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Comparative Jurisprudence (II): The Logic of Legal Transplants

I.

In a flood of books and articles examining the history of Western law, Alan Watson has proposed a theory of legal change: the theory, roughly stated, that the growth of law is principally to be explained by the transplantation of legal rules.[1]

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1. Watson's writings to date fill some twenty books and one hundred articles. They touch on much of Western legal history, but are centered on Roman Law and its subsequent influence in continental Europe. His chief works include: *Contract of Mandate in Roman Law* (1961); *The Law of Obligations in the Later Roman Republic* (1965); *The Law of Persons in the Later Roman Republic* (1967); *The Law of Property in the Later Roman Republic* (1968); *The Law of the Ancient Romans* (1970); *The Law of Succession I The Later Roman Republic* (1971); *Roman Private Law Around 200 B.C.* (1971); *Law Making in the Later Roman Republic* (1974); *Legal Transplants: An Approach to Comparative Law* (1974; 2d ed. 1993) [hereinafter *Transplants*]; *Rome of the XII Tables; Persons and Property* (1975); *The Nature of Law* (1977); *Society and Legal Change* (1977) [hereinafter *Society*]; *The Making of the Civil Law* (1981) [hereinafter *Making*]; *The Sources of Law, Legal Change, and Ambiguity* (1984); *The Evolution of Law* (1985) [hereinafter *Evolution*]; *Roman Slave Law* (1987); *Failures of the Legal Imagination* (1988); *Slave Law in the Americas* (1989); *Studies in Roman Private Law* (1991); *Legal Origins and Legal Change* (1991); *Roman Law and Comparative Law* (1991) [hereinafter *Roman and Comparative*]; *The State, Law, and Religion: Pagan Rome* (1992); *Joseph Story and the Comity of Errors* (1992); *International Law in Archaic Rome: War and Religion* (1993).

Watson's articles that are most relevant to the present topic are: "The Definition of Furtum and the Trichotomy," 28 *Revue d'Histoire de droit* 197 (1960); "The Development of Marital Justifications for Malitiosa Desertio in Roman-Dutch Law," 79 *Law Q. Rev.* 87 (1963); "Some Cases of Distortion by the Past in Classical Roman Law," 31 *Revue d'Histoire de droit* 69 (1963); "Roman Private Law and the Leges Regiae," 82 *Journal of Roman Studies* 100 (1972); "Personal injuries in the XII Tables," 43 *Tijdschrift voor rechtsgeschiednis* 213 (1975); "Legal Transplants and Law Reform," 92 *L.Q. Rev.* 79 (1976); "Comparative Law and Legal Change," 37 *Cambridge L.J.* (1978); "Two-Tier Law — A New Approach to Law Making," 27 *Intl. & Comp. L.Q.* 552 (1978); "Society's Choice and Legal Change," 9 *Hofstra L. Rev.* 1473 (1981); "The Notion of Equivalence of Contractual Obligation and Classical Roman Partnership," 97 *Law Q. Rev.* 275 (1981); "Legal Change: Sources of Law And Legal Culture," 131 *U. Pa. L. Rev.* 1121 (1983); "An Approach to Customary Law," 1984 *U. Ill. L. Rev.* 561 (1984); "The Evolution of Law: The Roman System of Contracts," 2 *Law & Hist. Rev.* 1 (1984); "The Future of the Common Law Tradition," 9 *Dalhousie L.J.* 67 (1984); "Law

This theory, if it is true, is of great importance, not only for legal history, but also for comparative law (which it supplies almost automatically with both a subject-matter and a method) and for legal philosophy (which it supplies with an original and contentious view of the relationship between law and society). For Watson's theory flies in the face of some of the most treasured preconceptions of modern legal thought. Since the time of Montesquieu it has frequently been assumed, sometimes explicitly, more often tacitly, that the law changes in response to forces *external* to law — that law reflects the power relations of society, or the workings of the market, or the ideology of possessive individualism, or the promptings of the judicial subconscious, or the cunning of the *Weltgeist*, or the self-interest of the dominant class, or the political ideology of the age; that, because law does not possess an autonomous existence, legal scholars should steep themselves in other disciplines, such as sociology, or anthropology, or philosophy, or economics, or literary criticism, or critical theory.

Watson's historical writings are centered on Roman law, and have investigated, in exacting detail, the gradual spread, by legal transplantation, of Roman law rules throughout continental Europe. Again and again he points to a fact which, to be sure, has often been remarked upon, but whose importance for legal philosophy few have noticed before his work, namely, the extraordinary persistence, into the present day, of rules that were first struck upon by a leisured class of slave-holding Italian aristocrats — men who pursued law as a hobby, and who have been dead for nearly two thousand years.

It is easy to see why Watson's theory has radical implications. If legal rules can be readily transported from society to society; if the very same rules of contract can operate in the worlds of Julius Caesar and the medieval Popes, of Louis XIV, of Bismarck, and of the twentieth-century welfare state; if law changes, not in response to external pressures, but to the internal requirements of the legal system itself, then the idea of a Grand External Theory of Law — the idea of law reduced to sociology or economics or class politics — must be a *fata morgana*, a pipe-dream of scholars who are entranced by the claims

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in a Reign of Terror," 3 *Law & Hist. Rev.* 163 (1985); "A House of Lords' Judgment, and Other Tales of the Absurd," 33 *Am. J. Comp. L.* 673 (1985); "Legal Evolution and Legislation," 1987 *B.Y.U. L. Rev.* 353 (1987); "Evolution of Law: Continued," 5 *Law & Hist. Rev.* 537 (1987); "The Structure of Blackstone's Commentaries," 97 *Yale L. J.* 795 (1988); "The Transformation of American Property Law: A Comparative Law Approach," 24 *Georgia L. Rev.* 163 (1990); "Roman Law and English Law: Two Patterns of Legal Development," in *Il diritto privato europeo: Problemi e perspettivi (Atti del convegno internazionale, macerata 8-10 giugno 1989)* 9 (Luigi Moccia ed. 1993); "Chancellor Kent's Use of Foreign Law," in *The Reception of Continental Ideas in the Common Law World, 1820-1920*, 45 (Mathias Reimann ed. 1993).

