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M. H. Hoeflich
University of Illinois College of Law

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LAW, SOCIETY, AND RECEPTION: THE VISION OF ALAN WATSON

*M.H. Hoeflich**

THE EVOLUTION OF LAW. By *Alan Watson*. Baltimore: Johns Hopkins University Press. 1985. Pp. xi, 156. \$17.50.

Professor Alan Watson is known as the Anglo-American world's preeminent expert on preclassical and classical Roman law. In recent years he has turned his formidable analytic skills and encyclopedic knowledge of European legal traditions to a broader jurisprudential topic: how and why the law develops as it does in any particular society. His latest book, *The Evolution of Law*, carries on the discussion of this topic begun in earlier books, such as his *Legal Transplants*¹ and *Sources of Law, Legal Change, and Ambiguity*.² It is a brief but brilliant exposition of two basic questions. First, to what extent is the development of law autonomous and independent of societal needs and demands? Second, how can one explain, within the context of this relationship between law and society, why so many legal systems borrow extensively, in the matter of specific substantive legal rules as well as broad jurisprudential categories, from other *alien* legal systems?

It is clear that Professor Watson's concerns stem, to a large extent, from a question which has troubled legal historians and legal philosophers for centuries. That is: how does one explain the puzzling phenomenon of legal reception? In its broadest sense, reception is the process in law by which one legal system adopts substantive or procedural rules developed by and native to another legal system. In its broadest form, reception may involve the wholesale adoption of an entire alien legal system, such as the modern Turkish adoption of Swiss law, or it may involve narrower borrowings, such as the adoption of European civil law principles into American water law in the early nineteenth century or of classical Roman law principles of obligations into the interstices of the modern continental legal systems of France and Germany. It is also easy to understand Professor Watson's fascination with reception. No student of Roman law can ignore its *Nachleben*; for two thousand years the bleached bones of this dead society's laws have continued to inspire, influence, and shape the ma-

* Professor of Law and University Scholar, University of Illinois College of Law. — Ed. Research for this essay was supported by a grant from the Workman Research Fund at the University of Illinois and a grant from the Illinois State Bar Foundation.

1. A. WATSON, *LEGAL TRANSPLANTS* (1974).

2. A. WATSON, *SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY* (1985).

majority of the world's legal systems and, indeed, in many cases, Roman law has been revived in wholly new societal contexts.

But reception also poses a fundamentally troubling jurisprudential issue. If law arises directly and solely from the needs of its particular national and societal context, how then can one explain the adoption of an alien system or its principles unless, coincidentally, their societal context closely parallels that of the adoptive system to the point where they are interchangeable? To answer this, we must begin by understanding that we are all of us children of the early nineteenth-century German legal scholar Friedrich Carl von Savigny and his vision of law.³ Savigny, under the influence of his own mentor, Hugo, founded what has come to be called the "historical school" of jurisprudence.⁴ In a large number of influential works, including his pamphlet *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*⁵ and his monumental *Geschichte des Römischen Rechts im Mittelalter*,⁶ Savigny argued that one cannot understand law unless it is viewed in its *historical* context. By this Savigny meant that to understand a particular legal rule one must know its origins. For Savigny, the origins of law rested in society, specifically in the *Volk*. And thus one of Savigny's American disciples, O.W. Holmes, could argue that the life of the law is experience not logic.⁷ It is the historical experience of a people which gives rise to its laws.

It is difficult to reconcile the pure version of Savigny's vision of law and legal origins with the fact of reception. This difficulty did not bother Savigny.⁸ On the contrary, it was Savigny's political motivation to oppose reception in the form of codification that led him to write his first legal pamphlet, the *Beruf*.⁹ But if we, as children of

3. On Savigny and his importance, see G. KLEINHEYER & J. SHRÖDER, *DEUTSCHE JURISTEN AUS FÜNF JAHRHUNDERTEN 230-36* (1976); G. MARINI, *SAVIGNY E IL METODO DELLA SCIENZA GIURIDICA* (1966); see also J. REDDIE, *HISTORICAL NOTICES OF THE ROMAN LAW AND OF THE RECENT PROGRESS OF ITS STUDY IN GERMANY* 98-99, 111-14 (1826); Kantorowicz, *Savigny and the Historical School of Law*, 53 *LAW Q. REV.* 326 (1937).

