

Law, Revolution, and Religion: Harold Berman's Interpretation of the English Revolution

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This article offers a sympathetic critique of Harold Berman's interpretation of the interaction between law and religion in seventeenth-century England. Berman's general historical account of what he calls the Western legal tradition is shaped by an organizing thesis about the relationship between law and revolution, supplemented by a secondary thesis about the role of religion in the development of Western law. However, Berman's description of the English revolution is marred by a persistent failure to define and distinguish with sufficient clarity the great variety of Protestant religious teachings of the day. As a consequence, the potential impact of these beliefs on the law of England is not adequately explored, and this makes it difficult to determine the extent to which the religious beliefs of particular Protestant parties shaped the future development of the Western legal tradition. Berman provides us, therefore, with a brilliant and provocative, yet ultimately attenuated, account of law and religion in seventeenth-century England.

Introduction

Law and Revolution, Harold Berman's landmark book first published in 1983, ended with the hint of a sequel.¹ Exactly twenty years later, in *Law and Revolution, II*, the long-awaited sequel has been published.²

Law and Revolution began the story of what Professor Berman calls the Western legal tradition. By this expression, Berman means the particular set of legal institutions, values, and concepts associated with the distinctive historical culture and civilization of the peoples of Western Europe, conceived as a coherent tradition, capable of growth and development over an extended period

of time.³ Berman's first volume recounted the formation of the Western legal tradition in the late eleventh and early twelfth centuries, and its early development through the thirteenth, fourteenth, and fifteenth centuries. The second volume, *Law and Revolution, II*, takes up the story in the sixteenth and seventeenth centuries, focusing in particular on events that occurred in Germany and England but that had implications for the Western legal tradition as a whole.

The brilliance of the ambitious project Berman commenced in *Law and Revolution* lay in the fact that the book not only traversed the relevant historical details of a vast time-period, but also that in so doing it advanced a specific (and controversial) historiography. Berman masterfully showed how a religiously inspired revolution, initiated in the late eleventh and early twelfth centuries, placed an indelible mark upon the legal systems of the medieval West. He also suggested that through the course of a series of successive revolutions—most of them religiously inspired—the Western legal tradition had been periodically transformed, yet in a way that preserved its essential identity.⁴ Berman's historiography thus advanced three general theses: first, that there was and is such a thing as the Western legal tradition; second, that it was initiated and has been periodically transformed by a series of revolutions; and, third, that these revolutions have been religious (ideological or philosophical) in their fundamental inspiration.

In *Law and Revolution, II*, the specific focus is upon on the consequences of the Protestant Reformation and, in particular, the impact of Lutheranism and Calvinism on the legal systems of Germany and England respectively. The general thesis about the Western legal tradition and its revolutionary origins is thus maintained, as is the argument that the periodic transformations of the tradition have essentially been religious in character. However, the nature of the historical events, as well as the interpretation Berman places upon them, evidences a certain unraveling of the religious aspect of the thesis, particularly when it comes to Berman's account of what he calls the English revolution. It is with this latter English and Calvinist part of the story that this article is particularly concerned, but in order to address what Berman has to say about seventeenth-century England it is first necessary to explain in more detail Berman's wider argument about the Western legal tradition as a whole.

The Western Legal Tradition

Berman's objective is to present, within the compass of two volumes, nothing less than a comprehensive framework for the history of law in the West.⁵ The ambitious scope of the project is simply breathtaking.⁶ Geographically, the argument encompasses the legal systems not only of Western Europe but also extends its reach eastward into Russia and westward to North America and the New World. Chronologically, the story reaches back to the tribal laws and customs of the Germanic peoples of postclassical Europe and works forward to the troubled state of the Western legal tradition in our own day.⁷ Thematically, the work concerns all areas of law (jurisprudential and scientific, constitutional and jurisdictional, criminal and civil, social and procedural) as well as the full range of discrete legal systems of Western civilization throughout its history (imperial and ecclesiastical, royal, feudal, manorial, mercantile and urban, national and international). Theoretically, Berman advances a jurisprudence that seeks to integrate the three schools of legal theory that have dominated the West (i.e., natural law, legal positivism, and historical jurisprudence).⁸ What is more, the work is contextual in orientation. While the central concern is with law as such, crucial to the argument is the impact of political, economic, and religious factors on the development of the Western legal tradition. *Law and Revolution* is thus not only about law and history, but it also encompasses philosophy and theology, sociology and economics, and much more besides.

The daunting scope of the undertaking is made comprehensible, however, by a very specific thesis. As noted earlier, Berman's central objective is to present the Western legal tradition as a movement that had its origin in a revolution and has been interrupted periodically by subsequent revolutions that radically transformed the tradition but also remained within it.⁹ Revolution is understood by Berman to be a concept and an experience that is original with and constitutive of the West, founded upon a historiography that is neither cyclical nor pessimistic, but rather understands history to have a dynamic quality—what Berman calls “a sense of progress in time” and “a belief in the reformation of the world.”¹⁰ *Law and Revolution* is, in essence, an account of the revolutionary origin and progressive transformation of the Western legal tradition. The motif of “law and revolution” serves to organize the material into an admirable synthesis, which makes a great deal of sense of both Western law and Western history, expounded with a sensitivity to the minutiae of legal rules and historical details as well as an appreciation for wider questions of general principle and historical evolution.

In giving an account of the Western legal tradition in terms of periodic transformation and revolution followed by periods of consolidation and gradual evolution, a second, subsidiary thesis also emerges. Berman is concerned to explain each of the transformative moments that have shaped the Western legal tradition in a manner that does justice to the political, social, economic, and religious context of each revolution. While Berman seeks to give each of these elements its due weight, he is particularly concerned to underscore the significance of the specifically religious (and, later, the philosophical and ideological) factors—as against the tendency of mainstream twentieth-century historiography to emphasize the political, social, and economic. As Berman puts it, “[i]t is impossible to understand the revolutionary quality of the Western legal tradition without exploring its religious dimension.”¹¹ Thus, as has been said, Berman’s interpretation of the Western legal tradition is marked by two key themes: a primary thesis about the existence of the tradition and its formation and transformation by revolution, and a secondary thesis about law and religion.¹² It is convenient to deal with each of these in turn.

Law and Revolution

The first of the revolutions—the upheaval that both initiated and consequently defined the Western legal tradition as a whole—Berman locates in the reform movement of the years 1075–1122, generally associated with the name of Pope Gregory VII (1073–1085), and known to specialist historians as the Gregorian Reformation or the Investiture Contest and, more recently, as the papal revolution.¹³ The efforts of Gregory VII and his supporters to secure the position of the Bishop of Rome as the sole head of the church and to emancipate the clergy from the control of emperor, kings, and feudal lords had the effect, Berman argues, of establishing the Roman Catholic Church as a distinct institution possessing its own, independent organs of government and system of law.¹⁴ The resulting systematization of the canon law,¹⁵ including the articulation of its constitutional foundations¹⁶ and the organization of its various elements,¹⁷ constituted the first legal system in the West and thus the beginning of the Western legal tradition.¹⁸ The essential features of the legal systems of the modern West can be traced, Berman says, to the papal revolution.¹⁹

The Gregorian Reform initiated an ecclesiastical system of government and law that stood both against and alongside the acknowledged jurisdiction of secular rulers.²⁰ While the Church opposed many of the sacral and ecclesiastical functions that had previously been exercised by temporal authorities, it acknowledged the legitimacy of a plurality of secular governments: imperial,

royal, feudal, manorial, mercantile, and urban.²¹ The resulting “competition and cooperation of rival limited jurisdictions,” as Berman puts it, provided the necessary ideological and institutional foundations for the supremacy of law and the development of Western freedoms.²² Thus, Berman understands the Western legal tradition to be characterized by a plurality of legal *systems* within a common legal *order*.²³ In Berman’s account, discrete *systems* of law within each of these jurisdictions developed as jurists drew upon the sophisticated analyses of the Canon lawyers, initiated by Gratian’s memorable *Concordia Discordantium Canonum* of 1140.²⁴ In close detail, Berman chronicles the development of each of these legal systems over the course of the ensuing centuries.²⁵

By definition, the papal revolution was supranational in scope. It involved, at its most general level, a confrontation between the universal claims of the pope against the equally universal claims of the emperor. However, says Berman, it was in due course followed by a series of revolutions that, though national in character, had a wider and permanent impact on the Western legal tradition as a whole. Thus, the Lutheran reformation of the sixteenth century, while it began in Germany, spread throughout Europe, ushering in a whole series of fundamental changes to the social, economic, political, and legal landscape.²⁶ In the next century, argues Berman, the English revolution, motivated to a large extent by the beliefs and attitudes of the Calvinist branch of the Reformation, transformed the public life of England to an extent that also reverberated throughout the West.²⁷ This was followed in the next century by the outworking of the deist and rationalist beliefs of the French revolution, as well as the far-reaching implications of the American revolution in its partly Protestant, partly Enlightenment character.²⁸ The last and most recent of the great Western revolutions, according to Berman, was the Russian revolution of the early twentieth century, whose atheistic state socialism has, albeit indirectly, profoundly influenced the political, economic, and legal character of the Western legal tradition as a whole.²⁹

