LEGAL CHANGE: SOURCES OF LAW AND LEGAL CULTURE

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I. INTRODUCTION

The most important general legal questions, it seems to me, both in theory and practice, concern, first, the nature of the relationship between a society and the legal rules that operate within it, and, second, the forces that cause law to change. The questions are obviously intimately connected. Yet so little serious scholarship—scholarship based on legal and other materials rather than on an ideologically predetermined position that dictates the conclusions—has been devoted to these questions that even deciding where to start an investigation or which lines of research to pursue presents formidable problems. My researches into the growth of the law, including the vagaries of legal development,[1] have resulted in four related books; and none of the last three was foreseen by me when the previous one was published.

I wish in this paper to reconsider my main conclusions, especially in the light of criticism, and attempt a new synthesis. My approach was dictated by disappointment with the results of traditional comparative

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[1] *See, e.g.*, Watson, *The Definition of Furtum and the Trichotomy*, 28 REVUE D'HISTOIRE DU DROIT 197 (1960) (The threefold division of theft, into theft of a thing, theft of use, and theft of possession, which appeared in civil law countries did not exist in Roman law. It was derived by later scholars from a poorly constructed definition of theft in Justinian's *Institutes* which led professors deliberately to alter the wording of the definition in the *Digest*.); Watson, *The Development of Marital Justifications for Malitiosa Desertio in Roman-Dutch Law*, 79 LAW Q. REV. 87 (1963) (For a time the South African courts recognized neither constructive desertion nor justifications for desertion, following the views of Dutch jurists, notably Hendrik Brouwer (1625-1683) who may have misunderstood the German, Henning Arnisaeus (died 1636?). But as a result of misunderstanding Brouwer, the courts reverted to the position of Arnisaeus, and accepted both constructive desertion and marital justifications for desertion.); Watson, *Some Cases of Distortion by the Past in Classical Roman Law*, 31 REVUE D'HISTOIRE DU DROIT 69 (1963); Watson, *The Notion of Equivalence of Contractual Obligation and Classical Roman Partnership*, 97 LAW Q. REV. 275 (1981) (Of all Roman contracts, only partnership involves the notion that the contracting parties benefit or suffer loss in the ratio of their contribution, and this resulted from the fact that partnership originated in the law of succession.).

law, legal history, and sociology of law.

Traditional comparative law does not seek systematically to explain differences and similarities between legal rules and approaches to law in various systems. Usually explanation is merely incidental to a primarily descriptive work. Examples can be chosen from two books by noted authors. J.P. Dawson in *Oracles of the Law* seems to be content to consider different systems of law at different times.[2] He draws no conclusions embracing the various systems from his investigations. Barry Nicholas in *French Law of Contract,* limits his efforts to an attempt to set out the elements of a branch of one legal system as they appear to someone familiar with another system.[3] However excellent these two books (and others like them) may be, they reveal very little about the general features of legal change or about the direction of change, even when they deal expressly with sources of law and even though they contain much legal history.

Legal history seemed to offer better prospects for an understanding of legal change. Any theory of the relationship between law and society must rest, I believe, on detailed knowledge of the history of individual legal systems. Indeed, an investigation into several systems is necessary if one is to discover general causes of legal change. The tendency to focus on only one system explains the three weaknesses commonly found in works of traditional legal history. The first derives from the fact that it is always possible to find immediate local causes that impel any legal change. Concentration on one system may cause one to overlook similar changes in other systems, all of which may be partially explained in terms of transnational factors. For instance, to understand codification in French law and the sharp distinction it draws between public law and private law, it is not enough to look simply at conditions in France: one must also take into account the fact that codification and a sharp distinction between public and private law are both much more frequently found in civil law systems than they are in common law systems. One must always ask why a particular change occurred and not another. Second, concentration on one legal system means that it is easy to overlook the extent to which that system is indebted to another. English legal historians, for example, frequently have underestimated the impact of Roman law on English law.[4]

The third common weakness is that legal historians tend to con-

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[2] J. P. DAWSON, THE ORACLES OF THE LAW (1968).

[3] B. NICHOLAS, FRENCH LAW OF CONTRACT v (1982).

[4] This does not apply to all English legal historians, particularly not to J. BARTON, ROMAN LAW IN MEDIEVAL ENGLAND (*Ius Romanum Medii Aevi*) part V, at 13a (1971).

centrate on change and innovation. They wish to explain why an innovation occurred when it did. But to understand law and society one must also explain why a legal change did not occur when society changed, or when perceptions about the quality of the law changed. Why, one must always ask, did the legal change not occur before? One example may suffice. England has permitted divorce (other than through an act of the legislature) since 1857. A.H. Manchester explains the timing of the change in the law in terms of the demise of Utilitarianism (whose proponents, such as Bentham, valued stability of marriage) as the dominant philosophy, and its replacement by individualism.[5] The similar change in America, led by Pennsylvania in 1785, is explained rather differently by L. Friedman. He finds that only then did the modern concept of the family reach fruition, and marriage (perceived as a life-long arrangement when the family was the center of social organization, and when domestic intimacy was greater) was unable to bear the strain.[6] At the very best, however, these explanations can only be partial. Among European countries that became Protestant at the time of the Reformation, England was exceptional in not permitting divorce. The dominant view among Protestant theologians of the time, including those in England, was that marriage was not a sacrament: it could be dissolved by humans and should not be a matter for the ecclesiastical courts. For instance, among the "High" school of theology, both J. Cosin and H. Hammond expressed the view that divorce and remarriage were both possible. The highly revered Martin Bucer in a book dedicated to King Edward VI favored divorce. The *Reformatio Legum Ecclesiasticarum* which was drafted by Thomas Cranmer, submitted in 1552, and published in 1571, and which is regarded as a true index of contemporary Protestant opinion, also favored divorce. The *Reformatio* was never enacted. Moreover, it seems that from 1548 to 1602 (apart from the reign of Mary) divorce operated in practice.[7] In these circumstances, an explanation of a change in the law to permit divorce in England in the nineteenth century (and rather earlier in North America to which English law had been transplanted) cannot satisfactorily be restricted to happenings and attitudes at the time of the appropriate legislation. A convincing explanation must also explain why England was an exception to the general rule that Protestant countries introduced divorce, why the ecclesiastical courts there retained

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[5] A. H. MANCHESTER, A MODERN LEGAL HISTORY OF ENGLAND AND WALES 360 (1980). Bentham himself had favored the possibility of divorce.

[6] L. FRIEDMAN, A HISTORY OF AMERICAN LAW 183 (1973).

[7] *See* G. E. HOWARD, 2 A HISTORY OF MATRIMONIAL INSTITUTIONS 73-80 (1904).

jurisdiction, and why (if particular historical factors prevailing around 1530 account for the failure to introduce divorce) in the conditions prevailing after the reign of Henry VIII, it took so long for England to permit divorce.

Sociology of law, as it is usually practiced, provides the least help in understanding legal change and the relationship between legal rules and the society in which they operate. The lack of a historical dimension means there is no way to measure the speed—or absence thereof—of a response to changed circumstances. Equally important, the emphasis on law-in-action blurs appreciation of the extent to which law may be dysfunctional. In all legal conflicts there will be winners and losers, but this by no means necessarily indicates that the legal rules are the best that could be devised and imposed upon society for the benefit of the winners. The legal rules may be unduly cumbrous, complex, or ambiguous. Transactional costs may be unnecessarily high. To notice that in court actions an advantage always rests with those able to pay for the best legal services or those most accustomed to using legal services—important though that is—does not indicate that the relevant rules are the most advantageous that could be achieved for these people. That a society or its ruling elite will not tolerate law that is destructive of the society or its elite does not imply that the operating rules are the most suitable for the society or for its elite. That law generally operates to protect the *status quo,* and hence to protect those having power, does not in itself mean that the rules are the best that could be achieved by the power elite.[8] A close scrutiny of the effect of law-in-action often results in a failure to consider the options that are available to, and knowable by, those able to effect changes in the law.

There are, of course, numerous works of legal history written from a sociological perspective, and they provide many insights. Certainly, the sociological perspective is necessary for any understanding of legal development. I am not arguing that the way law operates in practice is to be discounted. On the contrary, it is very relevant. But a focus on law-in-action leads to a discounting of the importance of legal rules and to a lack of awareness of their imperfections and their impact.

It would appear that the issues that are the concern of traditional comparative law, legal history, and sociology of law, and the methodology appropriate to these disciplines, will not lead scholars to satisfying answers to the two questions I posed at the outset of this Article. To understand the nature of legal change and the relationship between le-

[8] In a time of revolution, a new power elite may use law to change the *status quo* to its own advantage. The principle is the same.

gal rules and society, I believe it is necessary to look at a number of legal systems and at the changes in them over a long period of time. What is needed is an approach based on a combination of traditional comparative law, legal history, and sociology of law.

A first step, the realization of the enormous extent of legal transplants, resulted in *Legal Transplants.*[9] Borrowing from another system is the most common form of legal change. For proof of this, one need only consider the reception of Roman law in later Europe; the spread of English law through the countries of the common law, even into parts of the United States never under British rule; the impact of the French *Code civil* on the other civil law systems, and the extent to which the law of one state in the United States is affected by that of the others.

The power of law to survive through centuries is equally apparent. As a consequence a great deal, if not most, of law operates in a territory for which it was not originally designed, or in a society which is radically different from that which created the law. These phenomena highlight the impact of authority for legal change, whether the authority is that of a particular legal system such as that of ancient Rome or of individual lawyers such as Blackstone.

A second book, *Society and Legal Change,*[10] has essentially negative conclusions. It appeared to me that rules of Western private law were (and are) out of step with the needs and desires both of the society in which they operated (and operate) and of its ruling elite to an extent that renders existing theories of legal development and of the relationship between law and society implausible. Not only were and are legal rules often dysfunctional, but awareness of this by those in a position to effect change frequently did not (and does not) lead to improvement of the law.

In a third book, *The Making of the Civil Law,*[11] this time restricted to those Western systems usually called "civil law systems," I attempted to show that the legal tradition itself played an enormous role in the development of legal rules and approaches to law.

