Book Reviews

How Did It All Begin?

Law and Revolution: The Formation of the Western Legal Tradition. *By* Harold J. Berman.* *Cambridge, Massachusetts: Harvard University Press*, 1983. Pp. viii, 657. $32.50.

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Professor Berman's book tells a story within a story. His central theme is the emergence of Western legal culture, but he places his narrative within the framework of a visionary scheme about the destiny of Western civilization. This larger story is merely adumbrated in the book and not ripe for serious critical examination.[1] But because Berman's larger story intersects with his fully developed narrower one, the all-encompassing scheme of the larger narrative must quickly be summarized before we turn to the proper subject matter of this review—Professor Berman's interpretation of the origins of Western legal culture.

Berman's thesis is that distinctively Western legal institutions came to life about nine centuries ago in a violent upheaval, or revolution, in which the Church of Rome established its independence from domination by em-

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1. Berman has since fleshed out his skeletal story. *See* Berman, *Law and Belief in Three Revolutions*, 18 VAL. U.L. REV. 569 (1984). But at the root of his theory one can still recognize the scheme of Eugen Rosenstock-Huessy, as presented in his book OUT OF REVOLUTION: AUTOBIOGRAPHY OF WESTERN MAN (1969). Like Spengler before him, Rosenstock-Huessy, whose range of reading is immense, creates strange kaleidoscopic patterns by throwing facts together as in free association; like Spengler too, Rosenstock-Huessy assembles loosely integrated yet occasionally brilliant insights into fascinating collages. But unlike Spengler, Rosenstock-Huessy sees the history of the West as arising from the "papal revolution," *see infra* note 3, growing linearly, and punctuated by a series of six revolutions. The history is one of progressive secularization in the course of which more and more of the divine is put into men. Complete secularization signals the approach of the last phase of history. "When we put all the divine power into man . . . man's truly human side evaporates." *Id.* at 723–24. Berman openly acknowledges Rosenstock-Huessy's influence. *See* H. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 20, 27, 574 n.1 (1983) [hereinafter cited by page number only].

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perors, kings, and feudal lords. Since then, Berman claims, Western law has undergone a series of dramatic changes, each linked to a revolution that was a creative moment in history. (He lists the Lutheran, Puritan, American, French, and Russian revolutions.) But throughout momentous revolutionary transformations, Berman detects an ongoing evolution, an "organic growth." This growth reflects assumptions about the mission of history in general and of law in particular that were implanted in the law by religious beliefs dominating the West nine centuries ago. After an initial *Sturm und Drang* of revolutionary exuberance, legal institutions never rejected the past *in toto*; instead, reinterpretation of inherited institutions enabled the "tradition" to live on. For example, throughout all major revolutions, law continued to be viewed both as an "engagement" entrusted to a specialized corps of professionals, and as a discipline differentiated from ethics, politics, and religion. Legal scholars also continued to conceptualize the law, give it integrity as a coherent whole (a *corpus*), and create interpretative networks. Ideologically, jurists continued to imagine law, at least in some of its parts, as binding even the highest political authority. Common modes of categorization also survived, as well as many important postulates.

Events since the outbreak of the First World War, Berman insists, have disrupted this "organic growth." The Western legal tradition displays symptoms of a terminal illness, associated with the collapse of the belief systems and assumptions that sustained and nourished Western legal sensibility. The idea that law transcends and binds political power is no longer taken seriously; the belief in the relative autonomy of legal from other social institutions is seriously weakened. Scholarly efforts to order the law are everywhere in retreat; scholars no longer imagine the normative universe of law as a coherent whole capable of continuous growth, but rather as an assembly of discontinued fragments, growing irregularly, like dandelions. The very idea of a Western legal tradition that transcends national systems has lost its meaning. Berman's large story ends with a deep conviction about the impending doom of Western legal culture. In fact, some passages seem to suggest that we may already be living in the post-Western era: A new emerging culture, common to mankind, may be rendering intercivilizational clashes obsolete. Precisely because he sees an era ending, Berman thinks he can clearly discern its beginnings: The owl of Minerva spreads its wings only at dusk.

I.

Berman dates the inauguration of Western legal culture to the late eleventh, twelfth, and part of the thirteenth centuries, following the increasing recognition that the waning Middle Ages saw explosive innovations and

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breakthroughs in various spheres of social life. Indeed, many now view the late Middle Ages as a seedbed of modernity, an epoch more crucial to the West than the Renaissance.[2] Some "mutational" changes in governmental and legal structures in the late eleventh century illustrate the importance of the era for the rise of the Western legal tradition. While there were hardly any governmental writing offices in the West prior to the late eleventh century, centralized bureaucratic institutions (chanceries) suddenly began to sprout and act as nerve centers of government. Professional lawyers and judges appeared and were entrusted with "judicial matters." Where law had hardly been differentiated from the conscience and the customs of the community, newly founded universities developed a specifically legal technique of analyzing legal problems. Ordeals and similar "mythical" modes of proof began a retreat before new evidentiary techniques that relied on perception and rational inference.

