L.J. 751 (1977). For a contrast to Horwitz’s view of American legal history, see

IV. WATER LAWS

Let us take as a first example the water laws. The transfer of water laws from a country with plenty of water (England) to the arid southwestern United States caused serious social tensions, eventually bringing about a change in those laws.³⁰ What happened? While English common law followed the riparian rights theory, giving rights to the water to the owner of the land adjacent to the water, the courts of the West and Southwest developed the law of appropriation. As a consequence of the motto "First in time, first in right," those persons got priority who first made a "reasonable use" of the water. The reasons for this change can be found in a decision of the Supreme Court of Colorado from 1879:

The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. . . . Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed.

. . . .

We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith.³¹

Similar changes can be observed with regard to the law pertaining to withdrawal of water from land. The English rule of unlimited withdrawal³² (from "England's green and pleasant land")³³ changed to the predominant American rule of a "reasonable use," taking account of a "correlative right": water can only be taken out for a reasonable use balancing the consequences for the neighboring land.³⁴

Kahn-Freund, *English Law and American Law — Some Comparative Reflections*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 362 (R. Newman ed. 1962); Pound, *The Development of American Law and Its Deviation from English Law*, 67 *LAW. Q. REV.* 49 (1951).

30. See Wengler, *supra* note 29, at 53; Wiel, *Fifty Years of Water Law*, 50 *HARV. L. REV.* 252 (1936); Williams, *Optimizing Water Use: The Return Flow Issue*, 44 *U. COLO. L. REV.* 301 (1973). For a wide-ranging perspective, see M. HORWITZ, *supra* note 29, at 34. For modern variations of these transfer problems, see Taubenfeld & Taubenfeld, *Wind Energy: Legal Issues and Legal Barriers*, 31 *SW. L.J.* 1053 (1977); Williams, *Solar Access and Property Rights: A Maverick Analysis*, 11 *CONN. L. REV.* 430 (1979); Comment, *The Allocation of Sunlight: Solar Rights and the Prior Appropriation Doctrine*, 47 *U. COLO. L. REV.* 421 (1976).

31. *Coffin v. Left Hand Ditch Co.*, 6 *Colo.* 443, 446, 447 (1882).

32. See *Acton v. Blundell*, 12 *Mees. & W.* 324, 152 *Eng. Rep.* 1223 (Ex. Ch. 1843); see also *City of Corpus Christi v. City of Pleasanton*, 154 *Tex.* 289, 292, 276 *S.W.2d* 798, 800, 801 (1955).

33. *City of Pleasanton v. Lower Nueces River Supply Dist.*, 263 *S.W.2d* 797, 800 (Tex. Civ. App. 1953).

34. *Basset v. Salisbury Mfg. Co.*, 43 *N.H.* 569 (1862); see also W. PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 149-64, 171-72 (Univ. of Mich. Law School, Thomas M. Cooley Lectures, Fourth Series, 1953).

V. STRICT LIABILITY

But the effects of geography on law go still further. They explain, for example, why the English rule in *Rylands v. Fletcher*³⁵ did not become the law in Texas. According to the rule in *Rylands v. Fletcher*, the owner of land is responsible for damages resulting from the storage of water on his land. The Supreme Court of Texas, however, did not accept this rule:

In *Rylands v. Fletcher* the court predicated the absolute liability of the defendants on the proposition that the use of land for the artificial storage of water was not a natural use, and that, therefore, the landowner was bound at his peril to keep the waters on his own land. . . . This basis of the English rule is to be found in the meteorological conditions which obtain there. England is a pluvial country, where constant streams and abundant rains make the storage of water unnecessary for ordinary or general purposes.³⁶

The court was of the opinion that the situation in Texas was quite different from the one in England:

