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## The Crisis of the Western Legal Tradition

William Chester Jordan  
*Princeton University*

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# THE CRISIS OF THE WESTERN LEGAL TRADITION

*William Chester Jordan\**

LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION. By *Harold J. Berman*. Cambridge, Mass.: Harvard University Press. 1983. Pp. viii, 657. \$32.50.

“The individual parts of the story told in this book are well known to specialists in various fields of history and law. Yet the story as a whole is singularly unfamiliar and conflicts with conventional preconceptions in many ways.” So Professor Harold Berman of the Harvard Law School, the author of *Law and Revolution*, informs his readers on page 538 of his study. One can hardly question the accuracy of the first sentence: the individual parts are indeed well known. One may well dispute the accuracy of the second, however, for the synthesis is neither particularly startling nor particularly effective.

The thesis of Professor Berman’s study is familiar, but a summary is in order. In the late eleventh and early twelfth centuries, the Western (Roman Catholic) Church underwent revolutionary change. Those who captured the positions of leadership insisted on a clearer separation or at least a clearer analytical understanding of the difference between spiritual or clerical competence, on the one hand, and temporal and secular competence on the other. Because the leaders who carried through this revolution captured the papacy, it is correct to speak of these events as the Papal Revolution or even as the Hildebrandine or Gregorian Revolution, after the German pope who led it. The symbolic and jurisdictional aspects of the revolutionaries’ program required, among other things, that no lay person should invest a bishop with the signs of his spiritual authority, namely the ring and the staff. Thus, it is also legitimate, if a bit pale, to call the strenuous and prolonged clash between the revolutionaries and their enemies the “Investiture Controversy.” Fundamentally, in any case, what occurred was a definitional revolution. The church was redefined as the body of clergy; it was no longer the Christian people. Indeed, the very concept of “lay person” first developed in the wake of this strife. This definitional transformation was accompanied by rancorous debate and war, especially in Germany, because the dominant lay people

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\* Associate Professor of History, Princeton University. A.B. 1969, Ripon College; Ph.D. 1973, Princeton University. Professor Jordan has written *LOUIS IX AND THE CHALLENGE OF THE CRUSADE* (1979), and co-edited (with C. McNab and T. Ruiz) *ORDER AND INNOVATION IN THE MIDDLE AGES* (1976). — Ed.

— emperors, kings, and other princes — knew that there was a close and harmonious relationship between their exercise of power and the traditional, pre-revolutionary ideology that had equated their authority with that of priests, or had elevated their authority even beyond that sacral level. They correctly saw the Papal Revolution as a fundamental challenge to their notion of the right ordering of the world. And so, in order to protect everything they believed in and lived for, they became counter revolutionaries (pp. 85-113).

A revolution is not successful, Professor Berman reminds us, merely because a revolutionary party briefly comes to power. A revolution is successful because so much that seems to matter to the rich and powerful (and to historians) undergoes profound changes.<sup>1</sup> This is what occurred from roughly 1050 to 1250. The representatives of the two sources of authority — ecclesiastical and temporal — ultimately compromised, but even that compromise bespoke a reordering of the world. The “legalization” of discourse manifested part of that reordering. Important people spoke about their relationships to one another and to society at large in metaphors of the law. And increasingly they systematized their understanding of the world through legal terminology (pp. 115-19). They had to. Once the distinction between the temporal and the ecclesiastical spheres had been articulated, legal notions such as jurisdiction needed to be refined. Indeed, the concept of jurisdiction became finely nuanced. In a sense, the clerical reformers led the way. They created the first essentially Western *system* of law, the canon law, wherein they explored the relationship of the pope’s superior authority both to the authority of his ecclesiastical colleagues and to that of secular lords (pp. 199-224, 255-69).

Although the canonists led the way and were deeply influential, the legalization of discourse and the translation of moral obligations into the language of the law eventually swept all before it in the West. To read Bracton’s *De Legibus*,<sup>2</sup> Eike von Repgau’s *Sachsenspiegel*,<sup>3</sup> the *summae* of the Civilians<sup>4</sup> or the political theory of John of Salisbury<sup>5</sup> (pp. 277-88, 310-14), and to compare them with what went before on similar subjects — tribal law “codes,” penitential books, tracts on sacral kingship (pp. 52-76, 276-77) — is to see how successful the revolutionaries were. Here, for the first time, feudal and nonfeudal

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1. See generally pp. 19-20, 99-107.

