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Law and Belief in Three Revolutions

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LAW AND BELIEF IN THREE REVOLUTIONS*

HAROLD J. BERMAN**

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I. GENERAL INTRODUCTION

Periodically in the history of the West there have occurred revolutionary changes in the predominant system of beliefs held by the people of a given country or countries. Thus in the early sixteenth century the rise of Protestantism, especially in its Lutheran form, reflected a major shift in the belief system of most persons—not only of Protestants—living in the numerous polities that then made up the German Empire. Some four generations later, in the mid-seventeenth century, various Calvinist and neo-Calvinist beliefs became predominant in English social life, espoused not only by Puritans and other so-called Non-Conformists but also by many who remained loyal to Anglicanism. And then in the late eighteenth century Deism became strong, especially in France, and a new outlook came to prevail, called the Enlightenment, which was essentially individualistic and rationalistic; this outlook found expression in the French Revolution of 1789.

These shifts in religious outlook—from Lutheranism to neo-Calvinism to Enlightened Deism—were accompanied by parallel shifts.

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in the dominant political and constitutional outlook. Sixteenth-century German Lutheranism was associated with a new belief in the supremacy of the Prince, with his courtiers and civil servants. Seventeenth-century English Puritanism and Anglicanism were associated with a new belief in the supremacy of an essentially aristocratic Parliament over the Crown and the Church, and in the independence of the judiciary. Eighteenth-century French Deism and the Enlightenment were associated with a new belief in democracy and the rule of public opinion through a popularly elected legislature.

The interconnections between religious change and political-constitutional change in these three periods of European history have been explored in many books, and in that context certain changes in legal philosophy have also been discussed. Strangely, however, no one, so far as I know, has attempted to relate the changes in the legal system as a whole in any of the three periods—that is, the German legal system in the sixteenth century, the English legal system in the seventeenth century, and the French legal system in the late eighteenth and early nineteenth centuries—to the revolutionary changes that took place in the belief system. We have many studies of the relationship of German Protestantism, of English Puritanism, and of the French Enlightenment to political developments, to economic developments, to social developments, to the development of scientific thought—to virtually everything except the development of the characteristic legal institutions by which these nations were governed: judicial procedure, criminal law, contracts, property, business associations, family law, and the like.

But even apart from the paucity of such historical studies, our scholarship is woefully weak in discerning contemporary relationships between the legal institutions of a society and that society’s underlying system of ideas, ideals, or beliefs. We gladly reach out for an explanation of legal institutions in terms of the economic or political or social “interests” or “policies” that they support. But we are considerably less interested in identifying what Roscoe Pound once called “jural postulates”—the specific philosophical or moral assumptions implicit in specific legal institutions—and in relating those jural postulates to other postulates upon which our social order rests.

Our predilection for political, economic, and social explanations of legal development, and our corresponding aversion to philosophical and religious explanations, seem 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 cor-
rect 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 interests but also to reflect its ideas of rightness and of justice. Indeed, if we look to those regimes of recent history in which law was most openly subordinated to the ulterior political-economic-social ends of dictatorial power, namely, those of Hitler and Stalin, then we see immediately that even the legal systems instituted by these two tyrants strongly reflected their respective philosophies—indeed, their religions, for both Stalin's atheist socialism and Hitler's pagan racism were themselves, in an important sense, religions.

If Communist law reflects a Communist belief system, then surely it is at least plausible to suppose that the legal institutions introduced by the Lutheran princes of German territories in the sixteenth century reflected a Lutheran belief system; that the legal institutions introduced by the Puritan rulers of England in the 1640's and 1650's, and those that were later reaffirmed by their Anglican successors of the 1660's to 1690's, reflected Puritan and Anglican belief systems; and that the legal changes introduced in France after the French Revolution reflected the values, the postulates, the beliefs of the Enlightenment.

It should be emphasized that I am not now talking about "causation." I am not arguing that legal changes are caused by religious or ideological changes. I am talking rather about interconnections, interrelationships, whether or not causal. To take an example: the Puritan emphasis on the moral sanctity of an undertaking may or may not have been a "cause" of the development of the English doctrine of strict liability for breach of contract—a doctrine first clearly laid down in the case of Paradine and Jane, decided by the Court of King's Bench in 1648, at the height of the Puritan Revolution; but the interconnections between the religious postulate and the legal postulate need to be understood if either one is to be understood.

Yet one can read the entire scholarly literature on the history of Germany, England, and France in the sixteenth to nineteenth centuries without finding more than oblique references to such interconnections between legal institutions and fundamental beliefs.

This, then, is the first argument of these lectures, and, indeed the main point. It is a simple one, which I hope that even skeptics of my larger historical perspective would accept: that the new law that emerged in Germany at the time of the Protestant Reformation must be studied in connection with the beliefs to which the Protestant Reformers were committed, including not only their theology in
the narrow sense but also their social theories; similarly, that the new law that emerged in England as a result of the upheavals of 1640 to 1689 must be seen in the light of changes in belief that took place during that period, including not only religious belief but also political belief, scientific belief, and other aspects of the belief system; and finally, that the new law that emerged in France—and also in America—in the last years of the eighteenth and the early part of the nineteenth centuries must be understood as part of a shift in the entire system of beliefs that took place in the West at that time.

Why should legal history be viewed in this way? The answer is, once again, elementary: such a view, by helping us to understand the beliefs with which our legal institutions have been associated in the past, will help us also to anticipate the consequences of the decline of those beliefs for the development of law in the future. For at the end of the twentieth century we live once again in the wake of revolutionary upheavals and revolutionary changes both in our legal system and in our general system of beliefs. If we do not understand the close relationship between our legal system and our belief system, we will be unable, in my view, to change either the one or the other to meet the needs that confront us.

II. The Lutheran Reformation and German Law

The Religious Reformation

The fifteenth century was something like the twentieth: then, as now, the West lived, in Matthew Arnold's famous phrase, "between two worlds, one dead, the other powerless to be born." Then there was widespread clamor for a thoroughgoing reformation both of the church and of the secular order. In the early part of the century the religious revolt of the Hussites was put down, and the conciliar movement within the church was aborted. In the latter decades the campaign by the Northern humanists—Erasmus is the most famous name among them—for more civilized, more humane ecclesiastical policies met with only a weak response from the papal hierarchy, which by that time had sunk into the deepest corruption.

The demand for reformation extended also to the secular realm. As early as 1438, the German Emperor Sigismund himself proposed thoroughgoing secular changes, which he expressly called a "Reformation." Little came of it. The depressed peasant masses revolted sporadically without success. There was great poverty and unrest in the German cities as well, and many unsuccessful proposals for urban "reformations." The cities, in turn, put great economic and social pressure on the depressed knightly class, which itself eventually rose
up in revolt—again, without success.

Throughout Europe the central political authority was increasing its power, especially vis-à-vis the church and the feudal authorities. The growth of national political consciousness in the fifteenth century was reflected especially in the strengthening of royal power in England, France, Spain, Austria, and the German principalities. Secular authority was also becoming stronger in the cities. Everywhere the church was increasingly on the defensive.¹

In hindsight we can see that things were building up for an explosion. This was also recognized by many at the time, and many important changes were made in order to forestall such an explosion. None of them, however, prior to Luther, addressed the crucial problem of the times, namely, in Myron Gilmore's words, that "the Gregorian Revolution had finally failed." "The idea that secular government was directed ultimately to the attainment of grace or justice," Gilmore writes, "[was] no longer taken seriously."² In other words, the secular world could no longer derive its ultimate meaning from the tasks set for it by the Church of Rome. And there was no other Church!

The Gregorian Revolution of the late eleventh and early twelfth centuries had expressed itself in a revision of the ancient "two swords" theory. As revised by Pope Gregory VII and his successors, the theory postulated that the Church, conceived now as the priesthood, operating under the papal monarchy, had jurisdiction, that is, lawmaking power, over the spiritual life of Christendom. That was the "spiritual sword." It was limited, to be sure, by the "secular sword" wielded by kings, feudal lords, urban authorities, and others. Yet ultimately, the spiritual sword of the Church was to guide the secular authorities into the paths of truth and righteousness. It was the visible Church, under the papacy, that set the rules for leading the good life by which sinful man could be saved. Implicit in this division of jurisdictions was the doctrine that the forgiveness of sins and the salvation of souls rested not only on the faith of the sinner but also on his good deeds, and that the performance of good deeds depended, in turn, partly on his will and reason.

2. M. GILMORE, THE WORLD OF HUMANISM 135 (1952). Gilmore adds: "Given that problem, the thinkers of the age occupied themselves with finding a new justification and meaning for the secular world. This is the theme that not only unites Luther, More and Machiavelli, but it is also the theme that gives their writing its 'modern' tone." Id. On the Papal ("Gregorian") Revolution, see H.J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION, Chap. 2 (1983).
Luther started a revolution by addressing the question of ecclesiastical authority directly and in the most radical terms. He proclaimed the abolition of the ecclesiastical jurisdiction. This was the underlying significance of his 95 theses denouncing papal indulgences in 1517: it was not merely that he was against abuses of papal authority—it was that he denied the validity of the canon law altogether. No priest, he said, is authorized to come between God and the individual human soul that seeks forgiveness for sins. Therefore no priest can promulgate the laws by which Christians should live. The Church, Luther said, has no authority to declare laws at all. It is not a lawmaking institution. The Church is, rather, the invisible community of all believers in which all are priests, serving each other, and each is a "private person" in his relation to God. Each responds to the Bible as the Word of God.3

In testimony to his abolition of ecclesiastical jurisdiction, Luther in 1521 publicly burned the Papal Bull which excommunicated him, together with canon law books supporting the Bull. The Emperor of Germany, Austria, and Switzerland ("the Holy Roman Empire of the German Nation"), supported by the Imperial diet (Reichstag), outlawed Luther; however, his own prince protected him and in 1529 the Lutheran princes and city representatives "protested" the Imperial decrees, and civil war broke out. (It is from this protest that the name "Protestant" is derived.) The princes formed a religious party, the Protestant League, which in 1552, with the help of France, defeated the Emperor. Finally, in 1555, at Augsburg, a religious peace was made, whereby each of the various principalities of the Empire was empowered to establish its own form of religion, either Catholic or Protestant. The religion chosen by the prince was to be the religion of all people in the territory which he ruled—cuius regio eius religio, "he who rules shall establish his religion."4

Luther replaced the Gregorian "two swords" theory with a new "two kingdoms" theory. The Church, he taught, belongs to the heavenly kingdom of grace and faith; it is governed by the Gospel. The


4. The political history of the Reformation in Germany is well told in 1 H. HOLBORN, A HISTORY OF MODERN GERMANY, THE REFORMATION (1959) and in many other works.
earthly kingdom, the kingdom of "this world," is the kingdom of sin and death; it is governed by Law. It is the secular authority alone which governs the secular society.

Luther withdrew from the church its character as a sword-wielding entity—a visible, corporate, hierarchical, political and legal community. Instead, the church was to be a purely spiritual community, part of the heavenly realm of peace, joy, grace, salvation, and glory. This concept of the church was based on the pivotal doctrine of justification by faith. Luther denied that a person could work his way, so to speak, into the heavenly kingdom. Nothing that a person does can "save" him, that is, can make him acceptable to God. Man's fallen nature, his depravity, his essential selfishness, penetrates everything he does—indeed everything he thinks and everything he wants. Therefore salvation is only by grace, which is only bestowed on those who have faith. For this, no mediation by a priesthood is needed, or possible.

But what about the earthly kingdom? Superficially understood, Luther's doctrine seems to take an entirely negative view of it. It is a realm of sin and death, and there is no way out of it by exercise of will or reason. Politics and law are not a path to grace and faith. But are not grace and faith a path to the right politics and the right law?

Here Luther was torn between his belief in man's essential wickedness and his belief that that wickedness itself, and the earthly realm which embodies it, are ordained by God. This dilemma is resolved in part by the doctrine of "the uses of the law." The moral law as well as the law of civil society are ordained, first, in order to make people conscious of their obligations and hence repentant of their sins (the "theological use" of the law), and second, in order to deter recalcitrant people from misconduct by threat of penalties (the "civil use" of the law). Some Lutherans, at least, and most Calvinists, also accepted a third use of the law, called its "didactic" or "pedagogical" use, namely, to guide faithful people in the paths of virtuous living.

Even more important, however, than the doctrine of the uses of the law in explaining Luther's view of the earthly realm was his assumption that its ruler would himself be a Christian and would treat his princely responsibilities as a Christian calling. As the Christian prince, according to Luther, is a private person in his relation with God, "a person for himself alone," so he is a social person, a "person for the sake of others," in his calling as a prince. As such, he should be inspired to serve his people. He should seek to govern in a decent and godly way. He should strive to promote the well-being of his sub-
jects. The Lutheran prince was essentially different from the prince of Niccolò Machiavelli, Luther's contemporary. Machiavelli also believed in the secular state, removed from the divine law, but Machiavelli's prince was to act solely from considerations of power politics, whereas Luther's prince was to strive also to do justice. In this respect, secular politics and law in Protestant principalities continued the older Roman Catholic tradition, though from a different theological and philosophical perspective. The older tradition taught that law is based ultimately on reason and on man's natural inclination toward justice, and that human law, to be valid, must ultimately reflect natural law and divine law. Lutheranism taught, on the contrary, that man's reason and man's will are essentially corrupt, and that human law cannot help but partake of this corruption. Nevertheless, Lutheranism also taught that the Christian lawmaker can and should do his utmost to use his reason and his will to serve God. This was required both by Scripture and by natural law—"the law written in the hearts of men" (Romans 1:18). Further, it was the task of the Christian pastor to preach the Gospel to the prince in order to inspire him to fulfill his calling. Indeed, Luther expanded the concept of "calling," which previously had been applied solely to the clergy, to include the mission of every person to perform his social role in a manner pleasing to God.

Thus the connection between law and religion was preserved by the Lutheran doctrine of the Two Kingdoms, coupled with the concept of the Christian calling. Politics and law were not paths to grace and faith, but grace and faith remained paths to right politics and right law. The Christian was supposed to be law-abiding, and the law of a Christian prince was supposed to achieve both order and justice. Law was supposed to induce people to avoid evil, to cooperate, and to serve the community. The Christian was not to think that by doing good he could earn credits in heaven; nevertheless, he was to use his will and reason—with full consciousness of their defective nature—to do as much good as possible.

And so, ultimately, Luther took a positive view of secular law. More important, the Protestant Reformation which he inaugurated made substantial contributions to the development of law in Germany and elsewhere. In the words of the great German jurists and historian Rudolph Sohm, "Luther's Reformation was a renewal not only of faith but also of the world: both the world of spiritual life and the world of law."5

5. R. Sohm, Welthisches und geistliches Recht 69 (1914).
By "the secular authority," Luther meant, above all, the prince; and it was the alliance of Luther with the prince of his own territory, Saxony, and eventually the alliance of Lutherans with other princes, that secured the victory of Protestantism in the territories inhabited by a majority of the people of the German Empire. It was this alliance and this victory which I would call "the German Revolution." Each prince became head of the church in his principality. Not only did his choice of religion determine the established religion of the principality, under the doctrine cuius regio eius religio, but the Protestant prince exercised legislative, administrative, and judicial powers over the temporal affairs of the church in his territory. Lutheranism thus strengthened the authority of the prince—not only in Germany but also in other parts of Europe to which it penetrated.