Berman recognizes, of course, that he cannot properly explain, or even describe, these events in isolation from the broad currents of change that engulfed European society. He notes the rapid economic development after invasions into the West ceased, population growth, cultural revival, and the like. But he chooses to focus on the political and intellectual spheres, and more particularly on the Roman Catholic Church's political and legal institutions. For him, the influence of the Church holds the key to the emergence of distinctively Western legal institutions.[3] This focus is

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2. Already Henry Sumner Maine stressed the cardinal importance of the passage in the 12th century from the family to the individual as the unit governed by civil laws in progressive societies. H. MAINE, ANCIENT LAW 163–64 (10th ed. 1963) (1st ed. London 1861). Italian and French historians of law used to call the second half of the Middle Ages not the Renaissance, but the age of "the legal renaissance." *See, e.g.*, David, *Sources of Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 99 (R. David ed. 1984). But especially in the past few decades the belief seems to be spreading that our present circumstances should be viewed against the background of wider horizons which include reference to the twelfth and thirteenth centuries. The late Benjamin Nelson, better known in West Germany than in the United States, has persuasively argued that even the roots of the Western advances in science should be sought in this period. *See* B. NELSON, ON THE ROADS TO MODERNITY 192–93 (1981). For a different view, locating the roots of modernity at a later period, see, for example, J. FRANKLIN, JEAN BODIN AND THE SIXTEENTH-CENTURY REVOLUTION IN THE METHODOLOGY OF LAW AND HISTORY (1963); R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976).

3. *See* p. 87. His thesis is somewhat obscured by shifts in the meaning of his key concept—the "papal revolution." Most of the time the term refers to changes within the Church and in the Church's relation to secular authority which occurred from the late 11th century to sometime in the 13th century. When Berman uses "papal revolution" in this sense, there is room for questions about the relation of the revolution to changes in other sectors of social life. For example, was the revolution a response to socioeconomic change, a stimulus for these changes, or both? But Berman also uses the term to encompass the "totality" of social change in the period. Pp. 100–03. When he does that, his synecdoche prevents clear and meaningful questions concerning causation.

Notwithstanding occasional obscure passages, Berman leaves no doubt about his refusal to assign causal priorities: To him multiple factors interact in complex ways. Law itself can sometimes be an agent transforming the social environment rather than a mere product of the socioeconomic matrix.

It is also clear that he sees no evidence of the influence on the formation of Western law of intercivilizational encounters in the 12th and 13th centuries. *See, e.g.*, p. 588 n.85. Especially if the

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rare, but not unprecedented: Some social theorists have found the religious factor crucial in the rise of the West, and several historians have traced the great contribution of medieval canonists to specific areas of the law.[4] But Berman weaves these scholars' insights into novel patterns, adds his own ideas, and offers a novel perspective on the origins of Western legal culture. His contribution can best be presented by distinguishing three separate ways in which the Church may have influenced the legal culture.

A.

One argument is that the Church undermined the early medieval worldview, creating a propitious intellectual climate for the rise of Western institutions. Berman makes this argument by showing how Christianity affected the culture of the Germanic peoples[5] and by describing the impact of certain liturgical and doctrinal changes of the Western Church in the eleventh century.[6] He maintains that old Germanic perceptions of the world coexisted with Christianity; like Catholicism in today's Bahia, so Christianity in the European Middle Ages failed totally to dislodge mythical visions of reality in which the world of Gods continuously interpenetrated the human world.[7] The contact of the two discrepant worldviews created a strain in the intellectual spheres with great dynamic potential and produced a reservoir of creative energy to be released in the late eleventh century.

Berman also finds significant the expansion of solidarity beyond tribal limits through loyalty to a common faith. The idea of *populus christianus*, no matter how abstract, prepared the West for emergence as an ideo-

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"papal revolution" is extended into the 13th century, the problem requires more elaboration. For example, to the extent one recognizes the influence of Greek philosophy on early legal scholars, one must note that much of this philosophy reached the West in Arab dress. Even Abelard, in his later works, cites to parts of Aristotle's "new logic" that originated in translations from Arabic. *See* D. KNOWLES, THE EVOLUTION OF MEDIEVAL THOUGHT 189-90 (1962); *see also* A. EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE 135 (1971) (intercivilizational conjectures); G. MAKDISI, THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST (1981) (Moslem influence on scholastic method and modes of education in West).

4. For interesting insights in the intercivilizational context, see, for example, B. NELSON, *supra* note 2, at 192-93, 245; J. STRAYER, MEDIEVAL STATECRAFT AND THE PERSPECTIVES OF HISTORY 321-28 (1971); M. WEBER, GENERAL ECONOMIC HISTORY 313-14 (F. Knight trans. 1927).

Among legal historians Walter Ullmann has repeatedly stressed the importance for the West of "biblically engendered legalism." To him the Bible, at least since the Vulgate, is the harbinger of Roman law revival. But his interpretation of events differs considerably from Berman's. *See* W. ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES 45-49, 151 (1975).

Specialized studies on the canonist contribution are legion. Outstanding among more recent publications are those by Steven Kuttner, to whom Berman frequently refers. *See, e.g.*, pp. 189, 201, 585 n.53, 598 n.44, 601 n.7, 605 n.22.

5. *See* pp. 49-84.

6. *See* pp. 165-98.

7. Ordeals, for example, which rest on this vision of reality, were not abolished, but the clergy enlisted in their administration.

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logically identifiable unit, and planted the seeds of some peculiar attitudes toward the law, such as the belief that the law binds even the highest political authority.

Changes in Western Christianity during the eleventh century are of even greater importance to Berman's interpretation of events. Up to the end of the first millenium, perhaps haunted by the collapse of classical civilization, Christian faith was essentially apocalyptical, with little concern for secular life. Related to this general apathy about the *saeculum* was the belief that man, totally dependent on God for salvation, could do very little to save himself. Mysticism permeated theology; divine mysteries were objects of veneration rather than subjects for human reason. In the eleventh century, these earlier Christian positions lost prominence. The attitude toward the *hic et nunc* (the here and now) began to change, as the belief grew that life on earth could be ameliorated. Man was increasingly viewed as responsible for his actions and capable of avoiding sin through exertion of his will. Theologians began to discuss the sacred in terms of rational arguments that could persuade even a nonbeliever.

