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### Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*

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## BOOK REVIEW

### BERMAN'S EUROPEAN LEGAL HISTORY

DAVID A. FUNK\*

LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION. By *Harold J. Berman*. Cambridge, Mass. & London, England: Harvard University Press, 1983. Pp. xi, 657.

As the Papal Revolution gave birth to the modern Western state, so it gave birth also to modern Western legal systems, the first of which was the modern system of canon law.<sup>1</sup>

Professor Berman has produced a magnificent academic *tour de force*, monumental in its scope and breathtaking in its execution. It is closely reasoned and well supported, yet highly interpretive and analytical. In many respects Professor Berman has done for European legal history what Arnold Toynbee did for the history of world civilizations.<sup>2</sup>

Every chapter of this important revisionist work deserves careful consideration, and could be the subject of a separate review. The essay which follows, however, can only provide some general observations on the work as a whole, and some personal reactions to selected specific features. A book of this type, more than most, must be thoroughly chewed and digested to savor it as a whole and in all of its parts.

#### I. PRECURSORS AND QUALIFICATIONS.

That such a work has been produced by an American law professor is quite astonishing. Only a few American legal scholars have seriously ventured beyond English and American legal history into an analytical work of this scope and depth. Three American works

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1. H. BERMAN, *LAW AND REVOLUTION* 115 (1983).

2. See generally 1-12 A. TOYNBEE, *A STUDY OF HISTORY* (1934-61). Professor Berman does not refer to this work. But see his observation that "the greatest challenge to those foundations [of Western society] is the massive loss of confidence in the West itself, as a civilization, a community, and in the legal tradition which for nine centuries has helped to sustain it." H. BERMAN, *supra* note 1, at 40.

might be considered precursors of *Law and Revolution* in some respects.

First, Professor Munroe Smith, a historian who lectured at Columbia University, published a book on the development of European law in 1928.<sup>3</sup> Professor Smith, however, did not go nearly so far as Professor Berman, in constructing explanatory theories of European legal history or in working out their details. Second, Professor John Wigmore published his lantern slide lectures at Northwestern University School of Law under the title, *A Panorama of the World's Legal Systems*, in 1928.<sup>4</sup> Obviously the scope of this work<sup>5</sup> exceeds that of *Law and Revolution*, which is confined almost exclusively to European legal history,<sup>6</sup> though its sequel<sup>7</sup> may have a broader perspective. Professor Wigmore, however, confines his theory construction and detailed justification primarily to an "Epilogue,"<sup>8</sup> whereas Professor Berman deals with explanatory theories and supporting historical facts throughout his work. Finally, Professor John Dawson published a fine book, *The Oracles of the Law*,<sup>9</sup> in 1968, which might be considered an American precursor, of sorts, to *Law and Revolution*. Professor Dawson, however, confines his analysis to the Roman, German, French and English legal systems, neglecting almost entirely the canon law of the Church. Professor Berman, on the other hand,

3. M. SMITH, *THE DEVELOPMENT OF EUROPEAN LAW (1928)*. See also M. SMITH, *A GENERAL VIEW OF EUROPEAN LEGAL HISTORY AND OTHER PAPERS (1927)*, and especially *A General View of European Legal History*, *id.* at 3-42. Professor Berman does not refer to these works of Professor Smith, though he would be under no obligation to do so.

4. See generally 1-3 J. WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS (1928)*.

5. *Id.* (includes chapter on most of the major legal systems which have ever existed).

6. Professor Berman asserts, however, that eventually: "a social theory of law must move beyond the study of Western legal systems, and the Western legal tradition, to a study of non-Western legal systems and traditions . . ." *Id.* at 45. See also *id.* at 540. He also includes a discussion of "archaic" and primitive law, as well as some references to the law of "China," "Islam" and the "Jews." See index entries *id.* at 638, 640, & 647. For unindexed references to Greek law and India, see *id.* at 134 & 55.

7. *Id.* at 636.

8. See generally J. WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 1119-30 (1936)* entitled *Epilogue: The Evolution of Legal Systems* in the latest edition of this work.

9. J. DAWSON, *THE ORACLES OF THE LAW (1968)*, which was based on the Thomas S. Cooley lectures at the University of Michigan in March, 1959. Professor Berman relies at a number of places on this work. See H. BERMAN, *supra* note 1, at 128-29, 132, 451, 469, 629 & 630.

deals with many other national and European legal systems and many other facets of these legal systems. From time to time European legal scholars have produced similarly ambitious interpretive works,<sup>10</sup> but Professor Berman is in a class by himself among American legal scholars to date.<sup>11</sup>

Professor Berman is unusually well prepared for his task in many respects. First, he apparently has had a historical project like this in mind at least since 1950.<sup>12</sup> He has taught legal history at Harvard in some form since about 1967.<sup>13</sup> As early as 1976, the syllabus for his course in "Western Legal Traditions" resembled *Law and Revolution* in many respects.<sup>14</sup> Second, Professor Berman has written in the general area of jurisprudence and taught in this field for a number of years.<sup>15</sup> His jurisprudential background shows in his development of the general conceptual structure of his work,<sup>16</sup> as well as in the

10. O. VON GIERKE, 1-4 *DAS DEUTSCHE GENOSSENSCHAFTSRECHT* (1868-1913) (emphasized Teutonic law influences in preference to Romanist explanations of modern German legal history). See also, H. BERMAN, *supra* note 1, (emphasizes canon law influences in preference to Romanist and nationalist explanations of modern European legal history). See generally A. WATSON, *THE MAKING OF THE CIVIL LAW* (1981) (a shorter attempt to explain the origins of the main elements of modern civil law, by a Scottish legal scholar).

11. Other American authors have attempted ambitiously broad legal histories. See, e.g., W. SEAGLE, *THE HISTORY OF LAW* (1946); R. WORMSER, *THE STORY OF THE LAW* (1962); and J. ZANE, *THE STORY OF LAW* (1927). These efforts, while useful, are not on the same plane as those of Professors Smith, Wigmore and Dawson with respect to sustained historical explanation and detailed supporting facts.

