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HAROLD BERMAN'S ACCOMPLISHMENT AS A LEGAL HISTORIAN

R.H. Helmholz*

I. INTRODUCTION

The task assigned to me is not to sing the praises of Harold Berman as a legal historian, although to do so would be no heavy burden. This issue of the Emory Law Journal is the product of a conference, not merely a celebration, and my assignment throughout has been to state what contributions to the field of legal history have been made by the Robert W. Woodruff Professor of Law, and then to assess them from the standpoint of an impartial observer—or at least as near to an impartial observer as I can manage. Although this inevitably involves a little praise singing, that is an accidental byproduct of the assignment being undertaken. It is not what I was told to do.

As an earnest of impartiality, my intent is to begin by deliberately leaving aside my own opinions. I propose to attempt the reduction of Harold Berman’s achievement in the field to objective measures of influence and success. Some may indeed regard it as entirely appropriate for a member of the Law Faculty of the University of Chicago to come at such a task quantitatively. The second part of this assessment will move from numbers to less purely quantitative reporting. It will summarize the various ways in which his work has been regarded and used by contemporary legal historians. However, the second part of this assessment will again be as objective as possible, relying on the opinions of others rather than those of the assessor. Only in the third part of this presentation will objectivity be cast aside. It will move to what I think about the place of Berman’s contributions to the field. It will add a few examples, partly from my own research and partly from that of others, in order to show the sort of work in legal history that is called for by the agenda he has set before legal historians. My hope is that by proceeding this way, even if the reader is not convinced by my opinions (or does not care about them) at least there will be some benefit—an objective assessment as a measure of the success.

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or failure of the historical work of the honoree of the Conference. Before doing this, however, one should first say something about the facts upon which any assessment, objective or biased, must ultimately be based.

II. LAW AND REVOLUTION

The proper place to start is without doubt the book on legal history that Professor Berman published in 1983—Law and Revolution: The Formation of the Western Legal Tradition.¹ It is true that the book was preceded by articles on historical subjects from the pen of the author,² just as it has been followed by others expanding and carrying forward some of the themes found in the book.³ Nonetheless, it remains fair to say that it was Law and Revolution—a big book of over six hundred pages—that caused legal historians and others interested in the structure and traditions of our law to stop, peruse, and pay attention. The book was read. It was responded to. It was used.⁴ I will not presume to predict its status in fifty years time. Will it be the Pollock & Maitland of European Legal History? No one here knows, and it would be foolish to predict. The book is only ten years old, too soon to say whether it will earn an enduring palm. What one can do after ten years is take this opportunity to assess the work’s impact since its publication and the present status quæestionis of the principal themes found within it.

What are those themes? It is no insult to the richness of the coverage found in Professor Berman’s book to say that there are four principal, and controversial, themes to be found within it. For those who are not familiar with Law and Revolution, they should be stated briefly. First, between the years 1050 and 1200 a transforming change occurred in the nature of European life, in which the bishops of Rome asserted a leadership over the Western Church, and indeed over Western society as a whole. What once was known as the Investiture Crisis should, rightly considered, be

regarded as one part of a much broader transformation, one that is properly styled a revolution. This Papal Revolution brought in its train changes as fundamental as anything that we associate with the Protestant Reformation of the sixteenth century or the French Revolution of the eighteenth century.

Second, the Papal Revolution gave birth to a new, scientific legal system. This system was embodied in the canon law contained in what came to be known as the Corpus Iuris Canonici, and it is this law that constituted the first true Western legal system. In Professor Berman's view, it is not to Bologna and the glossators on the texts of the Roman Law that we must look for the origins of our law. Nor is it to the secularizing world of the Renaissance or later revolutions. Instead, we owe the origins of the Western legal tradition to religion and to the law of the Church, formulated definitively during the century and a half of the Papal Revolution.

Third, during the Middle Ages and indeed up until the nineteenth century, a fundamental unity existed in this Western legal tradition. True enough, there were everywhere and always regional variations to be found within it. But common assumptions and institutions, themselves much more important than the variations, united the lands of Western Europe. In particular, it is a mistake to regard England and the development of the English common law as diverging fundamentally from Continental patterns. Only the great age of European nationalism, the nineteenth century, spawned the notion that there has always been a deep legal divide between the lands on either side of the Channel.

Fourth, in our own day the Western legal tradition is threatened as never before. A challenge to its assumptions is occurring—even to belief in the rule of law itself—and if we are to rescue what is essential in that tradition, it is important that we appreciate the ways in which Western legal development has occurred. Those ways, obviously, have sometimes included revolution. However, since the twelfth century, Western lawyers have been capable of integrating changes demanded by revolutionaries within an evolving tradition. We have not jettisoned the past. We have used it and adapted it to changed circumstance. In past experience, the temporal unity of the Western legal tradition has sometimes been stretched, but it has never been broken. Only today does such a cataclysmic breach appear to be a real possibility.
III. Objective Measures