Berman self-consciously derives the general scheme of a distinctively Western culture and civilization, initiated and thereafter punctuated by periodic revolutions, from Eugen Rosenstock-Huussy’s remarkable *Out of Revolution: Autobiography of Western Man*.³⁰ In tracing the Western legal tradition to the Gregorian reformation, Berman, like Rosenstock-Huussy before him, deliberately challenges the standard historiography that divides Western history into periods of “Classical Antiquity,” the “Middle Ages” and “Modern Times.”³¹ Such a periodization, Berman points out, is flatly contradicted by the best in

recent specialist historical work.³² However, both Berman and Rosenstock-Huessy also depart from much of specialist historiography in this respect: Instead of its historicist, nationalist, and particularist emphases, their stories are deliberately revolutionary in structure, multinational in compass, and universal in outlook.³³ Like Rosenstock-Huessy, Berman's account of these revolutionary upheavals also gives a great deal of weight to the role of distinctively religious beliefs, particularly in respect of the papal, German, English, and American revolutions, contrasted with the characteristically philosophical and ideological beliefs that underlay the French and Russian revolutions.³⁴

Law and Religion

Time and again, Berman emphasizes the critical role of religious beliefs in the formation and periodic transformation of the Western legal tradition.³⁵ The papal revolution was, by definition, a religiously initiated movement. While the motives and prospects of the Gregorian Reform were undoubtedly shaped by political, social, and economic factors,³⁶ Gregory VII and his supporters articulated a distinctly theological rationale for the freedom and independence of the Church from secular control—a rationale that issued in very specific legal and jurisdictional consequences.³⁷ Moreover, as Berman demonstrates, the particular legal doctrines—rules, principles, and concepts—that formed the substance of the law of the eleventh, twelfth, and thirteenth centuries were decisively shaped by analogies and metaphors that were “chiefly of a religious nature.”³⁸ Specific theological doctrines, such as those concerning the last judgment, the Atonement, the sacraments, and the priesthood, helped to define the law that was first administered by the ecclesiastical courts and later taken over by the various secular courts of the era.³⁹ Berman also acknowledges the important contribution made by concepts derived from Roman law and feudal practices, but he shows how the distinctive syntheses of these elements, together with biblical precepts, natural-law principles, and customary law, built up a sophisticated body of canon law that served as a model and an inspiration for the emergent secular legal systems and jurisdictions.⁴⁰

The same emphasis on the impact of religious belief is, for the most part, also evident in Berman's account of the German revolution in *Law and Revolution, II*. His story of the German revolution is almost wholly an account of the Lutheran reformation and its impact on the law of the German principalities of the sixteenth and seventeenth centuries. In *Law and Revolution, II*, entire chapters are devoted to the distinctively Lutheran legal philosophy and legal science initiated by Luther himself and developed by Lutheran theo-

gians and jurists thereafter.⁴¹ This is followed by very detailed explanations of specific developments in German criminal, civil, economic, and social law, all of which are explained by reference, predominantly, to the impact of distinctively Lutheran theological and juristic formulations.⁴² It is true that these chapters also acknowledge the importance of political, scientific, and socioeconomic factors,⁴³ as well as the role of humanist legal science.⁴⁴ Indeed, they are preceded by a general account of the German reformation as a whole that seeks to give due weight to the important political and socioeconomic factors undoubtedly involved.⁴⁵ However, Berman insists on returning to the religious factors, even in those cases—such as particular developments in civil and economic law—where the evidence he marshals seems to support a predominantly economic, rather than religious, explanation.⁴⁶ In those cases where the evidence more strongly supports a religious interpretation—such as the transformation of the social dimensions of law relating to liturgy, marriage, education, moral discipline, and poor relief—Berman is very emphatic and systematic about the religious influences.⁴⁷

When it comes to the later revolutions—English, French, American, and Russian—Berman continues to place the emphasis on the religious, philosophical, and ideological factors. According to Berman, just as the determinative doctrinal system of the papal revolution was Roman Catholic and the German revolution was Lutheran, so, he argues, the English revolution was shaped by Calvinist theology, the French revolution by deist and rationalist assumptions, the American by both Protestant and Enlightenment beliefs and the Russian by a thorough-going atheism.⁴⁸ Despite this emphasis on the connection between law and religion, however, there is a certain unraveling of the thread to be discerned in what Berman has to say about the last four great Western revolutions. In the first place, there is the obvious shift from religion to philosophy and, more particularly, from Christianity through deism to the official atheism of the Russian revolution. Second, and more subtly, beginning with Berman's account of the English revolution, there is a definite sense of religious and ideological fragmentation. Of course, it was the Protestant Reformation in Germany that initially opened up the possibility of a proliferation of Christian sects. However, Berman finds himself able to interpret the German revolution of the sixteenth century almost wholly in terms of Luther and Lutheranism.⁴⁹ The role of Calvinism and Anabaptism in Germany is acknowledged,⁵⁰ but it is in terms of Lutheran political theology and jurisprudence that developments in German law are explained.⁵¹ The unraveling is much more evident, by contrast, in Berman's treatment of the seventeenth century English revolution, by which time the fragmentary potential of Protestantism was much more in

evidence. While Calvinism was clearly the most significant theological force behind the Puritan revolution in England, it was a Calvinism confronted by a variety of other religious forces: Roman Catholic and Anglican, Arminian and Antinomian, and Anabaptist and Quaker.⁵² Calvinism was itself also sharply divided, particularly in terms of ecclesiology, among Episcopalians, Presbyterians, Independents, and Separatists. Within Anglicanism, moreover, an Erastian policy had been imposed by Henry VIII and defended by Richard Hooker.⁵³ Indeed, Henry's motives in breaking with Rome and pronouncing himself to be head of the Church of England were primarily political and personal, rather than theological. Only by uncertain and circuitous steps were Calvinist beliefs eventually incorporated into English church life, law, and government.

The English revolution in this way represents unique and very difficult problems of historical interpretation, particularly in terms of Berman's wider thesis of law and revolution together with his subsidiary theme of law and religion. Indeed, it is Berman's handling of this complex religious situation that constitutes the chief weakness in his otherwise masterful account. It is proposed to devote the remainder of this article to this particular problem.

Berman's Account of the English Revolution

Berman's story in *Law and Revolution, II*, is shaped by the view that since the papal revolution of the eleventh and twelfth centuries the periodic revolutions that have progressively transformed the Western legal tradition have been national in character.⁵⁴ The very subject matter and structure of the book is organized around what he deliberately calls the German and English revolutions. This definition of the revolutions as national, rather than religious, makes clear that Berman's law and religion thesis is subsidiary to the law and revolution thesis. This subordination is relatively less evident in Berman's first volume because it is focused on a revolution the nature and scope of which was religiously or ecclesiastically defined (i.e., the papal revolution). The German and English revolutions, by contrast, are by definition national revolutions in which religion was only one factor among many; albeit an important factor, perhaps even the most important.⁵⁵

As a consequence, while Berman is solicitous to acknowledge the role of political, social, and economic dimensions in connection with the originating papal revolution, it is particularly in respect of the German and English revolutions that the complexity and variety of contributing factors is most emphasized. When this is combined in the case of England with a more advanced

state of Protestant fragmentation, the notion that one is dealing with a specifically religious revolution is challenged all the more.⁵⁶ Thus, Berman's account of the German revolution can still begin with a chapter entitled "The Reformation of the *Church* and of the State, 1517–1555," followed by a chapter entitled "Lutheran Legal Philosophy," whereas his account of the English revolution commences with chapters respectively entitled "The *English* Revolution, 1640–1689" and "The Transformation of *English* Legal Philosophy."⁵⁷ The English revolution, it seems, is less susceptible to a religious interpretation than is the German.

Berman follows Rosenstock-Huussy in understanding the English revolution as an extended struggle, stretching over the entire period between 1640 and 1689, and thus including the Civil War and Commonwealth (1640–1660), the Restoration (1660–1668), and the Glorious Revolution (1688–1689).⁵⁸ Both sides in the contest were wont, of course, to label these periods in terms of their own perspectives, and thus Great Rebellion and Interregnum competed, and compete still, with Commonwealth and The First Year of Freedom Restored.⁵⁹ In this respect, Berman also follows Rosenstock-Huussy in reinterpreting the three phases of the entire revolution as a series of restorations, reflecting the deep character of the upheaval as a revolution that disguised itself as a restoration.⁶⁰ Rosenstock-Huussy argues that the English revolution consisted, in essence, in the abolition of the preexisting Norman Constitution and its replacement by a Commonwealth. The Norman Constitution—by which he means the constitutional implications of the papal revolution—was outworked in England through the mediation of the Lord Chancellor, who, as keeper of the king's conscience and of the great seal, was meant to ensure that the law enacted in the king's name and administered by the king's courts was infused with the civilizing influence of canon law.⁶¹ According to Rosenstock-Huussy, the era of the Norman Constitution is framed at one end by the martyrdom of Thomas Beckett at the instigation of Henry II in 1170 and at the other end by the judicial murder of Thomas More on the command of Henry VIII in 1535.⁶² Henry VIII destroyed the Norman Constitution, he says, by proclaiming himself to be head of the Church of England, thus subordinating the church to royal power and control. This principle of secular control over the church, inherited by the Stuarts, was not repudiated by the gentry when through the House of Commons they initiated and sustained the first phase of the English revolution. The objective, argues Rosenstock-Huussy, was to place limits on the power of the king, but the parliamentary party did not seek to do so by restoring the Gregorian "liberties of the Church." Rather, he says, they established a "Commonwealth," founded upon a "restoration" of the "ancient

constitution” of England: a common law traced to “time immemorial,” a House of Commons exercising its “traditional” rights and privileges, and a *Book of Common Prayer* belonging to a national church that traced its origins to apostolic roots.⁶³ Compared to the papal revolution, which on Rosenstock-Huessy’s account was an essentially religious movement, the English revolution consisted, first, in a repudiation of the medieval order established by the papal revolution and, second, in the establishment of an essentially historical ideology—expressed in a historical jurisprudence—which disguised the revolution as a restoration of a (mythical) past.⁶⁴

