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## Correspondence (Letter to the Editor)

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## CORRESPONDENCE

*In A Comment on the Critical Method in Legal History, 6 Cardozo L. Rev. 997 (1985), Mark Tushnet responded to Alan Watson's review of his book, The American Law of Slavery, 1810-1860, which appeared at 91 Yale L.J. 1034 (1982). In a letter to the Editor-in-Chief of the Cardozo Law Review reproduced below, Professor Watson launches the next salvo in their ongoing debate by comparing quotes from Critical Method, The American Law of Slavery, the Yale book review, and other sources. Other than removal of salutations, the text of Professor Watson's letter is printed without editorial revisions.*

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*Apropos Mark V. Tushnet,  
'Counterresponse: A Comment on the Critical Method in  
Legal History,' 6 Cardozo L. Rev. 997 (1985).*

A few quotations:

1. a. 'The principal distinction in the law of persons is that all men are either free or slaves.' Gaius (circa 160 A.D.) and the Emperor Justinian.<sup>1</sup>
- b. 'Slavery was just one of a large number of statuses available in the Roman law, and there were many degrees of slavery, if they can be so called.' Mark Tushnet.<sup>2</sup>
- c. 'I should note that I am not a student of Roman Law.' Mark Tushnet.<sup>3</sup>
- d. 'In Roman law a person was either free or a slave—there was no third category.' Alan Watson.<sup>4</sup>
2. a. 'I believe that the areas of disagreement [with Alan Watson] about my discussion of *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829), are marginal.' Mark Tushnet.<sup>5</sup>
- b. 'But it is precisely here that Tushnet's Marxist analysis reveals itself as fundamentally sterile.' Alan Watson on Mark Tushnet's treatment of *State v. Mann*.<sup>6</sup>
3. a. 'I analyzed the North Carolina case of *Ponton v. Wilmington*

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<sup>1</sup> Justinian, Institutes, bk. I, tit. III, at 13 (JAC Thomas trans. 1975) (quoting Gaius, Institutes, bk. I, tit. IX).

<sup>2</sup> Tushnet, A Comment on the Critical Method in Legal History, 6 Cardozo L. Rev. 997, 1006 (1985).

<sup>3</sup> Id. at 1005 n.37.

<sup>4</sup> A. Watson, Colorblind Oppression: Roman Slave Law chapter 1 (forthcoming Johns Hopkins University Press 1987).

<sup>5</sup> Tushnet, supra note 2, at 997 n.3.

<sup>6</sup> Watson, Book Review, 91 Yale L.J. 1034, 1044 (1982) (reviewing M. Tushnet, The American Law of Slavery, 1810-1860 (1981)).

& *Weldon Rail Road*<sup>7</sup> in which the court denied recovery to a master whose slave had been killed through the negligence of another person employed by the railroad. The court denied recovery by invoking the relatively recent fellow-servant rule. But it did so by invoking only one of the two available rationales for the fellow-servant rule. . . . The *Ponton* court, however, did not rely on the slave's ability to inform the employers of the carelessness of other employees—a rationale applicable only to people of essentially equal status.

Watson argues that the failure of the *Ponton* court to make this tort argument establishes very little, for several reasons. . . . [Watson] says that the policing rationale of the fellow-servant rule was simply not available on the facts of *Ponton* because the injured worker and the negligent co-employee were employed in different departments. . . . Once again, Watson relies on a reified concept of rules of law: the fellow-servant rule and all its exceptions being present from the very start. . . . Of course a "different departments" exception did develop, but "develop" is the operative word.' Mark Tushnet,<sup>8</sup> who bases the two available rationales on the discussion of Chief Justice Shaw in *Farwell v. Boston & W.R.R.*<sup>9</sup>

- b. 'But Tushnet's argument from silence is not convincing. That sort of argument is persuasive only when particular and strong reasons seem to impel the discussion that is omitted. Such reasons are absent here. . . . Thus, since Shaw himself recognized the weakness of this [tort] rationale, it is only to be expected that a judge of Ruffin's ability would not use it in an instance where it was particularly inappropriate and where another perfectly good rationale was available.' Alan Watson discussing Mark Tushnet's treatment of *Ponton*.<sup>10</sup>
- c. 'Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connexion with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the ser-

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<sup>7</sup> 51 N.C. (6 Jones) 245 (1858).