A large portion of Texas is an arid or semi-arid region. West of the 98th meridian of longitude, where the rainfall is approximately 30 inches, the rainfall decreases until finally, in the extreme western part of the state, it is only about 10 inches. This land of decreasing rainfall is the great ranch or livestock region of the State, water for which is stored in thousands of ponds, tanks, and lakes on the surface of the ground. The country is almost without streams; and without the storage of water from rainfall in basins constructed for the purpose, or to hold waters pumped from the earth, the great livestock industry of West Texas must perish. No such condition obtains in England. With us the storage of water is a natural or necessary and common use of the land, . . . and obviously the rule announced in *Rylands v. Fletcher*, predicated upon different conditions, can have no application here.³⁷

As an additional argument the court referred to the special situation of Texas as an oil producing state:

Again, in England there are no oil wells, no necessity for using surface storage facilities for impounding and evaporating salt waters therefrom. In Texas the situation is different. Texas has many great oil fields, tens of thousands of wells in almost every part of the state. Producing oil is one of our major industries. One of the by-products of oil production is salt water, which must be disposed of without injury to property or the pollution of streams. The construction of basins or pounds [sic] to hold this salt water is a necessary part of the oil business.³⁸

VI. FENCING IN, FENCING OUT

The fencing problem is, in my eyes, the most beautiful and most dramatic example of geographically enforced change in the law.³⁹ This prob-

35. 3 L.R.-E. & I. App. 330 (1868).

36. *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 164, 96 S.W.2d 221, 225 (1936).

37. 128 Tex. at 165, 96 S.W.2d at 226.

38. 128 Tex. at 165-66, 96 S.W.2d at 226.

39. See generally D. MEINIG, *IMPERIAL TEXAS: AN INTERPRETATIVE ESSAY IN CULTURAL GEOGRAPHY* (1969). My acknowledgements to Professor Joseph McKnight from the Law

lem developed in the middle of the last century in the Midwest and Southwest of the United States as a struggle between ranchers and farmers — the classic Cain-and-Abel conflict.⁴⁰

Under the common law, ranchers had to “fence in” their cattle.⁴¹ If the ranchers failed to do so, they had to pay compensation for the damage done by the cattle to their neighbors’ fields. This rule meets the needs of a densely populated country in which farming has to be protected and promoted as the most intensive form of agricultural production. Under different geographic conditions, however, the rule of “fencing in” changed into its opposite, the rule of “fencing out.”⁴²

Some court decisions explain in detail the reasons behind this change. For example, in 1948 the Supreme Court of Illinois said:

However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill adapted to a new country like ours. If this common law rule prevails now, it must have prevailed from the time of the earliest settlements in the State, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, that they brought with them and adopted as applicable to their condition a rule of law, requiring each one to fence up his cattle; that they designed the millions of fertile acres stretched out before them to go ungrazed, except as each purchaser from government was able to inclose his part with a fence? This State is unlike any of the eastern states in their early settlement, because, from the scarcity of timber, it must be many years yet before our extensive prairies can be fenced, and their luxuriant growth sufficient for thousands of cattle must be suffered to rot and decay where it grows, unless the settlers upon their borders are permitted to turn their cattle upon them.⁴³

The court concluded that the common law rule “does not and never has prevailed in Illinois.”⁴⁴

The consequence was that the farmer had to put up fences in order to protect his fields against any damage from straying cattle (“fencing out”). As the Supreme Court of Kansas explained in 1869: “The owner of real estate does not use reasonable and ordinary care and diligence to protect his property from the intrusion of roaming cattle unless he incloses it with a lawful fence.”⁴⁵

The Supreme Court of the United States summarized this development in 1890:

[The principle of the liability of the cattleowner] was ill-adapted to the nature and condition of the country at that time. Owing to the scarcity of

School of Southern Methodist University, Dallas, Texas, for his very valuable suggestions. Mr. McKnight placed material that he had collected at my disposal. *See also* Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). Coase uses the fencing problem to illustrate his theorem.

40. *See* 3 DIE RELIGION IN GESCHICHTE UND GEGENWART, col. 1090 (3d ed. Tübingen 1959) (under the keyword “Kain und Abel”).

