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CONSOLIDATION OF POWER AND THE NAPOLEONIC CODES

COMMENT ON THE ENLIGHTENMENT, THE FRENCH REVOLUTION, AND THE NAPOLEONIC CODES

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A threshold problem exists with Professor Berman's approach to analyzing ideas and their relationship with history which carries throughout his entire discussion of the Enlightenment, the French Revolution and the Napoleonic Codes. It is possible, as Berman does for purposes of analysis, to consider any fact or set of facts in isolation from any other fact or set of facts. It is also possible for these same purposes to consider these matters in relation exclusively to some other fact or set of facts. But partial information on any subject is obviously misleading. All significant aspects of a topic need to be considered in order to properly understand the meaning of any particular part. I do not believe Berman does this in his analysis of this particular historical epoch.

In addition to this analytical danger there is a further more intangible problem which has been mentioned by Berman himself.¹ This problem is that an analysis along the lines discussed above "does not go far enough to be satisfying." It lacks a fullness, in that important facts are left out, or at most, implied. As Wordsworth said in regard to being alive during the French Revolution, "To be young was very heaven." These were exciting times, but Berman does not leave us with this impression.²

These are the underlying difficulties with his overall approach. Berman objects to what he believes is a greater than necessary stress placed on political, economic or social factors in explaining the law and developments therein.³ But the results of his analysis often seem to overly stress ideas at the cost of other factors and he seems, ultimately, to be proceeding without reference to critical causative

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1. Berman, *Revolution and Law*, 18 VAL. U.L. REV. 569, 579 (1984).

2. I have not only read Prof. Berman's lectures but I was also able to listen to them when delivered at Valparaiso University Law School in November of 1983.

3. Berman, *supra* note 1, at 570-71.

factors. Some specific examples of this in his discussion of the Enlightenment, the French Revolution, and the Napoleonic Codes will be cited as this critique develops.

Berman's contention that he is arguing "interconnections, inter-relationships,"⁴ rather than causation when he examines legal changes along with pre-existing religious or ideological changes is thus only partially correct. While it is admittedly improbable that legal changes can be fully explained without reference to religious or ideological changes, likewise salient facts are omitted when references to the political, economic, and social structure are excluded.⁵

We might utilize the philosopher's old distinction here between material and efficient causes.⁶ The interconnections that Berman discusses bear a strong resemblance to the philosopher's material cause, and the political, economic and social structure to the efficient cause. If the new social system will cause some kind of change, we can perhaps look at the pre-existing belief structure to have an idea what type of change that is. Thus, while no one wants to say that the legal system necessarily *resulted* from the pre-existing ideological changes, neither can this system be explained without reference to it.

Berman reflects that:

Our predilection for political, economic and social explanations of legal development, and our corresponding aversion to philosophical and religious explanations, seems to me to reflect a relatively narrow concept of law as a mere device or instrument by which powerful persons or groups may advance their political or economic or social objectives. Even if this narrow concept of law is assumed to be correct so far as it goes, it does not go far enough to be satisfying; for it ignores the fact that virtually every law-making regime in the history of mankind has wanted its laws not only to advance its interest but also to reflect its ideas of rightness and justice.⁷

This conclusion seems to be only partially accurate. It may well be

4. Berman, *supra* note 1, at 571.

5. Prof. Berman states that "Communist law reflects a Communist belief system." It also reflects, and is designed to maintain, a Communist economic, political and social system. It would probably be easier to study such a system, without studying the beliefs, and predict the types of laws that would have evolved, than to undertake such prediction on the basis of beliefs, solely. Berman, *supra* note 1, at ____.

6. 2 THE ENCYCLOPEDIA OF PHILOSOPHY, 56 (1967) (definition of *Causation*).

7. Berman, *supra* note 1, at 570-71.

that legal systems reflect more than an individual's or class' struggle to accomplish goals in its own interest, yet this is in *part* what transpires.

There is, however, a broader point to be made: that political, economic and social explanations of legal development reflect more than these power struggles. Analyzing legal systems in this fashion is not a "predilection," rather, it is a necessity. It is difficult to see how it could be any different, for we would otherwise be effectively operating, with an incomplete understanding of why things developed as they did.

To say that the pre-existing ideological and religious changes caused the subsequent legal ones would be analogous to saying that the clearing of a wheat field *caused* a subsequent planting. I am certainly not arguing along these lines. But, as when old ideas and ways of seeing things are cleared away, the seeds of new ideas may be planted. There will of course be many interconnections between general philosophical ideas "in the air," and subsequent developments in the legal structure. It could not be any different inasmuch as we are all products of times we live in, however much we instigate subsequent changes.

The problem with discussing these interrelationships is that we cannot ignore underlying factors, which may have been responsible for causing changes both philosophically and legally. These changes do not happen *ex nihilo*, although that is, at times, precisely the impression one receives in reading Berman's otherwise learned and informative disquisition on these matters.