Moreover, Lutheran support for the authority of the prince was not merely a matter of political strategy. It was a matter of theology as well. Luther found in Scripture and in Christian faith the source of royal power. Under the Fourth Commandment, he said, the citizen owes the same duty of obedience to the prince that the child owes to a father, the wife to a husband, or the individual to God. "The powers that be," in St. Paul's words, "are ordained by God" (Romans 13:11).

The Legal Reformation

I have given the very briefest account of some familiar features of Lutheran religious thought and of their significance for political and legal theory. I would like now to give the very briefest account of some basic changes in German law that took place in Luther's lifetime. My hope is to lay a foundation for some concluding remarks on the interconnections between these two reformations—the reform of religion and the reform of law in Germany.

Germany in 1500 formed an Empire, called the Holy Roman Empire of the German Nation. The German Emperor might rule territories outside of Germany as well, depending to a certain extent on his marital connections. But even the German part of the Empire was a very loose and a very weak structure. Within it there were an incredibly large number of principalities—some 350 all told. These ranged from very large territories (Länder), such as Saxony, Bohemia, Bavaria, Swabia, and others, some of which were sizeable kingdoms, to small counties and towns, and from large archbishoprics to small abbeys (some 120 of the principalities were ecclesiastical). In previous centuries the emperor had had very little control over the law by which the constituent principalities were governed. In 1495 Emperor
Maximilian finally succeeded in establishing a permanent imperial high court to hear some important cases, and in 1532 Emperor Charles V issued the first important modern imperial legislation, a code of criminal law and procedure. Even then, the principalities had a decisive voice in determining whether to be bound by that code.

Nineteenth and twentieth century German historians have complained bitterly about the fragmentation of Germany; they have envied France and England, which had already achieved a higher degree of national political unity in the fourteenth and fifteenth centuries. Yet the absence of strong political and legal institutions at the imperial level did not necessarily signify disunity. In fact, there had developed in the twelfth to fifteenth centuries in Germany a very strong “common law” on several levels. In the first place, the law applied in the German ecclesiastical courts was the *jus canonicum*, or canon law, common to the whole of Western Europe. For the peoples of Germany, as for all other peoples of Western Christendom, bishops' courts applied the learned law taught in virtually all the European universities, consisting partly of papal and conciliar legislation and papal court decisions (decretals), partly of Gratian's *Decretum* and other great treatises, and partly also of Roman law as reflected in the texts of Justinian that had been rediscovered in Italy in the late eleventh century and had been glossed, commented on, and systematized by many generations of scholars. Both canon law and Roman law were called *jus commune*, "common law."

In addition to canon law, with its Roman law component, Germany was governed, secondly, by a common customary law, including a common customary local law and a common customary feudal law; this was systematized in the *Sachsenspiegel* of 1220 and in other private German lawbooks which in fact had a quasi-official validity everywhere. Thirdly, many hundreds of German cities had adopted the collections of laws and had followed the court decisions of several leading cities, which, in turn, had many features in common. Finally, the *Länder*, in developing their own judicial and other legal institutions, borrowed extensively from each other. The widespread notion,
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then, that in comparison with other European countries, pre-Reformation Germany was fragmented in its legal development and backward in legal sophistication needs to be substantially revised.

On the other hand, the legal institutions of pre-Reformation Germany were indeed in great need of reform. The reasons were manifold; let me give two. First, there was an enormous problem of crime, especially on the highways. Huge numbers of wanderers—unemployed vagabonds, robbers, gypsies, ex-monks, ex-students, and others—were at large. The traditional local criminal law, based as it was on more stable conditions, was not adequate to deal effectively with widespread and mobile crime of a quasi-professional character. Second, the ecclesiastical courts, which had had an extremely broad civil and criminal jurisdiction in Germany, even broader, it is usually said, than in England, were losing substantial parts of that jurisdiction, especially to city and princely courts, whose procedures and norms were, once again, not well adapted to the increased number and variety of cases.

Here it is necessary to say more about the nature of the German secular courts in the period before the Reformation. For centuries there had existed in Germany, at the city and territorial level as well as at the imperial level, a tradition and a system of judging by tribunals composed of a number of prominent laymen, called Schoeffen ("assessors"), who sat with an official called a Richter ("director"). The word Richter, of course, now means "judge," but prior to the Reformation period, the Schoeffen were the Urteiler, the "judges"—they gave "judgment." This tradition and this system was fundamental to the development of German secular law in the twelfth to fifteenth centuries. The chief source of that law was custom, and the Schoeffen, being responsible, intelligent, educated (though not university-trained) leaders in the community, knew the custom or else were capable of finding it out. The fact that a substantial part of the customary law came to be expressed in written treatises, such as the Sachsenspiegel, or in written collections of city laws, did not change its character; it was presupposed in the written texts themselves that the law contained therein remained customary law, to be found and developed by benches of amateur, part-time Schoeffen sitting under the direction of an official Richter.

It was this tradition and this system which came under challenge in the late fifteenth and early sixteenth centuries. Eventually it gave way, first, to a system of tribunals consisting entirely of professional university-trained judges—officials educated in the kind of learned law that hitherto in Germany had been practiced only in the ecclesiastical courts; and second, to a tradition of law whose principal
source was not custom but rather legislation—not, to be sure, legislation in the contemporary sense, but legislation in the sense of a system of written rules contained in authoritative texts.

This change, which a distinguished German legal historian refers to as the Verwissenschaftlichung of German law—literally, the "scientificizing," the rationalizing and systematizing of it as a body of authoritative rules—did not, of course, come all at once. At first, important learned officials were named by the territorial princes to preside at the trials as Richter; eventually, the princes began to choose trained jurists to be Schoeffen; finally, the courts became wholly professional and the Schoeffen more or less disappeared.

Moreover, the "scientific" element in law—perhaps we should call it the "intellectual" element—was given its ultimate expression in the practice, which first became widespread in the sixteenth century, of submitting the most difficult cases to law professors, that is, to university law faculties, for decision.

Courts of territories and of cities as well as the Imperial High Court itself, when faced with a particularly difficult application of the law, were supposed to send the entire file of the case to a law faculty, and the law professors would study and discuss the case and render a reasoned judgment binding upon the court. Called Aktenversendung, "the sending of the file," this institution, which lasted in Germany until 1878, was not only highly lucrative for the professors; it also had an enormous influence on the substance as well as on the style of German law. It reflected and embodied an emphasis—new for the German secular courts—on written (instead of oral) procedure, on secrecy (instead of publicity) of proceedings, and on separation of issues of fact (on which findings below were final) from issues of law (on which errors below were subject to appeal). Even more fundamental was the shift from the concept that the court was to find the law, and thereby "set right what was wrong," to the concept that the court

9. F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 131 ff. (1967). Another prominent German historian defines the legal reformation of this period as the "gelehrte Bearbeitungen des einheimischen Rechts." H. HATTENHAUER and A. BUSCHMANN, TEXTBUCH DER PRIVATRECHTSGESCHICHTE DER NEUZEIT 11 (1967).

was to apply the law, that is, bring the case before it under the appropriate rule "by a process of logical subsumption." The latter intellectual process necessarily involved a new kind of systematization of legal rules.

We may understand better the significance of the "scientificization" of German law in the last years of the fifteenth and the first half of the sixteenth century if we examine its connection with the reform of criminal law and procedure. I have already mentioned that there was an enormous increase in violent crime in the late fifteenth century. Governmental authorities reacted by harsh measures of law enforcement. This, in turn, produced its own reaction. In 1497-1498 the Imperial Reichstag of Freiburg resolved: "Because complaints have been brought to [the imperial] court against princes, imperial cities, and other authorities, that they have allowed innocent people to be condemned to death and executed unlawfully and without sufficient cause... it is therefore necessary to undertake a general reforma-

11. F. WIEACKER, supra note 9, at 188.

12. Legal "reformations" preceded or accompanied religious "reformations" in major cities, including Nürnberg (1479), Worms (c. 1499), Frankfurt (1509, 1578), and Freiburg (1520). For a general survey of the city reformations, see B. MOELLER, IMPERIAL CITIES AND THE REFORMATION (1972) and S. OPMENT, THE REFORMATION AND THE CITIES (1972). For detailed studies of the legal reformations in individual cities, see for Nürnberg, J.W. ELLINGER, DIE JURISTEN DER REICHSTADT NÜRNBERG VOM 15. BIS 17. JÄHRHUNDERT (1954); A. GEDEON, ZUR REZEPTION DES RÖMISCHEN PRIVATRECHTS IN NÜRNBERG (1957); F. WINTER, BEITRÄGE UND ERLÄUTERUNGEN ZU GESCHICHTE UND RECHT DER NÜRNBERGER REFORMATION (1903); D. WALDMANN, ENTSTEHUNG DER NÜRNBERGER REFORMATION VON 1479 (1908). For Worms, see C. Koehe, DIE WORMSER REFORMATION VOM JAHRE 1499 (1897); id., Der Ursprung der Stadtverfassung in Worms, Speier, und Mainz, in OTTO VON GIERKE, UNTERSUCHUNGEN ZUR DEUTSCHEN STAAT-UND RECHTSGESCHICHTE (1890). For Frankfurt, see H. COING, DIE FRANKFURTER REFORMATION VON 1578 (1935); id., DIE REZEPTION DES RÖMISCHEN RECHTS IN FRANKFURT AM MAIN (1939, 1962). For Freiburg, see H. Knoch, ULRICH ZASIO UND DES FREIBURGER STADTRECHT VON 1520 (1957). A collection of city codes of this period may be found in W. KUNKEL ET AL., QUELLEN ZUR NEUEREN PRIVATRECHTSGESCHICHTE DEUTSCHLANDS I (1936).

Apart from city reformations, the Polizeiordnungen, promulgated first by the Empire and later by the Länder, became new sources of private law. Although Stobbe had emphasized their significance as early as 1860, later scholars subordinated them to what they called "the Reception of Roman Law" of the late fifteenth and early sixteenth centuries. More recent scholarship has placed that "Reception" much earlier and has revived interest in the Polizeiordnungen. See O. von STOBBE, GESCHICHTE DER DEUTSCHEN RECHTSGESELLSCHAFT, II, 200, 220, 229 ff. (1860); id., HANDBUCH DES DEUTSCHEN PRIVATRECHTS, I-V (1864); W. TRUSEN, ANFANG DES GELEHRTE RECHTS IN DEUTSCHLAND (1962). The best survey of the Polizeiordnungen is G.K. SCHMELZILEIEN, POLIZEIORDNUNGEN UND PRIVATRECHTS (1955). KUNKEL, QUELLEN ZUR NEUEREN PRIVATRECHTSGESCHICHTE DEUTSCHLANDS II (1968), includes many of the original ordinances.
tion and ordering in the Empire of the mode of proceeding in criminal matters.”

In light of our situation today, we can appreciate the poignancy of the conflict that raged in Germany at the end of the fifteenth and the beginning of the sixteenth century between adherents of what we would now call the “crime control” and the “due process” “models” of criminal procedure. We can also admire their resolutions of this conflict.

The great name, the great man, in criminal law reform was Johann von Schwarzenberg. He was born twenty years before Luther in a noble family in the episcopal principality of Bamberg. He eventually became the chief official (Hofmeister) of Bamberg, under the bishop, and sat as chief judge of the Bamberg high court. He was a man of great intelligence and dedication, a deeply religious person, very widely read, a folk-poet, with many learned friends, though he himself had not had a university training and did not know Latin. In 1507, when Schwarzenberg was in his early forties, he produced for Bamberg a code of criminal law and procedure that acquired almost instant fame throughout Germany. Other principalities copied it. The Emperor Charles V eventually employed Schwarzenberg to rework his code for adoption by the Empire and in 1532, a few years after Schwarzenberg’s death, the imperial code, called the Constitutio Criminalis Carolina, or Carolina for short, closely modelled on the Bamberg code, was in fact adopted.

14. A short biography and appreciation of Schwarzenberg is given in E. WOLF, GROSSE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE 92-128 (1963). The emphasis placed here on Schwarzenberg is not intended to exclude the importance of other great German jurists of the time, notably the famous Ulrich Zasius, an inspired scholar of Roman, canon, and civil law, a friend of Erasmus, an admirer and associate of Luther, and author of the Freiburg legal reformation of 1520. Zasius is sometimes said to be the jurist who best synthesized the Lutheran Reformation and the new humanism of Erasmus in their application to law. See Wolf, 55-92; id.; QUELLENBUCH ZUR GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT 7-48 (1949); R. STINTZING, Ulrich ZASIUS: EIN BEITRAG ZUR GESCHICHTE DER RECHTSWISSENSCHAFT IM ZEITALTER DER REFORMATION (1857); Knoche, supra note 11; R. SCHMIDT. ZASIUS UND SEINE STELLE IN DER RECHTSWISSENSCHAFT (1904); G. KISCH. ZASIUS UND REUCHLIN (1961); id., ERASMUS UND DIE JURISPRUDENZ SEINER ZEIT 317-43 (1960). Recently Steven W. Rowan has emphasized the theological and humanistic contributions of Zasius. See, e.g., S. ROWAN, Ulrich Zasius and the Baptism of Jewish Children, 6 SIXTEENTH CENTURY JOURNAL 3 (1975) and U. ZASIUS, DEATH PENALTY FOR ANABAPTISTS IN BIBLIOTHEQUE D’HUMANISME ET RENAISSANCE 527 (1979).
15. With the creation of the Reichskammergericht in 1495 came a movement to systematize an imperial criminal law that would be valid throughout the Empire.
Schwarzenberg's code was the first of its kind in history—that is, the first systematic codification of a single branch of law. There had been, to be sure, in the previous three centuries, systematic treatises on particular branches of law, including criminal law and procedure, written by canonist and Romanist legal scholars; and Schwarzenberg drew heavily on concepts and definitions contained in some of those treatises. Yet those treatises, though often treated by European courts as authoritative, were not legislation; they were not the same as comprehensive statutes promulgated by the legislative power of the state. Such comprehensive statutes on particular branches of law began to be promulgated in various German cities in the last decade of the 15th century. Schwarzenberg built on that practice. His genius was not that of a scholar but that of a judge, an administrator, and, ultimately, a legislator. Erik Wolf has called him "the great German legislator of the Reformation period."  

The starting-point of Schwarzenberg's Bamberg code of 1507—and hence of the Carolina as well—was the existing secular law of Bamberg as reflected in contemporary judicial practice. To this were added basic rules of the common law, as it was called, generally recognized throughout the Empire, which in turn were influenced by the categories of canon law, and to a certain extent Roman law, especially with regard to definitions of types of offenses. A third element was the conceptual framework that had been developed since the end of the thirteenth century by outstanding European canonists and Romanists, especially the Italians Durantis, Gandinus, Bartolus, Baldus, and others. Finally, the whole was permeated with a spirit of reform, and in this connection Schwarzenberg drew not only on the Bamberg court reform of 1503, of which he himself had been the chief author, but also on the so-called reformations of city law in Nürnberg, in Worms, and elsewhere. His own chief personal contribution, as Wolf has said, was synthesis, based on the two fundamental principles of "justice and the common weal" (Gerechtigkeit und Gemeinnutz).  

