

# ALAN WATSON'S CONTROVERSIAL CONTRIBUTION TO LEGAL SCHOLARSHIP

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It is an absolute pleasure to participate in honoring Alan Watson, who is undoubtedly one of the world's most gifted, prolific, and original legal scholars. Indeed, as a colleague once remarked: "The trouble with Alan Watson is that he is original." But such audacious scholarship is not without personal cost. Alan's originality has made him a most controversial figure in academia, and this controversy has followed him throughout his career.

Alan's first article on Roman law, discussing earnest money in the time of Justinian,<sup>1</sup> earned him the everlasting hostility of J.A.C. Thomas, and through him, of others. Alan, when he was a student of Thomas at the University of Glasgow, wrote an essay that disagreed with the position taken by Thomas on the same subject,<sup>2</sup> and he did not realise Thomas' article was then Thomas' only contribution to Roman law scholarship. When Alan began teaching the Roman law of sale in Oxford in 1957, he showed a revised version of his article on earnest money to his revered mentor, Professor David Daube, who at once sent it off to Professor Fernand de Visscher for publication in the prestigious *Revue Internationale des Droits de l'Antiquité*.

Alan wrote his doctoral thesis in Oxford on the Roman contract of mandate under the supervision of Daube and published it in 1961 as *Contract of Mandate in Roman Law*.<sup>3</sup> The book was warmly, if critically, received. However, Alan was taken aback by the rejection of what he regarded as his most important chapter. The reaction to this chapter is so revealing that I wish to devote some space on the topic. Justinian's *Digest* addresses the action available between a Roman and his *procurator*, or general agent.<sup>4</sup> Some texts give the *actio mandati*, action on the contract of mandate; some give the *actio*

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<sup>1</sup> Alan Watson, *Arra in the Law of Justinian*, 6 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ 385 (1959).

<sup>2</sup> J.A.C. Thomas, *Arra in Sale in Justinian's Law*, 24 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 253 (1956).

<sup>3</sup> ALAN WATSON, *CONTRACT OF MANDATE IN ROMAN LAW* (1961).

<sup>4</sup> JUSTINIAN, *DIGEST* (Alan Watson, trans., 1988).

*negotiorum gestorum*, action for work done; others give a choice of actions.<sup>5</sup> The general view of scholars was that: (1) classical jurists gave the *actio mandati*; (2) references to the *actio negotiorum gestorum* were Byzantine interpolations; and (3) the compilers of the *Digest* were careless. Alan noticed that up to the time of the Roman jurist Julian, the texts gave the *actio mandati*, that Julian's pupil, Africanus, gave a choice of actions; and that later jurists gave the *actio negotiorum gestorum*.<sup>6</sup> Thus, the development occurred in classical law, and the state of the texts was not the result of Byzantine interpolations of substance.

Alan felt his argument was irrefutable. But Alan is charmingly naive (and an enthusiast). He did not see that his approach would be taken as an attack on most Roman law scholarship of the previous century—and it was. Alan then generalized his approach and argued that there are very few interpolations as to substance in the law in Justinian's *Digest*. The implications of Alan's theory for an understanding of legal development are enormous. If Alan is correct, then the most influential work on private law in the Western world, Justinian's *Digest*, contains only law written for a very different civilization at least three centuries earlier. As was to be expected, the reaction in general to Alan's position was silence, although approval was expressed by J.H.A. Lokin<sup>7</sup> and O.F. Robinson.<sup>8</sup> As John Cairns and O.F. Robinson have noted, Watson's challenge to conventional legal scholarship has rarely been taken up.<sup>9</sup>

In 1965 Alan began to publish a series of five books on the law of the last two hundred years of the Roman Republic. When the first, *The Law of Obligations in the Later Republic*<sup>10</sup> appeared, his methodology was severely criticized. His plan was simple: to study every text, legal and non-legal, from the late Republic, then every earlier text where the survival (in some sense) of the law in later times could be checked, but to draw no arguments from evidence that related only to the Empire. In any event, Alan was able to show that private law in the late Republic was often substantially different from that

<sup>5</sup> *Id.*

<sup>6</sup> WATSON, *supra* note 3.