These ideas shape Berman’s account of the English revolution, sometimes explicitly, at other times implicitly. As noted, Berman’s account is of a national revolution having European-wide repercussions, and the national character of the revolution is defined politically. Thus, while Berman commences his first chapter, dealing with the English revolution, by recounting what he calls the religious, political, and socioeconomic aspects of the crisis faced by Europe at the time, the political factors provide the basic framework of analysis. Even the religious dimension of the crisis is explained as having to do with the problem of accommodating religious diversity—which is to characterize it in political, rather than religious, terms.⁶⁵ The story thus begins in the sixteenth century with a Reformation that is essentially an act of state,⁶⁶ which progresses in the next century through a parliamentary revolution, a military dictatorship, a monarchical restoration, and ends in 1689 with parliamentary supremacy. The events leading up to and culminating in the Civil War and Commonwealth era are thus explained in mostly political and legal terms: The story is about the confrontation between Stuart kings and Parliament, cavaliers and roundheads, prerogative courts and common law courts, and so on. Economically, the revolution involved the rise to power of the landed gentry and an emergent urban mercantile class, supplanting the economic and political power of the old royal aristocracy. Religiously, the revolution progressed from a Henrican assertion of Erastian supremacy over the church (with independence from Rome), through a period of turmoil as Protestant, particularly Calvinist belief systems in their Puritan, Independent, Presbyterian, and Episcopalian forms vied with Roman Catholic and Anglo-Catholic forces, as well as a variety of radical Anabaptist, Quaker, and other sects. The importance of religious and socioeconomic factors is thus emphasized.⁶⁷ Yet, the overarching structure of the argument is based upon the political dimension, the aspect that in fact dominates the story.

In his next chapter, dealing with the transformation of English legal philosophy, it seems that Berman’s chief concern is to explain what was to become

typical and distinctive about the English legal system, that is, those features that we today regard as characteristic of the common law: the role of custom and precedent, the emphasis on case-law, adversarial procedure, and so forth.⁶⁸ The chapter therefore seeks to explain the philosophical ideas that lay at the foundation of these characteristics, and thus Berman gives an account of the emergence of a distinctively English, historical school of jurisprudence, based on the writings of Richard Hooker, Edward Coke, John Selden, and Matthew Hale.⁶⁹ Given this objective, these are probably the right authors to emphasize. However, in so doing, Berman also wants to explain the distinctively religious influences that shaped these key figures.⁷⁰ For this reason, throughout the chapter, there are many references to Calvinism and to the proliferation of Calvinist and other Protestant parties. The chapter even closes with the somewhat unconvincing argument that there was a relationship between historical jurisprudence and Calvinist thought.⁷¹

The succeeding chapters, dealing with the transformation of legal science, criminal law, civil and economic law, and social law, follow the lines thus established. Political, socioeconomic, and religious factors are all given space, and the religious aspects are often emphasized. In relation to criminal law, this is particularly evident.⁷² The chapter is organized around four topics: (1) the coexistence and competition of diverse legal systems and jurisdictions (i.e., the ongoing impact of the papal revolution), (2) the effect of the triumph of the common-law courts over their rivals (i.e., politics), (3) the effect of the triumph of the landed gentry (i.e., socioeconomic), and (4) the effect of the triumph of Calvinist moral theology (i.e., religion).⁷³ It is the religious aspect, however, to which most of the chapter is devoted.

In this connection, Berman offers an intriguing account of the importance of Anglican moral theology in the development of English criminal law.⁷⁴ During the late seventeenth and early eighteenth centuries, there appears to have been a paradoxical proliferation of capital crimes accompanied by a substantial decline in capital convictions.⁷⁵ Berman suggests that this paradox is best explained by Calvinist moral theology in which the Roman Catholic distinction between mortal and venial sins was rejected:⁷⁶ all sins were punishable by eternal damnation; all believers were called to live lives of holiness; and yet all sinners, no matter how depraved, could be saved by divine grace. Berman argues that Anglican theologians, influenced by Calvinist theology, nonetheless drew a fundamental distinction between the gravity of the sinful act and the degree of depravity of the sinful will and that it was the latter, a depraved will, upon which culpability depended. This meant that many (if not all) crimes were in principle punishable by death, but whether punishment was

in fact warranted depended upon the degree to which the criminal act was accompanied by a depraved will. Moreover, what Berman calls Calvinist communitarianism invoked a concern for the moral improvement of the entire commonwealth, motivated by a fear that widespread immorality could bring divine judgment upon England. In accordance with this outlook, Berman argues, English parliaments vastly expanded the number of offences for which the maximum penalty was applicable, while English judges and juries tempered their verdicts according to the moral culpability of the defendant.⁷⁷

Original arguments like this constitute one of the great strengths of Berman's book. They also expose its principal weakness. Berman repeatedly refers to the impact of Calvinist ideas on the English law, but there is no systematic account of Calvinist theology, let alone Calvinist political theology and jurisprudence.⁷⁸ The absence of a chapter that focuses on John Calvin and Calvinism, renders Berman's frequent references to Calvinism sometimes rather vague and confusing. Calvinism is not explained systematically, yet systematic theological exposition is one of the prime characteristics of Calvinism. Time and again specifically Calvinist (or Puritan, or Presbyterian, or Anglican) beliefs are cited as a means of explaining legal developments, but the reader is left in the dark as to the relationship among the various points of Calvinist doctrine, as well as to the way in which Anglican, Presbyterian, and Puritan doctrinal formulations differed one from the other.⁷⁹ This, in turn, makes it difficult to determine whether and, if so, to what extent the religious beliefs of particular Protestant parties impacted English law.⁸⁰ The result is an attenuated account of law and religion in the context of the English revolution.

Law and Religion in the English Revolution

Berman's account of the German revolution begins with a careful and detailed exposition of Lutheran political theology and jurisprudence as a foundation for explaining the impact of the Lutheran reformation on German law. By contrast, in Berman's account of the English revolution, particular points of Calvinist theology are brought in to explain specific developments in English law, but no systematic exposition of Calvinist political theology and jurisprudence is provided. Some very important and insightful remarks are made concerning the impact of Calvinist belief on aspects, particularly, of criminal and social law, but the wider import of Calvinist doctrine in respect of the English constitution as a whole is not explained.⁸¹ What, then, might an adequately detailed description of Calvinist political theology and jurisprudence as a foundation for measuring the impact of the Calvinist reformation on English law

look like? Only the elements of a rudimentary framework can be mentioned here.

First of all, unless Calvinist teaching is explained as a systematic whole, the logical force and historical power of the international Calvinist movement then sweeping across western Europe—an important part of the wider context in which the English revolution needs to be understood—is unlikely to be appreciated.⁸² An obvious starting point in such a systematic exposition would be to begin with the emphasis Calvin himself placed on the doctrine of divine sovereignty that he shared with Luther⁸³ and the confidence in the providential direction of history that this implied;⁸⁴ a point that Berman acknowledges and, indeed, emphasizes.⁸⁵ Calvin's forceful doctrine of divine predestination was associated, systematically, with his emphasis on the postlapsarian depravity of human nature and, in particular, the noetic effects of sin.⁸⁶ Both doctrines led Calvin to approach the question of natural law cautiously, although affirmatively. While he acknowledged a universal, postlapsarian, objective knowledge of the precepts of natural law sufficient to render all people culpable before God, he underscored the distorting effects of sin and placed greater emphasis on the revealed law of God in the Bible.⁸⁷ Like the Lutheran theologians and jurists before them,⁸⁸ Calvinists therefore looked primarily to the Decalogue for guidance in respect of both personal morality and public law.⁸⁹ Critical, too, was the Calvinist understanding of the relationship between grace and law, and the greater emphasis (compared to Lutherans) that Calvinists placed upon the law, particularly as a guide to Christian conduct.⁹⁰ An associated distinguishing feature of Calvinist thought was its willingness to define the church in legal terms and to affirm the necessity of ecclesiastical jurisdiction.⁹¹ This was in turn linked with the Calvinist insistence on the independence of the church from state control and the demarcation of ecclesiastical from civil responsibilities.⁹² According to Calvinist thought, domestic, ecclesiastical, and civil governments are ordained by God to perform their own distinct functions.⁹³ Moreover, Calvinists typically understood God's relationship with humanity in covenantal terms,⁹⁴ and the idea of covenant provided a comprehensive framework according to which they understood the formation and functioning of family, church, and state.⁹⁵ The covenantal framework emphasized both divine ordination and human concurrence in the formation of earthly institutions and became the basis upon which theories of representative government, federally organized societal structures, and magisterial resistance to tyranny were developed.⁹⁶

