

Book Reviews

THE PROTESTANT REVOLUTIONS AND WESTERN LAW

LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION. By Harold J. Berman.¹ Harvard University Press. 2003. xii + 522 pp. \$49.95.

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What are the defining characteristics of the Western legal tradition? Where did it come from, how did evolve, and where is it heading? It is easy to fall into sprawling and superficial answers to these large questions, and even easier to neglect them altogether. Harold Berman has attempted to address them on a scale and with a precision that make this magisterial volume and its earlier companion a scholarly landmark. His first volume, *Law and Revolution*³ (published in 1983 and still in print) traced the origins of the Western legal system to the "Papal Revolution" which began at the end of the 11th century, and continued until the beginning of the 13th. That study, a great work of synthesizing scholarship, is today the standard point of departure for work in the field. The present volume, *Law and Revolution II*, carries the story forward, exploring the consequences for Western law of the Protestant Revolutions of the sixteenth and seventeenth centuries. These two volumes represent a sustained attempt to describe the emergence of the Western legal tradition, and they offer an abundance of material for historical and philosophical investigation.

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 3. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

Alas, Berman's work has not attracted the attention it deserves outside the world of medieval legal history, and it has had little impact on constitutional theory or legal philosophy. But Berman is broaching topics of extremely wide significance, and so it may be helpful to begin by trying to explain his general enterprise, and to identify the reasons for its importance.

As the titles of his two volumes indicate, Berman is preoccupied with the theme of revolution. In this, he follows explicitly in the footsteps of the pioneer he calls "the great (and greatly neglected)" historian Eugen Rosenstock-Huessy (p. 21). Rosenstock-Huessy saw Western history, since its emergence from the dark ages, as one long, continuous tradition, stretching from the 11th century to the present, but punctuated by a series of transformative revolutions. Berman applies this general framework to the special case of law; he argues that the Western legal tradition was largely shaped by six major revolutions, each of which profoundly transformed the legal system (and, more importantly, the understanding of law) while at the same time ultimately finding a way to absorb much of what had gone before.

The three most recent revolutions are also the most familiar: the American Revolution of 1776, the French Revolution of 1789, and the Russian Revolution of 1917. Berman does not discuss these revolutions in detail, but they hover over his two volumes and motivate his broader inquiry. For Berman sees Western law at the start of the third Christian millennium as being in "crisis"—cut off from its historical and religious roots, unsure of its own foundations, or of its relationship to other legal traditions.

Underlying this modern crisis, on Berman's analysis, is a splintering of legal philosophy. Since the Enlightenment the three strands of legal philosophy that have provided the conceptual underpinning for the Western tradition—namely, the *political* strand (represented by legal positivism), the *moral* strand (represented by natural law theory), and the *historical* strand (represented by the historical school and its predecessors)—have tended to come unstuck in such a way as to disorient and obscure the West's understanding of its own tradition. The ancient idea of a law transcending national political power is no longer taken seriously; and indeed the idea of a common Western legal tradition has lost its meaning. "In the early 21st century," he concludes, "the Western legal tradition is no longer alive and well" (p. 382).

This formulation “no longer alive and well” contains a significant ambiguity. At times, Berman seems to think that Western law has in fact died, along with the systems of belief on which it was based thus at the end of this book he says that:

Protestantism led to dissent, which led to relativism, which led to Deism, which led to atheism—which presumably is fatal to the preservation of Western culture, including the Western legal tradition (p. 382).

But at other times he suggests that Western law is merely ailing, and that his enterprise is to re-build an “integrative” legal philosophy (p. 382; also p. 130) that will once again unite the political, moral, and historical dimensions of law. (It is for this reason that he pays such close attention to the historical thinking of the great seventeenth-century common lawyers, and in particular Matthew Hale, since in his view they offer one of the supreme examples of an “integrative jurisprudence.”)

