
Ellis Sandoz
BOOK REVIEWS


Reviewed by Ellis Sandoz*

In 1898 a great legal historian wrote: "The attempt to draw an unwavering line between 'spiritual' and 'temporal' affairs is hopeless." A distinguished successor has gone very much farther than that in the monumental work before us, for Harold J. Berman concludes that "the history of Western law, and especially of its origins, reveals its rootedness in the deepest beliefs and emotions of a people. Without the fear of purgatory and the hope of the Last Judgment, the Western legal tradition could not have come into being" (p. 558). This is the challenging thesis of a powerfully argued history and theory of law and jurisprudence. Berman methodically (and repeatedly) takes aim at the prevailing dogmas and Idols of the Theater in conventional scholarship of every trendy ideological stripe in a synthesis of polemic, analysis, and narrative history presenting a master of his craft at his magisterial best. This is an outstanding book, perhaps a great one.

The book is divided into two major parts, the first devoted to "The Papal Revolution and the Canon Law" and the second to "The Formation of Secular Legal Systems," these major parts (of seven chapters each) are flanked by an Introduction and a Conclusion. The 558 pages of text is followed by 75 pages of explanatory and bibliographical notes. The author's own statement of his project is succinct and worth quoting:

This book tells the following story: that once there was a civilization called "Western"; that it developed distinctive "legal" institutions, values, and concepts; that these Western legal in-

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2. F. Bacon, The New Organon Aphorism XLIV (Library of Liberal Arts ed. 1960) begins as follows: "Lastly, these are Idols which have immigrated into men's minds from the various dogmas of philosophies, and also from wrong laws of demonstration. These I call Idols of the Theater, because in my judgment all the received systems are but so many stage plays, representing worlds of their own creation after an unreal and scenic fashion." Id. at 49. For Berman's own catalog of challenges to conventional wisdom, see H. Berman, supra note 1, at 2-44, 275-76, 538-42. This is to say that the author's intention is avowedly iconoclastic in the Baconian tradition.
stitutions, values, and concepts were consciously transmitted from generation to generation over centuries, and thus came to constitute a "tradition"; that the Western legal tradition was born of a "revolution" and thereafter, during the course of many centuries, has been periodically interrupted and transformed by revolutions; and that in the twentieth century the Western legal tradition is in a revolutionary crisis greater than any other in its history, one that some believe has brought it virtually to an end (p. 1).

Very much later, Berman adds: "The individual parts of the story told in this book are well known to specialists in various fields of history and law. Yet the story as a whole is singularly unfamiliar and conflicts with conventional preconceptions in many ways" (p. 538).

Now, to say that this book is devoted primarily to a legal history of the twelfth century in the West is true, but neither very alluring to the ordinary lawyer (or political scientist) nor adequate to the subject — even if we add with Berman that the twelfth century was "the legal century, the century in which the Western legal tradition was formed" (p. 120). The matter must be put into the context that makes the book exciting reading and pathbreaking analysis. The terms revolution and crisis signal the relevant context; for the Investiture Struggle that reached a head in 1075 with Gregory VII’s radical assertion of papal independence and supremacy in the Dictates of the Pope, and triggered a half-century of wars and lesser conflicts until finally compromised in 1122 in the Concordat of Worms, is renamed "the Papal Revolution" by Berman (pp. 94-100). Here is the first of the great Western revolutions, the one that marks the establishment of Western civilization generally and the Western legal order specifically. It is here that Western (and modern) civilization begins, not in Reformation or Renaissance or such subsequent major event as the Puritan Revolution of the seventeenth century or the Enlightenment and French Revolution of the eighteenth. The conventional periodization of history into Ancient, Medieval, and Modern is itself discarded as "fallacious." "Modern Times" begin with the reformation and renaissance effected by Hildebrand and his papal successors in the twelfth century, and the conventional "Renaissance and Reformation of the fifteenth and sixteenth centuries were directed against" the earlier epochal events of the Papal Revolution (p. 538; see also pp. 13-16, 86-119).³

The extensive meaning Berman gives to the term Papal Revolution will concern us shortly, but his interpretation of its central thrust requires

³ "Papal Revolution" is used by E. Rosenstock-Huessy, Die europäischen Revolutionen 168 (2d ed. 1951). Rosenstock-Huessy taught Berman at Dartmouth College in the 1930's and inspired much of the present volume, see H. Berman, supra note 1, at 574-75, 636. The vast literature on the Investiture Struggle is summarized id. at 86, 574-78.
immediate notice, for the chief impetus of this revolution is an emphatic institutionalization of Christianity through the creation of the comprehensive new legal system of the canon law and the establishment of the new corporate political entity of the church. The general effect is to solidify into procedure and practice the old theoretical principles of Gelasius' Two Swords by emphatically elevating the spiritual authority over the secular order and unifying it under the papacy. By a range of complex developments, Berman argues, the Roman Catholic Church is transformed into the first true state and turns its attention for the first time to a concerted reform of the world, even as it continues the vocation of saving souls for eternity. The chief vehicle for reform of the world is the centrality of law. As Berman writes:

It was this attitude toward law, and toward the relation of the church to the world, that changed dramatically in the late eleventh and the twelfth centuries. The church set out to reform both itself and the world by law. It established itself as a visible, corporate, legal entity, independent of imperial, royal, feudal, and urban authorities. Autonomous bodies of law were articulated, first within the ecclesiastical polity and then within the various secular polities, in part to maintain the cohesion of each polity, in part to achieve the reform of each, in part to keep an equilibrium among them all. These new developments were only possible, however, because the foundations for them had been laid in the earlier period. It was then that a basis was established for the formation of stable communities; that basis was the integrated populus christianus in which there was neither a separation of church from state nor a separation of law from other modes of social control (p. 83).