It is no great secret that a new social and economic system was struggling to be born amidst the rather stultifying strictures imposed by the old one. New forces of technology and production gave rise to a need for a new social order, with a concomitant novel way of viewing things. Capitalism was struggling to succeed feudalism. The same scientific and technological revolution that freed us of the Ptolemaic notions of our physical place in the universe also allowed for the development of the steam engine, to name only one machine. These types of changes allowed people (the philosophes in France) to literally apprehend with new telescopes, for example, things anew while the new forces of production were taking shape. Mankind was not required to speculate on his place in the physical universe when he could look through a piece of glass and see it for himself. Thus Western man was *allowed* to think his way out of the no longer useful feudal boxes and was *required* to construct a different social order. These changes do not occur in the abstract. They are reflective of

the social, economic, and political realities of the times.

I might comment here on Berman's use of the term "religious." He states at one point that: "Stalin's atheist socialism and Hitler's pagan racism were themselves, in an important sense, religious."⁸ From this and similar uses made by Berman, it seems that he often intends, when using the term "religious," to mean ideological; that is, the philosophical underpinnings which define our viewpoints at any given time and which explain much of our behavior.

The following discussion refers to the specific ways in which Napoleonic Codes embody much Enlightenment thought. Seeing all of this as a reflection of changes in the social order provides a necessary counterbalance to Berman's approach.⁹

We are all children of the Enlightenment. When an advertiser touts a "new and improved" product¹⁰ when a governmental leader does an act in the name of "the people,"¹¹ when a person changes lifestyles because the old one is not "fulfilling,"¹² when a spouse leaves and goes to St. Louis to find himself or herself,¹³ in large measure all of these people are acting on ideals enunciated during the Enlightenment.

One way of characterizing the Enlightenment is as an awakening, or a new way of seeing things. It was no longer of great importance how many angels could dance on the head of a pin, to pick an

8. *Id.*

9. Much of what is discussed has been raised by historians, philosophers and lawyers representing a variety of viewpoints, ranging from conservative to left-wing. See, e.g., J. BRONOWSKI AND B. MAZLISH, *THE WESTERN INTELLECTUAL TRADITION* (1960); P. GAY, *II THE ENLIGHTENMENT: AN INTERPRETATION, THE SCIENCE OF FREEDOM* (1969); *THE CODE NAPOLEON AND THE COMMON-LAW WORLD* (b. Schwartz ed. 1956); M.E. TIGAR AND M.R. LEVY, *LAW AND THE RISE OF CAPITALISM* (1977); M. BEAUD, *A HISTORY OF CAPITALISM, 1500-1980* (1983); H. KELLENBENZ, *THE RISE OF THE EUROPEAN ECONOMY: AN ECONOMIC HISTORY OF CONTINENTAL EUROPE, 1500-1750* (1976).

10. "In the Middle Ages, it had occurred to no one to think that the future would be better than the present; no one thought that it would even be different. . . ." The idea of progress was popularized during the Enlightenment by various thinkers. See BRONOWSKI AND MAZLISH, *supra* note 9, at 485.

11. See Bronowski's discussion of the idea of the "general will" as propounded by Rousseau. *Id.* at 297, 302, 435.

12. "In the 500 years since Leonardo, two ideas about man have been especially important. The first is the emphasis on the full development of the human personality. The individual is prized for himself. His creative powers are seen as the core of his being. The unfettered development of individual personality is praised as the ideal . . . This has come to be the unexpressed purpose of the life of individuals: fulfilling the special gifts with which a man is endowed." *Id.* at 499.

13. *Id.*

example that occupied certain medieval philosophers. Philosophy in some ways was taken from the realm of the speculative and the metaphysical, and brought down to earth. This new mode of thinking well suited a mankind which was no longer immobilized by the stultifying forces of feudalism. In that static condition, the philosophers had created great rationalist structures based mainly on speculation.¹⁴ Now mankind began turning outward, attempting both to understand and to master his environment.

In discussing the various factors stressed during the Enlightenment—individualism, secularism, progress, and the power of human reason¹⁵—Berman notes that the intellectual leaders of the Enlightenment were more European in their thinking than nationalist, and that the nationalism was itself more a product of the French Revolution. Rousseau's thinking in this area, as Berman notes, comes awfully close to notions of national sovereignty constituting a philosophical justification for nationalism,¹⁶ and some of this may be impied elsewhere, too.

