Book Review


With the publication of Law and Revolution, Harold Berman, the James Barr Ames Professor at Harvard Law School, adds yet another book to an already distinguished record of publications. That record includes publications in legal history, comparative law, and legal philosophy—studies such as Justice in the USSR, The Nature and Functions of Law, and The Interaction of Law and Religion. In significant respects, however, Professor Berman's new addition is an exceptional one—and, I submit, exceptionally important.

For one thing, this new work was extraordinarily long in the making, and, I suspect, of particular significance to its author—a fact underlined by his promise of a sequel. Berman states that he began work on this book in 1938—a full decade before he began teaching at Harvard. At that time he was a graduate student in legal history at London School of Economics, where he had studied under the inspiration of Eugen Rosenstock-Hussey, to study the influence of the English Revolution of 1640-1689 on the development of English law. There, as he relates, T. F. T. Plucknett, the dean of English legal historians in the period following World War I, advised him that he would not understand a word of English legal history unless he began his studies in the twelfth and thirteenth centuries with Glanvill and Bracton. He took Plucknett's advice, but he also took R. H. Tawney's course in seventeenth-century English history. The book, engendered amidst these circumstances, as its author suggests, builds on the work of all three mentors.

What is most exceptional about Law and Revolution, and what is bound to make it a controversial book, is its premise that we are currently undergoing an unprecedented crisis in Western Law—a crisis stemming in large part from a growing oblivion regarding the very roots of the Western legal tradition itself. That there is such a
crisis, Berman admits, is not something that can be proved scientifically. One either senses it, he says, or one does not.

I can only testify, so to speak, that I sense that we are in the midst of an unprecedented crisis of legal values and of legal thought, in which our entire legal tradition is being challenged—not only the so-called liberal concepts of the past few hundred years, but the very structure of Western legality, which dates from the eleventh and twelfth centuries.¹

Ultimately, suggests Berman, we are aware of this crisis intuitively, in the way that Archibald MacLeish in The Metaphor says that we are aware when the old images of a passing era have lost their meaning: "A world ends when its metaphor has died... It perishes when those images, though seen, no longer mean."

Such images, the metaphors and symbols of community in the West, have been predominantly religious and legal. Furthermore, until recent history, these have been always connected. But in the twentieth century, for the first time, the connection between the religious metaphor and the legal metaphor has been broken; religion has become largely a private, personal affair, and law has become largely a matter of technical expertise and practical expediency. Neither metaphor expresses any longer the collective vision of the West, its sense of unity or common purpose, or its understanding of its future or its past.

This crisis must not be mistaken, simply, for a crisis in legal philosophy. It is a crisis in law itself. The question as to what constitutes the precise foundations of law has always been a matter of philosophical debate; that legal systems themselves have always presupposed the validity of certain beliefs or postulates is not a matter of debate, but of historical fact. Yet, as Berman notes:

Today those beliefs or postulates—such as the structural integrity of the law, its ongoingness, its religious roots, its transcendent qualities—are rapidly disappearing, not only from the minds of philosophers, not only from the minds of lawmakers, judges, lawyers, law teachers, and other members of the legal professions, but from the consciousness of the vast majority of citizens, the people as a whole; and more than that, they are disappearing from the law itself. The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. Thus the historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse.²

² Id. at 39.
Periods of social upheaval and disintegration are not new in Western history, and such periods have strained traditional legal institutions, values, and concepts in the past. What is new today, according to Berman, is not the threat to particular elements within the legal tradition, but the threat to the survival of that tradition as a whole. If it were merely a matter of an ideological challenge, such as Marxism or socialism, Western society would be able to accommodate it within its legal tradition and to adjust. As Berman asserts, however, "the disintegration of the very foundations of that tradition cannot be accommodated; and the greatest challenge to those foundations is the massive loss of confidence in the West itself, as a civilization, a community, and in the legal tradition which for nine centuries has helped to sustain it." The crisis of the Western legal tradition, therefore, is ineluctably linked to the crisis of the West as a whole.