The fourth and most recent book, *Sources of Law; Legal Change and Ambiguity,*[12] is devoted to the proposition that for very long

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[9] A. WATSON, LEGAL TRANSPLANTS, AN APPROACH TO COMPARATIVE LAW (1974) [hereinafter cited as LEGAL TRANSPLANTS].

[10] A. WATSON, SOCIETY AND LEGAL CHANGE (1977) [hereinafter cited as LEGAL CHANGE].

[11] A. WATSON, THE MAKING OF THE CIVIL LAW (1981) [hereinafter cited as CIVIL LAW].

[12] A. WATSON, SOURCES OF LAW; LEGAL CHANGE AND AMBIGUITY (forthcoming, University of Pennsylvania Press, 1984) [hereinafter cited as SOURCES].

stretches of time Western systems make do with sources of law that are inadequate for the development of satisfactory or unambiguous law. Once again, awareness of these deficiencies in the sources of law by those in a position to make improvements frequently does not lead to reform.

I now wish to put these four books together, but in a different order, in the hope of achieving a synthesis.

II. The Making of the Civil Law

Let me start with the third book in the sequence, which has met with considerable criticism from J.P. Dawson.[13] That criticism, I think, illustrates the strength of my case. My central theme was that the legal elements that have gone into the makeup of modern Western legal systems are everywhere the same. Modern scholars, however, divide most of these systems into either civil law systems or common law systems. The difference is the consequence of civil law systems' adoption, in whole or in part, of Justinian's *Corpus Juris Civilis* of the sixth century A.D. as law of the land or at least as direct and highly persuasive authority.[14] Modern common law systems also borrowed much of their substantive law from Rome. The distinguishing factor between the two types of systems is that modern civil law also adopted the *Corpus Juris Civilis* as the organizing instrument. The parts of the *Corpus Juris* that concern us most are the *Code*, a collection of legal pronouncements by the Emperors; the *Digest*, a collection of fragments from the writings of jurists of the late Roman Republic and, more especially, of the classical period; and the *Institutes*, an elementary textbook for first-year law students, which also had the force of law. Together these works contain a huge mass of legal learning.

Dawson rightly points out that the *Digest* is "the most admired . . . part of the *Corpus Juris*," but he thinks I take from the Roman jurists who are recorded in the *Digest* their predominant position and instead elevate the elementary textbook for first-year law students, Justinian's *Institutes* to this position (at least for the years 1500 to 1800).[15] He rightly says that I argue that inevitably any society that accepts the *Corpus Juris* as being in force "gives a place of particular honor to Justinian's *Institutes*,"[16] and he also quotes (as an example of "simi-

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[13] Dawson, Book Review, 49 U. Chi. L. Rev. 595 (1982).

[14] Civil Law, *supra* note 11, at 4. I also accept as civil law systems those that derive from such systems.

[15] Dawson, *supra* note 13, at 596.

[16] Civil Law, *supra* note 11, at 62.

larly extreme statements")[17] my assertion that "particular prominence falls on Justinian's *Institutes*, because it is both the fundamental book for beginners and is the authoritative attempt to give a systematic structure to law."[18] Dawson has not quite taken my point, especially when he says that I make the students' handbook "appear as the most important surviving monument of Roman Law."[19] To say, as I do, that the *Institutes* will be given "a place of particular honor" is not to say that in every regard they will be viewed as the predominant part of the *Corpus Juris*. I merely argued that their particular and inevitable role was to provide the basic *structure* of modern civil law systems. From any perspective, the *Digest* and, to a lesser extent, the *Code* would provide more of the substance of law, and especially more of the detailed rules.

Nor is the reason for this role of the *Institutes* hard to find: they were the only part of the *Corpus Juris Civilis* in which the law was set forth in a reasonably satisfactory, systematic way. To my knowledge, no one has ever regarded the arrangement of the *Digest* as systematic—not even in 533, the year of its promulgation—and criticism of its structure has been loud and prolonged. Given the emphasis in teaching from the *Corpus Juris* and the correlative neglect of other law, the relative coherence of the structure of the *Institutes*, and the unsystematic structure of the rest of the *Corpus Juris* and other works on local law, it was only reasonable and natural to use the *Institutes* as the model.

Dawson notes that I describe "at length writings of the sixteenth through the nineteenth centuries that, appropriating the title of *Institutes*, gave short and elementary summaries of rules of strictly local origin and application,"[20] and he says that "these later *Institutes* varied greatly in style, arrangement and quality."[21] But these later *Institutes* did not only appropriate the name *Institutes*, they also appropriated many of the characteristics of Justinian's handbook. Above all, they are short systematic summaries of local law, and the great majority of them have unmistakably the general (even detailed) arrangement of Justinian's *Institutes*.[22]

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[17] Dawson, *supra* note 13, at 596 n.3.

[18] CIVIL LAW, *supra* note 11, at 103. I come much closer to the truth, he suggests, when elsewhere I describe the *Institutes* as an "elementary textbook [that] never stood in first place as a statement of the law. The *Digest* and the *Code* were both treated much more seriously." *Id.* at 136.

[19] Dawson, *supra* note 13, at 596.

[20] *Id.* at 596-97.

[21] *Id.* at 597.

[22] Let me give just one additional early example that I did not discuss in my book because, although it was written by a civilian and under civilian pressures, it was not produced in a civil law country: John Cowell's *Institutiones Juris Anglicani* (1608).

Even the standard variations from Justinian in those later *Institutes*—the frequent omission of procedure and of criminal law—are explicable only on the basis of the civilian tradition: the former, because the heroes of the civil law systems were professors uninterested in what happened in court; both, because Roman procedure and criminal law were neglected by the professors teaching the *Corpus Juris.*[23]

Dawson correctly observes that some of these local *Institutes* "had the evident purpose of interposing barriers to the spread of Roman law by preserving local idiosyncracies or advancing new and original points of view."[24] But it then becomes even more significant that works of this type, such as Georg Beyer's, *Delineatio Juris Germanici* (1718), adopted the overall structure of Justinian's *Institutes.* The structure had become endemic, and even works intended to inhibit the spread of Roman rules popularized the structure of the Roman handbook.

Actually, the appeal of Justinian's *Institutes* for those trying to systematise the local law was so powerful that the *Institutes* sometimes served as the principal model for legal works on subjects even when it was inappropriate. For example, it was used as a model for feudal law in Sam Stryk's (1640-1710) *Examen juris feudalis* and Alexander Bruce's (died 1729) *Principia juris feudalis;* for German public law in J.F. Rhetius's (1630-1707) *Institutiones juris publici Germanici Romani;* for German town law in the seventeenth century, in *Lübeck, Statuta, Stadt-Recht und Ordnungen;* and even for a commentary on Justinian's *Novellae* in P. Gudelinus's (1550-1619) *Commentarii de iure novissimo.*

Dawson rightly proceeds to emphasize "the strenuous and concerted effort of medieval minds to comprehend and adapt to their own needs the massive legacy in law from antiquity."[25] And he emphasizes the intellectual demands on those who made use of the enormous volume of complex literature. He says, but does not further explain: "It was a formidable compilation of book learning whose transmission and elaboration were almost necessarily functions of learned men, most of

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This short account of English law is divided into books and chapters, all of which correspond precisely in their placing and even in their titles, to the books and chapters of Justinian's *Institutes.* Cowell does not even add a single new chapter.

[23] Dawson rightly says that I see these *Institutes* of local law as "the direct descendants of Justinian's *Institutes,*" but does not say that he disagrees. Dawson, *supra* note 13, at 597 n.4 (quoting CIVIL LAW, *supra* note 11, at 65). If he does disagree, I should like to know what model he thinks inspired so many *Institutes* from different jurisdictions, having striking similarities with one another and, incidentally, with Justinian's handbook.

[24] Dawson, *supra* note 13, at 597.

[25] *Id.*

them sponsored by universities."[26] But why, in contrast to early common law, was there so much book learning, whose elaboration was almost necessarily the function of learned men, most of whom were predominantly professors (even if they also practiced)? For me, there is only one satisfactory answer to these questions: Justinian's *Corpus Juris Civilis* was treated as authoritative. When a complex, ancient, written work is treated as important for the law, the obvious way to learn it is from the books themselves, not from observing practitioners at work. The old books with all their (and with subsequent related) complexities will have to be expounded by learned men; the learned men will generate further elaboration, and they will teach and study in something akin to universities rather than Inns of Court.[27]

It must be stressed that regarding the *Corpus Juris* as authoritative in the conditions of medieval Europe, resulted in the neglect of the remainder of local law (apart from canon law) in university-style education. There are two main reasons for this. First, most local law was unwritten, to be discovered as custom by the courts; and authoritative treatment of it was not open to professors. Second, local law was very local: professors who were ambitious for money or fame would want to be known outside of their immediate territory, and would opt for the international discipline.[28] Other local law would be and was downgraded, and the law in the *Corpus Juris* became still more stressed.

It was also precisely because the tasks of understanding the *Corpus Juris Civilis*, of explicating it, and even of reinterpreting it to fit modern local conditions, were so mammoth that, in my opinion, it took centuries before scholars were able to produce new syntheses, as Dawson says, "to sketch designs for a more harmonious and durable edifice of ideas of a kind that Roman law had never had."[29] What Dawson omits to mention is that these designs in France as well as in Italy, Holland, and Germany were, for the most part, primarily based on the structure of Justinian's *Institutes.* These designs, in turn, became the model for the most distinctive feature of modern civil law systems, their civil codes. Although scholars may disagree as to which of the two elementary handbooks, F. Bourjon's *Le Droit commun de la France et la coutume de Paris reduits en principes, etc.* or G. Argou's *Institution au droit François,* was the main influence on the structure of the French *Code civil,* no one (I believe) will deny that their design was derived from Justinian's *Institutes* and from similar later *Institutes*

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[26] *Id.*
[27] *See* CIVIL LAW, *supra* note 11, at 24-38.
[28] *Id.* at 27-29.
[29] Dawson, *supra* note 13, at 599.

of local law. The end result of this enormous, sustained intellectual effort was a legal system, vastly different from anything the classical Roman jurists (who did not have the benefit of Justinian's *Institutes*) even knew, and which displays Max Weber's logically formal rationality.[30]

Dawson then turns to my claim that "modern civilian law reports retain many elements from their precodification ancestors."[31] My claim, I believe, rests on observable fact, and my intention was to show the durability of the legal tradition even after fundamental legal change. Dawson says, "French opinions can hardly follow models derived from olden times because French courts under the old regime were strictly forbidden to publish the reasons for their opinion."[32] Although it is true that the French courts were then forbidden to publish their reasons, Dawson himself has provided, for the years 1600-1789, accounts of various unofficial reports, by judges and attorneys alike, which *do* give the court's or their own reasons.[33] Other examples can be found in *The Making of the Civil Law*.[34]

Dawson next turns to a characteristic that I ascribe to civil law systems, namely, that they are more open to philosophy than are common law systems.[35] This, he says, I attribute to two factors: "first, the influence of Justinian's *Institutes*, whose account of Roman law was so simple that philosophers could understand it (!!)."[36] Here Dawson is

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[30] For an exceptionally clear account of Weber's meaning, *see* Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 730.