How were *Law and Revolution* and these four debatable assertions greeted? And how have they fared in the ten years since their publication? I begin with the first of the three parts of this assessment: objective measures of success or failure. Here the most obvious fact to emerge from any analysis is the truly exceptional attention that was paid to *Law and Revolution* when it appeared. This attention was a measure both of the interest generated by the book itself and of the need for a comprehensive treatment, in English, of European legal history. By the count of the data bases at my disposal, Law and Revolution received forty-eight separate reviews, of which twenty-nine appeared in law reviews. No doubt these data bases have missed a few.\(^6\) The list includes the law reviews for most of what the *U.S. News and World Report* regards as our leading law schools: Harvard, Yale, Chicago, Columbia, and Michigan. Sadly, I found that the *Emory Law Journal* had not reviewed the book.\(^7\) But in the world of American law reviews generally, where few books are habitually reviewed, the immediate attention accorded *Law and Revolution* is quite extraordinary. By comparison, Professor Lawrence Friedman's much praised, and praiseworthy, *History of American Law* received only twenty reviews, less than half as many as Berman's work, when it first appeared ten years earlier.

The extraordinary attention paid to Professor Berman's work was not confined to American law reviews. The law journals of the ancient English Universities, Oxford and Cambridge, both published reviews. So did American journals devoted to political science, religion, history, and sociology. And notice of the work was taken in some quite unexpected places. For instance, the editors of the *Bulletin*, the chief practitioners' journal in Chicago, found reason and room for a most favorable review of Professor Berman's book on July 6, 1984.\(^8\) Looking at the statistics alone makes it

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\(^6\) The data bases were the Social Science Citation Index; Arts & Humanities Citation Index; America: History & Life; Book Review Index; Magazine Index; National Newspaper Index; and Legal Resource Index.

\(^7\) There actually have been 56 reviews so far.


apparent that publication of the book was an event of which the legal and historical worlds took note.

What of *Law and Revolution*'s subsequent treatment? A doggedly objective survey suggests that it is going from strength to strength. Most substantially, it is being used and cited by young teachers, whom the book impressed while they were students and who have chosen to pursue some of its suggestive themes as scholars. But there is more that will impress even participants in the esoteric (to me) science of citation counting. Indeed, the work has almost achieved that blessed status desired by every law teacher: that of becoming a mandatory cite. This occurs whenever, in addition to exerting actual influence upon other scholarship, a work simply must be cited in articles touching upon the work's subject (or even coming close to it). This seems to be happening. One finds citations to *Law and Revolution* appearing in articles with titles like "Cradled on the Sea": Positive Images of Prison and Theories of Punishment, Exploring the "Dismal Swamp": The Revision of Louisiana's Conflicts Law on Successions, and The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique. In some of these, the connection with the Papal Revolution seems tenuous at best.

I myself would have supposed that a trustworthy test was the "unconscious" citation; that is, when there is evidence of borrowing ideas and phrases from a work without any citation to it whatsoever. We are all influenced by many things we cannot recall, and there are some signs that this is beginning to occur, despite the fact that Professor Berman's book is not very old. However, objectivity requires me to recognize that this is
not a test accepted by the leaders in the field of citation counting analysis. It must be very hard to measure accurately, and apparently if you cannot count it, it does not count.

Pride of place in this field seems to belong to the "disassociational" cite. That is the sort of citation that occurs when a work is mentioned, even though its argument is not consistent with that of the work being cited. The idea, I believe, is that the author feels it necessary or desirable to "disassociate" himself from the work cited simply because citation to it is so uniformly expected among readers. Something like this seems to be occurring. We find reference to Professor Berman's book in Charles Radding's contentious work on the origins of Western legal science, a book which reaches conclusions quite at odds with those of Professor Berman. There is also the recent example of Raoul Van Caenegem, whose views on the distinctive nature of English law put him somewhat at odds with Professor Berman. He nonetheless treats Law and Revolution as requiring respectful attention. Much the same can be said of Reinhard Zimmermann, whose extraordinary book on the law of obligations places greater emphasis on the contribution of civilians in the formation of Western law. Despite a clear disagreement in emphasis, Zimmermann cites Professor Berman's book repeatedly. All of this adds up to real and continuing recognition.

Citations to Professor Berman's work are also beginning to turn up in judicial opinions. There is as yet no flood; certainly citations to it are less prevalent than they are in the law reviews, but of course it is only natural that there should be a greater lag time between the appearance of a book

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GAL TRADITION 82 (1990) (referring to "the Papal Revolution, as it has been called," without actual citation to Law and Revolution).

15 However, it is recognized as important, though unmeasurable, under the concept of "obliteration by incorporation." See Robert K. Merton, Social Theory and Social Structure 27-28, 35-37 (1968).


20 Id. at 171 n.160, 550 n.26, 569 n.127; see also Reinhard Zimmermann, Usus Hodiernus Pandectarum, in Europäische Rechts-und Verfassungsgeschichte: Ergebnisse und Perspektiven der Forschung 61, 88 (Reiner Schulze ed., 1991) [hereinafter Europäische].
of legal history and its citation in appellate opinions than there is in its recognition by other legal historians. Nonetheless, there are indications that when judges need guidance or support in speaking about basic principles of Western law, some of them turn to *Law and Revolution*. We find it noted, for instance, as evidence about the legal rights of the family, the religious roots of our criminal law, and the evolution of constitutional principles. One state court judge even found in it a compelling argument for writing shorter judicial opinions—something of a stretch, it seemed to me, and so far without discernible result.