Watson summarizes his view of comparative law and of the evolution of the Civil Law systems in Rudolf B. Schlesinger, Hans Baade, Mirjan Damaška & Peter Herzog, *Comparative Law: Cases-Text-Materials* (5th ed. 1988) at 309-10.

of high theory, but who have not adequately studied the way in which law, as a matter of historical fact, actually develops.

Watson's contributions to legal history have been widely appreciated, as have his contributions to comparative law. But the significance of his work for legal philosophy has largely gone unnoticed. In large part, I think, this is because Watson's theory is sufficiently complex, and, as he presents it, sufficiently bound up with the discussion of intricate historical details, so that one can easily misunderstand its force and its relationship to the historical data. Indeed, Watson himself has presented his theory in a somewhat loose and intuitive fashion; he has, over time, and in different contexts, changed his formulations, sometimes claiming one thing and sometimes another, with the consequence that his theory has frequently been misunderstood.

In this article I therefore propose to try to explain, in abstract terms and as far as possible unencumbered by historical minutiae, what Watson's theory is and why it seems to me important; and I shall attempt to explain why it has been open to so much misinterpretation. In particular I shall argue that most of the confusions surrounding Watson's theory can be traced to a failure to pay adequate attention to the logical structure of his argument, and to the logical structure of the views he is concerned to oppose.

But I have a wider purpose in this undertaking than simply to understand Watson's theory. I have argued at length in the first article in this series that comparative law is in need of radical overhaul, and the arguments I make there are closely related to my interpretation of Watson's theory. Very roughly, and somewhat polemically, what I wish to say about Watson is this. Two souls dwell within his breast; we can call them, for reasons that will emerge, Weak Watson and Strong Watson. Both Watsons argue against what I shall call the mirror theory of law, i.e., the theory that law is the mirror of some set of forces (social, political, economic, whatever) external to the law. Weak Watson opposes this theory weakly and cautiously; Strong Watson opposes it strongly and, I think, recklessly. The difference between the two Watsons is precisely the logical difference I just alluded to.

That difference is of crucial importance for the following reason. Weak Watson's argument, I believe, is adequate to devastate the traditional mirror theories, at any rate in their cruder (and therefore more influential) forms. It is a major theoretical advance; and if it is correct (which I believe it is) it opens the door to the new style of comparative law which I have dubbed "comparative jurisprudence." I have sought in my other piece to say what the landscape looks like on the other side of that door.

Strong Watson, in contrast, is a menace to himself and to others. He looks on the surface like the more radical of the two Watsons; but once you get to know him, you find that he is hopelessly antique. If we follow *his* advice, we shall never get to the new landscapes; indeed, not even to the door. We will, in fact, end in a place where Watson the great scholar of Roman law has no business to be: with the traditional style of comparative-law scholarship that scorns ideas and fixes its gaze lovingly on the black-letter rules of the private law. That style of scholarship, I contend, is bankrupt; and in the other piece I give several examples of ways in which Watson has, it seems to me, been betrayed by his stronger self. My purpose here is to distinguish the weak twin from the strong: to praise the former, and banish the latter.

II.

It will be helpful if we begin by considering the group of theories Watson is arguing against. I propose to call those theories "mirror theories of law," and wish to make three points about them.

The basic flavor of a mirror theory is given by the following quotation from a distinguished American legal historian, who says that he conceives of law:

> not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society. This is the theme of every chapter and verse.[2]

The essence of the view seems to be this:

> Nothing in the law is autonomous; rather, law is a mirror of society, and every aspect of the law is molded by economy and society.

The first point to notice about mirror theories is that they do not constitute a *single* theory, but rather a *class* of theories. This fact is crucial for determining the logical structure of the arguments that can be deployed against them, and, in particular, for determining the logical structure of Watson's argument. So, for example, the view I have just quoted is but one representative of a familiar class of theories that take the form:

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2. Lawrence Friedman, *A History of American Law* 12 (2d ed. 1985). Here is another representative quotation from the end of the same book:

> 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 against life.

Id. at 595.

> Nothing in the law is autonomous; rather, law is a mirror of X, and every aspect of the law is molded by X.

In other words, this class of theories varies according to the choice of X; and, depending upon the particular theory in question, X can be assigned different (non-legal!) values: geography, religion, the *Weltgeist*, market economics, power-relations, the interests of the dominant class, or whatever.

Such mirror theories have a long and distinguished pedigree. Historically they seem to have appeared first in the eighteenth century,[3] and to have received their most influential statement in the works of Montesquieu, who declared that:

> [The political and civil laws of each nation] should be so closely tailored to the people for whom they are made, that it would be pure chance [*un grand hazard*] if the laws of one nation could meet the needs of another. . . .
>
> They should be relative to the *geography* of the country; to its climate, whether cold or tropical or temperate; to the quality of the land, its situation, and its extent; to the form of life of the people, whether farmers, hunters, or shepherds; they should be relative to the degree of liberty that the constitution can tolerate; to the religion of the inhabitants, to their inclinations, wealth, number, commerce, customs, manners.[4]

Similar statements have been made by Savigny, Hegel, Marx, Jhering, Pound, and many other thinkers of lesser note.[5]

The second point about mirror theories is that, not only do they vary according to the choice of X, but they also vary along a second dimension, which might be called the dimension of *strength*. Given a particular choice of X, a strong mirror theory takes some such form as:

> Law is nothing but X

or:

> Law is wholly explicable in terms of X

or:

> Given a knowledge of X, it is possible to calculate the rules of law that will hold in the given society.

A weak mirror theory, in contrast, claims only:

> Law and X are closely related

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3. Schröder, "Zur Vorgeschichte der Volksgeistlehre. Gesetzgebungs- und Rechtsquellentheorie im 17 und 18 Jahrhundert," 109 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanische Abteilung)* 1 (1992).

4. Charles de Secondat Montesquieu, *De l'esprit des lois*, book I, ch. 3 (Des lois positives) (1748).

5. Numerous quotations are given in Watson, *Society*, supra n. 1, at 3-4.

or:

> A knowledge of X is useful (but perhaps not sufficient) for understanding the rules of law that hold in a given society.