Of critical importance was the combination of systematic legal science with a procedure still characterized by lay participation. The

The attempts to introduce a systematic criminal statute (constitutio) at the imperial diets of 1521 and 1530 foundered on territorial and city opposition. See G. Krodel, Law, Order, and the Almighty Taler: The Empire in Action at the 1530 Diet of Augsburg, 12 SIXTEENTH CENTURY JOURNAL 75-106 (1982). The Carolina remained subject to variation in the individual polities within the Empire.

16.  WOLF, Grosse Rechtsdenker, supra note 14 at 96 ff., 109 ff.
17.  Id. at 109. Cf. Carolina, art. 104.
code was to govern the Schoeffen; therefore, it had to be understand-
able to them; and for that purpose Schwarzenberg wrote it in clear, strong German. Three hundred years later—in 1814—the great Ger-
man jurist Savigny was to say that no German legislation of the eigh-
teenth century could compare with the Carolina in seriousness and strength.

Incidentally, Schwarzenberg scattered little poems—rhymed couplets—through the various sections of his code, in order to dramatize the meaning of the rules and to make it easier to remember them. He also inserted many handsome woodcuts, with similar effect.

The purpose of codifying the criminal law was not to make the Schoeffen into learned jurists. Nor was the purpose to import a foreign law. The purpose was, rather, to reform the German secular law and, in that connection, to give it the benefit of the legal science that had developed first in the church courts and second in the scholarly literature of the university jurists.

Some of the major changes in secular German criminal law em-
bodyed in the Bamberg code and later in the Carolina are the following:

— Most major crimes were defined in a systematic way. Concepts such as self-defense, complicity, and attempt were defined. Emphasis was placed on intent, causation, and exculpating circumstances.

— Private criminal prosecutions were severely limited. Archaic forms of private remedies, such as wergeld, were finally eliminated. Proof by oath-helping was finally eliminated.

— The power of officials, the Obrigkeit, to initiate and carry out criminal prosecution was enhanced, while at the same time limits on their power were set with care. The proceedings were to take the form of an inquest, that is, an official investigation (Inquisition), with the judges inquiring and collecting evidence. The Schoeffen were to operate under the supervision of officials.

— The extraordinary procedures against persons charged merely with being socially harmful ("of evil repute") were eliminated. (These procedures, summary and harsh, together with the vagueness of the charges, had been a main source of complaint against unjust repress-

— The system of cruel punishments (including, for example, burial alive in the case of some crimes) was alleviated to some extent.

— High standards of proof were set. For capital crimes, in addi-
tion to convincing proof of each element of the crime it was required

http://scholar.valpo.edu/vulr/vol18/iss3/1
that there be two eye-witnesses or else a confession reiterated voluntarily in court. In such cases, unless there were two eye-witnesses, torture was permitted in order to extract a confession. However, such torture could only be used if there was sufficient evidence to convict without a confession.

—The Schoeffen were instructed repeatedly, in various contexts, that in difficult cases they should “seek counsel” of those who are “learned in the law”—a reference to the institution of the Aktenversendung.

_Law AND Belief in the German Reformation_

I come, finally, in our consideration of the Lutheran Reformation and German law, to the word “and.”

A leading contemporary Roman Catholic theologian told a friend that he had been asked to give a talk on “Freedom and the Church.” His friend said, “Of course you know a great deal about freedom, and you are a recognized expert on the church. But I think you will have a lot of difficulty with the ‘and’.”

By focusing attention on Schwarzenberg’s great reform of German criminal law—first enacted ten years before Luther’s denunciation of papal indulgences—I seem to have foreclosed any argument that the great changes in German law in the sixteenth century were caused by the Lutheran Reformation. It is true that the Carolina was not enacted until fifteen years after Luther took his stand, but it was based on Schwarzenberg’s earlier work and, moreover, it was promulgated by Emperor Charles V, an archfoe of Lutheranism.

On the other hand, Schwarzenberg did become a Lutheran. Indeed, he became an ardent and prominent Lutheran, corresponded with Luther, and wrote tracts in defense of Lutheranism. While he was working for the Emperor to prepare the Carolina, Schwarzenberg used his position to protect Luther and Lutherans from repression.

No doubt it is partly because the reformation of German law began before the reformation of the church, and partly because it was supported by many Catholics as well as by many Protestants (and also was opposed by many in both camps), that historians have generally ignored the relationship between the two reformations, the legal and the religious. Yet the fact that Lutheranism did not “cause” the Carolina, in some simple post hoc—propter hoc sense of causation, does not mean that the two may properly be viewed as independent of each other. The biography of Johann von Schwarzenberg suggests that the word “and” in this context has a more complex meaning.
The complexities multiply when we add other factors to the equation: the New Humanism, the so-called Reception of Roman Law, the increased importance of nationalism, the expansion of commerce, the exploration of new continents, and others. I mention these only to show some of the dimensions of the word "and," and some of the limits of my inquiry into it here. I am focusing simply on some of the connections between the Lutheran Reformation of the church in Germany in the early sixteenth century "and" the movement to reform German law.

There were clear political connections. Although the transfer to territorial and city courts of matters previously within the jurisdiction of the ecclesiastical courts had started well before Luther, this secularization—which was an important stimulus of the law reform movement—cannot be separated from Lutheranism. It received a tremendous impetus from the Lutheran attack on the very concept of ecclesiastical jurisdiction. With the abolition of the ecclesiastical courts in the Protestant principalities, the secular courts took jurisdiction over the crimes of heresy, blasphemy, sumptuousness of dress, and other religious and moral offenses. There was a secularization also of the canon law of marriage and divorce, wills, charitable foundations, and other civil matters previously within the ecclesiastical jurisdiction. Secular public schools and libraries were established to replace cathedral schools and libraries, and all universities were placed under civil authority. Poor relief, protection of widows and orphans, medical care, and other forms of public welfare, which previously had been chiefly the responsibility of monastic and other ecclesiastical charitable foundations, were now left to the secular authority and to secular law.

Also jurisdiction over the church itself was transferred from the ecclesiastical to the secular authority. The Protestant prince became the head of the churches in his principality. He was now responsible for the development of a body of secular ecclesiastical law for the government of their temporal affairs.

Moreover, the Protestant princes, lacking a Roman Catholic clergy trained to administer the affairs of state, developed a secular civil service to constitute their advisors, administrators, judges, diplomats, and other officers. The Lutheran Reformation enhanced immeasurably the authority not only of the prince but also of the prince's official retinue, the Obrigkeit. In addition, it was a pan-German Obrigkeit, for German civil servants could go from one prince to another, just as the university professors could go from the university of one principality to that of another. This extraordinary mobility of
the civil service, which contributed to its strong sense of calling, distinguished Germany from England and France in the period of what is usually called absolute monarchy in Europe.\(^1\)

Thus far I have stressed political connections between the religious reformation and the legal reformation. As a political matter, the suppression of ecclesiastical jurisdiction, which Lutherans demanded on theological grounds, inevitably resulted in a further rapid expansion of secular jurisdiction; and this expansion inevitably gave the opportunity to reform the substantive secular law which was to be applied.

There were, in addition, what might be called intellectual connections between the legal and the religious reformations. It is interesting, for example, to compare the rhetoric and style of the Carolina with the rhetoric and style of Luther's translation of the Bible and his commentaries on it. The Carolina—like Schwarzenberg's Bamberg code before it—was written in clear, simple, vivid German, to be understood by the lay judges and lesser legal officials, untrained in law, who participated in German criminal proceedings, just as Luther's Bible and his commentaries were written in clear simple, vivid German, to be understood by all believers who could read them. One may even compare Schwarzenberg's use of figures and woodcuts with Luther's use of hymns.

The "scientific" character of the new criminal codes, and of the legal reformation generally, also linked them with Lutheranism. Like Lutheranism, the Carolina was intended to be comprehensive, systematic, integrated, complete; it proceeded from interlocking basic principles and showed their application to typical concrete situations. The Carolina was professors' law, just as Lutheranism was professors' theology, an attempt to embrace and unify the entire Christian belief-system.

The paradox of a systematic legal codification understandable to all literate subjects, like the paradox of a systematic Biblical theology understandable to all literate believers, was resolved by assigning a special role to university professors. Just as especially difficult cases involving application of the Carolina were to be sent to university law faculties for resolution, so especially difficult theological questions that troubled princes and pastors were to be resolved by university professors of theology. These practices reflected a profound trust not only in learning but also in the university, which

\(^{18}\) E. ROSENSTOCK-HUESSY, supra note 10, at 394-95. Rosenstock-Huessy's entire chapter on the German Reformation is filled with important insights.
in a sense replaced the papal curia.

I have mentioned political and intellectual connections between the legal changes and the religious changes in sixteenth-century Germany. There are even closer moral and philosophical connections. Both Lutheranism and the Carolina—again, I use the Carolina as one example of the overall legal reformation that took place—share a revulsion against cruelty and arbitrariness; both place a high value on humaneness and rationality. Yet both accept a certain amount of cruelty as inevitable—neither is willing to proclaim its complete abolition. Luther wrote, after the peasant rebellion of 1524, that “stern, hard civil rule is necessary in the world. . . . The civil sword shall and must be red and bloody.” Many other violent statements can be found in his voluminous writings. He was a revolutionary, fighting enemies by the most ruthless means. Yet the faith for which he fought was one through which love was to triumph over hatred, virtue over sin, reason over irrationality. Similarly, Schwarzenberg was a man of piety and idealism, one of whose main purposes was to put an end to the cruelty and arbitrariness that had infected German criminal law and procedure in the fifteenth century. Yet the Carolina, though it substantially limited torture, did not abolish it. It eliminated death

20. It is something of a mystery why the requirement of a confession was retained even after it had become, in effect, a formality. John Langbein takes the traditional view that with the abolition of the ordeal in 1215 by the Fourth Lateran Council, so-called statutory proofs—that is, by a confession or by two eyewitnesses—were introduced because of the prevailing distrust of judicial evaluation of so-called subjective proofs (circumstantial evidence, one eye-witness, prior statements of the accused, etc.). Torture was then perceived to be a logical consequence of the requirement of a confession. Thus Langbein concludes that “The Roman-canon system . . . was simply unworkable without torture.” J. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME 11 (1977). This argument neglects the point made elsewhere by Langbein (id. at 13) that in the realm of lesser offenses the “Roman-canon” system worked quite well without the requirement of statutory proofs. Apparently there was something about capital punishment that made the usual standards of proof inadequate to justify the imposition of the death sentence, though only persons who were guilty by ordinary standards could be required to confess. It may be that in these circumstances unwillingness to give up the requirement of two eyewitnesses or a confession (and hence the option of torture) in capital cases was due partly to the belief that for the good of his own soul a guilty person should be made to confess before he is executed. It may also have been due partly to the fact that a confession, even when extorted, could help the investigating authorities to “solve” the crime—it could help them, for example, to track down accomplices; and that may have seemed especially important in cases of the more serious offenses.

As Langbein shows, in the sixteenth and seventeenth centuries new forms of punishment for the most serious crimes—including imprisonment, galley service, workhouses, and banishment—developed alongside the death penalty, and to impose these milder sentences a confession was considered unnecessary and hence torture
by burial alive as the penalty for infanticide, but substituted death by drowning. It did not eliminate the crime of sorcery, but it did require proof that the act of sorcery caused harm.21

In terms of legal theory, conflicts between Schwarzenberg's two guiding principles, justice and the common weal—in other words, between humaneness and civil order—were to be reconciled by the wisdom of the prince, whose will was the source of all earthly law. Luther did not adopt the modern theory of legal positivism in its strict form. He acknowledged the independent existence of moral law, or natural law, which he identified sometimes as that which is known to the conscience and sometimes as that which is reflected in the spirit of the Mosaic law. He also left some room, though not much, for civil disobedience when the ruler commands his subject to act in evil or ungodly ways. Nevertheless, he attacked the belief that man can truly understand the will of God by his reason or truly reflect it in his law, and he attacked the concept of God as a God of reason and of law. Thus the moral law, or natural law, was associated for him with the earthly rather than the heavenly realm. These theological positions give support to the positivist view that the source of all law is in the will of the ruler. Because Lutheran theory, in contrast to Roman Catholic, did not consider human law to be a given, an integral part of the objective reality of God himself, it had to put the question: What are the uses of the law? Thus Luther took an essentially utilitarian view of law—which also is congenial to a modern positivist jurisprudence. Moreover, like the modern positivists, he considered the civil use of the law to be to deter misconduct by threat of penalties.

Modern positivist jurisprudence is often attacked for its neglect of justice as a necessary dimension of law. It should be stressed, therefore, that the tendencies toward positivist jurisprudence in Lutheran thought in the sixteenth century were not antagonistic, but in fact highly congenial, to the zeal for law reform in the direction of justice. Lutheran thought could accept philosophical propositions

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that law is the will of the ruler, that it operates by imposing sanctions for violations of rules, and that justice—indeed, reason itself—is corrupted by man's total depravity. Yet German Lutherans of the sixteenth century could not accept the Machiavellian view that makes human selfishness the basic principle of political action for the individual Christian, be he subject or prince. They were unwilling to abandon the earthly kingdom to its own Satanic devices. It was presupposed that the ruler would be a Christian prince.

The religious doctrine which, perhaps more than any other, guided sixteenth century Lutheranism between the Scylla of Machiavellian cynicism and the Charybdis of political passivity was the doctrine of the Christian calling. I have stressed earlier that the Gregorian Revolution had placed the responsibility to reform the secular society primarily on the priesthood: this was part of the two swords theory of the Roman Catholic Church in the late eleventh to sixteenth centuries. Protestantism placed that responsibility on every Christian, and especially on the prince and the Obrigkeit. Each was a "private person" in his relation to God; but each had a public responsibility in his calling.

In a civilization reduced almost to despair by the failure, after four centuries, of the Gregorian Revolution, this Lutheran vision gave a new meaning to secular life. It was this vision that gave Germany society the energy to renew its legal institutions. The fact that reform had been in the air for a hundred years before Luther only enhances the importance of his role as a catalytic agent in bringing it to fruition. But beyond that, it places the Revolution itself in a better perspective. It was not simply Luther's Revolution. It was also Schwarzenberg's. Indeed, it was Germany's Revolution, in which many participated who were not Lutherans. The precise chronological timing of their participation is not important for us. The Revolution should be judged in terms not of chronos but of kairos: it came in the fullness of time.

III. THE PURITAN REVOLUTION AND ENGLISH LAW

The religious upheaval that took place in England in the seventeenth century and the transformation of English law that accompanied it were aspects of a general political, economic, and social revolution similar in scope to the German Reformation of a century before and the French Revolution of a century later. These three successive upheavals—the German, the English, and the French—were Great Revolutions in the classical sense, with civil war, class struggle, and apocalyptic visions of a new era; each was characterized by fundamen-
tal changes both in the nation's political and legal systems and in its system of beliefs and values.

The main political and constitutional events of the English Revolution are familiar and may be re-told quickly. For more than a hundred years the Tudors and Stuarts had ruled England as absolute monarchs—the Tudors, on the whole, quite successfully, the Stuarts much less so. The reign of Charles I was particularly unhappy. From 1629 to 1640 he did not once call a parliament into session. The landed gentry and merchants complained bitterly about extraordinary royal taxes used to finance unpopular wars. Religious Non-Conformists were persecuted; in the decade of the 1630's some 20,000 Puritans fled to Massachusetts Bay and a comparable number crossed the channel to the Netherlands; "they flew out of England," it was said, "as out of Babylon." Royal measures were rigorously enforced by the so-called "prerogative courts" of Star Chamber, High Commission, Admiralty, Requests, and others—courts which had been established by the Tudor kings and which were immediately responsive to the royal will. But even the common-law judges of the more ancient courts of King's Bench, Common Pleas, and Exchequer, with jurisdiction chiefly over felonies and rights in land, were at the king's mercy: he could dismiss them at will—indeed, he could easily have them put in the Tower.

