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# LAW AS LAG: INERTIA AS A SOCIAL THEORY OF LAW

*Richard L. Abel\**

SOCIETY AND LEGAL CHANGE. By *Alan Watson*. Edinburgh: Scottish Academic Press. 1977. Pp. x, 146. £3.75.

In *Society and Legal Change*,<sup>1</sup> Professor Alan Watson has built upon his vast knowledge of legal history to offer a social theory of law. Since I possess no expertise in the historical data themselves, the object of this Essay will be to clarify that theory and criticize it from the perspective of contemporary scholarship in law and social science. The title of the book itself encapsulates all of the issues that I want to raise: conceptual structure, the theoretical relationship between "society and legal change," and the political ideology implicit in this theoretical formulation.

## I. CONCEPTS OF LAW AND SOCIETY

The two central elements in Professor Watson's theory, naturally, are law and society, but his concept of law nonetheless remains extremely vague. Although he acknowledges some of the inherent ambiguities, he fails to resolve them or takes contradictory positions in doing so. The first ambiguity is whether he is speaking of positive law — law in the books, the authoritative pronouncements of legislators, judges, or jurists — or of living law — law in action, the behavior of lesser legal officials and laypersons, which often deviates from positive law. Unlike contemporary social scientists, Watson is necessarily dependent upon historical materials that are largely limited to official statements of law. I assume, therefore, that he must be writing about positive law.<sup>2</sup>

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1. This book incorporates and elaborates upon some of the ideas Watson put forward in his earlier work, *Legal Transplants*. A. WATSON, *LEGAL TRANSPLANTS* (1974).

2. The illustrations that he uses seem to support this interpretation. He writes at several places about a decree of the Roman Senate in the first century A.D. that permitted a marriage between uncle and niece, the purpose of which was to allow the Emperor Claudius to marry his niece Agrippina. Pp. 38-40. Watson stresses the substantial divergence between this law and a prior custom prohibiting incestuous marriages. But what has diverged from custom is the positive law — this particular decree — not the actions of other legal officials or the behavior of the population at large. Indeed, Watson acknowledges that during the succeeding three

Yet a *social* theory that deals only with positive law is open to an obvious criticism. Decades of sociological jurisprudence, legal realism, and sociology of law have rediscovered the gap between the law in the books and the law in action and established that one can only be understood in relation to the other. Watson is obviously familiar with this literature, and seeks to accommodate it:

Obviously in a work of the present kind what matters most is "law in action". If the only law out of step with society was that "in books" the observation of it would have little social significance. I have tried to show that "law in action" frequently diverges from the needs and desires of society. [P. 126.]

But many of his examples deal only with law in the books. Watson himself appears to recognize this limitation by contradicting the passage just quoted less than ten pages later:

There is one thing I should like to make explicit. Throughout I have been talking about legal *rules*, and not about how decisions are reached by the courts — though occasionally judicial reasoning on law has slipped in — or how the legal system actually works. What I have had to say should be treated independently of the propositions of Legal Realists or of the insights of students of Sociology of Law. [P. 135.]

Watson seems never to have decided which was more important, the law in the books or the law in action. Confusion is the inevitable result.<sup>3</sup>

A related ambiguity inheres in the multifaceted nature of law, all

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hundred years there were only two other known marriages of this sort — in other words, that there was virtually *no* divergence between custom and law in action. That Watson is only concerned with positive law is confirmed by his statement, in another context, that "it is in the highest degree . . . significant that no alteration occurred either to allow or to prohibit marriage with any niece for three centuries." P. 118. And elsewhere, discussing regimes of community property, he finds "the same legal rule," operative in Visigothic Spain, medieval Germany, and contemporary California. P. 106. Since it is inconceivable that identical social behavior could be found in such different settings, Watson can only be referring to positive law.

3. Watson's uncertainty about whether he should be speaking of the law in the books or the law in action reminds me of the perplexity of the King during the trial in *Alice in Wonderland* about what should be considered significant evidence:

"What do you know about this business?" the King said to Alice.

"Nothing," said Alice.

"Nothing *whatever*?" persisted the King.

"Nothing whatever," said Alice.

"That's very important," the King said, turning to the jury.

They were just beginning to write this down on their slates, when the White Rabbit interrupted.

"*Un*important, your Majesty means, of course," he said in a very respectful tone, but frowning and making faces at him as he spoke.

"*Un*important, of course, I meant," the King hastily said, and went on to himself in an undertone, "important — unimportant — unimportant — important" — as if he were trying which word sounded best. Some of the jury wrote it down "important," and some "unimportant." Alice could see this, as she was near enough to look over their slates; "but it doesn't matter a bit," she thought to herself.

L. CARROLL, ALICE IN WONDERLAND 126-27 (1946).

parts of which are closely related. It is impossible to study one set of substantive rules in isolation; even the totality of substantive rules must be seen in conjunction with legal processes, institutional structures, the personnel of the legal system, and the like. Thus Watson entertains the argument that he "should also have discussed administrative law, social welfare law, evidence and procedure and the workings of the court" (p. 126). Nor would it be sufficient to examine the totality of legal phenomena that perform similar functions, for law is, among other things, "one weapon in a whole battery of means of social control; organized religion, economic conditions, widely-held ideas of morality" (p. 125). Watson's response to these self-criticisms is twofold, if also contradictory. He insists, on the one hand, that he has adopted a holistic approach, and on the other, that the examples he has chosen make it unnecessary to do so because the particular laws analyzed are immune to the influence of other social forces. But once again, having flirted with sociology of law, he abandons it in the end: "[M]y narrow focus is deliberate. My concern has been to establish [only] whether *rules of substantive private law* are or are not in step with the needs and desires of the society . . ." (pp. 126-27).

Professor Watson's conception of society is even more problematic. Most of the time he treats society as an undifferentiated, personified whole; he repeatedly writes of the "needs or desires of society" (p. 9) or finds rules "satisfactory for the society as a whole" (p. 24). True, he again seeks to anticipate the attacks of pluralist political scientists, elite theorists, and Marxists (pp. 8-9), but not by analyzing interest groups, strata, or classes. Instead, he proposes to study only rules that are "inconvenient or positively harmful either to society as a whole or to large or powerful groups within the society" (p. 9). He views society as either an organic whole or as a series of interest groups utterly dominated by a monolithic ruling class.

In selecting both of his central concepts, in sum, Watson addresses the theoretical framework of the sociology of law only to dismiss it: He rejects the study of legal institutions and processes in order to concentrate upon substantive rules, and he personifies society so as to render unnecessary any analysis of the political ideas or behavior of particular individuals or groups.<sup>4</sup>

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4. The conceptual structures of comparative law and legal history on the one hand, and sociology of law on the other, may be so fundamentally incompatible as to make it virtually impossible for one to accommodate the other. See Abel, *Comparative Law and Social Theory*, 26 AM. J. COMP. L. 219 (1978).

## II. SOCIAL THEORIES OF LAW

These conceptual problems are compounded by, and contribute to, difficulties inherent in Watson's theoretical framework. It is necessary to begin with some basic epistemological issues. Watson appears to employ a highly oversimplified notion of social theory. He states, for instance: "The fact that some swans are black would not constitute proof of a theory that all swans were of necessity black" (p. 43). This flawed and simplistic formulation<sup>5</sup> is an essential element in Watson's implicitly antitheoretical stance. Much of the book attacks other theories that link society and legal change.<sup>6</sup> It does so by taking an extreme antihistoricist position in the tradition of Popper and Nisbet:<sup>7</sup>

[T]here must be some relationship between the needs and desires of society and its legal rules. . . . But this relationship seems impossible to define, perhaps because it varies from state to state and from one area of law to another. [P. 134.]