[31] CIVIL LAW, *supra* note 11, at 52.

[32] Dawson, *supra* note 13, at 600. *See also* J. DAWSON, *supra* note 2, at 286-305.

[33] J. DAWSON, *supra* note 2, at 314-38.

[34] CIVIL LAW, *supra* note 11, at 44. These seem to be excluded from consideration by a preceding footnote of Dawson's: "Those dating from before the year 1800 do not prove much, for they were prepared independently by private reporters." Dawson, *supra* note 13, at 599 n.13. I do not think that my argument that modern civil law reports retain many elements from precodification ancestors is affected by the observation that modern reports are official, and that earlier reports were unofficial. Dawson correctly says: "German opinions are filled with citations (not of course to Roman law but to modern German court decisions and the writings of modern German jurists) and also with pages of explanatory and argumentative discourse." *Id.* at 600. This is certainly true and corresponds precisely, *mutatis mutandis*, to the old German reports where the citations were to the *Corpus Juris*, the writings of jurists, statutes, and court decisions. I do not recognize my own position in the suggestion attributed to me that modern German High Court opinions are "extremely formal and meager." *Id.* at 600 n.15. What I said was that in comparison with Italian and French reports, the German reports are "written in an even more abstract form." CIVIL LAW, *supra* note 11, at 178. Perhaps Dawson was misled in that I said the reports do not give juristic opinions. This was said, however, to contrast German law with French law, in which a jurist's note is appended to the report.

[35] Dawson, *supra* note 13, at 600.

[36] *Id.*

obviously provoked, but I do not see why. What I said was that the *Institutes* and local *Institutes* "provide a simple account of the law and enable philosophers to feel that they know the law and what it is about, and that they can discuss it comfortably."[37] I wonder if Dawson would deny that, as a matter of fact, European philosophers, great and small, did write comfortably about law relying largely on Justinian's *Institutes* and also on local *Institutes?* My second factor was the leadership in civil law systems of academics who were more willing and able than practitioners to build up the systematic, philosophical, and structural side of the law.[38] Although England played a full part in eighteenth century rationalism, rationalism's effect on English law was minimal in contrast to its effect in the rest of Europe. In my view, one should expect this from a small, self-sufficient group of practitioners intensely focusing on litigation.[39] Dawson then says that this calls for an explanation and that I provide one, namely that civil law systems are open to philosophy and common law systems are not. This, he says, "will satisfy those willing to endow 'systems' with human attributes—with minds that open or close, as the case may be."[40]

Dawson's own explanation is revealing. Throughout most of the history of English common law, he finds "an almost total lack of human resources, that is, of expositors who were trained and were believed to be needed to explain, to organize, and also to criticize the legal system."[41] But does not this dearth of such expositors in England, in sharp contrast to continental territories where the Reception was most marked, itself demand explanation? The explanation, I believe, we have already seen. When an old, complex, written work like the *Corpus Juris Civilis* is accepted as authoritative, the obvious way to

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[37] CIVIL LAW, *supra* note 11, at 83.

[38] *Id.* at 84.

[39] Dawson actually says that during the period of reappraisal in law in some continental countries "England produced only Blackstone." Dawson, *supra* note 13, at 601. The logic of that paragraph (and of the following one) demands that this opinion is mine. I would deny strongly that such a limited view of English legal writing was ever mine. *See* Watson, *Justinian's Institutes and Some English Counterparts*, in STUDIES IN MEMORY OF J.A.C. THOMAS 181-86 (P. Stein & A. Lewis eds. 1983).

[40] Dawson, *supra* note 13, at 601. This surely is a debating point. My position would rather be that legal systems develop through the operation of human intellects. These intellects work on the basis of their own knowledge, experience, and originality. The first two qualities depend on the existing, known elements of the legal system and legal education; and in part so does the third. But in addition, progress within a legal system will occur only when views propounded are found acceptable to others in the legal community. Views whose originality stands outside of the legal tradition will find acceptance less easily. I do not think there is anything in this, or in my book, to justify Dawson's opinion that I make "it appear that in a 'system' a deficiency such as a mind that is closed is congenital and therefore incurable." *Id.*

[41] *Id.*

learn it is from books, which in turn provoke systematic inquiry into the law.[42] The basic differences between civil law and common law systems flow naturally from the acceptance in the former of the *Corpus Juris* as authoritative.

Dawson also contests my explanation for the fact that in modern times, codification is a typical attribute of civil law systems and is very much rarer in common law systems. There is, I argued, a propensity towards codification in civil law systems.[43] Dawson thinks I have trouble showing this propensity because the reasons I give for successful modern codification have little to do with the civil law tradition.[44] These reasons are: first, the *Institutes*, both the local *Institutes,* those various short systematic treatments of local law which show that the law can be simply stated, and Justinian's *Institutes* which show that the short treatment can be enacted as law; and second, "the conviction generated by eighteenth century rationalism that law ought to be the embodiment of reason and in being written down could be improved."[45] Now it seems to me that these two reasons have a great deal to do with the civil law tradition. The first because the local *Institutes* were the direct descendants of Justinian's *Institutes,* the second because the Enlightenment had a much greater impact on law in civil law systems precisely because they were more open to philosophy. Dawson says, "Some earlier advocates of codification had urged that codification could make law more intelligible by reducing its volume and complexity, but Watson rejects this explanation, reasoning that although English law in the eighteenth century was wholly unintelligible to the general population, codification was not even thought of in England."[46] Now I never would claim, and never have, that a desire for intelligibility and simplicity was not a powerful incentive towards codification.[47] Nor would I claim, nor have I, that codification was not even thought of in England. There were, in fact, numerous advocates of codification in England. For example, there is Jeremy Bentham in the eighteenth century, Francis Bacon and the Levellers in the seventeenth century, and Reginald Pole in the sixteenth century.[48] My concern in *The Making of the Civil Law* was with two questions: first, why successful codification is typical of civil law systems but not of common law systems;

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[42] *See supra* text accompanying notes 23-28.

[43] CIVIL LAW, *supra* note 11, at 99-130.

[44] Dawson, *supra* note 13, at 601-02.

[45] *Id.* at 602.

[46] *Id.*

[47] CIVIL LAW, *supra* note 11, at 101.

[48] See the quotation given by F.W. MAITLAND, ENGLISH LAW AND THE RENAISSANCE 41-44 (1901).

and second, why successful codification emerged relatively late in civil law countries. For these questions the simple explanation of a desire to simplify the law cannot be enough.

One point made by Dawson may incidentally be very instructive for understanding codification in lands that accepted the *Corpus Juris* as authoritative. He points to the labor and time involved in preparing a new code instead of borrowing much from one already in force elsewhere. It took, he observes, eighty-seven years for a code to be produced in Prussia, and thirty-seven in Germany.[49] But the earliest modern civil code of all, that of Bavaria, the *Codex Maximilianeus Bavaricus civilis*,[50] which owes its impetus to Prussian initiatives, took only six years. Work was begun in 1750, and the code was complete in 1756. In the intervening years, codes on criminal law and procedure had also appeared. The swiftly produced *Codex Maximilianeus Bavaricus civilis* is very heavily inspired by Justinian's *Institutes*;[51] the *Allgemeines Landrecht für die Preussischen Staaten* is not.[52] Are we to see in this only a coincidence? Or are we to believe that codification was relatively easier in territories where Justinian's *Institutes* had been treated as law, and where these *Institutes* (or local versions of them) were regarded as providing a suitable model for a civil code?

Dawson has his own explanation of civil law codification: "For the countries that led the way in codifying, I would ascribe the impulse not to a kind of unity produced by the borrowings from Roman law but to just the opposite: a legal inheritance that was too diversified and abundant to be managed otherwise."[53] For at least six reasons relating to civil codes or to the general structure of modern civil law systems, I believe this explanation is insufficient, even though a desire to simplify the law was one immediate important cause of codification. First, it does not explain why codification occurred at the time it did. Second, it does not account for the powerful role of Justinian's *Institutes* in generally systematizing the civil law even before codification. Third, it fails to explain the obviously large dependence of most modern codes, both in arrangement and in the extent of treatment of rules, on Justinian's and later *Institutes*. It also cannot account for omissions, notably of commercial law, from most civil codes. (My explanation is that what counts as commercial law in civil law countries was not included in Justinian's *Institutes*.) Fourth, it does not account for the very marked

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[49] Dawson, *supra* note 13, at 602.
[50] *See* CIVIL LAW, *supra* note 11, at 102.
[51] *Id.* at 104-05.
[52] *Id.* at 106-08.
[53] Dawson, *supra* note 13, at 603.

division between public law and private law in civil law systems. (The former was of little interest to the Roman legal writers, and was not treated in Justinian's *Institutes.*) Fifth, it cannot explain why the distinction between substance and procedure is so sharp in civil law systems. Sixth, Dawson's view cannot explain why the approach to law is much more theoretical in civil law than in common law systems.

For each of the points on which Dawson's explanation of modern codification is unilluminating, a satisfactory account of modern civil law systems must, I believe, provide answers. Answers are all to be found in the acceptance of the *Corpus Juris Civilis* as authoritative.