Central among these complex lines of development is the act of institutionalization whereby the Papal Revolution "gave birth to the modern Western state — the first example of which, paradoxically, was the church itself" (p. 113). Berman affirms that "[t]his is one of the main themes of my book" (p. 577). The extensive meaning of the Papal Revolution in Berman's sense of the term goes far beyond the passage of time and events from 1075 to 1122; it embraces all of the major developments of the period as a

4. Pope Gelasius I (492-496) stated this doctrine to the Emperor Anastasius: "Two [swords] there are, august emperor, by which this world is chiefly ruled, the sacred authority of the priesthood and the royal power . . . if the bishops themselves, recognizing that the imperial office was conferred on you by divine disposition, obey your laws so far as the sphere of public order is concerned . . . with what zeal, I ask you, ought you to obey those who have been charged with administering the sacred mysteries [in matters of religion]?" Quoted id. at 92; see also analysis id. at 92-94, 201, 279, 528.

5. J. Strayer, On the Medieval Origins of the Modern State 22 (1970), is a chief source of this idea; cf. H. Berman, supra note 1, at 577.
“total” revolution must, if it is to meet that criterion of revolution (pp. 99-103). Thus, it includes the rediscovery of the Roman law around 1080 and the founding of the great law schools to study the recovered texts from Justinian’s compilation of *circa* 534 A.D. and the establishment of the universities more generally. It extends to the work of Gratian who thought he could build a system of law on the Golden Rule, “Do unto others as you would have them do unto you,” and whose mammoth *A Concordance of Discordant Canons* appeared in Bologna in 1140 as the first comprehensive and systematic legal treatise in the “history of the West, and perhaps in the history of mankind” (p. 143). It extends to the founding of modern political science in the work of John of Salisbury, whose *Policraticus* in 1159 first elaborated “an organic theory of the secular political order” (p. 286), one expression of the developmental nature of Western history and the response of the secular communities to the centralization of the church effected by the revolution there. It extends to rise of the plurality of overlapping and conflicting legal and political jurisdictions that responsively arose in tension with the church and canon law, including the feudal, manorial, mercantile, urban, and variety of royal law that are discussed by Berman at length in separate chapters and compose the secular law (pp. 273-519). More centrally, it extends to philosophy and science themselves as major intellectual structures of the civilization now emphatically devoted to Truth through reason no less than by faith and to the reforming of the world. And, finally, it extends to the essential tension within the comprehensive Western vision of reality which Berman characterizes as typified in the conflict between Peter Abelard and St. Bernard of Clairvaux as going to the heart of the matter.

The struggle and tension between rational, scientific, and formalist attitudes, on the one hand, and mystical, poetic, and charismatic attitudes, on the other, help to explain why it took three generations for the new jurisprudence to establish itself and centuries more for it to run its course, and why ultimately it was in turn challenged by subsequent revolutions (p. 196).

Bernard denounced the study of Roman law before the Council of Reims in 1129, which then prohibited monks from studying it. In the sixteenth century the Protestant reformers sharply attacked the Roman Catholic Church for excessive legalism, and Martin Luther attacked the concept of the union of the visible corporate church under law, burned the books of canon law, and proclaimed his belief “that the true church can have no legal character whatever, that it is an invisible communion of the faithful” (pp. 196-97). The Papal Revolution thereby gave way to the next great Western convulsion, the Protestant Reformation (1517-
1555)—a restorative movement of Augustinian inspiration.

But the fundamentals lie with the intensive aspect of the Papal Revolution and the implications of Berman’s theme that it “made Christianity into a political and legal program. The church became a state. Canon law became a specific means, first, of holding the church-state together, and second, of reforming the world” (p. 528). He compares the Papal Revolution with “an atomic explosion that split Germanic Christendom into two parts: the church, viewed as an independent, visible, corporate, legal structure; and the secular order, viewed as divided among various polities” (p. 531). The question is what kind of political and legal program is Christianity? The answer, to begin with, is that it is essentially revolutionary. This means that by virtue of its principles, it is intrinsically unstable, and the revolutionary moment sets in motion a process of change that moves (perhaps by evolutionary degrees) from crisis to crisis, as Berman traces the process through the six great Western revolutions that he identifies: Papal, German (or Protestant Reformation), English, American, French, and Russian (p. 11-33). As is evident from the list, the “Christianity” of the revolutionary process is handed over to institutions other than the church with the passage of the centuries, a clue to the “unprecedented crisis” which Berman believes the West presently faces—but more of that in a moment. At present we must emphasize the chief point: “The most important consequence of the Papal Revolution was that it introduced into Western history the experience of revolution itself” (p. 118). On that occasion, the movement was away from the dreary Augustinian understanding of earthly existence as a meaningless age growing old awaiting only slow deterioration until the Last Judgment. Rather, the new Gothic architecture signalled with dramatic power the revolutionaries’ sense of time and prospects of reform, progress, amelioration, earthly hope of an improving world, and meeting in the here and now some of the “preconditions of salvation” in the beyond. “The great cathedrals expressed, in their soaring spires and flying buttresses and elongated vaulted arches, a dynamic spirit of movement upward, a sense of achieving, of incarnation of ultimate values” (p. 118).

The revolutionary mind of Christian politics moves in a spectrum of ever intensifying volatility from doing good to others by loving your neighbor as yourself, to social reform, to the general progress of society as a civilizational dogma, to an apocalyptical vision of a transfigured world and mankind at the End Time of the Creation in a Millennium or in the translation of time into the Eternal Sabbath of the Eighth

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7. See the account of St. Augustine’s theology of history in K. Loewith, Meaning in History 160-73 (1949).
Day. The eschatological vision of the end time is basic both to Christianity and to every revolution subsequent to its reception, as Berman's old teacher at Dartmouth College taught him in the late 1930's (pp. 27, 636). It was, in significant part, to combat the imminent expectation of a radical transfiguration of the world that Augustine wrote the City of God and distinguished the *civitas terrena* and the *civitas Dei*, the one a meaningless rise and fall of secular powers and a *saeculum senescens*, the other the repository of beatitude and ultimate fulfillment as the outcome of mankind's providential pilgrimage through time in the church considered as itself the mystical body of Christ present in history (cf. p. 27).