The Revolution—and indeed it was thought of at the time as *the* Revolution¹⁷—took France, and ultimately the Continent and the world, by storm. It swept with an unexpected fury. As Berman notes “. . . intellectual leaders did not prophesy a Revolution such as that which broke out in 1789 . . .”¹⁸ While we might say that profound and substantial change was probably an inevitability within the existing social and economic order at this time—feudalism giving way to capitalism—the *political* nature of this change was certainly unexpected. The monarchy gave way to the Assembly, to the Terror, to Thermidor, and finally to Napoleon. The *ancien regime* crumbled and the Rights of Man were proudly declaimed.

Berman's approach of ignoring social, economic and political factors does not provide an explanation of why particular ideas propounded during the Enlightenment or the French Revolution were adopted and put into practice while others were not. Likewise, it is

14. The example of Aristotle's belief in the spontaneous generation of maggots on rotting flesh comes readily to mind. This was commonly believed for some time. Bronowski also mentions Descartes' belief that clouds could rain blood, a conclusion Descartes' arrived at in the absence of any testing. BRONOWSKI AND MAZLISH, *supra* note 9, at 228.

15. Berman, *supra* note 1, at 616-19.

16. BRONOWSKI AND MAZLISH, *supra* note 9, at 302, 414.

17. Berman, *supra* note 1, at 615.

18. Berman, *supra* note 1, at 619.

incomprehensible why certain ideas were ratified and embodied in the Napoleonic Codes, while others were discarded. There were a number of ideas and ideals in the air at the time, and the ones chosen by the revolutionaries and those who drafted and adopted the Codes were not picked at random. There were specific causes, rooted in historical fact, although it is difficult to discern these causes from a reading of Berman's essay. One does not have to be an historical materialist or a determinist to recognize that social factors cannot be left out of these explanations. Man's relation to his society is dynamic, and neither his ideas nor the underlying social forces may be omitted from an analysis such as this.

If one looks just at the ideas of the time, it might be concluded that a society would have evolved in which legislation constantly attempted to equalize the various inequities which existed. This type of approach is, after all, the one advocated by Rosseau, among others.¹⁹ The temper of the times, as manifested by the cry "liberté, égalité, fraternité" leads to a belief that this would in fact have happened.

But it did not happen this way. After the dismantling of the feudal apparatus, redistributive and various emancipative efforts were deflected, thwarted, or significantly limited. This happened both during the Revolution and when the Code was adopted. Despite the beliefs and hopes of many of the participants, the Revolution was not an attempt to build a new society in which all citizens would participate and benefit equally in and from the political and economic structure. It was the securing of power by the rising capitalist class, the bourgeoisie. An analysis which ignores this reality omits significant causative factors.

One example of how a change was made and then was contained to benefit the bourgeoisie despite particular radical thinking is that of the large-scale dismantling of the feudal land structure. There were those who would have distributed to the peasantry the expropriated church-owned and royal lands. The Conspiracy of Equals certainly advocated the distribution of lands at the time.²⁰ Particular groups of peasants, believing that the Revolution had been undertaken at least in part to benefit them, even seized some lands.²¹

The feudal dues owed by the peasantry to the nobility were abolished, but then were put up for sale. It is not hard to understand

19. See Bronowski's discussion of Rosseau, BRONOWSKI AND MAZLISH, *supra* note 9, at 280-306.

20. *Id.* at 408.

21. TIGAR AND LEVY, *supra* note 9, at 244, 246.

in both of these cases why the Revolution failed to undertake a thoroughgoing change, despite the wishes of those who would benefit, and despite the fact that these ideas were propounded at the time. The royal and church lands were instead put up for auction. And who could afford to buy them? The peasantry? Of course not; these lands were bought in the main by the linchpins of the emerging economic order—the bankers and financiers.²²

The explanation for the way the impact of the abolition of feudal dues was watered down is as follows:

The reasons for the limited impact of the August 4 decree must be sought in the structure of landholding and finance. Those seigneurs who held parcels of land and exercised feudal rights over them were ruinously and inescapably in debt to the financiers of the rising bourgeoisie. These financiers were clients both of the lawyers in the National Assembly and of the nobility who were “of the robe” and allied with the Third Estate. They cared little for the right to hunt, fish, and dispense justice, but they insisted that the dues that were exacted from the tillers of the land and that secured the debts owed them be redeemable in cash.²³

These solutions were then embodied in the law.²⁴ Consequently, peasants became leaseholders or abandoned their land.²⁵ The bourgeoisie triumphed; the ideals of the revolution did not get out of hand nor did they interfere with the rights of the bankers and financiers. So much for agrarian reform!

Another interesting instance of Enlightenment and revolutionary ideals, conflicting with financial interests and thus leading to subsequent abandonment, is reflected in the problem of slavery. Various Enlightenment thinkers had eloquently addressed this injustice.²⁶ Indeed, slavery was abolished on paper at one point during the “radical” period of the Revolution—and that was the end of it.²⁷ The large sugar and coffee holding concerns, as well as shippers and other interests, would not brook interference with their profitable trade. According-

22. *Id.* at 245.

