

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

*Reviewed by Michael E. Tigar**

Harold Berman's career as a legal scholar spans decades, and he is perhaps best known for his work on Soviet law.¹ One might conclude from its title that this book is a new departure, a long look back to the crucial formative years of the Western legal tradition. Such a conclusion would be only partly right; Professor Berman also argues that the law, while a seamless web, is a fragile one that barely manages to hold society together. As observer and protagonist, he decries those who seem poised to rip the web apart.

Between his expression of deep concern, which we are promised will be more fully developed in a sequel to this book (p. 636), and his critique of other views, lie nearly five hundred pages of legal history. In these pages, Professor Berman focuses upon the three hundred year span from the Papacy of Gregory VII, who reigned from 1073 to 1085, to the fifteenth century. In his Acknowledgements (p. 636), Professor Berman traces the origins of this book to 1938, when he was a graduate student in London. There, his interest in the twelfth and thirteenth centuries was sparked by Plucknett,² Tawney,³ and Rosenstock-Huessy.⁴

Because the central part of *Law and Revolution* bears so clearly the marks of this early study, it is best to begin by analyzing Professor Berman's work as a legal history of this period, and then to analyze his defense of his thesis against plausible alternatives, and his expression of foreboding about the times in which we live.

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¹ E.g., H. BERMAN, *JUSTICE IN THE U.S.S.R.* (1963). *But see* H. BERMAN & W. GREINER, *THE NATURE AND FUNCTIONS OF LAW* (4th ed. 1980); H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974).

² See, e.g., T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956); Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

³ See, e.g., R. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* (1938).

⁴ See, e.g., E. ROSENSTOCK-HUESSY, *OUT OF REVOLUTION: THE AUTOBIOGRAPHY OF WESTERN MAN* (1938). Berman cites this study as a seminal work (p. 87 n.1).

I. THE PAPAL REVOLUTION

Sadly, the course offerings of most law schools, even good ones, pay meager attention to legal history. The picture is getting better, to be sure. Horwitz,⁵ Friedman,⁶ Tushnet,⁷ and others have pioneered a fresh approach to American legal history, and the Genoveses⁸ have made important contributions to studies with a comparative cast. I even cite my own work in this connection.⁹ For the most part, however, the English language literature that traces the origins of Western legal tradition, broader and longer than the common law's own relatively brief history,¹⁰ is sparse. Berman's book is, therefore, welcome; its faults are the occasion for dispute and not derision. *Law and Revolution* is not a definitive study, for Professor Berman fails in some crucial ways both to take account of relevant scholarship and to do his ideological adversaries full justice. However, it should be read by every law student and

⁵ E.g., M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

⁶ E.g., L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965).

⁷ E.g., M. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981).

⁸ E.g., E. FOX-GENOVESE & E. GENOVESE, *FRUITS OF MERCHANT CAPITAL: SLAVERY AND BOURGEOIS PROPERTY IN THE RISE AND EXPANSION OF CAPITALISM* (1983); E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974). If any single work may be commended as an introduction to new thought on the subject of the Western legal tradition and its relation to the development of capitalism, it would be *Fruits of Merchant Capital*. This book is a collection of essays and reviews, most of which have appeared before, but it is a stimulating and worthwhile introduction to its subject. For purposes of this review, its bibliography contains a number of works that Professor Berman might profitably have consulted before reaching and expressing conclusions about challenges to the Western legal tradition and "Marxist" thought. I do not unqualifiedly endorse the Genoveses' work, but my differences with them await another forum.

⁹ M. TIGAR, *LAW AND THE RISE OF CAPITALISM* (1977) (with the assistance of M. Levy). I will not, in this review, restate in detail my thesis about the rise of capitalism. The reader is invited to consult my book. See also Tigar, Book Review, 86 HARV. L. REV. 785 (1973) (reviewing A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* (1971)).

¹⁰ I know the common law can be traced back a long way, even past Magna Charta. See, e.g., A. HARDING, *THE LAW COURTS OF MEDIEVAL ENGLAND* (1973); R. PALMER, *THE COUNTY COURTS OF MEDIEVAL ENGLAND: 1150-1350* (1982); E. STENTON, *ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER, 1065-1215* (1964); R. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* (1973); Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613 (1983). But the common law had precious little to say about the fundamentals of the capitalist system of social relations until the 1500's. See M. TIGAR, *supra* note 9, at 183-227.

lawyer who cares about the beginnings of the system of rules and concepts, the manipulation and ordering of which are essential to the lawyer's craft.