Of course, reviews and citations are not everything. There are other objective standards by which to test a book’s impact and its author’s reputation. Professor Berman’s work easily passes them. There is the speedy issuance of a paperback version of the book by the Harvard University Press. There is the foreign translation of the book, published as *Recht und Revolution* in Germany in 1991. It was greeted by an admiring review in the pages of *Die Zeit* and praised as one of the best books of nonfiction for 1991 by the *Suddeutsche Zeitung*. There is the scholarly prize, the SCRIBES Book Award, given to Professor Berman by the American Bar Association in 1984. There is the *Festschrift*, published in his honor, which was compiled and edited by John Witte, Jr. and Frank Alexander in 1988. There is the honorary degree of Doctor of Laws, conferred on Professor Berman in 1991 by the Catholic University of America in Washington. There is the scholarly conference convoked to discuss the meaning and ramifications of the honoree’s work. In this case, (not considering the present Conference), it was an extraordinary assemblage of Italian scholars discussing *La Rivoluzione Papale*. There is the

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28 See NUOVI MOTI PER LE FORMAZIONE DEL DIRITTO (Giorgio Piva & F. Spantigati eds., 1988).
honor (or obligation) of writing general introductions for papers by younger scholars, as for instance Professor Berman’s opening remarks at a Legal History Symposium sponsored by the University of Illinois Law Review. These things must count in any objective assessment of the book’s impact and worth. And if we tote them up fairly, they testify to the quite considerable impact that the publication of Law and Revolution had, and continues to have, in scholarship devoted to legal history and even to current problems in our law.

IV. REACTIONS TO LAW AND REVOLUTION

Of course, one must look beyond honors and numbers. A fair assessment requires paying specific attention to what lies behind the numbers, at what the critics have said, as much as the fact that they have said something. Looking into this subject has formed the second part of my survey. When one undertakes this examination, it quickly becomes obvious that the results are overwhelmingly favorable to Professor Berman’s book and to the arguments found in it. It is true that, in the manner characteristic of academic reviewers, some had specific bones to pick. But praise abounded overall. Thus, a representative reviewer hailed Law and Revolution as “a magnificent academic tour de force, monumental in its scope and breathtaking in its execution.” Another described it as “an impressive work” and “a refreshing contrast to the standard legal fare, which seems to tend towards either the excessively narrow or the excessively abstract.” A third termed it “a masterful essay which overturns many conventional wisdoms in any number of academic disciplines.” Words like “magnificent,” “masterful,” and “impressive” recur with some regularity in the reviews.

Professor Berman’s book met a widely perceived need. Even those reviewers who thought that it did not meet exactly the need they themselves perceived all but unanimously praised the book’s clarity, forcefulness,

European legal history had long been a neglected subject in English scholarship. Here was a book to remedy that neglect. It ranged over feudal, mercantile, religious, and royal law. It embraced Danes and Spaniards as well as the more familiar English and Italian actors upon the European stage. And the book's narrative and description were rooted in a clear vision of what had driven legal development in the West. No one could mistake its meaning. No one could dismiss its argument as inconsequential. To judge by all the external manifestations, Law and Revolution was meant to have an impact. And it did.

The four principal, and controversial, themes that I outlined above fared pretty well at the hands of the critics, and they have continued to do so in the years since the book appeared. That there was a Papal Revolution in government commanded general assent among reviewers. Some historians suggested that Professor Berman had exaggerated the Gregorian reformers' break with the early medieval past. They might perhaps have taken more careful note that Law and Revolution itself points out that precedents were found for the eleventh and twelfth century changes in Church government. But even if one credits this criticism, surely the real question lies not in determining the exact extent to which the Gregorian papacy was revolutionary. The real question is whether or not a fundamental transformation in the nature of law and government, led by the papacy and enforced through the canon law, occurred between 1050 and 1200. That such a change did occur has been widely accepted.

Likewise, the primacy of the canon law was recognized as an accurate assessment by a majority of the reviewers. The controversial assertions—that the canon law was the first Western legal system, that other kinds of European law grew either from or in reaction to it, and that it is to religious law that we owe many of our basic ideas of law—went down quite well. This may seem an unlikely reaction in our aggressively secular age, but it is nonetheless what is revealed by the evidence. Professor

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35 BERMAN, supra note 1, at 96.
36 See Pennington, supra note 4, at 547. For a similar but more negative characterization of the change, see ROBERT I. MOORE, THE FORMATION OF A PERSECUTING SOCIETY: POWER AND DEVIANCE IN WESTERN EUROPE 950-1250 (1987).
Berman's conviction that religion has been a fundamental and creative force in the development of Western law struck a responsive chord among many reviewers.87

A few scholars did object that this emphasis had done less than full justice to the contributions of the medieval civilians to the formation of the Western legal tradition.88 Perhaps there is something to this. No fundamental antagonism between the canonists and civilians existed in the heyday of the European ius commune. There is some anachronism in separating the accomplishments of the canon law from those of the civil law.89 But the real question is which of the two laws provided the driving force, and for that question Professor Berman's views have largely won acceptance. It is not without significance, for example, that the Regius Professor of Civil Law at Cambridge found his point persuasive and important.40 Where there was conflict between the two, the medieval rule of thumb was that the canon law should prevail.41 The law of the Church was normally the dominant partner in the organization of a functioning legal system.

