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LEGAL GROWTH THROUGH EVOLUTION

COMMENT ON THE PURITAN REVOLUTION AND ENGLISH LAW

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Professor Harold Berman has presented the fascinating thesis that a people's religion influences their laws and that the Puritan religious revolution of seventeenth century England introduced Calvinist ideas into Anglo-American jurisprudence. I fully agree with Professor Berman's observations that religious beliefs and a sense of moral obligation to others are some of the motivations of, or at least influences upon, legal growth. Economic aggrandizement is not the only motivation of the human race. Religion has had a direct effect upon social and political institutions.

On the other hand, Professor Berman's arguments as to the specific relation of Calvinism and English legal development do not always convince. His discussion of Calvinist theology is very interesting, but it seems that the ideas that he takes to be tenets of Calvinism that he finds in English law were there before Puritanism took hold of England and that the development of the law in the seventeenth century in England, even when done by Puritans, was independent of theological doctrine.

It is stated that between 1640 and 1689 "[p]arliamentary supremacy was established." While it is true that the power of Parliament was greatly increased in this period, it is going too far to ignore the fact that the leaders of the parliamentary party were building with ideas firmly established before Calvin's influence reached England. It was accepted without question in medieval England that the consent of Parliament was absolutely necessary for taxation. In 1534, the same year that Calvin broke with Roman Catholicism, Henry VIII felt that he must have the consent of Parliament to remove the English Church from the authority of the pope.[1] The English Reformation was done by acts of Parliament not royal decree.[2] Without

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1. 26 Hen. VIII (1534), ch. 1, 3 STAT. REALM, 492.

2. *See generally* S. E. LEHMBERG, THE REFORMATION PARLIAMENT 1529-1536 (1970).

debating the influence of Puritanism during the generation of the Restoration, 1660 to 1689, it is clear that Parliament was not supreme in 1689. While it is true that Parliament called William and Mary to the Throne, William III did not accede to all of the demands of Parliament; for example, the Bill of Rights of 1688[3] did not require that judges be appointed *quamdiu se bene gesserint*, as was desired.[4] Queen Anne vetoed a bill in 1707.[5] It was not until the mid eighteenth century at the earliest that the majority party in Parliament could exercise the royal prerogative against the will of the king. George III had to be cajoled into receiving a personally unacceptable ministry, that of Fox and North in 1783. Even Queen Victoria had to be reminded by Gladstone that, though she was the queen, he represented the people of England. In the light of Pride's Purge in 1648 when Oliver Cromwell's political opponents were expelled from Parliament and of the government appointment rather than the popular election of the Parliament in 1653, it appears that parliamentary supremacy was not part of the Puritan religious philosophy. In this respect, Cromwell was not much of an improvement over Charles I. (Nor was the use of the Puritan Army to collect taxes better than the forced loans of Cromwell's royal predecessor.)

Professor Berman argues that "[t]he newer courts that had been created by the Tudor kings were abolished, and the older common-law courts became supreme over all." It is true that in 1640 the courts of Star Chamber and High Commission were abolished and the jurisdictions of the Council of the Marches of Wales and the Council of the North were greatly curtailed,[6] but the equity jurisdictions of the latter two courts continued to exist. These latter two courts and the Court of Requests slowly faded away after 1640 because of the political turmoil into which England was plunged by the Civil War. The common law judges had some thirty years before 1640, and for political not theological reasons, used the writ of prohibition to cut back the ecclesiastical and admiralty courts.[7] But the Court of Chancery had escaped all attacks. In spite of the opprobrium of Selden and other anti-royalists and in spite of a wild proposal to abolish it, the Court of Chancery flourished under the Commonwealth and the Protectorate;

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3. 1 W. & M. (1688), sess. 2, ch. 2, 6 STAT. REALM 142-45.

4. This statute, though an important step, failed to address many of the problems of the previous two reigns: J. P. KENYON, STUART ENGLAND 260-64 (1978).

5. 34 HALSBURY'S LAWS OF ENGLAND 518-19 (4th ed. by Hailsham 1980).

6. 16 Car. I (1640) ch. 10, §§ 1, 2, 7, and ch. 11, 5 STAT. REALM 110-13.

7. J. H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 107-09, 112, 124-25 (1979).

it continued to grow in strength and jurisdiction after the Restoration in 1660, as it had before. Except in the area of criminal law, the equity jurisdictions of the Chancery and the Exchequer were at least equal to the courts of common law. Moreover, it can be forcefully argued that they were supreme over the common law in that a court of equity could enjoin the enforcement of a common law judgment that was contrary to the established principles of equity. Not only was a judgment obtained through fraud to be suppressed in equity, practically speaking, but a common law mortgage would be relieved against and a trust would be enforced, though the common law courts refused to recognize the legal obligation of a trust. Equitable defenses could be asserted against common law obligations. In the areas of contract law and property, where equity and common law clashed, equity rules prevailed.