All of these aspects of Calvinist political theology and jurisprudence can be identified as motivating forces within England during the revolutionary

period.⁹⁷ Berman draws attention to a number of them, but does not, as has been said, explain them systematically;⁹⁸ nor in *Law and Revolution, II*, at least, does he indicate their capacity to explain many of the specifically political and constitutional changes effected by the English revolution. As far as English politics and constitutional law is concerned, Berman prefers to focus initially on the views of Richard Hooker and James I and to contrast their views with those of the Calvinists. However, the views of the Calvinists themselves are not explained.⁹⁹ Likewise, rather than discuss the relationship between Calvinist political theology and the parliamentary opposition to the Stuart kings, Berman concentrates on the opposition of the common lawyers, led by Coke, Selden, and Hale.¹⁰⁰ Berman's main objective is thus limited to explaining what he regards as the general characteristics of the English common-law system (via the historical jurisprudence of Coke, Selden, and Hale). While the impact of Calvinist beliefs on particular aspects of criminal, civil, economic, and social law is covered in some detail, its impact on English constitutional law is generally neglected.¹⁰¹

Toward the *end* of the chapter dealing with English legal philosophy, it is true, there is a brief exposition of Calvinist thought. Berman argues that five basic Calvinist tenets were of significance: (1) a confidence that history is an outworking of divine providence, (2) a sense that Christians are under a religious duty to reform the world, (3) a conviction that law is a divine means of reformation, (4) a belief in covenant as the foundation of corporate existence and social life, and (5) a stress on hard work, austerity, frugality, reliability, discipline, and vocational commitment.¹⁰² However, Calvinist political theology is omitted from this list—a remarkable omission because in an earlier essay, Berman covers precisely the same ground, but adds a sixth characteristic, namely “the Calvinist principle of government.” As Berman points out in that essay, Calvinist political theology vigorously promoted government by representative leaders of the community (i.e., elders and lower magistrates) and affirmed that a tyrannical government ought to be resisted by the lower magistrates as leaders and representatives of the people.¹⁰³ These principles, Berman acknowledges, provided the English Puritans with the “theory and vision” to “fight a civil war, overthrow the monarchy, and establish Parliamentary supremacy.”¹⁰⁴ These are very important points to make, but none of this appears in *Law and Revolution, II*.¹⁰⁵ The impact of Calvinist political theology on the constitutional law of England is thus downplayed.¹⁰⁶

Berman also discounts the enduring significance of Calvinist ecclesiastical thought. His argument is that Calvinism promoted an essentially “congregational” concept of government, and that such a concept was inadequate to the

administration of an entire nation.¹⁰⁷ Whatever element of truth there may be in this, a more systematic and detailed explanation of the variety of ecclesiologies adhered to by those who subscribed to Calvinist theological doctrines would have helped to make the point more clearly and parsimoniously. Berman acknowledges the fact that Episcopalians, Presbyterians, Independents, and Separatists differed on questions of church government, but he does not explain their views in adequate detail and, at critical points, tends to conflate them.¹⁰⁸

In the first place, while Presbyterians certainly believed that government in the church ought to be vested in representative elders, elected by the communicant members of individual congregations (as Berman emphasizes), they also affirmed that congregations ought to be united (federally) at a regional, national (and, in principle, transnational) level, governed by a system of graded courts, conciliar in composition and consisting of official representatives of the constituent congregations and regions.¹⁰⁹ It is thus misleading for Berman to suggest that Calvinist ecclesiology, because of its congregational concept of church government, lacked the institutional resources to address the government of an entire nation. It is only by conflating Presbyterianism with Independency that the argument carries any weight. It was the Independents (also known as Congregationalists) who resisted the suggestion that individual congregations should be subject to the government and judicial determinations of the courts and councils of the wider church.¹¹⁰ Separatists (also known as Brownists) took the matter further, insisting that the Anglican Church as it stood was not a true church and that complete separation from it was a Protestant obligation.¹¹¹ During the early period of the revolution, the Presbyterian party dominated Parliament. However, Congregationalist and Separatist influence grew with the rise to power of Oliver Cromwell (who was sympathetic to Independency).¹¹² The religious instability to which Berman refers should not be attributed to Calvinism in general but must be understood in the context of these competing ecclesiologies.¹¹³

Moreover, the significance of the various Calvinist positions on church government and civil polity should not be measured by their long-term impact in England alone. Presbyterianism came to be established in Scotland; Reformed polity was established within the Dutch Republic; and, in the American colonies, Calvinist and other Protestant groups were free to settle in particular regions and implement their particular concepts of ecclesiastical and civil government.¹¹⁴ The significance of these developments for the Western legal tradition as a whole should not be discounted simply because they occurred outside the realm of England. The English revolution was certainly an event of outstanding transnational importance, but it was precisely in conjunction with

events in places such as Scotland, the Dutch Republic, and the American colonies that this was the case. On Berman's argument, the story of America is part and parcel of a subsequent and distinct revolution (and thus outside the scope of *Law and Revolution, II*). A complete account of the origin and development of the American constitutional system, however, would certainly have to take into consideration the corporate religious diversity that typified the early colonies of North America, understood in the context of Calvinist ecclesiology and political theology, along with other Protestant belief systems.¹¹⁵

In his conclusion, Berman argues that the English revolution was eventually resolved in the form of a constitutional monarchy with parliamentary supremacy and an Anglican establishment with toleration for dissenting Protestants.¹¹⁶ Latitudinarianism came to dominate Anglican theology, just as toleration became a governing principle of English politics.¹¹⁷ In explanation of these developments, Berman gestures toward a number of factors: among them, religious diversity and an emergent scientific "relativism,"¹¹⁸ but, again, the discussion is very brief. A more systematic account of emergent liberal doctrines would have helped a great deal, starting, perhaps, with Jacob Arminius and his protégé, Hugo Grotius,¹¹⁹ together with their English disciples, John Milton and John Locke.¹²⁰ A concluding account of these ideas might have helped to explain the religious motifs and philosophical assumptions of the constitutional and ecclesiastical settlement of 1689, as well as lay some of the necessary groundwork for an examination of the French and American revolutions in terms of their impact on the Western legal tradition as a whole.

Conclusion

Berman's objective is to tell the story of the Western legal tradition; however, as he is fond of pointing out, *tradition* is best understood, not as "the dead faith of the living," but rather as "the living faith of the dead."¹²¹ A tradition, therefore, is a faith that stretches over generations. Thus, to explain the Western legal tradition it is necessary to explain its motivating faith. To do that fully means that the law and religion thesis must guide the narrative. However, Berman—following Rosenstock-Huessy—treats the law and revolution thesis as primary, thus identifying a succession of national revolutions as the substance and object of his inquiry in *Law and Revolution, II*. Certainly, the leading role taken by German princes and English monarchs in establishing the Reformation within their own domains, as well as the rise of state sovereignty after the Peace of Westphalia (1648),¹²² justifies this emphasis on *national* rev-

olution in terms of Berman's law and revolution thesis. The history of the Western legal tradition before, during, and after the sixteenth century, however, is just as much a story of *supranational* religious and ideological movements (the law and religion thesis) as it is about national revolutions.¹²³ In part 1 of *Law and Revolution, II* dealing with the Lutheran reformation in revolutionary Germany, Berman largely succeeds in giving due weight to both theses. However, in part 2, dealing with the English revolution, the law and revolution thesis overly determines the structure and scope of the argument such that the importance of the Calvinist and other religious dimensions of the English revolution are in certain important respects neglected and obscured. This is not to suggest that Berman should have written a different book, one in which law and religion is the dominating thesis. The importance of the nation-state in the historical development of the Western legal tradition is undoubtedly clear, but it is to suggest that Berman's account of the English revolution might have devoted more space to a systematic exposition of Calvinist political theology, ecclesiology, and jurisprudence as a framework for discussing the transformative changes to the English legal system effected during, and as a result of, the English reformation. Berman believes that the Western legal tradition is in crisis and that the first step toward a solution is to recover an understanding of the motivating beliefs that have from time to time inspired that tradition.¹²⁴ Berman's account of the papal, Lutheran, and Calvinist reformations admirably retrieve for us three vastly important parts of the story, and the achievement is truly remarkable. It is only to be regretted that a more systematic account of the Calvinist revolution was not forthcoming.

Notes

1. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), 636, hereinafter, *LR*.
2. Harold J. Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Belknap Press, 2003). [Hereinafter, *LR II*.] See also Berman's earlier work, *The Interaction of Law and Religion* (Nashville: Abingdon Press, 1974).
3. *LR*, 1–7; *LR II*, 2–3.
4. Only a few of the many reviewers of *LR* disputed Berman's thesis that there was a revolution in the eleven and twelfth centuries and that this had a transformative impact on the legal systems of western Europe. Some reviewers suggested that Berman had not given sufficient attention to earlier factors; many drew attention

to relatively minor errors of fact and interpretation; but none, to my knowledge, denied his general thesis about the profound impact of the religious changes of this period on the doctrines and development of the law. A sample of representative reviews is cited in notes 6–8 and 12 below.