Yet, here again, Watson is caught in a contradiction: If the relationship is truly unknowable, then he cannot offer an alternative explanation. So he backs away to an ambivalent position that posits a relationship but simultaneously asserts that it is accidental and unimportant:

Historical factors will explain why any law is passed at the time it is passed; but these factors need not be deeply embedded in the life and desires of society or the technical skills of the law-makers. [P. 90.]

And he appears uncertain about even these "historical factors," for he quotes Lord Devlin approvingly as wondering "whether the legislature selected the offences haphazardly" (p. 79).

Watson's general theoretical skepticism is only a prelude to his criticism of specific theories of law in society. It is possible to distinguish at least three of these theories. The first is associated with historical jurisprudence, perhaps most notably the work of Savigny; it asserts a natural harmony between law, as the spirit of the people, and society — at least until legislative action disturbs the harmony. The second is Marxist theory, which views law in capitalist societies

5. There are at least three problems with this formulation. First, "all swans are black" is not a theory; it is a descriptive statement at a fairly low level of generality that might be employed in constructing a theory. Second, theories are not proved; they are falsified or survive falsification. Third, single-factor, nonstatistical explanations of the kind suggested by Watson's example (if the animal is a swan, it will be black) are rarely useful in social science, since social systems are so extraordinarily complex.

6. *See, e.g.*, p. 130 ("[N]one of the theories of the development of law or the relationship between law and society are [sic] acceptable.").

7. R. NISBET, *SOCIAL CHANGE AND HISTORY* (1969); K. POPPER, *THE POVERTY OF HISTORICISM* (1977).

as an expression of the relations of production and, therefore, as a reflection of the class domination inherent in these relations. The third is the view of law as a means of social engineering, a perspective that can be traced from Ihering through Pound's sociological jurisprudence to contemporary "policy science."

In grouping together theories that are usually seen as distinct, even antithetical, Watson draws attention to an important common attribute: All three tacitly assume that harmony between law and society is natural and attainable. They differ largely in where they locate this harmony historically and how they evaluate it: The intellectual descendants of Savigny place the ideal society in the past, against which standard the present seems wanting;<sup>8</sup> social engineers assert that harmony could be achieved now, if only they were given free rein;<sup>9</sup> orthodox Marxists maintain that capitalist law furthers the interests of only one class and will express those of the entire society only when classes themselves disappear under socialism (at which point law, like the state, may wither away). It is perhaps not accidental that all three traditions derive from the work of German scholars writing within a few decades of each other, at a time when rapid social change appeared to threaten the capacity of law to serve society.

Watson's purpose, however, is not to reveal the truth that these otherwise divergent theories may share, but to expose their common error. To do this, he must caricature each approach. Thus he quotes Savigny on the *Zeitgeist*, and scattered extracts from some of his lesser known followers, while ignoring the monumental achievement of twentieth century anthropology, especially legal anthropology, in documenting and explaining the close connection between law and social structure in tribal societies.<sup>10</sup> While implicitly ridiculing what now appears, with the benefit of hindsight, to be Roscoe Pound's naïve overenthusiasm for social engineering, Watson conveniently ignores the indisputable fact that law *is* used to regulate vast areas of social life in virtually every contemporary society. And he singles out for criticism an obscure exponent of vulgar Marxism even though he is aware of the qualifications offered by Engels, if he does

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8. This would also include those who idealize tribal societies. For a criticism of such idealization, see E. COLSON, *TRADITION AND CONTRACT* (1974). For a discussion of some of the difficulties with Colson's position, see Abel, *The Problem of Values in the Analysis of Political Order: Myths of Tribal Society and Liberal Democracy*, 16 *AFR. L. STUD.* 132 (1978).

9. See, e.g., S. NAGEL & M. NEEF, *LEGAL POLICY ANALYSIS* (1977).

10. The literature is vast. See, e.g., S. ROBERTS, *ORDER AND DISPUTE* (1979); *THE DISPUTING PROCESS — LAW IN TEN SOCIETIES* (L. Nader & H. Todd eds. 1978); Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 *LAW & SOC. REV.* 217 (1973).

not seem familiar with later refinements of Marxist theory.<sup>11</sup>

Having set up these straw men, Watson advances his own thesis that

though there is a historical reason for every legal development, yet to a considerable extent law in most places at most times does not progress in a rational or responsive way, and that the divergence between law and the needs or wishes of the people involved or the will of the leaders of the people is marked. [P. 5.]

Although he caricatures the theories that he seeks to discredit, Watson must acknowledge that most of them make some allowance for divergence between law and society. To demonstrate the originality of his own views, therefore, he does two things. First, he asserts that a much greater degree of divergence exists than that admitted by other theorists — a position that creates problems, as this Essay will soon show. Second, he fails to mention scholars for whom the divergence was a central preoccupation, *e.g.*, William F. Ogburn,<sup>12</sup> with his theories of social lag, and William Graham Sumner, who wrote a whole book on the divergence between “folkways” and “lawways.”<sup>13</sup>

In fact, in reacting against the prevailing theoretical framework, Watson has not escaped it but merely turned it upside down. He appears to be asserting that law has never been congruent with society, is not presently used for social engineering, and does not express class domination.<sup>14</sup> His method of supporting this position, like the position itself, is a mirror image of the functionalism that he attacks. That functionalist metatheory, which pervades contemporary social science (including some Marxist analysis), has been lampooned as a mode of analysis that seeks the meaning of social institutions by asking questions in the form “If I were a horse,” after the apocryphal farmer who, looking for a lost horse, asked, “If I were a horse, where

11. Pp. 4, 7. Particularly important Marxist writings that Watson might have treated include G. LUKAS, *HISTORY AND CLASS CONSCIOUSNESS* (1971); K. RENNER, *THE INSTITUTIONS OF PRIVATE LAW* (A. Schwarzschild trans. 1949); and Pashukanis, *The General Theory of Law and Marxism*, in *SOVIET LEGAL PHILOSOPHY* (20th Century Legal Philosophy Series, vol. 5, H. Babb trans. 1951). A great deal has been published since Watson's book appeared. *See, e.g.*, M. CAIN & A. HUNT, *MARX AND ENGELS ON LAW* (1979); B. EDELMAN, *OWNERSHIP OF THE IMAGE* (1979); P. HIRST, *ON LAW AND IDEOLOGY* (1979); T. MATHIESEN, *LAW, SOCIETY AND POLITICAL ACTION* (1980); E. PASHUKANIS, *LAW AND MARXISM* (B. Einhorn trans., C. Arthur ed. 1978); E. PASHUKANIS, *SELECTED WRITINGS ON MARXISM AND LAW* (P. Beirne & R. Sharlet eds. 1979); P. PHILLIPS, *MARX AND ENGELS ON LAW AND LAWS* (1980); C. SUMNER, *READING IDEOLOGIES* (1979); M. TIGAR & M. LEVY, *LAW AND THE RISE OF CAPITALISM* (1977).