The Augustinian problem of how to control the lust for transfiguration is a permanent issue in post-Christian reality. By Berman's account, however, "regeneration was for the first time seen as applicable also to the secular society" in the Papal revolution and its aftermath (p. 28; cf. pp. 111-12). Otherworldly aspirations are infused into this world in the church become a state. The core meaning of "reform" as an activity of the church become state is "transform!") As Berman writes of each of the great revolutions, starting with the Papal Revolution of 1075: "Without the belief that this world... could be regenerated—and that such regeneration would lead to the fulfillment of man's ultimate destiny—the great revolutions of Western history could not have occurred" (p. 28). Side by side with the futurism, however, goes also the notion that a primordial time of founding is being restored as a condition to achieving the final victory: "Each [revolution] also placed the historical old and new within a framework of an original

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8. In Augustine's words:

"The sixth [day] is passing, and cannot be measured by any number of generations. . . . After this period God shall rest as on the seventh day, when He shall give us (who shall be the seventh day) rest in Himself. . . . the seventh shall be our Sabbath, which shall be brought to a close, not by an evening, but by the Lord's day, as an eighth and eternal day, consecrated by the resurrection of Christ, and prefiguring the eternal repose not only of the spirit, but also of the body. There we shall rest and see, see and love, love and praise. This is what shall be in the end without end. For what other end do we propose to ourselves than to attain to the kingdom of which there is no end?"

Augustine, *City of God* XXII. 30, at 867 (M. Dodds trans. 1950) (not cited or quoted by Berman). An issue left unresolved by Berman's analysis is whether the Papal Revolution affects the transcendental destiny of mankind as here expressed in Augustine's vision of eschatological destiny and the stages of history.


10. See Augustine, supra note 8, XX. 7, 8, 9, at 725-26, where Augustine argues that the awaited Millennium of Christ's victory has already begun (by way of roundly dismissing chiliastic expectations as "ridiculous fables") and writes of the church as Christ in history: "[T]he Church even now is the kingdom of Christ, and the kingdom of heaven. Accordingly, even now His saints reign with Him. . . ." For the "ridiculous fancies" or "fables" of the Chilists and Millenarians who hope for an earthly thousand-years of perfect bliss, a time of material abundance and carnal pleasure, see id. XX. 7, at 719. For analysis, see E. Voegelin, *New Science of Politics* 107-10 (1952).
creation, or state of nature, and a final end, an ultimate victory" so that every great revolution is characterized as both a restoration of first truths and the condition for final regeneration and perfection (pp. 28, 18-21).

"The pursuit of the Millennium" as manifested in the Papal Revolution and thereafter is controlled through the law, and Berman argues that this generalization holds true for all six Western revolutions, including the Bolshevik Revolution of 1917 (pp. 28-33). The character of the law of the Papal Revolution is his concern in this book, however, and requires our attention here. The central point is stated this way: the "fundamental concept of the Western legal tradition" is "the concept of a society that has the power to transform itself in time by the rapid and continuous infusion of divine and natural law into ecclesiastical and secular legal institutions" (p. 197).

Virtually all of the modern legal systems originated "right in the middle of the Middle Ages" (p. 42). This is the time of the Papal Revolution, and it is the time when "law became disembedded," i.e., through the professionalization of jurists, judges, and lawyers, and the rise of the universities and first law schools, the law for the first time emerged as an "autonomous, integrated, developing body of legal principles and procedures" (p. 86). Three elements are at the roots of the Western legal tradition: "the discovery of the legal writings compiled under the Roman Emperor Justinian, the scholastic method of analyzing and synthesizing them, and the teaching of law in the universities of Europe" (p. 123). The work of Justinian's jurists that was discovered in the 1080's is a manuscript in four parts dating from the sixth century and the law, not of the Roman Empire in the West, but of Byzantium. The parts consist of the Code, comprising the ordinances and decisions of the emperors prior to Justinian (in twelve books, taking up 1,034 pages in a modern English translation); the Novels, composing the laws of Justinian himself (562 pages); the Institutes, which is a textbook for beginning law students (173 pages); and the most important part, the Digest or Pandects, which contains a great variety of extracted opinions of Roman jurists on legal questions set forth in fifty books (2,734 pages). The law school at Bologna probably "was founded primarily for the purpose of studying that text" (p. 127). Since this was the law of no actually existing community, Justinian's law took its place with other authorities of what Edward S. Corwin calls the "higher law": the Bible, Plato, Aristotle, and (later) Cicero, and the church fathers, all declaratory of Truth itself and hence the law "applicable at all times and in all places" (p. 122).11 But then Rome was considered to be

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"There is in fact a true law (vera lex) — namely right reason (recta ratio) . . . .
eternal and the Roman Empire to exist in a special way into the period of our discussion in a continuation that was universal and permanent (cf. pp. 204-05, 603-04).

The centrality of truth to the theory of law must be stressed in this context. The "disembedding" of the law meant in substantial part the confrontation of the Gregorian reformers with the nearly universally prevailing customary law. Faced with an obnoxious custom, the Gregorians would "appeal over it to truth, quoting the aphorism of Tertullian and St. Cyprian [that] Christ said 'I am the truth.' He did not say 'I am the custom.' Gregory VII quoted this against Emperor Henry IV. Becket quoted it against King Henry II" (pp. 112-13, 258)

Berman gives high place to Gratian for so applying the scholastic technique of reconciling contradictions to extrapolate from Justinian's law. This law, interlaced with other legal sources and with philosophy, was in coherent whole denoted by the twelfth century phrase corpus juris Romani—the designation of the European Romanists and canonists, not of the earlier Roman lawyers themselves. Coherence, supremacy over the political authorities, historicity or ongoing growth by its own internal logic, and grounding in transcendent truth and justice are leading characteristics of the Western legal tradition (pp. 9-10). Gratian's great work of 1140 provided the first comprehensive expression of all these characteristics in a systematic analysis and synthesis and presented the various sources of law in a hierarchical order. He is "the great founder of the science of canon law" (pp. 187, 598).