That there was a fundamental unity to Western legal systems—at least until histories of national law began to be written in that “most nationalistic” of centuries, the nineteenth—also passed general muster among reviewers of Law and Revolution. It would be, admittedly, just possible to explain this favorable reaction by suggesting that no reviewer knew enough of the different systems of law effectively to criticize the argument. But this seems an unlikely explanation to me. Far more likely, it seems, the argument commanded general assent because it is right. At least it was widely accepted among historians interested enough in comparative legal history to agree to review the book.

87 E.g., David R. Wingfield, Book Review, 13 Queen's L.J. 233, 239 (1988) (“The inter-relationship between law and theology in the eleventh and twelfth century Church is easily the most important and telling part of Berman's book.”).
41 See the discussion in Guillelmus Durandus (d. 1296), Speculum Iudiciale, lib. II, pt. 2, it. De disputationibus et allegationibus advocatorum § 5. Porro, no. 4 (Basel 1574 ed. 750).
England is the test case, of course, and it is difficult to speak of a consensus view among English legal historians. Not enough of them reviewed the book. Perhaps they were either disinclined to review the book in the first place or unwilling to take up the cudgels in favor of the uniqueness of their legal system. They have often reacted to arguments in favor of interdependence between their law and Continental law by ignoring them. It would not be right, I think, to say that we can now set aside the notion that the English common law always formed a distinct and separate legal system from the civil law. However, today there is a growing body of scholarly literature, some of it from the pens of English authors, making connections between law in England and law on the Continent. This apparent, or at least growing, acceptance of what Professor Berman must have regarded as a highly controversial point suggests that it is having an effect.

Finally, the argument that a crisis threatens the continued existence of the rule of law that is fundamental to the Western legal tradition, and further, that an examination of the history of that tradition offers an avenue toward solving that crisis, commanded a considerable level of agreement among reviewers. The reception of this fourth argument demonstrates, incidentally, the value of taking a determined and objective approach to any subject. It forces one to confront what others think. I was skeptical about the point. I tended to think that the whole notion of the imminent collapse of Western law was the product of having attended too many faculty meetings at Harvard Law School, and I was inclined to believe that the idea of finding a solution to what crisis actually did exist was more likely to have been inspired by Alexander Haley's Roots than by a hard-headed assessment of the facts. My skepticism was not widely

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42 See, e.g., JOHN H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 35 (3d ed. 1990) ("And so English law flourished in noble isolation from Europe."). The statement is unchanged from the book's second edition. Id. at 28 (2d ed. 1979).
44 E.g., Berman, supra note 1, at 39 ("[The] historical soil of the Western legal tradition is being washed away.").
45 E.g., id. at 41 (citing Edmund Burke for the proposition that "those who do not look backward to their ancestry will not look forward to their posterity").
shared among the reviewers; however, I did have a little company. But far more common was the opposite reaction: "No one can doubt the present crisis in Western law." If we do not make an effort to understand the historical roots of the Western legal tradition, it "will slip through our fingers." Looking objectively at the common reactions to this, and indeed to all the principal arguments in *Law and Revolution*, the neutral reporter’s conclusion must be that, controversial as they seemed, they earned the agreement and approval of virtually all of the commentators.

Of course, overall acceptance is never incompatible with criticism of specific points, and some criticism did occur. Some of it should be put to one side. For instance, Professor Berman’s failure to take account of some recent scholarship on the many, many topics touched upon by his book is one. Such criticism may be justified, of course, if major trends in scholarship are omitted or ignored. But the reaction also may result from personal pique, as with complaints that he failed to cite or adequately recognize the contributions of a particular critic. This is all too natural. I may even have felt a twinge or two of it myself. But I do not consider it a valid criticism. The real issue is whether the book accurately describes the major developments: it passes that test.

A second criticism was that *Law and Revolution* exaggerated. Some critics suggested that Professor Berman’s concentration on the significance of the canon law and the Papal Revolution as the source of the Western legal tradition caused him to downplay other important contributions. For instance, it may have led him to minimize subsequent movements and revolutions in the formation of our constitutional traditions. Similarly, it may have caused him to slight the contribution of the civilians. While this sort of criticism may be valid, I cannot think it damning. If my reading of the book is accurate, its author intended it to be controversial. It was designed to provoke reaction. The very forcefulness with which the arguments are

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48 Ibbetson, supra note 33, at 140.
48 Peters, supra note 38, at 696.
49 Perhaps this has something to do with the well-attested tendency of writers to cite works by the best known authorities; it is called "The Matthew Effect" from the words of the Gospel: "For unto every one that hath shall be given, and he shall have abundance: but from him that hath not shall be taken away even that which he hath." *Matthew* 25:29. See generally Robert K. Merton, *The Matthew Effect in Science*, 159 Sci. 56 (1968).
made guaranteed that there would be both action and reaction. Again, the real question is not whether the principal arguments were stated with exact nuance and qualification, but whether they point the reader in the right direction. The book unquestionably accomplishes this task.