Although *The Making of the Civil Law* was concerned only with civil law systems, it is possible to draw several conclusions relating to general study of legal change. The contrast between civil law and common law systems is due to the acceptance of Justinian's *Corpus Juris Civilis* as authoritative by the former and not by the latter. The acceptance of this common organizing instrument allows the force of the legal tradition to emerge clearly in different states. It does not mean that the legal tradition will have less of an impact on legal change when there is no organizing instrument.

III. Society and Legal Change

If the legal tradition itself largely determines the pattern of change, then it would appear that legal systems are not always sensitive to wider local political, social, and economic issues. Legal rules may not be the best that could be devised, with the knowledge available at the time, for the society at large or for the ruling elite. The theme of *Society and Legal Change*[54] was that many important rules of private law in the West were, and are, dysfunctional. This thesis, which is in flat opposition to the views of most sociologists of law and of most theorists of law,[55] is perhaps most easily understood when we look at a quotation which is almost its contrary. In the concluding paragraph of his book, *A History of American Law,* L.M. Friedman writes:

> If by law one means an organized system of social control, any society of any size and complexity has law. As long as the country endures, so will its system of law, coextensive with society, reflecting its wishes and needs, in all their irrationality, ambiguity, and inconsistency. It will follow every twist and turn of development. The law is a mirror held up

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[54] Legal Change, *supra* note 10.

[55] Friedman, Book Review, 6 Brit. J.L. Soc'y 127 (1979).

> against life. It is order; it is justice; it is also fear, insecurity, and emptiness; it is whatever results from the scheming, plotting, and striving of people and groups, with and against each other. All these things law will continue to be. A full history of American law would be nothing more or less than a full history of American life.[56]

Of course, all this is mere assertion, and rhetorical assertion at that. Friedman has certainly not attempted to demonstrate in any systematic way that his history of American law is a history of American life, following every twist and turn of development. The theory is based on a common notion of the relationship between law and society, but the theory is one for which systematic proof is not offered. It is not proof of such a theory that an immediate cause can be found in a society for most legal changes.

In *Society and Legal Change* I was not seeking to put forward a positive view regarding the precise relationship between society and the legal rules that operate within it. Rather I was primarily putting forward the negative proposition that the relationship is not as close as existing theories of legal change and of law and society suggest.[57] The elements of my argument may be easily summarized. All legal rules are created by a cause; and this cause of creation is commonly, but not always, rooted in social, economic, or political factors important to the life of the society or its leaders.[58] I would now add that a great part of the cause may be rooted in transnational aspects of the legal tradition, which otherwise have little or nothing to do with social, economic, or political conditions. Once created, legal rules tend to live on; for reasons of course, but often for reasons which have no direct importance for the life of the society or its leaders. Often the legal rules are in obvious conflict with the best interests and desires of the ordinary citizens and the ruling elite, but nonetheless continue in existence. I used the term 'divergence of law and society' to indicate not just that the rule was not the best fitted to meet the needs and desires of a given society, but also that the dysfunction was known to the people concerned, and especially

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[56] L. FRIEDMAN, *supra* note 6, at 595. For a review that adequately demonstrates Friedman's failure to take account of the relative autonomy of law, *see* Tushnet, *Perspective on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WIS. L. REV. 81.

[57] At best, there are so many exceptions to, or anomalies for, the main theories that the theories themselves become cumbersome, vague, and equivocal; and lose their capacity to explain. One might compare the "awareness of anomaly" described by T.S. Kuhn to the role it plays in scientific revolutions. *See* T.S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 62-63, 67-68, 78 (2d ed. 1970).

[58] LEGAL CHANGE, *supra* note 10, at 7.

to those able to effect change.[59] It must be stressed that I am not concerned with the phenomenon of time lag where it simply takes time for law to catch up with broader societal change: when scores of years or even centuries intervene between the divergence and the reform, lack of phase cannot solely be due to the pace of societal change.[60] I suggest that the dynamic causal relationship between law and society which is often thought to keep the former in close harmony with the latter simply does not exist. Of course, I am not claiming that there is no connection between law and society. Rules that would be destructive of, or otherwise intolerable to, society or its ruling elite will be replaced, but it is a *non sequitur* to argue from that to the conclusion that law reflects the needs and desires of society or its ruling elite.

To demonstrate my thesis I concentrated on legal growth and the absence thereof in what are, I believe, the two most famous systems of Western private law: Roman law and English law. If numerous cases of divergence, enduring for centuries, could be found there, then, I claimed, my thesis could be accepted.

As I expected, my views have met with much opposition. This criticism resolves itself into six main objections. I think it correct to state that in general my historical accuracy has not been challenged. The weight of the objections rests elsewhere.

A first objection, levelled most strongly by R.L. Abel, is that although I purported to offer a social theory of law, I did not do so; and that in fact, my assertions "simultaneously deny the possibility of any theory and contradict both our daily experience and virtually all scholarly research on law in society."[61] I did not intend, and do not think I claimed, to set forth a social theory of law in *Society and Legal Change*. My main aims were to show that existing theories postulate too close a relationship between the needs and desires of a society or its ruling elite on the one hand, and of its legal rules on the other; and to suggest some explanations for the divergence. Likewise, my assertions, referred to by Abel, that society tolerates a great deal of inappropriate law; that inertia is a serious cause of divergence; that the most important element in legal development has been the transplanting of rules, principles, and systematics; and that there is no close, inherent, necessary relationship between legal rules and the society in which they operate,[62] do not, I believe, rule out the possibility of any theory of law in

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[59] *Id.* at 5.

[60] *Id.* at 7.

[61] Abel, *Law as Lag: Inertia as a Social Theory of Law* (Book Review), 80 MICH. L. REV. 785, 793 (1982) (reviewing LEGAL CHANGE, *supra* note 10).

[62] *See* Abel, *supra* note 61, at 793 (quoting LEGAL CHANGE, *supra* note 10, at ix,

society. Rather, they indicate that any theory will have to be complex and take into account, for instance, inertia and transplanting—all the causes of divergence in fact—as well as issues of power and will. The theory must not assume a simple mechanical and automatic relationship between law and society with a few admitted but unimportant exceptions.

This view admittedly contradicts virtually all scholarly research on law in society. But that may be, I suggest, because the focus of that research is inappropriate, inexact, or insufficient.[63] In the nature of things, traditional sociologists of law and legal anthropologists cannot admit that important legal rules may be largely dysfunctional; that would be to deny the possibility of any theory of legal development based on sociological or anthropological observations. No wonder Abel is ill at ease.

A ground for deep misconception already mentioned must again be emphasized to clear it out of the way. Legal sociologists have shown beyond doubt that persons able to hire the best lawyers will, on average, fare better in legal dealings, in law-in-action, than will those who have to make do with less competent attorneys; and that those who have frequent dealings with attorneys or with particular types of legal transaction will on average fare better than those who do not. There is thus a built-in bias in favor of certain groups, who usually will be the members of the ruling elite or the wealthy: those having political, social, or economic power, as against those who do not possess such power. All this is easy to show. But that should not then lead to an assumption, made all too often, that the legal rules themselves necessarily benefit some recognizable and powerful group, or that they are the best that could be devised for that group and still be tolerated by others. Often the question of the fitness of an actual rule for its purposes is not raised by sociologists. If it is, and if the deficiences of the rule are observed, then it will be suggested that the deficiences were not known to those concerned, or were only recently known and law had not yet caught up, or that the powerful group was not powerful enough, or was too prudent, to push through a more advantageous rule.

What is missing from the sociologists' approach is the historical element: a precise study through centuries of the possibility of persistence of defects in legal rules, principles, and systematics, when curable defects were known and not remedied. Of course, if such defects exist, as I claim is the case, then a theory explaining them would have to take

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79, 130).

[63] *See supra* text accompanying notes 1-8.

account of the characteristics of other legal systems. In the growth of human institutions, a pattern of harmony always seems more easily accounted for than dissonance. Sociologists of law usually do not have the linguistic skills or the knowledge of the history of various legal systems to begin to construct a theory that acknowledges the possibility of serious long-term divergences.

Legal anthropologists are worse off. The primary material necessary to allow them to trace the history of individual systems of "primitive law" is simply unavailable. It is of primary significance that Abel claims my views deny the possibility of any theory. From the standpoint of a sociologist of law or of a legal anthropologist that seems correct: they are irretrievably condemned—if they want a general theory—to claim that law is always functional (with insignificant exceptions).[64]

Comparative legal history offers the choice of a different possibility. The choice, I believe, deserves exploration. The significance of the extent of the dilemma facing those such as Abel becomes even more apparent when one takes account of remarks such as his: "Since I possess no expertise in the historical data themselves, the object of this Essay will be to clairfy that theory and criticise it from the perspective of contemporary scholarship in law and social science,"[65] and "Although I know nothing of the actual facts, it seems plausible to me that . . . ."[66] For Abel, the perspective of modern sociology of law so obviously leads one to the correct result that an examination of the data is not needed. He cannot conceive that the data of comparative legal history may suggest possibilities beyond the effective scope of traditional sociology of law or legal anthropology.

A second objection as stated by Abel is that I do not make plain whether I am dealing with law in books—juristic writings, judicial decisions, and the authoritative pronouncements of legislatures—or with law-in-action, namely the actual behavior of lesser legal officials or lay persons, which, it is said, may differ.[67] He concludes I meant the former. The law I dealt with, says Friedman, is scarely "living law."[68] I

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[64] The word "functional" is used here broadly, to include the notions of symbolic and legitimizing functions. But the notion is often grossly abused, since every time a legal rule or attitude seems to contradict a theory, the rule or attitude can be claimed to be symbolic or legitimizing. This notion cannot be tested. *See* Langbein, *Albion's Fatal Flaws*, 98 PAST & PRESENT 96, 114-15 (1983).

[65] Abel, *supra* note 61, at 785.

[66] *Id.* at 801. Actually, what seems plausible to Abel is just downright wrong, as someone more familiar with the relevant data could tell him.

[67] *Id.* at 785.