12. W. OGBURN, *SOCIAL CHANGE* (New ed. 1950).

13. W. SUMNER, *FOLKWAYS* (1906). *See* Ball, Simpson & Ikeda, *Law and Social Change: Sumner Reconsidered*, 67 *AM. J. SOC.* 532 (1962).

14. Indeed, the homology between Watson and the theories that he caricatures is even closer for, as we will see later, he believes strongly that law can and should be brought into harmony with society.

would I go?"<sup>15</sup> The functionalist observes a social behavior or an institution and asks himself, "If I were a member of that society at that time, why would I behave in that fashion?" The observer's empathetic response is then offered as the explanation for the institution or behavior. Watson does just the opposite. He examines a legal rule, asks whether *he* would want such a rule if he were a member of that society, decides that he would not, and concludes that the law serves *no* purpose. He discusses at some length, for instance, the distinction between manifest and nonmanifest theft in Roman law and notes that the penalty for the latter was much less severe (pp. 34-37). Why, he asks, was this so? Some scholars have argued that there is greater doubt about guilt in nonmanifest theft. Watson seems to ask himself, "If I were a Roman, would I find such doubt sufficient reason for greater lenience?" His response is unequivocal: "[T]here was a degree of illogicality in drawing the distinction. Doubt as to guilt may be a good reason for not condemning the action, but not for fixing a lower penalty" (p. 37). This judgment is Watson's alone. He offers no evidence that the Romans shared his feelings. Indeed, numerous empirical studies of decision-making by contemporary judges and juries show that doubt about guilt generally mitigates the rigor of punishment in both criminal<sup>16</sup> and civil<sup>17</sup> cases.

What Watson is doing is importing his own judgments — ethical, political, economic, and social — about what the rule ought to be, implicitly suggesting that these are the only purposes that the rule *could* serve, and then concluding that the rule serves *no* purpose. Such "antifunctionalism" has even greater epistemological problems than functionalism itself. First, it is hard to conceive of a theory of law in society grounded upon the principle of absurdity, irrationality, and disconnection.<sup>18</sup> Second, functionalism constitutes no more than a heuristic assumption in contemporary social science (and in my opinion one that has proved its worth): The hypotheses it generates are then subjected to rigorous testing. It is not clear to me how "antifunctionalist" hypotheses could be tested since the number of explanations for a given rule is logically infinite (it does not serve purposes A, B, C . . .). Watson's method is rather like that of the

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15. According to Max Gluckman, A.R. Radcliffe-Brown is the source of this criticism. See M. GLUCKMAN, *POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY* 2 (1965).

16. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1971). See generally *Symposium: Plea Bargaining*, 13 *LAW & SOC. REV.* 185 (1979).

17. See, e.g., H. ROSS, *SETTLED OUT OF COURT* 141 (1970). Compromise verdicts in tort cases, where the jury reduces damages because of uncertainty about fault, are widespread, though unlawful.

18. Cf. P. FEYERABEND, *AGAINST METHOD* (1975).



Western anthropologist who approaches a non-Western society with a set of preconceived hypothetical questions only to be told, in response to the question "What if . . . ?", that it never happens.<sup>19</sup> But where the anthropologist merely fails to recognize the significance of information because of his approach, Watson runs the greater risk of acquiring misinformation. His method is all the more difficult to evaluate because his judgments are implicit. He speaks, for example, of a rule as being "the best available," "selected for sound reasons," or "suit[ed] to its new environment" (p. 98). He asserts that "it is not the case that when it is generally known that a better rule exists elsewhere, that rule will be adopted" (p. 105). Yet, he never tells us what he means by "better," "best," "sound," or "suited."

In many ways, Watson seems to me to be an unconfessed utilitarian.<sup>20</sup> His approach certainly suffers from many of the problems of utilitarianism. There is a confusion of is and ought: Because a rule offends Watson's sense of logic or purpose, he concludes that it is arbitrary, accidental, dysfunctional, and absurd (p. 84). He is assisted in reaching these judgments by a tendency to be both ethnocentric and ahistorical. Sometimes he measures other societies and times by his own standards: "People everywhere want the same basic things from their contract law: simplicity, efficiency and easiness of proof" (p. 20). Quite apart from the impossibility of talking about what "people want" as though those wants could be known and were identical, this statement is obviously false — to begin with, most societies at most times have not even had a "contract law"<sup>21</sup> — and patently an attempt to universalize the ideology of liberal capitalism. At other times, Watson adopts and seeks to generalize the model of another society: "[A] rule which was unsatisfactory at Rome is not

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19. See Abel, *Customary Laws of Wrongs in Kenya: An Essay in Research Method*, 17 AM. J. COMP. L. 573 (1969).

20. He writes enthusiastically, for example, of Jeremy Bentham, who, "above all, never tired of pointing out how unsuitable much of English law was for the society as a whole. . . . In the present context one of the most interesting things is that, despite the efforts and influence of Bentham, the realisation of the divergences — which still continue — dimmed." P. 132 (footnote omitted).

21. See M. GLUCKMAN, *THE IDEAS IN BAROTSE JURISPRUDENCE* 170-203 (1965). Watson wavers between disregarding and reluctantly acknowledging the historical specificity of contractual ideas:

It was a weakness of Roman law that no general system of contract emerged but only individual contracts. . . . We should not be too ready to blame the Romans for not making a development which we, with hindsight, can regard as logical and appropriate, but it may be reasonable to blame them for not recognising certain situations as giving rise to a contract. The most obvious and worst instance of a non-contract is barter.

P. 18. This passage also illustrates how Watson conflates description and evaluation. The judgmental tone of the analysis could hardly be more pronounced: weakness, blame, logical, appropriate, obvious, worst.

too likely to fit its new domicile better" (p. 79). But he is ahistorical in an even more fundamental way. He judges the "appropriateness" of every law by a single standard — whether it promotes efficient social engineering — despite the fact that law has been viewed as capable of ready manipulation to serve consciously chosen ends only during the past few hundred years and even then primarily in Western nations.<sup>22</sup>

Perhaps the most serious problem with Watson's theory is that it is not a theory at all. Once he has qualified his assertions to accommodate the inevitable objections, there remains little more than a recommendation that we give greater weight to certain elements in our model of law in society, an argument with which few would quarrel. In order to show this I must back up a few steps. I noted earlier that Watson is drawn to exaggerate the claims of his theory in order to accentuate its differences from the theories that he criticizes.<sup>23</sup> Examples abound throughout the book:

The argument of this book is that in the West rules of private law have been and are in large measure out of step with the needs and desires of society and even of its ruling elite; to an extent which renders implausible the existing theories of legal development and of the relationship between law and society. The ability and readiness of society to tolerate inappropriate private law is truly remarkable. The main but by no means sole cause of this divergence is inertia, a lack of serious interest in developing legal rules to a satisfactory point and in changing them when society changes. Theorists seeking to understand the nature of law have neglected the significance of inertia and the longevity of legal rules. [P. ix.]

"The life of the law has not been logic: it has not been experience: it has been borrowing." In general the most important element in legal development has been the transplanting of legal rules, principles and systematics from one jurisdiction to another.<sup>24</sup>

. . . The first conclusion must simply be that there does not exist a close, inherent, necessary relationship between existing rules of law and the society in which they operate.<sup>25</sup>

Yet, these assertions are too broad: They simultaneously deny the possibility of any theory and contradict both our daily experience and virtually all scholarly research on law in society. Watson is thus forced to concede that "some kind of general correlation would in no

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22. Watson hints at differences in how and to what extent law is subjected to contemporaneous criticism, but this does not fundamentally alter his approach. P. 76.

