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ASPECTS OF PURITAN JURISPRUDENCE; COMMENT ON BERMAN, REVOLUTION AND LAW: II THE PURITAN REVOLUTION AND ENGLISH LAW

BARBARA A. BLACK

In his learned and informative lecture on the Puritan Revolution and English law, Professor Berman tells us that England in the seventeenth century witnessed fundamental, revolutionary change, both religious and legal; a "Puritan belief system"¹ became dominant and the English constitution and laws were transformed. According to Professor Berman, while there have been studies of the interconnections between religious change and *constitutional* change, nobody has attempted to relate *overall* change in the legal system to change in the belief system. However, "the new law that emerged in England as a result of the upheavals of 1640 and 1689 must be seen in the light of changes in belief that took place during that period, including . . . religious belief,"² and it is Professor Berman's aim to explore the "interconnections, interrelationships"³ between new legal system and new belief system.

As Professor Berman notes, his thesis of a radical transformation of English civil and criminal law in the late seventeenth/early eighteenth centuries is controversial.⁴ My own sense, more or less in accord with standard accounts, is of evolutionary rather than revolutionary, and incremental rather than fundamental, change. Professor Berman may, of course, be correct. Since there is no doubt whatever of substantial change, perhaps it does not matter greatly for our purpose whether we characterize that change as radical. I will, however, comment in passing that there may be a built-in danger in the entirely laudable enterprise of investigating connections between revolution and law: Those who study revolution *and* law seem overly-inclined to see revolution *in* law.⁵ The most egregious instance of this phenomenon is that modern scholarship on nineteenth-century Anglo-American law in which focus on the Industrial Revolution produces a thesis (in the event unsupportable) of

1. Berman, p. 594.

2. Berman, p. 572.

3. Berman, p. 570.

4. Berman, pp. 598-599.

5. Actually the problem may go deeper; as I seem to keep saying, historians tend to depict the period they are studying as more eventful than other times.

radical transformation of law. Although in other respects Professor Berman's approach offers a valuable corrective to studies of that kind,⁶ in this respect — that is, its rather dramatic view of legal change — his position is very like the others.

The phrase 'Revolution and Law' brings me to the one thing about Professor Berman's second lecture that I find troubling — or at least in need of clarification. The Puritan Revolution confronts us with *both* a belief system *and* revolution; thus when we refer to "The Puritan Revolution and English Law" we may be talking about the connections between *revolution* and law or between *Puritanism* and law. I take it that, as between these two, Professor Berman is chiefly (though not exclusively) interested in Puritanism and law. Thus: "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?" [Emphasis added]⁷ And then, more specifically: "Do seventeenth-century English *religious beliefs* help to explain why England opted [1] for Parliamentary supremacy as against royal supremacy, [2] for the common law as against rival systems, [3] for jury trial as against trial by professional judges, [4] for the adversary system of proof as against the inquisitorial system. . . ." [Emphasis added]⁸ Professor Berman's answer is, I take it, yes, but I have some doubts. Although it is very clear that English Puritans preferred Parliament to King, the common law to its rivals, jury to judge, and adversarial to inquisitorial procedure, it is not clear to me, at least, that in each of these the preference had its roots in a Puritan belief system rather than in the fact that the Puritan belief system was fighting for its life. The preferences, one and all, are for those institutions which happened at that time to be relatively friendly to Puritanism; the question is whether those are the institutions which are in their nature particularly suited to a Puritan society, which would invariably be relatively friendly to Puritanism, to which Puritanism not under siege would cleave.

The answer seems to me to be yes to the first — that is, Parliament v. King. Calvinist covenant theology did point in the direction of participatory government (even, as some have suggested, of democracy) in church and state. However, I am less comfortable about jury and adversarial system, and decidedly uncomfortable about the common law. Since

6. As Professor Berman points out, while we take readily to "explanations of legal institutions in terms of the economic or political or social 'interests' or 'policies' that they support," we are remarkably uninterested in "philosophical and religious explanations." Berman, p. 570.