In November 1640 the King at last convened a parliament. Under severe provocation, its leaders, mostly Puritans, seized power. A civil war broke out between the supporters of Parliament and the supporters of the Crown. A Puritan "Commonwealth" was established. In 1649 Charles Stuart was tried for treason and executed. But after Oliver Cromwell's death in 1658, Puritan rule quickly collapsed. In 1660 Charles's oldest son returned to England to take the throne as Charles II. This was called "the Restoration," but it was also a phase of the Revolution. Finally, in 1688, when James II—brother of Charles II—began to exercise powers similar to those exercised fifty years earlier by his father, Charles I, Parliament forced him to abdicate and installed a new dynasty on the throne. This was called "the Glorious Revolution;" it ended almost fifty years of acute civil strife, and established a system of government which survived into the twentieth century.

Henceforth it was clear that Parliament, not the king, reigned supreme in England. The English system of political parties took its shape. The Bill of Rights was enacted. Judges were given life tenure. With the abolition of the prerogative courts, the common law courts were recognized as subordinate only to Parliament. The content of
the common law also changed, both in procedure and in substance.

There was also a new religious settlement. An Act of Toleration gave freedom of association and worship to the Non-Conforming churches (although not to the Catholics). Anglican theology itself changed substantially, partly under the influence of Calvinism.

That is a bare outline of some of the major political-constitutional events of the English Revolution of 1640-1689. I propose now to examine in somewhat more detail, first, the religious changes that took place in that period, and second, the legal changes.

Religious Aspects of the English Revolution

Let me start with the religious side, and especially with Puritanism.

The Puritans—they were first called that by their enemies in the late sixteenth century—were English followers of the French Reformer, John Calvin. In the mid-1530’s, as a very young man, Calvin had established a Protestant religious community embracing the city of Geneva, Switzerland. He and his followers shared many of the theological doctrines that were being proclaimed by Martin Luther at the time. They denied the authority of the Church of Rome. They believed in the primacy of the Bible. They accepted, though with some modifications, the Lutheran doctrine of the two kingdoms, justification by faith alone, the fallen nature of man, predestination, the priesthood of all believers, and the Christian calling. They put great emphasis on the sovereignty of God and the providential character of human history.

The Calvinist conception of the church, however, differed substantially from the Lutheran. For Luther, the church as a visible institution was to be organized territorially under the secular ruler of the territorial polity, the prince. The prince was believed to be ordained by God to be the ruler of the institutional affairs of the church within his polity—not its faith and doctrine but its legal structure, its political and economic and social activities. The church was not a lawmaking body: church law was merely the law of the secular ruler relating to the secular affairs of the church. Calvin and his followers, on the other hand, viewed the church in its visible, institutional aspect as consisting of politically independent local congregations, each with its own elected minister and elders, each with its own legal authority. The legal authority of the local congregation, or synod of local congregations, was to be balanced against that of the civil polity and might even dominate the civil polity. The Calvinist churches had their
own law, by which they regulated not only the worship and the theological doctrine of the civil society but also its morals, including many aspects of its political, economic, and social life. In contrast to Luther, Calvin, who was himself trained as a lawyer, had a well worked out philosophy of secular law. He added, in effect, a new Two Swords doctrine to the Lutheran Two Kingdoms doctrine.

I will not attempt to recount the dramatic spread of Calvin's teachings through many parts of Europe in the sixteenth and early seventeenth century, other than to say that Calvinism became a transnational movement, but with many variations of doctrine and of policy in different times and places. Calvin's writings were known to educated people throughout Europe. Calvinist doctrines were studied and were taken seriously even by those who opposed them—Roman Catholics, Anglicans, Lutherans, and others.

Most English Calvinists, in the century prior to 1640, did not contest the authority of the English Crown over the church in England, nor did they attempt to draw its followers away from the Anglican Church. Instead, English Calvinists sought chiefly to reform the Church of England from within. They penetrated the Anglican clergy, from which vantage point they attacked traditional Anglican ritualism, resisted the Book of Common Prayer, denied the hierarchical authority of the episcopacy, and preached the right and duty of every believer to read and interpret Scripture for himself. Needless to say, they were, from an early time, a thorn—and eventually a knife—in the side not only of the Anglican Church as such but also of the Crown, whose

22. Calvin's views on law and government are discussed in Mueller, supra note 3 at 73-103; Tonkin, supra note 3, at 93-130; J.T. McNeill, John Calvin on Civil Government, 42 J. of Presbyterian History 71 (1964); H. Baron, Calvinist Republicanism and its Historical Roots, 8 Church History 30 (1939); J. Bohatec, Calvin und das Recht (1934); id., Calvins Lehre von Staat und Kirche (1961).

23. H. D. Foster has used the phrase "international Calvinism" to refer to the Calvinist and Neo-Calvinist teachings that spread throughout Europe in the sixteenth and seventeenth centuries. H. Foster, Private Papers 147 (1929). See also J.T. McNeill, History and Character of Calvinism (1957). A Calvinism largely consistent with Calvin's Institutes of the Christian Religion (1st ed., 1536) had entered Britain via the chief Reformers, Knox, Bucer, and Bullinger, the returning Marian exiles, and exiled Dutch and French Huguenot Calvinists. From 1575 to 1610, ninety-six editions of Calvin's writings were published in England, and of the eighty-five editions of the Bible printed in Elizabeth's reign sixty were the Geneva Bible in which Calvin's teachings were summarized. See D. Creemans, The Reception of Calvinist Thought in England 65-66 (1949). Yet Calvinism was accommodated to the scholasticism of Beza, the rationalism of Perkins and his followers, Arminianism, various forms of mysticism, and neo-Platonism. See P. Toon, Hypercalvinism in English Non-Conformity 18 ff. (1967).
authority derived in substantial part from its ecclesiastical supremacy. As King James I put it, “No bishops, no king.”

Yet despite some repressive measures, neither the monarch nor his bishops seriously tried to rid the English church entirely of its Calvinists. One reason for this was that the Puritans were strongly anti-Roman and were needed by the Crown in the struggle against the papacy and its Spanish and French supporters. (By the same token, the Crown was needed by the Puritans.) Moreover, the Puritans were great patriots, who with dedication entered English public life as justices of the peace, members of Parliament, and in many other capacities. In addition, Puritanism was quite strong among the minor landed gentry and among artisans and merchants—classes that did not have influence at the royal court but that nevertheless had to be reckoned with. Finally, although the excesses of Puritan doctrine and zeal were deplored by the Establishment, a number of Calvinist tenets penetrated high places. In the 1590’s, when at last a strong campaign against Puritanism was launched, it was considerably restrained by the fact that Archbishop Whitgift, who led the campaign, considered himself to be at least partly a Calvinist in theology. Eventually, Puritanism survived not only Archbishop Whitgift’s campaign but also the much more severe campaign of Archbishop Laud in the 1630’s.

Was there something in the Puritan belief system that helps to explain why the Puritans were able to assume leadership in Parliament in 1640 and 1641, to mobilize the pro-Parliament, anti-royalists forces of the country in 1642, and thereafter to lead an insurrectionary army and to establish a revolutionary government? Was there something in the Puritan belief system that helps to explain why the Puritans were able to transform the English system of government and law?

Several elements of that belief system deserve mention in that connection. The first is the Puritan view of history. The English Puritans—despite all the differences of belief among different branches, different sects, indeed, different congregations—shared the belief that human history is wholly within the providence of God, that it is not primarily a secular story of man’s struggle to achieve his own ends but rather primarily a spiritual story of the unfolding of God’s own purposes, with man acting always as God’s agent. Moreover, patriotic English Puritans in the seventeenth century were led by their belief in divine Providence to view England as God’s elect nation, destined to reveal and incarnate God’s mission for man-
Second, the English Puritans were committed to radical reform as a religious activity. They believed that God willed and commanded "the reformation of the world." "The spirit of the whole creation," wrote a leading Puritan, "was about the reformation of the world." "Reform all places, all persons and callings," said another, in a sermon preached before the House of Commons in 1641. "Reform the benches of judgment, the inferior magistrates . . . ," he continued. "Reform the universities, reform the cities, reform the counties, reform the inferior schools of learning, reform the Sabbath, reform the ordinances, the worship of God. Every plant which my heavenly father hath not planted shall be rooted up." Although the zeal for "the reformation of the world" subsided somewhat in England after the Restoration, it continued for some decades in Puritan-led colonies of North America, and was revived from time to time thereafter, both in England and America.

Third, the Puritan concept of reformation of the world was closely connected with the emphasis on law as a means of reformation. When the Puritans were in power during the 1640's and 1650's, over ten thousand different pamphlets were published urging law reforms of various kinds. This zeal for law reform reflected a deep religious conviction in a God of law, who inspires his followers to translate his will into legal precepts. Calvinism emphasized the didactic, or pedagogical, use of law, that is, its use in guiding faithful persons in the paths of virtuous living. Calvin had written that in addition to making people conscious of their sins and calling them to repentance.


[The Puritans] insisted that the Lord had made a compact with the English at some indeterminable time in the past, granting them peace, prosperity and Protestantism in exchange for obedience to scriptural law. The Puritans regarded this agreement as a real and binding contract for which all men could be held responsible. If the nation failed the Lord by allowing evil to flourish, He punished the entire population, saints and sinners alike. The ruler [thus] became a crucial figure for the Puritans, because it was his duty to make Englishmen uphold the terms of their compact [with the Lord] whether they wanted to or not.

BREEN, at 15.

tance (Luther's "theological" use of the law), and in addition to deter-
ringing recalcitrant persons from misconduct by threat of penalties
(Luther's "civil" use of the law) there is a "third and principal use,
which pertains more closely to the proper purpose of the law," and
which "finds its place among believers in whose hearts the Spirit of
God already lives and reigns." The law serves to help such believers
to know better the divine will and to arouse them to obedience.25

Calvin, to be sure, did not share the older Roman Catholic
understanding of law as something given, part of the very nature and
being of God. Law for Calvinists, as for Lutherans, was part of the
earthly kingdom of sin and death rather than of the heavenly kingdom
of grace and joy; nor was obedience to law a formula of works
necessary to enter that heavenly kingdom. Law was, indeed, ordained
by God but it was discerned and given expression by man's defective
will and reason. For Calvin, as for Luther, law was something that
had uses. More than Luther, however, Calvin—and the English
Puritans—stressed the positive role both of the moral law (which he
identified with natural law) and of the civil law in teaching man to
walk in the paths that God has set for him.

A fourth element in the Puritan belief system that contributed
to legal reform was its strong social dimension. The ultimate purpose
of law, according to Calvin and his followers, was not only to help
individual Christians to be upright but also thereby to create an
upright Christian community. The congregation of the faithful was
to be "a light to all the nations of the world," "a city on a hill."27
Calvinist Puritanism was essentially a communitarian religion. Each
was responsible for all. By the same token, all were responsible for
each. Breach of God's commandments by one incurred God's punish-
ment of the whole corporate body—be it the family, the church, or

and the general aims of the pamphleteers are discussed in BRAILSFORD, THE LEVELLERS
AND THE ENGLISH REVOLUTION 453, 523-40 (1961); D. VEALL, THE POPULAR MOVEMENT FOR
LAW REFORM 97-224 (1970). The Puritans attested to their belief in the didactic use of
the law by placing on the walls of their churches and homes long lists of simple rules
and by recitation of the Ten Commandments every Sunday morning. See G. R. C R A G G,
FREEDOM AND AUTHORITY: A STUDY OF ENGLISH THOUGHT IN THE EARLY SEVENTEENTH CEN-
TURY 147 ff. (1975).

27. Quotation from a sermon given in 1630 on The Arabella by Governor John
Winthrop entitled "A Model of Christian Charity," printed in WINTHROP PAPERS II,
295 (1931).
the nation.  

A fifth link in the chain that bound Puritan theology to Puritan political and legal philosophy was its stress on hard work, austerity, frugality of time and money, reliability, discipline, vocational ambition, individual commitment to improvement of self, of neighbor, and of society. This "Puritan ethic" was rooted in theological assumptions. The Puritan considered his life to be a part of the divine unfolding of God's plan for the world. To waste time was to do a disservice to God. To be drunk or play cards or keep ill company was to disturb his contemplation of the will of God for his life. Thus the Puritan saw his own life as bound by a multitude of rules. His morality was a legal morality, and he inevitably extended his legal morality to the local community and to the nation.

Finally, and most directly connected with the English Revolution itself, is a basic Calvinist principle of government, namely, the principle that government by representative leaders of the community, "the elders," "the lower magistrates," is superior to government by a single ruler, the prince. Calvin wrote that the best form of government is either "aristocracy or a system compounded of aristocracy and democracy," such as "the Lord established among the people of Israel." The theological basis of this theory of tempered aristocracy was the doctrine of the sinfulness of man, his fundamental selfishness and lust for power. It is "safer," Calvin wrote, "for a number to exercise government, so that . . . if one asserts himself unfairly, there may be a number of censors and masters to restrain his willfulness."

This theory was the basis also of Calvin's doctrine that when royal government becomes too tyrannical, then the lower magistrates, as leaders and protectors of the community, are commanded by God "to withstand the fierce licentiousness of kings." Thus the zeal for reformation might lead to revolution, which, however, was itself to be limited by aristocratic communitarian principles. Although Calvin himself had muted his advocacy of resistance to tyranny, his followers throughout Europe during the next century proclaimed it a basic religious doctrine.

29. CALVIN, supra note 26, bk. 4, ch. 2, para. 8, at 31.
30. Id. at bk. 4, ch. 20, para. 31. The doctrines of civil disobedience advocated by the Huguenots in France were built squarely on this teaching of Calvin.
In 1640 the English Puritans provided the theory and vision needed to fight a civil war, overthrow the monarchy, and establish Parliamentary supremacy. Ultimately, however, Puritanism foundered in England, since its essentially congregational conception of government was wholly inadequate as a system for ruling a whole nation. It led first to factionalism and disintegration and eventually succumbed to Cromwellian dictatorship. Nevertheless, even though the Anglican Church and the Stuart dynasty were restored in 1660, there was no going back to pre-Puritan times. The basic Puritan beliefs that had made the Revolution survived. I have listed six: the belief that God is working in history through his chosen nation, England; the belief in reformation of the world as a religious commitment; the belief that law is a prime instrument of such reformation; the belief in the corporate character of the local community; the belief in the “Puritan ethic;” and the belief in government either by aristocracy or by aristocracy tempered with democracy. These beliefs remained strong in England, although they lost their original Puritan fervor and some of their Puritan theological foundations.

The Transformation of English Law

I turn now to some of the changes in English law that took place during this period.31

That English constitutional law underwent fundamental changes between 1640 and 1689 is undisputed. Parliamentary supremacy was established. The newer courts that had been created by the Tudor kings were abolished, and the older common-law courts became supreme over all others. Judges were given life tenure. Religious toleration was extended to Protestant denominations. Royal powers were limited by a written Bill of Rights.

