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BOOK REVIEW

LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION. By Harold J. Berman.* Cambridge, Mass., and London, England: Harvard University Press, 1983. Pp. 657, including tables, notes, and index.

*Reviewed by Raymond B. Marcin***

Only a person with Professor Berman's credentials could put forth such an astonishing thesis, and only a person with Professor Berman's scholarly ability could defend it so well.

A decade ago Berman published a small book entitled *The Interaction of Law and Religion*.¹ It came out at a time when there was a great interest in law and morality. The end of the war in Viet Nam was the topic of the day and, just about the time when the little book came out, the full impact of the Watergate scandal was breaking in the news. Many people bought Berman's earlier book on the assumption that it would deal with one of the great issues of the day: the thesis that law is, despite reigning positivist thought, answerable to morality. I suspect that many who bought his earlier book were disappointed. Oh, it dealt with the thesis that law is answerable to morality. But it was not the hortatory denunciation of positivism that was the fashion of the day in books that addressed law-and-morality or law-and-religion topics. Instead, Berman's earlier book on *The Interaction of Law and Religion* presented a historical thesis. It was a graceful and delicate tracing of the interconnections between secular legal systems and church legal systems, and indeed between secular legal concepts and religious and moral concepts. But its basic approach was historical and, one may remember, in 1974 we were less than enamored with history. We had just scrapped a social history that had kept our ideals in chains, the god of the day was relevance, and we were not of a mood to see history as relevant.

But tucked neatly into Berman's earlier book, in a chapter entitled "The

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1. H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974).

Influence of Christianity on the Development of Western Law"² was a thesis that should have ignited our intellects and spurred our deep concern. In it, Berman explained that the Western legal tradition, as we have known it up until contemporary times, originated not during the Renaissances of the fourteenth and fifteenth centuries, not at some ancient Roman or Greek period, but rather in the latter part of the eleventh century. Again, it did not originate simply with the Norman Conquest, the point at which we sometimes mark the start of the Anglo-American legal tradition, but more broadly with events surrounding something known to church scholars as the Gregorian Reform, or as Berman calls it, the Papal Revolution. He explained that the tradition born of that Papal Revolution has survived all the great Western religious and social revolutions since then, e.g., the Reformation, the American and French Revolutions, even the Russian Revolution, and that today a contemporary revolution threatens to destroy the Western legal tradition.

Many read Berman's book on *The Interaction of Law and Religion*. Because the book was not a treatise or a disputation with proofs, as he himself acknowledged (it was a book of lectures), the readers accepted or rejected his thesis, in whole or in part, on the basis of euphony or conformity with their own appraisal of things.

Professor Berman's new book, *Law and Revolution: The Formation of the Western Legal Tradition*, makes demands on our minds this time that we cannot ignore. *Law and Revolution* is the treatise that *The Interaction of Law and Religion* was not. In *Law and Revolution* Professor Berman has gathered the evidence to support his thesis that our Western legal tradition began with the Papal Revolution of the late eleventh century *and not before or after*, that it survived every great religious and social revolution since then [indeed was a factor in some], and that its continued existence is endangered by a revolution that we are now experiencing.

Many of us have formed the impression today that there is a loss of confidence, perhaps a massive loss of confidence, in the legal system, in law itself, and in religion and morality. Legal and moral principles, and even ideals like justice, seem to many of us to have lost both their anchor and their rudder. They seem to be means alone, and have ceased being ends. But few of us would see, on the surface at least, the end of the Western legal tradition in that crisis. Professor Berman does. He supports his belief and his original thesis with a filler-less thoroughness and tenacity seldom matched in historical works. Berman is not only the historian writing about law, but also the lawyer writing about history.

2. *Id.* at 49-76.

American lawyers will have trouble with that term, the "Western" legal tradition. They know the "Anglo-American" legal tradition or the "common-law" tradition. As Berman has said, hardly any attempt has been made to integrate English and American legal history into the panorama of Western legal systems. This is, of course, true. In that context alone, Professor Berman's *Law and Revolution* is destined to become a classic source-work.