The causes that have precipitated this crisis, as understood by Berman, are closely related to the obstacles that block the way to the future and to a reorientation of legal thought. For what is required to go forward and to reorient ourselves amidst the current value vertigo is the overcoming of the same historical oblivion that has brought it about. What is required, ultimately, is a reapropriation of the past. Specifically, this means that the historical roots of Western law must be repossessed—roots that can be traced back through a series of "revolutions"—the Russian, French, American, English (1640-1689), and the German (Protestant) revolutions—to the most decisive of all: the "Papal Revolution" of 1077-1122 and the birth of canon law in the heart of the middle ages. This, in a sentence, is the thesis of Berman's book.

This thesis will be greeted, doubtless, with some skepticism. It runs counter to the grain of historical assumptions in modern jurisprudence, and will likely be dismissed by many as a nostalgic yearning for a bygone era. What will be less easily dismissed is Berman's assertion that current trends in legal thought and practice increasingly reveal a corrosive cynicism about law and a contempt for law itself. Such cynicism and contempt may be seen, for instance, in the effects of the "post-liberal" revolt against legal formalism, where a growing emphasis on "public policy" in legal reasoning comes dangerously close to instating a positivistic, instrumental view of law as a means of enforcing the will of those who happen to be in power. As Berman observes:

3. Id. at 40.
‘social justice’ and ‘substantive rationality’ have become identified with pragmatism; ‘fairness’ has lost its historical and philosophical roots and is blown about by every wind of fashionable doctrine. The language of law is viewed not only as necessarily complex, ambiguous, and rhetorical (which it is) but also wholly contingent, contemporary, and arbitrary (which it is not).”

The dangers here are evident—the subtle identification of law with national law and public policy, the separation of law from history, the reduction of law to a set of technical devices for achieving whatever needs to be done.

On perhaps its most general level, Berman’s thesis is a frontal assault on the presuppositions of conventional historiography as it has generally been taught since the sixteenth century, an assault on the widespread uncritical acceptance by educated people of the assumptions underlying the convention of dividing Western history into three periods: ancient, medieval, modern. This habit of periodization, according to Berman, is rooted in a number of historiographical fallacies that conspire to obscure the continuity between so-called medieval and modern times. These include:

religious fallacies, both Protestant and Roman Catholic, which have obscured the continuity between the Catholic Middle Ages and post-Reformation modern European history. To these have been added also the fallacies of the Enlightenment, which discovered a Renaissance contemporaneous with the Reformation, as well as the fallacies of Marxist theory, which discovered a Rise of Capitalism contemporaneous with the Renaissance and Reformation.

Nothing more clearly illustrates the hold that these fallacies have on modern man’s thinking about the past than the concepts expressed by the words “medieval” and “feudal.” Together with these fallacies, all the ideologies of the nineteenth century “conspire to minimize, deny, or ignore the deep roots of modern Western institutions and values in the pre-Protestant, prehumanist, prenationalist, preindividualist, and precapitalist era.” And, by obscuring the continuity between medieval and modern, all of these factors also conspire to conceal the revolutionary break in Western history that took place in the late eleventh and twelfth centuries during the Gregorian Reform and the rise of canon law.

On another level, Berman’s thesis represents a pointed criticism of the related fallacies of nationalism—those fallacies that lead to

4. Id. at 41.
5. Id. at 539.
6. Id. at 42.
the reduction of all law to national law and to the identification of all legal history with national legal history. These fallacies are related closely to the foregoing fallacies of conventional periodization and to the rise in the nineteenth century of so-called "scientific history," whose raison d'etre seemed to be, in many cases, the tracing of the emergence of one's own nation from primitive tribalism and medieval feudalism to modern eminence and grandeur (Hegel, Ranke). In the twentieth century, as Berman does admit, such nationalist historiography has largely given way to more global, transnational treatments, especially among social, economic and political historians, and even, to an extent, among legal historians (at least in Europe). But English and American legal historians still remain peculiarly isolated and ingrown. Berman relates how, in 1888, in his Inaugural Lecture as Downing Professor at Cambridge University, F.W. Maitland raised the question as to why the history of English law was not yet written. His answer was, in the first place, "because of the traditional isolation of the study of English law from every other study," and, in the second place, because "history involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history." Berman remarks:

Even for the period in which all the nations of the West, including England, were within the Roman Catholic Church and not only lived under the same system of ecclesiastical law but also had the closest intellectual, cultural and political ties with one another, English law is still treated by many legal historians as though it were outside of European history.