23. See text following note 11 *supra*.

24. P. 79 (footnote omitted).

25. P. 130 (footnote omitted).

sense be hostile to the thesis in this book."<sup>26</sup> But then the central question re-emerges. If the relationship between law and society is not wholly random, it is necessary to offer a social explanation for the existence of each law through time, whether that law has been borrowed, is a historical residuum, or has recently been promulgated. Watson fails to offer such an explanation, although he has some interesting things to say about the sources of borrowed laws and the historical origins of existing practices. Furthermore, even if one concedes (as I think one must) that the strength of the relationship between law and society varies among societies, across time within a society, and among legal institutions within a given society at any given instant, it is still necessary to explain this variation. Watson does not do so.<sup>27</sup>

The most that Watson does is to offer a series of metaphors that seem to do more to mystify the linkage than to illuminate it. He sees the law as sluggish, inert, never really able to get it together to do what it knows it ought to — consumed by yawns, like Oblomov.<sup>28</sup> He refers to society as a "home" or a "domicile" for these lazy laws (pp. 98, 79). By a slight metaphorical extension, society might be seen as the tolerant housekeeper who alternately ignores the mess that law makes and tidies up afterwards. For, as we will see below, there is yet another element in this metaphor: What is needed is a strict taskmaster who will make the law shape up. But these metaphors actually do little to advance our understanding — no more, say, than referring to the law as "a ass — a idiot"<sup>29</sup> or a "jealous mistress."<sup>30</sup>

Many of the difficulties with Watson's theory of society and legal

26. P. 125. Elsewhere he goes even further: "[I]t should be stressed that most statutes concerning private law are in line with at least what is conceived to be the interest of society or the rulers." P. 118. Hence, Watson's objection appears to be that he knows people's true interest better than they do.

27. Watson occasionally suggests such variation, as when he asserts, "[E]veryone would accept that certain problems are common to many relatively simple societies . . ." P. 4. He also quotes both Friedrich Engels and the legal anthropologist Paul Bohannan to the effect that, as society is progressively differentiated, the connection between legal and other social institutions becomes less intimate. Pp. 6-7. A systematic development of this idea can be found in Mayhew, *Stability and Change in Legal Systems*, in *STABILITY AND SOCIAL CHANGE* (B. Barber & A. Inkeles eds. 1971). Yet, at other times he seems to deny even the possibility of such comparisons: "It is, of course, impossible to determine whether Roman law or English law was less out of harmony with its society. No test exists which could measure this." P. 76.

28. I. GONCHAROV, *OBLOMOV* (New York 1929) (1st ed. Moscow 1859).

29. P. 79 (quoting Mr. Bumble in Charles Dickens's *Oliver Twist*).

30. See also H. Maine, *Ancient Law* 21 (1963) (discussing stationary and progressive societies). The analogy between society and organism, comparable to the pathetic fallacy in literature, is the object of a scathing and thoroughgoing attack by Robert Nisbet, with whose approach Watson is otherwise in substantial agreement. See note 7 *supra*.

change are common to other theoretical structures. By inverting the functionalism that underlies Savigny, Ihering, and even Marx, Watson has necessarily preserved the flaws that are fundamental to at least the vulgarized versions of these theoretical traditions. The central flaw is the insistence upon explaining law only as an instrumental means to a material goal or, as with Watson, the homologous insistence that the law has no explanation because it does not advance such a goal.<sup>31</sup> Such a monocausal view has long impoverished social studies of law: Sociologists have been condemned endlessly to rediscover the "gap";<sup>32</sup> economists strive relentlessly to find the legal framework that will achieve "the" efficient allocation;<sup>33</sup> policy "scientists" fiddle with rules and institutions in the search for maximum impact; and Marxists document once again how some laws directly support capitalism. Yet, if these studies teach us one thing, it is the inadequacy of the theoretical framework they share. Law does not just advance or frustrate material goals; it can also be expressive, mystifying, or legitimating; it can provide an arena for status competition. Once this complexity is recognized, explanations are immediately suggested for what puzzles Watson: the failure of law to change rapidly and the particular changes that do occur.<sup>34</sup> Law is constrained not only by instrumental goals but also by the requirement that it be accepted as legitimate, and the considerable difficulty of legitimating legal *change* (where the exercise of power is most clearly visible) is a major reason for stasis and for the limited range of the changes that do occur.

The very complexity of all social phenomena is reason enough for seeking a more varied theory to link one sub-set, legal phenomena, with others. For instance, Watson is often distressed by the rigidity of the categories of substantive law, which produce what seem

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31. I have argued above that "inertia" is not an explanation but the metaphorical use of a concept borrowed from psychology, which in turn borrowed it from physics, where alone it has a precise meaning.

32. See Abel, *Law Books and Books About Law*, 26 STAN. L. REV. 175 (1973); Abel, *Foreword* to 12 LAW & SOC. REV. 487 (1978).

33. For criticisms, see Baker, *The Ideology of the Economic Analysis of Law*, 5 J. PHIL. & PUB. AFF. 3 (1975); Heller, *The Importance of Normative Decisionmaking*, 1976 WIS. L. REV. 385; Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 689 (1979). See generally *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485-810 (1980); *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811-972 (1980).

34. For instance, Watson deplores the persistence of certain aspects of the Roman sales contract in other countries and subsequent periods: "The fascinating thing is that the lawyers all — explicitly or not — considered the question in terms of Roman law and minor deviations from it. The example of Rome obscured from them the possibility of a more radical solution." P. 100.

to him to be undesirable results. But an adequate understanding of why this occurs would require a grasp of linguistics, a recognition of the distinctive properties of legal language, and a theory of why legal language is differentiated in varying degrees in different societies.<sup>35</sup> As this example shows, it is not possible to give an acceptable explanation of a single legal phenomenon in terms of some other equally isolated phenomenon. Watson nevertheless attempts to do so:

It would seem in many cases [that] it will not matter greatly to society whether the law adopts solution A or solution B; the choice is socially neutral. [P. 134.]

And he concludes:

This can only mean that the role of private law rules in the well-being of the state, in the prosperity of merchants, in the happiness of individuals, is greatly exaggerated by lawyers and legal theorists. [P. 132.]

But Watson misconceives the relationship between private law and the state. Total legal systems are imbedded in, and support, entire societies. In order to see all of the connections between law and society, it is necessary to find substantial variation in the *totalities*, which means casting one's comparative and historical net very widely. No economist, for instance, would argue that a country's currency is unrelated to its capitalist economy simply because England's shift to decimal coinage was relatively painless. The significance of money can only be seen if comparison is made with a nonmonetary economy. Watson's decision to restrict himself to "developed Western law," excluding both tribal societies at one extreme and socialist states at another, similarly limits the scope of his analysis.<sup>36</sup>

Although Watson occasionally recognizes that lawmaking is a complex process involving multiple institutions and the interaction of numerous actors whose interests are often inconsistent,<sup>37</sup> he never carries his analysis through to a logical conclusion. Thus, at the very outset of his argument he notes that laws, once passed, "are kept in

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35. See L. FALLERS, *LAW WITHOUT PRECEDENT* (1969); Abel, *supra* note 10; Danet, *Language in the Legal Process*, 14 *LAW & SOC. REV.* 445 (1980).