The third sort of criticism, not frequent but common enough to demand notice, came from historians influenced by Karl Marx. It was, of course, bound to come. To lay less than full emphasis upon causal connections between changes in social structure and changes in law is to open oneself to disagreement from the left. Putting so much stress upon the autonomy of the rule of law and upon the dynamic place of religious ideas in law comes close to welcoming it. The integrative jurisprudence used by Professor Berman will seem weak stuff to the Marxist historian. It would not be sensible for a puzzled outsider to the continuing debate about the utility of Marxism for legal historians to pass judgment on this question. I will, however, say that it does seem exceedingly unlikely to me that Professor Berman, an acknowledged expert in Soviet Law, has misunderstood the richness of the Marxist tradition. As a perceptive historian noted, Professor Berman knowingly plants his colors firmly in "the liberal tradition in American legal education." Recent developments in Eastern Europe certainly do not suggest that he is mistaken to have done so.

To sum up this second part of my assignment, Law and Revolution won a broad and favorable reaction when it appeared in 1983. It has maintained that position in the succeeding ten years. Nothing has appeared to challenge its place. No critic has emerged to demolish its foundations. Accessible to nonspecialists, definite in its convictions, and catholic in its coverage, the book had an impact on readers that more narrowly focused studies on European law did not have, and could not have had! There were objections taken to this and that aspect of the book's approach. But in no case known to me did the objections drown admiration for what Berman had accomplished. Both in numbers and in substantive reactions, the appearance of the book marked a significant and positive moment in comparative legal history.

What this favorable reaction suggests for the future of work in legal history is a slightly different question, raising as it does the question of the book’s long-range impact. This question will occupy the third part of this assessment of Professor Berman’s work. In it I indulge in illustration and (perhaps) speculation about the themes of Law and Revolution based on my own research and my own understanding of Professor Berman’s accomplishments as a legal historian.

V. DEVELOPMENTS AND POSSIBILITIES IN LEGAL HISTORY

In my opinion, Professor Berman’s work in legal history has succeeded in two most important goals. The first goal has been to exemplify the vitality of legal history for modern students of the law and to reach out to readers beyond the confines of professional legal historians within academia. No one can accuse Harold Berman of idle antiquarianism. He is no compiler of medieval laundry lists. In his hands, the past is connected with the present, although he would be the first to say that one must not look at the past through strictly “presentist” lenses. One of his greatest strengths is his refusal to ask only modern questions of the past. He does believe, however, that we cannot deal adequately with our present problems unless we take the trouble to understand our past.

The second goal of Law and Revolution has been to state, in an eloquent and forceful way, themes that can (and should) be followed forward with profit. They are themes to be worked out in detail by other legal historians. Although I cannot endorse every single point in the book, there is not the slightest doubt in my mind that overall Professor Berman has hit just the right notes for the subject of comparative legal history. That is, he has emphasized the essential unity of the Western legal tradition, and he has stressed the importance of the canon law within it. These themes set an agenda. Permit me to work out a few details to illustrate the point. I hope to suggest some of the possibilities for present and future work that are tied to the themes advanced so forcefully in Professor Berman’s book.

I take three examples today from the fundamental document of our liberties, Magna Carta—a subject to which I devoted some attention a few years ago and which I have been able to follow forward in research un-

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dertaken since.\textsuperscript{54} As is well known, the Great Charter contained a series of concessions wrung from King John by the English barons in 1215.\textsuperscript{55} It survived initial invalidation by the papacy to become the first statute in the English Statutes of the Realm, and later a foundation for the modern rule of law. If it can be shown, as I think it can, that the Great Charter drew upon the canon law and upon Continental legal ideas, then major themes of \textit{Law and Revolution} will be illustrated and supported. Such a demonstration will show, or at least tend to show, the impact of the law of the Church on the temporal law. It may also bring out possible connections between English and Continental law in the development of a vital part of the Western legal tradition. It may even make a link to the present, because today, in conditions quite different from those that obtained on the fields of Runnymede, the chapters of the Magna Carta continue to figure in judicial decisions upholding the rule of law.\textsuperscript{56}

I will not deal with the obvious example, where the influence of the canon law cannot be doubted, and indeed is not doubted by any historian of ability.\textsuperscript{57} That example is Magna Carta’s first clause, which purported to guarantee the liberties of the English Church. This clause may have been motivated by self-interest on the part of the clerical order, but it also stated the rule of the contemporary canon law. \textit{Libertas ecclesie} was both a slogan and a plan of action for the Church.\textsuperscript{58} This evident connection with the law of the Church suggests that the topic is worth pursuing a little further, both for its own sake and as a test of the principal themes of \textit{Law and Revolution}.

