This is the second volume in Professor Harold J. Berman’s projected trilogy of works concerning the forces which have shaped the western legal tradition. The first, *Law and Revolution: The Formation of the Western Legal Tradition,* appeared in 1983. It won considerable acclaim and gained for the author the 1984 SCIBES Book Award of the American Bar Association for the best new book on a legal subject. It set out a clear and cogent argument that the western legal tradition had been shaped by the Papal revolution in government which flowed from the Hildebrandine reforms at the end of the eleventh century, reforms which led to the creation not only of the canon law system of the western Church but also to the development of constitutive legal systems by secular rulers across western Christendom. The work exhibited broad learning across the national and institutional boundaries which had tended to confine the study of European legal history, and it also challenged the chronology which had in large measure been accepted by generations of historians writing not only of law but of European history generally.

The current volume marks the turning of the author’s attention from the effect of the formation of the western legal tradition in the reforms of Pope Gregory VII, to the transformation wrought by the religious and political upheavals of the sixteenth and seventeenth centuries. He describes the changes wrought first by the Protestant Reformation on mainland Europe which fractured the unity of Catholic Christendom, and secondly by the English Revolution of the seventeenth century, which Professor Berman argues should be taken to include the entire period from the summoning of the Long Parliament in 1640, through the Civil Wars and the Commonwealth, and on through the years following the Restoration of the monarchy in 1660 to the so-called “Glorious” Revolution of 1688-89. At that time, a new constitutional and religious settlement was achieved, in what was shortly to become

Britain, in the wake of James II’s having to flee into exile.

Professor Berman’s works are not only aimed at demonstrating the importance of the central events described to the development of the legal tradition which he argues they shaped. Candidly, he states that he is promoting another agenda as well. He believes that the western legal tradition is the product not merely of political, social and economic forces, but also religious influences, which have not been accorded the significant place due to them by much modern historical writing. He states openly that he believes that

the rediscovery and revival of the historical connections between the Western legal tradition and the Western religious tradition will not only strengthen both but also facilitate dialogue and cooperation among adherents of the major cultures of the world in the development of universal legal standards and common legal institutions. (xii)

He believes that a proper appreciation of the role of religion in shaping western legal systems is vital in shaping the law of the future. Given the author’s candor, it is only proper that your reviewer should be equally frank and state that this is a view with which he finds himself in entire agreement.

The West which Professor Berman describes is essentially that part of Christendom which was once united in its allegiance to the Catholic Church, while for him tradition is “the sense of an ongoing historical continuity between past and future,” which in law manifests itself in the “organic development of legal institutions over generations and centuries, with each generation consciously building on the work of its predecessors.” (3) He approves of Jaroslav Pelikan’s contrast between traditionalism, the dead faith of the living, and tradition, the living faith of the dead. The projected final volume of the trilogy is intended to be an examination of the effects of the American, French and Russian revolutions on the western legal tradition. One wonders whether in that volume more attention will be given to Roman republican models in the constitutional development of the western nations. Clearly, those models cannot have been shaped by the Christian religious tradition of the west, but their influence deserves to be considered even if any decisive influence may be denied. There is something odd in the fact that in anticipating his consideration of the American Revolution and more particularly the French Revolution at the close of his Introduction, Roman republican models are not even mentioned. Odd too is the claim that “Soviet Marxist atheism was a Christian heresy.” (18) While the addition of the adjective “Soviet” might be pleaded as the decisive
The Marxist view of history has roots which lie more in Judaism and the history of the people of ancient Israel than in Christian doctrine, and Marx’ own cultural background supports this.

The author divides his work into two parts, the first of which deals with “The German Revolution and the Transformation of German Law in the Sixteenth Century,” while the second addresses “The English Revolution and the Transformation of English Law in the Seventeenth Century.” The balance in the wording of the titles of these parts continues into the structure of the sections, with successive chapters dealing with an outline of the background history of each period, an examination of the legal philosophy of the time, followed by four chapters dealing in turn with the transformations in legal science, criminal law, civil and economic law, and social law. This approach is somewhat rigid, but ensures ease of reference for those whose interests lie in particular aspects of Professor Berman’s thesis.

The thrust of the first section of the volume is that the break from Rome, which resulted from Luther’s rebellion against the Catholic Church, led to a transformation of legal arrangements in Germany, and that Luther, and more particularly his followers, in accommodating this transformation in their legal writings, in turn transformed western legal science. The Papal Revolution of the twelfth century had resulted in a Europe in which different legal systems addressed different facets of individual and communal life. The punishment of serious wrongs belonged to the royal jurisdiction; suits for land in the feudal. Matrimonial and testamentary matters, together with the punishment of sins, belonged to the Church courts, while matters relating to trade and the affairs of merchants went to specialist mercantile tribunals. The decision of some of the rulers of Germany to support Luther and thereby deny the jurisdiction of the Catholic Church within their lands led directly to a need to assimilate the former ecclesiastical jurisdiction within their own “secular” order. Professor Berman emphasizes that this was not a secularization of the Church’s former jurisdiction; he argues forcefully that it marked rather a spiritualization of the erstwhile temporal jurisdictions of the German princes. In any event, the upshot was the development of legal systems which embraced all aspects of social life within one political and geographical jurisdiction.