Plainly there is a continuum here, and a mirror theory can be more or less strong depending on *how close* it asserts the relationship between X and a society's laws to be.

There are some interesting parallels and dissimilarities between the two dimensions I have identified. The dimension of strength is a continuum, depending on how close one takes the relationship between law and X to be; whereas the choice of X is the choice of a more-or-less discrete subject-matter: economics, or geography, or whatever. But it should be noticed that, as in the quotation from Montesquieu above, X need not be a *single* subject: thus, a mirror-theory might hold that law is a mirror, not just of economics, but of economics *and* politics *and* climate. This fact complicates the analysis, and gives us a second, derivative sense in which a mirror theory can be strong or weak; to distinguish this sense from the first sense, I shall speak of the theory as being (relatively) *tight* or *loose*. A tight mirror-theory takes X to be a single, narrowly-defined non-legal subject, whereas a loose theory takes X to be a broader range of non-legal subjects. So a strongly-phrased, tight theory might hold:

> Law is nothing but economics;

whereas a strongly-phrased, but looser theory, might hold:

> Law is nothing but economics, politics, power relations, and the ideological consciousness of the age.

It should be clear that, as a mirror-theory becomes *either* weaker *or* looser, it becomes easier to defend and less likely to arouse controversy. But so long as the subjects encompassed by X are external to the law (as they are, say, in the quotation above from Montesquieu) the dimension of looseness is of less theoretical importance than the dimension of strength. For the central question Watson is concerned to answer is:

> To what extent can law be explained in terms of non-legal factors?

and this is primarily a question about the *strength* of any given mirror-theory. For this reason in the discussion that follows I shall ignore the dimension of looseness.

It is important to observe that many of the thinkers mentioned above have advocated a mirror-theory in a strong form, and that the strong form of the theory has had considerable practical influence. Perhaps the most conspicuous example is Savigny's *Volksgeist* theory, i.e., the theory that law must reflect the spirit of the nation.[6] But

6. Friedrich Carl von Savigny, *Vom beruf unserer zeit für gesetzgebung und rechtswissenschaft* (1814). I raise some doubts about the correctness of this strong

other, more modern examples abound. For example, Otto Kahn-Freund's theory of comparative legislation — a revised version of Montesquieu's theory — is very carefully nuanced, and allows that legal institutions may be more-or-less deeply embedded in a nation's life, and therefore more-or-less readily transplantable from one legal system to another; but nevertheless at one end of the spectrum law is so deeply embedded that transplantation is in effect impossible.[7] More generally, the acceptance by legal thinkers of a mirror theory, and in particular of a strong version of a mirror theory, can exert a powerful influence on the academic study of law, determining, for instance, whether one finds the writings of Marx or Foucault or game-theorists relevant to the understanding of labor-law doctrine, or whether, say, legal historians should concentrate their gaze narrowly on the development of legal rules, or should instead investigate the wider social or economic or political context.

The theories Watson is concerned to discuss are strong versions of mirror theories; and this raises the third observation. Observe that the *strongest* version of a mirror theory has the form of a logically universal proposition: that is, it makes an assertion about *every* rule of law, saying that *all* rules are "molded by economy and society." And the crucial logical point is that the *negation* of a universal proposition is not a universal but a particular. That is, to refute the universal proposition one need only exhibit a single counterexample, i.e., a particular rule that is not molded either by economy or by society; it is not necessary to slip into the trap of making the assertion that *no* rule is ever molded by economy and society.

Again, the fact that a mirror theory can be more-or-less strong complicates the analysis. Few of the influential mirror theories take the strongest and most categorical form; most slide into some qualifi-

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interpretation of Savigny in Ewald, "Comparative Jurisprudence (I): What it was Like to Try a Rat?," 143 *Penn. L. Rev.* 1189, 2031, n. 288 (1995). In fact this interpretation, which Watson endorses (id.), seems to me to get Savigny backwards; but that is not an issue that matters for the purposes of the present paper.

7. Kahn-Freund, "On Uses and Misuses of Comparative Law," 37 *Mod. L. Rev.* 1 (1972). Kahn-Freund arranges legal rules and institutions along a spectrum that ranges from the "mechanical" (which is relatively easy to transplant) to the "organic" (which is not). He summarizes his thesis as follows:

> the degree to which any rule . . . or institution . . . can be transplanted, its distance from the organic and from the mechanical end of the spectrum still depends to some extent on the geographical and sociological factors mentioned by Montesquieu, but especially in the developed and industrialized world to a very greatly diminished extent. The question is in many cases no longer how deeply it is embedded . . . but who has planted the roots and who cultivates the garden. Or, in non-metaphorical language: how closely it is linked with the foreign power-structure . . . .

Id. at 12-13. For Watson's response to Kahn-Freund, see Watson, "Legal Transplants and Law Reform," 92 *L.Q. Rev.* 79 (1976); for a continuation of the discussion, see also Stein, "Uses, Misuses— and Nonuses of Comparative Law," 72 *NW. U. L. Rev.* 198 (1977).

cations. If the theory maintains, not that *all* rules are molded by economics, but only that *most* are, then a single counterexample will not suffice. One needs several counterexamples, and counterexamples of a centrality and power sufficient to call the plausibility of the particular mirror-theory into question. But there is no need to produce as well an affirmative theory of the relationship between law and society.

Mirror theories are thus logically quite complex, and vary along several dimensions: they both constitute a class of theories (depending on which variables X the theory treats as the determining factors of law), and they can vary in terms of their logical strength.

Let us now consider how, as a logical matter, one is to argue against such a complex and slippery class of theories. If Watson is to show that the most influential of these theories are untenable, he must show, for each of the familiar choices of X, that the (relatively strong) mirror-theories associated with X are inadequate to explain the nature of the legal system, i.e., that law is not, in fact, in any interesting sense a reflection of X. Perhaps the most direct way to do this (and the way he in fact adopts) is to consider the evolution of a single legal system over time. That is, if a particular mirror theory asserts that

> Legal rules (or at any rate a weighted majority of legal rules) are a reflection of X

he will attempt to show, for *important* clusters of legal rules, that those rules have remained constant over *long* stretches of time, while the underlying facts X have undergone *significant* variation. (The more important the rules, the longer the stretch of time, and the more significant the underlying variation, the stronger is his counterexample to the proffered mirror theory.) At any rate, this is the general strategy; though the details, as we shall now see, are more complex.