This broader understanding about the importance of his project evidently lies close to Berman’s heart, and gives his investigations a certain sense of apocalyptic urgency. Both volumes start and end with forebodings about the imminent end of Western law. These dramatic remarks are the first thing a reader will encounter; and some will be put off by them. But it seems to me that they, too, are ambiguous. They can be taken either in a strong or in a weak sense. If they are taken in a strong sense, the claim is that Western culture and the Western legal tradition have reached or are nearing their final collapse. But to support such a thesis, one would need a sustained examination of the state of modern Western law: and that is not what this book offers. Nor does it attempt to offer an “integrative jurisprudence” for the modern age. Berman indicates that such a thing would be desirable, and says that detailed historical investigations would furnish philosophers with a useful foundation on which to build; but he leaves that task to others. The strong version of his remarks indeed seems to me in certain ways to cut against the historical narrative in the book. For one reaction to his description of the legal tumult and upheaval of the sixteenth and seventeenth centuries is that the law of the early twenty-first century looks stable by comparison: if the Western legal tradition has survived those earlier dramatic upheavals, there is reason to think that it may be able to survive the present period as well.

A more modest interpretation of his remarks seems to me both more plausible, and more in keeping with his actual prac-

tice in the book itself. In the end, his project rests on three claims: first, that modern legal philosophy has, to its great detriment, tended to divorce itself from legal history, and in particular to overlook the broader sweep of Western law; secondly, that there are deep gains in philosophical and legal understanding to be had from a detailed study of the evolution of the Western legal tradition; thirdly, that in an age of globalization such an understanding is a fundamental first step towards integrating the Western tradition with other legal traditions. These claims seem to me both true and important, and to be all the justification that Berman's historical investigations require: and it is here that the real power and novelty of his approach makes itself evident.

For Berman's conception of Western legal history as a single tradition punctuated by revolutions has three significant consequences. First, he takes an extremely long view of his period. He sees the legal systems of the West as having their beginning around 1100. Indeed, he occasionally mischievously refers to the legal system of the 12th-century papacy as the first "modern" legal system. But if this is mischief, it is mischief with a serious purpose: for Berman's aim is to break down the historical opposition between "medieval" and "modern." Berman in his first volume argued at length that the Papal Revolution begun by Gregory VII marked a sharp break with what had gone before, and inaugurated the Western legal tradition that we know today. It bound together in ways that still characterize Western legal thought elements taken from three sources: (1) from classical Graeco-Roman legal culture (and in particular from Roman law), (2) from Germanic customary law, and (3) from the medieval Christian tradition, based on the Hebrew and Greek Bible and the writings of the Church Fathers, as codified and incorporated into the system of Canon law. The Papal Revolution (assisted later by Aristotelian scholasticism) united these disparate strands into a philosophical synthesis that has left its imprint on virtually every part of Western law. Berman explains in detail how this Revolution gave rise to the first highly organized modern administrative state (i.e., the medieval papacy, whose territorial jurisdiction covered virtually the whole of Europe), and he traces the consequences for legal scholarship, legal education, the law of crime and contract (large portions of which fell within the jurisdiction of the ecclesiastical courts), trial procedure, and the constitutional theory of the relations between the papacy and the temporal Christian princes.

Berman argues that many of the supposed indicia of modernity—the rule of law, sophisticated rules of commercial practice, a structure of bureaucratic state administration, an abstract body of rules administered by a professional judiciary and professional attorneys—were already present in the so-called “middle” ages, and that other phenomena often regarded as “medieval”—notably the sense of Western law’s being ultimately grounded in a religious tradition—lasted until the Enlightenment and beyond. In other words, the traditional division of European history into three great periods—ancient, medieval, and modern—is a scheme that radically oversimplifies the complexities of the history of law. Berman’s periodization is both more sweeping and more fine-grained than the traditional division. On the one hand, there is but a single “modern” Western legal tradition, starting in the Papal Revolution; on the other hand, that single tradition is broken up by five other revolutions, each of which changed certain parts of the tradition while leaving others intact.

Secondly, his canvas is as wide geographically as it is chronologically. Here, too, he sees unity where earlier historiography had seen division. Especially since the nineteenth century, the mainstream of legal history has confined itself within the national borders. But Berman’s ultimate unit of study is the West (and in the end he includes within “the West” both Russia and the Americas). It is true that the specific revolutions—German, English, American, French, and Russian—are geographically restricted; but his overall conception is panoramic, and aims to understand the impact of the particular revolutions on Western law as a whole. Berman, without denying the national idiosyncrasies, has subtly changed the subject, and produced an account of the deep affinities as well as the differences between the various national systems of the West. This is a difficult scholarly feat to bring off successfully, and its *sine qua non* is a wide-ranging linguistic competence, and a familiarity with various national traditions of legal historiography. Berman draws heavily on German and French legal scholarship, as well as on documents from the sixteenth and seventeenth centuries, both in Latin and in the relevant vernacular languages; and one of the challenges facing any scholar who wishes to travel in his footsteps is the sheer linguistic erudition required.