Berman links this remarkable transition from otherworldliness to the Church of Rome's increasing emphasis on the Second Person of the Trinity. He sees this emphasis on the divine Saviour and his humanity as a decisive move in the direction of an anthropocentric view of the world. New conceptions of purgatory, the eucharist, and penitence implied man's own responsibility for the state of his soul and his actions: A tribunal of conscience was set up, reducing the significance of the Last Judgment itself. Theological thought was also affected; if God could assume the human form, why should theologians not try to fit the mysteries of faith into constructs of the human intellect, subjecting the sacred to rational reflection.

Berman imaginatively links these developments in the religious sphere to specifically legal problems. Consider, first, that the new attitude toward the sacred may have helped to unleash the rationalist forces that many scholars have found crucial to the emergence of characteristically Western legal, political, and social institutions as of the late eleventh century. If God's existence could be rationally understood, so could all the cosmos He had created.[8] To be sure, the belief continued that reason and faith can be

8. "Only when the effort was made to study God objectively, and God's laws, did it become possible to attempt to study secular life, and secular laws, objectively . . . ." P. 158.

R.C. Van Caenegem is right in asking those historians who emphasize the importance of "rationalization" in the genesis of Western legal institutions about the source of this will to rationalize. Van Caenegem, *The State, Society and Private Law*, in 37 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 236, 243-44 (1969). Of course, believers in the primacy of economic determinants will find the impetus for the increased use of reason in the revival of economic activity (mystics do not engage in commercial transactions). But even they might be willing to concede that religious factors contributed to the inten-

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reconciled, but their analytic separation proved to be the first long step toward their ultimate divorce. The separation created the room for the differentiation of philosophy and law from the theological matrix, and for the conception of law as an independent discipline.

Theology also gave the emerging body of legal thought its method: Clashing legal propositions, like religious ones, could be reconciled through subtle distinctions and related procedures. And only a short step separated Abelard's juxtaposition of contrary propositions of the faith from the juxtaposition of conflicting *legal* propositions by the canon lawyers. In both instances, like a composer writing a sonata, the scholar would commence by exposition of the theme, develop its complications, and then resolve them.

Second, the new and less reverential attitude toward the sacred could have combined with the Church's new interest in life in the *saeculum* to generate a propulsive conception of law. The *ius novum*, with which the Church was to perform its mission in the world, was no longer sacriligious tinkering with an immutable order established by divinity:[9] Legislative enactments could change the social structure. Berman also discusses more specific links between religious change and the law. For example, the emergence of the administration for the cure of the soul gave rise to penitential literature, and the casuistry of that literature directly influenced key concepts of substantive criminal law that we still use.[10]

Not all of Berman's observations about the religious roots of Western legal institutions are new. He may also have failed to consider some connections between the breakthroughs in theology, the tribunals of conscience, and the law.[11] Yet the amply footnoted pages he has written on the influence of religion on legal thought remain among the best in the book. Far from creating an impression of *déjà-lu*, these pages combine into a new ensemble the thesis about discontinuities in the medieval Church with findings of more recent studies in legal history. And Berman breaks the monotony of theological and legal argument with stimulating side glances at various spheres of social life, including medieval art.[12]

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sity and the speed of rationalization, or even exercised a reverse influence on the economic sphere.

9. Why the program of the Church became a legal program may have to be explained by the legalism of the Bible, and the infusion of legal notions into the concept of rule. These developments take us back at least as far as the Carolingian period. For some clues, see pp. 66–67.

10. *See* pp. 68–75, 179–98.

11. For ideas in this direction, see M. CHENU, NATURE, MAN, AND SOCIETY IN THE TWELFTH CENTURY (J. Taylor & L. Little trans. 1968); D. KNOWLES, *supra* note 3, at 157–59; D. LOTTIN, 3 PSYCHOLOGIE ET MORALE AUX XII^{E} ET XIII^{E} SIÈCLES (1949).

12. Berman does not fail to mention Gothic cathedrals. However, the first signals in art of the greater emphasis on God-Man and his sacrifice for humanity occur in crucifixes of Umbria and Tuscany, long before the break away from the impersonal and otherworldly Byzantine manner in better known art.

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B.

A second role of the Church in the genesis of Western legal culture is its creation of a peculiar political situation in the middle of the Middle Ages that was necessary for the growth of specifically Western characteristics in the law. This indirect influence of the Church is distinguishable from the more specific influence of its canon law: Where the latter is denied, the former can still be asserted. And for the purposes of this review, this indirect influence will be examined separately, even where this is not the case in Berman's book.

The political situation that was conducive to the emergence of Western traits in the law resulted from the conflict between the Popes and temporal rulers that Berman calls "the papal revolution."[13] Conventionally referred to as the Investiture Contest, it broke out in 1075, when Pope Gregory VII asserted the primacy of the Church in the religious sphere, and denied to the Emperor and the kings the spiritual functions that they had previously exercised. The protracted struggle that followed radically changed the political map of Europe. Western Christiandom was split into ecclesiastical and secular orders that coexisted within the same territory and claimed allegiance from the same persons. The Church became a hierarchical institution of government, with rapidly bureaucratized offices all over the West. Secular rulers were also driven to develop new governmental institutions; shorn of part of their functions by another authority, they made secular concerns, such as the maintenance of order, their first priority.