4. See J. REDDIE, *supra* note 3, at 99; Hoeflich, *Law & Geometry: Legal Science from Leibnitz to Langdell*, 30 *AM. J. LEGAL HIST.* 95, 106-08 (1986).

5. F. SAVIGNY, *VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (Heidelberg 1814). This work has been translated into English as F. SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (A. Hayward trans. 1831).

6. F. SAVIGNY, *GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER* (2d ed. 1834-1851) (translated as F. SAVIGNY, *THE HISTORY OF THE ROMAN LAW DURING THE MIDDLE AGES* (1829 & photo. reprint 1979)).

7. O.W. HOLMES, *THE COMMON LAW* 1 (1881).

8. If, in fact, one accepts that Savigny's vision that the *Volk* is the only legitimate source of law, then any law imported from an alien society (and, thus, an alien *Volk*) ought to be illegitimate and out of tune with society's needs. Of course, in its "pure" or extreme form this theory can be highly dangerous; witness the adoption of Savigny's arguments by the Nazis during the heyday of the Third Reich; see Lecture by M. Hoeflich, delivered at the 1986 AALS Legal History Workshop in New Orleans (entitled "Ideology and Legal History") (transcript on file at the *Michigan Law Review*).

9. F. Savigny, *supra* note 5.

Savigny, firmly believe that law does, indeed, derive *solely* from current social and political necessities, how can we also explain the constant borrowing of laws by most legal systems from alien systems? This borrowing, obviously, unless it itself derives from perceived societal needs and demands, directly conflicts with the historical theory of the social origins of law.¹⁰ Professor Watson in his *Evolution of Law* provides a mediating paradigm to explain and solve this seeming conceptual anomaly.

Professor Watson's paradigm for the relationship between law and society, while it is not fundamentally opposed to Savigny's, does certainly differ from it. Watson proposes that first, even in primitive systems based primarily on custom, systems where one would expect the closest ties between law and society, legal rules often do not "fit the society particularly well" (p. 116). In more advanced societies, where the formal sources of law extend beyond custom to legislated statute and, above all, to the development of case law and professional literature, while societal needs have a role, the far more important factor in lawmaking is professional tradition. Central to Professor Watson's theory is the notion that where a professional legal class develops (and he — like I — would argue that such a class developed early in Western Europe) it is this group's professional traditions and professional concerns which shape the law — especially private law — far more than any societal input. In essence, Watson proposes a two-tier law-creative structure. First, there is societal demand. When this becomes great enough, those with law-creative power (legislators, kings, judges) create a legal rule. Once created, this rule is then preserved and developed by the professional legal elite. Thus, beyond causing the law-creative process to begin, society has only indirect input.

Fundamentally, *The Evolution of Law* is a brilliantly constructed series of case studies designed to test this two-tier theory of lawmaking and of the central role played by professional legal traditions. To evaluate Watson's theory fairly, therefore, it is necessary to examine these case studies for accuracy and to ask whether they are persuasive.

Perhaps the most interesting chapter in the book is the third on "The Cause of the Reception of Roman Law," which focuses primarily on Western Europe in the early Middle Ages (pp. 66-97). This is a phenomenon which has puzzled and troubled scholars since the sixteenth century.¹¹ Essentially, the factual matter is clear. The Roman

10. That the borrowing itself derives from the *Volksgeist* is, of course, a possibility, but the history of reception suggests that societal demands for reception are few. See text following note 30 *infra*.

11. Works on the reception of Roman law in early medieval Europe are too numerous to list. Fundamentally, all scholars are agreed that some form of Roman law was received in Gaul, but the extent of this reception and the precise Roman and Byzantine sources remain controversial. Two classic studies of this problem are P. KOSCHAKER, *EUROPA UND DAS RÖMISCHE RECHT* (1947); P. VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* (1909).