5. See Harold J. Berman, “Why the History of Western Law Is Not Written,” *University of Illinois Law Review* (1984): 511–20, reprinted in Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta: Scholars Press, 1993), 23–33.
6. On the reception of the book, see Richard H. Helmholz, “Harold Berman’s Accomplishment as a Legal Historian,” *Emory Law Journal* 42 (1993): 475 and compare, John Witte, Jr., and Frank S. Alexander (eds.), *The Weightier Matters of the Law: Essays on Law and Religion—A Tribute to Harold J. Berman*, American Academy of Religion Studies in Religion Series (Atlanta: Scholars Press, 1988). Specialist historians (inevitably) drew attention to numerous errors of fact in *LR*, and will probably do so again in relation to *LR II*. See, for example, Kenneth Pennington, review of *Law and Revolution: The Formation of the Western Legal Tradition*, by Harold J. Berman, *American Journal of Comparative Law* 33 (1985): 546; Edward Peters, review of *The Origins of the Western Legal Tradition*, by Harold J. Berman, *Harvard Law Review* 98 (1985): 686. See also Peter Landau, review of *Law and Revolution*, by Harold J. Berman, *University of Chicago Law Review* 51 (1984): 937.
7. Attention is also given to the role of Greek political philosophy and Roman jurisprudence, although Berman’s (limited) treatment of the latter has been criticized. See Landau, Review, 939–40; Peters, Review, 694; Mirjan R. Damaska, review of *How Did It All Begin?* by Harold J. Berman, *Yale Law Journal* 94 (1985): 1807, 1816.
8. For a discussion of Berman’s jurisprudence, see Raymond A. Belliotti, review of *Law and Revolution: The Formation of the Western Legal Tradition*, by Harold J. Berman, *Brooklyn Law Review* 50 (1984): 351. See, further, Harold J. Berman, with William R. Greiner and Samir N. Saliba, *The Nature and Functions of Law*, 5th ed. (Brooklyn: Foundation Press, 1996) and most recently, Harold J. Berman, “World Law: An Ecumenical Jurisprudence of the Holy Spirit,” *Emory Public Law Research Paper No. 05–04*, February 2005.
9. *LR*, 1; *LR II*, 28. For an account that is much less optimistic about the unity of the Western philosophical tradition as a whole, see Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (London: Duckworth, 1985).
10. *LR*, 118.
11. *LR*, 165. For other studies that support this general conclusion, compare Ernst Kantorowicz, *The King’s Two Bodies: A Study in Mediaeval Political Theology*

(Princeton University Press, 1957); Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought 1150–1650* (Cambridge: Cambridge University Press, 1982); Oliver O’Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge: Cambridge University Press, 1996).

12. For interpretations of Berman’s work that emphasize the law and religion aspect, see John Witte, Jr., “A New Concordance of Discordant Canons: Harold J. Berman on Law and Religion,” *Emory Law Journal* 42 (1993): 523; David Ibbetson, “Law, Religion and Revolution in the Twelfth Century,” *Oxford Journal of Legal Studies* 6 (1986): 137; David R. Wingfield, review of *Law and Revolution*, by Harold J. Berman, *Queen’s Law Journal* 13 (1988): 233.
13. *LR*, 85–119. Berman dates the beginning of the papal revolution to the *Dictatus Papae*, said to have been issued by Gregory VII in 1075 (although scholars debate this), and its close by reference to the settlement achieved by the Concordat of Worms in 1122. See *LR*, 94–99. For the relevant documents, see Brian Tierney, *The Crisis of Church and State 1050–1300* (Englewood Cliffs, N.J.: Prentice-Hall, 1964).
14. *LR*, 113–19, 199–254.
15. *LR*, 143–64, 253–54. Representative studies include James Brundage, *Medieval Canon Law* (London: Longman, 1955); Walter Ullmann, *Growth of Papal Government in the Middle Ages* (London: Methuen, 1970); Richard M. Helmholz, ed., *The Spirit of Classical Canon Law* (Athens, Ga.: University of Georgia Press, 1996).
16. *LR*, 205–24.
17. *LR*, 225–53.
18. *LR*, 2; *LR II*, 4–5. For a similar assessment of the importance of the Gregorian Reform, see Joseph R. Strayer, *On the Medieval Origins of the Modern State* (Princeton: Princeton University Press, 1970) and compare the references cited in *LR*, 574–78, n. 1.
19. The papal revolution and its impact on the West is the principal subject of *LR*. See *LR*, 37–41, noting also, however, what Berman identifies as the contemporary crisis within Western civilization and its legal tradition.
20. *LR*, 110–11.
21. *LR*, 273. On the “untold variety” of jurisdictions and corporate groups that emerged in this period, see Tierney, *Growth of Constitutional Thought*, 11; Gaines Post, “Roman Law and Early Representation in Spain and Italy, 1150–1250,” in *Studies in Medieval Legal Thought, Public Law and the State, 1100–1322* (Princeton: Princeton University Press, 1964), 61–62. Pope Boniface VIII addressed the Bull *Clericis Laicos* (1296), for example, to all “prelates and ecclesiastical persons,

religious or secular, of whatsoever orders, condition or standing,” as well as to all “emperors, kings, or princes, dukes, earls, or barons, powers, captains, or officials, or rectors, by whatsoever names they are called, of cities, castles, or any places whatsoever.”

22. *LR*, 224, 269, 292–94; *LR II*, 5.
23. *LR*, 10.
24. *LR*, 143–51. For the text, see Aemilius Friedberg, ed., *Decretum Magistri Gratiani in Corpus Iuris Canonici*, 2 vols. (Leipzig: Bernhadi Tauchnitz, 1879–81). The first twenty of Gratian’s distinctions have been translated into English. See Augustine Thomson and James Gordley, eds, *The Treatise on Laws: Decretum Dist. 1–20, with the Ordinary Gloss* (Washington: Catholic University of America Press, 1993).
25. *LR*, 295–519 (chaps. 9–14).
26. The German revolution is dealt with in detail in *LR II*, pt. 1. It is also the subject of John Witte, Jr, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002). See also Harold J. Berman, “Law and Belief in Three Revolutions,” *Valparasio University Law Review* 18 (1984): 569–629, reprinted in Berman, *Faith and Order*, 83–139, especially at 86–103; John Witte, Jr., and Harold J. Berman, “The Transformation of Western Legal Philosophy in Lutheran Germany,” *Southern California Law Review* 62 (1989): 1575–1660, reprinted in Berman, *Faith and Order*, 141–85.
27. The English revolution is dealt with in detail in *LR II*, pt. 2. See also “Law and Belief in Three Revolutions,” 103–25.
28. The French and American revolutions are surveyed in *LR*, 31–32 and *LR II*, 10–16. On the French revolution, see also “Law and Belief in Three Revolutions,” 125–39. On the American revolution, see Harold J. Berman, “The Impact of the Enlightenment on American Constitutional Law,” *Yale Journal of Law & the Humanities* 4 (1992): 311; and compare John Witte, Jr., *Religion and the American Constitutional Experiment*, 2d ed. (Boulder: Westview Press, 2005).
29. The Russian revolution is surveyed in *LR II*, 16–21. See also *LR*, 32–33. Much of Berman’s early work focused on Russia and the Soviet Union. See, for example, Harold J. Berman, *Justice in Russia: An Interpretation of Soviet Law* (1950; repr., Cambridge: Harvard University Press, 1963).
30. Eugen Rosenstock-Huussy, *Out of Revolution: Autobiography of Western Man* (1938; repr., Providence: Berg Publishers, 1993). [Hereinafter, *OR*.] Berman dedicated *The Interaction of Law and Religion* to Rosenstock-Huussy, and describes himself as “Rosenstockian” in *Faith and Order*, 324. See also Berman’s introduction to the 1993 edition, describing Rosenstock-Huussy’s view of history as “peri-

odic in its course, as patterned, and as moving in long time-spans, with recurrent motifs,” and as “purposive”—what Berman describes as “revelatory” and “prophetic.” On historiography as prophecy, see *LR*, 33–41, 45, 558; *LR II*, 21, 382; “Introduction: Religious Dimensions of Law,” in *Faith and Order*, 1–20, especially at 1–3; “The Religious Foundations of Western Law,” *Catholic University Law Review* 24 (1975): 490–508, reprinted in *Faith and Order*, 35–53, especially at 52–53; “Law and History after the World Wars,” *Jahrbuch der Eugen Rosenstock-Huessy Gesellschaft* 3 (1990): 46–59, reprinted in *Faith and Order*, 323–31. See also, Harold J. Berman, “Law and Religion in the Development of a World Order,” *Sociological Analysis: A Journal in the Sociology of Religion* 52 (1991): 27–36, reprinted in *Faith and Order*, 277–87.