Clauses 20 and 21 provide a first example. They state an attractive, even seductive, rule that has had an “up and down” history within the


\textsuperscript{58} See, e.g., \textit{Henricus de Segusio (Hostiensis), Lectura in libros decretalium ad X 5.39.49 (Noverit fraternitas tua), no. 3} (Venice 1581 ed., fol. 121) (defining \textit{libertas ecclesie} to include, among others, the exclusive right to administer ecclesiastical matters).
common law: that amercements of free men by the king should be made only *secundum modum delicti* and should always preserve the means of livelihood to the person being amered. The broad principle here was that of proportionality in punishment, invoked by these clauses of the Great Charter in the circumstance of what we would call money fines levied for violations of the law. In 1215 amercements were the ordinary way in which the king's courts dealt with all but the most serious criminal offenses. For that reason, it is not at all a surprise to find the principle of proportionality linked, and in fact limited, to them.

What was the canon law on this subject? Readers of *Law and Revolution* will not be surprised to hear that it was identical. Gratian's *Decretum* and its accompanying *glossa ordinaria* stated the identical rule at several points. When the *delicta* are equal so should the penalties be equal (C. 36 q. 2 c. 6). Greater delicts are to be subject to greater penalties, lesser delicts to lesser penalties (C. 24 q. 1 c. 21). Punishments are to be determined in part by the status of the person being punished (C. 14 q. 6 c. 1). In other words, under the canon law punishment was to be determined according to the nature of the crime and the status of the offender. That this was the same rule adopted, within a more limited setting, by Magna Carta's clauses 20 and 21 seems evident; indeed these clauses use the somewhat "un-English" word *delict* alongside the more typically English term *amercement* in stating the principle. A live possibility, therefore, is that the English barons, seeking to put a stop to King John's arbitrary practices, found the principle and even some of the words

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60 *See* Berman, *supra* note 1, at 194.
61 *These texts are found in a modern edition, 1 Corpus Iuris Canonici 1291 (Emil Friedberg ed., 1879). I have used the medieval gloss, from which the quotations come, in the edition published in Venice in 1615; thus Glossa ordinaria ad id. s.v. nullus: "Unde arg. quod ista delicta paria sunt; ergo pari poena sunt punienda." *See also* Glossa ordinaria ad Cod. 9.12(13).9 (tit. Ad legem juliun de vi publica seu privata) s.v. crimen: "Quia ergo est aequale crimen, videtur aequalis poena." (Citations to medieval gloss on the Roman law are taken from the edition published in Venice in 1606). I have followed the commonly accepted modern methods of citation. *See* Eltjo J. Schrage, *Utrumque Ius: Eine Einführung in das Studium der Quellen des Mittelalterlichen Gelehrten Rechts* (1992).
62 *See* 1 Corpus Iuris Canonici, *supra* note 60, at 973; Glossa ordinaria ad id. s.v. scelaratus: "Nam dicitur lex quod malora delicta maioribus poenis, minore minoribus sunt punienda; et in delicto aequali propinquas esse poenas."
63 *See* 1 Corpus Iuris Canonici, *supra* note 60, at 742; Glossa ordinaria ad id. s.v. diversitas: "[S]ecundum diversitatem personarum diversae poenae statuuntur"; Glossa ordinaria ad Cod. 9.30.1 (tit. De seditiosis) s.v. gravissimam: "Vel dic pro qualitate personae et dignitatis."

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to curb him within contemporary canon law.

This principle of proportionality was an important legal ideal at the time. It remained an accepted one in the canon law and indeed became the rule that the severity of a judge’s sentence could result in its being treated as a nullity. The principle also had its unattractive face in taking over the Roman law’s tendency to make the punishment of a crime itself horrible whenever the offense was regarded as horrible. It was also a rule widely endorsed in theory and enforced in practice. The brutal punishments inflicted for religious dissent are the most conspicuous example in which the medieval Church embraced the rule of proportionality in unpalatable fashion.

Of course it might be said that, in our own ways, we are not so much better. We have preserved something similar to the principle of proportionality in the Eighth Amendment to the United States Constitution. It prohibits both excessive fines and “cruel and unusual” punishments. In 1991, however, the United States Supreme Court held that a mandatory sentence of life without parole for possession of more than 650 grams of cocaine violated neither provision, and it must be confessed that the decision seems consistent with evolving American case law. But this is by the way; let us return to Magna Carta.

A second example of possible canonical influence is clause 40: “To no one will we sell . . . right or justice.” Explaining the genesis and the meaning of this clause has long presented a problem to historians of Magna Carta since no such provision can be found in earlier statements of English legal principle, and more particularly since it appears to be so clearly contradicted by English legal practice both before and after Magna Carta. The King did sell justice. Writs cost money. And no move was made to change this aspect of the system in the wake of adoption of Magna Carta or of its subsequent reissues. Hence, it has been necessary to “read out” the heart of what this clause says on its face and to convert clause 40 into a promise of “good justice at reasonable rates.” That is essentially the treatment of McKechnie’s classic book on Magna Carta.