Comparative legal historians have managed to counter this tendency only slightly by their division of Western legal systems into the "Continental European" and the "Anglo-American," as well as, more recently, the "socialist law" of the Eastern bloc. In the final analysis, as Edmund Burke once observed, "The laws of all the nations of Europe are derived from the same sources," and the truth is, therefore, that these different national legal systems are nothing but branches of the same family tree.

On still another level, Berman's thesis represents a criticism of the fallacies of an exclusively political and analytical jurisprudence, an exclusively philosophical and moral jurisprudence, or an exclusively historical and socio-economic jurisprudence. These fallacies, closely related to the foregoing fallacies of historical peri-

7. Id. at 18.
8. Id. at 17-18.
odization and nationalism, correspond roughly to the three traditional schools of Western jurisprudence—the "analytical" school, the "natural law" school, and the "historical" school (and, more recently, also the "sociological" school).

"Analytical" jurisprudence, or, as it is now more commonly called, legal "positivism," arose on the Continent under the influence of Rudolf von Jhering and Hans Kelsen, and in the English-speaking world under the influence of John Austin, John Chipman Gray, and others. In one form or another, legal "positivism" prevails throughout the West today, although it is perhaps most fastidiously identified by its Anglo-American partisans with their own legal history. "Natural law theory" arose in the middle ages under the influence of Aristotelian philosophy and Christian theology and exerted a decided influence upon the formative period of the Western legal tradition. Although it has experienced periodic revivals under Neo-Thomist influence, it is not identified exclusively with any one national legal history. "Historical" jurisprudence, although embedded in the English legal system since the English Revolution of the seventeenth century, only took root as a legal philosophy in Germany, under the influence of Friedrich Karl von Savigny, Otto von Gierke, and others.

The problem with these traditional schools of jurisprudence is their myopic exclusivism. "Positivism" conceives of law as substantially nothing more than an expression of the law-maker's will in the form of rules and sanctions—what Max Weber called the "logical formalism" or "formal rationality" of Western law. "Natural law theory" conceives of law, ultimately, as an expression of conscience derived from moral standards understood by means of natural reason. "Historical" jurisprudence conceives of law primarily as an outgrowth of custom, which derives its meaning and authority from the past history and values of the people whose law it is. Each of these perspectives bears only a part of the whole truth, and insofar as that partiality itself is ignored or treated as though it were the only truth, it undermines even the partial insight of its own perspective.

It used to be said—as recently as C.K. Allen's Law in the Making,\(^9\)—that there are four sources of law: legislation (or rule), precedent, equity, and custom (or policy). But inasmuch as any of these is disregarded, let alone disparaged, the proper significance of all the others also tends to become diminished. What is needed,

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then, as Berman suggests, is an *integrative* approach, which will supplement the proper analytical focus on legislation and rule with a stabilizing historical focus on precedent and custom, and a balanced philosophical focus on equity, in the sense of conscience and morality. What is needed is an adequate social theory of law.

The first task of a social theory of law if it is to be viable today, according to Berman, is to escape from oversimplified concepts of law rooted in the late eighteenth and early nineteenth century "social theory”—theory of the variety pioneered by Montesquieu, Hegel, Saint-Simon, Comte and others; exemplified in the theories of Karl Marx in the mid-nineteenth century; and developed in the views of Max Weber in the late nineteenth and early twentieth centuries. These social theorists sought to explain the historical development of law in terms of social and economic forces operating beneath the surface of political and ideological events.