domination of Western Europe in a politico-military sense began to decline drastically by the end of the fourth century A.D.¹² By the fifth century any real central Roman control of the Western provinces was chimerical. Government was local. Nevertheless, Roman governmental, legal, and social structures were firmly rooted in the Gallic soil, and demographically, the Gallo-Roman population of the West was large (larger in fact than the Germanic tribes). Thus, when the Emperor Theodosius II ordered the making of an official code, which was published in 438 A.D. as the *Codex Theodosianus*,¹³ it rapidly became the governing law of the Western provinces. At the same time, as a result of the political and military retreat of Roman forces from Gaul and the increasing isolation of the Eastern Emperors at Constantinople, the powerful Germanic tribes settling in Gaul (the Ostrogoths, the Visigoths, the Burgundians, the Salian Franks, and others) began to exert their political and military dominance. By the beginning of the sixth century, the Gallic provinces were firmly under Germanic control. Importantly, the Germanic kings did not repudiate Roman legal institutions. On the contrary, the Germanic tribes generally adopted these alien laws. This legal adoption took several forms. The Germans believed law to be personal rather than territorial and thus they adopted the Roman law *in toto* for their Gallo-Roman subjects.¹⁴ The best known of these codes, the *Lex Romana-Visigothorum*, promulgated by the Visigothic King Alaric II, coexisted with a second Germanic Code applicable to Visigoths, fragments of which are still extant and now known to us as the *Codex Euricianus*.¹⁵ What is crucial, however, in terms of borrowing and reception is that the *Codex Euricianus*, a Germanic code for Germans, was itself Romanized, by incorporating substantive Roman legal principles into it. This same Romanization occurred in the *Codex Euricianus*' successor code, the great *Leges Visigothorum*.¹⁶ Indeed, throughout early medieval Gaul,

12. See A. JONES, *THE LATER ROMAN EMPIRE* (1964); R. MACMULLEN, *ROMAN GOVERNMENT'S RESPONSE TO CRISIS A.D. 235-337* (1976).

13. The standard modern edition of the *Codex Theodosianus* is T. MOMMSEN & P. KRUEGER, *THEODOSIANI LIBRI XVI* (reprint 1970). There is an English translation by C. PHARR, *THE THEODOSIAN CODE* (1952). On the use of the *Theodosianus* see A. de Wretschko, *De Usu Breviarum Alariciani*, in T. MOMMSEN & P. KRUEGER, *supra*, at cccvii. On the manuscript evidence, see also Hoefflich, *Law Beyond Byzantium: The Evidence of Palimpsests*, 1987 *ZEITSCHRIFT DER SAVIGNY STIFTUNG FÜR RECHTSGESCHICHTE, GERMANISTISCHE ABTEILUNG* (forthcoming).

14. See generally S. GUTERMAN, *FROM PERSONAL TO TERRITORIAL LAW* 215-21 (1972); P. KING, *King Chindasvind and the First Territorial Law-Code of the Visigothic Kingdom*, in *VISIGOTHIC SPAIN: NEW APPROACHES* 131-57 (E. James ed. 1980).

15. The modern edition of the *Codex Euricianus* is K. ZEUMER, *Legum codicis euriciani fragmenta*, in 1 *MONUMENTA GERMANIAE HISTORICA, LEGES VISIGOTHORUM* 1 (reprint 1973).

16. The modern edition of the *Leges Visigothorum* is 1 K. ZEUMER, *supra* note 15, at 33. The best study of the *Leges Visigothorum* in English is P. KING, *LAW & SOCIETY IN THE VISIGOTHIC KINGDOM* (1972).

the *Lex Romana-Visigothorum* and the *Codex Theodosianus* on which it was based were revered and cited (as *lex Romana*) and used as a source for substantive legal rules to supplement and occasionally supplant the Germanic customs.¹⁷ By the seventh century throughout southern and southeastern Gaul, Roman legal principles had been widely "received," and even in northern Gaul strong evidence of Roman legal ideas was present in the Germanic codes.¹⁸

The question one must ask, of course, is whether this "reception" of Roman law took place for the reasons outlined by Professor Watson. This is somewhat difficult to evaluate, for we do not have as much historical data about what early medieval society was like as we might wish. Certainly, it is fair to say that one might doubt whether early medieval society demanded the sorts of sophisticated commercial law rules which one finds contained in the Roman law sources from which they borrowed. Yet such Roman commercial laws were adopted, for instance, into the *Leges Visigothorum*.¹⁹ In recent literature, there has been a tendency to argue that early medieval kings borrowed from Roman law, even to the extent of writing their Germanic customs in Latin, because of the appeal of the Roman model and the almost magical aura attached to anything Roman.²⁰ Yet, contemporary sources would suggest also that the early Germans felt a fierce pride in their Germanic heritage. For instance, one early medieval Latin poet, Venantius Fortunatus, lauded his Germanic royal patron not by praising him solely for his Roman virtues, but, instead, by emphasizing how he incorporated the best of both the Roman and the German worlds.²¹ In the law codes, the reception of Roman rules would seem to be attributable to a similar desire to combine the best of both worlds, Roman and German, and the aspiration of the lawmakers to use Roman law for their own purposes.