2. H. DE BRACON (d. 1268), *DE LEGIBUS & CONSUEUDINIBUS ANGLIAE* (T. Twiss ed. 1878).

3. EIKE VON REPGAU (d. ca. 1233), *SACHSENSPIEGEL* [THE SAXON MIRROR] (1499). This was the earliest comprehensive lawbook in German. See p. 311.

4. See, e.g., Accursius (d. ca. 1260), *Glossa ordinaria*, in *CORPUS JURIS CIVILIS. INSTITUTIONES* (1485); AZO[OF BOLOGNA] (d. ca. 1230), *SUMMA AZONIS, LOCUPLES IURIS CIVILIS THESAURUS* (1566).

5. See JOHN OF SALISBURY, *POLICRATICUS* (C. Webb ed. 1909). The *Policraticus* was written about the year 1159.

customs, both unwritten and written, were analyzed by learned jurists who sought to distill their underlying principles (pp. 310-12). At the very least, then, the revolutionaries forced other intelligent people to think in their language and in their metaphors.

Needless to say, and as Professor Berman points out, the effects of the Papal Revolution were more sweeping than the transformation or even the invention of legal consciousness. Everything or nearly everything else changed at about the same time. To be sure, cause and effect are difficult to disentangle. Revolutionary moments indeed may not be susceptible to analysis in terms of cause and effect (pp. 18-23).<sup>6</sup> But only a fool could fail to see the *bouleversement* in social, political and economic life of the period 1050 to 1250. It saw a rapid and sustained growth in population and in the number and size of cities (pp. 102, 335, 363-64); it saw the creation of the medieval secular state and its systems of law (pp. 22-23); it witnessed the vicissitudes of the crusading movement, the rise of Gothic architecture, the modernization of Latin as a scholarly language, and the efflorescence of vernacular literature along with a dramatic if not quite measurable increase in literacy (a phenomenon obviously connected with the rise of universities in precisely the same years) (pp. 101-03). All of these changes stimulated innumerable other changes, resistances, and violent demonstrations.

So far, most of what Professor Berman proposes could be gleaned from any standard medieval history textbook, although his presentation is far more detailed. What is unique to his study, however, is his repeated insistence that we have been living with and benefiting from the results of the Papal Revolution ever since the twelfth century. Both a respect for pluralism (that is, the recognition that some matters are properly outside certain jurisdictions) and an inherent tendency creatively to adapt to new situations were at the legal heart of the Papal Revolution (pp. 9-10). In Professor Berman's view, the limitations placed upon the jurisdiction of each of the polities of Western Christendom, and the competition which resulted, infused each polity with the will "to bring [its] laws into a coherent, integrated intellectual system, with a complex structure of principles, including principles for regulating the application of principles to specific kinds of cases" (p. 224). This "excessive legalism" which grew up in the West (p. 224), a legalism based on rules whose own internal logic often ran counter to

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6. Disputes about cause and effect nonetheless lie at the heart of Professor Berman's strenuous disagreement with the Marxist view of history. Professor Berman's historiography is thus crucial to his theory: if the main features of modern Western law emerged out of the Papal Revolution of the late eleventh and twelfth centuries — that is, before capitalism — then that fact in itself challenges the view that modern Western law is merely an epiphenomenon of capitalism. Pp. 543-44. In Professor Berman's view, then, law must be seen as "an independent factor, one of the *causes*, and not only one of the results, of social, economic, political, intellectual, moral, and religious developments." P. 44 (emphasis added).

the vested interests of the ruling classes, is said to have contributed to the civilization's "relative success in achieving freedom from political and moral tyranny" (pp. 43, 224). There were (or are) many other distinctive and general characteristics of this persistent Western legal tradition (pp. 7-10), all of which are now at risk in what Professor Berman calls "the crisis of the Western legal tradition" in the late twentieth century.<sup>7</sup>