Although the military might of the papacy was no match for that of the emperor and the kings, Popes were enormously influential as custodians of ideational bonds that continued to hold medieval society (*populus christianus*) together; the Church could easily shake the legitimacy of the rule of secular princes. As a result, no political authority in the medieval West exercised all-embracing power: Papal claims to *plenitudo potestatis* were only expressions of pious wishes. Gaps and overlaps of authority created vast opportunities for political and social differentiation that distinguished the West from the East. Urban communes and lesser communities, such as guilds, or "universities" of scholars and students, could successfully seek independence.[14] In short, within the persisting medieval community of people bound by loyalty to the common faith, there existed a rich texture of competing political units. None was capable of exercising exclusive

13. *See supra* note 3.

14. Because the papal revolution was fought in the name of the freedom of the clergy, Berman finds it likely that demands for freedom revived the manors and contributed to the 15th century's abolition of serfdom in the West. *See* p. 331.

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authority, and each was forced to recognize the legitimacy of some other power within its sphere.

Berman considers this political landscape, quite plausibly, as the incubator of many characteristically Western attitudes toward the law, including its role in public life. For example, the need to delineate and justify the respective spheres of influence of competing powers, none "sovereign" within its territory or its community, generated Western "legalism." (It is in this period that sophisticated jurisdictional thinking entered Western law.) The traditional Western belief in the superiority of law is also rooted in the constellation of political forces that Berman describes: The equilibrium of competing powers could be maintained only by casting doctrines in terms of a "law" that transcended even the most powerful political entity and received the acceptance of the whole of Western Christiandom. Even the Emperor, the *dominus mundi* of classical legal texts, was driven to legitimate his power in terms of law higher or superior to him.[15]

The destabilization produced by the split between the ecclesiastical and secular orders was also a potent dynamic force. Since society was in ferment, it had to be regulated, and law could no longer continue to be regarded as an immutable entity. Instead, law came to be seen as capable of growth through fresh legislation. The plurality of powers was also instrumental in generating the idea that each political unit should clearly define the law in its sphere, thus creating a "body" or a "system" of law. In contrast to most other religious laws, the law of the Church also recognized its partial character, acknowledging the legitimacy of secular legislation within its sphere.[16]

Conventional continental accounts of the genesis of Western law accord credit for the rise of legal scholarship to the rediscovery of ancient Roman law books. While Berman shares the view that the rise of "legal science" is indispensible for the formation of the Western legal tradition, he sees it as a response to impulses first received from the papal revolution. He finds the rediscovery of the ancient texts not wholly accidental: In an age that saw a sudden surge in the use of *ratio*, the conflicting claims of Popes and Emperors needed support in texts that were considered an "embodi-

15. It should be noted, however, that the idea of subjecting the Christian prince to higher law antedates the papal revolution by several centuries. *See, e.g.*, W. ULLMANN, *supra* note 4, at 153.

It has become fashionable in some quarters to dismiss this feature of Western legal tradition as a mere ideological embellishment without practical importance. But even if the restraining force of "higher" law on rulers was always marginal, it did complicate somewhat their exercise of power. In order to legitimate their designs, they had to tailor them to recognized norms.

16. Temporal law was not taken away from Caesar. For contrast with the Muslim law, see David, *supra* note 2, at 14; Jabara, *Islamic Law and Aristotelianism*, 51 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 403, 405, 414 (1965).

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ment of reason." The papal revolution also contributed to the spreading of universities, if only because the drive of secular princes to build their governmental offices required the services of a secular profession of jurists.[17] Finally, the method of the legal scholars derived directly from the new theology: They treated Justinian's corpus of laws as theologians treated the Bible.

Berman traces in great detail many more ripple effects of the Investiture Contest, and some of them are of greater interest to political scientists than to lawyers.[18] But the farther the "papal revolution" progresses—Berman sees it continuing to an unidentified point in the *duecento*—the more difficult it becomes to disentangle the original impulse of the Gregorian reforms from the impact on Western institutions of subsequent events, including the contacts with other civilizations with which the twelfth century abounds. It may well be that Berman carries too far the effects of the Investiture Contest, or exaggerates their weight compared to other factors that influenced Western society in the twelfth and thirteenth centuries. But, on the whole, his focus on the situation created by the split between ecclesiastical and secular authority is a salutary realignment of emphasis. It is high time for legal scholars to follow their colleagues from other disciplines in noting the crucial importance of this division of functions for the genesis of distinctively Western social institutions. The extreme social differentiation and political pluralism that this split prompted seem truly unique to the West.

C.

A third way to assess the role of the Church in the genesis of Western legal culture is to concentrate on the influence exercised across Europe by its canon law and by its institutions on the administration of justice. In a highly informative chapter on the structural elements of canon law, Berman sets about this Herculean task by condensing an immense secondary literature on various branches of substantive law as it evolved from the Church's jurisdiction over such matters as the censuring of sins, the performance of sacraments, and the like.[19] But as he descends to legal detail, it is not always clear whether the law he discusses was already in

17. Chapter 3 of the book is devoted to the origin of Western legal scholarship in the universities. Berman's remarks on why this scholarship deserves to be termed "legal science" are original. *See* pp. 151–64. The issues he raises are important and provocative; they deserve a separate review.

18. Thus, for example, he finds that the papacy, by reducing the sacral quality of the nonecclesiastical government, laid the foundation for the emergence of the modern secular state. *See* pp. 113–15, 273. To him, modern Western political science is rooted in the struggles of Guelphic and Ghibellinic forces. Pp. 275–88. Of course, it is only in the mid-thirteenth century that Thomas Aquinas coined the term *scientia politica*.

19. *See* pp. 225–54.

