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# Society and Legal Change

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SOCIETY AND LEGAL CHANGE* By *Alan Watson*. Edinburgh: Scottish Academic Press. 1977. Pp. xi, 148. £3.75.

Most contemporary American legal historians agree that post-Revolutionary American society shaped and was shaped by evolving rules of private law.[1] Morton Horwitz, for example, argues that antebellum judges aggressively manipulated common-law doctrines to promote commercial development and to direct power and wealth to emerging entrepreneurial and commercial groups.[2] More specifically, the legal establishment modified private law to facilitate the transfer of capital and credit, reduce the liability of sellers, and decrease the vulnerability of employers.[3]

Alan Watson's engaging 150-page book rejects this view of legal development. Instead, it marvels that Western societies for centuries supported systems of private law that remain hopelessly out of step with the needs and aspirations of their citizens, particularly those of their dominant classes. For Watson, archaic rules of private law endure by the grace of inertia in legal reform and society's remarkable tolerance for the irrational. Watson draws freely from his encyclopedic knowledge of Western legal traditions for evidence to support his thesis. And, not surprisingly, he relies heavily on his earlier work. The finished product is crisp and engaging.

The first two thirds of *Society and Legal Change* analyzes rules of private law "which serve neither the interests of society at large or its ruling class nor the interests of anyone else" (p. 6). Watson devotes several chapters to various aspects of Roman contract, property, and family law. The concept of *patria potestas* — the power of a father over his descendants — kept children from owning property and made commercial arrangements cumbersome. In the author's view, it is an excellent example of a legal rule that remained on the books long after it had become "wildly out of step both with the needs of the society and the life-style of the society, its leaders in-

* This book review was prepared by an Editor of the *Michigan Law Review* — Ed.

1. *See, e.g.*, G. GILMORE, THE AGES OF AMERICAN LAW (1977); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957); W. NELSON, AMERICANIZATION OF THE COMMON LAW (1975).

2. *See* M. HORWITZ, *supra* note 1, at xv-xvi and *passim*.

3. *See, e.g.*, M. HORWITZ, *supra* note 1; W. NELSON, *supra* note 1. Judge Lemuel Shaw, for example, introduced the "fellow servant rule," which eliminated the liability of an employer for workers injured as the result of fellow workers' negligence. *See* L. LEVY, *supra* note 1, at ch. 10. Judges also applied notions of common-law conspiracy to prosecute nascent labor unions. *See id* at ch. 11. For an excellent collection of early labor decisions, see A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY (J. Commons and G. Gilmore, eds. 1958).

cluded" (p. 29).[4] Watson next studies the English law of future interests, title registration, defamation, and felony/misdemeanor distinctions, finding that private legal rules in these areas also failed to keep pace with social change. For example, England still has not adopted a system of compulsory title registration even though the benefits of such a system have been clearly demonstrated and the existing land conveyancing system is expensive and needlessly complex.

Watson draws several lessons from the private law's failure to meet the needs of society and its ruling elite. His foremost concern is that there is no effective mechanism to rationalize and modernize private law. He finds legislatures overburdened and too sensitive to the pressures of special interest groups. On the other hand, he finds judges' authority too limited to permit them to indulge in comprehensive law reform. Forced to follow irrational statutory and precedential mandates, judges must make legal rules more technical and obscure in order to moderate their undesirable effects — a process Watson dubs "legal scaffolding." He concludes that a case can "be made out for the proposition that it would be beneficial to have a law making body intermediate between the courts and the legislature; with greater and more systematic powers of law making than courts have, but not subject to the political pressures experienced by legislatures" (p. 133).[5]

In his final chapter, Watson prescribes a program for investigating the causes of legal development: "[A] particular country [should] be studied for a considerable period of its history during which it underwent marked changes in its circumstances whether social, economic, political, or religious. One should then look at its private law to see how quickly, if at all, the legal rules did in general respond to the change in society" (p. 140). Yet, as noted above, several prominent historians have conducted such an investigation of private law in nineteenth-century America.[6] Their unanimous conclusion that private-law rules were closely interwoven with the needs and aspirations of nineteenth-century society (or a dominant seg-

4. In practice, the harsh effects of *patria potestas* were mitigated through *emancipatio* (a ceremony that artificially ended the *patria potestas*) and the *peculium* (a fund that the father set aside for those in his *potestas*) (pp. 24-25).

5. Such bodies may already exist *de facto* in the United Kingdom in the English and Scottish Law Commissions (p. 136), and in the United States in the American Law Institute and the Commissioners on Uniform State Laws. Yet Watson's criticism of judges is equally applicable to his proposed intermediate body of elite law-makers:

> The power of the interpreters to reform the law or keep it static is, despite everything, considerable. These interpreters will form a small group within a society — indeed, a small group even among lawyers — and their views need not correspond to society as a whole. Loyalty to the group or to a wider circle of lawyers may deform the law further.

P. 121. Moreover, the political ramifications of vesting such substantial law-making powers in a body immune from "political pressures" are considerable.

6. *See, e.g.*, M. HORWITZ, *supra* note 1; J. HURST, *supra* note 1; W. NELSON, *supra* note 1.

ment of that society[7]) raises doubts about whether Watson's thesis (if valid) is applicable to legal institutions on this side of the Atlantic.