31. *LR*, 14, 538; *OR*, 163–64, 411–12, 564, 689–93, 699.
32. *LR*, 14, 538; *LR II*, 377–79. Indeed, it is principally upon this voluminous secondary literature that Berman relies throughout the two volumes. In addition to works already cited above, see John Neville Figgis, *Studies of Political Thought from Gerson to Grotius 1414–1625* (Cambridge: Cambridge University Press, 1923); Kenneth Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993).
33. *LR II*, 21–22. See also Berman, “Why the History of Western Law Is Not Written.”
34. The emphasis Berman places on the doctrine of the last judgment (in connection with the papal revolution), the Christian conscience (Germany), public spirit (England), public opinion (France and the United States), and social equality (Soviet Russia) are also prominent themes of Rosenstock-Huessy’s work. On differences between Berman and Rosenstock-Huessy, see Berman’s introduction to *Out of Revolution*, as well “Law and History after the World Wars,” 323.
35. For a synoptic statement to this effect, see *LR II*, 16–17. Many of the articles reprinted in *Faith and Order*—which is subtitled *The Reconciliation of Law and Religion*—reflect Berman’s interest in this question. Berman’s extended critique of Weber and Marx may be interpreted as a critique of interpretations of history that place undue, even a determining, emphasis on politics and economics. See Berman’s introductory and concluding remarks in *LR*, 44, 538–58 and in *LR II*, 24–28, 379–81.
36. *LR*, 100–103.
37. *LR*, 88–99.
38. *LR*, 165.
39. *LR*, 165–98. Berman explains, for example, how the doctrine of the last judgment was connected with the idea that as God is bound by his own law so kings must also be bound by theirs.

40. *LR*, 199–254, 273–519. Note also the emphasis Berman gives, not only to the recovery of Roman law but the emergence of universities and the systematic study of law and theology that the universities engendered. See *LR*, 86. Compare Harold J. Berman and Charles J. Reid, Jr., “Roman Law in Europe and the *Jus Commune*: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century,” *Syracuse Journal of International Law and Commerce* 20 (1994): 1.
41. *LR II*, 71–99, 100–130. According to Berman and Witte, Lutheran legal philosophy, proceeding on the basis of Luther’s two-kingdoms theory of the proper relationship between church and state, called on the Christian prince to rule with justice and equity by administering a thoroughgoing, systematic legal reformation, on the basis of the Ten Commandments, understood in the light of the theological doctrine of the threefold use of the law. See Berman and Witte, “The Transformation of Western Legal Philosophy in Lutheran Germany”; Witte, *Law and Protestantism*, 5–23, 87–196; John Witte, Jr., “Between Sanctity and Depravity: Law and Human Nature in Martin Luther’s Two Kingdoms,” *Villanova Law Review* 48 (2003): 727; John Witte, Jr., and Thomas C. Arthur, “The Three Uses of the Law: A Protestant Source for the Purposes of Criminal Punishment?” *Journal of Law and Religion* 10 (1994): 433.
42. See *LR II*, 131–55, 156–75, 176–97; “Law and Belief in Three Revolutions,” 86–103. Berman argues that despite the problem that the period of Lutheran *theological* reformation was *preceded* by an era of *legal* reformation in Germany, the two movements were congenial and mutually reinforcing. Witte generally agrees but also distinguishes between the older legal reformations of the fifteenth century and the later, distinctively Lutheran legal reformations of the sixteenth and later centuries. While the specific contributions of distinctively Roman Catholic and Lutheran jurisprudence to these developments can be debated, the overarching religious context, motivation, and content of both eras of legal reformation is very evident. See Witte, *Law and Protestantism*, 15, 42–46, 177–96; John Witte, Jr., “Canon Law in Lutheran Germany: A Surprising Case of Legal Transplantation,” in *Lex et Romanitas: Essays for Alan Watson*, ed. Michael Hoefflich (Berkeley: University of California Press, 2000), 181–224; Richard M. Helmholz, *Canon Law in Protestant Lands* (Berlin: Duncker & Humblot, 1992).
43. See, for example, *LR II*, 150–55.
44. *LR II*, 100–108.
45. *LR II*, 31–70.
46. See, in particular, the chapter on civil and economic law, which is suffused with economic factors and explanations, yet closes with the abrupt conclusion that the “new religious beliefs had a strong influence on the development of civil and economic law.” See *LR II*, 160, 163–66, 169, 170, 172, 175.

47. *LR II*, 176–97. John Witte is, perhaps, more cautious, restricting his discussion to Lutheran jurisprudence and its impact, in particular, on marriage and education law. See Witte, *Law and Protestantism*, 199–292; John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Louisville: Westminster John Knox Press, 1997), 42–73.
48. *LR II*, 4–21.
49. On Luther’s personal role, see *LR II*, 39–57.
50. *LR II*, 49, 58–59, 63. See, generally, George H. Williams, *The Radical Reformation* (Philadelphia: Westminster, 1962).
51. *LR II*, 40–45, 71–99.
52. *The Engagement Between the King and the Scots* (1647), for example, called for the suppression of all “Anti-Trinitarians, Anabaptists, Antinomians, Arminians, Familists, Brownists, Separatists, Independents, Libertines, and Seekers,” as well as “all blasphemy, heresy, schism, and all such scandalous doctrines and practices as are contrary to the light of nature, or to the known principles of Christianity.”
53. Richard Hooker, *Of the Laws of Ecclesiastical Polity*, 1st ed. (1593), XIII (book XIII was published in 1648). See also Thomas Erastus (Lieber), *Seventy-five Theses* and *Confirmatio Thesium* (1568), the former being translated into English in 1659. On Hooker and the early impact of the Reformation on English law, see Joan Lockwood O’Donovan, *Theology of Law and Authority in the English Reformation* (Atlanta: Scholars Press, 1991).
54. See *LR*, 23–25.
55. See Berman’s opening paragraph in *LR II*, 1: “This book tells the story of two successive transformations of the Western legal tradition under the impact of two Great Revolutions—the sixteenth-century German Revolution, of which the Lutheran Reformation was a critical part, and the seventeenth-century English Revolution, of which the Calvinist Reformation was a critical part.”
56. See, for example, the discussion of the religious, political, and socioeconomic dimensions of the English revolution in *LR II*, 201–5.
57. Emphasis added.
58. *LR II*, 205–6; *OR*, 257–59.
59. *OR*, 761, cited in *LR II*, 206, n. 20.
60. *LR II*, 206, 229; *OR*, 259–62, 345–47.
61. *OR*, 267–70.

62. *OR*, 269–77. Berman also emphasizes the roles of Beckett and More. See *LR*, 255–69; *LR II*, 209. Berman points out that following the murder of Beckett the jurisdiction asserted by Henry II in the Constitutions of Clarendon (1164) were not claimed again by an English king until Henry VIII. See *LR*, 263.
63. *OR*, 276–80, 291, 310–14, 322–23.
64. Compare J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957).
65. *LR II*, 201–2. The same might be said of Berman’s treatment of the socioeconomic aspects as having to do with conflict between “court” and “country.” See *LR II*, 203–4.
66. Following Rosenstock-Huussy, Berman points out that the Reformation of the Church of England was predominantly a political movement, initiated by Henry VIII for other than primarily theological reasons; Protestant beliefs and practices came only later, under Edward VI and Elizabeth. See *LR II*, 208–10.
67. See, for example, *LR II*, 224, 228–30.
68. These issues are addressed in the ensuing chapter entitled “The Transformation of Legal Science.”
69. The chapter is based on a more detailed account given in Harold J. Berman, “The Origins of Historical Jurisprudence: Coke, Selden, Hale,” *Yale Law Journal* 103 (1993): 1651. See also Harold J. Berman and Charles J. Reid, Jr., “The Transformation of English Legal Science: From Hale to Blackstone,” *Emory Law Journal* 45 (1996): 437.
70. See *LR II*, 248–51.
71. *LR II*, 263–65. There would seem to be a much greater affinity between historical jurisprudence and traditionalist Anglicanism than with the doctrinal and confessional emphases of Presbyterian and Puritan Calvinism.
72. The changes in criminal law are an important dimension of Berman’s response to Plucknett’s thesis of a “remarkable continuity and stability of English law during the vicissitudes of the seventeenth century.” See *LR II*, 303, citing T. F. T. Plucknett, “*Bonham’s Case* and Judicial Review,” *Harvard Law Review* 40 (1936): 30.
73. *LR II*, 307.
74. *LR II*, 317–29. See also Charles J. Reid, Jr., “Tyburn, Thanatos, and Marxist Historiography: The Case of the London Hanged,” *Cornell Law Review* 79 (1994): 1158, 1182–85.