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63 See, e.g., Julius Clarus (d. 1575), Practica Criminalis, Quaest. 93, no. 4, in Sententiarum receptarum liber quintus (Venice 1595 ed., fol. 228b).
and it must have seemed to him that he had little alternative if he were to give the clause any meaning at all. No alternative, that is, except to look to the contemporary canon law, in which McKechnie would have found the principle that justice should be rendered gratis frequently stated. For instance, C. 11 q. 3 c. 66 asks whether a judge who accepts a reward for his sentence can be called a *bonus iudex*. The answer in the text and the glosses is clear. He cannot. “He who takes a reward in recompense perpetrates a fraud upon God.” It does not matter if his sentence was in fact correct. Or consider C. 1 q. 3 c. 10: “Justice is a gift of God and he who sells or purchases a gift of God is condemned by God." Indeed, in several places in the *Decretum* the same wording appears that one finds in Magna Carta's clause 40: *vendere iusticiam* is an evil repeatedly condemned.

It would be otiose to point out to a sophisticated audience that the medieval canonists did not in the end understand these and similar texts as forbidding the payment of what we think of as court costs. Even less would I suggest that they regarded the system of ecclesiastical justice that existed as reaching the ideal embodied in these texts from the *Decretum*. On points like that, the canonists were as sophisticated as we are—in some respects they were actually more so—and ways were found to harmonize these texts and glosses with a functioning legal system. And this is my point. If one takes the words of Magna Carta's clause 40 at face value, they become very hard to understand. However, if one recognizes that what was being enacted in clause 40 was in fact a restatement of a canonical rule in an English secular context, a much wider scope for understanding and criticism emerges. I think this is an advantage.

A third example of possible connection between Continental law and English law is that most celebrated of phrases: Clause 39: “No free man shall be taken or imprisoned or disseised ... except by the legal judgment of his peers or by the law of the land [*per legale judicium parium vel per legem terre*].” In the world of American law schools controversy has long swirled about the meaning of the word *vel*. Does the

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66 *1 Corpus Iuris Canonici, supra* note 60, at 661; Glossa ordinaria ad id. “Qui recte iudicat, et praemium inde remunerationis expectat fraudem in Deum perpetrat.”

67 *1 Corpus Iuris Canonici, supra* note 60, at 416.

68 See id. at 741, C. 14 q. 5 c. 15; dictum post id. at 481, C. 2 q. 6 c. 41 § venales; 2 id. at 877, 5.34.16, and especially Glossa ordinaria ad id. s.v. venditionem iusticiæ.

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phrase imply alternate means of legitimate action on the sovereign's part, or does it mean that lawful judgment by one's peers was meant to be an essential part of English justice? Discussion of the question necessarily includes explaining the origin and contemporary meaning of "judgment of peers," a phrase that does not appear in statements of the law and constitution from the reign of either Henry I or Henry II.

Not even the wildest enthusiast for the merits of the medieval canon law would be bold enough to maintain that the concept of judgment by peers was a keystone of the canonistic arch. However, both the concept and the phrase do loom very large in one of the most important but neglected of medieval legal texts: the Libri Feodorum. This text of compiled and glossed feudal custom was the subject of much interest and interpretation during the years around 1200, and indeed in these years it reached what was to remain the form it retained when later printed in the old editions of the Corpus Iuris Civilis.

When one examines the actual provisions and glosses to the Libri Feodorum, it is at once notable how large a role the rule of judgment of peers played. Book I, title 18 states as follows: "If there is a dispute between greater and lesser vassals over a benefice, let it be settled in iudicio parium." Consider also Book II, title 20: "If a dispute arises between a lord and his vassal about a fief, it is to be determined by the peers of his court." These are but two examples of many in which the phrase iudicium parium was used and put into practice as a rule of decision. Is not this rule, and this same language, identical to that found in Magna Carta's clause 39? There can be little doubt that it is.

Explaining the genesis of the rule of course has been a long-time preoccupation of scholars. Finding English roots for it has not been easy, however, since as a contemporary writer remarked a few years later, "There are no peers in England as there are in France." The difficulty

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70 See 4 CORPUS IURIS CIVILIS 468 (Orléans 1604).
71 Id. at 484.
72 See, e.g., BARNABY C. KEENEY, JUDGMENT BY PEERS (1949). Holt lays out Continental parallels admirably, though without consideration of the Libri Feodorum. HOLT, supra note 56, at 75-77.
73 See the statements of Peter de Roches, recorded in Matthew of Paris, CHRONICA MAJORA III, 252 (Rolls Series 57:3): "Dixit quod non sunt pares in Anglia, sicut in regno Francorum."
is that the possible English sources for the idea contained only similar ideas, not the same idea. The possible parallels have been, first, the notion that the king must act by a judgment of his court (iudicio curiae suae), and second, that he should govern with the advice of the great men of the realm (consilium procerum). These may be one in spirit with clause 39, but they neither use the same language nor state the same legal principle.

These difficulties will disappear if we take the clause for what it appears to be: an importation from the Continent and perhaps specifically from the Libri Feodorum. Adopting that approach will admittedly require a further and perhaps more disquieting conclusion. Namely that the words chosen for inclusion in Magna Carta were not entirely suitable for English conditions, at least as things worked out over the course of the rest of the medieval period. But this is no reason why, in a moment of crisis between king and baronage, it might not have seemed sensible at the time to seize upon a principle found in this basic law book and include it in the Great Charter. Such a story is not implausible, although of course it cannot be proved with certainty.