12. H. BERMAN, *JUSTICE IN RUSSIA* 111-21 (1950). Professor Berman received a Certificate of Graduate Studies in 1939 from The London School of Economics and Political Science, and an M.A. in History in 1942 from Yale University. *DIRECTORY OF LAW TEACHERS*, 1958 70. See also H. BERMAN, *supra* note 1, at 636, ("I started writing this book in 1938, as a graduate student in legal history at London School of Economics.").

13. *DIRECTORY OF LAW TEACHERS*, 1968-1970 83 is the first entry since 1958 showing Professor Berman as teaching "Legal History," though he previously taught "Comparative-Historical Method." *DIRECTORY OF LAW TEACHERS*, 1977 1004 shows Professor Berman as having taught legal history for more than ten years.

14. Compare H. BOURGUIGNON, *REPORT ON THE TEACHING OF LEGAL HISTORY IN AMERICAN LAW SCHOOLS* 75-79 (1976) with H. BERMAN, *supra* note 1, at ix.

15. See, e.g., H. BERMAN & W. GREINER, *THE NATURE AND FUNCTIONS OF LAW* (1st ed. 1958, 2d ed. 1966, 3d ed. 1972 & 4th ed. 1980). Professor Berman apparently has taught jurisprudence since about 1977. *DIRECTORY OF LAW TEACHERS*, 1977 121. *DIRECTORY OF LAW TEACHERS*, 1983-84 836 shows him in the one to five year category of teaching experience in this subject.

16. See, e.g., his explicit definitions of "law," "legal order," "legal system," "institutions," and "revolution." H. BERMAN, *supra* note 1, at 79, 49-50, 76, 5 & 99-100. See also *id.* at 203 for the "defining features of the Western legal tradition."

excellent piece of intellectual history he has produced on John of Salisbury.<sup>17</sup> Third, Professor Berman obviously possesses very impressive linguistic skills. This enables him to make extensive use of the European historical literature and also to sprinkle perceptive etymological definitions throughout this volume.<sup>18</sup> Fourth, Professor Berman has extensive teaching experience in commercial law and international business transactions, and has written in this area.<sup>19</sup> This background undoubtedly contributed to a fine chapter on the unified law merchant.<sup>20</sup> Fifth, Professor Berman has maintained a longtime interest in the interaction of law and religion,<sup>21</sup> which influenced *Law and Revolution* at many points.<sup>22</sup>

Finally, Professor Berman is a preeminent American specialist in the Soviet legal system.<sup>23</sup> This background contributes an extremely timely dimension to his overall analysis. From time to time, the implicit motivating force of *Law and Revolution* almost seems to be a reaction against doctrinaire Marxist theories of history and a desire to set them right. Professor Berman agrees with Marx that revolution involves class struggle, but disagrees with Marxist economic

17. *Id.* at 273-94. "It is the thesis of this chapter that modern Western political science, including modern Western theories of the state and of law, are rooted in the struggle between the opposing forces of the Papal Revolution." *Id.* at 275.

18. *See, e.g., id.* at 316:

there seems to have been an upsurge of slavery in Europe in the eighth, ninth, and tenth centuries when many Slavs were captured and enslaved by the Frankish armies in the East; indeed, the Western word "slave" (in German, *Sklave*) derives from this historical experience. (The name "Frank," in contrast, came to mean "free.")

19. The DIRECTORY OF LAW TEACHERS in the 1960's showed commercial law among Professor Berman's teaching interests. DIRECTORY OF LAW TEACHERS, 1983-84 834 indicates that he has taught international transactions for more than ten years. *See generally* Berman & Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L. J. 221 (1978).

20. H. BERMAN, *supra* note 1 at 333-56.

21. H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974). *See generally* Vogel, *A Survey and Commentary on the New Literature in Law and Religion*, 1 J. OF LAW & REL. 79, 91-95 (1983) for a summary of the contributions of Professor Berman to this field. "[H]is writings are an important part of the new literature" which Professor Vogel describes. *Id.* at 92.

22. *See, e.g.,* H. BERMAN, *supra* note 1, at 273 on the separation of church and state; *see also id.* at 165-254 on "Theological Sources of the Western Legal Tradition," "Canon Law: The First Modern Western Legal System," and "Structural Elements of the System of Canon Law."

23. Professor Berman has written a number of books on Soviet law, including *JUSTICE IN THE U.S.S.R.* (2d ed. 1963) and *SOVIET CRIMINAL LAW AND PROCEDURE* (2d ed. 1972), as well as many substantial law review articles on various aspects of the Soviet legal system.

definitions of classes,<sup>24</sup> and especially with Marxist economic determinism.<sup>25</sup> Professor Berman emphatically sees law as *both* base and superstructure, and certainly not mere superstructure or ideology as the Marxists would have it.<sup>26</sup>

This combination of outstanding talents and accomplishments, all contributing to the end result, is so unusual that it is hard to think of any other American legal scholar who could have produced *Law and Revolution*, or anything at all like it. Since it has drawn on so many facets of his outstanding academic career, Professor Berman could well consider this to be his *magnum opus*, should he choose to rest from his scholarly labors at this point.

## II. PRIMARY THESES.

The primary theses of *Law and Revolution* may well prove to be the most controversial features of this work, though that should not detract unduly from its value. Professor Berman provides summaries of his main arguments in his own words, from time to time. Some instances of these summaries are set forth below, to provide a preliminary notion of the main thread of his overall argument and hint at the course of its development. First:

[t]he Papal Revolution gave birth to the modern Western state—the first example of which, paradoxically, was the church itself.<sup>27</sup>

Second:

[t]he princely power in the German territories [for exam-

24. See, e.g., H. BERMAN, *supra* note 1, at 108.

25. See, e.g., *id.* at 332, that “consciousness of the injustice of serfdom . . . changed the mere fact of economic exploitation into a social and political cause . . . .” Thus economics did not determine consciousness; consciousness affects economics. See also *id.* at 540 (“Marx’s historical materialism led to oversimplified explanations of the causes of the great European revolutions . . .”).

26. See, e.g., *id.* at 296, 403.

“Much Soviet jurisprudence criticizes as ‘bourgeois law’ the law of capitalist countries preceding the communist revolution. Soviet jurists consider this law as mere superstructure, the resultant of material forces of production.” Funk, *Lessons of Soviet Jurisprudence: Law for Social Change Versus Individual Rights*, 7 *IND. L. REV.* 449, 450-51 (1974).