Thirdly, Berman brings to his task a keen awareness of the importance of religion to the development of Western law. This is something often overlooked by legal historians, and badly ne-

glected by philosophers. But as Berman makes clear, it raises profound questions both about the relation of modern Western law to its own past, and also about the relationship of Western law to other legal traditions that arose, not on a foundation of Christianity, but on some other tradition of belief. To what extent can Western ideas of law be regarded as universal? And what extent can its distinctive ideas be blended with the ideas of other traditions? To what extent must Western law change in the process, and to what extent will it then cease to be Western?

Berman's approach to these questions about law and religion has an important consequence. He points out, often and in convincing detail, the historical importance of understanding how a new systems of theological belief led to major changes in the law: how Protestantism, for instance, when it rejected the authority of the Catholic priesthood, was inevitably forced to re-think such fundamental matters as the relation between the law of the church and the law of the state, or even the question of codification. This leads him to reject the idea that legal history can be understood as a simple emanation of underlying social and economic forces. Not that social and economic forces are unimportant: far from it. But Berman's implicit model is more complex, and allows for influences to proceed in multiple directions. If it is true that legal changes often occur in response to change in economic circumstances, it is no less true that economic circumstances change as a result of legal innovation: the legal device of the business corporation, for example, made possible forms of social and economic organization that could otherwise not exist. And, Berman points out, these legal innovations were themselves the result of changes, not in the economy, but in theological world-view. Thus we have a complex set of interactions, in which it makes sense to ask both about the influence of Western economics on Western law and Western religion, but also about the influence of Western religious beliefs on the development of law and on economics.

This last point is of course not new, and Max Weber long ago raised the question of the influence of Calvinist beliefs on the emergence of modern capitalism. Berman, like Weber, sees that this question is to be asked and answered, not by *a priori* theorizing, but by detailed empirical research into legal and religious and economic history. As it happens, Berman's consideration of the English Puritan Revolution leads him to disagree with Weber's thesis about the emergence of capitalism, at least in its broad outlines. He agrees with Weber that the Protestant Revo-

lutions, and in particular English Calvinism, are bound up with the emergence of capitalism; but where Weber traced the religious influence to the *individual* desire for salvation, Berman traces the origins of such fundamental legal devices as the joint stock corporation to the Calvinist theory of covenanted *communities*:

When one looks at the lawyers and the institutions they were creating, one does not see ascetic individualists trembling before the prospect of ultimate damnation or salvation. Rather, one sees community-minded men creating communitarian legal institutions such as joint-stock companies, bank credits, and the trust device. They understood that the success of a market economy rests on trust, on credit, on common enterprise, not, as many later came to believe, on personal greed. This communitarianism, involving large-scale cooperation among landed gentry and merchant elites, itself had deep Calvinist roots (p. 27).

I hope these remarks convey something of the scope and the excitement of Berman's overall scholarly project: his sweeping, panoramic vision, his sense of the grand philosophical questions, his ability to rise above the merely national and to contemplate the Western legal tradition as a whole—and at the same time his eye for the concrete detail and his acute sense of the complex interplay of law, society, religion, and economics. Berman is generous in recognizing that other historians besides himself have taken the West to be their fundamental unit of analysis. But if today the prevailing tendency among Europeanist comparative lawyers is to think in broad, trans-national terms, that tendency was much less in evidence when the first volume of *Law and Revolution* was published more than a quarter of a century ago, and the new style of comparative law and comparative legal history owes a great debt to his example.

