

# Deconstructing the Foundational Mythologies of American Legal Empire

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R.W. Kostal, [Laying Down the Law: The American Legal Revolutions in Occupied Germany and Japan](#) (2019).

The intertwining of American foreign policy and American law has been a renewed topic of historical interest in recent years, with specific focus placed on the United States' emergence as a global power at the turn of the 20th century. [Rande Kostal's](#) *Laying Down the Law* dives deeply into perhaps the two most enduring symbolic episodes that came to shape popular and elite understanding of the place of American law in what many now call America's informal empire: the post-World War II American occupations of Japan and Germany. Almost every subsequent American military action has to some degree invoked these interventions as precedents to justify efforts to export American legal models to foreign nations. For those working in this vein of international legal history, Kostal's work has thus been long anticipated.

Kostal examines one aspect of the occupations of Japan and Germany comparatively within each of his six substantive chapters. His first two chapters deal with the details of the planning and occupation of each country, respectively, and his last four chapters the substance of reforms in constitutional law, court organization, criminal justice, and civil liberties. Undergirding all of these efforts was a general presumption that American liberal legality and the rule of law were central to American democracy and, thus, to democratization abroad. Conversely, there was a presumption that fascism and international belligerence sprung from the rejection of such values.

Some of what *Laying Down the Law* reveals would not surprise critical scholars who work in the field loosely termed "law and development" or historians who have examined these occupations without a particular focus on law. Kostal's research highlights a distinct lack of coherent planning and local expertise that marked most every aspect of the legal reform efforts. Few with direct knowledge of Japanese law or society were employed by the US governmental agencies who oversaw the effort. Even expatriate German émigrés who had joined the American legal academy during the war often had their input subrogated to larger diplomatic imperatives. Both legal reform projects operated through compromise and dialogic engagement with local actors—cross-cut by the personal career ambitions of both American lawyers navigating a new wealth of foreign policy roles and their domestic interlocutors seeking to preserve positions of influence.

Kostal's careful research over more than a decade has yielded numerous novel discoveries and perspectives in *Laying Down the Law*. A notable highlight is how American perceptions of racial and religious difference/distance influenced both efforts in different ways. In Japan presumptions of substantial cultural difference amplified the generally dismissive view of anything particularly Japanese in the reform process. Such presumption even moved leaders of the occupation to assert that those with actual knowledge of Japan were suspect precisely because they might see something of value in the previous Japanese legal system. The irony that the Japanese system, even down to its system of legal education, was modeled on German law seemed to escape American reformers. Law in Germany was seen by American actors as central to the rise of Nazi fascism, whereas in Japan more inchoate resort was made to broader notions of Japanese culture as explanatory of its militarism. Moreover, while not

Kostal's particular focus, the fact that Germany was predominantly a Christian nation led to little of the co-mingling of legal reform and ambitions for religious conversion that marked the American discourse on Japan. All of which worked to display quite flexible American notions of the inter-relationship between law, democracy and modernity.

For international lawyers today, what might be most striking is how these legal reform efforts required a fundamental reshaping of the international laws of occupation. The idea that occupying powers can engage in reforming the political and legal institutions of a conquered country is almost completely normalized today. But Kostal shows how at the time this idea was broadly rejected by international legal scholars. Pioneering American international law scholar and diplomat Philip Jessup was approached for his opinion on the subject, but when he deemed the idea impermissible under international law more congenial counsel was sought. Many might point out that such ideas were recurrent in colonial occupations, but what marked this era, and especially marked American self-perception after the Spanish-American War, was the idea that all such occupations would be inherently temporary.