More controversial is the scope and nature of the changes in other branches of law, especially criminal and civil law in their procedural and substantive aspects. Legal historians have usually emphasized sixteenth-century more than seventeenth-century

developments in these branches of law. Moreover, they have tended
to see both sixteen and seventeenth century developments, and for
that matter eighteenth century developments as well, as gradual, in-
cremental changes arising from within the legal system itself rather
than as rapid, fundamental changes responding to pressures from out-
side the law. Plucknett even speaks of "the remarkable continuity
and stability of English law during the vicissitudes of the seventeenth
century." 2

I propose a different view, namely, that in the late seventeenth and
early eighteenth centuries there were fundamental changes in
the English legal system as a whole, including not only its constitu-
tional aspects but also its criminal and civil aspects—indeed, what
I would call a modernization of the English common law; and that
these changes were generated not only from within the law but also,
and more important, from within the entire political, economic, and
social upheaval of the time.

In the sixteenth century there had been, indeed, important
developments in English law, including the law applicable in the older
courts of King's Bench, Common Pleas, and Exchequer. These courts
had existed since the twelfth century; they had jurisdiction chiefly
over serious crimes ("felonies") (though not over treason) and over
civil disputes involving freehold land. Their civil procedure was
characterized by an elaborate process of pleadings, designed to reach
an issue of fact that could be presented to a petty jury of neighbors
for decision "Yes," or "No," based on the previous knowledge of the
jurors. In criminal procedure, indictment was by grand jury and con-
viction or acquittal was, once again, by a petty jury that, prior to
any trial, had informed itself of the guilt or innocence of the accused.

This archaic procedure was subjected to the same vigorous criti-
que in sixteenth century England as the Schoeffen procedure in six-
teenth century Germany. As in Germany, so in England, many called
for a rationalization and systematization of the law. In fact the
prerogative courts of the Tudor-Stuart kings operated on quite dif-
ferent principles from those of the common-law courts. None of
them—including the Court of Star Chamber, the Court of High Com-
mission, the Court of Requests, the High Court of Admiralty, and
others—used the common-law system of pleadings in civil cases or
of indictment in criminal cases, and none of them used the jury method
of decision. Nor did the Chancery, which had older credentials but

32. T.F.T. Plucknett, Bonham's Case and Judicial Review, 40 Harv. L. Rev.
30 (1936).
which in many ways had become like the prerogative courts. All of these non-common-law courts used a system of interrogation of parties and of witnesses by the court, with written depositions under oath; all of them were in the "civilian" (as it later came to be called)—actually, it was the canonist—procedural tradition.

Under the pressure of competition from the prerogative courts and from Chancery, the older common law courts gradually began to reform their procedure and to expand their jurisdiction. This was a very slow process, chiefly because the common law courts owed their very survival to the fact that by their antiquity they lent a legitimacy to Tudor justice that it might otherwise not have had. By declaring royal supremacy over the church in England, Henry VIII had cut English law adrift from its moorings in the Church of Rome and had anchored it instead to the supreme political authority of the state. The shock of this break with the past was somewhat softened by the perpetuation of the older royal courts, with their older, more popular, less learned procedures. Consequently, those older courts were reluctant to change those procedures; when they did change them they usually sought justification in the past. Hence there slowly emerged in the sixteenth century an increasing emphasis on precedent as a justification for both continuity and change.

In the sixteenth and especially in the first decades of the seventeenth century, the common law judges began to invoke precedent in order to control the rival courts and to limit their jurisdiction; this eventually brought them—and especially the Chief Justice of the King's Bench, Sir Edward Coke—into direct conflict with the king himself. Coke's historicism eventually became an important part of the ideology of the English Revolution. The radical Puritan John Lilburne used to go into the House of Commons in the 1640's with the Bible in one hand and Coke's Institutes in the other.

The abolition of the prerogative courts by the Puritan-led Parliament in 1641 signified an enormous change in English law. On the one hand, it meant the elimination of both the substantive and the procedural law of those courts and, on the other hand, it stimulated radical changes in the substance and procedure of the common law that was now made applicable to cases previously decided in those courts.

Thus the common law courts acquired exclusive jurisdiction over criminal cases, with right of trial by jury for all serious offenses. This meant the end of the inquisitorial system as it had been practiced in the Court of Star Chamber, the Court of High Commission, and in criminal cases in Admiralty, Chancery, and other courts.
notorious ex officio oath, under which a mere suspect could be required to swear to answer truthfully any questions that might be put to him by the investigator, and against which the common law courts had sometimes inveighed without much effect, now disappeared from English jurisprudence. Preliminary investigation of crimes was henceforth controlled partly by the writ of habeas corpus, which was considerably expanded and finally, in 1679, made the subject of a comprehensive statute; and partly by bail, which was also modernized by statute. Excessive fines were condemned, as were cruel and unusual punishments. The privilege against self-incrimination appeared for the first time. Torture was eliminated from English criminal procedure.

Also the nature of the jury trial changed. Previously, the jury had been an active investigative body, which was supposed to find out the guilt or innocence of the accused in advance and then merely to report its verdict when summoned by the court; now it became a passive body, which, knowing nothing of the crime in advance, was supposed to listen to evidence presented at trial. A system of more rational proofs, which in England had previously existed only in the ecclesiastical courts, the Chancellor's court, and the prerogative courts, was now introduced in a new form into jury trials in the common law courts. There appeared first the right and then the duty of witnesses to testify in the common law courts. The common law courts took over the contempt power of the ecclesiastical courts, Chancery, and the prerogative courts. The distinction between fact and law was sharpened, and the jury was given considerable independence in determining questions of fact at the same time that it was subjected to new forms of judicial supervision in matters of law.

These developments also affected civil procedure at common law, since jury trial was used there as well. In civil cases written pleadings were introduced, and witnesses were subjected to examination and cross-examination by counsel for the parties. (In criminal cases, counsel for the accused was not allowed until 1695, and then only in cases of treason; it was not until 1836 that counsel for the accused was allowed in cases of felonies.) Also the language of court reports, which previously had been Law-French, was shifted to English.

In addition, civil law was affected by the transformation of the forms of action. By an abundant use of fictions, the action of ejectment was transformed into an action to try title to land, the action of trover was transformed into an action to try title to chattels, the action of special assumpsit was transformed into an action for breach of contract, and the action of general assumpsit was transformed into an action for unjust enrichment. Thus the old forms were retained, but their functions were modernized.
Of critical importance in these developments was the fact that after 1640 the courts of common law inherited the vast jurisdiction of the prerogative courts. Prior thereto, the common law courts were concerned, in criminal law, principally with felonies and, in civil law, principally with rights in land. Now they had to be concerned with the entire range of criminal and civil causes; even those matters that continued to fall within the remaining jurisdiction of Chancery, Admiralty, and the ecclesiastical courts were now for the first time subjected to the regulation of the common law courts, which had the final say in the matter of jurisdiction.

One may speak, indeed, in this context, of a certain nationalization of English law. Mercantile law, for example, which had been applied in the sixteenth and early seventeenth centuries in the courts of Admiralty and Chancery, with their flourishing commercial jurisdiction, embodied many rules of canon law and Roman law that were accepted by merchants throughout Europe. These now passed over into the common law, at first in the form of commercial custom declared by juries of merchants and eventually by integration into the substantive common law itself.

Also the common law courts inherited some of the laws of morality that had been developed previously in the ecclesiastical and other courts. Thus in the famous case of the King against Sir Charles Sidley, decided in 1664, Sir Charles was indicted for "having shown his nude body in a balcony in Covent Garden to a great multitude of people, and had said and done certain things to the great scandal of Christianity." The Court of King's Bench took jurisdiction, stating that "since at this time there is no longer a Star Chamber... this Court is the custos morum ["guardian of morals"] of all the subjects of the King, and it is now high time to punish such profane actions done against all modesty..." The Court stated further that since the defendant was "a gentleman of a very old family (of the county of Kent) and his estate was encumbered (not intending his ruin but in order to reform him)"—he was to be fined 2000 marks and imprisoned for a week and placed on good behavior for three years.33

Two generations later, the common law courts also succeeded to the jurisdiction of the ecclesiastical courts over the crime of obscenity.

In addition to such important changes in jurisdiction and procedure, with their tendency toward unification of English law under

the supremacy of the courts of King's Bench and Common Pleas, a new technique of precedent was gradually introduced. I have mentioned the ideological need for a doctrine of precedent that would enable the common law to adduce the authority of the past for adaptation of its rules to new circumstances. In the latter seventeenth century and thereafter, as it became increasingly important to rationalize and systematize the common law, the earlier historicism was supplemented by a sophisticated technique of precedent. Previous decisions were subjected to a close analysis, with a distinction made between dictum and holding. This meant much great predictability of result. Holdings in cases came to have a function somewhat similar to that of codified rules. A science of reasoning by analogy of cases came to be developed.

There was also a rationalization of common law rules concerning property and contract. I have referred to the transformation of older forms of action to serve the functions of trying title to land (ejectment) and chattels (trover). The device of the "strict settlement" was invented to permit landed gentry to make effective arrangements, despite the rule against perpetuities, to keep land in the same family for many generations.

Also this was the period when it was established that a bargained exchange was binding and actionable on breach, regardless of the absence of fault. In the famous case of Paradine and Jane, decided in 1648, at the height of the Puritan Revolution, a lessor sued a lessee for nonpayment of rent. The tenant defended on the ground that due to the occupation of the leased premises by Prince Rupert's army, it was impossible for him to enjoy the benefit of his contract and he therefore should be excused from liability. He cited canon law, civil (i.e. Roman) law, military law, moral law, the law of reason, the law of nature, and the law of nations. The court held that by the common law of England a lessee for years is liable for the rent, even though the land be impossible to occupy. This was an early—perhaps the earliest—authoritative formulation of the principle of strict liability for breach of contract. The court said that where a duty or charge is created by law, the party will be excused if he is not at fault, "but when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract."

34. Paradine and Jane, Style 47, 82 Eng. Rep. 519 (1647); also reported in Aleyn 26, 82 Eng. Rep. 897.
Law AND Belief in the English Revolution

We come back once again to the word "and": law "and" belief, law "and" revolution. I have indicated certain revolutionary changes that took place in the English belief system after 1640; I have also indicated certain revolutionary changes that took place in the English legal system in roughly the same period. But what is the connection between the two sets of changes?

Some external connections are obvious. Puritanism was undoubtedly the spark which ignited the Civil War, which in turn led eventually, after many upheavals, to the victory of Parliament over the Crown and of the common law courts over its rivals. The Puritans in seventeenth century England—like the Lutherans in sixteenth century Germany, the Jacobins in eighteenth century France, and the Bolsheviks in twentieth century Russia—provided not only the zeal but also the theory and the vision that were needed to change radically the political, the constitutional, and ultimately the prevailing legal system. This "but for" causal connection between Puritanism and English constitutional law is not without importance, and it does not deserve to be ignored, as it often has been in the conventional historiography. All our modern Western legal systems, including the English, have their origins in violent revolutions, which in turn have their origins in radical ideologies.

We are looking, however, for more intimate connections between belief systems and legal systems. Do seventeenth century English religious beliefs help to explain why England opted for Parliamentary supremacy as against royal supremacy, for the common law as against rival systems, for jury trial as against trial by professional judges, for the adversary system of proof as against the inquisitorial system, for the doctrine of precedent as against systematization by codes, for strict liability for breach of contract as against contractual liability based on fault? In other words, is English law rooted in the Puritan Revolution merely in a chronological sense or is it rooted in it in the sense that it derives nourishment from it?

I have already suggested some positive connections of this kind. Calvinist theology itself favored aristocratic government over monarchical and advocated the God-given right and duty of lower magistrates to resist tyrants. These and other Calvinist teachings were invoked to support limitations placed on the English monarchy by the Long Parliament in 1640-1642 and during the Civil War that followed, the subjection of the monarchy to Parliament in the period after its restoration in 1660, and, finally, in 1688, the forced abdication of the monarch and his replacement by a new dynasty subject to the severe
restrictions placed on it by the Bill of Rights of 1689. The sixteenth century Lutheran and Anglican conception of the prince as the bearer of the religious mission to be the supreme governor of the earthly kingdom gave way to the Calvinist conception that the supreme duty of government is borne by the "magistracy," which ultimately meant, in England, the landed gentry, especially as they were represented in Parliament. Locke's theories of social contract and of government by consent of the governed, expounded in his Two Treatises of Government, published in 1689-90 as a justification of the Parliamentary system as established by the Glorious Revolution, were based essentially on liberal Calvinist doctrine. Underlying Locke's theory was the Calvinist emphasis on man's inherent selfishness. It was this that required the reciprocal limitations on power—on the power of subjects as well as on the power of rulers—that are implicit in the concept of a contract.35

The Calvinist doctrine of original sin also supported the idea of a written constitution, which in effect embodied the social contract and made it, by virtue of the writing, more difficult to break. In 1649, a written constitution called the "Agreement of the People," had been proposed but not adopted, and in 1653 a written constitution, called the "Instrument of Government," had been adopted—the first national written constitution in history. It was, however, wholly ineffective against Cromwell's dictatorship. Such experiments were not repeated after the Restoration. Nevertheless, they bore fruit in the Bill of Rights of 1689 and in the acceptance of that document, together with Magna Carta, the Petition of Right of 1628, and other written texts, as constituent parts of England's "unwritten" constitution. It is true that the theory of an "unwritten"—one might better call it a "half-written"—constitution left the way open to the acceptance of a parallel theory of absolute Parliamentary power. Parliament, some said, could, if it wished, enact a law turning all men into women. Fortunately, the matter remained hypothetical. In theory, the omnicompetence of Parliament was qualified by its duty to preserve the liberties of the subject and to respect the requirements of natural justice. In prac-

35. "Locke's political views were little more than a distillation of concepts that had long been current coin in Calvinist political theory ...." W.S. HUDSON, RELIGION IN AMERICA: AN HISTORICAL ACCOUNT OF THE DEVELOPMENT OF AMERICAN POLITICAL RELIGIOUS LIFE 94 (3rd ed., 1981). See also HUDSON, JOHN LOCKE: HEIR OF PURITAN POLITICAL THEORISTS, in G.L. Hunt, ed., CALVINISM AND THE POLITICAL ORDER 108-29 (1965), where many of Locke's ideas are traced to the devout Presbyterian Samuel Rutherford, author of Lex Rex (1644). For an account of Locke's Puritan upbringing and the liberal character of his Calvinist background, see FOSTER, supra note 3, at 153-78; LANG, supra note 3, at 86 ff.
tice, Parliament rarely invoked a competence to wield unlimited power. (When it did so with respect to the American colonies, they made their own Revolution.)

In tracing such basic constitutional principles to Calvinism, one must bear in mind not only Calvinist doctrine but also Calvinist practice. Aristocracy—or aristocracy tempered with democracy—had not only been advocated by Calvin as the best form of government; it had also been introduced into the ecclesiastical polity. Calvinist churches were governed by elected ministers and lay elders. Similarly, the Calvinist doctrine of social contract was introduced into practice in Geneva, where all citizens were summoned in groups to accept the "covenant" between God and the church, to take an oath to obey the Ten Commandments, and to swear loyalty to the city.