Let us now return to Berman's general historical scheme. The Western legal tradition, he says, is a single tradition punctuated by six revolutions, of which the American, French, and Russian are the most recent. The Papal Revolution started the entire process. The present volume treats the two "intermediate" Revolutions: the German Lutheran Revolution of the sixteenth century, and the English Puritan Revolution of the seventeenth century. By the time Martin Luther nailed his theses to the door in 1517, the classical Roman Catholic conception of law and the state, which had its origins in the earlier Papal Revolution, had begun to fall apart. The Lutheran Reformation com-

pleted the work of destruction, and created out of the rubble something new, with far-reaching consequences—introducing ideas that were then further developed in seventeenth century Puritan England. In this work, especially in the portion dealing with Germany, Berman covers material that is not readily available in English, and that will be unfamiliar to most of his readers; his survey is meticulous and well-documented, and, once again, this volume is sure to be the standard reference on its subject for years to come.

A brief summary will give an idea of the vastness of Berman's enterprise. His book is divided into two symmetrical halves. The first deals with the German Revolution; the second, with the English. Each half is organized into six chapters, which are exactly parallel: an introductory chapter on the broad political history, followed by chapters on legal philosophy, legal scholarship, criminal, civil, and social law.

Very roughly speaking, the classical Catholic theory of law had divided legal authority between the ecclesiastical hierarchy (at whose apex sat the Pope) and the hierarchy of temporal rulers (at whose apex, at least in theory, sat the Holy Roman Emperor). The two hierarchies each wielded legal power (the "two swords," ecclesiastical and temporal); each had its own proper sphere of legal action, and was not to encroach upon the jurisdiction of the other. When Luther, on essentially theological grounds, rejected the authority of the Catholic priesthood to intervene between the individual and God, when he rejected the Catholic tradition in favor of a theology based directly on the Bible, his religious arguments inevitably overturned as well the intellectual foundations of Western legal institutions. The Church in Lutheran theology was henceforth to be a spiritual community only: the invisible community of all believers, and no longer a law-making institution. He replaced the "two swords" theory with a new "two kingdoms" theory. As Berman puts Luther's central legal insight: "The Church . . . belongs to the heavenly kingdom of grace and faith; it is governed by the Gospel. The earthly kingdom, the kingdom of 'this world,' is the kingdom of sin and death; it is governed by the Law" (p. 40).

Luther preached his new religious doctrine to a politically precarious Germany, in which the fissures and rivalries between Pope, Emperor, and the Princes had long been evident. He thereby unleashed not only a religious but also a political and a legal revolution. For once the legal authority of the Church has been rejected, what is to become of the body of laws formerly

administered by the ecclesiastical courts? This was no trivial question, since a good deal of criminal law, family law, and contract law fell within the purview of the Canon law. And what was henceforth to be the foundation of legal order? What was to be the relation between Church and State? It took centuries for the answers to these questions to work themselves out, and for the implications of Luther's Reformation to become clear. Crudely put, the answer to the first question is that the temporal authorities took over the legal responsibilities formerly exercised by the Church; the answer to the second is that the idea of the legal unity of the West, which was based on the universal legal authority of the Catholic Church throughout Christendom, passed over into the idea of separate territorial jurisdictions.

It is these momentous changes that Berman sets out to describe. He begins with a chapter surveying the religious and political context of the Lutheran Revolution. He then turns to a detailed treatment of what might be called Lutheran legal theology. Luther himself had been trained in Canon law, and set forth the broad outlines of the new theological jurisprudence: law belongs to the kingdom of this world; it is ordained by divine command (and not, as Thomas Aquinas had taught, by reason) for the conduct of fallen human beings; and the heart of the law is to be found in the Bible, and specifically in the Ten Commandments. Luther's writings on law were sketchy, and he left the details to be filled in by others, notably by his colleagues Philip Melanchthon and Johann Oldendorp. In rejecting the authoritative Catholic tradition and the texts of Roman law on which the legal order had been based, the Lutherans were radical originalists, advocating a direct return to Biblical revelation. But this project involved them in the intricate task of working out the relations between Biblical revelation, the individual conscience, and the role of judicial equity in the administration and the interpretation of the law. It also fell to them to work out the legal role of the Lutheran prince. In rough terms, the prince was assigned the task of upholding both tables of the Decalogue—that is, both the first three commandments involving the duties of Christians to God, and the remaining commandments involving their duties to one another in society. But there was significant ambiguity, both in the writings of Luther himself and in those of his followers, over how this task was to be carried out, and over the question of the extent of the obedience owed to the secular power. Luther, even in the time of the Peasants' War, could advocate a principle of freedom of preaching that fore-