Professor Berman's thesis is that the isolated and largely independent folk law that existed in Western Europe from the sixth to the tenth centuries was transformed, displaced, reformed, and integrated by the Catholic Church beginning in the eleventh century under the Papacy of Gregory VII (p. 87).¹¹ For reasons I shall discuss presently, this thesis cannot be maintained. But in sketching the changes in law and legal institutions in the two centuries following Gregory's death, Professor Berman makes a number of important contributions that my disagreement with his basic thesis neither denies nor disparages.

Berman admirably sketches the origins of the Western legal tradition, and the contributions made to its development by the great law schools and law scholars. He presents, more clearly than anyone has in English up to now, a taxonomy of the legal systems that existed side by side in that time and so enriched the structure of rules that was finally erected as legal ideology by the victorious bourgeoisie some centuries later. Canon law, feudal and manorial law, mercantile law, urban law, royal law — his discussion of each of these systems is compendious (chs. 5, 9-14).¹² I will not waste space by summarizing this work; it is worthwhile reading. Most attorneys believe that the relevant history of modern law begins about 1600, in England, and surely no earlier than 1500. Professor Berman debunks this myth, as I have done before him. Our legal institutions come to us from a far earlier time, and are greatly influenced by the civil law.

Much of Professor Berman's analysis of legal history draws upon the contributions of others, as he frankly acknowledges.¹³ Much of the

¹¹ Gregory VII (1073-1085) sought to establish the Papacy as the final and supreme authority in Europe; the clergy were to be under papal control and the Pope was to be recognized not only as administrative head of the Church but as leader of the Christian community. See generally M. BLOCH, *FEUDAL SOCIETY* (L. Manyon trans. 1961); R. SOUTHERN, *WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES* (1970); J. STRAYER, *WESTERN EUROPE IN THE MIDDLE AGES* (1955). Berman regards the Gregorian Reform as "one of the first great revolutions of western history" (p. 87 n.1).

¹² It is clear that Berman has read *Law and the Rise of Capitalism*, for he cites it once to criticize (wrongly, I think) my rendering of a passage from Beaumanoir's thirteenth-century French (p. 476 n.82). His organization of topics, and indeed some of his analysis of significant events, is quite similar to my own. It is probably the case that anyone who attempts the formidable task of organizing so much data is compelled to use basically the same system of classifying it. Compare p. 49 with M. TIGAR, *supra* note 9, at xiii.

¹³ His notes span 75 pages (pp. 561-635), and his Acknowledgements page is quick

value of this book is to have brought these materials together in one volume and to have integrated them fairly well. One wishes, however, that he had considered some additional sources, particularly those far more recent than this book's origins in his studies at the London School of Economics in 1938. Fernand Braudel has written brilliantly on the origins of Mediterranean civilization.¹⁴ Scholars such as Professor Carlin of the law school at Nice have extensively researched the rich archive evidence of the post-Crusade period in northern Italy and southern France.¹⁵ Because, as we shall see, Professor Berman so strongly disagrees with what he believes to be the Marxist view of legal history, he would have done well to study Karl Renner's *The Institutions of Private Law and Their Social Functions*,¹⁶ a pioneering work that analyzes many of the same categories of legal thought that concern him.

If there is relatively little to fault in the book's presentation of historical material, there are many reasons to quarrel with its thesis about the pioneering role of what Berman terms "the Papal Revolution." One need not even debate whether the term accurately describes the events of the twelfth and thirteenth centuries to doubt that the Church played so great a role as he believes.

The Catholic Church, and more specifically the Papacy, simply did not possess the kind of power that Professor Berman attributes to it. Certainly the Church and its officers were very influential, particularly given the relatively large domains over which they held temporal suze-

to credit his main inspirations (p. 636). His research has not been particularly rich in the primary sources, but this is quite understandable. For any given decade, in any given place, the archive materials are likely to be so extensive that a work of this scope would be impossible to construct from primary materials in any scholar's lifetime.