[68] Friedman, *supra* note 55, at 127. Friedman's point may be slightly different. *See infra* text accompanying notes 70-79.

was, as I repeatedly stated and must now emphasize, primarily concerned with positive rules of law. What I wanted to show was that the rules as set down, were not the most satisfactory available to the society. I do recognize that there can be a big difference between the rules as they are authoritatively set down, and as they are actually enforced by lesser officials or used and understood by individuals. But I cannot accept Abel's classification as exhaustive, or his distinction as basically meaningful. To a very considerable extent the behavior of lesser officials is hemmed in and restricted by rules of positive law, and the behavior of individuals is also affected by legal rules. If this were not so there would be no point to having legal rules at all. Without rules of positive law, it is difficult even to imagine a discipline of sociology of law. The contrast between rules of positive law and law-in-action is by no means absolute. Of course, if what was under consideration was law that was only in books, law that was not living and had no practical impact, then, as I expressly said, the observation that the law was out of step with society would have little impact.[69] But I sought to choose examples of divergences where the impact of rules of positive law either could not be avoided or could be avoided only by taking pains and usually by incurring large transactional costs.

The third objection to my thesis is that the examples of survival of dysfunctional law that I gave are "little bits and pieces, left over from other periods. Very often, these fragments survive precisely because they are so minor that it is hardly worth the trouble to wipe them off the face of the earth."[70] So my examples, it is said, relate to rules that have either no practical impact or one so trivial that it is scarcely noticed. But let us look at some of these examples. Would an observer of English law seriously maintain that, despite criticism for centuries, there was no practical impact of the vagaries of land tenure as the system existed until 1925? And that before the legislation of that year, the absence of compulsory registration of title of land—a weakness in the law that Henry VIII sought to remedy in 1535—was of no consequence except to academics in their ivory towers?[71] If the oddities of the law of libel, especially for unintended libel before 1952, are accepted, would the same observer deny the claim of the Newspapers Mutual Insurance Society Ltd. that "Libel costs a lot of money"?[72] For

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[69] LEGAL CHANGE, *supra* note 10, at 126. Often a legal rule is deliberately framed to allow officials discretion. But that situation is not the most relevant here.

[70] Friedman, *supra* note 55, at 127.

[71] For these examples, see LEGAL CHANGE, *supra* note 10, at 47-60.

[72] *See id.* at 61-75. The Society also observed that for every claim that reaches court, dozens are settled. *Id.* at 68.

For Abel, however, defamation will have rapidly declined in importance with a

criminal law, are all the apparent absurdities and injustices flowing from the retention and deformation of benefit of clergy[73] to be assigned to the inflamed imagination of scholars spending their lives "embroidering and decorating some little swatch of material"?[74] The delusion of practical reality must have infected authoritative legislatures in view of the numerous, but sadly not comprehensive, statutes that they passed.[75] In Rome, did it really make no practical difference in commerce that the contract of sale—an object of pride because it could be contracted at a distance by letter or by messenger—could not contain a guarantee against eviction or against latent defects unless the parties (or persons subjected to their power) were face to face?[76] Or that the Romans never developed direct agency though the notion was well known to them?[77] Was it really without commercial significance that barter was long not recognized as a contract and that law in this area always remained underdeveloped?[78]

To the foregoing questions I, for one, would not be satisfied with an answer that simply said, without an investigation into the facts, that there could have been no important practical consequences since otherwise the law would have been changed. Examples of divergences can easily be expanded beyond those given in the book. One further instance from England may suffice. Frederic Maitland wrote: "The law of Husband and Wife is in an awful mess (I don't think that a layman would readily believe how bad it is) . . . ."[79] The problems arising from that well-known awful mess, many of which were wanted by no recognizable group, some of which in practice could not be avoided, some of which cost money and trouble, were based on positive rules of law but made their impact—surely not trivial—felt in law-in-action.

In this general connection there seems to be for those who disagree with me an irresistible temptation to overstate their case and exaggerate my position. Illuminating examples occur in both Friedman and Abel.

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mass, urban, industrialized society; for those involved "the precise content of the rules is irrelevant. The more complex and arbitrary they are, the better." Abel, *supra* note 61, at 799.

[73] *See* LEGAL CHANGE, *supra* note 10, at 92-94.

[74] Friedman, *supra* note 55, at 129.

[75] *See* LEGAL CHANGE, *supra* note 10, at 92-94.

[76] *Id.* at 14-22.

[77] *Id.* at 20.

[78] As an illustration of the last point it may be mentioned that an agreement to barter only became a contract and (in the absence of fraud) only had legal consequences when one party delivered; it could not be made by letter. Imagine the problems for merchants in different cities.

[79] C. FIFOOT, FREDERIC WILLIAM MAITLAND 53 (1971) (quoting F.W. Maitland). For an account that illustrates the mess, see A. MANCHESTER, A MODERN LEGAL HISTORY OF ENGLAND AND WALES 361-88 (1980).

The former observes that while parts of Roman law survive, whole chunks have gone.[80] The interesting question, he suggests, is the *principle* of survival, and this he finds in continued usefulness to society. "This is what kept the mortgage and the trust alive, while other parts of medieval law went to their graves."[81] But on this I should like to make three points. First, it is very easy to overestimate the extent to which ancient law has not survived. Thus, legal institution and legal rule (at least as law-in-action) do not exist in a vacuum. They are attached to social institutions. A legal institution, in fact, is a social institution backed by legal rules and looked at from the legal point of view. If the social institution disappears then so do, or at least so should, the legal institution and the legal rules. Thus, ancient Rome had a law of slavery and legal rules about slavery precisely because it had the social institution of slavery. It would make no sense in estimating the extent of disappearance of Roman legal rules in the contemporary West to point out that none of the rules of the law of slavery survive. In the West the social institution of slavery has gone. Rather one should look to a place and time in the recent past where the social institution survived, such as 19th century Spanish America, and consider the impact there of the Roman law of slavery. It is worth observing, however, that even when the vital social institution has gone, related legal rules may survive with important practical dysfunctional qualities. An obvious example would be the survival in England of dysfunctional land tenures long after the social institution of feudalism had otherwise disappeared. Second, the test for my thesis is not whether dysfunctional Roman or medieval legal rules still exist, but whether they continued in operation for a long time after they ceased to be functional. Third, I have never denied—could anyone?—that utility is part of the principle of survival of legal rules. Legal rules that work well obviously have a greater chance of survival than have those that work badly. The question that I find needs an answer and one that should not be given only on *a priori* reasoning is whether the principle of survival involves more than continuing usefulness.

Abel has his own exaggeration: that my constant refrain in the book is "that most laws are useless."[82] My refrain is very different and far less extreme, namely that much of law is out of step with the needs and desires of society "to an extent which renders implausible the existing theories of legal development and of the relationship between law

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[80] Friedman, *supra* note 55, at 128.
[81] *Id.*
[82] Abel, *supra* note 61, at 797.

and society."[63]

The fourth objection to my thesis involves a complex of issues that can, I think, be reduced to one: the approach, it is claimed, is too atheoretical. Thus, for Friedman, "[t]hroughout the book Watson tells us that this or that rule of law is absolutely fundamental, or basic, or terribly important: but we are not told what it means to be basic, fundamental or important or what is so basic about these particular rules."[64] J.N. Adams is troubled by my avoidance of concepts like class, elite, and status groups, and he objects that I do not distinguish between major and minor instances of divergence.[65] Abel objects that most of the time I treat "society as an undifferentiated, personified whole," or that I view "society as either an organic whole or as a series of interest groups utterly dominated by a monolithic ruling class."[66]

On one level this complex objection is accurate, and I accept it cheerfully and without remorse. I did try to be as atheoretical as was consistent with the subject. The study of legal change and of law and society from a comparative historical standpoint is in its infancy. The data have to be collected carefully then analyzed accurately before one should attempt to construct a theory. The data come first, and the theory should emerge from the data. Theoretical distinctions, when they would not be helpful, should be avoided.[67] It was on this basis that I did not try to draw a line between major and minor instances of divergence. The line drawn would have been arbitrary and would have given rise to unnecessary and harmful controversy. I also thought that it would have been obvious to everyone that many of the divergences I discussed were major. For instance, the first divergence studied related to much of the structure of the Roman system of contracts, which has been the most admired part of Roman law. The second concerned the Roman *patria potestas*. The power at private law of the oldest living male ancestor over his descendants of whatever age or rank was enormous; for example, for a very long time only he could own property. This system cannot have been economically efficient. Nor can one claim the system satisfied some deep psychological need, since the Romans

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[63] LEGAL CHANGE, *supra* note 10, at ix.

[64] Friedman, *supra* note 55, at 127.

[65] Adams, Book Review, 42 MOD. L. REV. 121, 123 (1979).

[66] Abel, *supra* note 61, at 787.

[67] Naturally, no approach, even in the collecting of data, will ever be entirely value-free. My own approach in the collecting of data was based on what seemed to me to be both apparent and often overlooked, namely that, in Western legal systems, many legal rules and whole branches of the law could be regarded as fundamentally unsatisfactory by those in a position to influence or effect legal change, without the change occurring.

sought assiduously to circumvent it. The failures in English law until recently to develop compulsory land registration or to deal adequately with the tenure system must, on any reckoning, be regarded as cases of major divergences. The English law of defamation was the subject of a report of a Select Committee of the House of Lords in 1843 and of two Commissions, the Porter Committee which reported in 1948 and the Faulks Committee which reported in 1975. Surely, *pace* Friedman and Abel, this indicates the subject is important; and all three Committees reported that the law was seriously defective.

I do not accept that I view society as an undifferentiated whole or as a series of interest groups utterly dominated by a monolithic ruling class. On the contrary, I agree that, in a well-rounded theory that intended to quantify the extent and causes of divergence, it would be appropriate to explain concepts like class, elite, and status groups, but for the limited purposes of *Society and Legal Change*, such explanation could be and was avoided for a very good reason. One difficulty in quantifying divergences is precisely the fact that in any society there are many recognizable groups, and their interests with regard to what the law should be may often be very different. It may then be suggested that rules that are unsatisfactory for the majority suit some powerful group and are therefore maintained; and that the rules, all taken together, form a pattern "in which the various interests of groups and individuals are represented according to their strength in the society."[88] Precisely to circumvent that difficulty I expressly[89] chose instances where there was no recognizable group or class—apart possibly from lawyers[90]—which had any interest, economic or social, in resisting change. With regard to the defects in the Roman contract of sale which would obstruct commerce, there is no social class of buyers and a different one of sellers.[91] The absence of registration of title of land in England and the pecularities of tenure could benefit no observable class or group and were harmful to landowners, precisely the people most able to effect change in the law. Substantial damages for unintentional libel were harmful to newspaper owners, etc., but there is no recognizable group who would be likely to be unintentionally libeled and so benefit: there is no class of people named Artemus Jones or who own restaurants called "The Spider's Web".[92] It might be suggested that Roman

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[88] LEGAL CHANGE, *supra* note 10, at 9.