shadows later ideas of religious liberty: "No ruler ought to prevent anyone from teaching or believing what he pleases, whether Gospel or lies. It is enough if he prevents the teaching of sedition or rebellion" (p. 183). But Luther in other moods severely restricted the scope of this principle, and never reached a settled position. Or again, on the critical question of civil disobedience, Luther himself had powerfully exemplified the claims of individual conscience in opposition to the established authorities. But, on the other hand, Luther also taught with St. Paul that "the powers that be are ordained by God," and that even capricious tyrants are owed unconditional obedience. He and his followers struggled with these issues without resolving them; and over the next two centuries Protestants were to go back and forth on these fundamental constitutional issues. (I note in passing that one important element of Lutheran legal thought—its attitude towards Roman law as a "law of peace" for the Holy Roman Empire—Berman leaves undiscussed: but this is a subject that has been treated insightfully in the opening chapter of James Whitman's *The Legacy of Roman Law in the German Romantic Era*.⁴)

From Lutheran legal theology, Berman proceeds to legal scholarship. Here, too, the Lutheran Revolution was a major watershed. The legal science that had emerged at the hands of the scholastics in the 12th-century was primarily dedicated to the classification and analysis of legal *rules* derived from authoritative *texts*, and in particular from the *Digest* of Justinian. The Scholastic method had already come under fire from the philologists and historians of the Italian Renaissance (notably Lorenzo Valla) in the 15th-century. But it was the German Humanists of the 1520s and 1530s—most of whom were Protestants—who showed how to consolidate the earlier criticisms into a new legal science. The new method was to classify and analyze legal *concepts* and legal *principles* derived, not from an authoritative text, but from inborn *conscience*. As Berman points out, this was not merely a question of abstract theory, but of the ultimate source of legal authority: the legal order was henceforth not to be grounded upon the texts controlled by the Pope and the Emperor, but rather upon principles implanted in the individual Christian conscience. A sequence of brilliant jurists—Melanchthon, Johann Apel, Konrad Lagus, Nicolas Vigelius, Jo-

4. JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE* (1990).

hann Althusius—set about organizing and classifying the entire legal order on this new basis. It is to their work that we owe the classificatory scheme still in use in modern legal scholarship: the division into public and private law, with public law being subdivided into the legislative, executive, and judicial functions, and private law being subdivided into the law of persons, the law of property, and the law of obligations arising from contract, tort, and unjust enrichment. These schemes of classification were not merely of scholarly importance, but helped to serve the political cause of the Protestant princes as well. For prior to the Reformation the law had been a complex patchwork of legal jurisdictions and legal texts, a situation that favored the sharing of legal power between the temporal rulers and the ecclesiastical authorities. But when the humanist scholars provided a systematic organization of the law, they were at the same time laying the intellectual foundation for a unified legal order to be administered by a single, territorial prince: they thus represent a significant step in the evolution of the centralized, sovereign state.

From here we proceed to the reform of the substantive law, starting with criminal law. This was a domain fraught with significance for the Lutheran Revolutionaries: for it involved both the exercise of the power of the secular princes, and also the control of human sinfulness. The early sixteenth century saw, at the hands of Johan von Schwarzenberg, the first systematic and comprehensive codification of the law of capital crime: indeed, Berman says that this was the first recognizably modern codification of *any* branch of law. Schwarzenberg produce a detailed typology and classification of criminal offenses, paying close attention to the definition of the elements of each crime, mental state, excuses, and a careful delineation of the applicable punishments. Schwarzenberg's code (the *Bambergensis*) quickly became famous, and influenced the *Carolina*, the famous criminal statute for the entire German Empire. Again, there are complex interrelationships between these developments and the Lutheran Reformation. Schwarzenberg's work in fact antedates the emergence of Martin Luther by about a decade, but intellectually the two men shared many of the same theological presuppositions. The emergence of independent Protestant princes, and the consequent need for a unified system of criminal law, gave a boost to the cause of codification. And the criminal theory of the age was saturated with theological conceptions of sin, *mens rea*, forgiveness and salvation. Berman stresses that such practices as torture of a criminal defendant should not be seen solely as a

means of extracting evidence, but also as motivated by a religious concern for the salvation of the criminal's soul, which was only to be had by confession.