7. Berman, p. 594.

8. Berman, p. 604.

the jury sense is the parliamentary sense, perhaps a Calvinist belief system would prefer jury to judge as it did Parliament to King. Nevertheless, there are strong counter-forces within the Puritan belief system, and we can cite at least one example of a relatively strict Anglo-American Calvinist society choosing to eliminate the jury.⁹ Although Puritans did, when in power, adopt the adversarial rather than inquisitional mode of trial, I am not persuaded that it was something in their religious belief system, rather than in their secular heritage (and of course immediate situation), that motivated this choice. The strongest statement that I would be inclined to make about jury and adversarial system is that they are not incompatible with a Puritan belief system. While I understand that Professor Berman's search for "interconnections, interrelationships" is not limited to the *causal*, I assume that he is looking for something stronger in the way of a link than mere non-incompatibility.

My suggestion is then, that as to certain of the connections that I understand Professor Berman to suggest, the linkage is *revolution* and law, rather than *Puritanism* and law. There is to be found no better illustration of this point than in the story of Puritanism and the common law. That English Puritans did prefer the common law to its rivals is hardly surprising in view of the role of those rivals in what was perceived as persecution of Puritans, and in opposing the prerogative courts they worked hand-in-hand with the common lawyers. Extreme caution must be exercised in describing Puritan attitudes toward the common law itself (not to mention the lawyers). Professor Berman seems to me to convey an impression of Puritan approval of, indeed attachment to, the common law. That is not my view. When the dust cleared, triumphant Puritans attacked the common law with relish. If the common law was, as it has been called, the soul of the rebellion, the rebellion shortly lost its soul. Taking the common law all in all, one could even make a fair, though not ultimately convincing, case for its *incompatibility* with a Puritan belief system. As for the partnership of Puritans and common lawyers, the marriage was one of convenience merely: Puritans took a dim view of lawyers.¹⁰

9. New Haven Colony. Moreover, the Massachusetts Bay colonists developed rigorous procedures for control of the jury.

10. The fact that Puritans disliked lawyers hardly serves to distinguish them from the balance of mankind, and in all truth the legal profession in Seventeenth century England had much to answer for in the delays, technicalities and excessive charges which transformed the course of justice into a denial of justice. A variety of suggestions were advanced in England for dealing with these unsavoury persons. In 1653 a committee on law reform presented for consideration by the Little Parliament, bills establishing a £5 maximum fee for counsel in any one cause, prohibiting

Perhaps the point I have been making may be though more quibble than contribution, and off the mark as well. In Professor Berman's capacious definition, a "Puritan belief system" includes "Calvinist and neo-Calvinist beliefs . . . espoused not only by Puritans and other so-called Non-Conformists, but also by many who remained loyal to Anglicanism."¹¹ This definition has not only the advantage of emphasizing the widespread influence of Calvinism, but the answer, it may be, to my criticism, such as it is: The inquiry is into the connections between the *dominant* belief system and law, and the *dominant* belief system was positively hospitable to, not merely not incompatible with, such institutions as those above. There is, of course, no quarreling with this approach *qua* approach (assuming it fairly to represent Professor Berman's view); the least we can grant a lecturer/author is the privilege of defining his terms and framing his questions. Even so, I am not sure that I agree with all of the lec-

practice by any member of Parliament except on behalf of the Commonwealth, and excluding practicing lawyers, judges and officers of the court from the final court of appeals. Hugh Peter would have permitted lawyers only in cases involving large sums, and, in 1645, one "Anonymous" admonished his "deare Countrey" against electing to Parliament "such men whom Fooles admire for their wit, *Lawyers*." There was, however, the not uncommon phenomenon of the Puritan lawyer, as in the person of John Cook, who replied to Anonymous in "The Vindication of the Professors & Profession of the Law" &., wherein he professes that "no calling makes more for the happy state of the Kingdom than the law...." Cook observes that Anonymous refers to lawyers as necessary evils, "...but it seems he meanes that there is no more necessity of Lawyers in a Kingdome, then there is of Woemen who have been called necessary evils...."

There is no evidence that Puritans advocated, and certainly they did not legislate, the abolition of women; in Massachusetts Bay, however, they provided:

"Every man that findeth himself unfit to plead his own cause in any Court shall have Libertie to impley any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines." (*Body of Liberties*, 1641).