Many great revolutions have come and gone in Western history, Professor Berman argues, but the Western legal tradition has survived them all since the twelfth century (pp. 23-25, 28-33). Few people think the tradition works anymore, however. First, they have been misled largely though not exclusively by Marxists to favor an instrumental understanding of the law, whereby law is characterized as a mere tool of upper-class oppression (pp. 37-38). Second, people, even lawyers, a class also invented or reinvented in the period of the Papal Revolution (p. 50), fail to respect the wholeness of the law and to appreciate it as an elegantly articulated and patterned *summa* (p. 38). Third, few now conceive or dare to conceive of the whole body of law as developing from within itself. Rather, any development of this sort as has sometimes been attested is regarded as a positivist myth. Growth does not proceed from the internal logic of the law, the critics say, but from the manipulation of legal doctrines for the benefit of the ruling class. Law does not transcend politics; it obeys politics (pp. 38-39). Fourth, the pluralism afforded by independent and competitive legal *systems* is rapidly crumbling under the hammer blows of the critics and practitioners, while a single jurisdiction, that of the centralized state, gobbles up all coordinate or subordinate jurisdictions (pp. 38-39). Finally, according to Professor Berman, belief in the very autonomy of law is being challenged. Even believers in the Western legal tradition are beginning to deny that it can be fruitful outside the West or can be further adapted in the "post-liberal" age of Western history (pp. 33-34, 37-38). Although Professor Berman does not tell us specifically what will happen if the present crisis is played out, I infer that if we are not careful, we will awaken not to a bright new adaptation of the Western legal tradition, but to a terrible and enduring nightmare. Such, in brief, are the message and the tone of this book.

As the foregoing summary should make clear, we have here not merely history but a manifesto. A sequel is planned that, I presume, will pursue comparatively the themes treated in the present book (p. 636). My criticisms will be directed to the three major aspects of this book: (I) its analysis of the Papal Revolution *per se*, (II) its description of the secular systems of law that emerged in the wake of the revolution, and (III) its characterization of the present crisis. Taken

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7. See pp. 33-41.

together these criticisms should demonstrate why, despite its very laudable aims, I do not think that this book works.

## I

As to Professor Berman's summary of the prevailing scholarship on the Investiture Controversy or the Papal Revolution, on the whole I would say that it is adequate. There are, however, some distressing mannerisms, especially Professor Berman's tendency to make emphatic statements for dramatic effect but without proof. He states flatly, to give one illustration, that "freedom of the church," one of the hortatory expressions uttered during the Papal Revolution of the late eleventh century, must be echoed by any number of desires for freedom "by other polities and other classes as well," including those of the servile peasantry of the late thirteenth and fourteenth centuries (p. 331). Surely such an assertion with regard to the peasantry requires proof, but Professor Berman does not even refer us to the work of any scholar who claims to have documented the connection. Certainly the closest citation (p. 618 n.25), that to Rodney Hilton's little piece on "Serfdom and Villeinage" in the *Encyclopaedia Britannica*,<sup>8</sup> does not direct the reader to a discussion of the connection.

There are also some unhappy mistakes. One need not be a specialist to be irked at Professor Berman's reference to the abbey church of Saint-Denis as a "cathedral" (it was not) (p. 103), or to read that "baptismal records and death certificates" were, already in the eleventh or twelfth century, "a kind of civil register" (p.114), an assertion which dates such records about four hundred years before their appearance in most places. Islamists may be distressed at the inclusion of a clearly problematic commonplace borrowed from old textbooks, namely, that from the twelfth century forward "Islam lacked . . . zeal to reform and redeem secular society" (p. 363). Specialists in Roman law will wish that Professor Berman had not written that the compilers of the Digest did not aim to be "internally consistent" (p. 128). They may not have *achieved* that goal, but they certainly attempted it or said they did: the Digest was created "so that the whole substance might be taken from [the opinions of the jurists], all repetition and all discrepancy being as far as possible got rid of . . . ."<sup>9</sup>

Besides the mannerisms and mistakes (of which this is a small selection), there is an odd unevenness in the treatment of subjects. In describing the separation of spheres of competence between the canon law and secular law, for example, Professor Berman asserts that "secular authorities did sometimes challenge ecclesiastical enactments on the ground that they were contrary to natural law" (p. 147). This

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8. Hilton, *Serfdom and Villeinage*, 20 *ENCYCLOPAEDIA BRITANNICA* 244 (1968).

9. *Constitutio Deo auctore*, in 1 *THE DIGEST OF JUSTINIAN* xiii, xiv (C. Monro trans. 1904).

could have been an important point in the context of this discussion, but it is dropped; the attentive reader cannot even follow it up in a footnote, because it is not footnoted. Yet there are either superfluous textual asides or long irrelevant footnotes to issues like "existential generalization" in modern logic (p. 140), and to whether "nineteenth-century science would have been possible without the scientific method first developed by the jurists of the twelfth century" (pp. 155, 587 n.78).