In considering Berman's thesis, the American lawyer will want to know the characteristics of this broader idea, this "Western" legal tradition. Berman lists ten characteristics: (1) a relatively sharp distinction between legal and other types of institutions; (2) the entrusting of the legal institutions to professionals; (3) the training of those professionals in a discrete body of learning; (4) the existence of that body of learning in a complex, dialectical relationship to the legal institutions, giving the law the capability of a meta-law by which it can be analyzed and evaluated; (5) law as a coherent whole, a body; (6) law as having an ongoing character, a capacity for growth, an inherent mechanism for change; (7) that growth as being logical, patterned, regular, reflecting an inner necessity; (8) law as being supreme over the political authorities, this linked to its historicity; (9) law's coexistence and competition within diverse legal systems, making the supremacy of law both necessary and possible; and (10) the existence of a tension between ideals and realities, between the dynamic and the stable, between transcendence and immanence, a tension which leads to tradition-renewing revolutions.

Not all of those characteristics were born in the Gregorian Reform of the late eleventh century. Berman acknowledges that the first four were characteristic of Roman law. The last six characteristics, however, indeed all ten taken together, bespeak a legal tradition that must be regarded as qualitatively different from any description one could make of the legal tradition in early medieval feudalism. We recognize all those characteristics in our system today. Berman says that the quantum leap occurred in the late eleventh century in, of all places, the Church:

The creation of modern legal systems was, in the first instance, a response to a revolutionary change within the church and in the relation of the church to the secular authorities. And here the word 'revolutionary' has all the modern connotations of class struggle and violence. In 1075, after some twenty-five years of agitation and propaganda by the papal party, Pope Gregory VII declared the political and legal supremacy of the papacy over the entire church and the independence of the clergy from secular control. Gregory also asserted the ultimate supremacy of the

pope in secular matters, including the authority to depose emperors and kings. The emperor—Henry IV of Saxony—responded with military action. Civil war between the papal and imperial parties raged sporadically throughout Europe until 1122.³

Along with these conflicts emerged a strong central authority, both ecclesiastical and secular. Simultaneously an intellectual centralization was also occurring:

Intellectually, western Europe experienced at the same time the creation of its first law schools, the writing of its first legal treatises, the conscious ordering of the huge mass of inherited legal materials, and the development of the concept of law as an autonomous, integrated, developing body of legal principles and procedures.⁴

Intellectually, the Western legal tradition was baptized in the law school at Bologna, founded in the late eleventh century. Politically, it received its confirmation in the martyrdom of Thomas Becket in 1170, who interestingly becomes a martyr not solely to religious principle, but to the incipient Western legal tradition itself. With these events, and all the events in between, law and the institutions of law changed. Law took on its transcendent quality and justice, its messianic quality. No longer solely a means, law and justice fused in the Western legal tradition into an eschatological end, a matrix through which “before” becomes “after,” and ideals can dimly but actually be seen and almost reached:

[I]n the nature of the Western legal tradition . . . justice . . . is seen in dialectical terms, involving a tension between the rights of the individual and the welfare of the community. The realization of justice has been proclaimed as a messianic ideal of the law itself, originally associated (in the Papal Revolution) with the Last Judgment and the Kingdom of God, then (in the German Revolution) with the Christian conscience, later (in the English Revolution) with public spirit, fairness, and the traditions of the past, still later (in the French and American Revolutions) with public opinion, reason, and the rights of man, and most recently (in the Russian Revolution) with collectivism, planned economy, and social equality. It was the messianic ideal of justice, above all, that found expression in the great revolutions. The overthrow of the preexisting *law as order* was justified as the reestablishment of a more fundamental *law as justice*.⁵

3. H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 87 (1983).

4. *Id.* at 86.

5. *Id.* at 21-22.