23. *Id.*

24. *Id.*

25. *Id.*

26. GAY, *supra* note 9, at 410-13; TIGAR AND LEVY, *supra* note 9, at 253-54.

27. TIGAR AND LEVY, *supra* note 9, at 253.

28. *Id.* at 255.

ly, not only was the abolition ignored *in toto*, but the Napoleonic Codes restored it, even on paper.²⁸

A further interesting contrast is one presented by the Rights of Man, and the spirit embodied therein; and how in fact "man," in the form of both men and women, was placed totally at the mercy of marketplace forces. The only economic "right" remaining was the right to work under the conditions dictated, for the wages paid, or to starve. Unions were outlawed, guilds were dismantled, and existing protective legislation destroyed.²⁹ There were limitations to the most high-sounding of rights.

Finally, it is instructive to view the fate of explicitly socialist ideals during the French Revolution. These ideals have been referred to "as a last convulsive effort of the principles of the great French Revolution to work themselves out to their logical ends."³⁰ Gracchus Babeuf of the Conspiracy of Equals advocated true egalitarianism and was executed for his plotting.³¹ The following has been said about the Napoleonic Codes and it applies equally well to those phases of the Revolution wherein the bourgeoisie consolidated power: "Fundamentally [the Code] proclaimed only two commandments: A material one, that everyone should keep what he had, and a personal one, that everyone should mind his own business."³²

Indeed, the personal aspect is a logical concomitant of the material one. A society in which the chief activity is the individual pursuit of personal profit requires that everyone—in *both* senses of the word—"mind his own business." No one was getting too carried away with ideals or rhetoric here.

The various Codes, drafted by jurists appointed by the First Conseil, simultaneously ratified the advances made by the bourgeoisie at the expense of the King and the nobility and protected the capitalists from the demands of the radicals. As has been said: "There is further evidence in the legislative work which preceded the Code that the more radical ideas and the intent of the armed movements battling outside always succumbed to the will of those who wished to express, codify, and extend the bourgeois vision."³³ Thus, Enlightenment ideals, *which were in accord with the interests of the rising capitalist class*, were put into effect and those which were not were discarded. In-

29. *Id.* at 247-50.

30. BRONOWSKI AND MAZLISH, *supra* note 9, at 407.

31. *Id.* at 408.

32. TIGAR AND LEVY, *supra* note 9, at 256.

33. *Id.* at 253.

dividualism in all its aspects was strengthened.³⁴ The role of women improved³⁵ and the criminal process was reformed.³⁶ Those forces which stood between a citizen and his nation, or between an enterpreneur and his enterprise, were dismantled.³⁷ The rights of free contract triumphed over the sacraments of the Church—as in marriage and divorce, for example.³⁸

The very idea of a Code conforms well to the times: through the application of human reason one can and *should* set forth general principles, based on reason and evidence, to govern human conduct in particular situations. This was done so well that even the return of the Bourbons only temporarily sidetracked progress and the main elements of the Code were eventually re-enacted.³⁹

It was not my intention here to address the larger concerns that underlie Berman's attempts to examine and postulate the existence of interconnections between belief systems of the Western World and the legal systems.⁴⁰ However, in the instance of the Enlightenment, French Revolution, and Napoleonic Codes, I maintain that a complete picture of events is not presented when economic, political and social factors are not fully examined.

The ideas of an epoch are not simply a passive reflection of the underlying political, social, or economic structure, and I have nowhere argued that this is so. But neither can they be examined without looking at that structure. This is not to address the validity of those ideas as such, but, for example, it is no coincidence that we are more likely to find advocates of slavery in slave-holding societies than in non-slaveholding societies. It would not occur to many of us to otherwise attempt to justify slavery. Nor does it occur to many to speak against it and find reasons for its injustice when their immediate economic interests are affected adversely. Humans draw ideas from their environments—including society—and then act on those ideas producing new environments and new ideas. To ignore the relationship between people and their times is to attempt to view mankind ahistorically and to operate partially *in vacuo*.

34. BRONOWSKI AND MAZLISH, *supra* note 9, at 409, n. 27.

35. Berman, *supra* note 1, at 622.

36. Berman, *supra* note 1, at 623-25.

37. See Walter Derenberg's discussion of *The Code and Unfair Competition*, THE CODE NAPOLEON, *supra* note 9, at 177-223.

38. See Max Rheinstein's discussion of *The Code and the Family*, THE CODE NAPOLEON, *supra* note 9, at 139-61.

39. See, e.g., THE CODE NAPOLEON, *supra* note 9, at 143.

40. See, e.g., Berman, *Law and Revolution and Religious Foundations of Law in the West: An Historical Perspective*, 1 JOURNAL OF LAW AND RELIGION 3 (1983).