27. H. BERMAN, *supra* note 1, at 113. See also *supra* note 1 and accompanying text.

Professor Berman summarizes his intellectual debts with respect to the origin of the Western legal tradition in the Papal Revolution, *id.* at 574-78.

ple] manifested itself in governmental and legal institutions similar to those that had been developed first by the princely power of the papacy and later by the princely power of the secular kingdoms of Sicily, England, Normandy, and France: a treasury, a judiciary, a chancery, and other departments of government; civil and criminal and other branches of law; adjudication, legislation, and other institutional processes of legal development.<sup>28</sup>

Third:

[t]he combination of . . . two factors, the political and the intellectual, helped to produce modern Western legal systems, of which the first was the new system of canon law of the Roman Catholic Church . . . . Against the background of the new system of canon law, and often in rivalry with it, the European kingdoms and other polities began to create their own secular legal systems. At the same time there emerged in most parts of Europe free cities, each with its own governmental and legal institutions, forming a new type of urban law. In addition, feudal (lord-vassal) and manorial (lord-peasant) legal institutions underwent systematization, and a new system of mercantile law was developed to meet the needs of merchants engaged in intercity, interregional, and international trade. The emergence of these systems of feudal law, manorial law, mercantile law, and urban law clearly indicates that not only political and intellectual but also social and economic factors were at work in producing what can only be called a revolutionary development of legal institutions.<sup>29</sup>

Professor Berman recognizes that his development of these theses "conflicts with conventional preconceptions in many ways."<sup>30</sup> His story

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28. *Id.* at 507. See also *id.* at 408-09 for "nine significant characteristics" of the "new type of political community, the secular kingdom" which emerged in the late eleventh, twelfth, and thirteenth centuries. To summarize Professor Berman's summary, the king (1) was now a secular (or temporal) ruler, (2) had authority to rule all subjects directly, (3) had the principal tasks of keeping the peace and doing justice, (4) performed these tasks through royal officials, (5) "asserted for the first time the right and duty to legislate," (6) developed a body of royal state law with the aid of professional adjudication and legislation, (7) was limited in political and legal theory by constitutional restraints, (8) was limited in political and legal practice by the power of various communities and international classes, and (9) derived his character as king partly from the recognition of his legitimacy by other kings. *Id.*

29. *Id.* at 86.

30. *Id.* at 538.

as a whole, he claims,

contradicts the usual periodization of Western history. It treats the history of Western civilization as a whole rather than as a history of individual nations. It attributes modern characteristics to what is generally considered to be a premodern era. It denies the predominantly feudal character of what is usually called the age of feudalism, and treats feudal and manorial law as complementary rather than antagonistic to commercial law, urban law, and royal law. It traces the roots of Western legal tradition to a violent separation of the ecclesiastical polity from secular authority and to the formation within the church of the first modern Western legal system.<sup>31</sup>

These claims should not be critically assessed without some notion, at least in general outline, of the way in which Professor Berman develops his arguments.

### III. GENERAL OUTLINE.

Professor Berman develops his primary theses by dealing successively with six legal systems which he sees as "integral parts of an overarching structural process, the Western legal tradition."<sup>32</sup> All six of these legal systems were more or less closely related to each other.<sup>33</sup> The first, the system of canon law, is the primary subject of Part I, which comprises almost half of the book. The other five legal systems are secular and treated successively in Part II, which comprises most of the remaining half of the book.

The first two secular systems discussed in Part II are feudal law and manorial law, respectively.<sup>34</sup> Professor Berman distinguishes these two legal systems in the following fashion: feudal law was the law regulating feudal tenures (fiefs) and lord-vassal relations (fealty), whereas manorial law regulated lord-peasant relations, agricultural production, and manorial life generally.<sup>35</sup> Nevertheless, these two secular legal systems are very closely related.<sup>36</sup> Professor Berman deals next

31. *Id.*

32. *Id.* at 316.

33. *Id.* Moreover, "all the secular legal systems—feudal manorial, mercantile, urban, and royal (common)—overlapped one another." *Id.* at 311.

34. *Id.* at 295-315 (deals with feudal law). *Id.* at 316-32 (deals with manorial law).

35. *Id.* at 296.

36. *Id.* at 316.

with mercantile law and urban law respectively.<sup>37</sup> How closely related these two secular legal systems are, is not so clear.<sup>38</sup> Finally Professor Berman discusses "royal law" in Sicily,<sup>39</sup> England,<sup>40</sup> Normandy,<sup>41</sup> France,<sup>42</sup> Germany,<sup>43</sup> Spain,<sup>44</sup> Flanders,<sup>45</sup> Hungary,<sup>46</sup> and Denmark.<sup>47</sup> The first four of these royal legal systems seem to be more closely related to each other, and also seem to demonstrate Professor Berman's primary theses more fully, than the others.<sup>48</sup>

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37. *Id.* at 333-56 (deals with mercantile law). *Id.* at 357-403 (deals with urban law).

38. *See, e.g., id.* at 375 (the burghers of Freiburg "were to be subject only to the law of merchants, particularly the law enjoyed by the merchants of Cologne . . .").

39. *Id.* at 409-34.

40. *Id.* at 434-59.

41. *Id.* at 459-61.

42. *Id.* at 461-81.

43. *Id.* at 482-510.

44. *Id.* at 511-13. Actually the legal history of "Spain" is treated in this section as that of three independent kingdoms: (1) Catalonia, (2) Aragon, and (3) Castile and León. *Id.* Also, some of the operative Spanish legal events antedate the Papal Revolution, the Peace of God movement is treated as the main "causative" factor, and the revived Roman law apparently is as influential as canon law in explaining Spanish legal development. *Id.*

"[E]fforts of the great kings of the thirteenth and fourteenth centuries to unify the law of Castile succumbed to the pressure of the localities to keep their own customs." *Id.* at 513. Yet Professor Berman does not explain why the papal example apparently was not followed here.

Incidentally, this reviewer feels Professor Berman's treatment of Spanish legal history would have benefitted from more attention to Spanish "foral laws," *i.e.* special municipal and other charters (*fueros*) granted to cities and other special jurisdictions. *See generally* E. VAN KLEFFENS, *HISPANIC LAW UNTIL THE END OF OF THE MIDDLE AGES* 125-31 (1968).