In his final two chapters on the Lutheran Revolution, Berman covers a host of topics in both private and public law: the development of the secular law of contract; the differentiation between the law of obligations and the law of property; the law of usury and the theory of just price (which, in Lutheran theory, is much less of a departure from Roman Catholic doctrine than writers such as Max Weber have assumed—a significant point for discussions of the religious origins of capitalism); the rapid growth in the use of bills of exchange and of international commercial transactions; the assumption by the state of responsibility for the liturgy, marriage, religious education, moral discipline, and poor relief—all parts of the Protestant program to create a godly society.

The second half of the book is devoted to the English Revolution, whose dates Berman gives as 1640-1689. In contrast to much traditional historiography, he sees the entire period from the Puritan uprising against Charles I to the deposition of James II as a single episode—not a mere rebellion, and still less a restoration of the “ancient constitution” (as some traditionalists still like to argue), but rather as a genuine Revolution, with legal and social consequences as radical as that terminology implies. During this period the form of government in England changed from absolute monarchy to a constitutional monarchy; Parliament became both politically supreme over the King, and also the *de facto* head of the Church of England; the various dissenting Protestant churches were now recognized as legitimate; the landed gentry replaced the old peerage as the dominant class; the prerogative courts were abolished; judges were given life tenure and independence of the Crown; the jury became independent of the judge; the common law courts achieved their dominance over the entire English legal system; and the very notions of a trial, of evidence, and of precedent were transformed.

After a brief historical overview, Berman begins his discussion of the English Revolution with the transformation of legal philosophy, and in particular the theory of the foundation of the state: he discussed Hooker's temperate *Laws of Ecclesiastical Polity*, the absolutist theories of James I (heavily influenced by Bodin), and then, at greater depth, the theories of the constitutional common lawyers—Sir Edward Coke, John Selden, and especially Matthew Hale. This was the period that saw the triumph

of the common-law courts, and indeed the emergence of the common law as a kind of traditional unwritten constitution, and Berman is especially fine in his description of the historicism that lay at the heart of the English Protestant legal theory.

The changes to the substance of the law were no less dramatic than the changes to its theory. This is especially so in the law of crime and punishment. Prior to the English Revolution there did not in fact exist anything be called "the English system of criminal law": the various ecclesiastical, common-law, prerogative, mercantile, and urban courts each had its own separate criminal jurisdiction and its own body of substantive criminal law and criminal procedure. It was the abolition of the prerogative courts in the Revolution, and the consolidation of the power of the common-law courts, that first created a unified system of criminal law—and, importantly, this new system was socially under the domination of the newly-ascendant landed gentry, and intellectually under the domination of Calvinist moral theology. In a particularly insightful passage (p. 319), Berman describes the way in which Calvinist ideas about sin and forgiveness, which required, at the same time, both maximum severity in the formulation of the legal rules, and maximum mercy in their application, lie at the bottom of a well-known paradox of English criminal law in the early eighteenth century: the sudden increase in the number of capital crimes, combined with a sharp decrease in the number of criminals actually put to death. Earlier historians have tried to explain this paradox in Marxist or social or economic terms: but Berman is surely correct to stress the important religious dimension of the story.

In his final chapters, Berman considers the abolition of feudal tenure, the aggregation of land holding, and the development of a law of trusts and mortgages; the emergence of the common law of contract; the influence of communitarian Calvinist ideas on corporate enterprise; the elimination of monopolies; and the emergence of patent law and new forms of insurance. He concludes with a discussion of social law, considering the impact of Calvinist theology on the law of marriage, charity schools, moral offenses, and poor relief. These areas had traditionally fallen within the jurisdiction of the Church, but in the Revolution they passed into the jurisdiction of Parliament.