Their experience, and not only their theory, was also of crucial importance in the development by the Puritans of constitutional principles of civil rights—particularly their experience in openly disobeying, on grounds of Christian conscience, the oppressive laws of the Tudor-Stuart monarchy. Many Puritans had refused to take the ex officio oath as required by the Court of High Commission under Archbishop Laud: such an oath, they said, which would require them to swear, in advance of any charges made, to answer truthfully any question that might be asked, violated their sacred obligation, based on the Bible, not to swear oaths; and furthermore, it violated the English common law. Puritans also resorted to the writ of habeas corpus to challenge the jurisdiction of courts established by the king on the basis of his own prerogative—the Court of Star Chamber, the Court of High Commission, and others; and when they came to power they abolished such "prerogative" courts. They asserted a right to refuse to testify against themselves in criminal proceedings, and a right not to be prosecuted for an act that had not previously been declared to be criminal. They objected to excessive bail, excessive fines, cruel and unusual punishments, the presumption of guilt, the subjection of the jury to the will of the judge, royal interference in adjudication, and torture. They objected to these on principle: first, that they were against the will of God; second, that they violated "the ancient constitution," the common law of former times—that is, before the Tudor-Stuart monarchy had assumed supremacy over the

Men like John Hampden, John Lilburne, Walter Udall, William Penn, and thousands of other Puritans (I use the name in its broadest sense) gave England—and ultimately America—civil rights by being willing, on grounds of Christian conscience, to go to prison for them. Later, a Puritan-led Parliament enacted legislation guaranteeing many of the rights on which Puritans had previously insisted in vain. Still later, Parliaments not led by Puritans reaffirmed and added to such legislation.

It may be somewhat less easy to discern religious influences in the seventeenth century tendency to rationalize the common-law rules of property and contract. Here major roles were played by political and economic considerations as well as by the new scientific outlook of the seventeenth century. There was a drive toward security of property rights and of contractual transactions; there was a drive toward rationality, in the sense of calculability or predictability.

Puritanism also played a role. Efforts to rationalize the English common law, as well as to secure property and contract rights, were connected with the Puritan emphasis on order and discipline: "God being the God of order and not of confusion hath Commanded in his word and put man into a Capacitie in some measure to observe and bee guided by good and wholesome lawes. . . ." 38 "Discipline," Calvin had said, "serves as the sinews [of the church] through which the members of the body hold together, each in its own place." 39 Developments in the law of contract and property were also connected with the Calvinist emphasis on voluntary action, the act of will, in the service of God, together with God's faithfulness in response. Calvinists taught that there were two covenants, one between God and the community, including the ruler and the people as parties, the other between the ruler and the people. These covenants were seen in terms of the same values of rationality, predictability, and security that were emphasized in the law of property and contract.

Finally, there were important connections between Puritan casuistry and Puritan historicism, on the one hand, and the seventeenth century English lawyer's emphasis on analogy of cases and on historical precedent.


39. Calvin, supra note 26, bk. 4, ch. 12, para 1.
To stress these links between seventeenth century English legal developments and Puritanism is not to ignore their links also with Anglicanism, including not only those features of Anglicanism which it shared with Puritanism but also those features which contrasted with Puritanism. For example, the historicism of the seventeenth century English common lawyers, exemplified above all in the writings of Sir Edward Coke and in his judgments when on the bench, is much more akin to the historicism of Bishop Hooker and of the Church of England than to that of Calvin and his English followers. The English Puritans followed Calvin in looking first to Biblical history and Biblical examples. They added, however, a vision of England as an "elect nation" destined to fulfill God's plan of history. Anglican historicism—developed only partly in response to Puritanism—taught the fiction of a continuously developing Anglican church, always fundamentally the same, always English, never really Roman, "comprehensive" enough to embrace widely differing intellectual approaches, founded not on doctrinal consistency but on historical continuity. This, of course, was the kind of historicism adopted ultimately by the English common law.

Also the language and style of the seventeenth century English common law was more similar to that of the Book of Common Prayer than to that of Calvin's Institutes or the English Puritan tracts. Indeed, Calvinist doctrine was congenial to codification of law, and it was no accident that in the Puritan period of the English Revolution there were great pressures toward codification of the English common law. Ultimately, however, English law adopted a quite different mode of systematization, namely, systematization by forms of action and by precedent—one that was controlled primarily by the judiciary rather than by the university professors. English Puritans were eventually able to find a good deal in their religious upbringing to support a judge-made systematization of the law, even though they might have found even more to support codification. The Anglican outlook, however, would have found codification quite uncongenial.

The interconnection between the transformation of the English system of law and the transformation of the English system of beliefs found vivid expression in the life and work of Matthew Hale, who, like the sixteenth century German von Schwarzenberg, represented in his own person both the legal genius and the religious genius of his time.

Holdsworth has called Hale a "consummate master of English law," "easily the greatest English lawyer of his day," "the first of our great modern common lawyers." Born in 1609, he had already distinguished himself at the bar when the Puritans seized power in 1641. In 1652 he headed an important law reform committee appointed by Parliament, known as the Hale Commission, which proposed fundamental changes in English law. From 1653 to 1657 he was a judge of the Court of Common Pleas. In 1660, with the return of Charles II, Hale became Chief Baron of the Exchequer and in 1671 Chief Justice of the King's Bench, which he remained until just before his death in 1676. His reputation as a lawyer rested not only on his great ability in these practical roles but also, and even more, on his scholarship. He was a master of constitutional and legal history and the author of the first history of English law ever written. His writings on English criminal and civil law represent the first systematic studies in those fields. Moreover, he was a serious student of the Roman law and also wrote tracts in the fields of mathematics, natural science, philosophy, and theology.

Hale's career as a lawyer and legal scholar cannot be divorced


42. Hale's HISTORY OF THE COMMON LAW was first published in 1713. (None of Hale's voluminous legal writings were published in his lifetime, though many of them circulated widely in manuscript).

43. Hale's HISTORY OF THE PLEAS OF THE CROWN, first published in 1736, was not a history but a textbook on criminal law and procedure dealing with capital crimes. Heward writes (133-34): "This book is a tour de force. It is systematic and detailed. . . . Hale succeeded in reducing the mass of material to a coherent account of the criminal law relating to capital offenses. . . ."

Hale's ANALYSIS OF THE LAW divides the law into two main divisions, namely, civil law and criminal law, but itself deals only with civil matters, which it divides into civil rights or interests, wrongs or injuries related to those rights, and relief or remedies applicable to those wrongs. Civil rights are subdivided in the Romanist style into rights of persons and rights of things.

44. Hale admired Roman law and, in the words of his contemporary biographer, Burnet, "lamented much that it was so little studied in England." Quoted in Heward, supra note 41, at 26. Hale's systematization of English law was greatly influenced by Romanist legal science as it had developed in the West since the late eleventh century. However, Hale did not write any tracts on Roman law. His systematization of English law was also greatly influenced by his knowledge of the exact and natural sciences, on which he did write several long tracts. He was well acquainted with Boyle and Newton and with some of the founders of the Royal Society of London. Three of his discourses on religion were published after his death by his friend the Puritan minister, Richard Baxter. They are summarized in Heward, id. at 127-28.
from his deep religious convictions. Raised a Puritan, he retained a passion for piety, order, discipline, and moral responsibility. Yet he was also loyal to the Church of England. He wrote a number of meditational and devotional tracts which reflected his adherence to both Calvinism and Anglicanism. In the period of Puritan ascendancy, he remained a royalist and advised Strafford, Bramston, Laud, and other persons accused by the Long Parliament, and when Charles I was tried for treason by a special court, the so-called High Court of Justice, Hale advised him to plead to the jurisdiction. Nevertheless, he was able conscientiously to serve under Oliver Cromwell (though he refused to be reappointed to the Court of Common Pleas in 1658 by Oliver's son and successor Richard), and after the restoration of the monarchy, which Hale had helped to facilitate, he befriended and defended Protestant Non-Conformists with the same openness and integrity with which he had formerly befriended and defended Anglican royalists.

Hale was driven by a deep Christian faith to live and to work without deceit, without greed for money or power, without injustice; he represented in his person the new "public spirit" which the English Revolution put forward as a principal basis of legitimacy. At the bar, Hale refused to take cases that he considered to be unjust; also he would often forego fees in order himself to arbitrate disputes that

45. As "public opinion" became a principal source of the legitimacy of governmental authority in France from the time of the French Revolution (see infra, note 60), so "public spirit" was a principal source of the legitimacy of governmental authority in England from the time of the English Revolution of the seventeenth century. Public spirit included not only civic zeal but also loyalty to tradition as well as other "aristocratic" virtues. It was defined by de Tocqueville in the early nineteenth century as including "the affections of a man with his birthplace . . . united with a taste for ancient customs and a reverence for traditions of the past, . . . patriotism sometimes stimulated by religious enthusiasm." Alexis de Tocqueville, Democracy in America, Phillips Bradley, ed., 274 (1945). The phrase itself goes back to 1654, when Whitlock wrote: "Persons with Publike Spirits, are of a goodnesse Angelicall." Quoted in Oxford English Dictionary under heading "Public spirit." Lecky characterizes the late seventeenth and eighteenth centuries in England as an age of public spirit; although public spirit diminished substantially in the middle of the eighteenth century, he writes, it nevertheless remained stronger than in other countries of Europe. W.E.H. Lecky, England in the Eighteenth Century, I 188-98, 489-90, 505-12 (1892). In the early 1700's the coffee houses of London were called "the School of Publick Spirit, where every Man . . . learns the most hearty contempt of his own Personal Sordid Interest . . . and devotes himself to . . . his Country . . . ." Daily Gazeteer, London, July 4, 1737. A pamphleteer in London in 1714 sharply criticized the Whigs for neglecting public spirit and being "ready to gratifie their Ambition and Revenge by all desperate Methods; wholly alienate from Truth, Law, Religion, Mercy, Conscience, or Honour." Pamphlet entitled "The Publick Spirit of the Whigs," London, 1714, available in Widener Library, Harvard University.
came to him. As a judge, he would subordinate strict law to equity or else use his mastery of the techniques and subtleties of strict law to achieve a result dictated by conscience. He refused the gifts that were customarily offered by persons seeking favors or else, if it was necessary to accept them, he would require that they be in the form of money, which he then gave to the poor. His extraordinary generosity was made apparent by the relatively small estate that he left when he died. “His dread of ostentation and vanity led him to go so shabbily clothed that even [his close friend the Puritan minister Richard] Baxter remonstrated with him.”\(^{46}\) In Holdsworth’s words, “Hale was a man of a really saintly character, who, by his genuine goodness, attracted the affection [not only of those who knew him well but also] of all those with whom he came into merely passing contact.”\(^{47}\)

In combining impeccable moral and personal qualities with superb professional skills and intellectual powers, Hale, like Schwarzenberg before him, inevitably made a strong impact on his contemporaries. Even more important, in both cases, was the nature of the impact. Hale, like Schwarzenberg, helped to bring about fundamental changes in the pre-existing legal system that were responsive to fundamental changes that were taking place at the same time in the belief system of the society. Hale’s deepest beliefs, which were characteristic of the beliefs of his time, not only influenced his own personal and professional life but also found expression in the substantive contributions which he made to the development of English law.

Many examples can be given of specific legal contributions that reflected Hale’s religious outlook. As a judge, he set an example of scrupulous fairness to prisoners in criminal cases. He once persuaded a jury, with some difficulty, to acquit a man who had stolen a loaf of bread because he was starving. He shared the overriding Puritan concern with poor relief; his “Discourse Touching Provision for the Poor,” written in 1659, contained a detailed plan for providing work for the poor, anticipating reforms that were only carried out a century-and-a-half later. On the other hand, he also shared the Puritan horror of witchcraft and in 1664 he imposed the death penalty, as provided by statute, on two women found by the jury to be guilty of bewitching certain children.\(^{48}\)

\(^{46}\) Holdsworth, supra note 41, at 578.

\(^{47}\) Id. at 579. Holdsworth compares Hale’s character to that of Sir Thomas More.

\(^{48}\) See Heward, supra note 41, at 71-86, and Holdsworth, supra note 41, at 578-79.
More important than these and other specific contributions which Hale made as a judge and as an advocate of law reform was his more general contribution to the very conception of law. Hale, above all in his writings, introduced a systematization of English law based primarily on the concept of its historical development. This historical jurisprudence had been nourished initially in his university days at Oxford, where he had come under the influence of the great Puritan legal historian John Selden. Living in the prerevolutionary period of struggle between the common law courts and the prerogative courts, Selden had emphasized the medieval tradition of limitations upon the royal prerogative. Living in the postrevolutionary period, Hale emphasized not only the medieval roots of the English legal tradition but also its capacity to evolve and to adapt itself to new needs. Laws must change with the times, he wrote, or they will lose their usefulness.49

Hale also went far beyond Selden in deriving from the evolution of the English legal tradition a systematization of rules, principles, concepts, and standards. Here he was helped both by his deep knowledge of Roman law and by his studies of natural science.

Hale’s biographer, Burnet, reports that some persons once said to Hale that they “looked on the common law as a study that could not be brought into a scheme, nor formed into a rational science, by reason of the indigestedness of it, and the multiplicity of cases in it.” Hale’s reply was decisive. He “was not of their mind,” he said; and he drew on a large sheet of paper “a scheme of the whole order and parts of it . . . to the great satisfaction of those to whom he sent it.”50

Hale proved by his own example that the English common law was not a wilderness of single instances, but an evolving system which he, at least, could grasp as an integrated whole.

That Hale’s historical systematization of English law was rooted in his religious convictions, both Puritan and Anglican, may be demonstrated by contrasting it with other methods of systematization of law. Hale did not attempt to show that English law is to be

49. Hale wrote: “The matter changeth the custom; the contracts the commerce; the dispositions educations tempers of men and societies change in a long tract of time; and so must their lawes in some measure be changed, or they will not be usefull for their state and condition.” Quoted in HOLDSWORTH, supra note 41, at 593. Hale’s CONSIDERATIONS TOUCHING THE AMENDMENT AND ALTERATION OF LAWS is a systematic analysis of policies and techniques of law reform. It is digested in HEWARD, supra note 41, at 156-66.
50. Quoted in HOLDSWORTH, supra note 41, at 584.
understood and tested primarily by reference to divine law and natural law, as Roman Catholic jurisprudence maintained. Nor did he attempt to show that English law is to be understood and tested by justice and the common weal, as taught in Schwarzenberg's Lutheran jurisprudence. Hale asserted, of course, the validity of divine law and natural law, which he equated with Christian revelation and the Christian religion, respectively; and he asserted the claims of justice and utility. But he also asserted the independent validity of English law as such, which evolved in the first instance through experience, through custom and usage, and which was suited to the character of the English people.

Hale's historical jurisprudence may be contrasted not only with Roman Catholic and Lutheran legal thought but also with the rationalistic and individualistic legal thought that was characteristic of the eighteenth century Enlightenment and of the period following the French Revolution.

The links between Hale's jurisprudence and his religious beliefs are to be found above all in his emphasis on the God-given historicity of the English people and of their legal institutions. Hale denounced the doctrine of sovereignty proclaimed by his contemporary, Thomas Hobbes; Hobbes's "speculations" concerning the unlimited power of the sovereign to repeal and alter laws or to take the property of his subjects as he pleases, Hale stated, are contradicted in England by the existence of laws and customs that bind the sovereign. "The laws and customs of the kingdom are facts which exist," he wrote in answer to Hobbes. That is, they are historical facts, providential facts, and therefore superior to any sovereignty, any government. By the same token they formed, for Hale, a system of facts whose interrelationships with each other could be studied scientifically.