¹⁴ F. BRAUDEL, *LA MÉDITERRANÉE ET LE MONDE MÉDITERRANÉEN À L'ÉPOQUE DE PHILIPPE II* (2d ed. 1966) (published in English as F. BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II* (S. Reynolds trans. 1972)); see also F. BRAUDEL, *AFTERTHOUGHTS ON MATERIAL CIVILIZATION AND CAPITALISM* (1977); F. BRAUDEL, *CAPITALISM AND MATERIAL LIFE, 1400-1800* (1973). Braudel's work is in the distinguished tradition of the *Annales'* early period, under the leadership of Marc Bloch and Georges Lefebvre. *E.g.*, M. BLOCH, *FEUDAL SOCIETY* (L. Manyon trans. 1961); 1 G. LEFEBVRE, *THE FRENCH REVOLUTION* (E. Evanson trans. 1962); 2 G. LEFEBVRE, *THE FRENCH REVOLUTION* (J. Stewart & J. Friguglietti trans. 1964). Berman does cite and rely upon Bloch's pioneering work, particularly *Feudal Society* (p. 87 n.1).

¹⁵ M. CARLIN, *LA PÉNÉTRATION DU DROIT ROMAIN DANS LES ACTES DE LA PRATIQUE PROVENÇALE* (1967); see also P. MALAUSSENA, *LA VIE EN PROVENCE ORIENTALE AUX XI^È ET XV^È SIÈCLES* (1969).

¹⁶ K. RENNER, *THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS* (1949).

rainty, and the rather larger area over which they claimed ecclesiastical dominion. The Church's domains generated an enormous surplus value in addition to tithes and services; this revenue increased dramatically in the twelfth and thirteenth centuries. With this patrimony, the Church could fund law schools, courts, and the other trappings of power, as well as the cathedrals that almost every traveler to Europe visits.¹⁷

True, the struggles in the late eleventh and early twelfth centuries over who would invest clergy and where lay the boundary between ecclesiastical and secular authority were laden with importance for the subsequent development of Western law. But Professor Berman allots the Papacy a greater share of the victory than history records that it won. He also pays relatively scant attention to the great coalescence of social, economic, and technological forces that in my view produced the enormous changes that marked this time.

Pope Gregory VII certainly challenged the secular princes, and in 1077, Emperor Henry IV stood three days in the cold to make his humble apology to the man he had called "not Pope but false monk." But eight years later, Gregory VII died in exile, prisoner of a Norman-Sicilian secular prince. Gregory's successor, by the official record, was Urban II, but matters were so little under control that Urban could not be elected Pope until 1088, displacing another claimant to the Papacy. Even then, Urban was compelled to tread carefully, and his conduct seems to me more appropriate to a skillful survivor than to the victorious head of an institution that, as Professor Berman writes, "gave birth to the modern Western state" (p. 113).

The Papacy claimed that its authority was universal, descended from St. Peter, and based upon a set of legal rules that combined the Church's teaching with the extensive body of legal doctrine developed by the Romans. Professor Berman answers the obvious point that the Papacy lacked soldiers by reference to "law as a source of authority and a means of control" (p. 95). I think this puts matters backwards.

Western Europe in the late eleventh century was in ferment. The Italian trading cities were on their way to substantial commercial success. Guiscard had begun to secure Sicily and the south of Italy. New techniques in agriculture had led to something of a population explosion. Warring nobles and land-hungry peasants proved eager to join the ranks of a crusade promising riches in this world and salvation in the next. Only upon so broad a canvas as this, ornamented with the doings of all manner of folk, can a true picture of the legal history of this time

¹⁷ See generally H. ADAMS, *MONT-SAINT-MICHEL AND CHARTRES* (1957); G. DUBY, *THE AGE OF THE CATHEDRALS: ART AND SOCIETY* 980-1420 (1981).

be painted.

Only metaphorically can law be termed a weapon against disorder, and that metaphor is dangerous because it contributes to the reification of law and the sclerosis of thought.¹⁸ Law, considered as a set of precepts that will be enforced by an arm of the state specially appointed to that purpose, is without those enforcers nothing more than words. It is always necessary to ask who made up the words and in whose service they will be enforced. Given the congeries of temporal and secular powers that went off to the Crusades, one must also ask over what area, with what population, will any given "law" be effective.

Certainly, in the wake of the Crusades a new set of legal rules began to be imposed upon Western Europe. Professor Berman admirably traces this development, although as I have noted there are lacunae in his research. But it simply defies reality to claim that the Papacy was the principal sponsor of these changes in legal ideology.¹⁹ The penetration of mercantile capitalism is demonstrably among the most powerful forces leading to the imposition of new legal rules and tending to encourage the creation of new types of social relations.²⁰ Indeed, Professor Berman recognizes that capitalism and feudalism dwelt together for a long period of time (p. 338).