The opposite conclusions of Watson and the American historians might reflect different evidentiary emphasis. The American historians focused their attention on those aspects of private law closely related to commercial development — negotiable instruments, contracts, employer-employee relations, and torts. Watson's main concern, in contrast, is with private law in general. As a broad proposition, his contention that legal rules often endure long after they cease to benefit society or its dominant classes is well documented. But in the specific sphere of post-Roman[8] commercial law, the evidence seems to be on the other side. Had he been careful to limit his thesis to noncommercial private law, Watson might have escaped the need to confront the American evidence.

It may be, however, that the divergence between Watson and the American historians has a more structural cause: the uniquely important role of judges in the American legal process. Chief Justice Lemuel Shaw of the Massachusetts Supreme Court, the most prolific of all American judges, sought to explain the unusually creative role that judges played in nineteenth-century jurisprudence:

> It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions . . . the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy . . . . These general principles of equity and policy are rendered precise by . . . usage [and] judicial exposition . . . .[9]

Whether or not one approves of Shaw's heuristic theory, his picture of the innovative jurist seems to fit well with our knowledge of the colonial experience. Lacking law books and technical training, the early American legal community developed an organic conception of law that lacked sharp distinctions between common law, custom, and community standards.[10] Unlike the hierarchical British

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7. For Hurst, nineteenth-century law evolved in response to a broad consensus of goals and values in American society; for Horwitz, it evolved in response to the desires of the dominant commercial classes, which he perceived to be in conflict with the interests of other segments of society. *See* M. HORWITZ, *supra* note 1; J. HURST, *supra* note 1.

8. Watson does consider aspects of the Roman commercial law of contract and novation. Because of the paucity of evidence regarding the values and aspirations of Roman society and its ruling elite, it is difficult to determine the correlation between important rules of commercial law and the desires of commercial and entrepreneurial groups. In addition, Watson suggests that Roman jurists disregarded the relation of law and "extra-legal" matters, a phenomenon, that if true, contrasts sharply with nineteenth-century American jurisprudence (pp. 44, 46 n.48).

9. Norway Plains Co. v. Boston & Me. R.R., 67 Mass. (1 Gray) 263, 267 (1854).

10. *See* 1 D. BOORSTIN, THE AMERICANS 199-205 (1958). In his important study of legal development in Plymouth colony, Julius Goebel concludes that English legal doctrines were rarely received without substantial modification into American legal institutions:

> Local custom, substantive as the Winchester measure, pretentious as the notion of the code, ineradicable as the methods of law administration, fortuitous as a form of tenure;

legal system, colonial courts combined the rules of admiralty, borough, manor, and often equity in their effort to discover principles of justice appropriate to the new society. The level of experimentation in colonial courts was so high that the English provincial governments became alarmed; the General Court of Massachusetts, for one, published a "Declaration" designed to establish congruity between Massachusetts and English law.[11] Significantly, however, the Declaration discussed only public law. Throughout the colonial and Revolutionary periods, the dearth of law digests and the lay character of the legal community may have made judicial "creativity" inevitable.

> [A]lthough English authorities were cited constantly, they appear to have expanded rather than restricted judicial discretion. Because of the very perplexities of colonial law the judges were free, indeed were driven, to select and to innovate in order to adjust continually to local circumstances. "I never presumed to call myself a Lawyer," wrote Thomas Hutchinson of his experiences as Chief Justice of the Massachusetts Superior Court from 1760-69. "The most I could pretend to was when I heard the Law laid on both sides to judge what was right."[12]

Thus, American judges, unlike their counterparts in England and South Africa,[13] may have been free to fashion rules of private law appropriate to American soil, borrowing from other systems only when helpful. If the American judiciary was indeed an effective mechanism for the systematic modernization of private law,[14] Watson's thesis would seem unsuited to this country's experience.

*Society and Legal Change* is an important contribution to the historiography of legal development; students of private law must consider the important questions Watson raises regarding scaffolding and the potential for systematic law reform. Substantial additional investigation is necessary to determine the extent to which private

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bitter experience at the hands of a zealous bishop and his pursuivants, or a stony-hearted evicting landlord; hope and salvation in the Word of God preached by word or pamphlet, these things are the materials that went with settlers to Plymouth and out of which their law was fashioned.

Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416, 447 (1931).

11. *See A Declaration of the General Court holden at Boston 4(9) 1646, reprinted in*, A COLLECTION OF ORIGINAL PAPERS RELATIVE TO THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY 196 (T. Hutchinson ed. 1769).

12. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 297 (1969).

13. The South African judges Watson refers to seem particularly obsessed with tracing legal doctrines back through history to their English, Roman-Dutch, and Justinian roots. In fact one judge relied on some thirty medieval juristic authorities (finally reaching a statute written circa 287 B.C.) in order to determine the "correct" rule regarding an owner's liability for damage caused by his dog in the absence of negligence on the part of the owner (pp. 82-83).

14. *See generally* M. HORWITZ, *supra* note 1; L. LEVY, *supra* note 1; W. NELSON, *supra* note 1. It is instructive to note that Watson does not analyze the opinions of Lord Mansfield, the eighteenth-century British jurist whose transformation of English commercial law to reflect laissez-faire business doctrines presaged the efforts of Shaw and other American judges.

law is out of step with the needs and desires of society generally, and especially the extent to which private law fails to mirror the interests of the dominant classes of society. It is surely no longer possible for legal historians to assert, without qualification or substantial evidence, that "[t]he material content of a legal system has always been seen to reflect in some sense the needs or demands of societies. . . ."[15]

15. P. 1 (quoting G. SAWER, LAW IN SOCIETY 147 (1965)).