III.

As I mentioned at the outset, Watson's writings are voluminous and their principal concern is to delve into the history of the civil law systems; his central theoretical claims must therefore be extracted from the various historical discussions in which they are embedded. Although Watson's remarks on legal theory are widely scattered and at times loosely stated, it seems to me that the principal aspects of his theory can be summed up in five theses. (I offer these theses as what philosophers call a "rational reconstruction" of his theory; they are not thus stated in his writings.)

(1) *The Comparative Law Thesis.* Comparative law should be concerned, not simply to study foreign law, but to

study the relationship between law and society.[8] This thesis (as presented by Watson) divides into two parts:

(a) *The Actual Relationships Thesis.* Comparative law is the study of the influences *that have actually taken place* between one system of legal rules and another.[9]

(b) *The Legal History Thesis.* Because the actual influences take place over protracted periods of time, comparative law will consequently have a large historical component.[10]

I do not propose to discuss these claims at any length, and they will play little rôle in the arguments that follow. Although Watson frequently insists on the actual relationships thesis (a), this particular thesis seems to me not to follow from his more general thesis (1) about comparative law; in fact it constitutes a needless restriction on the subject. One of the delights of comparative law should be to ascertain the ways in which different, unrelated societies have tried to solve similar legal problems; but Watson's thesis (a) would preclude, say, a comparison of the property law of feudal England with that of feudal Japan — a comparison that, at least *prima facie*, might be expected to shed light on the relationships between law and society.

Since thesis (a) seems to me unnecessary to Watson's project, I shall simply discard it as an irrelevance. His thesis (b), in contrast, seems to me essential, although not for the reason he gives. He seems to base thesis (b) on thesis (a). But (b) in fact follows directly from (1). For if one is to study the relationship, within a given society, between law and some external social phenomenon X, one must allow X to vary, and see how law changes in response; and this can

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8. Thus in the Afterword to the second edition of *Legal Transplants*, Watson observes: "My notion was that the study of legal developments in a number of states would, by uncovering patterns and divergences, best reveal societal concerns, and how law responds." Watson, *Transplants*, supra n. 1, at 107. See also id. at 1-21, and Watson, *Roman and Comparative*, supra n. 1, at 97.

9. Thus he says:

> Comparative Law as an academic discipline in its own right is the other side of the coin, an investigation into the legal transplants that have occurred: how, when, why and from which systems have they been made; the circumstances in which they have succeeded and failed; and the impact on them of their new environment.

The quotation occurs in Schlesinger, et al., supra n. 1, at 309.

10. Comparative Law, then, if it is to be an intellectual discipline in its own right, is something other than the study of one foreign system (with glances at one's own), and overall look at the world's systems or comparison of individual rules or of branches of law as between two or more systems, and I would suggest that it is the study of the relationship of one legal system and its rules with another. The nature of any such relationship, the reasons for the similarities and the differences, is discoverable only by a study of the history of the systems or of the rules; hence in the first place, Comparative Law is Legal History concerned with the relationship between systems.

Watson, *Transplants*, supra n. 1, at 6.

only be done by considering historically how law has evolved over time.

The next three theses are the core of Watson's theory and of his argument against the various strong mirror-theories. They are:

(2) *The Roman Law Thesis.* The Roman Law Thesis comes in two forms:

(a) *The Strong Roman Law Thesis.* Roman law is the only thing we need to consider in explaining the modern civil law systems: *Given* the initial acceptance of Justinian's *Corpus Juris Civilis*, "everything else follows."[11]

(b) *The Weak Roman Law Thesis.* Roman law is the most important thing we need to consider in explaining the differences between the common law and the civil law.[12]

These theses are based on Watson's historical studies of the influence of the *Corpus Juris Civilis* on the development of the civil law in Europe; and those studies investigate, not just the influence exerted by the acceptance of the substantive rules of the *Digest*, but also the more subtle influence of the *Institutes* on such matters as legal education or the way in which the civil law systems arrange the various legal sub-disciplines.

These Roman law theses are the empirical core of Watson's argument against the mirror theories. They are also the foundation for the next thesis.

(3) *The Transplants Thesis.* As a matter of observed fact, legal borrowings have been the "most fertile" source of legal change in the Western world.[13] The rules of Roman law have been transplanted in bulk into most of the countries of Continental Europe, and form the foundation of their legal systems; in addition, within a legal system change often occurs as a result of *internal* borrowing, when a new rule is developed by analogy to an old rule on a different subject.

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11. Thus Watson writes:

> After the initial acceptance [of Justinian's *Corpus Juris*], everything else, including the dominant role of the universities in shaping legal thought, would follow. For this process, once started, to be explicable, no reference need be made to further societal factors, including the general political structure or the organization of practicing lawyers.

Watson, *Making*, supra n. 1, at 32-33.

12. "An historical dependence on Roman law is, in fact, the common characteristic of the civil law systems. . . ." Id. at 3.

13. "[T]ransplanting is, in fact, the most fertile source of development. Most changes in most systems are the result of borrowing." Watson, *Transplants*, supra n. 1, at 95. See also Watson's comments in Schlesinger, et al., supra n. 1, at 309.