The belief that God has providentially revealed himself in the ongoing history of the English common law is the Puritan and Anglican legacy of the seventeenth century English Revolution to Western jurisprudence.

IV. THE ENLIGHTENMENT, THE FRENCH REVOLUTION, AND THE NAPOLEONIC CODES

France in 1789 was the largest country of Europe, with some twenty-five million inhabitants—three times more than in England.

51. Quoted in Heward, supra note 41, at 140. The text of Hale's Reflections on Hobbes' Dialogue of the Law may be found in the appendix to Holdsworth, supra note 41, V, at 500.
It was divided administratively into thirty-five provinces, thirty-eight military districts, one-hundred-and-forty-two bishoprics, and innumerable local frontiers where tolls and customs duties were imposed on travelers. These units were governed generally by local patrician oligarchies, whether of the higher clergy or of the nobility or both. In addition to the clergy and nobility, which were characterized as the First and Second Estates, respectively, there was a flourishing Third Estate consisting of officials, lawyers, teachers, merchants, artisans, well-to-do farmers, and others.

France was an autocracy. The king was considered to have absolute authority; that is, he was the supreme legislator, judge, and executor of the laws, and was himself "absolved" from obedience to them. All officials, central and local, exercised their authority in his name and as his agents.

There were two symbolic limitations on royal power. The appellate courts, called Parlements, of which there were thirteen, consisted of judges who were noble either by birth or by office, whose families had purchased their judicial office and were therefore irremovable by the king; the Parlements claimed the right to advise the king on the limits of his power—they were custodians of the medieval tradition of constitutionalism, although in fact they had no effective means of checking royal abuses. The second symbolic limitation on the king's power was the historical institution of the Estates General, the assembly of representatives of the three estates, which had power to veto royal taxes and to advise the king. This was an even less effective protection against royal abuses, since it could only meet at the call of the king and the king had not called it into existence since 1614.

Royal government, including royal military activity, was carried on at the king's private expense, except that he could levy taxes within limits set by tradition. The church was not taxed at all, though it owned a substantial part of the land of France. The abundant privileges of the aristocracy also included exemptions from various taxes. King Louis XVI, who had come to the throne in 1774, financed French assistance to the American Revolution largely by extravagant borrowing. By 1787 the servicing of the royal debt had driven the crown to the verge of bankruptcy. The aristocracy would not give up its privileges. Meanwhile there were hunger riots and peasant revolts. The Parlements had already been moved on several occasions to advise the king that he was exceeding the limits of his powers. In 1788, Necker, recalled as Minister of Finance by popular demand, persuaded the king to allow him to call for elections and to convene the Estates General in order to raise money.
The Estates General met at Versailles in May 1789—for the first time in 175 years! There was a sharp conflict between the deputies of the Third Estate and those of the other two estates. In June the Third Estate took the title of National Assembly and assumed full sovereign powers. The king took the side of the other two estates. On July 14 a crowd stormed the royal prison, the Bastille; this act was immediately recognized as a revolution—indeed as "the" Revolution. It symbolized for all Europe the fall of absolute monarchy. The king accepted representatives of the Third Estate as rulers of the city of Paris. The ecclesiastical hierarchy and the nobility now stepped forward to renounce their privileges—solemnly and in detail ("the renunciations"). Throughout France, the old administrative and judicial authorities dissolved.

In August 1789 the National Assembly adopted a Declaration of the Rights of Man and Citizen, which proclaimed civil rights and civil liberties. Its first article expressed a basic ideal of the Revolution: "Men are born and remain free and equal in rights. Social distinctions can only be based on general utility." Article 3 stated: "The source of all sovereignty resides essentially in the nation . . ." A wholesale reorganization of the country's administrative structure was introduced. The entire legal system was reformed.

In the decade after 1789 France was in a constant state of turmoil. The various factions which had helped to bring on the Revolution fought viciously among themselves. Written constitutions came and went—ten different ones between 1789 and 1815. Meanwhile there was the constant threat that the royalists would regain power, backed by the Roman Catholic hierarchy and by various foreign powers. The list of leaders executed or murdered under successive Revolutionary regimes included King Louis XVI, Marie-Antoinette, Marat, Danton, Robespierre—in all, there were over 14,000 victims of the Terror and civil war, of whom only about a tenth were nobles.

Various Revolutionary governments launched a series of wars—most of them disastrous—against Austria, Prussia, Belgium, the Rhineland, Savoy, Nice, England, Holland, Italy, Switzerland, Malta, Egypt. A young military commander from Corsica, Napoleon Bonaparte, became a hero in some of these campaigns. The people of France were ready for a dictatorship, and in 1799 Napoleon seized power. He presented himself as the fulfillment of the spirit of 1789. One might call him the Stalin of the French Revolution.

Wherever Napoleon's armies went in Europe they carried with them something of the French Revolution and especially its slogans of liberation from aristocratic privileges. Even after the final defeat of Napoleon in 1815 and the restoration of the Bourbon dynasty, it
was impossible to turn the clock back to the ancien régime. The permanent achievements of the French Revolution were finally established in 1830 when the Chamber of Deputies invited Louis Phillipe, Duke of Orleans, to assume the throne as a constitutional monarch.

Thus the French Revolution may be dated not, as it often is, from 1789 to 1799 but from 1789 to 1830, just as the English Revolution may be dated from 1640 to 1689, and the German Revolution from 1517 to 1555.

The Belief System Embodied in the French Revolution; Deism

The belief system embodied in the French Revolution—that is, the structure of ideas and attitudes reflected in the policies of the new regime—had its origin in the eighteenth century European movement called "the Enlightenment." Among the most famous French participants in this movement were (1) Montesquieu, for many years the presiding judge of the High Court of Bordeaux, whose book The Spirit of the Laws, written in 1748, remains a classic of modern social theory; (2) Voltaire, satirist, historian, man of letters and leading philosophe, who wrote his first play, Oedipus, in 1718 and died in full vigor in 1778 at the age of 84; (3) Diderot, a man of universal knowledge, who put together the ideas of the Enlightenment in a huge set of volumes called the Encyclopedia; and (4) Jean-Jacques Rousseau, whose Confessions made him the man of the age and whose Social Contract, published in 1762, was a principal source of inspiration for the revolutionary dictator Robespierre among countless others. A great many others could also be listed among the intellectual leaders of the mid-eighteenth century whose ideology became the ideology of the Revolution.52

Before describing the tenets of the Enlightenment, I should note that this was the first European belief system that was developed outside of any organized church by people who were for the most part not Christians in the conventional sense, and were, indeed, in many cases avowed anti-Christians. The new belief system was neither Calvinist nor Lutheran nor Roman Catholic—nor any combination of these. It built, to be sure, partly on the writings of seventeenth cen-

tury English philosophers and scientists such as John Locke and Isaac Newton, who themselves were devout Christians; but it ignored their theology and built only on their secular writings, without regard to the fact that those writings were considered by their authors to be devoted solely to the "earthly kingdom," in which God was present but hidden.

The word "secular" takes on a new meaning when it is applied to the world-view of the eighteenth century *philosophes*. Prior to the sixteenth century political power in Roman Catholic Christendom was divided between the ecclesiastical and the secular "swords." In the sixteenth and seventeenth centuries the idea had become widespread that all political authority, including that wielded by the ecclesiastical hierarchy, is secular, "earthly," in contrast to the "heavenly realm" of Gospel and grace—whether conceived in Lutheran terms or in Calvinist. For the intellectual leaders of the eighteenth century Enlightenment, however, there was neither a "spiritual sword" nor a "heavenly" realm. God was pushed back to a remote beginning. The secular realm—the world of time—had indeed been created a long time ago by a "supreme artisan," or a Supreme Being, and had then been given it direction, its design, its purposes. But the God of Voltaire and Rousseau did not intervene in the nature that he had once created.

These religious tenets, called Deism, were an essential part of the belief system of the Enlightenment. Deism was founded, to be sure, on reason; it was a system of rational propositions based on observation of nature, including human nature. The source of reason was the intellectual capacity of every individual person; Deism had no church. Nevertheless, God was an essential part of the Deist belief system. Reason, it was said, teaches every person who is willing to exercise it that the universe was created by God, and that according to God's design man should use his reason to do good and to avoid evil. Although they attacked traditional Christianity, most *philosophes* vigorously denied that they were atheists or pantheists. Voltaire, for example, criticized Spinoza for failing to recognize that there is a divine Providence which made eyes to see, minds to reason. "How is it that [Spinoza] did not glance at these mechanisms," Voltaire asks, "these agents, each of which has its purpose, and investigate whether they do not prove the existence of a supreme artisan?"53 "The whole philosophy of Newton," Voltaire wrote, "leads of necessity to the knowledge of a Supreme Being who created everything, arranged all things of his own free will."54

53. Cited by HAMPSON, supra note 52, at 81.
54. Id. at 78.
Thus the *philosophes*—in general—believed that there is a cosmic order, that it was created originally by the Deity, and that it was designed to operate harmoniously for the benefit of mankind. They believed in what Jefferson, in the Declaration of Independence, called "the laws of Nature and of Nature's God." It was, in fact, their belief in the laws of Nature's God that led the *philosophes* to proclaim universal human happiness as the highest goal, and universal liberty, equality, and fraternity as the highest means of achieving that goal. Deism was a Christian heresy. As Carl Becker has put it, "[The *philosophes*] had put off the fear of God, but maintained a respectful attitude toward the Deity. They ridiculed the idea that the universe had been created in six days, but still believed it to be a beautifully articulated machine designed by the Supreme Being according to a rational plan as an abiding place for mankind. . . . They renounced the authority of church and Bible, but exhibited a naive faith in the authority of nature and reason. They scorned metaphysics, but were proud to be called philosophers."55

The political, economic, and social implications of the religion of Deism are apparent. Its individualism and its rationalism led inevitably to an emphasis on reform of existing conditions for the benefit of the majority of individuals living in a given society. It was utilitarian in both the popular and technical sense of that term; indeed, it was the young Beccaria who, in 1765, with Voltaire's endorsement, in proposing substantial reforms of communal law, first coined the slogan of utilitarianism later adopted by Jeremy Bentham, "the greatest happiness of the greatest number."

The *philosophes* of the French Enlightenment taught that the privileges of the aristocracy were not only unjust but also illogical—in other words, that the reasons hitherto given to justify them were false. This was an essential precondition of the Revolution.

The *philosophes* also provided major elements of the political program later adopted by leaders of the Revolution. Montesquieu's *Spirit of the Laws* had expounded the theory of separation of powers; he attributed this theory to the English system of government, but in fact he altered the English theory substantially by placing the functions of legislation, executing, and judging in three wholly separate compartments, with legislation supreme over the other two. This paved the way for the development of a theory of the judicial function as the objective, consistent, and logical application of statutory law to

specific cases. Montesquieu had also taught that laws have the purpose of promoting individual liberty and economic equality; this, too, became part of the program of the Revolution.56

Rousseau may also be credited with providing major elements in the later political program of the Revolution. He taught that law should rectify inequalities that arise from natural differences among people. "For the very reason that the force of things always tends to destroy equality," he wrote, "the force of legislation must always tend to maintain it."57 Rousseau, like other intellectual leaders of the Enlightenment, attacked specific aristocratic privileges. In his Discourse on Inequality he proposed that inheritances ought to be reduced by taxes, and that those who owned no land receive some.

In general, however, the intellectual leaders of the eighteenth century did not prophesy a Revolution such as that which broke out in 1789. They did not propose the overthrow of the monarchy. "In all France there were not ten of us who were republicans before 1789," wrote the Revolutionary lawyer Camille Desmoulins.58

The philosophes had not preached a revolution. They were reformers, not revolutionaries. They presented a critique of the existing regime, together with proposals for changing it, not for abolishing it. Their critique, and the philosophy that underlay it, became part of the belief system of those who later overthrew the regime and established a new one. Above all, the individualism of the Enlightenment and its rationalism—these two basic elements from whose combinations were derived its utilitarianism and its emphasis on liberty and equality—became fundamental principles of the Revolution. But the Revolution also added other elements that were only implicit, at most, in the Enlightenment philosophy. One such element was the belief in public opinion as the ultimate political authority. Another was nationalism.

The phrase "public opinion"—l'opinion publique—emerged in the 1780's in one of the leading salons of Paris, Necker's circle. This was after more than thirty years of intense agitation among the intellectuals of France, especially in the large cities. Ideas had fermented


57. J. ROUSSEAU, CONTRAT SOCIAL, bk. 2, ch. xi (1762).

58. Quoted in PEYRE, supra note 52, at 73. Peyre adds, "Furthermore, he [Desmoulins] was not one of those ten."
through salons, clubs, circles, and societies of all kinds; through pamphlets, tracts, periodicals, books; through the theater (Beaumarchais' *Marriage of Figaro*, for example, was an attack upon aristocratic privilege whose repercussions were enormous); through secondary education; through conversation. Then in 1788 the public as a whole was invited—by Necker—to make suggestions of remedies for the great financial crisis of the government; the floodgates were opened, and the *cahiers de doléances* poured in—grievances of all kinds, proposals of all kinds. Now the circulation of ideas was extended beyond the intellectuals to professional people generally, tradesmen, artisans, indeed the entire middle class. Finally, King Louis XVI himself used the magic phrase: "[Let us] raise the results of public opinion," he said, "to the rank of laws, after they have submitted to ripe and profound examination."60

Eventually the Revolution institutionalized the concept that government should be so organized as to require the maximum responsiveness to public opinion. The theoretical basis for such a political principle may be found in the Enlightenment view that society is an

59. Id. at 75-76; HAMPSON, supra note 52, at 132-41.
60. Louis made this statement in 1788 as an invitation to the public to contribute to the initial stages of drafting a criminal code. "All our subjects," Louis declared, "will be allowed to take part in the execution of the project [of the Criminal Code] with which we are occupied. . . ." Quoted in Paul Viollet, *French Law in the Age of the Revolution*, in A.W. Ward et al., eds., *THE CAMBRIDGE MODERN HISTORY*, VIII, 744-45. Cf. also E.J. LOWELL, *THE EVE OF THE FRENCH REVOLUTION* 324 (1892). Lowell states: "In the decay of religious ideas, the Frenchmen of the eighteenth century had set up a comparison independent of revelation. They had found it in public opinion. The sociable population of Paris was ready to accept the common voice as arbiter. . . . 'A halberd leads a kingdom,' cried a courtier to Quesnay the economist. 'And who leads the halberd?' retorted the latter. 'Public opinion.'"

On Rousseau's use of the phrase "public opinion" see Paul A. Palmer, *The Concept of Public Opinion in Political Theory*, in *ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCILWAiN* 235-37 (1936). Rousseau writes: "Just as the declaration of the general will is made by the law, the declaration of public judgment is made by the censorial tribunal. Public opinion is the sort of law of which the censor is the minister." Cited in id. at 237. Palmer notes (233) that the phrase "*opinio publica*" is found without the political connotation of public opinion in the writings of Marcus Tullius Cicero, Ad. Atticum VI, i. 18 and in the writings of John of Salisbury, *The Statesman's Book of John of Salisbury*, John Dickenson, ed., 39, 130 (1927). Earlier uses of the term "opinion" in Pascal, Voltaire, Hobbes, and Locke carried a quite different connotation (as did Rousseau's "general will"). See also Wilhelm Bauer, *Public Opinion*, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (1934); B. FAY, *NAISSANCE D'UN MONSTRE—L'OPINION PUBLIQUE* (1965); H. Speier, *The Rise of Public Opinion* in Harold D. Lasswell et al., eds., *PROPAGANDA AND COMMUNICATION IN WORLD HISTORY* 147-67 (1980).