36. P. 6. This is especially unfortunate since there is reason to think that the degree of interrelatedness between legal and other social phenomena — the central concern of this book — exhibits its greatest variation across those societies.

37. Suggestions of a more complex view of law in society are scattered throughout the book, both in asides and qualifications and in concrete examples. Sometimes Watson acknowledges the expressive quality of law: "Legislation — even on private law — is very often a 'gut reaction,' an immediate, strong response to some particular event." P. 117. If this is true of private law, how much more is it likely to characterize public law, especially criminal legislation? This is, of course, Durkheim's well-known theory of the criminal law, which has stimulated a wealth of empirical studies that generally support it. See E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (Simpson trans. 1947). John Hagan, in an extensive survey of studies of criminal legislation, examined two instrumentalist perspectives — liberal pluralist and Marxist — and rejected both in favor of a more complex explanation that emphasizes

existence by factors such as the absence of effective machinery for radical change, by indifference, by juristic fascination with technicalities, and by lawyers' self-interest" and continues in a footnote: "Of course, the machinery for, and effectiveness of, legal change will vary from place to place and time to time" (pp. 8, 11 n.20). Here is the foundation for a sociology of law that would look at both institutional structures and the socialization and organization of the personnel who staff them.<sup>38</sup> Occasionally Watson does look at these, as when he observes that "once draft legislation is prepared it may fail to pass the legislature simply because of pressure of business" (p. 117). Even here, however, the analysis does not fulfill its promise, largely because it is strangely devoid of political content — a problem to which I will return below.<sup>39</sup> We are not told *why* the resources of the legislature are insufficient to the demands placed upon it nor why, with its limited resources, the legislature chooses to satisfy some demands and not others; nor are we told the circumstances under which, or the extent to which, the interpreters of the law — the lawyers — can pursue their own interests, or how these interests correspond with those of other groups in society.

The constant refrain of *Law and Society* — that most laws are useless — tends to obscure what insights the book does offer. I shall try to show what is lost in Watson's analysis by briefly presenting and reanalyzing some of his own examples.

Although Watson begins with illustrations from Roman law, he soon turns to English law to forestall the objection that the peculiar Roman concern for legal theory may explain its abstraction from

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expressive and status factors. See Hagan, *The Legislation of Crime and Delinquency: A Review of Theory, Method, and Research*, 14 LAW & SOC. REV. (1980).

At another point, Watson discusses David Daube's theory that the institution of *patria potestas* was a form of status competition among the Roman elite:

The principal explanation of the tenacity with which the Roman upper classes — for it is only a question of that minority — stuck to these incredible rules is that they saw them as expressing, and safeguarding, their innate superiority over the foreign rabble and probably, in course of time, also over the rabble at home. There is no limit to the hardship people will bear for the sake of status, national or sectional.

Pp. 28-29 (quoting D. DAUBE, ROMAN LAW 85-86 (1969)). However, Watson ultimately rejects Daube's theory on the ground of inadequate evidence, although he offers no more evidence for his own characterization of *patria potestas* as "purposeless."

Joseph Gusfield has given a persuasive account of the American experiment with Prohibition — an equally "purposeless" law — as the result of status competition. See J. GUSFIELD, SYMBOLIC CRUSADE (1963). John Hagan has generalized this interpretation and applied it to other laws. See Hagan, *supra*.

38. The power of the interpreters to reform the law or keep it static is, despite everything, considerable. These interpreters will form a small group within a society — indeed, a small group even among themselves — and their views need not correspond to those of society as a whole.

P. 121.

39. See notes 52-54 *infra* and accompanying text.

daily life (pp. 43-44). He devotes a chapter to English land law, certainly one of the more complex and obscure bodies of legal rules, and concentrates on the failure of the English to abandon this system for one of comprehensive, compulsory land registration. He considers and rejects a number of possible explanations, including the lack of enthusiasm among lawyers, both for economic reasons and because "it is natural that a lawyer should derive pleasure from the contemplation of an excellent piece of applied technique" (p. 58). But by thus understating the case, he obscures what we *know* to be the real reason for the interminable delay in embracing a scheme of land registration: the deliberate and energetic opposition of the organized profession. This has long been notorious and is thoroughly documented in recent historical and critical scholarship.<sup>40</sup> Furthermore, the motive for that opposition is not the pleasure of aesthetic contemplation but simple greed: English solicitors still derive between thirty and sixty percent of their income from conveyancing, depending on the size of the firm.<sup>41</sup> Thus Watson's conclusion — "a body of law which is technically satisfying is not for that reason alone suited to the needs of society" — should be the beginning of analysis, not the end, a signal to search for whose needs it does satisfy, not grounds for a premature conclusion that the rules have no meaning.<sup>42</sup>

Watson's next example is the English law of libel and slander, again a source of results that often appear bizarre. Here, too, he ignores the obvious explanation that complexity and uncertainty serve the interests of a powerful identifiable group, namely lawyers, whose efforts have in fact fostered just those qualities. But there is another way of viewing the rules of defamation, which Watson's the-

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40. See, e.g., B. ABEL-SMITH & R. STEVENS, *LAWYERS AND THE COURTS* 59-61, 198-99 (1967); M. ZANDER, *LAWYERS AND THE PUBLIC INTEREST* 171-72 (1968); Spring, *Landowners, Lawyers, and Land Law Reform in Nineteenth Century England*, 21 AM. J. LEGAL HIST. 40 (1977). For a general sociological theory of the professional struggle for market control under capitalism, see M. LARSON, *THE RISE OF PROFESSIONALISM* (1977).

41. 2 ROYAL COMMISSION ON LEGAL SERVICES, FINAL REPORT, CMND. No. 8648-1, at 107 (1979).

42. P. 58. This failure to pursue a political analysis is visible elsewhere. Watson notes that in automobile accidents today the driver may not be sufficiently insured, so that the victim may go uncompensated. The United Kingdom has compulsory insurance; the United States does not. This he finds absurd, since

it has been obvious that any Government anywhere, at no real cost to itself since it could recoup from a levy on motorists, could introduce a system of reasonable protection for the victim (or, if one prefers, at least for innocent victims) of automobile accidents.

P. 106 (footnote omitted). This is only obvious if one remains ignorant of political reality. Private insurance companies wish neither to be forced to insure drivers who may be poor risks, nor to allow the state to enter the insurance business, which they fear may be the thin wedge of nationalization. See, e.g., R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 91-102 (1965).

oretical framework and methodology do not let him see. I argued earlier that Watson views law as narrowly instrumental, perhaps because he wants it to be instrumentally efficacious. Thus, when he perceives a disjunction between the purpose that he assigns a law and its actual consequences, he concludes that the law is both pointless and socially harmful. The value of this approach will vary with the legal subject matter: Land law has arguably been of vital importance to English society over the past five hundred years; it is not obvious that the same can be said of the law of defamation. In order to determine the importance of defamation law it would be necessary to look beyond the substantive rules (the law in the books) to how they are invoked in litigation, in negotiation, in discussions, and even in reflection (the law in action). To determine what would constitute frequent or rare invocation, we would have to compare contemporary England with other societies. Although those studies have not been done, I think that we can hazard some educated guesses about what we would find. With the emergence of mass, urban, industrialized society the defense of reputation against verbal or written attack, which is a preoccupation of conflict in tribal and peasant societies, rapidly declines in importance.<sup>43</sup> Furthermore, the characteristics of the disputants change: Instead of disputes among kinfolk, neighbors, and workmates, we find relatively public personages suing the mass media, or occasionally each other. Disputes over defamation often seem to take on the aspect of a game; indeed, one party may utter the defamation precisely to force the other to sue, in order to publicize the dispute.<sup>44</sup> Defamation rules, then, are not utilitarian in any narrow sense: They neither compensate the victim for the injury to his reputation nor deter the utterance of injurious falsehoods in the future. Instead, they provide a framework within which individuals can fight for status. If this is so, then the precise content of the rules is irrelevant. The more complex and arbitrary they are, the better. This is a very different interpretation of defamation law from that offered by Watson:

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43. I have sought to document this for Kenya. See Abel, *Case Method Research in the Customary Laws of Wrongs in Kenya: Part II: Statistical Analysis*, 6 E. AFR. L.J. 20, 27-28, 34-35 (1970); for Africa more generally, see Abel, *Western Courts in Non-Western Settings: Patterns of Court Use in Colonial and Neo-Colonial Africa*, in *THE IMPOSITION OF LAW 188-89* (B. Harrell-Bond & S. Burman eds. 1979); for Turkey, see Abel, *Book Review*, 27 UCLA L. REV. 223, 232-34 (1979) (reviewing J. STARR, *DISPUTE AND SETTLEMENT IN RURAL TURKEY* (1978)); and in general theoretical terms, see Abel, *Theories of Litigation in Society*, 6 JAHRBUCH FÜR RECHTSZOLOGIE UND RECHTSTHEORIE 165, 170-78 (1979). Vivid accounts of disputing in societies where reputation is of vital importance can be found in *HONOUR AND SHAME* (J. Peristiany ed. 1965); *GIFTS AND POISON* (F. Bailey ed. 1971).

44. See J. DEAN, *HATRED, RIDICULE, OR CONTEMPT* 235-39 (1953).



Despite its importance for the happiness of individuals and the welfare of society, the law of defamation has been and is marred by grave defects which have caused it to be inefficient and out of step with the needs and desires both of society as a whole and with any ruling elite.<sup>45</sup>

Although I would not claim that I have proved my case, Watson has certainly offered no evidence that the law of defamation significantly affects either the happiness of individuals or the welfare of society.

A third illustration may be taken from a chapter in which Watson enumerates many instances of what he calls "legal scaffolding," elaborations of the law that attempt to correct earlier errors but actually produce more problems than they solve. These structures reach a level of complexity that is often humorous: He quotes a piece of English subordinate legislation that took nearly half a page just to announce its own title (p. 95). But by highlighting the ridiculous in an effort to demonstrate the inutility of these laws, Watson obscures their actual functions. A case in point is a South African criminal prosecution in which the single charge against the accused required references to four regulations, four government notices, and a statute. Yet this complexity was not accidental, dysfunctional, or even inefficient. Watson comments that "the body of the charge conveyed that the defendant being an Asiatic male had entered a particular part of a sea-shore which had been reserved for the exclusive use of whites."<sup>46</sup> In other words, this "whites only" rule was part of a body of racist regulations whose very comprehensiveness, arbitrariness, and incomprehensibility allowed a small white elite to use the forms of liberal democracy to enforce totalitarian controls upon a large Asian, African, and mixed population.<sup>47</sup> But in order to acquire this insight it is necessary to abandon the attempt to explain individual laws in terms of their narrow self-proclaimed instrumental purposes and instead consider how an entire body of law interrelates and is administered.

One additional set of illustrations will have to suffice to substantiate my argument that it is futile and positively misleading to at-

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45. P. 72 (footnote omitted).

46. P. 96 (footnote omitted).

47. Douglas Hay recently made this approach central to his analysis of how eighteenth-century English criminal procedure "put the instruments of terror directly at the disposal of the dominant socio-economic actors, but under the guise of an impartial, determinate, and humane rule of law." See Klare, *Law-Making as Praxis*, *TELOS*, Summer 1979, at 123, 130 (summarizing Hay, *Property, Authority and the Criminal Law*, in *ALBION'S FATAL TREE* (1975)). For an American example of the use of equally vague vagrancy laws to control the workforce, see Harring, *Class Conflict and the Suppression of Tramps in Buffalo, 1892-1894*, 11 *LAW & SOC. REV.* 873 (1977).

tempt to develop a coherent and internally consistent theory of law with the theoretical and methodological tools that Watson has chosen. The first concerns "legal transplants," the subject of a previous book and a chapter in this one.<sup>48</sup> Watson first attempts to determine the source from which a particular country chose to borrow its laws, but his conclusions are sociologically and politically unsatisfying. "In the first place," he states, "the donor system may be chosen because of the general respect in which it is held" (p. 98); but surely it must be rare for the laws of one country to arouse "general respect" in the people of another. If the concept of "respect" is to have any meaning, except as rhetoric, it is necessary to specify the small elite (presumably a functionally specialized category) whose "respect" is significant. The same difficulty troubles the next explanation: "In the second place national pride may determine that borrowings should be made, or should be restricted, from some particular system."<sup>49</sup> The reified concept of "national pride" does not become clear until Watson gives an example. There is strong opposition in Scotland to the importation of English law and to the assimilation of the two bodies of law. Yet, that opposition is an expression not of "general respect" or "national pride" but rather of the political views of identifiable individuals — T.B. Smith, then a professor of Scottish Law and now a Scottish Law Commissioner; another Scottish Law Commissioner; the Commission as a whole; and Professor A.B. Wilkinson — who constitute a coherent category of academic Scottish lawyers (pp. 102-03). Nor does it refute the explanation grounded in the self-interest of academic lawyers to show that the Law Society of Scotland favors greater reconciliation of the two bodies of law and even ultimate consolidation:<sup>50</sup> Although I know nothing of the actual facts, it seems plausible to me that Scottish lawyers are losing divorce and business clients to English competitors and hope to regain or acquire them through the assimilation of English law.

The last two reasons for the source of legal transplants that Watson considers are "language and accessibility" and "past history" (pp. 104-05). These bland concepts once again conceal the political sources that actually influence choice. Watson seeks to explain the fact that "neighbouring countries in Africa may have basically a

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48. See note 1 *supra*.

49. P. 102. Empirical research concerning public knowledge about law strongly suggests that national pride is preoccupied with other concerns. See generally A. PODGORECKI, W. KAUPEN, J. VAN HOUTTE, P. VINKE, B. KUTCHINSKY, KNOWLEDGE AND OPINION ABOUT LAW (1973); Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC. REV. 427 (1977).

50. See pp. 103-04 (quoting the Law Society of Scotland).

Common Law or a Civil Law system" (p. 105). But most people in any African country speak neither English nor French; they have little or no access to the (borrowed) national legal system; and their historical experience has been one of oppression by the colonial power. Language, law, and history are shared only by colonial rulers and the elites that they preserved or created. It was therefore the coincidence of interests between metropolitan and colonial political and economic elites that explains the decision to retain the colonial legal system: The former gained political influence and trade advantages, the latter strengthened the support of the metropole for their continued dominance, and were enabled to legitimate that dominance internally by their superior ability to manipulate the legal system.<sup>51</sup>

### III. LAG AS POLITICAL IDEOLOGY

Watson's analysis of law in society contains an implicit social theory, which I have tried to bring out above. But like all social theory it also expresses a politics, a set of underlying values about the society that he would like to have. To understand Watson's politics, it is once again useful to begin with the title of the book: By choosing "society and legal change" rather than the more common "law and social change,"<sup>52</sup> Watson implies that law necessarily lags behind social norms and behavior, that it can only be a force for reaction not progress. A political ideology of law as lag would be consistent with a Benthamite impatience, which is clearly evident in Watson's contention that "every demand for law reform is a recognition that law has come to diverge from society" (p. 132). What is singularly lacking in this view is any notion that law ought to lead society, ought to be an instrument for radical change, from which I infer that he opposes such change.