Finally, it is part of Professor Berman's thesis that there was an intimate relationship between canon law and theological doctrine — an easy proposition to prove. It is important to him because through the canon law's influence upon and inspiration of systems of secular law, a religious dimension filtered into those secular systems. One aspect of the present crisis, to paraphrase Professor Berman, is our forgetfulness of the religious and specifically Christian roots of our jurisprudence (pp. 165-66). All of this, I suppose, is true. And it is assuredly the case that Professor Berman moves easily and deftly through the christology and redemptive theology of the Middle Ages, although it does seem to me that he devotes inordinate space to these matters (pp. 165-98).

When he writes about the political and legal history of the medieval church as an institution, however, he frequently resorts to mere assertions. If one is going to challenge historians for ridiculing the sorts of punishment meted out by ecclesiastical courts, for instance, one ought to be very careful. Mere assertion is not evidence. Excommunication, Professor Berman says, "could be very severe, since in its extreme form it was in effect an outlawry from the church, involving virtual ostracism" (p. 260) (unfootnoted). This confuses the legal process and its resulting legal status (excommunication is similar to outlawry) with its social effect. Most historians would be very careful not to declare positively that excommunication led to effective or "virtual ostracism," even though it was meant to.<sup>10</sup> Most would also hesitate to pen the simplistic statement that "England groaned under the interdict" (p. 262), the suspension of certain ecclesiastical services during King John's struggle with the papacy during the years 1207-1212. Perhaps England did groan, but Christopher Cheney, an historian who knows more about this matter than any living soul, offers a rather more nuanced view.<sup>11</sup> Unfortunately, Professor Berman does not refer

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10. "As a spiritual penalty, admittedly with social consequences, excommunication did not always succeed in effecting the desired repentance and consequently the obdurate excommunicate was not an unfamiliar figure." F. LOGAN, *EXCOMMUNICATION AND THE SECULAR ARM IN MEDIEVAL ENGLAND* 15 (1968). Logan goes on to mention 7,600(!) examples of requests by the church addressed to the royal government in England to act against contumacious excommunicates. *Id.* at 23-24.

11. See C. CHENEY, *POPE INNOCENT III AND ENGLAND* 303-37 (1976). Cheney suggests, for example, that while it was the pope's object to convince the English clergy and the laity of the

to Cheney, though Cheney's study came out in 1976.

I was especially taken aback, finally, by this sentence: "Becket's stand against the assertion of royal authority over the clergy is reproduced in contemporary resistance to legal control over belief and morality" (p. 269). Utter nonsense. Becket believed in legal control over belief and morality as long as he and his church exercised it.

## II

What of the next major concern of Professor Berman's study, the medieval "formation of secular legal systems"? Here Professor Berman presents more or less adequate summaries of a great deal of the research in this area, arranged according to the type of law, *i.e.*, feudal, manorial, mercantile, urban and royal law. It would take a bold critic to confront Professor Berman in so many areas. Nonetheless, judged by the areas I know best, my overall faith in this book is weak. The subsections seem to stand alone and unintegrated, despite a forced parallelism of presentation. Moreover, they are sometimes rambling, and contain maddening errors of detail or of omission of the recent literature. Thus, the reader often feels that the author is addressing old scholarship, employing outmoded methods, and reaching old-fashioned conclusions.

Consider the aside in the section on urban law that "some towns, notably Paris, had no guilds" (p. 391). Paris most assuredly did have guilds. Philip Augustus (r. 1180-1223) and his predecessors were regulating these craft associations with some care;<sup>12</sup> by 1260, according to *Le Livre des métiers (Book of Crafts)* of Paris, there were more than one hundred guilds in the city.<sup>13</sup> Perhaps Professor Berman has a definition of a guild in mind that would exclude these associations. If so, that definition is at variance with every book on medieval economic history known to this reviewer. All these works mention the guilds of Paris.<sup>14</sup> Or perhaps he is talking about a period of time other than the one he usually talks about. If so, his prose does not make this qualification clear. And more than this, his discussion of guilds and the administration of cities is quite unfinished precisely because he would have found a great deal of relevant material in the history of medieval Paris.<sup>15</sup>

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king's guilt, the king was able to do a good deal by way of propaganda to persuade his people that the fault lay with the pope, not with himself. *Id.* at 312.