These three examples of connections between canonical and civilian sources and the common law could be multiplied, and in fact once one gets started the search for canonical precedents can become an obsession. I will not pursue that obsession further today because it seems more sensible to call attention to some of the relevant, detailed work on the same broad theme by young scholars that has begun appearing in the years since the publication of Law and Revolution. One example is a striking suggestion by Michael Macnair, a young English academic lawyer now teaching at Southampton University, that principles of the law of evidence may have been inspired by Continental sources.74 There is room for much further work on this subject of the sources of the modern law of evidence, but this scholar’s work is both promising and suggestive. A second example is the demonstration, built upon painstaking work in the English Yearbooks by Professor David Seipp of Boston University Law School, that medieval English judges in fact knew a good deal about the ius commune.75 He went through the Yearbook cases, counting how often references to the

canon law could be found. And he found quite a bit. The celebrated isola-
tion of English judges may turn out to be a nineteenth century invention.
A third example is the quite different, but equally important, bibliograph-
ical work being done by Professor Alain Wijffels of Leiden University.
His meticulous examination of the contents of English libraries has shed
new light on the realities of the existence and uses of canonical and civil-
ian sources in early modern England. Wijffels very well may place the
whole subject on a much firmer footing than it ever could have been in the
absence of his careful exploratory work.

These are samples of the kind of research that is being carried forward.
It is also occurring in other areas of the common law such as the trust, an
English institution Maitland thought Continental writers would have
found incomprehensible. The English law of criminal procedure seems
also to have been touched by the hand of the learned laws, if one looks to
what has been discovered in recent studies. Indeed, there is enough of
this kind of work so that review articles dealing with the subject have
begun to appear. Unless my reading of all this is very much off the
mark, many are following the paths laid out in Law and Revolution. It is
of course impossible to say whether or not, in particular cases, this might
have happened anyway or whether it was this book that excited the inter-

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76 See Alain Wijffels, Late Sixteenth-Century Lists of Law Books at Merton Col-
77 See Stephen W. DeVine, The Concept of Epieikeia in the Chancellor of England’s En-
forcement of the Feoffment to Uses Before 1535, 21 U. BRIT. COLUM. L. REV. 323 (1987); H. Patrick
Glenn, Le Trust et le Jus Commune, in Common Law d’un Siècle L’autre 87 (Pierre Legrand
78 See 3 Frederick W. Maitland, Trust and Corporation, in The Collected Papers of
Frederic William Maitland: Downing Professor of the Laws of England 321-404 (Her-
bert A. Fisher ed., 1911).
79 See John G. Bellamy, Criminal Law and Society in Late Medieval and Tudor
England 39 (1984); Charles Donahue, Jr., The Interaction of Law and Religion in the Middle
Ages, 31 MERCER L. REV. 466, 471 (1980); Daniel Klerman, Appeals and Ordeals: The Thirteenth-
the annual meeting of the American Society for Legal History, New Haven, Connecticut).
80 See William W. Bassett, Canon Law and the Common Law, 29 HASTINGS L.J. 1383 (1978);
T.H. Bingham, “There Is a World Elsewhere”: The Changing Perspectives of English Law, 41
INT’L & COMP. L.Q. 513 (1992); Charles Donahue, Jr., Ius Commune, Canon Law, and Common
Law in England, 66 TUL. L. REV. 1745 (1992); Gino Gorla & Luigi Moccia, A “Revisiting” of the
Comparison Between “Continental Law” and “English Law” (16th-19th Century) and English
Law Attitudes to the “Civil Law,” 2 J. LEGAL HIST. 143, 157 (1981); Martínez-Torrón, supra note
42; Reinhard Zimmermann, Das Römisch-kanonische ius Commune als Grundlage Europäischer
est and the response of individual legal historians. However, I am con-
vinced that the call for further detailed research, which is without doubt
one of the signal contributions of Professor Berman's work, is in fact be-
ing answered, and answered in ways that confirm, amplify, and solidify
the four principal arguments of *Law and Revolution*.

VI. Conclusion

It seems evident to me that Harold Berman's book lays out an agenda
for research in the Western legal tradition and that it is the right agenda.
One need add no more than a single word about the current movement
towards internationalization that will spur further work on that agenda.
This movement will encourage a more widespread recognition of the re-
sults than was possible in a scholarly world that regarded the creation of
nation states as the end of human history. The existence and energetic
efforts of the European Community, together with the "globalization" of
the commercial world, are pushing us in that direction. Already, Europe-
ans are beginning to speak of a modern *ius commune*, a European law
akin to the earlier *ius commune* that was the result of the developments so
forcefully described in *Law and Revolution*. They see in the subject's his-
tory hopeful and helpful guidance for the present. In this sense, the
quantitative and objective evidence with which this assessment began is no
more than a predictable reaction to such a book. It is the recognition of
the boldness and the historical vision of the man we honor.

81 See the agenda proposed in Helmut Coing & Knut W. Nörr, *Englische und Kon-

82 See, e.g., Reiner Schulze, *Vom Ius Commune Bis Zum Gemeinschaftsrecht—Das Forschungs-
sfeld der Europäischen, Rechtsgeschichte*, in *Europäische*, supra note 20, at 3.