He started by interposing the concept of natural law between the concepts of divine law and human law. Divine law is the will of God reflected in revelation, especially the revelation of Holy Scripture. Natural law also reflects God's will; however, it is found both in divine revelation and in human reason and conscience. From this Gratian could conclude that "the laws [leges] of princes [i.e., of the secular authorities] ought not to prevail over natural law [ius naturale]." Likewise ecclesiastical "laws" may not contravene natural "law." "Ius," he wrote, "is the genus, lex is a species of it."

To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. . . . It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of a man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishment."

Gratian also concluded that, as a matter of natural law, “princes are bound by and shall live according to their laws.”

The theory that customs must yield to natural law was one of the greatest achievements of the canonists (p. 145).

Gratian’s reliance on natural law and on reason was philosophically informed from Greek, and especially Stoic, sources to produce the coherent statement given in his sprawling 1,000 page work. Although there was little theory in the work of Justinian’s jurists and although the Greek philosophers were not lawyers, “in the twelfth century the canonists and Romanists of western Europe combined the Greek capacity for philosophy with the Roman capacity for law. In addition, they deepened the earlier concepts of reason and equity by adding to them the Judaic and Christian concept of conscience, which they related to mercy and love” (p. 146).

It is a noteworthy further argument of Berman’s that the legal science of the kind just glimpsed in Gratian’s work “was a progenitor of the modern Western sciences” (p. 151). Science is primarily a Western achievement, and the openness, objectivity, skepticism, and devotion to reason characteristic of the West, and vital to scientific inquiry, “have stemmed from a complex relationship between the sacred and the profane” (p. 158). The de-divinization of the world (to use Eric Voegelin’s phrase) fostered by the emphatic separation of ecclesiastical and secular polities (thereby ending the German sacred kingship) coincided with the rise of science. What is to be noted, however, is that such scientific inquiry arose in the ecclesiastical sphere in the work of such Western theologians as Anselm and Abelard who subjected the evidence of the divine mysteries themselves to rational scrutiny and even skeptical examination. They concluded, for example, that Christ’s deputy himself, the Pope, was subject to deposition if found to be a heretic or if guilty of a crime that would scandalize the church. What seems decisive in the rise of science, then, is “a new attitude toward the sacred itself. The church, though still understood to be the ‘mystical body of Christ,’ was viewed as also having a visible, legal, corporate identity and an earthly mission to reform the world.” Berman continues:

The emphasis shifted from sacredness in the sense of otherworldliness to the incarnation of the sacred, which meant its manifestation in the political, economic, and social life of the times. That, in turn, made it necessary to examine the sacred, the spiritual, with scientific value premises. 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 — and eventually nature and nature’s laws (p. 158).

Perhaps the most original pages in Berman's book occur in chapter four which is devoted to the theological sources of the western legal tradition. As noted above, the religious faith that sees ultimate human destiny in terms of purgatory and Last Judgment is central to our legal tradition by this account of it: "Western legal science is a secular theology" (p. 165). By Berman's analysis, Christianity during the first millennium was an apocalyptic faith and not a social program, although it contributed to a revision of laws in the direction of greater humanity. It stressed dying to the world and reconciliation of man to God and men to one another, so that the exemplary Christian life was the monastic ideal. The biblical God revealed in Christ is both Redeemer and Judge. At the end of history looms the Last Judgment, initially construed as the inauguration of divine rule in the world to come. In the early part of the eleventh century, however, a shift occurred in the understanding of the Last Judgment through the emergence of belief in an intermediate period of purging between the death of the individual and the Last Judgment which will occur with the return of Christ as divine judge. At the Last Judgment all souls that ever lived will stand resurrected before the Judge and either be admitted to eternal bliss in the Kingdom of God or consigned to eternal perdition with the devil.

The emergent doctrine of Purgatory was conceived as a temporal condition of punishment for individual souls of Christians: original sin had been cleansed by baptism, but the sins subsequently committed in life required as a matter of justice a price to be paid after death, in time, for sins not fully expiated in life. "Expiation meant payment of a price, not gradual reformation: the soul remained guilty (indebted) until the full price was paid" (p. 169), and that payment meant that the "Christian soul remained in purgatory until fully purged by suffering" (p. 170). A universal democracy characterizes the Last Judgment and gives essential meaning to life itself; every human being will stand before the divine judge and give accounting. So, also, Purgatory is a Christian democracy where proportional equality of punishment is justly meted out to princes and popes no less than serfs and thieves according to the gravity of their sins. Because the church, however, has jurisdiction over purgatory and the Pope administers the Treasury of Merits, the time to be spent in purgatory can be determined by clerical decision. Thus, at the end of the eleventh century, Pope Urban II granted the first "plenary indulgence" to those who joined the army of the First Crusade, releasing them from liability for punishment in purgatory for all sins committed prior to that time (p. 171).

The legalization of life after death meant that everyone who died in the faith was assured of eternal bliss at the Last Judgment, so that the vindication of the law brought a happy outcome and God's role became merely ministerial. "Man was beginning to take the center of the stage" (p. 171). The new holiday of All Souls Day was introduced to symbolize the Last Judgment as a universal "Law Day" when all souls that ever lived are to come before Christ to be eternally convicted or acquitted (p. 195). The Atonement of Christ through the dimensions of incarnation-crucifix-
ion-resurrection had achieved the demands of divine justice and divine mercy through the assurance of eternal beatitude for all penitent, baptized Christians because their natural sin was already forgiven and their actual sins would be fully expiated through the legalities of church-administered proportional punishment in purgatory prior to the Last Judgment. Christ as ominous Judge in the end time then became more "the divine Brother whose sacrifice on the cross served to reconcile God and man" (p. 195). Holy Communion (the eucharist), too, assumed a central place in worship and constantly reminded the faithful of the paradox of divine punishment and divine forgiveness through repeated enactment and incorporation into the lives of the men and women composing the Christian community. Through an intricate web of legal rules devised by the theologians and canonists of the time, it was demonstrated that God rules through law; hence, the ecclesiastical and secular authorities ordained by him justly declare legal principles and impose sanctions and remedies for their violation.