This selective adoption of Roman models is, in fact, characteristic of the reception of Roman law in early medieval Europe. Indeed, it is characteristic of virtually all legal receptions that they do not involve a

17. See Hoefflich, *supra* note 13.

18. See, e.g., Gaudemet, *Code Théodosien et Bréviaire d'Alaric*, in 4 STUDI IN ONORE DI GIUSEPPE GROSSO 359 (G. Giappichelli ed. 1971); see also Nehlsen, *Zur Aktualität und Effektivität germanischer Rechtsaufzeichnungen*, in RECHT UND SCHRIFT IM MITTELALTER 449 (P. Classen ed. 1977); J. GAUDEMET, *LE BRÉVIAIRE D'ALARIC ET LES ÉPITOME (Ius Romanum Medii Aevi 1, 2 b aa β, 1965)*.

19. See e.g., *Legis Visigothorum* 5.4 in K. ZEUMER, *supra* note 15, at 217, 226 ("De commutationibus et venditionibus").

20. See P. Wormald, *Lex Scripta and Verbum Regis: Legislation and Germanic Kingship from Euric to Chnut*, in P. SAWYER & I. WOOD, *EARLY MEDIEVAL KINGSHIP* 105-38 (reprint 1979); see also Lecture by M. Hoefflich, delivered at the 1983 Annual Meeting of the Medieval Academy of America (entitled "Law and the Commonweal in the Middle Ages: Ideology and Pragmatism") (forthcoming).

21. See Hoefflich, *Between Gothia and Romania: The Image of the King in the Poetry of Venantius Fortunatus*, 5 RES PUBLICA LITTERARUM 123 (1982).

total, unthinking adoption of an alien legal system, but, on the contrary, a reflective and selective adoption and adaptation of the alien rules. What is important here is to determine, if we can, why particular rules were received. Was it a crying societal need that led to the domestication of Roman rules amongst the barbarian German tribes? Or was it, rather, the influence of a professional legal elite?

We know, at least, that in the early Middle Ages in Gaul there was no large cadre of professionally trained lawyers who could direct the reception of Roman law into the Germanic states. However, there were royal counsellors principally concerned with legal matters who seem to have kept alive some sense of legal professionalism and who were primarily responsible for integrating substantive Roman legal rules with Germanic customs.²² Indeed, to a large extent these counsellors appear to have been of Gallo-Roman stock and may well have had some rudimentary training in German and Roman law.²³ Were they responding to perceived societal needs in adopting Roman law? Or, were they simply fleshing out their law books with no true interest in the substantive rules themselves or in society? Clearly it was the former. Societal needs, however, must be understood as meaning those things which the small, semi-educated legal elite believed society to need.

To this point, certainly, Professor Watson's views would agree with those of most traditional scholars that the interests of early medieval society, as defined by the narrow elite, motivated the adoption of Roman rules. Thus, for example, Ostrogothic laws tended to incorporate Roman rules on buildings, roads, and monuments, for the new Germanic rulers of Italy discovered that they had inherited an infrastructure with which they had never before been concerned and for which they had no Germanic laws. The Roman legal rules provided a handy source of useful regulations and obviated the need to formulate new ones. It was far easier to borrow already established rules than attempt to formulate new ones *de novo*. Similarly, the Visigoths in Spain adopted Roman legal rules on the treatment of captives since, again, these rules were clear, well thought out, and addressed a then-pressing problem.

What is crucial to Professor Watson's vision of law, however, comes after this initial reception. These Roman rules, once adopted, continued to be included in Germanic legal compilations, and these compilations themselves tended to be adopted and adapted cross-na-

22. See P. RICHÉ, *EDUCATION AND CULTURE IN THE BARBARIAN WEST: SIXTH THROUGH EIGHTH CENTURIES 214-18* (J. Contreni trans. 1st ed. 1976); see also P. RICHÉ, *ENSEIGNEMENT DU DROIT EN GAULE DU VI^e AU XI^e SIÈCLE* (*Ius Romanum Medii Aevi* 1, 5 b *bb*, 1965). On the late ancient heritage, see F. WIEACKER, *ALLGEMEINE ZUSTÄNDE UND RECHTSZUSTÄNDE GEGEN ENDE DES WESTRÖMISCHEN REICHS* (*Ius Romanum Medii Aevi* 1, 2 a, 1963).