*Laying Down the Law* also reveals a pivotal early moment in the administrative law of American foreign policy. There was no pre-existing agency with a mandate for legal reform projects in occupied nations. Accordingly, shifting inter-agency conflicts drove the management of both reform efforts—foreshadowing the long-standing unease among military actors ultimately vested with such responsibility. Even here, the particularly porous nature of American administration stood out as those tasked with carrying out reform projects were primarily Harvard-trained corporate lawyers who had moved into government service after Pearl Harbor. These lawyers epitomized the American legal profession's growing confidence that it possessed a type of near-universal problem-solving expertise that could be brought to bear on any regulatory enterprise, foreign or domestic. Historians of the American legal profession would be little surprised by how the claim that a "good [American] lawyer can do anything" (P. 366 n.38) was cited to naturalize the participation of those with no country-specific expertise, or even expertise in the substantive areas of law addressed (most notably in criminal law).

In the end, the reforms in each country had much less transformative impact than would be vaunted stateside. Resistance by local interests and the extant legal profession in each country restricted American-led reforms to those that were publicly evocative and logistically convenient. In Germany this meant "de-Nazification" was limited to purging any laws that made explicit reference to the ideology of the Nazi regime, especially in terms of categorical discrimination, rather than systemic institutional reform—or even the removal of judges who had served under the previous regime. In Japan, this dynamic led to perhaps the quickest constitution writing project in history and a quite muted pattern of reform which entrenched much of the pre-existing legal elite. It is hard to do justice here to the complex maneuvering at play in each chapter, but Kostal maps them out with great legibility.

This is not to say that such changes were not consequential, especially for Japan's de-militarization. Yet, as legal historians in this arena recurrently note, the content of such foreign legal engagement over time belies the that idea that American law has certain fixed values and institutional expression. The content of even the more ambitious reform imaginations contemplated at the outset of the occupations reflected a very different version of what "American law" was taken to be in later decades—especially in regard to the prominent regulatory role of the state. Furthermore, and most acutely for the mythology they came to inspire, these reforms lost any particular quality of "Americanization" even when formal transplants seemed to have been made. If one were to look at the German and Japanese legal systems just a few decades after the occupations, it would be hard to describe their particular American elements. Notably, by the 1980's Japanese law was cited by many as itself the antithesis of American law, and many Germany scholars today might still proactively assert a parallel claim on their own.

But perhaps what is most intriguing about Kostal's narratives is not how wide the gap was between the

rhetoric and reality of the reform efforts, but how the nature of the compromises made reflected tensions at the heart of modern American liberalism. American reformers in both countries allied with less-liberally inclined domestic actors in order to facilitate the use of criminal law to repress the speech and organization of those deemed too politically radical (especially labor activists). Here the occupations foreshadowed the general Cold War dynamic where American legal internationalism would become highly charged by notions of allegiance that too-often trumped commitments to the principles of liberal politics. As Kostal explicitly notes “at war’s end, America’s own liberal rule-of-law project was profoundly flawed....in its posture as liberal revolutionary, the American colossus had feet of clay.” (Pp. 300, 327.)

Today, much of the mythology generated by the occupations is under renewed scrutiny. The sacralization of the American constitution emergent at the beginning of the 20th century drew deeply on the idea that it was a model for the world, and the Japanese occupation in particular has always served as a symbolic lynchpin in this mythologization. Even the very enterprise of contemporary comparative constitutional law in the United States now grapples with its future when the presupposition of American constitutionalism as a dominant global model is no longer empirically tenable.

Perhaps Kostal would not be so direct in drawing out these conclusions from his work, even though he unabashedly notes the weakness and hypocrisies of the occupation efforts throughout *Laying Down the Law*. But this is the value of historical work that interrogates episodes that become so symbolically charged and consequential. Disruption invites re-imagination, even if Kostal places such outside of his scholarly ambit. If anything, the post-occupation role that the many participants he studied played in constructing this mythology stateside remains open as a fascinating subject left to explore.

As with any historical project of such depth and scope, there are of course subjects I could have read more on, especially as legal education reform became so central to subsequent American rule of law reform efforts. For non-specialists, Kostal has rendered this topic accessible and with all the personal details and intrigue commensurate with his level of archival engagement. For anyone thinking deeply about the past and future rule of American law and American lawyers in the international world, *Laying Down the Law* will be a must read.

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