The English judges did not achieve life tenure in the seventeenth century. The salutary concept of judicial independence from political pressures had existed in England long before Calvin wrote,[8] and in the seventeenth century, it was believed that if the judges held office with a secure tenure, (i.e. *quamdiu se bene gesserint*, "so long as they acted properly") and not at the whim of the king, independence would be achieved. The Long Parliament in 1641, prevailed upon Charles I to appoint the judges to sit with secure tenure.[9] This was done by him and his successors until 1668. But it is to be noted that Oliver Cromwell removed Chief Baron Wilde from office in 1653 and Baron Thorpe in 1655. Charles II in 1668, following the end of the influence of the earl of Clarendon (who was not a Puritan) refused any longer to appoint judges with secure tenure. Charles II and James II attempted to manipulate the courts through changing the judges who sat there.

After the explusion of James II, it was attempted to force William III to appoint judges with secure tenure. Although he and his successor, Queen Anne did do so, it was as a matter of his free will, and he vetoed a bill in 1692 which would have required it. However, in 1701, William III was forced to yield up this royal prerogative in return for the passage of the Act of Settlement (which was necessary to keep the English Crown on protestant heads, which was necessary to keep Catholic France from annexing the Netherlands). But the Act of Settlement did not come into effect until

8. 2 W. S. HOLDSWORTH, HISTORY OF ENGLISH LAW 559-64 (1923).

9. H. L. JOUR. vol. 4, pp. 130, 132. *See generally* W. H. BRYSON, EQUITY SIDE OF THE EXCHEQUER 52-57 (1975).

the death of Queen Anne in 1714.[10]

But even in 1714 it could not have been said that the English judges held by life tenure because their offices expired when a king died and reappointment was not required. George I did not reappoint Baron Banastre in 1714. It was not until 1760 that a statute was passed which declared that judicial appointments did not expire upon the death of the monarch.[11]

Security of judicial tenure, however, is but a partial solution to the availability of impartial justice. Throughout the seventeenth century, a special royal commission of oyer and terminer could set up a hand-picked court to try and convict a special prisoner. These special commissions included laymen as well as judges, and if it were thought necessary for a conviction, the laymen could outnumber the professionals. This method of manipulating justice was used regularly from the sixteenth to the eighteenth century. Some of the more prominent defendants before these special courts were Sir Thomas More (1535), Sir Nicholas Throckmorton (1554), Mary Queen of Scots (1586), Sir Walter Raleigh (1603), and Guy Fawkes (1606).[12] This method of judicial selection was still in use in the mid eighteenth century, and several of the Jacobite rebels were tried under special commissions in 1746.[13] It was used by the Puritans in 1649 to prosecute John Lilburne. Cromwell and the others had dispatched King Charles I by a special court created for that purpose, which court was different from special commissioners only in name.[14] The regicides, in their turn, were convicted in 1660 under special commissions.[15]

It is stated that "[r]eligious toleration was extended to Protestant denominations" in the period 1640 to 1689. While this is true, it was not the result of Calvinist theology or example. It was the result of some hard political realities. The Puritans in England and in New England were not tolerant of religious dissent as a matter of their theology; they were forced to accede to a small measure of it only in order to protect themselves from the Roman Catholics and the high church Anglicans.

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10. BRYSON, *supra* note 9, at 56-7.

11. BRYSON, *supra* note 9, at 59-61.

12. 1 *COBBETT'S STATE TRIALS 385, 869, 1161, (1809), 2 Id.* 1, 159 (1809); 1 J. F. STEPHEN,HISTORY OF THE CRIMINAL LAW OF ENGLAND 337 (1883).

13. Francis Townley, Alexander Kinloch & Charles Kinloch: 18 HOWELL'S STATE TRIALS 329, 395 (1813). William Jackson and others were tried for murder in 1749 under special commissions of oyer and terminer: 18 HOWELL'S STATE TRIALS 1069 (1813).

14. 4 COBBETT'S STATE TRIALS 1269, 989 (1809).

15. 5 COBBETT'S STATE TRIALS 947 (1810).

Professor Berman is quite correct in saying that some of the "[r]oyal powers were limited by a written Bill of Rights." But this was not a new concept. Royal powers of the English monarchy had been limited by Magna Carta (1215), the Statute of Marlborough (1267), and the Confirmatio Cartarum (1297).[16]

Other chronological errors slip into the argument. The privilege against self-incrimination, for example, was allowed in the days of Good Queen Bess.[17] The jury had ceased to be "an active investigatory body" in the sixteenth century or earlier.[18] Written pleading was introduced into civil litigation in the early part of the sixteenth century.[19] Also, the fictions of the actions of ejectment and trover that enabled the court of king's bench to capture much of the business of the court of common pleas were developed well before the dawn of the seventeenth century.[20]

I disagree also as to the holding of the case of *Paradine* v. *Jane*.[21] This case did not establish any rule of contract law but was a case involving property rights; the lessee was liable for the rent because he had conveyed it to the lessor, and any theory of failure of consideration was irrelevant. This strikes me as a backward looking and medieval case. The modern view, which is not even today fully accepted by the legal profession and the courts, is that a lease agreement is a bilateral contract and not two independent conveyances.[22]

The most significant legal change in the seventeenth century was the abolition of tenure by knight's service, tenure in capite, and its feudal incidents in 1660. However, this was almost accomplished in the early years of the reign of James I. The so-called Great Contract with the king would have re-organized the finances of the Crown and

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16. The Petition of Right (1641), 4 H. L. JOUR. 130, 132, and the Bill of Rights (1688), 1 W. & M. [1688], sess. 2, ch. 2, 6 STAT. REALM 142-45, were anticipated by Magna Carta (1215), 1 STAT. REALM 9-13, the Statute of Marlborough, 52 Hen. III [1267], 1 STAT. REALM 19-25, and the Confirmatio Cartarum (1297), 25 Edw. I [1297], 1 STAT. REALM, 123-24.