Watson's portrayal of law as lag is, moreover, distinctly apolitical. He does not tell us how specific social actors — individuals or groups — seek to preserve the status quo or why they prevail. Rather, his explanation may be summed up in the term "inertia," a rhetorical personification of social structure and behavior that, be-

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51. For an account of how the economic, political, and legal institutions imposed during colonialism preserve the dependence of the former colony upon the metropole after political independence, see C. LEYS, *UNDERDEVELOPMENT IN KENYA* (1974). A thorough study of the transplantation from England to Ghana of a particular legal institution, the public corporation, is R. POZEN, *LEGAL CHOICES FOR STATE ENTERPRISES IN THE THIRD WORLD* (1976).

52. See, e.g., J. COLLIER, *LAW AND SOCIAL CHANGE IN ZINACANTAN* (1973); W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* (2d ed. 1972); W. HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* (1966).

cause advanced as a self-contained interpretation, fails to recognize the need for political analysis. I tried to show earlier that Watson consistently conceals the political element in his statements of and explanations for such phenomena as the English conveyancing rules and the imposition and preservation of metropolitan law in the colonies. This perhaps unconscious concealment is consistent with his basically conservative world view. Nor is the connection between conservatism and apolitical interpretation accidental. Those who have denied the existence of pattern and necessity in history — scholars like Karl Popper and Robert Nisbet<sup>53</sup> — have been political conservatives seeking to confute radicals, notably Marx and later Marxists, who maintain that historical trends do exist and should be used to further progressive causes.

When Watson does mention politics, his goal seems to be to forestall criticism, to trivialize the political by ticking it off before going on to more important things. Sometimes he is quite explicit about his motives: “[O]ne advantage of this way of proceeding is that we need not concern ourselves with the definition of such sociological concepts as stratification, class, power” (p. 9). To this end he defines the process of legislation as fundamentally apolitical, in the sense both that it has no political content and that therefore politics can only distract from legislation:

[F]or radical law reform something like legislation is usually needed. . . . [O]ften legislation is not forthcoming, at least for centuries. The basic reason for this is quite simply that the body or individual which has control over legislation on private law often has insufficient time or interest for law reform since it is usually charged with other functions especially of a political nature. [P. 115.]

Similarly, once draft legislation is prepared it may fail to pass the legislature simply because of pressure of business. [P. 117.]

Yet, the notion of legislation as apolitical is too clearly counterfactual to be maintained for long. Watson therefore makes a concession that he phrases in such a way as to belittle the insight it contains:

[I]t scarcely needs to be said that often legislation is and has been the result of pressure from overt or hidden groups. Clearly a law may result which is beneficial to the group but does not conform to what society as a whole needs or wants. If little is said about this phenomenon here it is only because it is so obvious and well recognized.<sup>54</sup>

This seems to give the whole game away. If legislation is “often” political — as we all know to be, if anything, an understatement —

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53. See R. NISBET, *supra* note 7; K. POPPER, *supra* note 7.

54. P. 118 (footnote omitted).

then politics and not inertia must be the starting point for the study of "society and legal change." Watson can only save his original approach in the face of that insight by depoliticizing the political, using techniques perfected by liberal political scientists in the last few decades. He minimizes the magnitude of social conflict in order to obscure the extent to which the interests of individuals and groups are incompatible.<sup>55</sup> Although he cannot deny outright that the conflict exists, since this contradicts our entire experience, his recurrent personification of society as an entity with "needs and desires" strongly suggests that these are unitary and consistent. Occasionally the image is even more unambiguous, as when he states, "I use the word 'society' as a shorthand way of describing the people inhabiting a particular territory, or the citizens of a particular state" (p. 9).

Since Watson can only hint at social harmony through implication and metaphor, he must launch a direct attack upon those theories that make social conflict their central concern. He does so by embracing a view of society that, in the United States, would be associated with libertarianism, and elsewhere would be identifiable as an extreme form of individualism:

Some legal theorists, as is well-known, have indeed maintained that what is good for the society or the class is good for each individual member of the society or class . . . I do not share [this view]. The interests (and wishes) of an individual are, I believe, often at variance both with those of his society as a whole and with his class. [P. 8.]

This ideology attempts to undermine not only class analysis but even the significance of pluralistic interest groups, except those of the most transitory and fluid sort. Because Marxist class analysis is more fundamentally irreconcilable with Watson's position, both theoretically and politically, he is more scornful of it. His strategy is to ridicule Marxism by selecting extracts from its more vulgar proponents:

We Marxists assert that law is carried out in practice by means of coercion and violence, because all law is a class law, and the law of the class without coercion is not a law.<sup>56</sup>

This is not Marx, or Engels, or Lenin, or Pashukanis, or Gramsci, or Lucas, or indeed the writing of any recognized Marxist theorist, but rather the oral remark of an obscure Russian, Tumanov, at a conference in Soviet Georgia in 1930. And when Watson cannot find a quotation from any Marxist that will make his point, he engages in implicit attribution:

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55. See, e.g., D. BELL, *THE END OF IDEOLOGY* (1960).

56. P. 4 (footnote omitted).

If one subscribes to the view that all law is class law then one has to say that those in charge of legalities do not feel a deep need to keep private law in line with the apparent needs of society; that this role is to a very considerable extent delegated in effect to judges or jurists who, however, are not put into a position where they can do the job efficiently or effectively. [P. 89.]

No doubt there are writers trapped in such narrow instrumentalism, but they are hardly representative of contemporary Marxist scholarship.<sup>57</sup>

Watson is more ambivalent toward the interest-group analysis developed by contemporary political science out of the legitimating ideology of liberal democracy, perhaps because a pluralistic universe of multiple groups is clearly less threatening to his scheme than a pair of irreconcilably opposed classes. He assimilates this liberal pluralism to his own image of society by portraying interest groups as amorphous and interchangeable and by identifying the elite as simply the group that happens to be dominant at a particular moment:

[G]roups with conflicting interests may be rather evenly balanced within the society. Rules may suit one class or one group which is very active in preserving them. It might be suggested that the result in a society will be a mixture of some rules which harmonize with the wishes and needs of the whole society or the ruling class and of others which suit particular groups or classes, and that form a pattern in which the various interests of groups and individuals are represented according to their strength in the society.<sup>58</sup>

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57. This more sophisticated approach can be illustrated by a recent article by Isaac Balbus, whose richness the following brief quotation can only suggest:

[T]he formulation that *to the degree that the law does not respond directly to the demands of powerful social actors it is autonomous, in the sense that it functions and develops according to its own internal dynamics* omits the possibility that the law is not autonomous from, but rather articulates with and must be explained by, the systemic requirements of capitalism precisely because it does *not* respond directly to the demands of these actors.