75. *LR II*, 317. Berman cites Douglas Hay, "Property, Authority, and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay, Peter Linebaugh, and E. P. Thomson (London: A. Lane, 1975), 17–18, and Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, 5 vols. (London: Stevens, 1948–68), 1.1–4.
76. See John Calvin, *Institutio Christianae Religionis* (1559 ed.), 2.8:58–59.
77. *LR II*, 317–24.
78. The one exception to this is discussed below.
79. To be fully convincing, Berman's argument concerning the impact of Calvinism on English criminal law needs to be supported by specific references to the relevant primary materials. William Perkins, for example, clearly thought that the civil magistrate had the discretion to impose harsh penalties, including capital punishment, for theft. However, the rationale he gave for this—in his commentary on the book of Galatians, no less!—had nothing to do with Calvinist doctrines of sin and damnation but with the very pragmatic argument that the Mosaic Law might in some circumstances be insufficiently severe to prevent widespread lawless behavior. See William Perkins, *A Commentarie or Exposition Upon the Five First Chapters of the Epistle to the Galatians* (1604), 232. A similar failure to base the argument on the primary literature weakens Berman's claim that the Calvinist doctrine of the covenant supported the development of a doctrine of absolute liability for breach of contract (*LR II*, 280, 340). See C. Scott Pryor and Glenn M. Hoshauer, "The Puritan Revolution and the Law of Contracts," *Texas Wesleyan Law Review* (forthcoming), who draw attention to William Ames, *Conscience with the Power and Cases Thereof* (1639), 4.227–48.
80. For example, when Berman insightfully invokes what he calls Calvinist communitarianism and the threat of divine judgment, the context of covenantal theology and politics in which these beliefs were developed is alluded to but not explained. See *LR II*, 322, 342, 344, 348, 368, 376.
81. Berman deals with the constitutional results of the revolution without relating them in any systematic sense to Calvinist political theology. This contrasts with his approach to other areas of law. See, for example, *LR II*, 220–30, 330.
82. Compare John T. McNeill, *The History and Character of Calvinism* (New York: Oxford, 1962); Michael Walzer, *The Revolution of the Saints* (Cambridge: Harvard University Press, 1965). The English revolution was not, after all, the only Calvinist-inspired upheaval within a European nation-state. On the Dutch revolt, for example, see Martin van Gelderen (ed.), *The Dutch Revolt* (Cambridge: Cambridge University Press, 1993).

83. Compare Martin Luther, *De Servo Arbitrio* (1525) and Philip Melancthon, *Loci Communes* (1555), 15.
84. See John Calvin, *Institutio Christianae Religionis* (1559 ed.), 1.16–18, 3.21–24; *Westminster Confession of Faith* (1646), III, V, X. Note, however, the argument of Paul Helm, “Calvin (and Zwingli) on Divine Providence,” *Calvin Theological Journal* 29 (1994): 388 on the role of the doctrine of predestination in Calvin’s theology.
85. *LR II*, 264.
86. Calvin, *Institutio Christianae Religionis* (1559 ed.), 1.3–6, 15, 2.1–5. See also *Westminster Confession of Faith* (1646), VI, IX.
87. Calvin, *Institutio Christianae Religionis* (1559 ed.), 2.2:22, 3.8:1; 4.20:16. Compare *Westminster Confession of Faith* (1646), VI:2. See Stephen J. Grabill, *Theological Foundation for a Reformed Doctrine of Natural Law* (Ph.D., diss., Calvin Theological Seminary, 2004), chap. 4.
88. See Witte, *Law and Protestantism*, 122–40, 158–64, 169–70.
89. Some Puritan legislators went so far as to implement the Old Testament judicial laws directly. See, for example, John Cotton, *Moses His Judicials* (1636); *An Abstract of the Laws of New England* (1641). Others denied that the judicial laws of Moses were strictly binding on the Christian commonwealth, focusing rather on the moral law (summarized in the Decalogue) and the law of nature. See, for example, Calvin, *Institutio Christianae Religionis* (1559 ed.), 2.7:14–17, 2.8:1–50, 4.20:9, 4.20:14–16; *Westminster Confession of Faith* (1646), XIX:4; Johannes Althusius, *Politica Methodice Digesta Exemplis Sacris & Profanis Illustrata* (1603, 1614), VII:7–10, X:1–8, XXI:16–20, 22–29, 35–41, XXII:3–4; William Ames, *Conscience with the Power and Cases thereof* (1639), V:1.
90. See Calvin, *Institutio Christianae Religionis* (1559 ed.), 2.7:8, 10–13, 2.9:4, 2.11:10; *Westminster Confession of Faith* (1646), XIX:5–7; Ernest Kevan, *The Grace of Law: A Study of Puritan Theology* (Grand Rapids: Baker, 1976).
91. Calvin, *Institutio Christianae Religionis* (1559 ed.), 4.8:1, 4.10:27–31, 4.11:1–5, 4.12:1–13; *Westminster Confession of Faith* (1646), XXX, XXXI. Compare John Witte, Jr., “The Catholic Origins and Calvinist Orientation of Dutch Reformed Church Law,” *Calvin Theological Journal* 29 (1993): 328; John Witte, Jr., “The Plight of Canon Law in the Early Dutch Republic,” in *Canon Law in Protestant Lands*, ed. Richard H. Helmholz (Berlin: Duncker & Humblot, 1992).
92. Calvin, *Institutio Christianae Religionis* (1559 ed.), 3.19:14–16, 4.11:3–5, 4.20:1–2; *Westminster Confession of Faith* (1646), XXIII:3, XXXI:5. See, further, John Witte, Jr., “Moderate Religious Liberty in the Theology of John Calvin,” *Calvin Theological Journal* 31 (1996): 359.

93. See Johannes Althusius, *Politica Methodice Digesta* (1614); and compare Abraham Kuyper, *Lectures on Calvinism* (Grand Rapids: Eerdmans, 1931); Herman Dooyeweerd, *A New Critique of Theoretical Thought* (Jordan Station, Ontario: Paideia Press, 1984); Gordan J. Spykman, "Sphere Sovereignty in Calvin and the Calvinist Tradition," in *Exploring the Heritage of John Calvin: Essays in Honor of John Bratt*, ed. David E. Holwerda (Grand Rapids: Baker, 1976).
94. See Calvin, *Institutio Christianae Religionis* (1559 ed.), 2.10:1–5, 2.11:4, 4.26:5–6, 14 and *Westminster Confession of Faith* (1646), VII, XIX. Compare, generally, J. Wayne Baker, *Heinrich Bullinger and the Covenant: The Other Reformed Tradition* (Athens, Ohio: Ohio University Press, 1980); David A. Weir, *The Origins of the Federal Theology of the Sixteenth Century Reformation Thought* (Oxford: Clarendon Press, 1990); Peter Lillback, *The Binding of God: Calvin's Role in the Development of Covenant Theology* (Grand Rapids: Baker, 2001).
95. A point noted by Berman in *LR*, 31, n. 27 and *LR II*, 264–65, 343, 348, but generally overlooked in respect of the political and constitutional changes introduced by the English revolution. Compare Frederick S. Carney, "Associational Thought in Early Calvinism," in *Voluntary Association: A Study of Groups in Free Societies*, ed. D. B. Robertson (Richmond, Virginia: John Knox Press, 1966); Charles S. McCoy and J. Wayne Baker, *Fountainhead of Federalism: Heinrich Bullinger and the Covenantal Tradition* (Louisville: Westminster/John Knox Press, 1991); Daniel J. Elazar, *The Covenant Tradition in Politics*, vol. 2, *Covenant and Commonwealth* (New Brunswick: Transaction Publishers, 1996).
96. For theological and juristic works, see, for example, John Calvin, *Institutio Christianae Religionis* (1536 ed.), 6.35–56; (1559 ed.), 4.20; John Ponet, *Shorte Treatise of Politicke Power* (1556); John Knox, *Appellation to the Nobility and Estates of Scotland* (1558); Theodore Beza, *De jure magistratum in subditos et officio subditorum erga magistratus* (1576); Junius Brutus (probably Philippe Duplessis-Mornay), *Vindiciae Contra Tyrannos* (1579); George Buchanan, *De Jure Regni apud Scotus* (1579); François Hotman, *Franco-gallia* (1586), and Johannes Althusius, *Politica Methodice Digesta* (1614). For relevant political debates and constitutional documents within England and Scotland, see, for example, "The Scottish National Covenant" (1638), "The Solemn League and Covenant" (1643), and "The Engagement between the King and the Scots," (1647) in Samuel R. Gardiner, *The Constitutional Documents of the Puritan Revolution 1625–1660*, 3d ed. (Oxford: Clarendon Press, 1906) and A. S. P. Woodhouse, ed., *Puritanism and Liberty: Being the Army Debates (1647–1649)* (London: Dent, 1938). See also J. H. Franklin, *Constitutionalism and Resistance in the Sixteenth Century* (New York: Pegasus, 1969).