Here, again, Watson states the implications of his observations in two forms, sometimes seeming to assert that comparative law is *equivalent* to the study of legal transplants,[14] and sometimes asserting the weaker claim that comparative law should be centrally (but not exclusively) concerned with the study of legal transplants.[15]

Two things should be noticed about the transplants thesis. First, Watson, on the basis of his historical investigations into *Roman* law, has now begun to move to conclusions about the methodology of comparative law *in general*. This might seem like a plump *non sequitur*; however, Watson's work implicitly contains a complex, underlying argument that would justify the move. The argument involves numerous historical considerations that I cannot go into here; but, briefly, Watson argues that the "transplant bias" of Western legal systems is grounded in the nature of the legal profession. Lawyers (whether they act as legislators, judges, or scholars) constitute an elite lawmaking group within society; into their hands has been entrusted the task of interpreting, preserving, and developing the law. On the basis of historical observation we can make certain general comments about how they have done this. As a group, lawyers exhibit certain distinctive characteristics. They are creatures of habit; they tend to view legal rules as ends in themselves; in altering the law they seek either to play down the extent of the change, or to borrow a rule from some foreign legal system with great prestige and authority. In brief:

> Law is treated [by the legal elite] as existing in its own right; it is being in conformity with lawness that makes law law. Hence, first, the means of creating law, the sources of law, come to be regarded as a given, almost as something sacrosanct . . . . Secondly, law has to be justified in its own terms; hence authority has to be sought and found. That authority (in some form, which may be perverted) must already exist; hence law is typically backward-looking. These two features make law inherently conservative.[16]

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14. Watson provides a summary description of his approach to comparative law in Schlesinger, et al., supra n. 1, at 309:

> Comparative Law is a study of the connections between systems which have some relationship. As a practical subject Comparative Law is a study of the legal borrowings or transplants that can and should be made; Comparative Law as an academic discipline in its own right is the other side of the coin, an investigation into the legal transplants that have occurred: how, when, why and from which systems have they been made; the circumstances in which they have succeeded and failed; and the impact on them of their new environment.

15. The main type of relationships between systems arises because one system borrowed from the other, or because both borrowed from a third. Since borrowing — often with modifications — is the main way in which the law of any Western system develops, at the centre of study of Comparative Law should be Legal Transplants.

Watson, *Society*, supra n. 1, at 141.

16. Watson, *Evolution*, supra n. 1, at 119.

The crucial point to notice is that, if this argument about the nature of the legal elite is correct, then legal transplants will constitute the chief mechanism of legal change for law *in general*, and not just for the history of Roman law.

The second point to notice is that this same argument about the legal elite is crucial to Watson's argument against the mirror theories. Recall the logical structure of those theories: they form a class varying according to the choice of X, and they vary in strength. Were Watson to show, for various choices of X, that the resulting strong mirror theory fails to account for the historical facts, he would have provided only a superficial and (as it were) negative account of the failure of various mirror theories. That is, he would have told us that certain theories fail to work; but he would not have explained, at a deep level, why they fail, and he would have given us no affirmative reason for believing that, in principle, no mirror theory is likely to succeed where the existing theories have failed.

But his discussions of the culture of the legal elite fill this gap. For if lawyers are as bound by the legal tradition, by the need for authority, by the need to appear to be moving in accordance with precedent as his account suggests; if, for their legal justifications, they look principally to the legal tradition itself, and not, as a rule to anything outside of that tradition, then strong mirror theories as a class are unlikely to provide an accurate account of the evolution of law.

(It is important here to bear in mind the logical structure of the argument Watson needs to make. He does not need to show, in order to refute a strong mirror-theory, that lawyers *never* look outside the legal tradition; he need only show that *often* they do not. The power of the facts he adduces about the legal elite is that, if true, they suggest a conclusion even stronger than the one he needs: that, not only *often*, but *usually*, lawyers look to the legal tradition rather than to economics or sociology or politics.)

These theses and their supporting arguments have an important corollary:

> (4) *The Insulation Thesis*. The development of the civil law is the result of "purely legal history," and can be explained "without reference to" social, political, or economic factors.[17]

Once again, Watson's insulation thesis comes in two versions. In some moods he is uncompromising, and states his thesis as what

17. For example, Watson says:

> [According to Kahn-Freund,] 'No amount of planned or unplanned harmonization can expunge the traces of political or social, as distinct from purely legal, history.' Contrary to this opinion, the main differences in common law and civil law systems, which are generally to be found in approaches to law and to structures, are primarily the result of purely legal history.

Watson, *Making*, supra n. 1, at 38.

might be called the *strong insulation thesis*; informing us, for example, in a striking passage, that

> The lesson of history, in fact, is that over most of the field of law, and especially of private law, in most political and economic circumstances, political rulers need have no interest in determining what the rules of law are or should be (provided always, of course, that revenues roll in and that the public peace is kept). Rulers and their immediate underlings can be, and often have been and are, indifferent to the nature of the legal rules in operation. This simple fact is often overlooked; indeed, it is habitually denied. But failure to accept it is the greatest cause of misunderstanding the nature of law, the relationship of law and society, and the course of legal development.[18]

(Notice here that the claim is not about Roman law or Western law, but about law in general.)

In other moods he is more guarded, and adopts what might be called the *weak insulation thesis*:

> No reasonable person would wish to deny that to some extent a people's law is peculiar to it, that the law does reflect that people's desires and needs. . . . It is easy to agree that a legal rule is often the result of social engineering especially if we consider only case law, or a statute when it is passed. And who would deny that much of law reflects the interests of the ruling élite?[19]

Watson's actual position is, I think, the more nuanced weaker position; but at times he slides to the stronger position. (This is an important fact, and I believe the slide affects his practice of historiography. But I shall not discuss this matter here, since my concern is solely to understand the fundamentals of his argument against the mirror theories of law.)

It should also be observed that Watson deploys two sorts of argument against the mirror theories. First is the *general* argument I have already noted; that is, the argument that, because of the cultural attributes of the legal elite, law will tend to develop by transplantation rather than by creation *ex nihilo*, and will tend to reflect the legal tradition rather than anything extrinsic to the law. Second,

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18. Watson, *Roman and Comparative*, supra n. 1, at 97-98.

19. Watson, *Society*, supra n. 1, at 4. Or again:

> The general argument of this book has been, it will be recalled, *not that private law fails to mirror the needs and desires of society or its ruling élite*, but that to a very considerable extent it is out of step with such needs and desires. This divergence, it has been maintained, is so great that none of the theories of the development of law and society are acceptable even though each, or at least some, may contain much accurate observation.