12. Boussard, *Phillippe Auguste et Paris*, in *LA FRANCE DE PHILIPPE AUGUSTE 331-32* (R.-H. Bautier ed. 1982).

13. See *LE LIVRE DES MÉTIERS D'ETIENNE BOILEAU* (R. Lespinasse & F. Bonnardot eds. 1879).

14. See, e.g., FONTANA *ECONOMIC HISTORY OF EUROPE: THE MIDDLE AGES 250* (C. Cipolla ed. 1972); H. PIRENNE, *ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE 181-82*, 184 n.1 (I. Clegg trans. 1937).

15. See, e.g., Lecaron, *Les Origines de la municipalité parisienne*, (pts. 1 & 2), in *7 MÉMOIRES*

Since it is manifestly the area to which Professor Berman devoted the most space (pp. 404-519), I should probably concentrate also on his treatment of royal law, that is, the law of large territorial principalities. Professor Berman has written individual sections on French, English and Imperial law (all lavishly treated), on Sicilian law (good), Norman law (problematic), Spanish law (two pages for the law of Catalonia, Aragon, Castile and Leon) and Flemish, Hungarian and Danish law (all summarily treated).

I have considerable misgivings about the discussion of England. As a case in point, I think it is misleading to say that "[t]he upheavals of Stephen's reign [in the mid-twelfth century] left no doubt that the Anglo-Norman kingship lacked the legal institutions needed to keep peace in England in the long run" (pp. 441-42). If that were true, one imagines, the problem must have inhered in the "institution" of succession to the throne. And as Professor Berman well knows, that problem was not unique to the reign of Stephen, and indeed was not solved until much later. Clearly, then, he has something different in mind. He refers to the weak personality of Stephen, but immediately concedes that this is not quite relevant to systemic or institutional problems. So, finally we are informed that the defect in Anglo-Norman governance was the peripatetic nature of kingship, whereby "the king or his chief lieutenant had to march continually through the land with his armies in order to keep peace among his tenants and subtenants and to offer such protection as he could and would to the local population against oppression by their feudal lords" (p. 442). One would guess from this conclusion that after Henry II's accession in 1154, and the restoration of order, peripatetic kingship withered away. But every medievalist knows that Henry II, Richard I and John were nearly always on the move, and very frequently with armies.

I *think* I know what Professor Berman wanted to say, namely, that there were new and fixed methods of dispute resolution introduced in the reign of Henry II (most of which, of course, had no relevance to the sort of succession crisis and resulting civil war that had disrupted Stephen's reign). These innovations were connected with the concept of *seisin*, a concept which becomes the focus of Professor Berman's investigation. Surely here if anywhere there was an opportunity for Professor Berman to bring interested lawyers and historians not working directly with medieval legal history up to date on what has been going on in the scholarly debates about the institutional and procedural innovations of Henry II. This opportunity, however, is not sufficiently exploited. We are told, for example, that the appointment of five royal judges in 1178 to hear complaints was the origin of the Court of Common Pleas (p. 444). Yet back in 1977 Ralph Turner

showed that presently available evidence requires more circumspect treatment of this issue.<sup>16</sup> If Professor Berman rejects Turner's arguments he should say so. But a reader would have no idea that anybody ever doubted what he writes as solid fact. We are told, too, that in 1166 the civil action known as the assize of novel disseisin was enacted (pp. 448-49, 455). Again, the truth is only maybe. Van Caenegem has argued, after all, that the civil action dates from a decade or more later, and that we must therefore stress the "criminal" origins of novel disseisin.<sup>17</sup> I do not insist that Professor Berman endorse this view.<sup>18</sup> But surely a reader who is given as much detail on the historical origin of the forms of action as Berman gives in this book should at least be alerted to the fact that much is still controversial or obscure.

When he turns to Normandy, Professor Berman tells us that the duchy was "the source of the possessory writs of Henry II" (p. 460). Charles Homer Haskins certainly believed so in 1918 (he is cited to this effect), but Van Caenegem says the data are uncertain.<sup>19</sup> It is interesting, again in the context of novel disseisin, that Professor Berman writes that after the French conquest of Normandy in the early thirteenth century, the king of France "adopted some of the basic institutions of Norman law for the royal law of France, including important features of the Norman administrative and judicial system" (p. 461). True, there were adaptations of administration. But law is another thing. To the greatest extent possible, Norman law was preserved *in Normandy*, but just what Norman law was adopted for France? We ought to be told, but we are not. Unsuspecting readers may make a contextual leap and conclude that, since novel disseisin had just been mentioned, the French adopted that Anglo-Norman action for themselves. They should be cautioned that, to the contrary, the French enjoyed other, though similar, processes for dealing with disseisins, and, to a degree, the use of the specifically Anglo-Norman writ even in Normandy seems to have been curtailed by royal judges in the late thirteenth century.<sup>20</sup>

As for the discussion of France proper, there are, I am afraid, far

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16. Turner, *The Origins of Common Pleas and King's Bench*, 21 AM. J. LEGAL HIST. 238 (1977).