23. See P. RICHÉ, *EDUCATION AND CULTURE IN THE BARBARIAN WEST: SIXTH THROUGH EIGHTH CENTURIES*, *supra* note 22.

tionally for centuries throughout Western Europe. Were they *at all times* fulfilling a perceived and current societal need? Professor Watson would argue that they were not. Rather, by virtue of having become established legal rules, they became the property of legists and as such came to have a life independent of immediate social demands. Indeed, this would seem to have been the case. They continued to be compiled and adopted because they had become part of a legal canon accepted by legal professionals. The legal history of early medieval Europe in this regard tends to bear out Professor Watson's theories. The Visigothic laws continued to be cited after the demise of the Visigothic kingdom in Spain as well as in the territories of the Carolingians and Ottonians in what was later to become France and Germany (pp. 91-92). In these kingdoms, they were adopted almost exclusively through the active intervention of legal specialists; individuals doing what Karl Llewellyn would have called "law jobs." They were adopted primarily because they were by then traditionally viewed as "good" Roman law rules, and if a custom were lacking in the native tradition, a jurist would cite such a canonical legal rule. Why? Perhaps, in part, to appeal to the authority of the old Empire. Perhaps, also, because jurists who could cite Roman law were considered learned and gained prestige. Perhaps also, if not primarily, because it was easier than formulating a new rule, and because the task of formulation was left to such legal professionals.

Does this mean that the jurists and royal lawmakers of the early Middle Ages ignored popular needs? Surely not. Rather it means, as Professor Watson has suggested, that the interconnection between law and society is not so close as to preclude borrowing from alien systems. Reception is both possible and explicable so long as one recognizes that the most important group for reception of legal rules is the legal elite. Or, put differently, reception is principally a phenomenon associated with contexts where law-creative authority is vested in professionals or quasi-professionals.

Thus, Professor Watson's theory of the relation between law and society does help to explain both why and where reception takes place, and is consistent with what we know of early medieval Europe. In fact, another, more modern test case, one less well-known, could also be cited: the reception of Roman law in the common law jurisdictions of the United States in the early nineteenth century. Roman law in nineteenth-century America was not received in the way it was in seventh- and eighth-century Gaul. However, between 1790 and 1850 Roman and civil law made its appearance in most American doctrinal legal writings.²⁴ For instance, the Roman and civilian components

24. See M. Hoefflich, *Roman Law & the Development of Anglo-American Jurisprudence in the Nineteenth Century* (forthcoming).

loom large in Joseph Story's works.²⁵ The same may be said of Chancellor Kent's *Commentaries*, as well as of the writings of South Carolinian jurist and U.S. Attorney General, Hugh Swinton Legaré.²⁶ In the case law too, especially in areas such as conflict of laws where domestic rules were lacking, Roman and civilian learning is dominant. One sees this, for instance, in the decisions of Judge Theophilus Parsons of Massachusetts and in early Virginia state court cases.²⁷ Could native American rules have been formulated without recourse to Roman law? Almost certainly Story or Kent, *had they felt it necessary*, could have avoided ever referring to other legal systems. However, they believed that Roman and civil law were useful and that the rules they contained could be profitably adopted.²⁸ And, once adopted, these rules became part of the American legal tradition. Was this reception a direct response to social demand for the use of alien rules? Again, clearly not; yet this "mini-reception" was not antithetical to society's demands, and it was effectuated by the legal elite.

Ultimately, to understand Professor Watson's vision of the relationship between law and society and of legal development as a process quasi-independent of societal needs, we can, perhaps, recall a statement of O.W. Holmes in *The Common Law*. For Holmes, law, especially case law, does need to "correspond with the actual feelings and demands of the community" when it is first adopted.²⁹ But, as time passes, according to Holmes, the reasons for adoption of a rule may pass, and "as the clavicle in the cat only tells of the existence of some earlier creature to which a collarbone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten."³⁰ What Holmes was getting at is simple: eventually a legal rule must be consonant with society's wants, but it can take a while for a rule which is no longer socially necessary or desirable to be rejected. The crux of the Holmesian argument about case law is also the key to the Watsonian view of reception. There are really two parties vitally interested in law: society at large and the legal professionals. No law can be adopted and maintained indefinitely directly *against* the will of society. To the extent, however, that society is divided and pluralistic and the legal professionals who tend to specialize in legal activities are unified and share common goals and

25. See Hoeflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 AM. J. LEGAL HIST. 36, 56-76 (1985).

26. See M. Hoeflich, *supra* note 24; M. O'BRIEN, A CHARACTER OF HUGH LEGARÉ 25-28 (1985); see also Hoeflich, *supra* note 4, at 112-14.