The merchants and bankers made shifting and unsteady alliances with secular and ecclesiastical powers, as their relative strengths grew and waned. Mercantile capitalism was not so much a social system in these early centuries as a group of relatively isolated enclaves scattered across Western Europe. The records that survive do not permit one to say that the Papacy, the Holy Roman Empire, or any other single force ruled over the whole continent in any meaningful sense. And while the Church claimed that its teachings about law as well as theology were

¹⁸ See Gabel & Feinman, *Contract Law as Ideology*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 172 (D. Kairys ed. 1982); Gabel, *Reification in Legal Reasoning*, 3 *RESEARCH IN L. & S.* 25 (1980).

¹⁹ See M. TIGAR, *supra* note 9, chs. 3-6, 8, 9, 11, 12; see also Carlin, *supra* note 15. For a more balanced view than Berman's, see P. VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* (3d ed. 1961).

²⁰ E.g., D. HAY, P. LINEBAUGH, J. RULE, E. THOMPSON & C. WINSLOW, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975); E. THOMPSON, *WHIGS AND HUNTERS* (1975); E. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1963); M. TUSHNET, *supra* note 7; Becker, *Property in the Workplace: Labor, Capital, and Crime in the Eighteenth-Century British Woolen and Worsted Industry*, 69 *VA. L. REV.* 1487 (1983). See generally P. KRIEDTE, H. MEDICK & J. SCHLUMBOHM, *INDUSTRIALIZATION BEFORE INDUSTRIALIZATION: RURAL INDUSTRY IN THE GENESIS OF CAPITALISM* (1981); B. MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY* (1966).

entitled to universal recognition, this claim was seldom taken seriously when to do so would have cut against some powerful secular interest.²¹

Professor Berman has, in short, brilliantly told us the story of a legal system that claimed to be more than it was. Yet this is no basis for dismissing his admirable work. The existence of a set of legal rules that claimed to be exhaustive and backed by Papal authority, and that were at the same time indisputably derived from the Roman tradition, no doubt lent legitimacy to those movements for progress that sponsored adoption of all or part of these rules. These movements included, variously and at different times, merchants, kings, popes, and nobles.

This book is excellent legal history, flawed by insufficient attention to the social context in which that history was made. This flaw would be less serious if Professor Berman had, in his final chapter, told us more about why he so enthusiastically embraces the notion that the eleventh and twelfth century Papacy was so important to the development of the legal system under which we now live.

II. THE FINAL CHAPTER: PROFESSOR BERMAN'S RESTATEMENT

In his final chapter, Professor Berman summarizes and defends his views. Some of this argument need not occupy us: he is quite right that too many legal historians have placed the origins of capitalism and of the capitalist legal system far too late. I was one of those wayward souls, though I found out I was wrong before committing my views to print.²² Professor Berman is also right in insisting that studying the common law hardly gives one a proper sense of the rich legal tradition of the civil law, and of the importance of that tradition to England and the United States. Indeed, he stresses that the common, civil, and even socialist legal systems have a great deal more in common than most people suppose (p. 539).

He is also right in seeing that nineteenth-century nationalist legal historiography contributed to distorting the understanding of history, and particularly of the multinational character of those rules of contract and property that were central to the legal ideology of the bourgeoisie. English legal history, to take just one example, is full of barely concealed — and even overt — rewriting in the interest of continuity, legitimacy, consistency, and other such values. Did not Lord Coke himself approve such inventiveness in saying “from the old fields must

²¹ See generally M. TIGAR, *supra* note 9, at 120-64.

²² *Id.* at xiv-xv.

come the new corne."²³

I part company with Professor Berman when he characterizes Marxist theory, which he says (without citing any particular Marxist) "discovered a Rise of Capitalism contemporaneous with the Renaissance and Reformation" (p. 539) and when he argues that the emergence of key capitalist legal concepts in the eleven and twelfth centuries is a decisive refutation of "the usual materialistic view both of law and history" (p. 544). Because Professor Berman rests, so far as his footnotes reveal, upon a few passages from Marx and Engels, and upon a relatively few authors as stating the Marxist view, his characterization is worthy of comment.