This enactment was a statement of existing law in the Bay Colony, rather than an innovation of 1641. It went beyond anything even proposed in England, and eliminated the problems presented by the legal profession by eliminating the legal profession. Thus, whatever the Protestant ethic said to the spirit of capitalism, lawyers were not to benefit from the concept of calling. The godly lawyer, if that is not a contradiction in terms, would assist those in need of counsel in some spirit other, and worthier, than *lucri causa*. However, in *The Laws and Liberties of 1648*, which incorporated almost all of *The Body of Liberties*, there was no proscription, as there was in the earlier Code, of the practice of law for "fee or reward"; lawyers were, after all, like "woemen,... necessary evils."

11. Berman, p. 569.

turer/author's conclusions, but certainly the belief system of a Matthew Hale — a person who, accepting many a Calvinist tenet would nevertheless not, in strict usage, be called a Puritan — *was* hospitable to, *e.g.*, the common law.

Musing over the difference, in this context, between a Matthew Hale and the Puritan strictly so-called, it occurred to me that the reader might be interested in hearing further about the latter. And so, for the remainder of this comment, I will consider Puritanism and law in a narrower perspective than that adopted by Professor Berman. Focusing on orthodox Puritanism, I will ask not what connections there were between the emerging Puritan belief system and the English legal system but what English and American Puritans said about law. What jurisprudential principles, precepts, propositions, did Puritans as Puritans embrace? Was there something we may usefully call a Puritan jurisprudence, and, if so, what was it like? Since this is to be a reasonably short comment, I will deal mainly with one jurisprudential issue: The source of law.¹²

There would seem to be no doubt that to seventeenth-century Puritans the source of law was the word of God; thus, the Puritans of Massachusetts Bay wrote: "This hath been no small privilege, and advantage to us in New England . . . to frame our . . . lawes according to the rules of his most holy word."¹³ Nevertheless, and no doubt predictably, agreement on this abstraction did not produce agreement on specifics. One can see the range of potential formulations contained in the acceptable general principle, and each had its advocates. Thus, at one extreme, the logical if anarchical conclusion of this kind of legal philosophy is the denial that man should or can enact laws at all:

For alas, what energy or virtue can such an act of a company of poor sinful creatures add unto the most perfect and wholesome laws of God? It is enough for us, and indeed it is all that can be done by any people upon earth.

1st. To declare by their representatives, their voluntary subjection unto them, as unto the laws of the Lord their God.

12. The discussion of Massachusetts that follows leans heavily on George Haskins' book, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (Archon Books 1968) (Hereafter Haskins). Professor Haskins has in this work so thoroughly treated the subject that those of us who turn to it have a hard time avoiding plagiarism, much less finding anything original to say; I have tried to do both here but I am not sure how successfully. See, in particular, Haskins Chapter IX.

13. Epistle, *The Laws and Liberties of Massachusetts* (1648) (ed. M. Farrand: Cambridge Mass. 1929).

2nd. After such professed subjection, to fall into the practice thereof, in the name and strength of Christ, their King and Lawgiver.¹⁴

There is no record that any commonwealth or kingdom evinced much enthusiasm for this plan, which was urged by one William Aspinwall, but in 1567 Scotland did follow the procedure which would be the next best thing, namely literal enactment of Scripture. Leviticus 18 was adopted verbatim as positive law. Somewhere further along the spectrum were those who advocated only the repeal of existing laws contrary or repugnant to the law of God. At the other extreme, it was even possible to satisfy the requirement that man's law be the law of God merely by enactment of laws in harmony with some highly abstract ethical system derived from, or contained within, God's word. Calvin, for example, at one point said that laws were valid to the extent that they followed "the perpetual rule of love."¹⁵ Such an approach would scarcely distinguish a Puritan legal system from one consciously secular. Society may rule that its juristic institutions are to be unaffected by the religious convictions of its members; nonetheless the normative component of law will be determined, by and large, by the ethical code of the majority, and ethical attitudes more often than not are religiously inspired.

