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Sources of Law, Legal Change, and Ambiguity

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SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY. By *Alan Watson.* Philadelphia: University of Pennsylvania Press. 1984. Pp. xviii, 164. $22.50.

Sources of Law, Legal Change, and Ambiguity, by Alan Watson,[1] is a valuable and ambitious discussion of the "sources of law" — how law is developed and what authority gives it legitimacy. The first half of the book discusses methods of lawmaking at various points in European history, while the second concerns problems of lawmaking in modern England and makes proposals for radical reform. Both halves share a single thesis: that inadequate and uncertain sources of law in Western society have often caused confusion as to what the law is.

Unfortunately, Professor Watson's treatment, spanning twenty-two centuries in 131 pages of text, is too brief and too cursory to do justice either to the subject or to the author's own provocative ideas. The result is two incongruous halves uneasily pasted together rather than a seamless whole. Furthermore, the second half — especially the author's proposal for a new system of law — is especially vulnerable to criticism.

The "sources of law" of which Watson writes include custom, legislation, scholarly writing, and judicial precedent.[2] The general line of his argument is clear: these sources of law are often inadequate and unclear, and lawyers and others have paid insufficient attention to improving them. One of his examples of this inadequacy is the legislative system of England (and, by analogy, that of the United States), in which old, outmoded laws are retained because the legislature does not have the will to agree on new laws (p. 83). A related example is the legislative habit of passing statutes with broad, often ambiguous language (because it is easier to secure a majority this way), and leaving it to the courts to divine the legislative "intent" behind the language — even though there really was no such "intent," and many of the legislators voting for a bill may not even have read it (pp. 78, 80). Consequently, there is much confusion as to what the law is and from whom it comes.

In arguing that this problem is by no means new, Watson draws on examples from ancient Rome, from Germany and northern France in the thirteenth through fifteenth centuries, and from Italy, France, and

1. Professor of Law and Classical Studies, University of Pennsylvania, and editor of a forthcoming English edition of Justinian's *Digest.*

2. Unfortunately, the author is not always entirely clear what he means by such terms. For example, "custom" as he uses the phrase is extremely difficult to define. It is something other than merely prevailing moral values (p. xii), but it does appear to have something to do with popular feelings and usages, pp. 22, 37 — which need not, however, be *current* usages but may be relics of past beliefs. P. 27.

Scotland in the seventeenth century. In all of these examples, problems resulted when a jurisdiction sought to formulate its laws, especially when the jurisdiction sought to use custom (whether its own or another's) or the laws of another jurisdiction.

In imperial Rome, Watson notes, confusion about the sources of law was partly caused by the fact that works which had the force of law were rarely collected and difficult to find, so that even lawyers did not have access to them (pp. 16-17). In medieval Germany and northern France, law was almost wholly customary and local. Custom, however, is often hard to discern and leaves many gaps, creating a legal vacuum, which in Germany was filled in part by *Spiegels* (books discussing the legal customs of a specific place). These books were privately produced, yet often considered authoritative even outside of the place covered — oddly, since the laws treated by the books were based solely on the custom of the jurisdiction covered (pp. 26, 28). The failure of custom to provide sufficient legal guidance in a jurisdiction thus led it to adopt the customs of other jurisdictions. Furthermore, in time the *Spiegels* came to be treated as a kind of code, which would override custom itself (p. 38) — thus making one jurisdiction's custom subservient to that of another area.

Another way in which the legal vacuum was filled was the practice of some towns of carrying over intact the body of law of another town (even when that other town was not politically dominant). The body of law adopted would itself be essentially the custom of the "mother" town; the "daughter" town would not only adopt this custom but rely on interpretations of the law by experts in the "mother" town. Adding to the confusion was the fact that the mother town's law was often unwritten — indeed, such law was in many cases written down for the first time by the experts, or *Schöffen,* only in response to questions from the "daughter" town as to what the *latter's* own law was (pp. 35, 39). The value of custom as a source of law is that it reflects and is adaptable to local usage and belief, yet in the case of both the *Spiegels* and the "mother-daughter" arrangements, jurisdictions adopted the custom of other areas, partly because their own customs were inadequate in that they were not known or written down.

In medieval France, there were frequent attempts to remedy the inadequacies of custom by writing them down. Once these customs were written out, however, they tended to become established as if they were statutes, thereby lessening the values of adaptability and compatibility with local usage (pp. 44, 48, 101). Even though the customs were written down, there remained a need for other sources of law, yet these alternative sources were sometimes ludicrously disguised. One French legal compiler, in clarifying the French law, simply carried over the old Roman law but, to give it authority, attributed it to French sources (p. 47).

In seventeenth-century Italy, lack of sufficient local law contributed to the use of Roman law and of the "law of neighboring places," a group often broadly defined to include France and Spain. Use of Roman law, however, led to confusion because the Latin of the Roman legal authorities was neither that of the classical authors nor that of educated seventeenth-century Italians.[3] The "law of neighboring places," meanwhile, was extremely difficult to find and raised further language problems. Moreover, since there was no systematic ranking of other legal systems, its use gave great discretion to the judge to use whatever law he favored.

Watson perceives a common problem in these examples: the inadequacies of existing law create a vacuum which leads to the often unthinking adoption of other inadequate law in an attempt to fill the gaps. Examples include the ready adoption of the *Spiegels* and of "mother" towns' laws in medieval Germany, the significance accorded Lord Stair's *Institutions* in eighteenth-century Scotland (p. 74), and a frequent demand for codification as a way to clarify and simplify the law. The replacements, however, were themselves rarely satisfactory: Watson notes, for example, that "codification once complete, law begins to sink back into complexity and ambiguity" (p. 97).