[89] *Id.*

[90] *See infra* text accompanying notes 126-35.

[91] Actually, the rules would not benefit buyers or sellers. LEGAL CHANGE, *supra* note 10, at 15.

[92] *See id.* at 65-66.

fathers formed a group or class, but they were not a cohesive social, economic, or political group. In public life no distinction was made between males who were not subject to paternal power and those who were. Sons could, and often did, occupy the highest offices of state and were in a good or even the best possible position to change the law. The approach I adopted in this regard does not dismiss the theoretical framework of sociology of laws; rather it sidesteps it for the time being.

A fifth objection I must regard as perverse. Abel writes: "He [Watson] 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."[93] Continually I sought to show that those involved with the law at the time and in a position to effect change were aware of the defects, without a change resulting for some time.

Thus, for example, from its creation, probably in the later third century B.C., until around 200 A.D. (or later) the Roman contract of sale did not usually contain inherent warranties against eviction or against latent defects. But the Romans did want warranties against eviction and against latent defects. We know this because there are literally hundreds of texts in the Roman sources on the subject of these warranties. But in the effort to take express warranties the great advantage of consensuality was lost because the only way to obtain the guarantees was by the contract of stipulation which required the parties to be face to face. Also, as is made clear, leaving the taking of the warranties to buyers resulted in awkward drafting problems. Lest it be suggested that for long the Romans were unaware of the possibility of inherent warranties, let me mention that from at least the fifth century B.C. the ceremony of *mancipatio*, the common mode of transfer of certain important types of property, did precisely contain an inherent warranty against eviction.[94]

Again, it was mentioned above that barter as a legal institution was long underdeveloped in Rome and never became a commercially efficient contract. That the Romans knew that barter had legally unsatisfactory remedies and that the matter was one of importance is easily demonstrated. The Sabinian school of jurists claimed that barter was a form of the contract of sale and, to prove this, argued from a mistranslation of a quotation from Homer, who was scarcely a legal authority for the Romans. They would not have relied on such a poor argument for a weak case if they had not thought the matter significant. The

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[93] Abel, *supra* note 61, at 791.

[94] *See* LEGAL CHANGE, *supra* note 10, at 14-15.

converse argument, which prevailed, of the rival Proculian school was based purely on considerations of legal logic and not on economic, social, or political consequences: the price had to be in money, they said, otherwise one could not determine what was the thing sold and what was the price.[95]

Roman law did not recognize the principle of direct agency, even in the sixth century A.D., but that the Romans were aware of its commercial usefulness is shown by the use they made of it from the second century A.D. in their province of Egypt where Roman law was less strictly applied.[96]

That those with the power to effect changes in English law knew even before 1925 that the absence of compulsory land registration was dysfunctional is obvious from the stated intentions of those who sought to introduce it: Henry VIII in the sixteenth century, Oliver Cromwell in the seventeenth century, the registers for Middlesex and Yorkshire in the eighteenth century, the 1829 report of the Real Property Commissioners, and various acts of the nineteenth century.[97]

The arbitrary nature of the distinction between libel and slander and the injustices caused by it were known to and disapproved of by Sir James Mansfield, Lord Chief Justice, in 1812; the Select Committee of the House of Lords in 1843; F. Carr in 1902; famous scholars such as Sir William Holdsworth, Spencer Bower, Sir Frederick Pollock, Professor E.C.S. Wade, and Professor Winfield; and the Faulks Committee. Probably no English academic has supported the distinction in this century, but it still exists.[98] Examples showing that I am not imposing my views of dysfunction, but that those involved were aware of the defects, can be multiplied.[99]

To return for a moment to implied warranties against eviction and

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[95] *See id.* at 19.

[96] *See id.* at 20; LEGAL TRANSPLANTS, *supra* note 9, at 33.

[97] LEGAL CHANGE, *supra* note 10, at 56-57.

[98] *Id.* at 63-65.

[99] The instance Abel selects to illustrate my imposition of value judgments is revealing. I had observed, *id.* at 34-37, that it was a weakness of Roman law that the nature of the unavoidable and important (as to consequences) distinction between manifest and non-manifest theft was never clarified; and that it is surprising that, to the best of our knowledge, the Romans never discussed the basis of the distinction. I then incidentally mentioned modern explanations of the basis of the distinction and argued that one of them was illogical. Abel seized on this claim of illogic as an illustration of my imposition of my own standards on the Romans. Abel says that I "offer[ed] no evidence that the Romans shared [my] feelings." Abel, *supra* note 61, at 791. This is quite true. My point was, and is, that the law was deficient in not deciding what counted as manifest or as non-manifest theft, and that though the Romans knew of the problem, and exposed it, they never asked why the distinction was made. My treatment of modern scholarly accounts was simply intended to show that a basis for the distinction is hard to find. The Romans offered none.

against latent defects in the Roman contract of sale, there is an insoluble problem here for those who, like Friedman, believe that "law is a mirror held up against life."[100] The problem is that the Roman jurists eventually did regard such warranties as inherent in the contract.[101] Friedman and I would both hold that those able to effect change regarded inherent warranties as desirable. But Friedman must hold either that inherent warranties were not previously desirable, or at least not previously desirable to those able to make the change. But no one who knows Roman law would think that the class of people who effected the change, the jurists, had undergone alteration.[102] And there is nothing in Roman economic history to suggest either a change in the kinds of sale that were being made, or in the relative bargaining power of buyer and seller.[103] The difficulty for Friedman is all the greater in that the evolution of inherent warranties was gradual. The insoluble problem for Friedman, of course, is a general one, and applies in many contexts.

A sixth and very different objection, that I am apolitical or antipolitical or conservative, is best left until later in this paper.

IV. Legal Transplants

Very little need now be said about the subject of the first book, *Legal Transplants*.[104] I think it is now generally accepted that in the West most of the law of most jurisdictions is the result of borrowing from elsewhere. More interesting though, and perhaps not so widely accepted, is the common existence of a "transplant bias."[105] Although a totally inappropriate rule is very unlikely to be voluntarily borrowed, it often happens, and at least in the past usually did, that the borrowing system does not systematically search for the best rule from else-

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[100] Friedman, *supra* note 6, at 595.

[101] *See, e.g.*, J.A.C. Thomas, A Textbook of Roman Law 284 (1976).

[102] *See* W. Kunkel, Herkunft und soziale Stellung der römischen Juristen 114 (2d ed. 1967).

[103] *See, e.g.*, M. Rostovtsev, The Social and Economic History of the Roman Empire (P.M. Fraser ed., 2d ed. 1957).

[104] For critical reviews, see, e.g., Kahn-Freund, Book Review, 91 L.Q. Rev. 292 (1975); Seidman, Book Review, 55 B.U.L. Rev. 682 (1975).

[105] Friedman, for example, does not appear to agree with me. I am not sure that I fully understand Friedman's position. He says, "there is a good deal more *choice* in borrowing than Watson suggests. Borrowing is done systematically." Friedman, *supra* note 55, at 128 (emphasis in original). If he means that one foreign system is continually chosen as the donor, then the borrowing from that system may be done systematically, but the judges or jurists who do the taking often do not choose the best solution to their legal problem. If he means that before borrowing takes place the judges or jurists systematically look for the most appropriate solution in a number of societies, he is historically wrong.

where, but rather looks consistently to one system, which at times will not have the most appropriate rules. The well-known dependence of other societies (which were politically free) on Roman, English, and French law are cases in point. Often the foreign rules are borrowed without investigation into whether the rules are the best possible or even appropriate. The main causes of this transplant bias are, I think obvious: the general high standing of the donor system; the general high prestige, apart from its law, of the donor state; a shared legal tradition of the donor and borrower; and the accessibility—for instance, in writing or in a code—of the law to be borrowed.

Two examples, not discussed in *Legal Transplants,* from medieval Germany may be chosen as further illustrations.[108] In the thirteenth century, law in Germany was almost entirely customary, and the custom was very local at that. At the beginning of the century there existed nowhere a written official or unofficial account of customary law. But before 1235, probably between 1221 and 1222 or betwen 1221 and 1224, Eike von Repgow produced his *Sachsenspiegel,* 'Saxon Mirror', an unofficial account of what happened in practice in the bishoprics of Magdeburg and Halberstadt. As a written account of legal customs in one corner of Germany it had no rival. Of its two parts, one has survived in over 150 manuscripts, the other in over 200, and it was translated into a number of German dialects, back into Latin (its original language) at least three times, into Dutch and, it is said though personally I can find no trace, into Polish. Its influence was enormous; it was the only account (at the time) of law that was accessible and Germanic, and it was also of high quality. Thus, even custom transplants. A second example can be found in the transplanting of law among German towns which took place extensively during the fourteenth century, although some did take place even before that. Towns would adopt the town law of another town, and the "daughter" towns might in their turn be accepted as "mothers" for law by other towns. The "mother" town would be selected not just for the quality of its law, but because of its general high standing and also because its law was in the tradition wanted by the "daughter." But the law of the most famous "mother," Magdeburg, was adopted widely even in Poland. Strangely, in that instance the law of the "mother" town was often unwritten and relatively inaccessible.

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[108] For these two examples, see SOURCES, *supra* note 12, at 25-50.