<sup>7</sup> J.H.A. Lokin, *The End of an Epoch: Epilegomena to a Century of Interpolation Criticism*, 1 COLLATIO IURIS ROMANI, 261, 271 (1995).

<sup>8</sup> O.F. ROBINSON, THE SOURCES OF ROMAN LAW: PROBLEMS AND METHODS FOR ANCIENT HISTORIANS, 128 n.7 (1997).

<sup>9</sup> *Critical Studies in Ancient Law, Comparative Law and Legal History: Essays in Honour of Alan Watson* xvii (John W. Cairns & O.F. Robinson eds., 2001).

<sup>10</sup> ALAN WATSON, THE LAW OF OBLIGATION IN THE LATER REPUBLIC (1965).

of so-called classical law. But the books are difficult reading partly because the surviving texts do not reveal all of the law and partly because Alan does not provide translations of his Latin quotations!

In 1970 Alan wrote *Legal Transplants: An Approach to Comparative Law*<sup>11</sup> but this could not be published until 1974 because of the outright hostile response of outside readers for academic presses. One of them, A.A. Schiller of Columbia University, maintained that Alan could not have read all the sources he cites. He had. Erudition is one of his hallmarks. Indeed, as a colleague once remarked, Watson is “the greatest man with texts since Irnerius in the 12th century!”<sup>12</sup> A.M. Honoré claimed the book was an attack on comparative law as he had taught it for years. He told Alan to “hide” the book. At this time, Alan received his first and only rebuke from Daube, his mentor, who claimed that Alan was wrong to take such criticisms seriously. Alan’s thesis is that borrowing has been the most fruitful means of legal development, hence comparative law is the best approach to understanding the relationship between law and society. Moreover, because of the longevity of legal rules, comparative law must also be a historical discipline. Ignored for years, this book is now at the center of the debate on making a new common law for the European Union. Yet the book still has a fierce critic in Pierre LeGrand.<sup>13</sup>

Alan followed *Legal Transplants* with *Society and Legal Change*<sup>14</sup> which also received little attention for some years but a second edition was published in 2001 and received considerable acclaim. Alan shows that much law that is dysfunctional for the elite who have the power to change the law remains in effect for centuries. He chose his examples from the two most innovative western systems, Roman law and English law. Daube wrote: “In *Society and Legal Change*, [Watson] comes near revealing the DNA responsible for a system’s growth.”<sup>15</sup>

Alan has been a prolific writer on a number of different topics. In addition to his four volume translation of Justinian’s *Digest*<sup>16</sup> and *The Evolution of Western Private Law*,<sup>17</sup> Alan’s other books on ancient Roman law include:

<sup>11</sup> ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974).

<sup>12</sup> MICHAEL HOEFELICH, *LEX ET ROMANITAS: ESSAYS FOR ALAN WATSON 1* (2000).

<sup>13</sup> Pierre LeGrand, *The Impossibility of ‘Legal Transplants’*, 4 *MAASTRICHT J. EUR. & COMP. L.* 111 (1997).

<sup>14</sup> ALAN WATSON, *SOCIETY AND LEGAL CHANGE* (1977).

<sup>15</sup> David Daube, *A Corrupt Judge Sets the Pace*, in *GEDÄCHTNISCHRIFT FÜR WOLFGANG KUNKEL* 1379ff.

<sup>16</sup> Justinian, *supra* note 4.

<sup>17</sup> ALAN WATSON, *THE EVOLUTION OF WESTERN PRIVATE LAW* (2001).