The belief in a God of justice who operates a lawful universe, punishing and rewarding according to principles of proportion, mercifully mitigated in exceptional cases, corresponded to the belief in a complex social unity, Christendom, in which the dialectic of interacting realms and polities was regulated by a similar kind of justice-based-on-law and law-based-on-justice, with mercy playing an exceptional role (pp. 196-97).

Distinctive to Western law as it takes shape in the eleventh and twelfth centuries, Berman emphasizes, is the vision of God as not only transcendent but as immanent, too, through incarnation in Christ. Incarnation is the central reality of the universe, and the regeneration of the world and its redemption are pursued with great energy as a consequence. This is the significance he attaches to the liturgical identification of crucifixion with redemption. Christ is primarily the conqueror of sin, and it is Christ on the cross that is emphasized. The church itself becomes less a communion of saints in heaven than a community of sinners on earth. The sacraments are highly ritualized and formally limited to seven in the twelfth century. The sacrament of holy communion from the eleventh century is rigorously defined and systematized to become centrally important as the principal symbol of church membership. The miraculous real presence of Christ in the host as the source of its grace-giving power is designated "transubstantiation" at the Fourth Lateran Council in 1215 and the Eucharist (preceded by the sacrament of penance) made mandatory for all Christians at least once a year, usually at Easter. Penance itself as the sacrament of confession of sins and absolution underwent significant development, so that by the twelfth century the priest's Ego te absolvo ("I absolve you") came to be interpreted, not merely as his certification of God's forgiveness (declarative), but as performative or sacramental (p. 173). Deprivation of the right to take communion marked expulsion from church membership and, hence, participation in divine incarnation itself as a member of the body of Christ. Berman writes of the close connection of the mystery of the
atonement and the Eucharist (especially in light of Anselm’s theory) as sacramental incorporation into Christ:

sacramental incorporation into Christ was conceived in terms of identification with Christ on the cross, not with the risen Christ. Thus the centrality of the eucharist in the second millennium of the history of the church, as contrasted with the centrality of baptism in the first millennium, is connected with the later emphasis on the incarnation of God in human history as contrasted with the earlier emphasis on the deification of man in the kingdom of heaven (p. 593).

"For the scholastics of the late eleventh and twelfth centuries the way of the knowledge of God was the way of incarnation, not deification" (p. 595).

The principles of constitutionalism are theoretically refined and instituted in canon and secular law systems during the Papal Revolution, even if the term itself is not coined until the American Revolution (p. 9). Supremacy of the law is a familiar principle tied to the notion, on one hand, that human law must conform to the superior natural, divine, and eternal law and, hence, approximate perfect reason and justice to be valid. On the other hand, the law rests in some sense on the will or consent of the community or citizen-body, since reason and liberty are natural attributes of all human beings as bearers of the image of God, and since the community is composed of persons who are both Christians and universally sinners, so that none is naturally so fit through superiority or perfection as to rule others but by their consent. The moral equality arising from the sharing of a common sinful humanity is illustrated by the requirement, in cases where capital punishment is the sentence, that the executioner "kneel down before the condemned man at the last moment . . . to ask his forgiveness for the act he was about the commit" (p. 184). In Azo's development of the concept of sovereignty from the Roman law texts concerning jurisdictio and imperium in the first quarter of the thirteenth century, he concluded that all rulers have imperium (sovereignty) "because they have jurisdictio, the right to establish law in the respective states. But what was the source of that lawmaking right? Azo answered that the source was in the corpus, the universitas, the communitas. Jurisdiction did not descend downward from the emperor but upward from the corporate community" (p. 292). Gratian and Huguccio taught that it lay within the power of the community to try and depose the pope for heinous offenses (p. 214). John of Salisbury (in 1159) taught that "[t]o kill a tyrant is not merely lawful, but right and just" (quoted p. 282), a view rejected by Thomas Aquinas a century later as "not in accord with apostolic teaching;" Thomas advocates deposition of kings who have become tyrants, if "to provide itself with a king belongs to the right of a given multitude" or, if it does not, to look for remedy to a higher authority if one has provided the king with his dominion. Otherwise, prayer and repentance are recommended.13

Rule of law as it emerges in the eleventh and twelfth centuries consists of essentially three things: (1) the authority of the ecclesiastical and secular authorities to enact law and rule by it through judicial systems and governmental agencies; (2) the readiness of the heads of ruling bodies to obey the laws of their own devising, until modified through further legislation, or to rule under law; and (3) the respect of the laws of other jurisdictions when just and acceptance of them as binding one's own jurisdiction. A major characteristic of the Western legal tradition as it arose in this period is the plurality of interrelated jurisdictions that tended mutually to reinforce the principles of rule by law and rule under law: "If the church was to have inviolable legal rights, the state had to accept those rights as a lawful limitation upon its own supremacy" and vice versa (p. 292). The harmonizing of the laws of various jurisdictions and their acceptance as mutually valid depends on the hierarchical conception of the law as divinely instituted and of God as the ultimate source of all law as made known through Scripture, natural law, and human laws that participate in (and conform with) the higher law. In turn, this view gives force to the claims of such English writers as Bracton that the king is "under God and the law" and that it is not the king that makes the law but the law which makes the king. But this principle is not merely English, famous though it is for statements there in Magna Carta and elsewhere. The Sachsenspiegel of the early thirteenth century legalizes resistance against unlawful commands or acts of the king and his judges as both a right and a duty. A legal formula of Aragon demands that the subjects obey the king so long as he performs his duties, "and if not, not" (p. 293). In short, the fundamental law embodies absolute right, and all subordinate law is to be given effect only to the degree that it conforms to that absolute standard. The tyrant's laws, according to Thomas Aquinas, are not laws but perversions of law and disobedience to them and resistance by the people does not constitute sedition; rather, it is the king become tyrant who commits sedition against the community. Aquinas sounds very much like John Locke did 400 years later. Thus, the scriptural admonition is basic: "We ought to obey God rather than men." And Aquinas summarizes in this way:

Man is bound to obey secular princes in so far as this is required by the order of justice. Wherefore if the prince's authority is not just but usurped, or if he commands what is unjust, his subjects are not bound to obey him, except perhaps accidentally, in order...
to avoid scandal or danger.17

As for kings, Bracton and Aquinas agree that they are bound to do justice and be obedient to the laws but that they cannot be coerced to do so but only directed by reason and conscience (p. 293).18 This view overlooks, however, the emerging checks and balances of the English constitution as wonderfully exemplified in Magna Carta (1215), Chapter 61, as the very theory of that monumental event and its legacy.

Among much else of interest and importance to the emergence of constitutionalism from the side of Berman’s discussion of comparative secular law, urban law is especially noteworthy and must be mentioned here. The cities arose as integrated communities formed on the basis of actual or implied covenants, often in the form of solemn collective oaths of the entire citizenry to adhere to the terms of the charter of the city read aloud to them. This fundamental act of consent constitutes the society in much the way the “social contract” of subsequent political theory is intended by Hooker and Locke to be the basis of free government.19 And “the reality of modern constitutionalism... was present first in the urban law systems of western Europe in the eleventh and twelfth centuries” (p. 396). Thus, the charters of these cities embody their laws and are the first written constitutions. The systems of government thereby established bear striking similarity to modern constitutional arrangements: the urban governments had limited powers, were often divided into executive, legislative, and judicial branches which checked and balanced one another; periodic elections to office were held; laws were published and collections of laws issued; and judges held office on condition of their good behavior or until recalled by the citizenry. Civil rights were guaranteed by the charter; included a trial procedure with judgment by peers; no arbitrary arrests; no imprisonment without due process; citizens bore arms and voted by right; rich and poor were theoretically equal before the law; immigrants achieved the rights of citizens after a year and a day residence. Urban civil liberties usually included exemption from normal feudal duties and taxes and often restricted the king’s prerogative in important ways, such as forbidding him to impose forced loans. Finally, the urban citizenry’s constitutional law included rights and liberties of participation in popular government through elections, office-holding, and giving of consent to laws. “This, in turn, was connected with the constitutional theory, never fully accepted but never fully rejected, that political power was ultimately vested in the whole body of citizens” (p. 397). Thus, even though England’s towns were less democratic and more dependent upon the crown than those in Italy, Germany, Flanders, and parts of France, many borough officials were elected, and

18. Id. Q. 96, A. 5 ad 3, at 74.
London's citizens obtained the right to elect their sheriff and a justiciary in 1131 and their mayor in 1231 (p. 398).

There is promise of a "sequel" by Professor Berman to the present volume, although there is no indication of its character (p. 636). However, one would guess that it will continue the comparative history of Western law here so splendidly given for the initial phase in the Papal Revolution and that it will more systematically elaborate the "social theory of law" (pp. 44, 556) alluded to in the present volume. Berman is plainly dissatisfied with reigning legal theory and jurisprudence, and for good reason. He sees them as being at loggerheads with the very foundations of the Western legal system and as a considerable part of the "crisis" of our tradition that so alarms him. Indeed, the sense of urgency in the book arises from profound anxieties so acute that he confesses (on the very first page of the book) his personal desperation: "It is said that a drowning man may see his whole life flash before him." He then continues:

That may be his unconscious effort to find within his experience the resources to extricate himself from impending doom. So I have had to view the Western tradition of law and legality, or order and justice, in a very long historical perspective, from its beginnings, in order to find a way out of our present predicament.

Because the age is ending, we are now able to discern its beginnings.

It is impossible not to sense the social disintegration, the breakdown of communities, that has taken place in Europe, North America, and other parts of Western civilization in the twentieth century.

The traditional symbols of community in the West have been above all religious and legal. In the twentieth century religion has become largely a private affair, while law has become largely a matter of practical expediency. The connection between the religious metaphor and the legal metaphor has been broken. Neither expresses any longer the community's vision of its future and its past; neither commands any longer its passionate loyalty.

One need not bemoan these changes. They may be a good thing. They are no doubt inevitable. In any case, they mark the end of an era, and since there is no going back, the only question is, "How do we go forward" (pp. v-vi)?

How ought one react to the grim discovery that the cumulative crisis unfolding before our eyes is terminal for our civilization? In the era of the Moral Majority at home and Solidarity abroad, we can roundly deny that our history is whimpering to its end before us and embrace the Twainian postulate that our demise is greatly exaggerated. After all, dire prophecies of The End of civilization—even of the world—have been rampant for millennia, a veritable apocalyptic thread in history running from Spengler
and Nietzsche through an illustrious lineage back to Lot and Noah. Take heart! As to the fatalistic or crypto-Marxian notion of inevitability of the impending disintegration of the world, we can recall Mr. Justice Brandeis’s *bon mot* that “the irresistible is often only that which is not resisted.”

20 We can also be reminded from Eric Voegelin’s elaborate diagnosis of the crisis of the age that “[n]o one is obliged to take part in the spiritual crisis of a society; on the contrary, everyone is obliged to avoid this folly and live his life in order.”