V. Sources of Law

Sources of Law; Legal Change and Ambiguity has not yet had the benefit of criticism. The main theme is that at various times within the Western legal tradition there has been profound indifference among those capable of making law about the quality of the sources of law and about their fitness for developing the law and for clarifying ambiguities. A few examples will suffice. Opinions of jurists were among the most fruitful sources of legal growth in Rome. The jurists often disagreed on important issues and when they did there was, with very minor exceptions, no way of ranking their opinions. Many of the disputes that we know raged in the second century A.D. existed until they were settled by the Emperor Justinian in the sixth century. For instance, the Proculian school of jurists held that a male reached puberty when he completed his fourteenth year, the Sabinians required actual physical development, and Justinian in 529 settled the dispute in favor of the Proculians. But attainment of puberty had important consequences which resulted from the operation of law and which could not be altered by the behavior of interested parties.[107] Problems must have arisen in practice; fatherless youths in their early teens are not, I suspect, free from the perils of mortality. On this and other issues, however, no definite solution was forthcoming for centuries. What does seem to me to be significant is that though many of the most distinguished jurists were also high ranking public officials and bureaucrats, not one of them ever, so far as we know, arranged for the resolution of such a juristic dispute by legislation. They seem to have preferred the ambiguity. The other sources of Roman law also contained serious defects.[108]

Similarly, after the Reception of Roman law in Western Europe a major source of law was the writings of jurists, professors, and attorneys, from the eleventh century onwards. But no system ever developed for determining the ranking of individual jurists. There was even no agreement on the relative weight to be attributed to the different types of juristic writings, whether glosses, commentaries, treatises, collections of opinions, collections of legal advice, or even attorneys' briefs. With a

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[107] When a male was not in the power of his father (i.e., usually when the father was dead), he would have a guardian until he reached puberty. He could enter a transaction that might (even in theory) injure his patrimony only if he had his guardian's permission. He could not make a will at all, and if he had been appointed heir by his father's will and a substitute heir was also appointed (in case the boy died before puberty), then if he did so die, the estate went to the named substitute heir, not to the boy's own heirs on intestacy.

[108] *See* Sources, *supra* note 12, at 1-24.

few exceptions such as Giovanni Battista de Luca (1614-83), very little attention was even paid to this issue. When, as was very frequently the case, there was no local statute on point—statutes in private law were rare—or custom or precedent from the highest court of the jurisdiction, there was not even agreement regarding whether one should resort first to the authority of the jurists or to the law of a neighboring state. De Luca favored the latter alternative. What was to count as a "neighboring state" or how the law of competing neighboring states was to be ranked was also not established, apart from the principle that neighboring did not mean "territorially adjacent" but "similar in law." For example, De Luca considered Spanish fueros as neighboring law, presumably from a perspective in Naples.[109]

In modern England the most important sources of law are statutes and precedents. It is notoriously difficult to find the appropriate or correct statutory law for a number of reasons. The same subject may be dealt with in many Acts. In the case of building operations there were, in 1970, 179 national Acts and 220 local Acts.[110] In 1949, the law relating to the validity of a marriage was contained in as many as 40 statutes.[111] This problem has been recognized since at least the time of Sir Nicholas Bacon, the Lord Keeper (1509-79), and has been the object of the (unsuccessful) attention of Kings Edward VI (1537-53) and James I (1566-1625), and Sir Francis Bacon (1561-1626).

Likewise, the drafting of individual Acts is notoriously poor, and the standards of discussion very inadequate. Parliament also has difficulty in finding time to pass much needed legislation. In fact, it has long been known that the Parliament, as presently constituted, is just not an appropriate body for making satisfactorily intelligible legislation, especially of a comprehensive type. "It would be as impossible to get in Parliament a really satisfactory discussion of a Bill codifying the Law of Evidence as to get a committee of the whole House to paint a picture," said Sir James Fitzjames Stephens who wanted the law of evidence set out in one Act.[112] "It is [a] matter of amazement that Englishmen should be content to have the laws by which they are governed in

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[109] Pompeo Neri Badia, who in 1745 was appointed by the Grand Duke of Tuscany to prepare a code (which was never completed), proposed that there should be no recourse to the law of another place because of the confusion this system had created in Tuscany. The *Leggi e constituzioni* of 1770 of Sardinia and Piedmont, bk. 3, tit. 22, ¶ 9, did ban recourse to the law of a neighboring place, and such a ban had earlier been read, by implication, into a provision of 1729. The confusion resulting from the practice was well-known long before anything was done about it anywhere; even later it continued elsewhere. *See* SOURCES, *supra* note 12, at 51-67.

[110] G.W. PATON, A TEXTBOOK OF JURISPRUDENCE 246 (4th ed. 1972).

[111] *See* A. MANCHESTER, *supra* note 79, at 361.

[112] G. CHASE, A DIGEST OF THE LAW OF EVIDENCE xxii (1898).

such an inaccessible shape as they are; but, no doubt, one explanation of this state of things is the hopelessness of passing through Parliament, without mutilation, any carefully considered exposition of any great branch of law," wrote Sir Nathaniel Lindley in the context of the Partnership Act, in 1890.[113] Richard Crossman wrote in his *Diaries of a Cabinet Minister* that when he was a Cabinet Minister he never bothered to read any of the Bills he got through Parliament and that he did not bother to understand the individual clauses, nor did many Members of Parliament, not even the spokesman for the Opposition. He also wrote that the Opposition used up their questions on the early clauses.[114] In 1981, Lord Hailsham of St. Marylebone, Lord High Chancellor of Great Britain, claimed: "Parliament in general and the House of Commons in particular has long since ceased to believe that its main business is to act as an efficient legislature."[115] But Members of Parliament are not concerned. A committee of the unofficial *Statute Law Society* in 1970 issued a questionnaire on quality of statute law to users of statutes, and received responses from only 7% of those to whom it was sent; from barristers and solicitors they received a 10% response. By far the lowest response, 2%, was from the Members of both Houses of Parliament.[116]

It is in this context that Abel's objections that I am "not really an admirer of liberal democracy"[117] and am setting up a "fundamentally apolitical" theory of legislation should be set.[118] I was suggesting a lawmaking body intermediate between the courts and the legislature.[119] This body would be subordinate to the legislature which would remain supreme, and its main work would be the preparation of bills which would become law if not objected to by the legislature. Its desirability stems from the lack of interest in legislation, especially for private and commercial law, shown by the present legislatures.[120]

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[113] N. LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP 2 (W. Lindley 6th ed. 1893).

[114] 1 R. CROSSMAN, THE DIARIES OF A CABINET MINISTER 629 (1975).

[115] Hailsham, *Obstacles to Law Reform*, 34 CURRENT LEGAL PROBS. 279, 286-87 (1981).

[116] *See* SOURCES, *supra* note 12, at 76-92. For a history that reveals the defects in English lawmaking by legislation, see A. MANCHESTER, *supra* note 79, at 32-49.

[117] Abel, *supra* note 61, at 806.

[118] *Id.* at 807.

[119] But not with autocratic powers as stated by Abel. *Id.* at 807; LEGAL CHANGE, *supra* note 10, at 133. The idea is developed in Watson, *Two-Tier Law—A New Approach to Law-Making*, 27 INT'L & COMP. L.Q. 552 (1978).

[120] One might think of non-legislative lawmaking procedures in the United States, such as court rulemaking or the pronouncements of administrative agencies. See also the suggestion of Justice Stevens, and Justice Brennan's response. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 232 (1983). There is also

English law also has a system of binding precedent. The element in a decision that is binding is the *ratio decidendi,* that is, the propositions of law that the court appeared to consider necessary for its judgment. Usually the court will not declare what was the *ratio decidendi,* and judges in subsequent cases are therefore forced to find it themselves. This task may often prove to be quite difficult especially because there is no theoretical method for uncovering the *ratio.* This reliance on precedent may create persistent ambiguity. Obviously, it does not necessarily result in improved quality in the law, because the subsequent court may, as the first could also have done, give an unfortunate *ratio.* The conclusion I reached was that where, as often, the sources of law are inadequate for keeping the law up to date and for removing ambiguity, and the inadequacy is apparent to those involved in the system, then those with the capacity to change the law must have in fact a positive disinclination against reform of the sources. The reason for this, I suggested, is to be found in group psychology. The Roman jurists *qua* jurists owed their prestige and power to their skill in handling abstract legal problems. To win prestige, they had to impress their fellow jurists with skillful, complex arguments. Solving difficult legal problems through legislation would not win jurists the approval of their fellows. Similarly, Members of Parliament are more interested in party politics and economic issues than in law reform. Yet much of their prestige comes from their role as legislators, and they are unwilling to concede any of their power in this regard.

English judges, too, are a group with a strong *esprit de corps.* Much of their high prestige depends on the fact that their decisions are binding in future cases. Yet their *esprit de corps* would be endangered if a judge stated too directly the *ratio decidendi* of a particular case when fellow judges might feel compelled to voice their disagreement. Members of such legal elites attach much weight to the opinion of their fellows. They are unwilling to suggest a course of action that could diminish the prestige, power, or earning capacity of the group.

VI. An Attempted Synthesis

It should still be maintained, I would claim, that legal rules—including many that have a great impact on practical life—frequently are and have been dysfunctional, that is, out of step with the needs and desires both of society at large and of its ruling elite,

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a growing awareness in the United States that something is amiss with the legislative process. *See, e.g.,* G. Calabresi, A Common Law for the Age of Statutes (1982).

and that this is not and has not been unknown to those who can reform the law. To a considerable, but as yet unmeasured, and possibly unmeasurable, extent this is because the sources of law themselves are often inadequate to the task of keeping law up to date and of removing its ambiguities. When this situation persists for a long time it suggests that those who can influence legal change have a positive disinclination against radical reform. In addition, the legal tradition itself plays an important role in shaping legal change in a number of ways. For example, borrowing from other systems, the form taken by most legal change, is by no means always the result of a systematic search for the best solution. A bias tends to favor some particular system, and this bias is rooted to some extent in the legal tradition. Moreover, even in times of revolutionary change, the legal tradition is the product of history, particularly of legal history. A remark of Karl Marx is very *a propos:*

> Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living.[121]

From the foregoing, it should be obvious that law exists and flourishes at the level of idea, and is part of culture. As culture it operates in at least three spheres of differing sizes, one within another. As these spheres decrease in size law becomes a more pervasive and dominant element in the culture of that sphere. The spheres are: the population at large, lawyers, and the lawmakers. By "lawmakers," I mean the members of that elite group who in a particular society have their hands on the levers of legal change, whether as legislators, judges, or jurists.