When that leading Massachusetts minister, John Cotton, said, as perhaps none other could have, "the more any law smells of man, the more unprofitable,"¹⁶ he identified precisely, if inelegantly, the point at issue among the proponents of the various positions sketched above. God and man were in inverse relations, and man's function as law-maker might range from ministerial, as the Biblical literalists would hold, to the near-illimitable, the natural inference from Calvin's thesis. As his words suggest, Cotton can be placed toward the Biblical literalist end of the spectrum occupied by William Aspinwall.¹⁷

14. William Aspinwall, "An Address to the Reader," *V Massachusetts Historical Society Collections*, (1798): 187, 190.

15. Quoted in Haskins, 161.

16. Quoted in Haskins, 160.

17. It is clear that Aspinwall felt this to be the case. In 1655, in England, Aspinwall published a code of laws drafted by John Cotton, together with his own comments. Aspinwall's praise was unstinting, and uncritical; he titled the code "An Abstract of the Laws and Government, wherein, as in a mirror, may be seen the wisdom and perfection of Christ's kingdom, accomodable to any state or form of government that is not antichristian and tyrannical." "Note," *V Massachusetts Historical Society Collections* (1798), 172. While this panegyric may have flowed from Aspinwall's conviction that the Abstract "far surpasseth all the municipal laws and statutes of any of the Gentile nations and corporations under the cope of Heaven," "Address to the

The Massachusetts colonists had, then, to make decisions about the extent to which a belief in God's word as the source of law bound them to that word as it appeared in Scripture. They had also to make decisions about the extent to which their freedom in this belief was circumscribed by English law. The Massachusetts Charter proscribed laws and ordinances "contrary or repugnant to the laws and statutes of this our realm of England." It was certainly not beyond Puritan ingenuity, honed by Biblical exegesis, to construct a theory by which the letter of the Charter could be followed while its spirit and the common law were evaded; the theory surfaced in the so-called codification crisis. In John Winthrop's words:

The people had long desired a body of laws [One] great reason . . . which caused most of the magistrates and some of the elders not to be very forward in this matter For that it would professedly transgress the limits of our charter, which provide, we shall make no laws repugnant to the laws of England, and that we were assured we must do. *But to raise up laws by practice and custom had been no transgression as in our church discipline, and in matters of marriage, to make a law that marriages shall not be solemnized by ministers, is repugnant to the laws of England; but to bring it to a custom by practice for the magistrates to perform it, is no law made repugnant, &c.*¹⁸

Thus the law of England was to be displaced by what Professor Goebel has called "a growth of custom along biblical lines."¹⁹ The examples given by Winthrop, church discipline and civil marriage, were specifically Puritan tenets, in harmony with Puritan conceptions of the word of God. Winthrop's other reason for the resistance to codification was that a new community would benefit by experience with the new environment in determining which laws it were well to adopt. The two themes, Godly sanction and utility, recur repeatedly in the early legal development of Massachusetts Bay. When, for example, the pressure for codification became irresistible, the General Court initiated codification procedure in orders which read:

Reader," *supra*, n.14 at 190, the main thrust of his remarks lies elsewhere, for he concedes that the model is imperfect and incomplete. It is not so much the substance, as the jurisprudential basis of the Code which he extolls, the fact, that is, that it was collected out of the scriptures," *id.* at 187. Aspinwall's eulogistic commentary on Cotton's Code is reprinted along with that Code in *V Massachusetts Historical Society Collections* 173 (1798).

18. I *Winthrop's Journal: History of New England* (ed. J.K. Hosmer, New York 1908) 2 vols., 323-32 (hereafter *Winthrop, Journal*).

19. Julius Goebel, Jr., "King's Law and Local Custom in Seventeenth-Century New England," 31 *Col. L. Rev.*, 416, 432 (1931).

(May 6, 1635) The Governor [et al] are deputed by the Court to make a draught of such laws, as they shall judge useful for the well ordering of this Plantation. . . .²⁰

(May 25, 1636) The Governor [et al] are entreated to make a draught of laws agreeable to the word of God, which may be the Fundamentals of this Commonwealth, and to present the same to the next General Court.²¹

Notably and significantly there was no injunction to draft laws which would not be repugnant to, much less laws based on, the law of England. They were to be "useful" and (or?) they were to be "agreeable to the word of God." On the other hand, we have Winthrop's interpolation to the first order, to the effect that ". . . it was agreed, that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws."²² No modern commentator has succeeded in improving on this pithy encapsulation of the place of English Law in the Bay Colony. Magna Charta was not to be adopted, not even so far as it might have been applicable to the conditions in Massachusetts in 1635. But there it was, for handy reference, known to these transplanted Englishmen, like the English language itself a medium for the communication of ideas. And so with all of English law, which as a working tool provided language and procedure with which to effectuate the principles of utility and of harmony with God's word. It was inevitable that some of the substantive content of Magna Charta, and of English law generally, would filter into Massachusetts law, but, on the evidence not because the colonists felt themselves bound to adopt it.