21 To a considerable degree, these lessons are taught by the massive work before us—for Berman plainly does not think that the degradation of Western civilization into ideological and technological barbarism is “a good thing.” Nor can we subscribe to a fellow-lawyer’s verdict that “this truly magnificent book is a last hurrah, if not a memorial in the genteel tradition, for a world which exists today only in one’s memory,” a “superb memorial” to an irrelevant past. To the contrary, Berman is doing the historian’s duty of recovering the past for a generation that has substantially forgotten who it is they are, if they ever knew. His purpose is therapeutic. And the reaction of some of his commentators suggests that the crisis is acute enough among his colleagues to justify his anguish.

Berman, by recovering the history of the origins of Western law, seeks to counter the crude pragmatism, cynicism, and reductionism in contemporary legal teaching that views law as a set of technical devices for getting things done, separates it from history, identifies all law with national law, and our own national legal history with all that is relevant in legal history. He calls for a new jurisprudence that is integrative and overcomes the fallacies of an exclusively positivist or natural law or historical and social-economic jurisprudence, one that goes beyond them (pp. vi-vii). While his social theory of law remains to be fully developed, the starting point is to understand that just because Hegel was wrong does not mean Marx was right: neither a pure rationalism or idealism nor a materialism supplies an adequate frame of reference. “Western legal institutions cannot . . . . be explained satisfactorily either as mere superstructure or as mere ideology.’’

Berman continues:

Conventional social theory errs in supposing that historical change is caused by changes in basic social, economic, and political conditions alone. There is, in fact, no such thing as social, economic, and political conditions (or forces) alone; they are always part of a context of perception and feeling. Nor are there values ideas, beliefs — alone; as a social matter, they are always interconnected.

with "material interests." . . .

To understand why a great historical change occurred, one must go . . . to the times and circumstances themselves . . . . They were not merely "manifestations" and "instruments"; they happened; . . . . legal institutions . . . cannot be explained satisfactorily in any other way. In addition to the objective materialist "why" and the subjective idealist "why" there is a historical "why"—a "why" that adds to the outer and inner dimensions of the inquiry both a past and a future dimension (p. 403).

It seems wholly becoming for a lawyer to stress that empirical reality, or the historical facts themselves, deserve equal weight with spiritual and material components of theories of human institutions and existence. Thus, law is not only an instrument of domination (positivism), but also an expression of moral standards as understood by human reason (natural law theory), and the outgrowth of custom (the historical school): "Law . . . is custom transformed, and not merely the will or reason of the lawmaker. Law spreads upward from the bottom and not only downward from the top" as the command of the sovereign (p. 556). The dichotomy which asks whether the law is part of the ideological superstructure or part of the material base is itself wrong. Rather, law grows up from customs and structures of the whole society and down from the policies and reasons of the rulers to help integrate both aspects of social existence in the ongoing practice of a legal order serving justice and protecting rights. In this synthesis, tradition plays a cardinal role, and "tradition is a blend of conscious and unconscious elements" embracing both the visible institutions and works and the invisible aspirations, beliefs, and convictions (pp. 557-58).

Certain reservations about Berman's presentation may be mentioned in conclusion. Most central is doubt about the sweeping shift of the Papal Revolution itself, to the end that the church becomes the first state and Christianity becomes a program of reforming the world. The medievalists will doubtless tackle this thesis with suitable vigor. Until then, however, we can recall that comparable ideas appear in the debate surrounding the Great Schism and filioque controversy (1054) and are popular in Eastern Orthodox Russian church literature. They are expressed in Dostoevsky's "Legend of the Grand Inquisitor" in The Brothers Karamazov, in The Possessed, and in the theory of history of Dostoevsky's friend, the philosopher Vladimir Solovyov. By this account, the chief culprits are rationalism and the lust for power that perverted Catholicism by replacing Christianity with Caesar's dominion; thus Stavrogin believed "that Christ

24. See the section entitled "The Church as the State," in E. Sandoz, Political Apocalypse: A Study of Dostoevsky's Grand Inquisitor 123 (1971); see also id. at 155-70. Cf. H. Berman, supra note 1, at 178. No such outrageous condemnation as given by Dostoevsky is present in Berman, one should stress.
without an earthly kingdom cannot hold his ground upon earth, [and] Catholicism by so doing proclaimed the Antichrist and ruined the whole Western world."Whatever the inspirational debt to these ideas owed by Berman's thesis, there is no doubt that he tends to exaggerate the polarization of reason and faith in Anselm's thought (cf. pp. 195-97), however fraught that tension is with later unfortunate developments in the rise of modern scientism and instrumentalism.

The opposition between the prevailing teaching of the church and Augustine after 1075 also is overdrawn. Perhaps the key here is failure to distinguish between the millenialism of the likes of Joachim of Flora and the main strands of development in Christian theology and philosophy during the period under discussion (see p. 112). The "new sense of time" there commended by Berman certainly had its long term influence. But it entailed the transformation of the world through a free descent of grace in the Third Age of the Holy Spirit. Now this is no part of the church's reform of the world, if we are to believe Thomas Aquinas, himself a believer in progress. The New Law of the Gospel will last till the end of the world, Aquinas teaches, and he rejects the ancient Gnostic teachings of Montanus and Priscilla, and of the Manicheans, in the same paragraph with those of Joachim. These are "foolish notions," and the transformation of time through a coming of the Holy Ghost is "a senseless idea." That radical modernity partly takes its rise from Joachim's speculation, to issue into the very ideological distortions of reality that Berman is combatting, has been argued convincingly by Eric Voegelin. Transformationism is, indeed, an essential ingredient of Christianity and found in many versions in the East and the West. But the principal churches of the West hold to Aquinas' view that the New Law lasts as definitive revelation to the end of the world and do not fallaciously make immanent the Christian eschatological teaching. The Realm of Freedom may be the utopian outcome of the Marxian dialectic, and it may also be a derivative of Christian

25. F. Dostoevsky, The Possessed 252 (C. Garnett trans. 1936). See 1 F. Dostoevsky, The Brothers Karamazov 263 (C. Garnett trans. 1927), where the Grand Inquisitor confesses to Christ as follows:

We are not working with Thee, but with him—that is our mystery. It's long—eight centuries—since we have been on his side and not on Thine. Just eight centuries ago, we took from him [Satan] what Thou didst reject with scorn [during the temptation in the wilderness], that last gift he offered Thee, showing Thee all the kingdoms of the earth. We took from him Rome and the sword of Caesar, and proclaimed ourselves [i.e., the Roman Catholic Church] sole rulers of the earth. . . .