As Berman points out, this process, and the parallel process in Germany, are not happily described by the label "secularization." For in the thinking both of Luther and the English Puritans "the Church" was no longer *restricted* to the Roman Catho-

lic clergy, but now had been *expanded* to encompass all believers. And this new, larger Church, as before, had as part of its mission the creation of a godly society in which vice would be discouraged, marriage and the family would flourish, and the needs of the poor would be attended to. The new Protestant state was to be a Christian state, charged with the suppression of sin, and the promotion of the spiritual well-being of the community. Heresy was no more to be tolerated than it had been in earlier ages. The Lutheran and English Revolutions thus represent as much a sacralization of the temporal realm as a secularization of the domain of the Roman Church. Secularization in the modern sense was in time to follow—but not until centuries later.

It should be evident even from this brief summary that Berman covers an enormous range of topics. His pages are rich in information and insight. But no book of 400 pages can hope to cover everything involved in the German and English Revolutions. There are inevitably areas for further exploration; let me note a few.

(1) Berman's two volumes jump from the Papal Revolution of the twelfth century to the Lutheran Revolution of the sixteenth. I have mentioned the strengths of the Rosenstock-Huessy "revolutionary" conception of Western history; but it also has its dangers. In particular, there is a risk of gliding over the "non-revolutionary" periods—in this case, a period that covers nearly four centuries. And if one comes to this topic from the point of view of the history of philosophy, it is clear that something of vital significance has been omitted. Luther's views did not emerge from nowhere: they were prefigured in the writings of Duns Scotus and then William of Occam in the fourteenth century. Philosophically this was one of the great, formative moments in the Western tradition: but here it falls entirely between the cracks.

(2) A second issue involves Berman's own periodization of the German and the English Revolutions. He argues persuasively that the English events from 1640 to 1689 should be seen as a single revolutionary event. But it is less clear to me why he thinks that the German Revolution and the English Revolution should be seen as two separate revolutions, rather than conceiving of them as two phases of a single "Protestant Revolution" that swept across Europe from Luther to 1689. (His earlier book on the Papal Revolution covered a comparable span of time.) France and the Low Countries are left out of his account: but surely Grotius and Bodin are a significant part of the larger

story? And what of the legal theory of the Catholic Counter-Reformation? This volume plunges us from the Germany of the sixteenth century directly into the England of the seventeenth: the two parts of his book are consequently somewhat disconnected, and we are left with little understanding of the way in which the German Protestant ideas traveled across the continent and influenced the later English developments. One would like to know more about the intervening decades, and the intervening nations.

(3) Berman is in my opinion entirely correct that the legal thinkers of the sixteenth and seventeenth centuries are of great philosophical interest. But he does not furnish the sort of careful philosophical exegesis that their works deserve. He has an unfortunate tendency to resort to labels, calling legal philosophers "positivist" or "historicist" or "natural lawyers" regardless of whether the thinker was writing in the sixteenth or the nineteenth century, and without detailed probing of the underlying arguments. Here is a specimen; it is unfortunately not isolated. In attempting to argue that the new English legal science of the seventeenth century was related to the changing conception of scientific method, he says, "the traditionary doctrine of precedent was founded on the theory of scientific knowledge expounded in the late seventeenth century by the chemist Robert Boyle, the physicist Isaac Newton, the jurist Matthew Hale, and other prominent members of the Royal Society. That theory was subsequently developed in the mid-eighteenth century by David Hume" (p. 275). *The* theory of scientific knowledge shared by Newton and Hume? This is too broad-brush to be helpful. And it is far from clear that the theory of judicial precedent can be regarded as in any sense "founded on" the work of Newton. It is beyond controversy that certain broadly empiricist ideas were "in the air" in seventeenth-century England; but to work out the relationships and influences with precision would require a much deeper immersion in both the scientific and the legal literature than is evident here.

But this is only to say that a great deal of work still remains to be done. Taken together, Berman's two volumes offer a sweeping panorama of the rise of modern law in the West, from its medieval beginnings to the start of the eighteenth century. In scope, learning, and ambition there is nothing else quite like them, and they constitute one of the deepest contributions to scholarship to have emerged from the legal academy in decades. In calling attention to these neglected episodes in the history of

Western law, Berman has raised a host of difficult questions for historical and philosophical investigation, and one can only hope that others will follow his footsteps and explore the territory he has charted.