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this form during the formative period, or only in later centuries, especially at the time of Baldus and Bartolus. One also wishes that Berman had brought out more clearly which parts of the law depended on the heritage of Roman law as transformed by university scholars (the civilians), and which parts were an original creation of canonists. Although the canonists readily acknowledged cross-fertilization of Roman and canon law,[20] and although a great deal of work remains to be done to tease apart the contributions of canonists and civilians, areas are already known in which the lawyers of the Church were independently creative.

One such area is the public law, and especially the legal foundations of government. Here the canonists, struggling with the practical needs of the state-like Church, enjoyed a great advantage in perspective and insight over their more bookish colleagues in the academies. Berman depicts in Chapter Five the contribution of Church lawyers to medieval constitutionalism. They elaborated the view that the Church is a "juristic person," a corporation independent of its officers, so that intellectual space appeared for the idea that even the autocracy of the Pope was limited. In a century in which no authority was ever able totally to dictate the thrust of reflection, and in which the secular and ecclesiastical orders shared authority, it should not be surprising that doctrinal limitations on papal power crystallized and were publicly presented. Nevertheless, the same canon lawyers who elaborated the corporeal theory of the Church also developed the hierarchical-bureaucratic vision of government. According to this vision, authority comes from the top, and cascades down the echelons of offices; the ordinary person, a simple *fidelis*, plays no part in government. Moreover, the theory of papal *plenitudo potestatis* also originated in canon law scholarship of the twelfth and thirteenth centuries. In sum, the contribution of canonists to *modern* constitutional thought can easily be exaggerated. While Berman does not fail to note counter-currents in the legacy of decretists and decretalists,[21] he is not invulnerable to this criticism.

Surprisingly the author accords modest space to the influence of the Church on judicial organization, procedural law, and the law of evidence.[22] With the possible exception of substantive criminal law, there is hardly any other area in which the work of the canonists has been so influential and original, as well as essentially completed in the period of the papal revolution. In addition, while there are precedents in antiquity for the theoretical ordering of substantive law, the treatises and the *sum-*

20. Baldus stated as late as the 14th century that canon law without civil law was *vidua et imperfecta scientia*. For his views, gathered from a conspectus of scattered relevant utterances, see N. HORN, AEQUITAS IN DEN LEHREN DES BALDUS 58 (1968).

21. *See, e.g.*, p. 213.

22. *See* pp. 250–53.

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mae on procedure that appear in large numbers in the twelfth century are truly unequaled.

Consider briefly some major innovations of the Church in the sphere of judicial organization and procedure that Berman omits. Whereas the judge in Germanic Europe merely organized the trial and enforced the judgment made by special judgment finders, the Church accorded to its judge a much more encompassing responsibility. He was not only expected to render the judgment, but was also obligated actively to "ventilate the truth" by examining the litigants and engaging in proof-taking. The most immediate source for this conception of "*officium judicis*" was the role played by the clergy in the newly established tribunal of conscience.[23] The judge was required to decide only on the basis of information received in court, ignoring information obtained extra-procedurally. Adjudicative and testimonial functions were thus sharply segregated in the ecclesiastical administration of justice as early as the twelfth century. This division is comparatively striking in light of the fusion of these two functions in the jury as a decisionmaker well into the sixteenth century. One already finds among early canonists a fairly sophisticated discussion about the extent to which the judge can disregard the rules of procedure, as well as an analysis of similar problems that sound modern to our ears.[24] In another major departure from the past, Popes organized the judges into a hierarchy, interconnected by an elaborate system for review of judgments and even interlocutory decisions. In addition to judges, other specialized officials appear in the administration of justice, among them the precursors of modern public prosecutors and state attorneys.[25]

For civil litigation, canonists developed a style of proceeding through discrete court sessions, instead of through a continuous mode of trial that proceeded to its end without interruption. With incredible speed and sparkling originality, they elaborated from very scarce Byzantine sources a whole battery of concepts for the appellate process that is still firmly nestled in Western procedural systems. In the administration of criminal justice, their contribution is often unfairly identified solely with the summary

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23. It should be recognized that the confessor was expected to ask questions in the confessional, and that the bishop was at once an ecclesiastical judge and a father confessor. The return to the classical Byzantine idea of the judge was thus perfectly natural.

24. On the problem of *transgressio legis*, quite controversial in early scholarly literature, see Lefebvre, *Morale et Droit positif: une institution disparue, la "transgressio legis,"* in 2 MISCELLANEA MORALIA IN HONOREM EXIMII DOMINI ARTHUR JANSSEN 381 (1949).

25. It is often said that the forerunner of the modern public prosecutor was the French *procureur du roi*, who then influenced the Church's *promotor* or *procurator fiscalis*. *See, e.g.*, P. HINSCHIUS, 6 SYSTEM DES KATHOLISCHEN KIRCHENRECHTS MIT BESONDERER RÜCKSICHT AUF DEUTSCHLAND 12 n.2 (1959). In fact, a *promotor* appears in the ecclesiastical criminal process at least at the time of Tancredus. Durantis mentions these ecclesiastical officials at several places in his *Speculum*. So-called *auditores* also appear in the 12th century as assistants to judges with investigative responsibilities.

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process for the repression of heresy before special papal delegates *(inquisitio hereticae pravitatis)*. In fact, the regular criminal process of the Church, at least until the end of the papal revolution, was a peculiar kind of party-dominated, adversarial process, greatly perfected and "rationalized" by canon lawyers, and vastly superior to medieval trials by ordeal, or similar medieval forms of accusatorial justice.[26] And when the *regular* inquisitorial procedure of the Church (to be distinguished from the Holy Inquisition) was elaborated, it contained many ideas that are still at the root of the continental nonadversarial criminal process.