And indeed the Massachusetts colonists were not bound to *adopt* English Law, but simply to avoid making laws contrary or repugnant thereto. Even this lesser obligation was, however, too burdensome for them, and they paid it roughly no mind. But there were those within the colony to whom this cavalier attitude was anathema, and who threatened to bring the wrath of English authority down upon the Bay Colony. In 1646, Robert Child and his fellow remonstrants petitioned the Massachusetts General Court for general incorporation of English law, and warned that their next step would be to appeal to Parliament. Whereupon the General Court published, in its own defense, the Declara-

20. I Records of the Governor and Company of Massachusetts Bay (ed. N.B. Shurtleff: Boston 1853-1854) 6 vols., 147 (hereafter, Mass. Records).

21. *Id.* at 174-175.

22. I Winthrop, *Journal* 151.

tion of 1646 wherein is "established" the identity of Massachusetts and English Law.²³

It was of course not true that because the colonists denied the bindingness of English Law they were foreclosed from adopting any rules or concepts of English law which they considered useful, or in harmony with God's word, and scholars have traced much colonial law to its English origin, in King's law and local custom. But the Declaration of 1646, in which colonial authorities strained very intellectual muscle to demonstrate the over-all conformity of their law to English law, is damning evidence of the impossibility of that enterprise. Thus, by way of example, colony law provided that "When parents dye intestate, the Elder sonne shall have a doble portion of his whole estate. . . ." Under common law primogeniture operated to give all realty in the estate to the eldest son. The Declaration, however, states blandly that in Massachusetts, as in England, "The eldest sonne is preferred before the younger in the ancestor's inheritance."²⁴

In the reply of the General Court to the petitioners, the matter was dealt with thus:

And whereas they seem to admit of laws not repugnant, etc., if by repugnant they mean, as the word truly imports, and as by the charter must needs be intended, they have no cause to complain, for we have no laws diametrically opposite to those of England, for then they must be contrary to the law of God and of right reason, which the learned in those laws have anciently and still do hold forth as the fundamental basis of their law. . . .²⁵

This was a brilliant, but surely inaccurate, interpretation of the word "repugnant" as used in the Charter, which doubtless aimed lower: "You may not give younger sons a share in the inheritance if that is not the law in England," seems more in the probable spirit of the Charter. What we see here, *inter alia*, is the substitution of a concept of similarity of validation for the concept of similarity of content which was, almost certainly, the intendment of the Charter. In effecting this alteration, the General Court perforce took up John Calvin's position on the source-of-law spectrum, holding, by necessary implication, that man is to have the broad function in law-making which Calvin's view would assign to him, rather than the merely ministerial role to which John Cotton would have

23. I *The Hutchinson Papers* (Albany, 1865) 223.

24. *Id.*

25. II Winthrop, *Journal* 301.

him relegated. The double-barrelled utility of this jurisprudential stance lay in the fact that it enabled colonial authorities to ignore English law on the one hand, and the Bible on the other. Moreover, concentrating now on the latter aspect, if God's law might speak through an almost infinite variety of man-made laws, then perhaps all man-made laws are God's law and must be obeyed:

That distinction which is put between the Lawes of God and the lawes of men, becomes a snare to many as it is misapplied in the ordering of their obedience to civil authority; for when the Authority is of God and that in way of an Ordinance *Rom. 13.1.* and when the administration of it is according to deductions, and rules gathered from the word of God, and the clear light of nature in civil nations, surely there is no humane law that tendeth to common good (according to those principles) but the same is mediately a law of God, and that in way of an Ordinance which all are to submit unto and that for conscience sake.²⁶

To the modern cynical eye this completes the process of providing theoretical justification for secularization of the juristic underpinnings of a Puritan (or any) society. The jurisdiction to decide the soundness of a given deduction from God's word resided, beyond doubt, in civil authority; a Biblical literalist, unwilling to obey a law which seemed to him patently contrary to Scripture, had no alternative to obedience, for, he was assured, when the voice is the voice of duly constituted authority, the words are the words of God.