Id. at 130; emphasis added; footnote omitted.

however, Watson advances numerous arguments of *detail* — specific counterexamples to the claims of the mirror theories. For these counterexamples to be persuasive, Watson must show that they are not mere incidental blemishes on the mirror theories, but go to the heart of the issue. He accordingly describes numerous examples[20] in which the following conditions are satisfied:

(1) The legal rules are *inefficient* in the sense that:

(a) the rules, both from our point of view and from the point of view of members of the society, benefit nobody within the society; and,

(b) the rules, both from our point of view and from the point of view of members of the society, harm either the society as a whole or harm some large and powerful group within the society;

(2) these inefficiencies are *known* to the legal elite, who also know of the possibility of changing the rules, and who have the power so to change them; and,

(3) the rules and the inefficiencies are nevertheless allowed to *persist* for centuries.

Watson concludes from these counterexamples that:

> Legal rules, once created, live on. They are frequently remote from the experience and understanding of non-lawyers, and are kept in existence by factors such as the absence of effective machinery for radical change, by indifference, by juristic fascination with technicalities, and by lawyers' self-interest.[21]

IV.

It should be evident from the foregoing discussion that Watson's argument and the mirror theories he contests both have a complex and intricate structure, and that his arguments have far-reaching implications for legal scholarship.

As a result of this logical complexity Watson's argument is easy to misunderstand, and in particular it is important to observe the way in which he relates historical facts to his theoretical conclusions. It is especially important to observe that the Insulation Thesis is a *consequence* of the earlier theses, and not their foundation. In other words, the argument is not:

> Law is insulated from social change; therefore legal evolution must take place by the transplantation of legal rules

20. The examples include: the English system of land tenure, Roman contract law, the Roman *paterfamilias*, the medieval doctrine of "benefit of clergy." See, Watson, *Society*, supra n. 1, at 12-22, 47-59, 23-30, and 92-96.

21. Id. at 8.

but rather:

> History shows that, because of the nature of the legal profession, legal change in European private law has taken place largely by transplantation of legal rules; therefore, law is, at least sometimes, insulated from social and economic change.

This is an important point, because the historical argument presents specific and testable empirical evidence for the more general insulation thesis; if (as some critics have done) one gets the argument backwards and starts with the more general thesis, Watson will appear to be first stating an implausible and unsupported doctrine about the nature of law in general, with the result that the entire argument is left hanging in the air.

Watson himself often tends to slide towards the strong versions of his theses, and we must therefore try to understand both why he does so, and the limits of what his argument is capable of establishing.

First, it should be noticed that, strictly speaking, his conclusions about the method of comparative law do not follow from the premise about the "fertility" of legal transplants. For even if most existing legal rules in most Western legal systems arose through borrowing and transplantation, it might still be the case that comparative law should study the exceptional moments of transition, when a legal system has created something entirely novel — just as, in the study of domestic American law, one concentrates, not on the routine cases that, in terms of sheer quantity, make up the overwhelming bulk of cases that enter the legal system, but rather on the exceptional cases that re-define the law. (This observation, although it is important for the methodology of comparative law, is not central to the discussion of the mirror theories, so I shall not argue the point further.)

Second, as a logical matter Watson's Insulation Thesis is bound by the limits of his data. His theories are based principally on his investigations of Roman law, and specifically of Roman *private* law. He is therefore not entitled to claim that law in other, non-Western cultures obeys the Insulation Thesis: this may well be true, but it is a conclusion that requires further argument. Nor, indeed, by the same token, can he claim that European *public* law is insulated from political, economic, and social forces. That conclusion is most likely false,[22] and when Watson is being precise he is careful to state his conclusions as conclusions about private law only.[23]

There are, I believe, three reasons for Watson's tendency to slide to an unacceptably strong statement of his position. First, as we have

22. I have made this argument in Ewald, "The American Revolution and the Evolution of Law," 42 *Am. J. Comp. L.* 1 (supplement volume 1994).

23. Watson, *Roman and Comparative*, supra n. 1, at 271-72; Watson, *Society*, supra n. 1, preface.

seen, the argument he advances is so complex that it is easy to lose track of the various qualifications that must be added — especially when the presentation of the theory is intermingled with the analysis of historical details; so that it becomes easy to assert more than has in fact been established. Second, the theories he opposes have such a complex structure that he is in a manner pressed to exaggerate his claims; for a mirror theorist can accommodate most counterexamples simply by weakening the mirror theory, but refusing to abandon it. So it is a temptation to preempt this maneuver by making unnecessarily categorical assertions that, for example, "political leaders need have *no* interest in determining what the legal rules are or should be."

Third, it is important to observe that Watson is not hostile to theories about the relationship between law and society,[24] and therefore not hostile to pronouncing general theories. Indeed, such hostility would be hard to reconcile with his view of comparative law. But for precisely this reason the strong version of the insulation thesis is, in the end, both less interesting and less in keeping with his general approach than the more nuanced weak version. For a theory that says that there is *no* significant relationship between law and politics (or society, or economics, or religion, or whatever) leaves us with nothing further to say. Whereas the weaker version lays stress on the *complexity* of the phenomena, pointing out that the relationship between law and society is neither non-existent, nor a simple mirroring, but a subtle and intricate interrelationship that must be studied case-by-case.

V.

Let us briefly take stock of where we are. Watson's criticism of the mirror theories is, as we have seen, far more complicated than it appears on the surface. It offers numerous subtle enticements towards oversimplification, and in particular towards a confusion of two quite different claims, one negative, and the other positive: on the one hand, the denial that law is a mirror of society; and, on the other, the claim that law is entirely insulated from society.