. . . Stated otherwise, the autonomy of the Law from the preferences of even the most powerful social actors (the members of the capitalist class) is not an obstacle to, but rather a prerequisite for, the capacity of the Law to contribute to the reproduction of the overall conditions that make capitalism possible, and thus its capacity to serve the interests of capital as a *class*.

Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC. REV. 571, 572, 585 (1977) (emphasis in original). See E. THOMPSON, WHIGS AND HUNTERS (1975); Fraser, *The Legal Theory We Need Now*, SOCIALIST REV., July-Oct. 1978, at 40-41.

58. Pp. 8-9. This is not an isolated instance; the model of liberal pluralism pervades the book:

If by pressing for a reform which is generally recognized as desirable, they [the legislators] could alienate even a small number of their supporters, they may prefer to stay aloof.

P. 115

[A]mendments of varying types may be accepted and the resulting legislation may correspond to the wishes of no one and be not even a satisfactory compromise.

P. 117.

Although this comment seems to admit the significance of politics, in fact it is deeply apolitical. The groups remain anonymous, as do such concepts as elite or ruling class. Even more important, the groups are portrayed as fungible, equally capable of influencing legislation in the same way. That is precisely the ideology of liberal democracy: The formal right of access to the political arena is confounded with actual equality within it.

But in fact Watson is not really an admirer of liberal democracy. He emphasizes the power of small interest groups to block legislation and tends to see the clash of inconsistent interests not as a necessary process through which to arrive at the most satisfactory compromise but as leading all too often to stalemate. The long quotation given above, which could be taken as a paradigm of liberal ideology, is in fact rejected by Watson as inaccurate (p. 9). But if the law-making process does not produce politically satisfactory rules, it does at least produce rules, and this, according to Watson, is all that is necessary for society:

This brings us to the eighth conclusion that the essential, inescapable function of a rule of private law is to help in avoiding or settling conflicts. The rule may also have, but need not have, the function of resolving a dispute for the moral, social or economic well-being of the society. Society's essential stake in rules of private law is the avoidance or peaceful resolving of conflicts. This can occur only if formal justice is applied between the parties to a dispute; both sides must be given an equal chance to put their case, there should be no decision *ad hominem*, similar situations should be judged alike, and so on.<sup>59</sup>

This, Watson's ultimate conclusion, is fundamental to his argument, if it is also rather startling. It completes the process of depoliticization: Both substantive rules and legal procedures are essentially neutral. This means that lawmaking can properly be divorced from politics and *should* be so divorced because politics is so inefficient and often leads to dead ends. The necessary corollary is that formal justice has meaning without reference to the content of substantive rules and can be attained by correctly designed legal procedures, regardless of the social system within which they operate. The latter assumption is disproved by everything that we have learned from empirical studies of law in society during the past few decades.<sup>60</sup>

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When a small group wishes the law changed this seldom seems to arouse society to defend the status quo.

P. 133

59. P. 134 (footnotes omitted). See p. ix.

60. See, e.g., Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 LAW & POLY. Q. 5 (1979); Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y. REV. 95 (1974). And see

The former assumption is the necessary foundation for Watson's political program.

Just as Watson's theory of legislation is fundamentally apolitical, so his prescription for better legislation is to remove it from politics, which he sees as distorting or corrupting the perfect law. His book ends with a call for citizens to hand over the lawmaking power to a body of experts, who would be given the autocratic powers and other resources necessary to replace our messy collection of rules — the product of history and political conflict — with perfect codes:

[I]t would be beneficial to have a law making body intermediate between the courts and the legislature; with greater and more systematic powers of law making than courts have, but not subject to the political pressures experienced by legislatures.

. . . .

. . . Theoretically it should be possible to make the legal rules coincide with the needs and desires of society. To some extent it is a question of allocating sufficient resources. . . . Codes in the modern world, whatever else they may be, should be seen as a step towards deliberately rationalising the law. The same is true of the setting up of permanent bodies with the duty of considering law reform.

. . . .

The preparation of an original code represents a unique opportunity to bring law into line with society at a single sweep . . . .<sup>61</sup>

The lag in law is thus explained — it was caused by politics. And the solution is clear — harmonize law with society by excluding the political!

#### CONCLUSION

Professor Watson's book is a missed opportunity. Recent social studies of law are impoverished by their parochial focus on contemporary legal institutions within a single country. Our theories could be enormously enriched by comparative and historical scholarship. But that scholarship must meet the canons of contemporary social science. Let me summarize those criteria here, as I have applied them in the Essay.<sup>62</sup> The starting point must be a statement of values, for the scholar's vision of the good society influences not only

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my editorial introductions to the *Law & Society Review*, vols. 11 & 12 (on unnumbered pages introducing each issue).

61. Pp. 133, 136. Watson speaks admiringly of historical instances where this occurred: "A strong Emperor or King . . . could very quickly . . . make a legal reform which was obviously needed." P. 115.

62. I have attempted a more comprehensive statement of the position and prospects of sociolegal scholarship. See Abel, *Redirecting Social Studies of Law*, 14 *LAW & SOC. REV.* 805 (1980).



what he deems worthy of study but also the kind of explanations that he will entertain. Some epistemological position must also be chosen and adhered to rigorously. One of the principal dangers to guard against is the sociological equivalent of the pathetic fallacy — reading into the actions of other individuals, and especially the actions of groups and entire societies, one's own motives and aspirations, often in the name of functionalism. These preliminary decisions will largely determine the theory of society with which the investigator begins — the nature of its constituent units (*e.g.*, individuals, interest groups, strata, or classes) and the relations between them (*e.g.*, conflict or consensus, equal or dominant/subordinate).

I believe that we can, and must, be more positive about the proper conceptualization of the legal ingredients of an adequate social theory. Because all institutions, the legal among them, perform multiple functions, and all functions, including the legal, are performed by more than one structure, it is essential that we define the boundaries of study functionally and not, for instance, limit our interest to state institutions. Because there is interaction among the various institutions that perform legal functions, one institution cannot be understood in isolation: A holistic approach is necessary to comprehend how change in one part produces compensatory change elsewhere. Finally, and perhaps most important, an adequate social theory of law cannot be constructed out of the ideology that constitutes the fundamental legitimation for contemporary Western legal systems. That legislators, judges, administrators, lawyers, scholars, politicians, and policy-makers *justify* laws in terms of their declared purposes does not mean that such purposes *explain* those laws, nor that the deviation of laws from their stated goals requires us, in despair, to adopt a theory of law as lag. Law simply is not primarily instrumental — there are usually many obvious and better ways to attain the ostensible object; law is rather ideological, symbolic, expressive, and mystifying. If social analysis must always be sensitive to latent functions underlying the manifest, this wider view is absolutely vital for an understanding of law, which constantly seeks to distract the observer with the siren call of "purpose." And among the latent functions, one that deserves particular attention is the self-interest of those occupational specialists (whether government officials or private professionals) who most vehemently proclaim the manifest functions of law.

Comparative law and legal history no longer can be, indeed no longer are, content to confine themselves to doctrinal analysis of positive law. But the social theory of law cannot be a mere adjunct to

doctrinal analysis, a series of qualifications tacked on to an enterprise that otherwise remains unchanged. Furthermore, social theory, if taken seriously, forces us to confront the political content that is inextricably involved in any account of law and, a fortiori, in any prescription for reform. Studies using historical and comparative materials to construct a social theory of when and why legal rules are preserved under changed social conditions, and assessing that persistence in terms of explicitly stated values, would be a major contribution.