I am not enough of a Marxologist to list all the contending voices that lay claim to have properly understood Marx.²⁴ One might, however, begin with a systematic analysis of what Marx himself wrote about law. His writings, from the earliest to the most mature, are full of references to legal doctrine, and he studied Roman law at the university.²⁵ Karl Renner, in a pioneering scholarly book that Professor Berman does not mention, has analyzed the use of Roman law-derived concepts in the development of capitalism, and any characterization of "Marxist" thought ought at least to have paid some attention to Renner's work.²⁶

Professor Berman does cite my own book, at one point, so he knows it exists (p. 476 n.82). I have not, in that work, fallen prey to either of the errors he ascribes to Marxists in general. He also takes a look at views attributed to Marxists in his opening chapter, and there purports to summarize the views of Christopher Hill, former Master of Balliol and a distinguished English historian, with one quote taken out of context (p. 42).²⁷ I doubt the wisdom of dismissing alternative views by trivializing or ignoring them.

²³ Cited *id.* at 261.

²⁴ *E.g.*, G. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENCE* (1978).

²⁵ 1 K. MARX & F. ENGELS, *COLLECTED WORKS* 19 (1975) (letter from Marx to his father, November 1837).

²⁶ Renner's initial discussion of Marx's knowledge of and attitude toward law and legal history appears in K. RENNER, *supra* note 16, at 55-60.

²⁷ Hill's point, in the article cited, is that the feudal system is not defined solely by reliance upon the institution of serfdom. Hill, *A Comment*, in *THE TRANSITION FROM FEUDALISM TO CAPITALISM* 121 (1976); *see also* 1 C. HILL, *REFORMATION TO INDUSTRIAL REVOLUTION: THE MAKING OF MODERN ENGLISH SOCIETY 1530-1780* (1967). Hill has reviewed *Law and the Rise of Capitalism* and does confess that he may have placed the origins of the bourgeoisie too late. He also says (and here I disagree) that I give the Catholic Church pride of place in the development of bourgeois legal ideology. Hill, *Book Review*, 96 *NEW STATESMAN* 56 (1978).

I think Professor Berman misunderstands the economic history of the period about which he has written, and misconceives the nature of capitalist development. Certainly he misconstrues what Marxists have written about the development of merchant capitalism and the transition to industrial capitalism. The markets created by the merchants and bankers of the eleventh and twelfth centuries were largely local; they began as entry ports for goods from the East, developed further as centers for the exchange of relatively simple manufactures, and were carried on under a variety of sponsors. In some places, sovereigns and merchants were allied. Elsewhere, free cities had been carved out, by agreement or force of arms, from the domains of a secular or ecclesiastical suzerain. These nodes of capitalist production and trade, heavily regulated, could exist within the structure of manorial economies that were increasingly being organized into royal domains. In this limited sense, capitalism existed all over Western Europe — that is, in enclaves in every area — from an early time.

In these enclaves, concepts of property and contract, and procedural systems for enforcing them, could develop and flourish. There was an alliance between the merchants and sovereigns or suzerains, and while bankers and merchants had power, real authority remained with those who controlled the land that was the principal basis of production.

The existence and flourishing of these early capitalist forms does not at all diminish the importance of dramatic changes in the sixteenth and seventeenth centuries: the organization of larger and larger aggregations of capital and a shift away from mercantile and toward productive enterprises as the dominant capitalist activity. This changeover was aided by strong central authority, and by the countryside's integration into a market economy.²⁸

In this process, the Roman law-based formal principles of property and contract did not need to be changed in any fundamental way so much as filled with new content. The contract of labor was simply a contract, and the ideology of free bargain was if anything more helpful than not to its acceptance.²⁹ I would be surprised if Professor Berman denied that the rigorous insistence of the law that property was simply a relationship between person and thing, not to be interfered with by the state, gained ground impressively in the sixteenth and seventeenth centuries. In short, while capitalist social relations existed from a very early time, and while legal rules still in use trace their beginnings to

²⁸ M. TIGAR, *supra* note 9, *passim*; see also M. DOBB, *STUDIES IN THE DEVELOPMENT OF CAPITALISM* (2d ed. 1963).