There is reason to fear that the complexities of Watson's argument have led to widespread misunderstanding of his theory. The point can be illustrated by considering the criticisms of Watson that have been made by the legal sociologist Richard Abel. Abel is one of the few scholars to have attempted to grapple with Watson's argument in detail and to evaluate its importance for the social theory of law. But it seems to me that he falls victim to precisely the logical

24. Thus one book begins by announcing: "In this book I seek to present a general and coherent view of the nature of legal change which is independent of a particular time and place." Watson, *Evolution*, supra n. 1, at ix.

misunderstandings I have outlined above, and that these misunderstandings are the source of several subsidiary misunderstandings.[25]

Abel's discussion explicitly revolves around issues of logical structure. He begins his analysis with a blunt *confessio ignorantiae*, admitting at once that "I possess no expertise in the historical data themselves,"[26] and saying that, rather than dispute about the facts, he will "clarify" Watson's theory, and "criticize it from the perspective of contemporary scholarship in law and social science"; he proposes to uncover its "conceptual structure" and reveal its "political ideology."[27]

Abel levels a number of accusations against Watson's work. Watson's concept of law, he says, is so "vague"[28] that "confusion is the inevitable result."[29] Watson's reasoning is "simplistic," "implicitly anti-theoretical," and "mystifying."[30] In addition Abel levels the following specific charges:

(1) *Monolithic structure of society*. Watson treats society "as an undifferentiated, personified whole," and ignores the differences between "interest groups, strata, or classes."[31]

(2) *Imposition of values*. Watson imposes his own value-judgments on the societies he studies, and judges the appropriateness "of every law by a single standard — whether it promotes efficient social engineering."[32]

(3) *A-historicism*. Moreover, Watson has "a tendency to be both ethnocentric and ahistorical."[33] Watson's a-historicism is related to his imposition of his own values on the societies he studies:

> He judges the 'appropriateness' of every law by a single standard — whether it promotes efficient social engineering — despite the fact that law has been viewed as capable of ready manipulation to serve consciously chosen ends only during the past few hundred years and even then primarily in Western nations.[34]

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25. Watson has himself replied to Abel's famous or notorious attack; see Watson, "Legal Change: Sources of Law and Legal Culture," 131 *U. Pa. L. Rev.* 1121 (1983). My criticisms of Abel take a different tack, and focus on the logical aspects; but, as Watson shows with gusto and glee, there are things to be said about Abel's knowledge of history as well.

26. Abel, "Law as Lag: Inertia as a Social Theory of Law," 80 *Mich. L. R.* 785 (1982).

27. Id.

28. Id. at 785.

29. Id. at 786.

30. Id. at 788 and 794.

31. Id. at 787.

32. Id. at 791, 792, 793.

33. Id. at 792.

34. Id. at 793.

(4) *The uselessness of law.* Watson believes that "most laws are useless," "serve *no* purpose," "have no meaning," and are "both pointless and socially harmful."[35]

(5) *Political conservativism.* Watson has "a basically conservative world-view"; he is "not really an admirer of liberal democracy";[36] he attempts to "trivialize the political";[37] like Karl Popper and Robert Nisbet, his apolitical scholarship seeks "to confute radicals, notably Marx and later Marxists, who maintain that historical trends do exist and should be used to further progressive causes."[38]

(6) *Not a theory.* Finally, Abel asserts that, "[p]erhaps the most serious problem with Watson's theory is that it is not a theory at all."[39]

Abel's accusations, it seems to me, all rest on a misunderstanding of the logical structure of Watson's argument. Abel takes Watson to be asserting the Insulation Thesis in its strongest form:

> In fact, in reacting against the prevailing theoretical framework, Watson has not escaped it but merely turned it upside down. He appears to be asserting that law has *never* been congruent with society, *is not* presently used for social engineering, and *does not* express class domination.[40]

But Abel has here fallen into precisely the logical trap I identified earlier, namely, a confusion of "sometimes not" with "never." And from this error, I believe, all his other misunderstandings of Watson's argument flow.

Take, first, "the most serious" problem with Watson's theory, namely that it "is not a theory at all." If by *theory* is meant a positive theory of the relationship between law and society, this observation is correct, but harmless. For Watson's purpose is to argue that the mirror theories fail to fit the historical facts. And, as we saw, to accom-

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35. Id. at 791, 797, 798, 799.
36. Id. at 806.
37. Id. at 803.
38. The full quotation reads:

> This perhaps unconscious concealment is consistent with his basically conservative world view. Nor is the connection between conservatism and apolitical interpretation accidental. Those who have denied the existence of pattern in history—scholars like Karl Popper and Robert Nisbet—have been political conservatives seeking to confute radicals, notably Marx and later Marxists, who maintain that historical trends do exist and should be used to further progressive causes.

Id. at 803.

I note in passing that Abel is mistaken in his reasoning in this passage. Historicist theories have been advocated both by radicals (like Marx) and by social conservatives (like Savigny): there is no necessary connection between a belief in laws of history and political radicalism. (Indeed, Hegel's followers notoriously divided into two hostile political camps, the radical "Left Hegelians" and the conservative "Right Hegelians." Both camps affirmed "the existence of pattern in history.")

39. Id. at 793.
40. Id. at 790 (emphases added).

plish this he need only provide a string of counterexamples; he does not in addition need an affirmative theory of law and society.

Consider now the charge that he views society as a monolith. The mirror theories assert that legal rules reflect the interests of society, or of some group within society. In response, Watson must supply examples of legal rules that reflect the interests of *no* group within society.[41] But plainly the fact that he is able to provide *some* such counterexamples does not commit him to the proposition that the interests of *all* groups *always* coincide.

The situation is somewhat more complex for charges (2) and (3), the charges that he is a-historical and that he measures all values by a single yardstick. For here there is an important split within the mirror theories. Some mirror theorists, like Marx, treat law as a reflection of economic relations, and measure law by a standard of economic efficiency that is constant across cultures. Others, like Savigny, allow a greater degree of cultural relativity, and allow that values can vary from *Volksgeist* to *Volksgeist*. Watson accordingly chooses counterexamples that fail by *every* yardstick: our own, and the yardstick of the culture under study, and of every significant subgroup within that culture. But the fact that, in these examples, we and the foreign culture are in agreement does not commit him to the proposition that all cultures can or should be measured by twentieth-century Western standards.

As for the charge that "*most* laws are useless," Watson's argument is merely that the legal rules discussed in his particular counterexamples are "dysfunctional"; but this conclusion says nothing about laws in general.