41. *See* G. WILLIAMS, LIABILITY FOR ANIMALS (1939).

42. For details see J. INGHAM, THE LAW OF ANIMALS 258-69 (1900).

43. *Seeley v. Peters*, 10 Ill. (5 Gilm.) 130, 142 (1848).

44. 10 Ill. (5 Gilm.) at 143.

45. *Union Pac. Ry. v. Rollins*, 5 Kan. 98, 104 (1869).

means for enclosing lands, and the great value of the use of the public domain for pasturage, it was never adopted or recognized as the law of the country. . . . Indeed, it is only within a few years past, as the country has been settled and become highly cultivated, all the land nearly being so used by its owners or by their tenants, that the question of compelling the owner of cattle to keep them confined has been the subject of agitation.⁴⁶

Many prairie states enacted "fencing-out" statutes.⁴⁷ Behind all this lay the struggle for an open ranch,⁴⁸ perceived by the "fencecutters" as vital to bringing their cattle to the chief markets in the East, as well as to gaining access to water. This struggle even became the theme of a popular song: "Oh give me lands, lots of lands under starry skies above, don't fence me in."

The legal situation differed in its details from state to state.⁴⁹ However, the general rule, which had once adopted "fencing out" over the common law "fencing in," later changed back to "fencing in."⁵⁰ The main reasons for that reversal were the increase in population and the change in attitude towards pastureland and farmland. Decisive, however, were three technical developments: First, the railroad solved the problem of transportation and made it possible to bring the wood needed for fences into the prairie states; second, the invention of barbed wire in the 1870's allowed the fencing of great areas,⁵¹ and created fences that were strong enough to hold the half-wild longhorns; finally, arrival of the iron windmill made it possible to pump up water wherever it was needed, so fences no longer blocked the way to water. A reminder of this famous dispute still lives today. In the musical *Oklahoma* by Rodgers and Hammerstein, this song can be heard:

The farmer and the cowman should be friends!
 Oh, the farmer and cowman should be friends!
 The one man likes to push a plow,
 The other likes to chase a cow,
 But that's no reason why they can't be friends!

46. *Buford v. Houtz*, 133 U.S. 320, 328 (1890); *see also Lazarus v. Phelps*, 152 U.S. 81 (1894); *Garcia v. Sumrall*, 58 Ariz. 526, 535, 121 P.2d 640, 644 (1942):

The result was that if the old common law rule of trespass was applied, it would have been practically impossible to use these federal lands for grazing, for the animals running at large thereon, due to their natural instincts, would be practically certain to trespass upon any privately owned lands lying adjacent to the open range.

47. *See, e.g.*, Act of Feb. 28, 1838, ch. 76, 1838 Ark. Laws 450; Act of Mar. 31, 1855, ch. 59, 1855 Cal. Stat. 70; Act of Jan. 11, 1866, ch. 15, 1865-1866 Dakota Laws 472; Act of Jan. 29, 1864, 1863 Idaho Laws 594; Act of Jan. 27, 1835, 1834-1835 Ill. Laws 144; Act of Feb. 5, 1840, 1839-1840 Tex. Laws 179. These statutes typically embrace a "fencing out" rule by stating that a person could recover for damage caused by the trespassing animals of another *if* his own lands were enclosed by a sufficient fence. *See Clarendon Land, Inv. & Ag. Co. v. McClland*, 89 Tex. 483, 34 S.W. 474 (1896); *Ford v. Taggart*, 4 Tex. 492 (1849).

48. *See generally* C. RICHTER, *THE SEA OF GRASS* (1937) (a novel dealing with open range themes).

49. For an overview, see J. INGHAM, *supra* note 42, at 265-67.

50. *See generally* W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 706-07 (7th ed. 1982), for a brief overview of the "fencing in"/"fencing out" controversy in the United States.

