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A Review of and Commentary on Alan Watson, Slave Law in the Americas

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BOOK REVIEW

Bradley J. Nicholson,[1] A Review of and Commentary on Alan Watson, *Slave Law in the Americas* (Athens: University of Georgia Press, 1989).

In his new book on comparative slave law, Professor Alan Watson compares Roman slavery and colonial Spanish, French, English, Portuguese, and Dutch slavery and refines his theories of both slave law development and general legal development. Watson cogently argues that slave law in the Americas developed more from Continental and Roman legal traditions than colonial society. This book is a thought-provoking work of comparative legal-historical analysis with many useful ideas of historical method, analysis of legal issues, and critical thinking about the historian's use of law to further our understanding of history. Watson's analysis of slave law development in Spanish, Portuguese, French, and Dutch America is very persuasive and his analysis of slave law development in English America is effective for his comparative purposes. However, Watson's approach of looking for answers within a legal tradition and emphasis on legal borrowing could take us farther than Watson in fact does, in understanding the development of Anglo-American slavery.

Slave Law in the Americas is not just about slave law. Fundamentally, Watson's book is an argument for the truth of a comparative approach to legal-historical development. "Comparative law is valuable in academic study because it helps to identify the circumstances in which law changes and hence to uncover the reasons for legal development." (p. xi) According to Watson, any theory of legal development must be tested comparatively, for only in comparison can one deter-

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mine the significance of legal developments in a particular society. "It is a phenomenon of the law of slavery that some detail or expression of the law in one system catches the imagination of scholars, who then attribute significance to it. Accounts of the law, especially as compared to that of other systems, become very misleading." (p. 115)

Without testing one's legal-historical conclusions comparatively, errors are easy to make. For example, Watson uses the comparative method to explode three long held misconceptions about slave law. First, the emphasis in Spanish law that liberty is natural leads modern scholars erroneously to read into such statements that Spanish jurists and theologians were aware of the immorality of slavery. According to Watson, this is an anachronism because the statements of Spanish scholars must be read in light of the Roman texts which influenced Spanish law. (pp. 115-19) When read in light of the Roman texts, Spanish natural law did not find slavery immoral, but instead accepted its existence as merely contrary to man's natural state.

Second, Watson criticizes as false the distinction between chattel slavery in English America and "contractual" slavery in Latin America found in works such as Klein's *Slavery in the Americas*.[2] Watson dismisses such a distinction in the context of slavery. While, in a theoretical sense, Roman slave law contained some contractual forms, such forms in its successor Spanish slavery had become moribund. Spanish slavery was in this sense practically no different from English chattel slavery. (pp. 119-22)

Third, many scholars accept that Somersett's Case of 1722 demonstrates an emphasis on liberty and freedom under common law. Blackstone wrote, and many have subsequently accepted as unique the idea, that once a slave stepped onto the soil of England, he or she became instantly a free man or woman. This was accepted as "a tribute to the efficacy of the writ of habeas corpus and thus of the common law." (p. 122) However, Watson documents that this doctrine is not unique to England; in fact, the idea existed previously in the Roman law countries of the continent before it was accepted in common law England. (p. 123-24)

A concise guide to Watson's theories appears in the first chapter, "The General Thesis." Watson argues that government is usually uninterested in the precise content of the legal rules, particularly in private law, and usually gives such lawmaking duties to subordinates in the

2. H. Klein, *Slavery in the Americas* (1967).

legal system. This is so because such matters are below the interests of the sovereign. Exact content is not important as long as the tax money flows in and the King's Peace is kept. Thus, subordinates such as judges in common-law jurisdictions, law professors in medieval Europe, and private commentators in ancient Rome developed most of the private law in each of those legal cultures.

This lack of interest in content, combined with the peculiar trait of the legal mind which worships tradition and precedent, explains another phenomenon Watson has written about extensively, legal borrowing. Civil law countries are the paradigm of how rules often do not develop organically out of society, but are borrowed from another society. Historically, European states were controlled by rules written in a different culture, time, and place. Watson would not argue that society has no influence on legal growth, but rather that ancient laws often guide the legal development of later societies. Thus, Watson's theory is a warning to historians who would unreflectingly assume that laws reflect society. While Spanish colonial law came from Spain, French colonial law from France, and Portuguese colonial law from Portugal, the law—especially the slave law—of each of these countries came originally from Rome.