Within these new comprehensive legal jurisdictions, the rulers were bound to accommodate certain charitable endeavors which had previously been the province of the Catholic Church. Thus, Professor Berman provides interesting and valuable discussions of the development of education and poor relief in the Protestant jurisdictions,
and also examines how the theology of the reformers impacted upon the law of marriage in the states within which their doctrines were accepted. Professor Berman is perhaps at his best in the German part of the volume when he considers the legal philosophy of the reformers and the importance of their work to the development of legal science. He looks in some detail at the writings of Melancthon, Apel, Oldendorp, Lagus and Vigelius. He claims for Apel the introduction of the distinction between ownership and obligation in western legal theory, and a key role in the development of systematic presentation. Lagus, he argues, applied the traditional four causes of Aristotle to his legal analysis and combined Roman and canon law in his works, producing compendia of both civil and Saxon law. The author sees the distinction between private and public law, as set out by Vigelius, as only becoming “basic to legal analysis” at this time (124–125). The pride of place usually accorded to French jurists, such as Hugh Doneau, in developing the civil law is impliedly questioned; they are described as having applied Melancthon’s topical method to the mass of legal materials in Justinian’s texts.

Professor Berman has importantly presented his readership with an account of the development of German legal science at this period which corrects what has been a clear neglect. Nevertheless, your reviewer is unable to accept all that the author claims. He is uneasy with Professor Berman’s emphasis on the unity of Germany at this time. It is noticeable that, in comparison to France for instance, religious refugees had merely to move from one territory to another, while in France, men such as Calvin or Doneau had to flee the kingdom. Nor does Professor Berman give due recognition to the manner in which the scheme of Justinian’s Institutes played a key role in the fresh systematization of legal sources. He believes that the changes in religion shaped the changes in the law and legal science, but does not give due weight to how far the general questioning of received knowledge which was part of the “spirit of the age”—leading to a need to reconsider basic ideas such as the shape of the world and the shape of the universe—caused questioning of existing structures in both religion and the law. This despite the fact that he acknowledges that some key developments in legal science in Germany, such as Schwarzenberg’s Bambergensis, antedated Luther’s attack on the Catholic Church. Professor Berman’s thesis, however, is always clearly argued, often with considerable passion, written—like the juristic works he describes—from the heart.

Turning to the English Revolution, Professor Berman lists among its consequences the development of constitutional monarchy, a measure
of religious tolerance, the development of the doctrine of precedent, the adversarial style in procedure, and once more the emergence of a comprehensive legal system. In legal science, he examines the works of Fortescue, Hooker, Coke and Hale—the last-mentioned very much the hero of the story, possibly as much for his life as for his work. Collectively he believes they created an English tradition in legal science which was a harbinger of what would later be termed historical jurisprudence. The demise of the prerogative courts of Star Chamber and High Commission, and the need to accommodate their work within the jurisdiction of the common law courts, undoubtedly played a major role in the shaping of much of English law thereafter, but to what extent religious factors, particularly Calvinism, can be credited with a significant part in this history is questionable. Nevertheless, Professor Berman’s view that the Calvinist theology of covenant influenced the decision in \textit{Paradine v. Jane}, that liability for breach of contract was strict, remains interesting.

Professor Berman is again convincing when he argues that in England as in Germany, the changes which flowed from religious reformation spiritualized the secular order rather than secularized the spiritual, although this seems more true of the Tudor and early Stuart reigns than of the post-Restoration period. Poor relief, he argues, contrary to the views of some Marxist historians, was not grounded in economic motives, but undertaken, as Hale wrote, because it was in accordance with God’s will, exhibited common humanity and was sound social policy.

As with the first volume, the breadth of Professor Berman’s analysis occasionally leaves the reader uneasy with regard to his grasp of some of the detail, and there are pitfalls for the unwary. Some errors are probably typographical—Philip II was not king of Spain in 1640 (204) and Littleton did not write his \textit{Tenures} in the sixteenth century (294); others are not. The comments on the Roman law of contracts (156–57), the description of the decision in \textit{Slade’s case} (338), and the dating of the introduction of judicial divorce into England (353) are all misleading. The distinction between murder and manslaughter based on killing in hot blood went back to the sixteenth century. (325–326) The treatment of the common law’s use of legal fictions strains the author’s argument. (280) Less importantly, the continual reference to the pre-Reformation Catholic Church as “Roman Catholic” irritates.

Despite these caveats, Professor Berman’s work is one which cannot in the future be ignored by those who seek to understand the development of law and of the idea of law in the western world. That he
has brought the juristic work of the German Protestant reformers into the limelight in itself is deserving of gratitude. At the end of the volume, the author responds to the charge that he has confused history with prophecy. Professor Berman rightly refuses to demarcate so sharply between the two vocations. His own work is prophetic in the best sense; he interprets events in the light of experience in order to enable sound, informed choices to be made for the future. It is a worthy contribution to the tradition it describes.

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