27. See, e.g., *Pearsall v. Dwight* (1806), reprinted in T. PARSONS, COMMENTARIES ON AMERICAN LAW 2-5 (1836); see also Bryson, *The Use of Roman Law in Virginia Courts*, 28 AM. J. LEGAL HIST. 135 (1984).

28. Hoeflich, *supra* note 25, at 74-77.

29. O.W. HOLMES, *supra* note 7, at 41.

30. *Id.* at 35.

perceptions, the legal professionals have a great deal of power both to adopt initially and to preserve and maintain legal rules to which society is indifferent or only mildly antagonistic. Furthermore, society as a whole *is* indifferent to most private law rules. Thus, it is Watson's great insight to realize that reception is fundamentally an elitist phenomenon, in which society plays only a small role initially. For instance, one might argue that Roman law failed to be received in England to any great extent, not because it was contrary to the needs of English society, but, rather, because it was contrary to the interests of English jurists and lawyers. Where it was not contrary, as in certain commercial law areas, it *was* received.³¹

In fact, Watson's vision of legal development is not contrary at all to Savigny's when closely examined. Watson understands that legal development is a dynamic process in which law professionals and lay society must interact over time. The professionals cannot totally ignore societal needs. Thus, we find far less reception of substantive Roman legal rules concerning marriage into the early medieval Germanic codes where Germanic social practices differed radically from Roman.³² And, equally, we find little use of Roman penal concepts in nineteenth-century American law treatises, when such concepts were opposed to then-modern ideas of morality and crime. Similarly, the Roman law of slavery was probably not very influential in the formulation of American slave law. On the other hand, general society is not particularly interested in most areas of the law and is quite willing to turn over responsibility to an established legal elite. Until such time as the rules formulated by such an elite conflict with cherished societal beliefs, the legal professionals will be permitted to do very much what they want to do with those rules. So long as they don't step beyond the limits of what society will accept, they can indeed follow their own logic.

What one needs to add to Professor Watson's vision of this dynamic relationship amongst law, society, and legal professionals is a series of definitions and categories. First, it seems relatively clear that the dynamic will be more flexible with some legal subjects than with others. Thus, family law, the law of marriage and succession, would seem to be one where the dominance of general social attitudes over professional traditions will be great, while the subject of legal procedure, that area of the law of most concern to legal professionals, will be of least interest to society at large and most autonomous. It is likely, then, that there will be a greater chance of reception of alien

31. On the reception of Roman law into English law, Scrutton's study remains useful. See T. SCRUTTON, *THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND* (1885).

32. See J. GOODY, *THE DEVELOPMENT OF THE FAMILY AND MARRIAGE IN EUROPE* (1983). Some Roman rules about marriage were adopted, however, with changes. See generally A. WATSON, *THE EVOLUTION OF LAW* 85 (1985).

rules in those legal subject areas which are most autonomous, such as procedure.

Two interesting examples in this area may be mentioned. The first example actually involves a refusal to receive an alien system. Prior to its incorporation into the United States, Texas was a republic with a legal system based, in large part, on civil law inherited from the Spanish. Even before incorporation into the United States, the common law was received and, in most areas of the law, quickly supplanted the civilian tradition. In the area of procedure, however, the reception was not so smooth. In fact, the judges of the Texas Supreme Court and the new Congress of Texas refused to accept wholly the rules of common law pleading, but, instead, retained the older, already in place, civilian tradition of pleading by petition and answer.³³

The second example is more speculative. To some extent, the twentieth-century reform of civil procedure in the federal courts is traceable to a speech given before the American Bar Association by Roscoe Pound at the turn of the century.³⁴ Pound, of course, was soon thereafter to become dean of the Harvard Law School and one of the foremost legal philosophers of his time.³⁵ But when he delivered his speech arguing for a simplification of pleading rules and a reform of civil procedure, he was primarily teaching and writing in the field of Roman and civil laws.³⁶ Indeed, it is noteworthy, as the Texas judges had realized a half century before, that the Roman law procedural rules were far simpler and clearer than common law rules. Might one suggest, therefore, that the intellectual genesis of Pound's ideas delivered to the ABA may have lain, partly, in his civilian studies?