On the emergence of the modern meaning of "public opinion" in Necker's Circle, and the elaboration by him of a theory of government responsive to public opinion, see FERDINAND TÖNNIES, *KRITIK DER ÖFFENTLICHEN MEINUNG* Chap. VIII (1922).
association of rational individuals; for if that is so, their shared opinions are the best indication of their needs. It was revolutionary experience, however, that brought this theory to fruition.

The element of nationalism was also more a product of the Revolution itself than of the Enlightenment as such. Most of the intellectual leaders of the Enlightenment had thought of themselves as Europeans. Rousseau, to be sure, had glorified the nation-state. He had attributed to the nation total sovereignty, and to the state the responsibility of inculcating in its citizens the redemptive virtues of simplicity and honesty and care for the common good. Similarly, the Abbé de Sieyes, in his famous revolutionary tract The Third Estate—What It Is, wrote that the nation exists before all and is the origin of all; “its will is always legal, it is the law itself.” These doctrines are, indeed, as Jacob Talmon stressed, sources of twentieth century totalitarian democracy. 61 From an eighteenth century viewpoint, however, the glorification of the nation-state was only an indirect reflection of Enlightenment thought; more fundamentally, it was a product of the intense nationalism that was beginning to overcome Europe as belief in traditional Christianity began to decline. 62 But whatever the underlying causes may have been, it was the Revolution itself that put nationalism in the forefront of its belief system and of its domestic and foreign policies. Domestically, the Revolutionary government sought to unify France politically, administratively, and legally, as well as culturally. In foreign relations, the Revolutionary government mobilized a mass army to make war upon France’s neighbors in order to secure what she now conceived to be her “natural boundaries.”

The Transformation of French Law

As in the case of the German and English Revolutions, the most apparent and most comprehensive legal changes connected with the French Revolution were in the field of constitutional law. I have already referred to many of these changes. A written constitution was adopted for the first time in French history. A republican form

of government was instituted, with supreme power given to a legislative assembly elected by popular vote and responsive to public opinion. The church was subjected to state control insofar as that was necessary to protect religious toleration. The judiciary was confined to the application of statutory law. Most hereditary distinctions and social privileges of the aristocracy were abolished. Remnants of feudal law were abolished. In principle, equal civil rights were established for all.

In addition to constitutional law, other aspects of the French legal system underwent transformation. Of special importance was the unification of French law. Diversity of local customs, and especially the striking differences in legal traditions between the south and the north of France, were subordinated not only to a common written constitution and a unified system of legislation and adjudication but also to codification of criminal, civil, and commercial law on a national scale.

In civil law, the famous Code civil of 1804, in whose drafting Napoleon himself played a part, and which was intended to express the spirit of the Revolution, gave especially strong protection to rights of private property and contract. With the abolition of the remaining feudal dues and restrictions, ownership was defined broadly as the right to possess, use, and dispose of one’s property as one wills, except as prohibited by law. A general contract law was formulated—rules applicable to all kinds of agreement; and the intention of the parties was made central to contractual obligation. Rescission of contract for gross unfairness (“lesion”), duress, or fraud, as well as for minority, was now permitted by law without the former requirement of royal consent. In tort law (“delict”), the principle was established that, as a general rule, liability should be based on fault: the doer of harm should not be civilly liable to the victim unless he intended to cause the harm or else caused it negligently. In family law, the state was accorded general jurisdiction over marriage and divorce. Marriage was viewed as any other civil contract, and divorce was obtainable by mutual consent, for cause, or for proven incompatibility. The father’s disciplinary power over his wife and his children was restricted. Wives were accorded greater property rights and greater civil rights generally.63

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Striking law reforms were also introduced in the field of criminal law and procedure. Voltaire had not exaggerated when he wrote that French criminal law and procedure of his time seemed to be "planned to ruin citizens." Although the Criminal Ordinance of 1670 had identified types of crimes and the punishments applicable to them, in fact public prosecutors and judges were free to indict and convict for acts not legally defined as crimes at all; moreover, there was no control over their actions, since proceedings were not public and no reports of the reasons for decisions were given. Von Bar summarized the pre-Revolutionary situation as follows:

Punishments [were] unequal; they [varied] according to the status of rank of the offenders rather than the nature of the crime. Punishments [were] also cruel and barbarous in their method—the base of the system [was] the death penalty, and a prodigal use of bodily mutilations. Furthermore, punishments [were] variable in discretion; crimes [were] loosely defined, and the individual [had] no security against excess of severity in the state's repression of crime. Finally, ignorance, prejudice, and emotional violence [bred] imaginary crimes; and the scope of penal law [extended] beyond the regulation of social relations and trespasses even upon the domain of conscience.5

The arbitrariness and cruelty of the substantive criminal law was more than matched by that of the system of criminal procedure. I have already mentioned the secrecy of it. In addition, suspects could be held indefinitely in prison, incommunicado, while under investigation—this under the notorious lettres de cachet. For capital offenses, of which there were a very large number (including not only treason and murder but also sacrilege, heresy, pandering, incest and others), torture could be applied to secure a confession. The judges, who had purchased their offices, were paid by the parties; additional fees were extorted by delays, and bribery was a common practice.

The penal policy of the Revolution was expressed forcefully in the Declaration of the Rights of Man and Citizen of August 1789. Among its provisions were the following:

—The law may inflict only such penalties as are strictly and clearly necessary.

—Retroactive laws are proscribed.

64. Quoted in L. RADZINOWICZ, IDEOLOGY AND CRIME 1 (1966).
65. LUDWIG VON BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW 315 (1916).
Like offenses are to receive like punishments, regardless of the rank and station of the offender.

The death penalty or infamous punishment cannot carry a vicarious infamy to the family of the condemned person.

General confiscation of the property of a condemned person is abolished.

A criminal action against a party dies when the party dies.

There shall be no crime, no punishment, without a [previously enacted] law.

There shall be a presumption of innocence.

In 1791 the fledgling Republic issues a comprehensive Penal Code. Characteristically, it was meticulous in its efforts to define crimes and to fix the severity of the punishments in proportion to the gravity of the crime. It aimed to curtail judicial discretion severely and to provide a predictable, graduated penalty structure. The 1791 Penal Code was revised in 1795. Ultimately it was replaced in 1810. The 1810 Code has served as the basic penal legislation in France—of course, with numerous amendments—until the present.

The 1810 Penal Code—like the 1804 Civil Code—bears the stamp of Napoleon's own ideas. Napoleon was in close touch with the five draftsmen of his Penal Code and with the Council of State which was responsible for accepting or rejecting it.

Napoleon's guiding principle, and that of his draftsmen, was general deterrence of crime, which he believed that the law could foster by intimidation, that is, by threat of penalty. Retribution was rejected, whether in the classical sense of exaction of a price for violation of the law (which I would call general retribution) or in the sense of vengeance (which I would call special retribution). The emphasis on deterrence was characteristic of the utilitarian philosophy which prevailed in the Enlightenment and was embodied in the Revolution. Criminal acts were to be punished because they were socially harmful—not because they violated the divine order or the cosmic order, not because they were morally wrong, not because they were against the traditions of the people. The punishment was to be primarily a deterrent to others. The goal of rehabilitation of the offender is, of course, consistent with utilitarianism and was reflected in the 1791 Code. In the 1810 Code, however, Napoleon opted for general deterrence, and against rehabilitation, as a guiding principle. "Prisons,"
said Napoleon, "are to punish prisoners, not to reform them." This was also consistent with utilitarianism, and with Beccaria's view that it is not a proper function of the law to enforce moral virtues.

In addition, Napoleon supported the reintroduction of branding for forgery, which the 1791 Code had eliminated. Confiscation of property was also reintroduced. Life imprisonment was ruled out, but not penal servitude for life. Only limited judicial discretion to move between minimum and maximum penalties was favored. There were other shifts in emphasis between 1791 and 1810, but the basic philosophy was the same: for Napoleon and his draftsmen, as for the draftsmen of 1791, as for Beccaria and the *philosophes* in the generation after 1750, the criminal law was to be, above all, a rational instrument of the state, intended by its nature to deter potential criminals by threat of penalties. Of Luther's first two uses of the law—the political and the theological—only the first was kept; the third use, the educational (to guide the faithful to virtue), stressed by Calvinism, was also discarded ("Prisons are to punish prisoners; not to reform them").

I have touched on a few basic changes in French law that followed in the wake of the French Revolution. Among many other such changes I shall mention only one: the change in legal science itself, and especially in the style and method of legal analysis and of legislation.

Prior to the Revolution, legal science in France was highly developed in the Roman Catholic Church, where it was applied to canon law and to the texts of Roman law that formed one of the sources of canon law, and in the universities, where it was also applied chiefly to canon law and Roman law. French secular law—royal law, customary law, the law of the cities and provinces—had become a university subject in 1697, but prior to the Revolution it remained a stepchild in the curriculum. This was due in part to the extraordinary diversity and complexity of French customary and local law, and in part to the largely unsystematized character of French royal law. Decisions of royal courts were seldom published; indeed, they were, for the most part, secret; and French royal statutes and regulations, though increasingly numerous in the eighteenth century, were for the most part not collected or harmonized. Portalis, a principal

author of the 1804 Code civil, described the predicament of the codifiers as they considered the pre-existing laws. "What a spectacle opened before our eyes!" he wrote. "Facing us was a confused and shapeless mass of foreign and French laws, of general and particular customs, of abrogated and unabrogated ordinances, of contradictory regulations and conflicting decisions; one encountered nothing but a mysterious labyrinth."67

Under these circumstances the draftsmen of the civil code seized upon the few available treatises. Of these, the most important was that of Pothier (1699-1772), former judge at Orléans, professor of French law at the University of Orléans after 1750, and prolific writer on civil law and family law. In criminal law as well, the codifiers drew heavily upon leading scholarly writings. Thus in France in the late eighteenth and early nineteenth centuries, as in Germany three centuries earlier, a professorial style of systematization was introduced both into legal analysis and into legislation (though not into French judicial opinions, which, under the influence of the doctrine of absolute legislative supremacy, became more laconic than ever).

French professorial style differed, however, from its German counterpart. Far more than the Germans, the French jurists prized simplicity and clarity and strove to avoid both casuistry and the excessive qualification of general doctrines. These characteristics of the new French legal science linked it with post-Revolutionary French thought and with French letters generally. Stendhal's famous remark is revealing in this regard—that he kept the Code civil at his bedside for evening reading, pour prendre le ton.

Law AND Belief in the French Revolution

That both the French legal system and the French belief system underwent substantial transformations in the last decade of the eighteenth century and the first decades of the nineteenth century can hardly be doubted. Moreover, important connections between the two transformations are easily discernible. In this respect the French Revolution differed markedly from its predecessors, the English and the German. As we have seen, it is not obvious—although it is true—that the nature and substance of German law reform in the sixteenth century are traceable in part to Lutheran beliefs and concepts. Similarly, it is not obvious—although it is true—that basic changes in English law in the late seventeenth and early eighteenth centuries are.

traceable in part to Puritan beliefs and concepts. In the case of these earlier revolutions, the connections between political and legal changes, on the one hand, and changes in the belief system, on the other, are more hidden, partly because the changes in the belief system were expressed primarily in new theologies rather than in new secular philosophies. The secular philosophies of Lutheranism and Calvinism were for the most part implicit rather than explicit. In the French Revolution, on the other hand, the secular philosophies were largely explicit; indeed, it was the theology of the Revolution that was largely implicit. Eventually, the law reforms that took place in France in the decades after 1789 were a conscious reflection of secular philosophies associated with the Revolution—its outlook of rationalism, individualism, and utilitarianism, and its emphasis on equality of opportunity, natural rights, freedom of expression, and freedom of will. In many instances the law reforms introduced after the Revolution were those that had previously been demanded by the opinion leaders of the Enlightenment; for example, in the 1750s, 1760s, and 1770s Voltaire, Beccaria, and hundreds of others who called themselves philosophes demanded the reform of French criminal law and procedure, and in the period after 1789 their demands were largely fulfilled by new legislation. Thus it has been said that the criminal law reform in the post-1789 period is "one of the clearest 'success stories' of the philosophes." 68

In speaking of the secular outlook of the Enlightenment and of the embodiment of that outlook in the law reforms that followed the French Revolution, one cannot ignore the fact that that secular outlook was itself derived from certain religious beliefs. I have spoken earlier of the belief in Deism. That was, of course, an explicit theology. It postulated a God of creation, who appointed a purpose for everything in the universe. Man was given certain qualities—above all, reason—to enable him to secure his own advancement. By using his reason Man is able—so the philosophes taught—to cast out error, to discern truth, and to reform the world.

From Deism it followed—and here we move from explicit to implicit theology—that Man is essentially good, not evil. He is born free and equal. He is born with the capacity to pursue—and to achieve—both knowledge and happiness. His future is governed by a natural law of progress. Thus arose what has been called "a new cosmology," namely, "the belief that all human beings can attain here on this earth a share of perfection hitherto in the West thought to be possible only

for Christians in a state of grace and for them only after death." 69

Not only Protestant Christianity in its Lutheran and Calvinist forms but also Roman Catholic and Anglican Christianity were challenged by this new implicit theology. Faith in the natural goodness of man, in the purity and power of reason, in the promise of science, and in the inevitability of progress—challenged the old belief in Scripture and tradition, in the sinfulness of man, in the providential character of human history, and in the power of grace and revelation.

Standing between the secular outlook (rationalism, individualism, utilitarianism, natural rights, equality of opportunity, freedom of expression, freedom of will) on the one hand, and the implicit theology (Deist creationism, the perfectability of man, the natural law of progress) on the other hand were the twin dogmas of the nation-state and of public opinion. Law was to be the law of the nation-state as determined by public opinion. Its ultimate justification was to bring about progress and perfect happiness, and thus to fulfill the purpose of creation, but it was to do so, in the first instance, by responding to the national interest democratically expressed. 70

Yet it would be wrong to say that the philosophy and theology of the eighteenth century Enlightenment and of the French Revolution marked a total break with the philosophy and theology of the English and German Revolutions or of Western Christendom in the Roman Catholic era of the eleventh to fifteenth centuries. The answers were different, but the basic questions and the terms of reference were the same.

Similarly, it would be wrong to suppose that the changes in French law that took place in the late eighteenth and early nineteenth centuries lacked continuity with prerevolutionary law. Like the reformed German law of the sixteenth century and the reformed English law of the seventeenth and eighteenth centuries, so the reformed

69. CRANE BRINTON, IDEAS AND MEN: THE STORY OF WESTERN THOUGHT 369 (1950). The novelty of this conception was expressed by St. Just: "Le bonheur est une idée nueve en Europe." Id.

French law of the nineteenth century had its roots in an older European legal tradition that dated from the late eleventh and twelfth centuries. Each of the Great Revolutions of modern Western history represented both a break with that tradition and a renewal of it.