17. R. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 87, 283-90 (1959).

18. Milsom has sometimes found this view attractive, even if he has not fully endorsed it. See Milsom, *Introduction* to 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW xxiii, xxxix (2d ed. repr. 1968).

19. Compare C. HASKINS, NORMAN INSTITUTIONS 189, 192 (1918), with R. VAN CAENEGEM, THE BIRTH OF THE COMMON LAW 58 (1973). Once again, Van Caenegem is not cited on this point.

20. See Strayer, *The Writ of Novel Disseisin in Normandy at the End of the Thirteenth Century*, in MEDIEVAL STATECRAFT AND THE PERSPECTIVES OF HISTORY 3-12 (J. Benton & T. Bisson eds. 1971).

too many errors, misleading statements and confident assertions of the kind that obscure continuing scholarly debates. Let me mention a very few. First, Philip Augustus' jurisdiction did not include the Duchy of Aquitaine and the County of Toulouse because he had not won them "chiefly from King Richard (r. 1189-1199) and King John (r. 1199-1216)" as Professor Berman claims (p. 462). Aquitaine was still loyal to John's living mother at the time of the other forfeitures in the year 1202, and remained outside French authority; Toulouse was not a possession of either Richard or John. Philip Augustus's son, taking up the claims of Amaury de Montfort, defeated the count of Toulouse in the Albigensian crusades, but the county did not come under the administration of a prince of the royal house until 1249 and was not assimilated into the royal domain until 1271.<sup>21</sup> Second, and despite Professor Berman's insistence to the contrary (p. 466), in the thirteenth century the king of France participated very frequently in the high court (Parlement) of France.<sup>22</sup> Third, according to Professor Berman, Louis IX (r. 1226-1270) outlawed trial by battle in 1258 (p. 467). In civil cases? In criminal cases? Everywhere in the kingdom? A reader cannot find out from Professor Berman's description that this too remains a matter of some doubt.<sup>23</sup> Fourth, who were the *baillis* (administrative/judicial officials) who Professor Berman says had a dual *administrative* allegiance to the king of France and to their local dukes or counts (p. 468)? A royal *bailli* was not under any feudatory. True, there were ducal and comital *baillis* for the fiefs of dukes and counts, but they were not royal administrators. Indeed, there seems to be confusion in Professor Berman's writing here between the notion of sovereign allegiance and that of administrative competence.<sup>24</sup> Finally, cases decided by the Exchequer or high court of Normandy, Professor Berman says, were appealable to the French Parlement (p. 468). But here again the issue is not nearly so cut and dried as he thinks.<sup>25</sup> And so it goes. Whether the sections on Sicilian and Imperial law are as problematic as those on English, Norman and French law, I leave to others.

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21. R. FAWTIER, *THE CAPETIAN KINGS OF FRANCE 120-24*, 149 (L. Butler & R. Adam trans. 1960).

22. J. SHENNAN, *THE PARLEMENT OF PARIS* 24 (1968).

23. W. JORDAN, *LOUIS IX AND THE CHALLENGE OF THE CRUSADE* 204 (1979).

24. For the clearest discussion in English of the *baillis*, see Fesler, *French Field Administration: The Beginnings*, 5 *COMP. STUD. IN SOC. AND HIST.* 76 (1962).

25. See Strayer, *Exchequer and Parlement Under Philip the Fair*, in *DROIT PRIVÉ ET INSTITUTIONS RÉGIONALES: ÉTUDES HISTORIQUES OFFERTES À JEAN YVER* 655, 656 (1976):

This brings up a perplexing question: could one appeal from the Exchequer to the Parlement? Theoretically, such an appeal should have been impossible, since the Masters [of the Exchequer] were also judges in Parlement. In the practice, formal appeals were avoided, but the Parlement often intervened in, or completed the work of the Exchequer.