The part played by the Church in the demise of the system of mythical proof can hardly be overstated. The Church encouraged proof by witnesses and documents at the expense of trial by ordeal, oath-helpers, and similar devices prevalent in Germanic Europe. Long before direct- and cross-examination were invented, the Church developed a rational technique for the examination of witnesses. Aside from exclusionary rules and rules for the weighing of evidence (both of which Berman recognizes), canonists also developed, almost from whole cloth, the theory of judicial notice *(notorium)*,[27] as well as new ideas on proof-sufficiency standards that varied according to the importance and the nature of the cause.

The especially remarkable aspect of the contribution of canonists to judicial administration and procedure is the fact that all their spade work had already been completed in the thirteenth century. And it is in the *duecento* that the ecclesiastical procedure finds a classical statement in the *Speculum* of Durantis, one of the most important books on procedure of all time.[28] It may well be that Berman fails sufficiently to emphasize this contribution because it is much more important to continental countries than to common law systems. But this observation takes us from a cursory presentation of Berman's book to some comments about his interpretation of events leading to the formation of the Western legal tradition.

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26. This *processus per accusationem* was regarded in most continental countries as the ideal form of criminal justice throughout the practical reign in Europe of the *processus per inquisitionem. See, e.g.*, B. CARPZOV, PRACTICA NOVA IMPERIALIS SAXONICA RERUM CRIMINALIUM (Pars 3, qu. 106) 44–55 (1677). It is only in the late 18th century that it came to be recognized that the inquisitorial process is the *via ordinaria. See* Homberk zu Vack, *De diversa indole processus inquisitorii et accusatorii*, in ANALECTA JURIS CRIMINALIS 365, 402 (J. Plitt ed. 1791).

27. See Ghisalberti, *La Teoria del Notorio nel Diritto Comune*, 1 ANNALI DI STORIA DEL DIRITTO 403, 403–06 (1957). Here again the creative work is completed with Durantis; Antonius de Butrio only places the law into an elaborate scheme in the late 14th century. *See id.* at 407.

28. *See* F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 75 (2d ed. 1967); Van Caenegem, *History of European Civil Procedure*, 16 ENCYCLOPEDIA OF COMPARATIVE LAW 20 (M. Cappelletti ed. 1972).

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II.

As Berman's larger story concerns the fate of the West, his account of the genesis of Western legal institutions naturally embraces the whole of Western Christendom, defined as a civilization separate from the Byzantine and Arab cultures that also sprung from the soil of classical antiquity. It seems natural to him to leave out of focus, at least when examining the inception of specifically Western institutions, the distinctive developments in the Mediterranean setting and in Northern Europe that gave rise to the contrast between continental and common law systems. Because so many comparative historians concentrate on differences, Berman's concern with the unity of Western culture is refreshing. Echoes of the Investiture Contest indeed reverberate even in the remote corners of Western Christendom; diverse patterns of political association seem everywhere in evidence; and archaic forms of government and law are in retreat both in the North and in the South. Rationalist structures, released by developments in the Church, affect the entire West.

It is Berman's search for unity that seems to make him see more. Everywhere, and in all branches of the law, from manorial, to mercantile, urban, and royal, he identifies the advance of the "systematizing" and "scientific" approach to law that the universities developed and the Church embraced. The disorderly mass of customs was subjected throughout Western Christendom to pruning of "irrational" elements, and brought into a system. Governmental and legal ideas pioneered by the Church of Rome exert their influence throughout Western Christendom. There are only differences in the degree of legal systematization and in the intensity of imitation of the Church's model. And as the thirteenth century drew to a close, all legal systems of Europe carried this unilinear process to its conclusion.[29] Berman does not see the native Germanic soil, affected by the turbulences of the papal revolution, as a breeding ground of an alternative force, exerting a rationalizing influence independent of the roman-canonical model.

A different interpretation of events, however, is possible. One can find an independent force that shaped legal institutions of Europe in a style different from the one disseminated by the Church. As early as the twelfth and thirteenth centuries, this style can be discerned in patterns of judicial organization, in attitudes toward law making, and even in limits to the systematic construction of the law. Each should be examined in quick turn.

First, Northern Europe in the period of the Investiture Contest did not accept the conception of judicial office developed in the Church. The tri-

29. *See* pp. 527–36.

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bunal remained divided between judgment-finders and the judge as convenor and enforcer. Only the function of judgment finders changed: Rather than relying on divine expertise (ordeals), they were expected to arrive at a verdict by their reason and good sense. This institution, given various names in different places, is best known by the name it has received in England—the jury.[30] It is said about this institution that the judicial function was in the hands of the judge, who only "took the facts" from the jury. But because the ascertainment of the truth was of the essence of *officium judicis*, it would seem to canon lawyers that the nearest analog of the *judex* was the jury rather than the judge. And because canonists believed that the exercise of judicial function required suitable persons, with special knowledge and skill, the transfer of judicial functions to *personae minores*, or *judices idiotae*, would appear undesirable.[31] Thus, when Berman writes of participatory adjudication in various spheres of secular law,[32] he means a model of adjudication different from the one propagated by the Church, rather than a watered-down ecclesiastical model. That different models were involved is visible also from the fact that in most secular jurisdictions adjudication remained an essentially one-level enterprise, whereas the Church differentiated between higher and lower judges and insisted on the importance of appeals. And if one is to seek the roots of the more generalizing and abstract impulses of continental lawyers, as opposed to their English counterparts, one can find these roots not only in the greater influence of academic scholarship, as conventionally stated, but also in the hierarchical *hauteur* of the traditional continental judicial apparatus.[33] In a single-level system of adjudication, lawyers are exposed to the dense texture and minutiae of individual cases, whereas in higher reaches of judicial authority particulars are never fully perceived and human drama is muted. It is therefore easier for tone-setting higher authority to concentrate on broader ordering schemes within which edited cases and problems can consistently be fitted.