What we seem to see in Puritan Massachusetts, then, is a jurisprudence which renders equally illusory the constraints of Charter and Scripture, and even-handed, impartial, sophistry which provides, for anyone seeking it, a route of escape from the straitjackets of English law on the one hand and God's word on the other. Still we must be wary of too-facile equation of Puritan attitudes toward English law with those toward Scripture. The theory which justifies departure from English law renders English law irrelevant, but the theory which justifies departure from Scripture assumes the relevance of Scripture. However, it may look to those of us who lack the Puritans' trust in their elected leaders and can hardly even comprehend the degree of their faith in man's ability to reason, when the Massachusetts authorities declared that their law was to be, and was, "gathered from the word of God," they meant it.²⁷

26. Epistle, *Laws and Liberties*, *supra*, n.13.

27. And in fact there was much reliance in Massachusetts law on Scripture, in the area of capital crime almost total reliance.

While there is no denying the Puritan's belief that the word of God is the source of law, there has been some suggestion that Puritans were not really very different from non-Puritan Englishmen in this tenet.²⁸ Investigation of the origins of Puritan attitudes toward law has led commentators to point to widespread Biblicism in England from the 1530s on, and to the fact that lawyers commonly argued that the law of England was grounded upon the law of God. Englishmen generally, it is said, were conversant with the Bible and accustomed to "looking upon it as authority."²⁹ However, Puritans outdistanced non-Puritan Englishmen in Biblical literalism, and were more influenced than others by the Bible in their conceptions of ideal law. Insofar as this analysis seems to suggest that the difference was essentially one of degree, it is, I should say, somewhat misleading, for, as is often the case, that which can be stated in theoretical terms as a mere variation in emphasis was, practically, a fundamental difference in approach. The distinction between the lawyer and the Puritan was that the one sought justification for existing law in Scripture, while the other often found in Scripture justification, indeed a command, for the abrogation of existing law. Coke might remark, in his Report of a case, "that in this Point as almost in all others the Common Law was grounded upon the Law of God as it appeareth in the 27 Chap. of *Numbers* . . .,"³⁰ but if the Common Law "in this Point" had contradicted, as it well might, *Numbers: 27*, Coke would not have suggested substituting God's law. Nor for that matter would Matthew Hale. As Professor Berman tells us, Hale believed in the independent validity of "English law as such," a validity independent, that is, of divine law. To the orthodox Puritan there could be no validity, for "English law as such" or for any law of human invention, independent of divine law. Thus, where English law did not, in Puritan eyes, accord with God's word, English Puritans urged, and Massachusetts Puritans effected, its replacement by law in consonance with that word. Therefore, we see Puritans in the vanguard of law reform in England, and the common lawyers on the whole opposed. Puritan law reform was, of course, in part an attack on prerogative courts, but it was also in substantial part an attack on the common law. Unhampered by the common lawyers' devotion to the common law, not inclined to grant it a presumption even of validity, much less of desirability, the Puritan—even the Puritan lawyer—might, and did, examine the common law with cool, clear-eyed detachment.

Since, as we have seen, there was considerable elasticity to the con-

28. See Haskins, Chapter IX.

29. Haskins, 145.

30. *Ratcliffe's Case*, 3 Coke's Reports 37a, 40a (Queens Bench, 1592), quoted in Haskins, 144.

cept of consonance with God's word, Puritan attack on the common law exhibited considerable range, from the radical demand that it be scrapped entirely, to relatively moderate proposals for cure of one or more of its numerous defects. The former, or root-and-branch, approach was taken by the Biblical literalist wing, and had not a prayer (so to speak) of broad support even among Puritans. But the latter did have wide support. Now insofar as these proposals were based (as some were) on inconsonance with God's word, we would expect Puritans to be more forward than non-Puritans. But many of the objections to the common law had nothing to do with its inconsonance with God's word and indeed many non-Puritans also cried out for an end to the perceived inconveniences and injustices of the common law system as it then operated; the common lawyers themselves were not altogether blind to the obvious faults of the common law.³¹ But it is my impression that even as to these, as it were secular, defects, Puritans led the drive for reform. And while it is not inaccurate to locate the explanation in a very general Puritan reformist zeal, I find a more satisfying explanation in the operation of the Puritan's belief that law can have no validity independent of its foundation in God's word: Detachment is the word for the Puritan attitude toward the common law, and detachment was both necessary and sufficient for fullest comprehension of that law's defects.