<sup>8</sup> Tushnet, *supra* note 2, at 998-99 (footnote omitted).

<sup>9</sup> 45 Mass. (4 Met.) 49 (1842).

<sup>10</sup> Watson, *supra* note 6, at 1038-39.

vant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds.' Chief Justice Shaw in *Farwell*<sup>11</sup> on what Mark Tushnet calls the tort rationale.

4. a. 'The defendant paid damages to the slave's owner and then—invoking a provision of the civil code drawn, as Watson says, from the Roman law of slavery,—claimed that title to the slave should be transferred to him.' Mark Tushnet on his treatment of the Louisiana case of *Jourdan v. Patton*, 5 Mart. 615 (La. 1818).<sup>12</sup>
- b. 'So far as we know the defendant made no such claim, there was no such provision in the Louisiana civil code, there was no such rule in Roman law, Watson said nothing of the kind.' Alan Watson on Mark Tushnet's 'Counterresponse' on *Jourdan*.<sup>13</sup>
5. a. 'I was trying to provide an argument for what might be called an "equitable exception" to the statutory provision on which the defendant relied. I then engaged in a fairly detailed analysis of the skimpy text of the appellate decision reversing the lower court, which Watson calls "nonsense on various levels."' Mark Tushnet on his treatment of *Jourdan*.<sup>14</sup>
- b. "'Nonsense on various levels";<sup>15</sup> a remark elicited by Mark Tushnet's treatment of the *trial court*'s approach—for which he provides no evidence and his reconstruction of the law is demonstrably wrong—not, as he now claims, on the reasoning of the appellate division. Again there was no statutory provision to which Mark Tushnet could provide an argument for an "equitable exception." Alas, Mark Tushnet shows no greater care or understanding in handling reviews of his book

<sup>11</sup> 45 Mass. at 60-61.

<sup>12</sup> Tushnet, *supra* note 2, at 1002 (footnote omitted).

<sup>13</sup> A. Watson, *Failures of the Legal Imagination* (Julius Rosenthal Lectures to be delivered at Northwestern University 1987).

<sup>14</sup> Tushnet, *supra* note 2, at 1002 (footnote omitted) (quoting Watson, *supra* note 6, at 1045).

<sup>15</sup> When I wrote these words I had in mind Bentham's description of natural rights as "simple nonsense" and of inalienable rights as "nonsense upon stilts." See J. Bentham, *Anarchical Fallacies*, in 2 *The Works of Jeremy Bentham* 501 (J. Bowring ed. 1962).

than in discussing case law.' Alan Watson on Mark Tushnet's 'Counterresponse.'<sup>16</sup>

6. a. 'Watson would explain much of Southern slave law by reference to its origins in the Roman law of slavery.' Mark Tushnet.<sup>17</sup>
- b. 'Watson does not spell out what he regards as the adaptive mechanisms in his genetic account.' Mark Tushnet.<sup>18</sup>
- c. 'One hundred dollars reward to anyone (including Mark Tushnet) who can show in writing to the satisfaction of the editor-in-chief of the *Cardozo Law Review* that Alan Watson has claimed a genetic relationship between Roman law and much of Southern slave law apart from Louisiana.' Alan Watson.<sup>19</sup>

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P.S. The full title of Mark Tushnet's 'Counterresponse' might give the impression that my review of his book was a comment on the critical method in legal history. That is not the case. I was writing on one book by one individual and was concerned with its defects and his failings.

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<sup>16</sup> A. Watson, *supra* note 13.

<sup>17</sup> Tushnet, *supra* note 2, at 1003.

<sup>18</sup> *Id.* at 1007.

<sup>19</sup> Now.