51. *See* H. MCCALLUM & F. MCCALLUM, *THE WIRE THAT FENCED THE WEST* (1965); Gates, *The Devil's Rope*, *TEXAS HIGHWAYS*, Sept. 1982, at 24; Kalez, *Barbed Wire Benny*, *THE CATTLEMAN*, Jan. 1972, at 50.

We may be tempted to regard these events as stories from the Wild West that should not be taken too seriously. But it is startling that the norm of "fencing out" was already part of the Spanish law when Texas still belonged to Mexico.⁵² This, however, must not induce the conclusion that the Spanish example shaped the later American rule.⁵³ The American rule developed independently. Geography alone was decisive: it was stronger than legal culture and history.

VII. FURTHER EXAMPLES

Examples may be easily multiplied. Note, for instance, the difference between the "incorporation theory" (England) and the "real seat theory" (Continental Europe) in international company law.⁵⁴ These rules developed in different geographical environments and reflect their heritage even today. The same is true for corporation laws in general, as can be seen by looking at Delaware and Liechtenstein and comparing the characteristics of their respective corporation laws. Similarly, geography influences the choice of a particular tax system. Why else does the income tax preponderate in the United States, whereas the turnover tax is the major tax in Europe? The answer lies at least partly in geography: A turnover tax tends to burden consumption and is thus the more appropriate tax for a culture that puts a premium on savings in view of scarce natural resources — an approach that is typical of the European tradition.⁵⁵ The catch-phrases "tax haven" and "off-shore funds" must also be mentioned in the context of geography and tax. These phrases actually connote the nature of a law by reference to a particular geographic situation.

Another element in the influence of geography on law is the difference in sheer size between countries, the feeling of seemingly inexhaustible land reserves which informs, for instance, the American character and is a main element of American law. It is also clear that an increase in population increases the need for the legal protection of the private sphere, that formality becomes more important.⁵⁶ It makes a difference in law and social behavior when, instead of twenty-two persons (USA), two-hundred-fifty persons (West Germany) live on one square kilometer.

VIII. CONCLUSION

This short essay shows us that the relations between geography and law — though so often overlooked — have far-reaching implications. Any in-

52. W. MYRES, *THE RANCH IN SPANISH TEXAS, 1691-1800*, at 25 (1969).

53. Jordan, *The Origin of Anglo-American Cattle Ranching in Texas: A Documentation of Diffusion from the Lower South*, 45 *ECON. GEOGRAPHY* 63 (1969) (disputing the thesis accepted by many that Anglo-American cattle ranchers in Texas learned from Mexican ranchers).

54. See, e.g., A. CONARD, *CORPORATIONS IN PERSPECTIVE* 14-16 (1976).

55. B. GROSSFELD, *DIE EINKOMMENSTEUER* 8 (Recht und Staat in Geschichte und Gegenwart No. 504/505, 1981).

56. See generally *Privacy as a Behavioral Phenomenon*, 33 *J. SOC. ISSUES* 1 (1977); see also *Gray v. Board of Higher Educ.*, 692 F.2d 901 (2d Cir. 1982); *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981); *Report of Committee A, 1980-81*, 67 *ACADEME Bulletin of the AAUP* 176, 181-85 (1981) (Chairman of Committee, M. Finkin, commenting on judicially compelled disclosures of decisions by academic bodies).

depth comparative research must take this factor into account. We have to be aware of the fact that a change in the geographical environment in itself might change the function of a given legal institution. It is very difficult, if not often impossible, to predict in which direction this change might go.

The conclusion is clear. Geographical factors can help us understand a foreign law, but by the same token they make comparisons more difficult. Comparative law offers no easy way to borrow solutions from other legal cultures. There is, however, no reason to fall from exaggerated optimism into complete pessimism. Notwithstanding all difficulties, we have quite a few examples of successful legal transplants. Seeing the problems more clearly is often the first step to coping with and overcoming them — though the way may be long and hard.