## III

All thoughtful adults who read this book will be impressed by the fervor with which Professor Berman talks about the present-day crisis of the Western legal tradition which he, unfortunately, equates with cynicism about and contempt for the law:

The cities have become increasingly unsafe. The welfare system has almost broken down under unenforceable regulations. There is wholesale violation of the tax laws by the rich and the poor and those in between. There is hardly a profession that is not caught up in evasion of one or another form of governmental regulation. And the government itself, from bottom to top, is caught up in illegalities. But that is not the main point. The main point is that the only ones who seem to be conscience-stricken over this matter are those few whose crimes have been exposed. [P. 40.]

I would certainly dispute the last sentence. It seems to me that "those few whose crimes have been exposed" are quite unrepentant, excusing themselves frequently by the claim of unfair or unjustified entrapment. In any case, as the whole quotation demonstrates, Professor Berman seems to conflate two rather different things: the so-called crisis of the Western legal tradition and the equally so-called crisis of the United States legal system. Professor Berman realizes that not everyone would agree that mere lawlessness or even strong criticisms of contemporary laws, lawyers, law professors and judges ought to be considered of a piece with the alleged abandonment of our cultural heritage. Still, Professor Berman has accurately related a general malaise. Enough people routinely write articles and editorials about the poorly working apparatus and immoral ministers of the law that it would be presumptuous to deny that the American "system" *seems* to be in crisis.<sup>26</sup> But irrespective of this fact, it is analytically primitive to lump the two crises together. Moreover, no matter how useful it may be to explore the history of the twelfth century for clues to the structural dilemmas of the Western legal tradition, even Professor Berman admits that the endeavor will have little relevance to the problems of the welfare system, the tax laws and crime in the streets. As he puts it, knowledge of the medieval heritage will not "save society. Society moves inevitably into the future" (p. 41).

Leaving aside the problems of the current legal system of the United States, what is troubling about Professor Berman's treatment of the crisis of the Western tradition *per se* is his apparent unfamiliarity with the richness of the criticisms that he attacks. His beautifully written conclusion, for example, castigates the Marxists and the anthropologists on the basis of what his notes reveal, or at least suggest,

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26. See, e.g., *Too Much Law — and Too Little*, N.Y. Times, Apr. 23, 1983, at A22, col. 1 (editorial); Schanberg, *What Price a Waiter's Life?*, N.Y. Times, June 22, 1982, at A27, col. 2 (article analyzing the declining prestige of the legal profession).

is not very extensive reading of the modern scholarship or theory. True, theory can be nasty, boring stuff, but it is not fair to criticize Marxist views of the law<sup>27</sup> without reference to, say, Nicos Poulantzas's work<sup>28</sup> or to the cluster of studies on Marxist "Theories of Law and the State" published a few years ago in *Socialist Review*.<sup>29</sup> And criticism of anthropologists should address the work of the most respected among them; yet, there is no reference to, for example, Clifford Geertz's *Negara*,<sup>30</sup> a work whose influence has already been very widespread. In other words, while Professor Berman may be right to characterize the anthropologists as the developers of a "much less complex kind of sociohistorical analysis" of law than that of the Marxists or the Weberians, he does not seem to have expended much effort actually to read what they have written.<sup>31</sup>

In sum, Professor Berman successfully raises fundamental questions about the nature of law in the West and, therefore, about the nature of ourselves. He proceeds to try to answer these questions merely by reducing serious work to a series of uneven summaries. There is no effective integration of the themes, although the refrain is always there: these sub-studies are related to "the crisis." But as to how they are related, there is no convincing discussion in this book. Instead we end up with mountains of facts, whole pages of which are sometimes irrelevant or not shown to my satisfaction to be relevant, rambling asides in the text and the footnotes that display "learning," and aprioristic statements substituting for data and arguments. All of these factors, I am afraid, spoil this book. Despite the evident intensity of Professor Berman's moral earnestness, he provides no answer, nor even a partial answer, to the crisis of the Western legal tradition. Let us hope for better in the sequel.

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27. See pp. 540-45 and accompanying notes.

28. Poulantzas, *L'Examen marxiste de l'état et du droit actuels et la question de l'alternative*, 20 *LES TEMPS MODERNES* 274 (1964).

29. 40-41 *SOCIALIST REVIEW* 143-220 (1978).

30. C. GEERTZ, *NEGARA: THE THEATRE STATE IN NINETEENTH-CENTURY BALI* (1980).

31. See pp. 552-53 and accompanying note.