17. *E.g.*, Fenton v. Blomer, P.R.O., C. 33/61, f. 66 (Ch. 1580); Anon., 3 Leonard 204, 74 Eng. Rep. 634 (Ex. 1588); Cary and Cottington v. Mildmay, Tothill 7, 21 Eng. Rep. 107 (Ch. 1590); Vice-Countess Montague v. Anon., Cary 9, 21 Eng. Rep. 5 (Ch. temp. Eliz. I).

18. J. H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 65-6 (1979).

19. BAKER, *supra* note 18, at 71-72.

20. BAKER, *supra* note 18, at 254-55, 332-34.

21. Style 47, Aleyn 26, 82 Eng. Rep. 519, 897 (K.B. 1648). I thus do not agree with Prof. Simpson's characterization of this case as expounded in A. W. B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 32-33, 529-32 (1975).

22. *See* AMERICAN LAW OF PROPERTY §§ 3.103, 9.41 (1952).

abolished the rights of wardship, marriage, and purveyance, which were medieval shackles upon real property, but political negotiations broke down. By the end of 1607, both king and Parliament had become wary of the proposal, and it was put on the shelf.[23]

One could cavil further, but this is sufficient to demonstrate that almost all of the progress of the law of the seventeenth century had significant legal antecedents and that what happened in the century of Hale and Nottingham was but a part of the slow but steady evolution of the English law and civilization.[24]

Professor Berman writes "[a]ll our modern Western legal systems, including the English, have their origins in violent revolutions, . . ." This is not true of Anglo-American law. Violent revolution is the opposite of the rule of law. *Inter arma silent leges.* War is violence not law or reason; violence is hatred and cruelty. Revolution is, moreover, usually followed by counter-revolution. Cromwell turned out to be an undemocratic dictator. The repressive Bourbon monarchy was restored to France after the brutal Terror of the French Revolution. Stalin was Ivan the Terrible writ large. Professor Berman's suggestion that revolution be given any credit for the development of the law is unfortunate; while war may result in some small political gains, it only impedes the natural evolution of legal principles and procedures.

The concept of legal "revolution" is dramatic and exciting; it makes for good reading. However, the more closely one studies history, and particularly legal history, the more it appears that the law and its development is enormously complicated and subtle. The law seems to be very wary of change and seems always to be holding back to see if the political and social revolutions are valid, and, if so, then the law will change a little in response. The political revolutionaries, of course, try to use law as a tool, but somehow the schemes for reform founder unless they are based on some widely-shared, long-debated, ancient idea. The law is not as tractable a tool as a gun or a knife, nor is it so brutal. The law is persuasion rather than force. Revolution is barbarism; law is civilization.

However, Professor Berman does not stop with these opinions on revolution but goes on to discuss with approval the career of Sir Matthew Hale, who was a moderate puritan (or maybe he was a

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23. KENYON, *supra* note 4, at 65-68.

24. B. Shapiro, *Law Reform in Seventeenth Century England*, 19 AM. JOUR. LEGAL HIST. 280, esp. 310-11 (1975).

moderate Anglican). Hale studied theology in his spare time but remained above sectarian quibbling and intolerance. Hale was intellectually honest in his religion, in the administration of the law, and in the living of his life. Although I do not see any connection between Hale's moderate religion and his legal philosophy, I do agree with Professor Berman's opinion that Hale "asserted the independent validity of English law as such, which evolved in the first instance through experience, through wisdom and usage, and which was suited to the character of the English people." I also agree with Hale. The growth of the law has been by small steps taken slowly, by trial and error, by decisions agreed upon after lengthy debate. Those revolutionaries who were most strident in their criticism of the law, who would discard the old and compose new law, who would make the law "concise" and "understandable" were usually those people who were the most ignorant of the law. After the radicals have spent their fury, the law resumes its original shape and continues its course of growth by evolution. England was fortunate in that the ignorance that would have abolished the Court of Chancery in the mid seventeenth century was smothered by the Hale Commission of 1651. The Hale Commission built on ideas which had been discussed before and would be discussed again, long after the Restoration of the Stuarts.

Professor Berman's absorbing Lecture ends with the thought that revolutions represent "both a break with that tradition and a renewal of it." And indeed when revolutions attempt to break up traditions, the underlying legal system renews those good parts of the old legal ways of our getting along with each other, legal traditions which the revolutionaries in their impatient zeal failed to appreciate.