Therefore, in Watson's view, an analysis of Roman law in all but the English colonies must begin with Rome. The Roman political and economic colossus depended on slave labor and the Romans developed many laws to facilitate control over their slaves. In the Middle Ages and the Renaissance, Continental European states adopted Roman law as the basis of their own legal systems. By doing so they adopted a slave code which, except in the case of Spain, lay unused for centuries. When the Europeans (except the common law English) began to enslave Africans in the 16th and 17th centuries, they turned for guidance to the law they had already adopted, Roman law, rather than creating a slave code from scratch.

Why Latin American and Dutch, but not English, colonies allowed manumission may be explained in part by the Roman legal tradition. Roman slavery was not racially based. The Romans enslaved many other peoples, both alike and different from themselves. The laws governing slaves were likewise colorblind. There were few restrictions on a slave's training or employment. Restrictions on the slave were really a private matter, one between slave and owner. Roman slaves were easily manumitted, could be given property, and could even become Roman citizens. In the New World colonies of Spain, France, Portugal, and

the Netherlands, the slave system was racially based. However, each colony received a slave law based on colorblind Roman law, providing relatively free manumission and granting of free property rights. In the English colonies, racist slaveowners wrote the strict manumission laws which denied freedom and property to slaves. The legal tradition explains sufficiently, though perhaps not completely, the difference: while both slave systems were implicitly racist, Roman law constrained the racist tendencies of Latin American and Dutch colonial slavery. While English slaveowners were unconstrained in creating racist law from racist assumptions about the necessity of social control over slaves, colorblind Roman slave laws prevented the other European colonies from creating a racially based legal framework.

While not necessary to the success of his comparative analysis, Watson does not apply his theories systematically in a search for the legal sources of English slavery,[3] and uses English slavery mostly for comparative purposes. Thus, he offers no unified theory of slave law sources in the English colonies. In his chapter on English American slave law Watson discusses police law and manumission in South Carolina. While his analysis of South Carolina is correct, South Carolina borrowed its slave code from another English colony, Barbados. Watson's discussion neglects colonies which did not borrow their slave codes from other colonies, *e.g.*, Barbados and Virginia. How these colonies developed their slave code is a key issue in the development of slave law.

A Watsonian analysis could explain the development of English slave law in states that did not borrow their laws. Watson has rightly demonstrated again and again that law often develops through borrowing.[4] Watson nearly gives us an answer when he explores two modes of legal thought reflected in a single case. In *Commonwealth v. Turner*[5] the majority opinion considers the opinion of Roman law authorities on the issue at hand. But the dissenting judge in *Turner* notes a different—and more pervasive—phenomenon in the development of slave

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3. Admittedly, Watson states that his interests actually lie elsewhere: "Here I wish rather to note the role of borrowing in the growth of the law, and to emphasize that there was a pattern of development. . . . My purpose in this chapter is to point out the contrast between the slave law of English America on the one hand and of Rome and the rest of America on the other." (p. 67)

4. In addition to *Slave Law in the Americas*, see Watson's other major works, *Failures of the Legal Imagination* (1988); *Evolution of Law* (1985); *Sources of Law, Legal Change, and Ambiguity* (1984); *The Making of the Civil Law* (1981); *Legal Transplants: An Approach to Comparative Law* (1974).

5. 5 Rand. 678 (Va. 1827).

law in the United States. Judge Brockenbrough claimed that slave law can and did develop by analogy within the system, by borrowing from other branches of the common law. Watson does not demonstrate how this worked in South Carolina, but his theories could be used to show that this phenomenon was the engine of slave law doctrine in English America.[6]

In sum, Watson has used his mastery of Roman law and comparative analysis to explode several slave law myths and has once again demonstrated the effectiveness, if not the necessity, of the comparative method of legal-historical analysis.

6. Professor Morris appears to suggest by the principle of exhaustion that a Watsonian approach to slave law sources would be correct. *See* Morris, *"Villeinage . . . as it existed in England, reflects but little light on our subject:" The Problem of "Sources" of Southern Slave Law*, 32 AM. J. LEGAL HIST. 95 (1988). Morris stresses the English legal tradition through the common law rules of property. I will show that slave police law developed from the English legal tradition, specifically English labor practices, in a forthcoming article.