The accusation of conservativism is more puzzling; it appears to have arisen in the following way. First, Abel interpreted Watson as advancing the theory that there is *no* relationship between law and society. Then he concluded that Watson must actively approve of legal inertia; *ergo*, that he is a political conservative. Indeed, at one point Abel declares:

> What is singularly lacking in [Watson's] view is any notion that law ought to lead society, ought to be an instrument for

41. That the choice of these examples was deliberately motivated by the logical points I have been discussing is clear from the following quotation:

> In other words, I will look for examples where the law actively benefits no recognizable group or class within the society (except possibly lawyers who benefit from confusion) and is generally inconvenient or positively harmful either to society as a whole or to large and powerful groups within the society. . . . [O]ne advantage of this way of proceeding is that we need not concern ourselves with the definition of such sociological concepts as stratification, class, power.

Watson, *Society*, supra n. 1, at 9.

> radical change, from which I infer that he opposes such change.[42]

But to describe a phenomenon is manifestly not *ipso facto* to applaud it; one may also describe in order to deplore, and Abel's interpretation of Watson can not survive a careful (or even a casual) reading of the text. Watson repeatedly speaks of "dysfunctional" legal rules, calling them "absurdities" or "unsuitable" or "inappropriate" or "out of step with society"[43] —terms that scarcely suggest warm approval. His position on legal reform is rather that the mirror theories can conceal the difficulty of change by suggesting that there is a Panglossian preestablished harmony between law and society,[44] and in accordance with this insight he has proposed changes to the law-making process precisely in order to overcome the inertia of the present system.[45]

Professor Abel's curious accusation that Watson is "ethnocentric" and "a-historical" we can, I think, safely leave Watson to discuss with his historical and linguistic peers. My present enterprise was merely to point out that Abel's remaining accusations rest on a failure to appreciate the logical distinction beween "never" and "sometimes not."

VI.

If the foregoing argument has been correct, then, if we are to interpret Watson's theory correctly, it is important to bear in mind the logical distinction between, on the one hand, negating the mirror theories, and, on the other, offering an affirmative theory of the relationship between law and society. With this distinction in hand, we are now in a position to evaluate Watson's accomplishment, which is an accomplishment both destructive and constructive.

On the destructive side, it seems to me that even the weak versions of Watson's theses are adequate to scupper the traditional mirror theories that have so dominated modern legal thought. Legal theorists are no longer entitled to make glib assertions about the preestablished harmony between law and society: that law "mirrors" society or that it "fits society like a glove." For Watson has shown that those *a priori* assumptions are open to too many exceptions to be tenable as a general theory of law.

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42. Id. at 802.

43. E.g., in *Society*, at 84, 130, 132, and passim; it should perhaps also be remarked that he has written articles with titles like "A House of Lords' Judgment and Other Tales of the Absurd," and books with titles like *Failures of the Legal Imagination* or *Joseph Story and the Comity of Errors*.

44. Thus he asserts that "if legal rules have to be fought for and legal improvements result from battle, then the fight for change is, in general, not vigorous enough." Watson, *Society*, supra n. 1, at 133. Or again: "[I]f we want to have a legal rule suited to our needs we must in many instances cleanse it from its history, take it right away from our existing tradition." Id.

45. See his "Two Tier Law — a New Approach to Law Making," 27 *Int'l. & Comp. L.Q.* 552 (1978).

It is tempting, as we saw, to pass beyond this important negative conclusion to something like Watson's Strong Insulation Thesis, i.e., to the general thesis that law is radically insulated from economics, sociology, and politics. But I have urged that we should resist the temptation. There are essentially two reasons. First, although Watson's examples suffice to undermine the mirror theories, they do not yet provide an adequate foundation for a full-blown theory of law and society. Watson's focus has been almost exclusively on the rules of private law in western Europe, and he is not entitled, on this slender evidential basis, to draw conclusions about law in general.

The second reason, however, is more subtle and more fundamental. And it is precisely here that the distinction between the weak and the strong versions of Watson's argument becomes crucial. Both suffice to undermine the mirror theories. But the Strong Insulation Thesis leads to the conclusion that there is *no* interesting relationship to be discovered between law and society; the result is a view of law and society that is as categorical and as one-dimensional as the mirror theories he contests.

The weak version, in contrast, opens the door to a view of law that is subtler and more nuanced than any of the theories that have hitherto prevailed. Watson has shown that law does not *reduce* to economics (or politics or philosophy or society); but, as we saw, he need not claim that law is entirely *unrelated* to these subjects, and this means that he need not abandon altogether the insights of the great legal thinkers of the past. Something can be salvaged from the work of Marx and Savigny, of Montesquieu and Jhering. But the point is that their ideas must now be coupled with a cautious awareness of the complexity of the relationship between law and society, and must be grounded in a deep investigation of the history of law.

In particular, Watson's work shows two things about any future social theory of law. First, the content of such a theory will have to be far more complex than the old theories. It will have to account *inter alia* for legal dysfunctions, for inertia, for failures of rationality — and not just incidental failures, but failures on a massive scale. It will have to uncover, case by case, the various causes of legal change, and explain their relationship to the forces of inertia. Whatever these relationships turn out to be, they are unlikely to be straightforward; indeed, it is reasonable to expect that the causal relations between law and society will prove to be reciprocal, interactive, and multi-layered. If that is so, then one must be prepared for the possibility that (as has happened in certain parts of physics and logic) no satisfactory theory can be given: the phenomena may be too complex for a tidy description, even in principle.

Second, Watson's work sets new methodological standards for sociological speculation about the nature of law. It should be clear from

the foregoing discussion that a theory of law must grow out of a careful study of the data, rather than being imposed upon them *a priori*. And Watson's investigations make clear what kind of a study is required. The study can not confine itself to an investigation of a single, present-day legal system, but must also contain a substantial historical and comparative component. For in attempting to limit the link between law and society, one must consider how laws originate, how they evolve, and how they differ from society to society; and this can only be done by detailed comparative studies. Moreover, such studies must take into account the reciprocal influences of different legal systems, one upon the other, and the spread of legal ideas from culture to culture. As a practical matter, this means that speculative legal sociologists will either have to chase the comparative and historical quarry themselves — with all that entails in the mastery of languages, of archival sources, of the history of ideas — or depend upon others to do the job for them. But *somebody* must do it, or the ensuing speculations will be (as so often in the past) little more than a fable.