45. H. BERMAN, *supra* note 1, at 513-14. The centralizing ambitions of the Flemish counts were frustrated eventually by the Flemish cities. *Id.* at 514. Again Professor Berman offers little explanation for the failure of the example of the Papal Revolution to influence Flemish legal development more completely.

46. *Id.* at 514-15. Here Professor Berman seems to shift to an ethnic explanation ("the population was predominantly Magyar not Germanic"), and to the influence of specific historical events (the Mongol invasion), to explain why the Papal Revolution failed here.

47. *Id.* at 515-16. There seems to be little canon law influence in Denmark, and one cannot help wondering why other Scandinavian countries, such as Sweden and Iceland, in particular, were not discussed. The legal history of Norway is treated in one sentence. *Id.* at 516. But Norway was part of Denmark from 1380 to 1814. L. ORFIELD, *THE GROWTH OF SCANDINAVIAN LAW* 6 (1953).

48. Perhaps this explains why Professor Berman divided his discussion of "royal law" into two chapters, the first dealing with Sicily, England, Normandy and France, and the second dealing with Germany, Spain, Flanders, Hungary and Denmark. H. BERMAN, *supra* note 1 at 404-81, 482-519.

Professor Berman is to be congratulated for widening his perspective as much as he did in dealing with these nine systems of royal law. Attention to Sicily, Flanders, and Hungary is especially rare. Nevertheless, any partial discussion of European kingdoms and principalities inevitably raises questions concerning additional royal law "cases" where his basic theses might have been tested. Northern and central Italy, Switzerland, Portugal, the Netherlands, Ireland, Scotland, and the remaining Scandinavian countries,<sup>49</sup> for example, also might have been included. Even if royal law in these additional areas seems not to have followed the example of the Papacy, so that a strong unitary national state did not emerge as a result of the Papal Revolution, analysis of such "deviant cases" might have suggested modifications of, or limitations in, Professor Berman's basic theses.<sup>50</sup> When a pioneer maps a portion of a wilderness, of course, it is easy for stay-at-homes to say that he should have done the rest of the job while he was at it. Perhaps a disciple of Professor Berman someday will attempt to test the influence of the Papal Revolution more extensively in each major area of Western Europe, to explain why it was followed by a unitary modern state more quickly in some places than in others.

#### IV. ADDITIONAL MAJOR THEMES.

In explicating his primary theses,<sup>51</sup> Professor Berman develops two additional major themes. First, there is an "essential unity of the basic legal concepts, values, and processes of the European peoples."<sup>52</sup> Professor Berman announces this theme in simple terms at the very outset as follows:

This book tells the following story: that once there was a civilization called "Western"; that it developed distinctive "legal" institutions, values, and concepts; that these Western legal institutions, values, and concepts were consciously transmitted from generation to generation, and thus came to constitute a tradition; . . .<sup>53</sup>

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49. See *supra* note 47.

50. On deviant case analysis, see, e.g., R. THOMLINSON, *SOCIOLOGICAL CONCEPTS AND RESEARCH* 85-86 (1965).

Professor Berman himself criticizes nationalist legal historiography for either ignoring countries that "didn't make it," or treating them as part of the history of some other nation, e.g., a country which conquered the former. H. BERMAN, *supra* note 1 at 459.

51. See *supra* notes 27-31 and accompanying text.

52. H. BERMAN, *supra* note 1, at 459.

53. *Id.* at 1.

Apparently common patterns of historical development provide supporting evidence for this essential unity of Western legal systems.<sup>54</sup> Modern nationalist historiography, Professor Berman claims, resulted from the exaggerated nationalism of the nineteenth century, when "scientific history" first began to be written.<sup>55</sup> For the most part, *Law and Revolution* incorporates this unified approach. Occasionally, however, even Professor Berman lapses into *seriatim* nationalistic legal histories in developing his unified "story."<sup>56</sup>

The second major subsidiary theme of *Law and Revolution* is that "the Western legal tradition was born of a 'revolution' and thereafter, during the course of many centuries, has been periodically interrupted and transformed by revolutions."<sup>57</sup> Professor Berman lists six of these revolutions, as follows: (1) the Papal Revolution of 1075-1122 including the reforms of Pope Gregory VII; (2) the Protestant Revolution, starting with the attack of Martin Luther on the Papacy in 1517 and ending in 1555 with the establishment of religious peace among the German principalities; (3) the English Revolution of 1640-89; (4) the American Revolution; (5) the French Revolution; and (6) the Russian Revolution.<sup>58</sup> Professor Berman also refers to an economic revolution, leading to an enormous growth in prosperity during the late eleventh and early twelfth centuries, following indirectly from the Papal Revolution.<sup>59</sup> On the other hand, the Industrial Revolution of the late eighteenth and nineteenth centuries<sup>60</sup> apparently is of no particular importance for the development of this particular story.

The revolutions which Professor Berman describes seem almost destined to succeed.<sup>61</sup> One wonders whether some examination of those revolutions that "didn't make it" might have been helpful here, as

54. See, e.g., *id.* at 330 (regarding the common pattern of historical development in Western European manorial law).

55. *Id.* at 538-39.

56. See, e.g., (the discussions of royal law) *supra* notes 39-47 and accompanying text; H. BERMAN, *supra* note 1, at 363-90 (*seriatim* discussions of "urban law" in various European cities grouped by nations).

57. *Id.* at 1.

58. *Id.* at 18-19.

59. *Id.* at 319.

60. See generally S. CLOUGH & C. COLE, *ECONOMIC HISTORY OF EUROPE* 393 (3d ed. 1952).

61. See generally H. BERMAN, *supra* note 1, at 41.

it was when Professor Berman examined the development of unitary nation states.<sup>62</sup>

### V. MAJOR CRITICISMS.

Any work so ambitious as this is susceptible to criticisms of many types on many planes. This reviewer still has some "lingering doubts" on several fundamental matters, even after a careful first reading of this fine work.