*Rome of the Twelve Tables: Persons and Property*,<sup>18</sup> *The State, Law, and Religion: Pagan Rome*,<sup>19</sup> and *International Law in Archaic Rome: War and Religion*.<sup>20</sup> Alan has also written numerous articles and book reviews. His books have also been translated into Chinese, Italian, and Serbian. His latest book, *Legal History and a Common Law for Europe: Mystery, Imagination, Reality*,<sup>21</sup> appeared in Stockholm in December, 2001.<sup>22</sup> More recently, Alan has turned his attention to law in the Gospels.<sup>23</sup> He believes that an understanding of the Gospels is much enhanced if one pays attention to rabbinic law which actually is prominent in all four Gospels. In the first book, *Jesus and the Jews: the Pharisaic Tradition in John*, Alan specifically argues that behind the legal episodes in *John* there is a Pharisaic source that was hostile to Jesus but was too well-known to be ignored. John sought to defang this Pharisaic source, adding a spiritual message, but as is standard with composite works the original shines through. These books again met with a cool reception from theologians but had more immediate success with ancient legal historians. There is growing evidence of serious interest by theologians.

Although there is increasing international recognition of Alan's status as the foremost comparative law theorist in the world, he remains a controversial figure in academia. But Alan's rejection by many "mainstream" scholars has become something of a point of pride. I remember the glee with which he told me that the *Oxford Classical Dictionary*<sup>24</sup> contains almost no reference to his work. The editors entrusted the articles on Roman law to Tony Honoré whose book, *Ulpian*,<sup>25</sup> was severely criticized by Alan in the *Times Literary Supplement*.<sup>26</sup> At the time, Honoré's theory—that one could ascertain when

<sup>18</sup> ALAN WATSON, *ROME OF THE TWELVE TABLES: PERSONS AND PROPERTY* (1975).

<sup>19</sup> ALAN WATSON, *THE STATE, LAW AND RELIGION: PAGAN ROME* (1992).

<sup>20</sup> ALAN WATSON, *INTERNATIONAL LAW IN ARCHAIC ROME: WAR AND RELIGION* (1993).

<sup>21</sup> ALAN WATSON, *LEGAL HISTORY AND A COMMON LAW FOR EUROPE: MYSTERY IMAGINATION, REALITY* (2001).

<sup>22</sup> I once asked Alan what he thought was his best work. He replied that the one he most enjoyed writing was that on private international law in the U.S., *Joseph Storey and the Comity of Errors* (1992), but that his best work was the essays collected in *Studies in Roman Private Law* (1991).

<sup>23</sup> See, e.g., ALAN WATSON, *JESUS AND THE JEWS: THE PHARISAIC TRADITION IN JOHN* (1995). See also ALAN WATSON, *THE TRIAL OF JESUS* (1995); ALAN WATSON, *JESUS AND THE LAW* (1996); ALAN WATSON, *JESUS: A PROFILE* (1998). Connected with these is ALAN WATSON, *THE TRIAL OF STEPHEN: THE FIRST CHRISTIAN MARTYR* (1996).

<sup>24</sup> OXFORD CLASSICAL DICTIONARY (3d ed. 1996).

<sup>25</sup> TONY HONORÉ, *ULPIAN* (1982).

<sup>26</sup> Alan Watson, *Times Literary Supplement*, Feb. 18, 1983, at 104. Honoré, who had known Alan's opinion of the book, challenged him to review it, so that he might reply.

texts were written based purely on vocabulary, taking no account of the fact that *Ulpian* was relying on Sabinus and that nothing acknowledged to be written by Sabinus has survived—was vigorously supported, especially by P. Birks who became Honoré's successor at Oxford. Today, everyone—including Birks—seems to regard Honoré's thesis as a wayward aberration. It is sad to think that people pay good money for the *Oxford Classical Dictionary* believing that the entries are objectively written and not merely the result of petty academic politics.

In concluding, I would like to note that I have known Alan Watson since I was a student in law school. He and I were colleagues for five years at the University of Pennsylvania. I have learned more from him than from any other figure in my academic life. He possesses integrity—both personal and academic—in a measure that I have encountered in few others. I am proud to be his student, his colleague, and his friend.