Berman is right in calling attention to the significance for the European

30. In German lands it was called *veritas scabinorum*; in Normandy "recognition." Twelfth- and thirteenth-century Normandy was the battleground between the home-grown recognition and the canonical inquest, with the latter ultimately prevailing. *See* J. STRAYER, *supra* note 4, at 3–12.

31. As of the 12th century, bishops began to appoint their judicial officers from among the clergy learned in the law.

32. Pp. 307, 324, 346. While persons in secular courts were entitled to the judgment of peers, a mere *fidelis* exercised no such rights in ecclesiastical tribunals. Generally, laymen had no right to participate in the exercise of authority in the Church; this right was limited to the (hierarchically organized) clergy.

33. It tends to be forgotten that regular appeals appeared in England only in the last years of the 19th century, while already early canonists regarded them as essential to "due process."

Observe also that, whereas private prosecutions were in decline throughout 12th-century Europe, the Church developed a system of official prosecution and England developed the grand jury—another form of recruiting laymen into the administration of justice.

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future of papal legislation: In a period when law was seen as expressing an immutable order willed by Providence, the *jus novum* of the Popes was indeed a revolutionary innovation. And although it did not occur to the Popes to claim that their legislation was valid because it expressed their will alone, they viewed themselves as law-makers. Not rarely in the twelfth and thirteenth centuries, papal decretals were put into effect prior to ratification by church councils, much as in our own time decrees of the Presidium of the Supreme Soviet are implemented prior to adoption by the whole legislative body.

Did secular rulers view themselves as originators of a secular *jus novum*, even if on a lesser scale? There is ample evidence for the proposition that this was not yet the case in the period of the papal revolution. While the prince was to organize the administration of justice and enforce decisions arrived at in accordance with law, he was not yet the *fons et origo* of law itself. Princely ordinances dealt primarily with judicial administration rather than with substantive law. And whatever substantive law the prince created was mainly a by-product of his responsibility to maintain public order. In any event, new law was emerging more from the communities that were thought of as bearers of the right to find the law, than from the top of a pyramid of authority as was the case in the Church. The new substantive law that developed in those turbulent times reflected the views of the rationalizing elite, often drawn as law-finders in the administration of justice, as well as the logic of lawyers who framed questions to be addressed to the jury. In other words, while the Church espoused a "descending" vision of law-making, the secular polity tenaciously clung to an "ascending" vision.[34]

Undeniably, the twelfth and the thirteenth centuries saw a small avalanche of law books not only on the law of the Church, or the "ideal" Roman law, but also on various fields of secular law. But this abundance does not necessarily indicate that these books were of the same significance and impact everywhere, or that law was everywhere—albeit with various degrees of success—pressed into a coherently integrated system under the influence of roman-canon scholarship.

While one can imagine that a learned *summa*, or Gratian's *Decretum*, played an important role in ecclesiastical courts, it is much harder to believe that Obertus de Orto's *Libri Feodorum*, or some urban law books, occupied a similar position in the respective secular courts. One can imagine a learned ecclesiastical judge turning to intellectual techniques developed by the new legal science of the glossators, in order to solve a case within the framework of a law book. To such a judge, locked in a hierar-

34. Here we are appealing to terms used by W. ULLMANN, *supra* note 4, at 30–31.

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chical organization, law may have been essentially an authoritative, textually fixed norm. But this scenario is much less likely in secular courts dominated by the lay social elite. Even if they revered and had access to learned books on the law, it does not seem plausible that they applied scholars' intellectual techniques developed in using such books. More likely, they fell back on their common sense, general experience, or some similar salving device.[35]

In addition, at least some law books—*Libri Feodorum* may again be a good example—may actually have distorted the living law by presenting it in the manner fashionable to those steeped in the roman-canon scholarship, and adorning it with scholarly Latin concepts in the process of translation from the vernacular.[36] Those who, like Berman, are interested in law as a living enterprise should beware of investing these books with too much "operational" significance.

Whether most secular law of the period here under discussion can be said to have been brought into an integrated "system" depends, of course, on the meaning to be attributed to this term. Even the glossators were not system builders in the usual sense of the term; they were primarily concerned with specific problems of reconciling classical texts rather than with a systematic reconstruction of the law. In their effort to solve conflicting authoritative texts, they elaborated abstract concepts, but they did not use these concepts as building blocks in a systematic body of Roman law. They can be considered as systematizers only in the weaker sense that they tried to make sense of the law *within* the original framework of the Justinian's Corpus which they deemed sancrosanct. As Berman readily concedes, those who wrote secular law books, arranging the law under various headings, were even less systematic. But in still emphasizing their systematic efforts he places such minimal demands on systematization as a concept that he diminishes the discontinuity between poorly systematized

35. Even in the period after the papal revolution, decisionmakers in many European countries saw the law not so much in textually fixed norms which are logically interrelated, but rather in the experience and the reasonableness of the ruling elite spontaneously integrated in the administration of justice. *See* F. WIEACKER, *supra* note 28, at 112. Berman recognizes this for German lands in an article published after the book under review. *See* Berman, *supra* note 1, at 579.

36. De Orto's *Libri Feodorum* appeared in 12th-century Bologna. Observe also that, after the papal revolution, one of the most brilliant discussions of feudal law originated from the pen of Baldus de Ubaldis who was, first and foremost, a great authority on Roman and canon law, deeply steeped in the "post-glossatorian" approach to law.