Thus, Berman traces the Western legal tradition through the various great religious and social revolutions that, curiously and paradoxically, beset it and were caused by it. Each revolution changed the tradition. Nevertheless, the tradition was never lost; it was always regenerated.

And yet Berman says that in the twentieth century the Western legal tradition is in its worst revolutionary crisis, a crisis that threatens its continued existence. Berman sees, today, the latter six of the characteristics of the tradition as being already substantially weakened. In some instances these characteristics already have been replaced by a primitive pragmatism, a cynicism, an acceptance of the notion that the justice factors amount only to the will of those who are currently in control—a new feudalism. The Western legal tradition has lost its anchor several times in the past, in each of the great social and religious upheavals that Berman chronicles. It may be more in line with Berman's thesis, however, to suggest that the Western legal tradition has, from time to time, weighed its own anchor and sought, under the guidance of its own inner-directed rudder, a new anchorage. In the crisis of today, the tradition seems to have lost anchor, rudder, and inner direction, . . . to have only sail and the outer direction of the winds. How Berman supports this belief is best left to the reading. Suffice it to say that contemporary positivist thought does not come off well, and that (most tantalizing) a reactionary and conservative return to the specifics of the tradition is *not necessarily* what Berman sees as the solution.

The American lawyer needs to read Berman's *Law and Revolution*. The *Anglo-American legal tradition* needs to be exposed to Berman's *Law and Revolution*. Berman's tracing of the Western legal tradition's highest ideals to Church law, indeed his finding of its very origins there, will not sit well with the secularized American lawyer. And Berman's perceptions of the tradition and the threats to it will not sit well with the pure legal positivist. But every good thesis causes discomfort. Indeed, it may be a measure of the worth of Berman's thesis that those religionists who might be expected to derive comfort from Berman's tracing of the entire Western legal tradition, both canonical and secular, into Church law and Church events instead will find themselves squirming as they read Berman's candid and straightforward account of how some treasured Church doctrines, like papal supremacy, came into being.

Generations of lawyers have studied only the *Anglo-American* legal tradition and have seen it dissolve frustratingly into the fragmentary mist surrounding the Norman Conquest. We have a larger history; we have a tradition. But have we found it too late to save it? Berman ends his book

with a quote from Octavio Paz which seems to serve as a self-fulfilling prophecy both pointing to an answer to the question and explaining Berman's purpose in writing the book:

Every time a society finds itself in crisis it instinctively turns its eyes towards its origins and looks there for a sign.⁶

What "sign," if any, that may have been in Berman's mind is left tantalizingly unclear. Each reader will find his or her own "sign" in the understandings and experiences that he or she brings to the material in Berman's book. My own version of the "sign," however, and the version which I suspect is Berman's, comes from Berman's account of what "law" meant to Western humanity on the eve of the birth of our Western legal tradition. In those murky times, "law" was a rough and uncertain thing, but it was integrated also into the common consciousness of a people, into "the common conscience of the community." Adjudication, as rough, uncertain, and even brutal as it sometimes was, "often [was] a stage in the reconciliation process." Law is no longer rough and uncertain, and adjudication has become more civilized. But both have strayed far from those ideals of the common conscience and reconciliation. And what's left of the Western legal tradition today, e.g., ideological pluralism and the adjudicating or lobbying battle, seems to be the antithesis of those ideals. But, for all that, Berman seems hopeful, perhaps less so at the end of the book than at the end of an early chapter entitled "The Background of the Western Legal Tradition", where he says:

There is, of course, no returning to the past—least of all, to the remote beginnings of Western civilization. Yet it is important, in a time of skepticism, for the skeptics, above all, to ask by what historical route Western man has come to his present predicament, and to confront their own nostalgia for an earlier age when people really believed that 'peace vanquishes law, and love vanquishes justice.'⁷

In the gravest of crises are hidden the noblest of opportunities. Berman's book itself may be the sign.

6. *Id.* at 558.

7. *Id.* at 83-84.