Finally, one ancillary theme in Professor Watson's book deserves mention. Watson believes that even when society does have a particular need, because of the intervention of a professional legal elite between society as a whole and its lawmaking processes, there is often a considerable lag between the declaration of such a need and the creation of a legal rule to satisfy it. He cites, for instance, the fact that the Roman jurists never finally determined the elements of the crime of theft (pp. 33-35). Watson surmises that such a determination must have been socially necessary, since such matters would need to be certain if theft were to be punished effectively.

Again, Professor Watson's insight here is valuable. It is a curious

33. See McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEXAS L. REV. 24, 26-31 (1959). It is interesting to note that the Spanish legal tradition as to marriage and property was also retained here, in part perhaps because of both the lawyers' familiarity with it and popular pressure.

34. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in 29 REPORT OF THE 29TH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 395 (1906).

35. The leading biography of Pound is P. SAYRE, *THE LIFE OF ROSCOE POUND* (1948).

36. Pound's course materials were published as R. POUND, *READINGS IN ROMAN LAW AND THE CIVIL LAW AND MODERN CODES AS DEVELOPMENTS THEREOF* (2d ed. 1914).

fact that a sophisticated legal system would leave basic questions unresolved. Watson's analysis suggests two possible explanations. First, the role of the professional legal elite in the lawmaking process tends to act as a filter of social demands, and the filtration process simply tends to slow legal response. Second, and perhaps more interesting, the professional legal elite will, on occasion, deliberately fail to respond to a perceived social need for reasons of its own. This second possible explanation is especially thought-provoking and leads one to consider the themes worked out in Dean Guido Calabresi's *A Common Law for an Age of Statutes*³⁷ and the last chapter of Professor Watson's own *Sources of Law, Legal Change, and Ambiguity*.³⁸

There may be, however, a third possible explanation not explicitly mentioned by Professor Watson. This is simply that any institution with traditions of its own, including institutionalized professional groups, will generally resist change. We have a number of such examples of institutional resistance to change, even where the need for change is pressing and obvious, in the history of technology. In Elting Morison's splendid book, *Men, Machines, and Modern Times*,³⁹ he recounts the history of a number of cases where the institutionalization of the military establishment caused harmful resistance to change. One example he cites is the history of the development and deployment of continuous-aim firing for naval guns in the nineteenth century.⁴⁰ This technique was actually developed in the latter part of the nineteenth century by a British naval officer of the line, Percy Scott. It made for a remarkable improvement in the accuracy of naval guns. This was noticed by an American naval officer of the line, William Sims, who proceeded to report to Washington on this remarkable improvement. However, the U.S. Navy refused to deploy the necessary devices, even though it would have been of immense value in sea battles, because it had not been developed through traditional channels and because it was deemed to be too radical a change. For two years Sims fought the naval bureaucracy. Finally, in a show of extraordinary courage, he wrote directly to President Roosevelt, who personally ordered the navy to give Sims' ideas a chance. Morison attributes this resistance and the need for a *deus ex machina* to human nature, to the fact that societies are protective of the status quo and view all changes with suspicion.

The lesson Morison's case study offers for the legal historian is clear. It may well be that part of the reason lawmaking, in societies where a professional legal elite controls the legislative process, is slow to respond to societal needs stems simply from the inherent conserva-

37. G. CALABRESI, *A COMMON LAW FOR AN AGE OF STATUTES* (1982).

38. A. WATSON, *supra* note 2, at 111-31.

39. E. MORISON, *MEN, MACHINES, AND MODERN TIMES* (1966).

40. *Id.* at 17-44.

tism and self-interest of any tradition-bound group. Large groups with institutionalized power generally do not welcome changes of any sort. Changes are difficult to absorb and upset established tradition. The phenomenon that Professor Watson describes is thus not necessarily a purely legal phenomenon at all, but may be a broader sociological phenomenon common to all similar situations and to all societies.

In conclusion, however, the importance of Professor Watson's vision of lawmaking and reception is apparent. His is a book which will provoke debate and stimulate our search to understand basic legal phenomena. As such it is an important contribution.