97. The *Vindiciae Contra Tyrannos*, for example, was translated into English in 1622 and reprinted in 1631, 1648, 1660, and 1689. Samuel Rutherford, *Lex, Rex, or the Law and the Prince* (1644) and John Goodwin, *Right and Might Well Met* (1649) advanced arguments along similar lines. See also Richard Baxter, *A Holy Commonwealth* (1659). The issues of oath, covenant, and solemn engagement run throughout the Army debates at Putney, Whitehall, and Reading. See the documents collected in Woodhouse, *Puritanism and Liberty*; and in David Wootton, ed., *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (London: Penguin, 1986).
98. That is, with the exception of the passage at *LR II*, 264–65, discussed below.
99. See *LR II*, 232–38.
100. *LR II*, 238–63. The only antiabsolutist theory that is presented in any detail is Hale's *Reflections by the lrd. Cheife Justice Hale on Mr. Hobbes His Dialogue on the Lawe* (ca. 1661–1675), a work that, like that of Locke, was published after the initial, decisive steps in the revolution had already taken place and the Cromwellian era had come to an end. Berman also says that the legal theories of Coke, Selden, and Hale are to be understood in the context of their total philosophy, religious and scientific. To this end, Hale is presented as Calvinist, rather than a latitudinarian Anglican—a problematic claim. See Alan Cromartie, *Sir Matthew Hale, 1609–1676: Law, Religion and Natural Philosophy* (Cambridge: Cambridge University Press, 1995), chap. 10.
101. See *LR II*, 317–29, 341–48, 350–52, 357–62, 368–69.
102. *LR II*, 264–65. The same discussion appears in “Origins of Historical Jurisprudence,” 1722–1724. See also *LR*, 30–31; *LR II*, 8–10, 26.
103. “Law and Belief in Three Revolutions,” 109–10. Berman cites Calvin, *Institutes of the Christian Religion*, 4.2:8 and 4.20:31. See also “Origins of Historical Jurisprudence,” 1660–62, 1669, where Berman incidentally touches on some of these themes.
104. “Law and Belief in Three Revolutions,” 110, and see also 107, 116–19, citing the alleged influence of Rutherford's, *Lex, Rex* (1644) on John Locke's *Two Treatises of Government* (1689–1690).
105. Berman does make passing reference, for example, to the role of the idea of covenant in John Selden's theory of law, but there is no detailed explanation of the political theology involved and Berman argues in any case that what was of “decisive importance” in Selden's thought was his sociological-historical jurisprudence. See *LR II*, 247, discussing Selden, *De Jure Naturali et Gentium juxta Disciplinam Ebraeorum Libri Septum* (1640).

106. This is not to suggest, of course, that resistance theory was only a Calvinist idea. For early statements regarding the limited scope of royal power and the question of restraint by law and resistance by force, see, for example, John of Salisbury, *Policraticus sive de nugis curialium et vestigiis philosophorum* (1159) and Henry de Bracton (attr.), *De Legibus Et Consuetudinibus Angliæ* (ca. 1220–1260).
107. Thus, in “Law and Belief in Three Revolutions,” 110, he says that the Puritan movement fragmented into diverse parties and eventually gave way to the Cromwellian dictatorship. Yet, he maintains, Puritan beliefs continued to have a long-term impact on the English mind.
108. See, for example, *LR II*, 26, 58, 211, 217, 221, 228, 233; “Law and Belief in Three Revolutions,” 105. This tendency to conflation is particularly evident in Rosenstock-Huessy. See *OR*, 314–19.
109. See, for example, John Calvin, *Institutio Christianae Religionis* (1559 ed.), 4.3:4–9, 4.4:1–4; *Ecclesiastical Discipline* (1559); *Ecclesiastical Ordinances of the Church of Geneva* (1561); *The Belgic Confession* (1561); *The Church Order of Dort* (1619); *The First Book of Discipline or the Policie and Discipline of the Church* (1560); *The Second Book of Discipline or Heads and Conclusions of the Polity of the Church* (1578); Samuel Rutherford, *The Due Right of Presbyteries, or a Peaceable Plea for the Government of the Church of Scotland* (1644); George Gillespie, *Aaron’s Rod Blossoming; or, The Divine Ordinance of Church Government Vindicated* (1646); *A Directory for Church-Government for Church-Censures, and Ordination of Ministers, Agreed Upon by the Assembly of Divines at Westminster* (1645); *Westminster Confession of Faith* (1646), XXXI. See also M. I. Klauber, “Calvin on Fundamental Articles and Ecclesiastical Union,” *Westminster Theological Journal* 54 (1992): 349. Note, however, the difference between Dutch Reformed and Scottish Presbyterian polity regarding the locus of church authority (local consistory/session vs. classis/presbytery). Compare the *Belgic Confession*, 30–32 and *Church Order of Dort*, 4 with the *Westminster Directory for Church-Government*, section headed “It belongeth unto Classical Presbyteries.”
110. See, for example, Richard Mather, in *An Apologie of the Churches in New England for Church-Covenant* (1643); John Cotton, *The Keys of the Kingdom of Heaven* (1644); Thomas Goodwin, *Independency God’s Verity* (1647); Thomas Hooker, *A Survey of the Summe of Church Discipline* (1648); *The Cambridge Platform* (1648); *The Savoy Declaration of Faith and Order* (1658).
111. See, for example, Robert Browne, *A Treatise of Reformation without Taryng for Anie* (1582); John Robinson, *A Justification of Separation from the Church of England* (1610).

112. Although Presbyterianism was promulgated by Parliament in 1645, it was never effectively implemented, even before Cromwell's rise to power. See the *Ordinance Regulating the Election of Elders* (1645) and the discussion in J. P. Kenyon, *The Stuart Constitution: Documents and Commentary* (Cambridge University Press, 1969), 251–57 and, for a detailed account, William A. Shaw, *A History of the English Church During the Civil Wars and Under the Commonwealth 1640–1660*, 2 vols. (London: Longmans, Green, 1900).
113. As Tierney, *Growth of Constitutional Thought*, 1, has pointed out, “it is impossible really to understand the growth of Western constitutional thought unless we consider constantly, side by side, ecclesiology and political theory, ideas about the church and ideas about the state.”
114. See, for example, William Bradford, *Of Plimoth Plantation* (1647); Cotton Mather, *Magnalia Christi Americana* (1702); David Neal, *History of the Puritans*, 2 vols. (1731, 1738). See also Henry Martyn Dexter, *The Congregationalism of the Last Three Hundred Years* (1880); Charles Hodge, *The Constitutional History of the Presbyterian Church in the United States, Part I* (Philadelphia: Presbyterian Board of Publication, 1851); Leonard J. Trinterud, *The Formation of an American Tradition: A Re-examination of Colonial Presbyterianism* (Philadelphia: Westminster Press, 1949); Edmund S. Morgan, *Visible Saints: The History of a Puritan Idea* (New York: New York University Press, 1963); Carl Bridenbaugh, *Mitre and Sceptre: Transatlantic Faiths, Ideas, Personalities and Politics, 1689–1775* (New York: Oxford University Press, 1962).
115. On the role of covenantal political theology in the early American colonies, see Perry Miller, “The Marrow of Puritan Divinity,” in *Errand into the Wilderness* (Cambridge: Belknap Press, 1981); Andrew C. McLaughlin, *The Foundations of American Constitutionalism* (New York: Fawcett Publications, 1961); John Witte, Jr., “Blest Be the Ties that Bind: Covenant and Community in Puritan Thought,” *Emory Law Journal* 36 (1987): 579; John Witte, Jr., “How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism,” *Emory Law Journal* 39 (1990): 41; Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988); Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge: Louisiana State University Press, 1980); Donald S. Lutz, *Colonial Origins of the American Constitution: A Documentary History* (Indianapolis: Liberty Fund, 1998); Donald S. Lutz, “Religious Dimensions in the Development of American Constitutionalism,” *Emory Law Journal* 39 (1990): 21; Stephen L. Schechter, ed., *Roots of the Republic: American Founding Documents Interpreted* (Madison: Madison House, 1990); Barry A. Shain, *The Myth of American Individualism: The Protestant Origins of American Political Thought* (Princeton: Princeton University Press, 1994).

116. *LR II*, 375.
117. Compare *LR II*, 228–30, 234 (discussing Hooker) and 304–5.
118. *LR II*, 304–5, 376.
119. See Timothy S. Shah, “Making the Christian World Safe for Liberalism: From Grotius to Rawls,” *The Political Quarterly* 71 (2000): 121, comparing Hugo Grotius, *Meletius sive de iis quae inter Christianos conveniunt epistola* (1610); and John Locke, *Letter Concerning Toleration* (1689).
120. John Milton, *Areopagitica* (1644); *The Tenure of Kings and Magistrates* (1648); John Locke, *Letter concerning Toleration* (1689); *Two Treatises of Government* (1690). See also Roger Williams, *The Bloody Tenent of Persecution for the Cause of Conscience* (1644). Compare the “Leveller” position, as stated by John Lilburne, *The Free-mans Freedom Vindicated* (1646); John Lilburne, *An Agreement of the People for a Firme and Present Peace* (1647); John Lilburne, *Foundations of Freedom or an Agreement of the People* (1648).
121. *LR II*, 3, 245, citing Jaroslav Pelikan, *The Vindication of Tradition* (New Haven: Yale University Press, 1984), 65.
122. See *LR II*, 62.
123. Berman generally bypasses, for example, the contribution of the fifteenth-century conciliarists as well as Scottish and, especially, Dutch, constitutional developments in the sixteenth and seventeenth centuries. On the former, see Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (Cambridge: Cambridge University Press, 1968); Antony Black, *Council and Commune: The Conciliar Movement and the Fifteenth Century Heritage* (London: Burns & Oates, 1979); Francis Oakley, “On the Road from Constance to 1688: The Political Thought of John Major and George Buchanan,” *Journal of British Studies* 1 (1962): 1. On the Dutch revolt, see van Gelderen, *The Dutch Revolt*.
124. *LR*, 558; *LR II*, 382.