For Marx and his partner, Friedrich Engels, the principles of law, which jurists imagine to be *a priori* principles, are in fact merely ideological reflexes of economic forces. Law is essentially nothing more than part of the political and ideological "superstructure" determined by the "material base" of economic realities, which it reflects and seeks to preserve. Such notions of economic causation, however, are grossly oversimplified and cannot make any sense whatsoever of certain crucial elements in Western legal history, such as the tradition of "the rule of law" and the fact that law under so-called feudalism not only supported the power of feudal lords but carefully restricted their power in order to protect the peasants. But even sophisticated Marxists, like Rodney Hilton, who concede these facts, are constrained by their uncritical identification of law with an economically determined, ideological "superstructure" to downplay their warranted significance. Those, furthermore, such as Perry Anderson, who, because of the evident formative significance of such elements as religion and law in the development of medieval culture, go so far as to actually reject this dualism of "superstructure" and "base," and still leave open the option of reverting to it in order to explain periods of upheaval and revolution as economically motivated.

Similar problems are apparent in Weber's thought, despite the fact that his training in legal history, as Berman notes, was far superior to that of Marx, and despite the fact that he utterly rejected Marx's "evolutionary dogmatism," economic determinism and materialism. Specifically, Weber set forth a classification of societies and legal systems according to a theory of ideal "types": charis-

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1985 Book Review 361
matic, traditional, and formal rational. He construed these as purely ideal, ahistorical "types" and conceived of his theory as a purely static model. But his concept of the "routinization" of charismatic law and his idea of the transition from traditional to rational types of law in the Occident introduced a dynamic element into his theory, which inclined, inevitably, toward an implicit historiography. While Weber's acquaintance with the details of history enabled him to resist the obvious error of endeavoring to force the Western legal tradition into the procrustean bed of his typological classification, his underlying commitment to its implicit historiography compelled him, like Marx, to impose a sharp break in the sixteenth century between medieval feudalism and modern capitalism.

Weber's social theory was no more capable than Marx's of accounting for the existence of capitalist elements in thirteenth and fourteenth century commercial law, or for the existence in modern law of characteristics more feudal than capitalist, or for the coexistence of elements of each of his ideal "types" of law in eleventh and twelfth century canon law, urban law, feudal law, manorial law, mercantile law, and royal law. It is no less a distortion to suggest that all Western law prior to the sixteenth century is an ideological reflection of feudal economics than to suggest that all modern law is an ideological reflection of capitalism. Law is neither a part, simply, of an ideological "superstructure" nor of a material, economic "base." If anything, Berman suggests, law is both ideal and material and thereby serves to integrate (ideal) policies and values of legislators and (material) structures and customs of society at large. "Thus theoretically at least, a conflict between social-economic conditions and political-moral ideology, which Marx saw as the primary cause of revolution, may be resolved by law."¹⁰

The second major task of a social theory of law today, in Berman's view, is to adopt a historiography appropriate to the history of law, rather than one derived primarily from economic history or some other kind of history. Too often legal history has been distorted by reductionistic ideological commitments and oversimplified notions of economic and social causality in law. As a result, Western legal history has been analyzed broadly in terms of a series of transitions from feudalism to capitalism to socialism, and the continuity of the present with the past has been largely obscured. An adequate social theory of law must confront this con-

¹⁰. H. Berman, supra note 1, at 557.
tinuity and the ineluctable rootedness of contemporary law in a tradition that has evolved and persisted through the great revolutions of the last four hundred years and which stems, ultimately, from the Papal Revolution of the late eleventh and early twelfth centuries. The fact must be faced, as Berman emphatically asserts, that "modern" Western law began in the middle ages, and that the first "modern" Western legal system was nothing other than the canon law of the Roman Catholic Church.