First, the role of law in Western European history seems over-emphasized. For example, Professor Berman considers manorial legal concepts and institutions to be "just as 'basic' and just as much a part of the infrastructure as the economics of production and distribution of goods."<sup>63</sup> In addition, the legal ordering itself is treated as a form of capital.<sup>64</sup> In explaining the development of urban law in Cologne, Professor Berman states that "the idea of the gradual reformation of the world through law had become a leading concept and a governing motive in both the ecclesiastical and the secular spheres."<sup>65</sup> Occasionally "law" is personified and treated as an independent historical force.<sup>66</sup> Undoubtedly, medieval law did influence perceptions and feelings underlying political, economic, and social "forces" in history, as Professor Berman claims.<sup>67</sup> Still one wonders whether medieval law operated that independently of other political, economic, and social forces.

Second, the role of canon law seems overemphasized. The influences of Carolingian<sup>68</sup> and other<sup>69</sup> developments in the Dark Ages, on one hand, and even the independent influence of Roman law, both

62. See generally *supra* note 50.

63. H. BERMAN, *supra* note 1, at 330.

64. *Id.* at 557.

65. *Id.* at 374.

66. See generally *id.* at 43-44.

67. See generally *id.* at 403. Legal science is even treated as a prototype of Western science. *Id.* at 151-64.

68. See generally Seeliger, *Legislation and Administration of Charles the Great*, in 2 THE CAMBRIDGE MEDIEVAL HISTORY (1913) at 655. Professor Berman refers to Charlemagne from time to time in *Law and Revolution*, but considers imperial legislation "rudimentary" prior to the Papal Revolution. H. BERMAN, *supra* note 1, at 483.

69. Alfred the Great's West Saxon Code of the ninth century, for example, obviously antedated the Papal Revolution. See generally M. TURK, THE LEGAL CODE OF ALFRED THE GREAT (1893); F. ATTENBOROUGH, LAWS OF THE EARLIEST ENGLISH KINGS 62-93 (1922). Professor Berman discusses the laws of Alfred the Great briefly. H. BERMAN, *supra* note 1, at 61, 65.

West Roman vulgar law<sup>70</sup> and the revived Roman law,<sup>71</sup> on the other hand, are minimized. Occasionally Professor Berman treats revived Roman law and canon law as apparently equivalent influences.<sup>72</sup> But his major emphasis is on the influence of canon law.<sup>73</sup> This relegates revived study of Roman law to an indirect influence working through canon law.

Can the revived study of Roman law have been this insignificant as an independent factor in Western European legal history? A main thrust of *Law and Revolution* is to show that it was.<sup>74</sup> But one wonders still whether so many Pandectists could have been so wrong? To take one small example, can the legal history of the German principalities be discussed adequately without greater stress on the Roman law trained bureaucrats who came to work in them,<sup>75</sup> along with the canonists? This reviewer welcomes *Law and Revolution* as a useful realignment of emphasis among the various components of Western legal systems, but is not yet willing to accept its thesis *in toto*. For better or worse, he is not yet ready to assign such a minor role to earlier legal influences preceding the Papal Revolution, especially West Roman vulgar law, and would assign a still greater role to the revived study of Roman law *per se* than Professor Berman seems to accept. This does not mean that the revisionist work of Professor Berman has been wasted. Historiography may vindicate him in the end. This reviewer simply would wait a little longer and see a little more, with the point of view of Professor Berman in mind, before making it his own.

Third, the revolutions<sup>76</sup> which Professor Berman lists seem to combine two different types of social phenomenon. Some, such as the

70. See generally E. LEVY, WEST ROMAN VULGAR LAW (1951); Levy, *Vulgarization of Roman Law in the Early Middle Ages*, GESAMMELTE SCHRIFTEN (W. Kunkel & M. Kaser eds. 1963) at 220. Professor Berman indicates familiarity with these works, H. BERMAN, *supra* note 1, at 565, n.2, 570, n.40, but the question of emphasis remains nonetheless. See, e.g., *id.* at 53 ("[p]erhaps the chief historical importance of these scattered survivals of Roman law is that they helped preserve the idea that law should play a role in the ordering of political and social relationships."). But see *id.* at 67 ("[m]any Roman rules were kept.").

71. See generally P. KOSCHAKER, EUROPA UND DAS RÖMISCHE RECHT (3d ed. 1958). Professor Berman cites this work, H. BERMAN, *supra* note 1, at 604 n.16. Wylie, *Roman Law as an Element in European Culture*, 65 S. AF. L. J. 4-13, 201-12 & 349-61 (1948) (summarizes an earlier edition of P. KOSCHAKER).

72. See, e.g., H. BERMAN, *supra* note 1, at 511-12.

73. See, e.g., *id.* at 86.

74. See generally *id.* at 204-05 (the relation of Roman law to canon law).

75. Compare *id.* at 505-10, with J. DAWSON, *supra* note 9 at 178, 259-60.

76. See *supra* note 58 and accompanying text.

American, French, and Russian revolutions, obviously were violent political upheavals.<sup>77</sup> The Papal Revolution and Protestant Revolution, on the other hand, seem to have been more peaceful changes in basic ways of preceiving the world.<sup>78</sup> Moreover the medieval economic revolution which Professor Berman describes,<sup>79</sup> seems like still another basic type of social change. Professor Berman defines "revolution" rather broadly. In his view, a revolution exhibits four main characteristics, namely: (1) "a total transformation in which political, religious, economic, legal, cultural, linguistic, artistic, philosophical, and other basic categories of social change are interlocked"<sup>80</sup>; (2) *rapid* change; (3) "*violence*, which takes the form not only of class struggle and civil war but also foreign wars of expansion"<sup>81</sup>; and (4) "*duration* over two or three generations."<sup>82</sup>

An author may define terms as he wishes, and may group somewhat dissimilar historical phenomena under a common term, if he likes, to emphasize points of similarity among them. Thus, Professor Berman explicitly treats the revolutions he describes as fitting a common pattern.<sup>83</sup> Still, this reviewer finds his efforts more successful as emphases of points of similarity, than as proofs of essential likeness. Had the title been *Law and Revolutions*, perhaps greater allowances could have been made for some fundamental differences among various types of revolution, without ignoring similarities in their intellectual, social, and economic results.

Similarly, the attempt by Professor Berman to "prove" his main theses by examination of various separate systems of royal law seems only partially successful.<sup>84</sup> Moreover, his final comparison of royal law

77. See generally C. BRINTON, *THE ANATOMY OF REVOLUTION* (rev. ed. 1965), cited in H. BERMAN, *supra* note 1 at 563, n.15.