For present purposes, we may accept as a definition of culture in general the summary formulation of A.L. Kroeber and Clyde Kluckhohn:

> Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive achievements of a human group, including their embodiments in artifacts; the essential core of culture consists of traditional (i.e. historically derived and selected)

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[121] Marx, *The Eighteenth Brumaire of Louis Bonaparte* in K. MARX & F. ENGELS, SELECTED WORKS 96 (1968).

> ideas and especially their attached values; culture systems may, on the one hand, be considered as products of action, on the other as conditioning elements of further action.[122]

Law, of course, is functional and practical. To some extent, it facilitates social and economic life. At a minimum, it exists to institutionalize dispute situations and to validate decisions given in the appropriate process which itself has the specific object of inhibiting unregulated conflict. It may do this without having the rules best adapted for society as a whole or for leading groups. It is important, too, that not all groups in a society are affected by legal rules to the same extent. One group, though, is always affected: the lawyers. They earn their living by the law. A change that made the law simpler or less ambiguous or reduced the volume of disputes, actual or possible, could have an adverse effect on their income. In addition, the stock-in-trade of a practicing attorney is his or her knowledge of the *existing* law. A drastic change could reduce the most experienced practitioner almost to the level of a beginner.

For a rule to become law it must be institutionalized. It must go through the stages required for achieving the status of law. A new formulation expressed by a jurist might become accepted by other jurists; or a court may utter a judgment which the system recognizes as binding precedent and makes part of general law; or social ideas might be put in the acceptable form, pass through the stages in the legislature that are regarded as necessary and become a statute. Because lawyers and lawmakers are involved in all of these processes a rule cannot become law without being subjected to legal culture. Equally important, a legal change may result from legal culture alone. For example, a jurist may develop a new rule based on his or her studies that may find favor with his or her fellows because its logical elegance appeals to them. This does not mean, however, that a rule developed in this manner will necessarily have no practical effects.[123]

But when practical economic or social reasons suggest that the law should be changed, the pressure for such a change must also operate on the culture.[124] If such practical pressure starts with the lawmakers, it is only their culture that is involved; if it starts with the lawyers, their

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[122] A.L. KROEBER & C. KLUCKHOHN, CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS 181 (1952).

[123] The Proculians denied the advantages of the contract of sale to barter-like transactions, because it would not be possible to determine who was buyer and who was seller.

[124] For the importance of "pressure forces" for legal change, see Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 324-26, 332-33 (1978).

own culture is involved and the pressure must be directed against the culture of the lawmakers; if it starts with the population at large (or some segment of it, other than lawyers) then its legal culture is involved, but the pressure must, once again, be directed against the culture of the lawmakers, usually through the medium of lawyers. Thus, even when practical needs and the social pressures arising from them determine that a legal change must occur, both the timing and the nature of the change will be mediated through the legal culture, particularly through that of the lawmakers. As Marshal Sahlins says in a different context: "The general determinations of praxis are subject to the specific formulations of culture; that is, of an order that enjoys, by its own properties as a symbolic system, a fundamental autonomy."[125]

In an earlier work I sought to set out the factors that govern the legal changes that are made, and those include, naturally enough, the needs that are felt by a group that acts as a pressure force.[126] But what has emerged from these four books is my appreciation of the enormous power of the legal culture in determining the timing, the extent, and the nature of legal change. Social, economic, and political conditions that affect other groups within society are important, of course, but their impact on the legal rules must not be exaggerated. For example, such conditions may lead to the existence of barter as a social institution in a particular society at a particular time, but the legal rules surrounding barter may be only a very approximate fit of those desired by traders and may instead derive largely from the influence of the legal culture. Legal issues, such as whether barter should be given the status of contract; whether a contract of barter comes into being simply on agreement; or whether writing is required for the formation of the contract; whether delivery alone creates the obligation; and whether the remedy for breach is specific performance, money damages, the return of goods already delivered, or the money value of delivered goods may all be determined, not out of concern for present mercantile practice or merchants, but rather by the tenets of the existing legal culture. These tenets, in turn, may have been created in the distant past. Mercantile practice may itself come to be influenced by the rules established on the basis of legal culture.

Failure to appreciate the power and the autonomy of legal culture may lead scholars into interesting and illuminating errors. For instance, the avowedly Marxist Mark Tushnet, in discussing the American law of slavery, says: "The insertion of slave law into a bourgeois framework

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[125] M. SAHLINS, CULTURE AND PRACTICAL REASON 57 (1976).

[126] Watson, *supra* note 124. *See also*, CIVIL LAW, *supra* note 11, at 182-84; Watson, *Society's Choice and Legal Change*, 9 HOFSTRA L. REV. 1473 (1981).

therefore causes new problems, as bourgeois principles must accommodate the incompatible principles of slave law."[127] He feels that the principal problem thus identified is that in a bourgeois society labor power is considered fungible with money, but in slave law "we should find a reluctance to treat all forms of property, and especially slaves, as reducible to a common measure in money."[128] If law were determined by the social relations of production, we would expect to find the reluctance Tushnet posits. But, in fact, in ancient Rome, a quintessential slave society, all private law actions without exception, even those brought claiming ownership of a slave, were for money damages or penalty. And in nineteenth and twentieth century Germany, a quintessential bourgeois society, actions for compensation in money are limited to a few express exceptional cases. For instance, even for damage to property, the *Bürgerliches Gesetzbuch (BGB)* section 249 gives an action for compensation in kind as the primary remedy, though the creditor can choose compensation in money as an alternative.[129] Section 241 says that the effect of an obligation is that the creditor is entitled to claim *performance* from the debtor.[130]

The claim that culture is fundamentally autonomous would be challenged, I think, by some Marxists. But I am convinced by Sahlins: "The first problem, how to account for the kinds of goods a society will produce, their precise form and content, is a question without answer in Marx's theory. . . . The 'system of needs' must always be relative, not accountable as such by physical necessity, hence symbolic by definition."[131] No theory of economic materialism will explain why dog is not eaten in the United States; why the flesh of steers is highly favored when the eating of soya beans could produce the same material results; why men wear or wore ties around their necks; or why women wear or wore ribbons in their hair. If it be suggested in reply to the last point that in view of their economic dependence women had to appear "feminine" the particular choice of hair ribbons as opposed to neckties would still be without explanation.

The formulation of a culture is a process of rendering experience

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[127] M. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860 at 158 (1981) [hereinafter cited as M. TUSHNET, SLAVERY]. But elsewhere, Tushnet has demonstrated a keen awareness of the relative autonomy of law, although apparently only within a classical Marxist framework. Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law"*, 1977 WIS. L. REV. 81.

[128] M. TUSHNET, SLAVERY, *supra* note 127, at 157-58.

[129] BÜRGERLICHES GESETZBUCH [BGB] § 249 (W. Ger.).

[130] BGB § 241.

[131] M. SAHLINS, *supra* note 125, at 148, 150.

meaningful and, as Franz Boas argued,[132] "necessarily proceeds on a theory—of nature, of man, of man's being in nature. This theory, however, remains unformulated by the human group that lives it."[133] This unformulated theory is, of course, shared by the members of the group. The more basic an element of the culture, the more diffident a member of the group will be in modifying it and the more violent will be the attack by the group on anyone who suggests change.

This view of the legal culture begins to explain three of the striking features of legal growth. First, even in a time of conscious legal reform, the sources of the law are often not considered candidates for reform. The formal mechanism for making legal rules is more basic in the culture than are individual legal rules. Second, it provides one explanation for the well-known phenomenon that often fundamental law reform, especially reform of the sources, proceeds from, or is suggested by, someone outside of the two inner circles of legal culture. The best illustration for this is the fact that the impetus towards codification of the law in the interest of clarity or simplicity often does not come from lawyers or legislatures and traditional lawmakers but from dictators or other powerful leaders who have made their reputation in other activities: for example, Lipit-Ishtar, Hammurabi, Moses, Julius Caesar, Pompey the Great, Justinian, Frederick the Great, Napoleon, or Ataturk. That their dominating position could get their laws passed more easily is not the issue: what matters is that they proposed and pushed strongly for radical reform of the sources. To the extent that they were outside of the culture, they were less influenced by it. They were more aware of the defects and confusions of the law, and less sensitive to the susceptibilities and pressures of the members of the inner ring of the legal subculture. Similarly, for Sir William Blackstone, English law was near-perfection; for Jeremy Bentham, it was anathema. Creative judges, too, are often outsiders in some sense, or set apart in some way from their colleagues: an outstanding example is Mansfield, a Scot in England. Another Scot in England who, impatient with the complexities of English law, was responsible for much reform is Henry Brougham.[134] In fact, much of the struggle in England in the nineteenth and early twentieth centuries for procedural reform was led by the public, not by the bar.[135]

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[132] *See generally*, F. BOAS, RACE, LANGUAGE AND CULTURE (1966).

[133] M. SAHLINS, *supra* note 125, at 70 (discussing Boas's theories and works).

[134] *See* J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 186-87 (2d ed. 1979).

[135] *See* Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725 (1926). For the opinion that in the United States the reform of the law of evidence would not come from the bar, see E.M. MORGAN, THE LAW OF EVIDENCE

Third, the concept of a legal culure I have described allows for a better understanding of the transnational character of legal change. To a considerable degree, the lawmakers of one society share the same legal culture with the lawmakers of other societies. This is particularly clear when a complex, ancient, written work like Justinian's *Corpus Juris Civilis* is accepted as authoritative in a number of states. Thus, to the extent that law is determined by economic forms and is not autonomous, and to the extent that the legal culture is based on local traditions, the law of two neighboring territories need not converge; but to the degree that the culture is shared by the two sets of lawmakers, it will.

One final point should be stressed. If the arguments put forward here are sound, then law is often dysfunctional with regard to society as a whole or groups within it. When this is so, the cause is frequently to be found in the legal tradition. In other words, law operates as culture not only where the practical effects of the rules are economically, socially, or politically indifferent to society as a whole, to powerful groups, or to the ruling elite, but even where they are positively detrimental.

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66 (1927). It is a commonplace in science that

> [a]lmost always the men who achieve these fundamental inventions of a new paradigm have been either very young or very new to the field whose paradigm they change. . . . [O]bviously these are the men who, being little committed by prior practice to the traditional rules of normal science, are particularly likely to see that those rules no longer define a playable game and to conceive another set that can replace them.

T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 90 (2d ed. 1970) (footnote omitted).