Many of the secular, rational, materialistic and individualistic characteristics that contemporary social theorists attribute to the legal systems of modern liberal capitalist societies already existed in medieval law. Contemporary notions of civil rights in the United States, for example, did not originate in the movements of the 1960's. The civil rights movement of the sixties themselves cannot be understood apart from the Bill of Rights and the American Revolution of 1776; the basic American notions of civil liberty—including freedom of speech, freedom of the press, and free exercise of religion, among others—in turn cannot be understood apart from their rootedness in the English Bill of Rights and seventeenth century Puritanism. In fact, Berman finds the main antecedents of modern Western conceptions of the social contract and government by consent of the governed, not in Locke and Hobbes, as one might expect, but in seventeenth century Calvinist congregationalism; in sixteenth century Geneva, where John Calvin instituted a civil covenant in which the entire populace swore obedience to the Ten Commandments and loyalty to the city; and, still farther back, in the late eleventh and early twelfth century Papal Revolution and the formation of cities as sworn communes.

A social theory of law must seek to account for these facts. Furthermore, it must seek to offer an explanation of the fact that the first corporate legal entity to emerge late in the eleventh century was not "the state" but the church in the form of the state, and that this church-state claimed to govern only half of life. It must seek to help us understand the peculiar Western dualism of ecclesiastical and secular jurisdictions in the development of Western law, and the pluralism of corporate groups within the secular jurisdiction, each with its own law (feudal, manorial, mercantile, urban, and royal law), and the relationship of this pluralism to the dualism of secular and ecclesiastical jurisdictions. It must seek to disclose the historical process by which these diverse jurisdictions and diverse laws have become secularized, levelled, and assimilated into monolithic, national, state legal systems. Furthermore, it must
be concerned, as Berman says,

with the extent to which the Western legal tradition has always been dependent, even in the heyday of the national state, on belief in the existence of a body of law beyond the law of the highest political authority, once called divine law, then natural law, and recently human rights; and the extent to which this belief, in turn, has always been dependent on the vitality of autonomous legal systems of communities within the nation (cities, regions, labor unions), as well as communities crossing national boundaries (international mercantile and banking association, international agencies, churches). 11

In eighteenth century England, Sir William Blackstone's *Commentaries on the Laws of England* 12 served as a reference book not only for lawyers but also, and primarily, for all educated people. It discussed natural law, divine law, the laws of nations, the English common law, laws of local custom, Roman law, canon law, mercantile law, statutory law and equity. Underlying this catalogue of diverse laws was a historical perspective unfettered by the limitations of provincialistic nationalism, reductionistic ideology, or chauvinistic obsession with the here and now. Such a perspective, by linking Blackstone's readers with a whole diverse tradition of Western law, freed them from bondage to any single time, any single place, any single past, any single nation, any single system of law.

This perspective has been all but lost today, when people think of law chiefly as a formidable mass of legislative, administrative and judicial rules, regulations and procedure in effect in a given country. Berman's work, however, is an encouraging sign. One would like to think that a book such as *Law and Revolution* could serve a comparable purpose in our own day to Blackstone's in his; that it would be taken up and read widely among educated people, that its message would be understood, its content absorbed. If that prospect seems doubtful, it cannot be for lack of an adequately wide-ranging and comprehensive book.

*Law and Revolution* is divided into two parts. Part I is entitled "The Papal Revolution and the Canon Law"; Part II "The Formation of Secular Legal Systems." Each part is subdivided into seven chapters. In Part I these include (1) a discussion of the background of Western law in Germanic tribal law, (2) the origin of the Western legal tradition in the Papal Revolution, (3) the origin of Western jurisprudence in the first European universities, (4) an exami-

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11. Id. at 45.
12. W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (C. Gavit 1941).
nation of the theological sources of the Western legal tradition, (5 & 6) a detailed analysis of the origin and structure of canon law, and (7) a discussion of the conflict between Becket and Henry II as a conflict between concurrent jurisdictions. In Part II, there are chapters on (8) the concept of secular as opposed to ecclesiastical law, (9) feudal law, (10) manorial law, (11) mercantile law, (12) urban law, and (13 & 14) royal law in Sicily, England, Normandy, France, Germany, Spain, Flanders, Hungary, and Denmark.

With such a work already in hand, one cannot but look forward with great expectation to the promised sequel.

Philip Blosser