78. See, e.g., *id.* at 86: "[t]he emergence of these systems of feudal law, manorial law, mercantile law, and urban law clearly indicates that not only political and intellectual but also social and economic factors were at work in producing what can only be called a revolutionary development in legal institutions."

79. See *supra* note 59 and accompanying text.

80. H. BERMAN, *supra* note 1, at 99.

81. *Id.* at 100.

82. *Id.* See also *id.* at 19 (each violent upheaval in the West has marked:  
a fundamental change,  
a rapid change,  
a violent change,  
a lasting change,  
in the social system as a whole . . . .

Each took more than one generation to establish its roots).

83. See, e.g., *id.* at 106.

84. See generally *supra* notes 39-50 and accompanying text.

and canon law<sup>85</sup> proceeds on such general grounds that almost any system of law would seem like canon law. Again, the analogy which Professor Berman draws between the Papacy and national states is perceptive and useful; but one cannot help wondering whether historical coincidences or local factors might explain systematization of at least some royal law systems just as well as the Papal model. Since at least some royal law systems apparently have distinctive features, can systematization of canon law be the primary "causative" factor in the legal development of each?

Finally, what began as merely historical or genetic explanation<sup>86</sup> (the Papal Revolution gave birth to the modern Western state)<sup>87</sup> in the end becomes almost the sole "cause" of systematized royal law in general.<sup>88</sup> One cannot help wondering how systematized royal law came about in Islam, India, and China, for example, where the Papal Revolution must have had minimal influence.

#### VI. MINOR CRITICISMS.

Any reader of a work so extensive as *Law and Revolution* is bound to notice minor imperfections. Some reactions of this reviewer in relatively minor respects are discussed below, not to detract from the greatness of Professor Berman's work, but to indicate some difficulties one reader had with his arguments at various minor points.

Professor Berman sees the Papal Revolution as the great turning point in modern European legal history.<sup>89</sup> At one point<sup>90</sup> the Cluniac reform of the tenth and early eleventh centuries is treated as a forerunner of the Papal Revolution. If the Cluniac reform was the model for the Papal Revolution, which in turn was the model for modern Western legal systems, one wonders whether Professor Berman should have been a little more flexible about the influence of events preceding the Papal Revolution.

85. H. BERMAN, *supra* note 1, at 516-19.

86. *See, e.g., id.* at 279 (historians "explain the new by its origins in the past—and thereby . . . explain everything about it except its newness.").

87. *Id.* at 113.

88. *See, e.g., id.* at 511:

the systematization and expansion of royal law occurred throughout the West, wherever the Roman Catholic Church asserted its independence of the secular authority and wherever the kingship had the task of organizing peace and justice in the secular sphere.

89. *See, e.g., id.* at 115.

90. *Id.* at 89.

Similarly, Professor Berman shifts ground a little in discussing the exact dates for the Papal Revolution (if such an "event" can be precisely dated). Sometimes the Papal Revolution is described as occurring between 1050 and 1150<sup>91</sup>; at other times it is described as occurring between 1075 and 1170<sup>92</sup> or between 1075 and 1122.<sup>93</sup> Canon law apparently was systematized between 1050 and 1200,<sup>94</sup> and the crucial period for royal law seems to have been the late twelfth and thirteenth centuries.<sup>95</sup> Obviously movements this profound cannot be precisely dated, and the use of various dates, while mildly puzzling to the reader, is not a very serious objection. Nevertheless a little more explanation of the reasons for these discrepancies would have been helpful.

Occasionally specific claims made for the influences of the Papal Revolution and canon law seem unlikely. For example, Constantinople had hundreds of thousands of inhabitants in 1050, while only two cities in Europe (Venice and London) had a population of more than 10,000.<sup>96</sup> With respect to urbanization, could the Papal Revolution at least partially have been following in the footsteps of an earlier "Byzantine Revolution?"

Professor Berman concludes that "there seem to have been virtually no direct contemporary Jewish or Islamic influences on the development of Western legal systems in their formative era, that is, in the late eleventh and twelfth centuries."<sup>97</sup> He searches, unsuccessfully, for evidence that the Western jurists of this period turned to Judaism and Islam for inspiration.<sup>98</sup> This may be the case; but this reviewer could not help wondering whether Jewish ideas on usury, for example, might have influenced canon law, or whether Islamic

91. *Id.* at 4, 174.

92. *Id.* at 50. The *Dictatus Papae* of Pope Gregory VII was written in 1075. *Id.* at 95.

93. *Id.* at 19.

94. *Id.* at 199.

95. *Id.* at 404, 406.

96. *Id.* at 102.

Professor Berman indicates that Roman cities were "merely administrative and military outposts of some central authority (or authorities)" and Islamic cities were "merely large villages," without "the self-conscious corporate unity and the capacity for organic development that have given the Western city its unique character." *Id.* at 363. Apparently this depends on "urban legal consciousness and a system of urban law." *Id.*

97. *Id.* at 160. "[N]either the Talmud nor the Koran seems to have made any impact on the first great lawmakers and jurists of the West." *Id.* at 161.

98. *Id.* at 588-90.

forms of business organization might have influenced the *lex mercatoria* via the Moors in Spain.<sup>99</sup>

Again, the development of governmental bureaucracies in England and Europe is treated implicitly as though this phenomenon were peculiar to Europe.<sup>100</sup> One cannot help wondering about governmental bureaucracy in China, for example,<sup>101</sup> which surely was not influenced significantly by the Papal Revolution.

Professor Berman generally treats historical forces as nearly inevitable so that all we can do is understand them<sup>102</sup> and adapt more quickly after a "revolution" has occurred.<sup>103</sup> If that is true, why should we concern ourselves very much with "great man" history?<sup>104</sup> Yet Professor Berman lists the main royal legislators of the eleventh and twelfth centuries<sup>105</sup> and provides mini-biographies for at least four of them.<sup>106</sup> These biographies, while interesting, seem out of place in a book devoted almost exclusively to general historical forces.

99. For a brief account of the development of the canon law on usury, see, e.g., W. ADDIS & T. ARNOLD, *A CATHOLIC DICTIONARY s.v. "Usury"* 807-09 (15th ed. T. Scannel & P. Hallett eds. 1955). See generally, Salin, *Usury*, 15 *ENCYCL. OF THE SOCIAL SCIENCES* 193 (1935).