²⁹ K. RENNER, *supra* note 16, at 105-21; see also Gabel & Feinman, *supra* note 18.

that time, the social system called capitalism could not be proclaimed victorious until capitalists dominated the means of production.³⁰

All of this development that I have so briefly sketched has been discussed in detail by those who call themselves Marxists, and whose works Professor Berman does not cite.³¹ Perhaps more importantly, this "Marxist" view of history is much closer to describing the tentative and fitful way in which the legal principles Professor Berman so ably describes took root in early medieval Europe than is Berman's thesis. Moreover, if one begins with the economic and social events that give rise to legal rules, one will not make the mistake of confusing legal rules with the system of social relations they are supposed to describe and help regulate. As I have argued elsewhere,³² law is a form of ideology; it is a mistake to assume that the proclamation of a legal rule or the elaboration of a legal theory changes things, and even more of a mistake to believe that if a legal rule does not change, the society it regulates has not changed either. Professor Berman comes perilously close to making both these errors, which is surprising for a historian of the Soviet Union, where gaps between what the law says and what is really going on are particularly noticeable.

III. FOREBODINGS

I turn, at last, to the theme of Professor Berman's opening chapter, which is strangely isolated from the rest of his book. In his opening paragraph, he states the thesis that has occupied us up to this point (p. 1). He concludes 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). This language echoes the darker portent of the Preface, in which Professor Berman speaks of himself as a kind of "drowning man," before whom flashes the entire Western tradition of law and justice, from which he hopes "to find a way out of our present predicament" (p. v). And then, "Because the age is ending, we are now able to discern its beginnings." (P. v).

Professor Berman takes up this theme of challenges to the Western legal tradition throughout his first chapter without clearly identifying the sources of danger that he perceives. Then, curiously, he says little if anything else about the matter for the rest of the book. Perhaps we

³⁰ See M. DOBB, *supra* note 28.

³¹ I am referring to the works of M. DOBB, *supra* note 28, K. RENNER, *supra* note 16, and E. FOX-GENOVESE & E. GENOVESE, *supra* note 8, for example.

³² M. TIGAR, *supra* note 9, at 277-309.

shall find more in the promised sequel to this book (p. 636), together with a fuller development of Professor Berman's concerns. But there is enough already here to make some few tentative comments.

Professor Berman singles out by name one of his colleagues, Roberto M. Unger, whose work on post-liberal legal thought he finds disturbing because it seems to herald the demise of a "Western tradition of legality which strikes a balance among rule, precedent, policy and equity — all four" (p. 41). If I read him right, Professor Berman reads much of the attack on legal formalism as an attack on legal ideology as such, and fears therefore that legal concepts, torn from their historic and formal context, will come to mean whatever the ruling group wants them to mean.

Professor Berman states other concerns as well, but this theme of impending demise is both unique to this chapter and written in terms that barely conceal his profound anger and distress. Perhaps he is only telling us why we must read his book carefully, for in it we will find so much of the rich history of Western legal thought that we will not lightly cast that tradition aside. Perhaps he is angry at what he sees as the arrogance of the iconoclastic views of radical legal theorists, including his colleague Professor Unger.³³ I don't know.

I do know that revolutionary movements sometimes decry the entire legal ideology of the dominant class against which they have raised their voices. I know also that in the name of doing away with formalism and rigid rules, terrible errors are committed by those in power. My own optimism about the relatively rule-free community court experiments in some socialist countries has given way to skepticism.³⁴

Perhaps Professor Berman hypothesizes a Western legal tradition, beginning in the "Papal Revolution," as a counterpoint to the disorder he perceives as immanent in contemporary criticism of the legal ideology dominant in the West. If this is his thesis, it certainly ties the various parts of this book together more coherently than otherwise. The problem is that history will not bear out any view of the Western legal tradition quite so orderly as this thesis would suggest. Every effort, by

³³ See R. UNGER, *LAW IN MODERN SOCIETY* (1976); R. UNGER, *KNOWLEDGE & POLITICS* (1975); Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 563 (1983); see also Trillin, *A Reporter At Large (Harvard Law)*, *THE NEW YORKER*, Mar. 26, 1984, at 53, 56-59 (discussing the influence and effect of the Critical Legal Studies movement at Harvard Law School). See generally *Critical Legal Studies Symposium*, 36 *STAN. L. REV.* 1 (1984) (examination of the Critical Legal Studies movement).