Watson's overview of the problem of legal sources in European history is an impressive performance, but a flawed one. For some periods, notably seventeenth-century Italy, he relies too heavily on the work of a few authors, and sometimes strains to make rather bland quotations carry a greater freight of significance than they can easily bear.[4] For some areas, such as ancient Rome, it may be that there are just not enough sources extant for an exhaustive study; the author's twenty-four pages on the subject span eight centuries. If this is the case, however, it would be better to face up to it rather than to pretend that one can accurately discern, from a handful of texts, a society's attitudes toward many issues over a long period. Finally, Watson does not always translate his quotations into graceful (or even grammatical) English. One quotation is rendered as: "we relied upon God who in the magnitude of his goodness can gift and bring to fulfillment achievements deeply desperate" (p. 94).

It is, however, the second half of the book — dealing with modern England and with Watson's scheme for a new system of law — that is most vulnerable to attack. First, while a paucity of materials may justify briefer treatment of ancient Rome than is desirable, the same cannot be said of nineteenth-century England. Yet the author, having an

3. Indeed, one polemicist argued for the use of Italian in the law on the ground that, being clearer and better understood than Latin, its use would give rise to less litigation. P. 57.

4. *See, e.g.*, pp. 4 (in which a two-sentence joke by Cicero becomes a major source on Romans' attitude toward legal authority), 60 (in which a single contemporary treatise becomes virtually the sole important authority Watson uses in discussing seventeenth-century Italy).

opportunity to delve into the riches of English legal history, and expressly disclaiming a desire to deal with the present (p. 77), prefers to write, in pamphlet-like tones, about Harold Wilson's Minister of Housing and Local Government, and how impossible it is to get anything through parliament nowadays.

Watson's scheme for a new system of law is still less satisfactory. He proposes a system of "two-tier law" which he believes would enhance the law's comprehensibility, comprehensiveness, and responsiveness to community values and social change (p. 112). Under this system, the focus would be on the legislature rather than on the judiciary. An interpretive committee, mainly of legal experts, would draft, and the legislature ratify, two types of law: a code of "first-tier law," which would be accessible to the layman and would seek to make the law clear to nonlawyers; and a "second-tier law," which would be a thorough, comprehensive commentary on the first-tier law, and which itself would have the force of statute but, unlike modern statutes, would deal in much greater depth with the reasoning behind the law and with possible applications to hypothetical situations. In Watson's system, the courts would be limited to applying the very detailed codification and would have no judicial precedent and no direct citation of scholarship (p. 113).

Professor Watson somewhat uncharitably observes that his proposal has no chance of being enacted because of the selfishness and self-interest of the legal profession (p. 131). Another possible reason is that it is an inherently unworkable scheme. It may seem quaint to hand over the writing of laws to a group of legal scholars who would sit down and write up works with the force of law. This, however, is in itself not a very difficult notion to accept, since it is essentially how the Uniform Commercial Code, for example, originated. The problem, rather, lies in Watson's belief that such law could be drafted so as to be considerably more comprehensible than it is now, and so that it could significantly reduce the role of judges in producing the law.

The first-tier law, for example, would be aimed specifically at nonlawyers (p. 126), but it would be supplemented by the second-tier law and overridden by it when the second-tier law is directly on point.[5] Therefore, even if the first-tier law is extremely clear, it could mislead the citizen who does not know the second-tier law. Indeed, the clearer, simpler, and shorter the first-tier law is, the greater its likely divergence from the more complex and specific second-tier law. Conversely, the more accurate the first-tier law is, the less likely it is that it could be communicated effectively to the nonlawyer. It may be that in a complex society, law is necessarily complex, and it is an unhappy thing to imagine trying to explain amorphous standards such as "rea-

5. Presumably the extremely difficult issue (not dealt with by Watson) of whether the second-tier law is "on point" would be decided by the judges.

sonableness" to the layperson in such a way that it will both be understood by the nonlawyer and be accurate enough to be codified law.

But there are still graver practical obstacles to the plan. Watson himself acknowledges that it is extremely difficult to pass any law in a legislature, and still more difficult to get legislators to agree on a common reason for passing it. Legislators, therefore, are often intentionally obscure in their drafting, so as to attract the largest number of other legislators to support the bill for often contradictory reasons, and, by eliminating unneeded specificity, to avoid antagonizing voters. Difficult as it is to pass laws under that system, it would be far more difficult to persuade a majority of legislators to agree on a thorough treatise having the force of law, discussing in detail how the law will apply to specific situations, and describing the reasons why the law should be so.

This problem is compounded by the fact that the Interpretive Committee itself would probably have enormous trouble agreeing, and a treatise approved by the committee on a three-to-two vote would be unlikely to find much deference in the legislature. The Committee might be able to agree (or to win legislative ratification) only by obscuring the language and blurring differences; the temptation to leave the real problems to the judges would remain.[6]

Thus, even if the author's proposal were put into effect, it would be likely to lead naturally to a system with many of the defects of our own: broad, general statutory language, promulgated because more specific proposals were too controversial, and supplemented by a plethora of exceptions. Therefore, while Professor Watson may be correct in arguing that the currently existing sources of law are unsatisfactory, he has failed to show that his own preferred alternative would be an improvement.

6. Any expectation that the statutes passed would be free of inconsistencies should be tempered by knowledge of the American Law Institute's experiences in drafting restatements. Faced with a dispute between Williston and Corbin on whether consideration should be required for an enforceable contract, the Restaters of Contracts chose simply to include both views, in sections 75 and 90. *See* G. GILMORE, THE DEATH OF CONTRACT 60-65 (1974).