The English Puritan law reform movement achieved only moderate short-run success. The range of projected reforms was vast, but relatively few were adopted during the Interregnum. The general instability and incertitudes of the Commonwealth government were partially responsible for this development, or lack of it, but lawyers must bear the major share of blame or credit. As many have noted, lawyers' law reform tends to be cosmetic rather than profound, and the entrenched legal profession was more than a match for earnest reformers. It is true that many of the reforms which failed of immediate adoption were later incorporated into English law, and, as we learn from Professor Berman, a more diffuse, but not less important, Puritan influence can be seen in such areas of law as contracts. But, as Professor Berman so insightfully notes, English law considered as a system took a direction which was, at best, merely not incompatible with the Puritan belief system: "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."³² Puritans,

31. Apologies to Tom Lehrer. Matthew Hale was only one of a number of reformist lawyers.

32. Berman, p. 608.

we are told, made the best of this path of the law, but it was not their chosen path.

Professor Berman notes that the Puritan preference for a code system over one of precedent is related to the Puritan passion for order and so it is. Putting the point slightly differently, other commentators have remarked that Puritans on both sides of the Atlantic demanded *certainty* in secular affairs, including law: Thus they displayed decided interest in public recording, specifically recordation of court proceedings and deeds, and proposals for registries of wills, provided for the use of English instead of Latin and Law-French, attacked the whimsicality of the chancellor, and advocated a systematic restatement of the law. In the eternal jurisprudential tension between certainty and flexibility, it seems clear that on the whole Puritanism led in the direction of certainty. However, the direction was complicated. For one thing, the root-and-branch faction seemed to the more moderate Puritans to be courting confusion: according to Cromwell, it was the design of the Saints in the Barebones Parliament assembled, ". . . instead of order to set up the judicial law of Moses, . . . *pro hinc et nunc*, according to the wisdom of any man that would have interpreted the text; this way or that way. . . ."³³ And indeed the Puritan minister Hugh Peter declared himself "fully satisfied with what the Supreme Power shall give out daily, yea, though they daily alter something, if for the good of the whole."³⁴ Hardly the high road to certainty. And then there is the matter of the Puritan's abiding and boundless faith in reason. When one looks closely at the preference for code over precedent, one finds it rooted firmly in this faith. "For a Bodie of Laws I know none but should be the result of sound reason, nor do I know anie sound reason that what the God of Wisdom hath appointed. . . . I wish our Lawyers would urge . . . [Scripture] for Law, and not . . . obsolete precedents."³⁵ "Why do the issue of most law suits depend upon precedents rather than the rule, especially the rule of reason?"³⁶ Reason, then, was viewed and expressed as an alternative, in contrast, to precedent, and preferred. Now this would seem to the modern lawyer to cast considerable doubt on the proposition that a Puritan belief system fostered certainty. Recognizing fully the limitations of a system of precedent considered as a means of achieving certainty, lawyers today would (I believe) nevertheless think it merely nonsense to assert that there is a *greater* degree of certainty in the use

33. Somers Tracts, VI, A Collection of Scarce and Valuable Tracts . . . 2d edition by Walter Scott (London 1809-95) 13 vols., 276-7 n.1.

34. Good Work for a Good Magistrate (London 1651), 32-3.

35. *Id.* at 32.

36. John Warr, *The Corruption and Deficiency of the Laws of England, soberly discovered* (London 1649) 3 Harleian Miscellany 239-249, 257.

of reason than in the use of precedent. And I suspect that most lawyers in the seventeenth century would have felt this way; at least such an objection was anticipated: “. . . it will be said that by this meanes all things will be uncertaine if one Judge or Chancellour shall crosse their predecessors.” *But*: “. . . nothing lesse, for it is the greatest certainty and security imaginable to judge all things by right reason. . . .”³⁷

As the reader will by now ruefully have concluded, Professor Berman's scholarship is inspiring as well as inspired. However, while there may be no logical stopping-place in an investigation of Puritan Jurisprudence, there must be an end to brief comments. I hope that this comment has served as an interesting footnote to Professor Berman's fine lecture on The Puritan Revolution and English Law.

37. John Cooke, *Vindication of the Professors and Profession of the Law* (London, 1646).