For the Inquisitor's chronology, see E. Sandoz, supra note 24, at 124-25.

26. T. Aquinas, Summa Theologica I-II, Q. 106, A. 4 ad 2, in 2 Basic Writings of St. Thomas Aquinas 956 (A.C. Pegis ed. 1945). Aquinas also stated that "no state of the present life can be more perfect than that of the New Law . . . ." Id. at 955.

27. E. Voegelin, supra note 10, at 107-32; E. Voegelin, supra note 21, at 92-99; also K. Loewith, supra note 7, especially the chapter on Marx and the appendix on Joachim.
and broadly biblical understandings of history. But "My kingdom is not of this world" is a permanent limitation on the prospective transfiguration of the world in time and an ineluctable part of Christian truth, both prior to the twelfth century's events and subsequently.

It may also be said that Berman too readily assimilates the "ideology" of the American Revolution and Founders to the "massive secularism" of the Enlightenment philosophes and of the French Revolution. Despite recent comments in this journal to the contrary, the secularism, rampant rationalism, and Deism of the American Founders have been exaggerated and distorted in earlier literature of this century, a view that is being revised and corrected. The Protestant Christian vision of reality was, in fact, a major source of thought in the period of the Declaration, Revolution, and Constitution, as recent scholarship convincingly shows. This also means that a kind of watershed of radicality lies between the conservative and truly restorative revolutions in the West down to the American Revolution and the increasingly radical and nihilistic revolutions from the French Revolution onward.

Finally, missing from Berman's argument (and a source of the despair he expresses in the face of present troubles) is any sense that the Western tradition of philosophy, religion, and law is more than merely a civilization's belief system. A sociological and historicist perspective dominates, even though the natural law analysis is favorably reported as one element among others to be considered. Yet the classical philosophers of Hellenic antiquity and the Christ of the Gospels, upon whom the Western tradition chiefly depend, asserted and proclaimed the truth about reality in the mode of an ontology of abiding validity. The insights of Aristotle's science of human affairs and of St. Paul's faith, whatever their differences, share a

28. See K. Loewith, supra note 7, ch. 2.
claim to disclose enduring truth about the structure and dynamic process
of human reality as dimensions of the mysterious comprehensive horizon
of being itself. Herein lies the experiential-symbolic ground of all knowing,
partly expressed by the conviction of the intelligibility of reality, whatever
the deficiencies of human knowledge. Whether this or that individual, or
this or that nation or generation, accepts or ignores the fundamental struc-
tures of philosophical and revelatory truth is beside the point of their va-
lidity, from this perspective: "no amount of empirical defection from the
order of being can touch the truth of being itself." Whether Berman
subscribes to this epistemology or is himself content with relativism of one
sort or another is not entirely clear. But the mystic-philosophers, prophets,
apostles, and their successors into the present are not asserting merely a
tradition—anymore than the Christ of the Gospels asserts "I am the cus-
tom!"—but, rather, they are asserting the truth, as far as they can see.
This truth of objective reality progressively gained through science and
faith, and periodically lost through forgetfulness and social amnesia, con-
stitutes historical reality itself together with the orders and disorders of the
human condition.  

The characteristically Western view is fundamentally
reflected in the spirit of Albert Einstein's great work in physics. There is
ded order whose beauty we celebrate, whose goodness we love, and
whose truth we are moved to find in many guises. This is not to assert a
dogma, and still debate, but to acknowledge openness to self-disclosing
reality and to recognize the foundation of reason itself in the faith that
"God does not play at dice"—the physicist's analogue to the saint's fides
quaerens intellectum (p. 175).

33. E. Sandoz, supra note 24, at 214.
34. E.g., T. Aquinas, supra note 14, I-II, Q. 97, A. 1, at xxii, 78-80.
   It seems natural to human reason to advance gradually from imperfect to the
   perfect. Hence, in speculative sciences, we see that the teaching of the early
   philosophers was imperfect, and that it was afterward perfected by those who
   succeeded them. So also in practical matters; for those who first endeavored
to discover something useful for the human community, not being able by
themselves to take everything into consideration, set up certain institutions which
were deficient in many ways, and these were changed by subsequent lawgivers
who made institutions that might prove less frequently deficient in respect of
the common weal.
Id. at 79.
36. Translation: "Faith in search of understanding." For an elaboration of this view
of Western thought, see E. Sandoz, The Voegelinian Revolution 188-217 & passim (1981).
That the first principles of knowledge and being are indemonstrable and are apprehended
apperceptively to form the foundation of the participatory reality of human experience
is a common axiom of Aristotle, Anselm, and Aquinas, inter alios. Thus, Anselm in the
Proslogion begins from faith, and when the monk Gaunilon appears and wishes to take
the part of the fool (Psalms 14:1, 53: 1: "The fool hath said in his heart, there is no
God"), Anselm declines to do the impossible and debate a fool, saying: "I think it
sufficient that I answer the Catholic." The starting point of Anselm's reply to Gaunilon's
attack on the ontological argument is precisely faith: "I call on your faith and conscience
But these reservations aside, Harold Berman has provided an erudite and significant work as his own hard won therapy for the besetting distempers of our troubled age. He has placed the vast artifact of the legal mind solidly in the foundation of the Western intellectual, spiritual, and social order and its historical development. This is an extraordinary achievement. He writes, somewhat as an anguished Richard Hooker did in another troubled time, "Though for no other cause, yet for this; that posterity may know we have not loosely through silence permitted things to pass away as in a dream."