The relationship of some treatises on Customary law to the actual administration of justice governed by such customs may be likened to the relationship of some systematic treatises on African law, written by 19th-century Europeans, to the realities of administration of justice in the Africa of the period.

For presuppositions for a "scientific" approach to law, see Damaška, *On Circumstances Favoring Codification*, 52 REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 355, 357–59, 360–62 (1983).

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law books that appeared before the papal revolution and those that appeared in its wake.[37]

These divergent patterns of judicial organization and divergent attitudes toward the law in twelfth-century Europe suggest partial modification of Berman's interpretation of events. We need not abandon his focus on the role of the Church of Rome in the genesis of Western institutions. His intuition that the religious complexion of Europe and the fissure precipitated by the papal revolution created the breeding ground of Western law may well be correct and turn out to be his great contribution. But one could see this revolution as unleashing not a single transforming force, but two forces, both carrying dissatisfaction with the past, yet each following a different path in changing inherited institutions. One, more "revolutionary," could be seen as spreading the vision of government and law of the Church; the other, more "reformatory," could be seen as spreading an adaptation of feudal and old Germanic notions of law and government. Of course, if this different interpretation of events were accepted, then the essentials of the contrast between continental and common law existed already in the twelfth and thirteenth centuries, although not in exactly the same territory or form in which we can later identify them.

As it stands, Berman has difficulty harmonizing these two different forces of revolution and reform into a unitary Western tradition. For example, he stresses the importance for the West of legal science, which not only describes the law, but also shapes it by conceptualization, systematization, and interpretative techniques. But while this scholarly ingredient is indisputably central to the continental heritage, many would deny that scholarship played a similar role in the development of common law, at least in certain periods of history.[38] The situation is reversed in relation to another aspect of the Western law which Berman defines as "organic growth." Although it is not always clear what he means by the organic process and how precisely it can be reconciled with the "totality" of revolutions, which, in Berman's scheme, periodically rock Western society,

37. Probably the best example of a relatively sophisticated law book antedating the papal revolution is the collection of Lombard law known as LIBER PAPIENSIS (1019-1034). It was even an object of studies in Pavia. On Lombard laws generally, see K. LEHMANN, DAS LANGOBARDISCHE LEHENSRECHT (1896).

38. Fortescue argued, in his 15th-century laudation of English law, that the laws of England cannot be constructed through the schoolmen's method of rational deduction or learned through scholarly study. It grew and could be mastered only through the slow process of accumulating experience. *See* J. POCOCK, THE MACHIAVELLIAN MOMENT 17-19 (1975). Sixteenth-century Englishmen, who had been educated in Italian law schools, bitterly complained that English law was "without order or end." *See* T. STARKEY, A DIALOGUE BETWEEN REGINALD POLE AND THOMAS LUPSET 173 (K. Burton ed. 1948). *Inglese italianato e diavolo incarnato*! Hegel thought, of course, that common law was an "Augean stable" in dire need of cleaning, an "extensive jumble" to be cleared by legislation "framed preponderantly on general principles." G. HEGEL, POLITICAL WRITINGS 300, 310 (T. Knox trans. 1964).

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historians find much sharper discontinuities in continental than in common law culture.[39] If the organic growth is indeed crucial to the law in the West, has the Continent not mortally wounded this tradition by demanding, in the seventeenth and eighteenth centuries, that all legal institutions pass muster of an ahistorical rationalism? Is Voltaire's famous remark, "if you want good laws, burn them, and make new ones," not an appropriate epitaph in memory of the tradition of organic growth?[40]

One could continue this differential diagnosis of the continental and common law variants of the Western tradition.[41] But we should resist the temptation of speculating how Western legal culture could be redefined, and its crisis relocated, in light of modifications of Berman's historical narrative. Such conjectures would inevitably lead us to the larger story in which Berman envelops his narrative, a story that we have promised to leave to one side. His account of the birth of Western law is an impressive achievement, a towering contribution to comparative legal history. It is a product of patient scholarship, and a brief review cannot do justice to its range of reference. It is also unusually bold in its conception and in some of its permeating themes. It is passionate in its desire to leave a message to the future and to bid adieu to the past. It will be indispensable to anyone who wishes to understand the distinctive features of Western civilization.

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39. If the interpretation suggested in this review is accepted, then, of course, the continental variant of the Western legal culture was more "revolutionary" (i.e., discontinuous) from the beginning. A dramatic discontinuity occurred in the period of the French revolution, although this too can be exaggerated. (Some comparativists, wrongly, I think, trace the origin of the cleavage between common and civil law mainly to events following the downfall of the *ancien régime*).

40. VOLTAIRE, DICTIONNAIRE PHILOSOPHIQUE 247, 248 (1789) ("Voulez-vous avoir de bonnes lois? brûlez les vôtres et faites-en de nouvelles."). The medieval mind of the Popes did not reject the entire past, of course, but it ushered in the dynamic and transforming vision of law in the West. Indeed, papal legislation (the *jus novum*) planted the seeds of its own destruction at the very moment of its inception. Already the Renaissance was ready for a wholesale rejection of the Middle Ages and for a fresh start to regain the peaks that ancient Rome had already reached. The Age of Reason went even further in the belief that men are vested with ability to create new orders in the domain of secular history. The idea of "organic growth" can thus be seen as an unstable intermediate position between a static and a truly propulsive view of law.

41. For example, the idea of "plurality of legal orders" continued to be quite alive in England and in America, while its demise on the Continent began with the rise of absolutism and its ideology of unitary sovereignty. Du Moulin and Bodin are real villains who prepared the later destruction of intermediate communities by the omnivorous state.

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