On Islamic law influences in Spain, see generally Altamira, *Spain*, in *A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS AND MOVEMENTS IN CONTINENTAL LEGAL HISTORY* (J. Wigmore ed. F. Philbrick transl. 1912) at 579, 604-06. A. UDOVITCH, *PARTNERSHIP AND PROFIT IN MEDIEVAL ISLAM* (1970) describes forms of business organization used by Arabian traders during this period.

100. See generally H. BERMAN, *supra* note 1, at 444-45. This treatment of governmental processes accords with Professor Berman's definition of law as "not just the making and applying of rules but also other modes of governance, including . . . the issuing of orders, [and] the appointment of officials . . ." *Id.* at 4. The Roman Catholic church is treated as a "government," *id.* at 205-15.

On the other hand, Professor Berman occasionally treats control over adjudication as central to the authority to rule (sovereignty). *Id.* at 492.

101. See, e.g., T. METZGER, *THE INTERNAL ORGANIZATION OF CH'ING BUREAUCRACY* (1973).

102. See, e.g., H. BERMAN, *supra* note 1, at 21 ("[t]o change in time is the key to the vitality of any legal system that confronts irresistible pressure for change."). "Society moves inevitably into the future." *Id.* at 41. See generally *id.* at 403.

103. See generally *id.* at 45 (we must "examine the ways in which foundations are or are not laid for a stable and just order in the future, after the revolution has settled down.").

104. See, e.g., A. LICHTMAN & V. FRENCH, *HISTORIANS AND THE LIVING PAST* 103 (1978).

105. H. BERMAN, *supra* note 1, at 406.

106. See *id.* at 417-19 (Roger II of Sicily); *id.* at 438-39 (Henry II of England); *id.* at 463-64 (Philip Augustus of France); *id.* at 488-93 (Frederick Barbarossa of Germany). See also *id.* at 94-99 (a mini-biography of Hildebrand as Pope Gregory VIII).

If "great men" are to be discussed at all, we wonder whether Professor Berman chose to discuss these individuals only because they happened to have been prominent in the period which Professor Berman, on other grounds, regards as crucial. In other words, are these the "greatest" of European "great legislators," or merely "greats" who happened to live during a "great period" of historical change? The total space which Professor Berman devotes to this approach is not very great, and he apparently felt it added something to his story. Nevertheless, one wonders whether this approach should have been left for another type of historical work at another time, when any influence of the Papal Revolution on the occurrence of great historical actors could be examined with more care.

Very occasionally Professor Berman lapses from his usual European perspective, into a narrower focus on English legal history.<sup>107</sup> One wonders, for example, whether the contest between Becket and Henry II in England really is worthy of a separate chapter,<sup>108</sup> no matter how small. Even if this English struggle is not so crucial from a general European perspective, of course, it may be useful as an important side of special interest to English readers.

In the absence of a strong German nation, Professor Berman uses the German principalities to prove his theses with respect to royal law in Germany.<sup>109</sup> He characterizes the German principalities as "modern states, or prototypes of modern states, surpassing the empire in this respect."<sup>110</sup> But, with all due respect, they do not seem to this reviewer to resemble the Papacy, England, and France very closely. Moreover, almost all of the supporting discussion of "The Law of the Principalities" focuses on one of them—Bavaria.<sup>111</sup>

Finally, at one point a careless reader might get the impression that Professor Berman is applying his thesis to the German *tribes and clans* ("stems").<sup>112</sup> At the outset, however, we are told that legal

107. See, e.g., *id.* at 232-33 (English legal institutions are impliedly treated as typical).

108. *Id.* at 255-69.

109. See generally *id.* at 482-510.

110. *Id.* at 491.

111. *Id.* at 505-10. Only one (unsupported) paragraph is devoted to the law of the other German principalities. *Id.* at 510.

112.

In the various *Länder* the German tribes and clans ("stems") experienced a transformation of political and legal institutions, a systematization and rationalization of government and law, in the two centuries after the Papal Revolution, parallel to that experienced by the tribes and clans in the various kingdoms elsewhere in Western Christendom. *Id.* at 506.

systems, as distinguished from legal orders, were created for the first time in Europe at the end of the eleventh century and in the early twelfth century, and Professor Berman consistently treats tribal law as a legal order, not a legal system.<sup>113</sup> Therefore, closer reading discloses that Professor Berman is saying simply that German tribal law gave way, in the two centuries after the Papal Revolution, to the systematized law of the German *principalities*.

## VII. COUNTERBALANCING STRENGTHS.

The minor criticisms above are not meant to detract from the signal accomplishments which Professor Berman has achieved in this work. Each criticism could easily be balanced by another unusually worthwhile feature of this encyclopedic essay in addition to those already mentioned. For example, the chapters on Christian theology and law,<sup>114</sup> and John of Salisbury as the first modern political theorist,<sup>115</sup> are especially unusual and noteworthy contributions to these specialized topics. Inclusion of medieval guild "law"<sup>116</sup> also is unusual and commendable, though this reviewer tends to distinguish these private rule systems from state law.<sup>117</sup> Some valuable demographic quantitative history is included to show the indirect effects of the Papal Revolution on urbanization.<sup>118</sup> This is a surprising methodological innovation<sup>119</sup> for an interpretive work of this scope.

The writing style employed is critical, philosophical, and exciting throughout, even when Professor Berman deals with such a technical and difficult subject as canon law, for example.<sup>120</sup> This reviewer doubts whether the general reader will find this "a fascinating story for the layman," as the book blurb claims, but perhaps Professor Berman was not responsible for that phrase. At any rate it is a fascinating story for the legal historian and serious student of Western European legal history; surely that should be enough.

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113. *Id.* at 49. *See generally id.* at 52-61 on tribal law, and the distinction between "legal order" and "legal system." *Id.* at 49-50, 76.

114. *Id.* at 165-98.

115. *Id.* at 273-94.

116. *Id.* at 390-92.

117. D. FUNK, *GROUP DYNAMIC LAW* 40-41 (1982).

118. *See, e.g.,* H. BERMAN, *supra* note 1, at 102, 333, 335, 364. A valuable map of cities and towns of Western Europe circa 1250 by city size, is included. *Id.* at 365.