³⁴ Tigar, *Socialist Law and Legal Institutions*, in *LAW AGAINST THE PEOPLE* 327 (R. Lefcourt ed. 1971).

every secular and ecclesiastical power, to synthesize and restate the law ended in relative failure. Only the scholars, or the hirelings of princes, could ever make it all fit together, and their works were always a blend of wish and reality. The systematic law codes and treatises that began to appear in the thirteenth century never stated rules as they were actually enforced over more than a relatively modest geographical area. Thus to the extent that this book is in part an argument that once there was a coherent and generally applied body of rules called the Western legal tradition and today there increasingly is not, I disagree. The Western legal tradition has been continually molded by the results of struggles — often quite violent — and has never had the coherence that Professor Berman suggests.

Perhaps Professor Berman means only to criticize the “collectivism” of recent developments in Western law, and a perceived break with notions of private property and freedom of contract (pp. 36-37). The paragraphs that suggest this do not cite any specific legislation, and could as easily be criticisms of the New Deal as of more modern proposals. I think it unfair to take up a detailed analysis of Professor Berman’s forebodings on the basis of this one chapter. I would only note that the legal ideology of free contract and private property began to receive a deserved and witty drubbing from mainstream legal thinkers some fifty years ago, and the Western legal tradition seems to be holding up, at least to attacks from that quarter.

To be sure, the Western legal tradition is in bad repute. Its leading exponent, the United States, has of late pursued foreign policy choices that have done little to elevate the rule of law to pride of place. However, important and enduring parts of that tradition have survived revolution after revolution. To note this is not to preach blind veneration of the past; it is only to recognize that history is not discontinuous, that revolutionary change blends new and old in a new synthesis. It is also to preach skepticism about claims that the entire order is in jeopardy, for everybody, when all that might be in danger are some privileges that ought not to exist.

More fundamentally, Professor Berman appears to confuse the tearing off of masks with the desire to do away with every protection of freedom and fairness. The legal scholars whose work distresses him have attacked a certain view of the Western legal tradition, and for quite good reasons. Their work is subject to misunderstanding because of the inescapable ambiguity in their stance.

It is true that the Western legal tradition rests upon a thesis that there is something called “law,” which has the transcendent quality of binding sovereign and citizen indifferently. Lord Coke so proclaimed in

Dr. Bonham's Case, and invoked history, tradition, and reason.³⁵ In the wake of Lord Coke's dictum, claims by citizens against the sovereign have regularly been taken to courts for resolution, in the belief or hope that the apparatus of state power specially appointed to the purpose of enforcing these transcendent principles will apply them fairly and neutrally.

Resort to institutions of state power for the purpose of enforcing rights has been a traditional — and many would say essential — strategy of progressive forces. Therein lies the ambiguity, the contradiction, for discerning lawyers know that neither the law nor the state's apparatus truly transcends the system of social relations, but rather are both designed to support that system.³⁶ Unmasking the pretense of transcendence and neutrality is not faithless to a desire for freedom and fairness. Rather, it is a means to make sense both of the process of seeking to vindicate claims based on law and of the results one obtains by doing so. This process is particularly important in a time when the state is making serious efforts to undermine, weaken, and deny the rights the law is supposed to guarantee. Indeed, the pretense of neutrality is subject to more danger from that quarter than from any of Professor Berman's antagonists.

Embedded in the Western legal tradition, as ideology, are principles that are the product of social struggles and are rightly perceived as recognizing basic human rights and needs.³⁷ These principles are not under attack in the way Professor Berman believes them to be. Rather, those whose work he appears to decry are engaged in the valuable work of disembedding these principles from the myth that the present system of social relations — and its protective apparatus of state power — is their inevitable protector. This process is not dissimilar from that which occurred time and again during the social unrest of Western Europe. Indeed, it bears striking resemblance to the efforts to debunk the Papacy's claim that it was the neutral and authoritative exponent of the system of rules Professor Berman so ably describes.

³⁵ *Dr. Bonham's Case*, 8 Co. Rep. 114a, 77 Eng. Rep. 646 (K.B. 1610), discussed in T. PLUCKNETT, *supra* note 2, at 51, 243.

³⁶ See, e.g., Kinoy, *The Role of the Radical Lawyer and Teacher of Law*, in *LAW AGAINST THE PEOPLE* 276 (R. Lefcourt ed. 1971).

³⁷ Cf. Cover, *The Supreme Court, 1982 Term — Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).