119. *See generally* Funk, *Legal History as Empirical Social Science in Theory and Practice*, 21 *HOUS. L. REV.* (Mar. 1984) (forthcoming).

120. H. BERMAN, *supra* note 1, at 199-224. The final paragraphs of this work, on the other hand, left this reviewer wondering whether he had missed something; but that was a miniscule matter at that point. *See id.* at 557-58.

The publisher has provided generally adequate technical aids. A useful chart<sup>121</sup> enables a final review of key temporal comparisons once the argument and its explication have been mastered. This reviewer usually finds indexes not quite complete enough for future reference and somewhat weak on technical legal terms. The index to this work, though extensive,<sup>122</sup> suffers from these common, though minor, faults.

For this reviewer, the most irritating technical aspect of this book was the common practice of including all footnotes in one grouping at the back of the volume.<sup>123</sup> Perhaps the publisher really believed that this book was at least partly for the general reader, or is not fully in sympathy with the teutonic discipline of scholarly documentation. Even pure source notes need to be read in conjunction with the text, and many of the notes in this work are useful explanations and amplifications of the argument in the text. Thus a collection of notes at the end of each chapter, at least, would have been more convenient than grouping them at the end of the book.

In general, this work is quite well documented. Nevertheless, this reviewer wondered at some points whether some footnotes from the original manuscript<sup>124</sup> had been omitted at the prodding of some editor. Occasionally it would have been helpful to know whether an additional fact or proposition was original with Professor Berman, or whether he was relying at that point on the work of some other scholar. Surely no one could have expected Professor Berman to produce a work of this type without relying to some extent on the results of prior scholarship.<sup>125</sup>

121. *Id.* at 522-26.

122. *Id.* at 637-57.

123. *Id.* at 561-635.

124. For previously published versions of several chapters, see, e.g. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894 (1977); Berman, *Theological Sources of the Western Legal Tradition*, 1977 REV. JUR. U.P.R. 372; Berman, *The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe*, 45 U. CHI. L. REV. 553 (1978) (contains 91 footnotes, whereas the corresponding chapter in *Law and Revolution* contains 71). H. BERMAN, *supra* note 1, at 565-74. This discrepancy does not necessarily mean that *significant* references were omitted; but at least a question is raised as to whether that might have been the case.

Ironically, the index to *Law and Revolution* fails to include an entry for Professor Berman, though previous works of his are cited. *Id.* at 588, 590, 598.

125. For example, Professor Berman derives his theory of revolutions in part from E. ROSENSTOCK-HUESSY, *OUT OF REVOLUTION* (1938). See generally H. BERMAN, *supra* note 1 at 636 (Professor Berman's intellectual debts to Professors Rosenstock-Huessy, Plucknett and Tawney).

Nevertheless, truly scholarly publishing is difficult enough under current economic conditions.<sup>126</sup> Therefore this reviewer hastens to express his personal gratitude to the Harvard University Press for undertaking to publish such an ambitious scholarly work, apparently without truncating the manuscript too drastically to fit its publishing budget. Scholars and publishers pursue different values and yet are caught up in a symbiotic relationship. Legal historians should be grateful both to Professor Berman and his publisher that their joint efforts resulted in such an outstanding work in almost every respect.

#### VIII. A BROADER CONTEXT.

Professor Berman recognizes that in the final analysis, his general social history of law eventually "must move beyond the study of Western legal systems and the Western legal tradition, to a study of non-Western legal systems and traditions, of the meeting of Western and non-Western law, and of the development of a common legal language for mankind."<sup>127</sup> He occasionally draws useful comparisons between European and Far Eastern legal systems.<sup>128</sup> Eventually, however, even more extensive comparisons of this type are needed.<sup>129</sup> How else can we ascertain, for example, whether "[t]he unique feature of the law of Western Christendom was that the individual person lived under a plurality of legal systems, each one of which governed one of the overlapping subcommunities of which he was a member," as Professor Berman claims?<sup>130</sup> At another point he concludes that "the Western city, in contrast to Roman, Islamic, and Oriental cities, believed in the organic growth of its political and economic and social institutions over generations and centuries."<sup>131</sup> Obviously a conclusion of this type ultimately should be tested, not only in Islam and the

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126. See generally SCHOLARLY COMMUNICATION: THE REPORT OF THE NATIONAL ENQUIRY (1979).

127. H. BERMAN, *supra* note 1, at 45.

128. See, e.g., *id.* at 67.

129. This reviewer has been teaching a separate course in World Legal History since 1978, partly to attempt to develop some foundations for transcultural comparisons.

130. *Id.* at 395. See *id.* at 7-10 (ten "principal characteristics" of the Western legal tradition, according to Professor Berman); *id.* at 203 (three "defining features," namely "(1) the periodization into old law and new law, (2) the summarization and integration of the two as a united structure, and (3) the conception of the whole body of law as moving forward in time . . .").

Perhaps conclusions like these could be tested to some extent by using the approach of works like FEUDALISM IN HISTORY (R. Coulborn ed. 1965) and G. SJOBERG, THE PREINDUSTRIAL CITY (1960) which adopt a wider, world perspective.

131. H. BERMAN, *supra* note 1, at 399. See also *supra* note 96.

Far East, but also in Egypt, Mesopotamia, India, and pre-Columbian Mexico and Peru.<sup>132</sup>

This is in no sense a criticism of what Professor Berman has achieved. Only a broad scholar of his great capabilities would even allude to these broader problems. While thanking Professor Berman for helping us this far along the way, however, we can still eagerly await the sequel which he seems to have planned.<sup>133</sup> In addition, we earnestly hope that someday another talented scholar, working from a World Legal History perspective, will attempt to stand on Professor Berman's broad scholarly shoulders to see whether his Western European theses and themes can be extended even further, under cross-cultural scrutiny.<sup>134</sup>

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132. See generally G. SJOBERG, *supra* note 130.

133. H. BERMAN, *supra* note 1, at 636.

134. This reviewer intends, perhaps on retirement, to edit a collection of readings along the lines of his World Legal History course. That, however, falls far short of the task which needs attempting—projecting a work like *Law and Revolution* onto a world plane. When some world legal historian, somewhere, accomplishes such a task, this reviewer only hopes that he may then have an opportunity also to applaud those efforts.

