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# The Western Legal Tradition in a Millennial Perspective: Past and Future\*

Harold J. Berman\*\*

It is a great honor for me to be added to the list of distinguished scholars who have given the Edward Douglass White lectures during the past 65 years. My topic is the Western legal tradition, viewed in a broad historical and philosophical perspective, its past and its future.

In Part I, I shall discuss the development of the Western legal tradition from its origins in the late eleventh and twelfth centuries through the great national revolutions in Germany, England, France, and the United States. In Part II, I shall discuss the crisis of the Western legal tradition in the twentieth century, including the impact of the Russian Revolution and the World Wars, and the future of the Western legal tradition as we enter a new millennium, in which a multi-cultural West and East and North and South are beginning to forge a new tradition of world law. Part I focuses on history, Part II on prophecy.

## I. HISTORY

Let me say first what I mean by the three words "Western," "legal," and "tradition"—especially when the three words are put together as a single concept, a single phenomenon.

By "*the West*" I mean the historically developing culture of the peoples of Western Europe, who from the late eleventh to the early sixteenth century shared a common allegiance to the Roman Catholic papal hierarchy, and who from the sixteenth century to the twentieth century experienced a series of national revolutions, each of which had repercussions throughout Europe; and I include also non-European peoples who eventually were brought within the historically developing Western culture by colonization or, as in the case of Russia, by religious and political and cultural affinity and interchange.

By "*legal*" I mean the systems of positive law and legal science that have developed in the West since the twelfth century, legal systems that share common historical foundations, common sources, common concepts. The first such legal system was the canon law of the Roman Catholic Church. Enacted, in part, by the papacy and church councils, and enforced by a hierarchy of ecclesiastical courts, the canon law, prior to the rise of Protestantism, governed every person in Western Christendom, from England to Poland and from Scandinavia to Sicily, and was a

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model, or a foil, in the contemporaneous origin and gradual development of secular systems of royal law, feudal law, urban law, and mercantile law. For some four hundred years these secular legal systems co-existed alongside the canon law, and alongside each other, within every territory of Europe. With the national Protestant Revolutions of the sixteenth and seventeenth centuries, the various co-existing jurisdictions were, in effect, nationalized; nevertheless, the existence of plural jurisdictions and plural bodies of law within each country has remained a significant characteristic of the Western legal tradition at least until the latter part of the twentieth century.

By "*tradition*" I mean the sense of continuity between past and future, the partnership, as Edmund Burke put it, of the generations, the looking backward to our ancestors for inspiration in moving forward to our posterity.<sup>1</sup> Jaroslav Pelikan has contrasted this allegiance to tradition with *traditionalism*: *traditionalism*, he writes, is the dead faith of the living, *tradition* is the living faith of the dead.<sup>2</sup> The former is mere repetition of the past, adherence to the past for its own sake, *historicism*, as contrasted with what I would call *historicity*, the adaptation of past experience to the solution of new problems, a sense of historical continuity, of ongoingness.

You will ask—you *should* ask—first, why is it important to study the historical roots of our legal institutions? And second, even if that *is* important, why is it important to go back 900 years? And third, even if *that* is important, why go back to the canon law of the Church and the development of the various European national legal systems—why should we Americans not stick to the roots of American law in the early English common law? I hope that the answers to these questions will become apparent when we come to consider the crisis of the Western legal tradition in the twentieth century and its future in the new millennium. But let me give very brief answers to the three questions now.

First, it is important to know the historical development of our legal institutions in order to know what they *are*. We cannot understand what they are today if we do not know how they came to be what they are today, just as we cannot know who we ourselves are if we do not know how we came to be who we are. Let me quote Holmes's once famous words, "In order to know what [the law] is, we must know what it has been, and what it tends to become."<sup>3</sup> Like the community of which they are a part, living legal institutions exist not only in space but also in time, and in time they have both a past and a future, and the two—their past and their future—are closely interdependent. Our history is our group memory, without which we as a group are lost. If we live only in the present, we suffer from memory impairment, a kind of social amnesia, not knowing whence we came or whither we are going.

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1. Society, Burke wrote, is "a partnership not only between those who are living but between those who are living, those who are dead, and those who are to be born." Edmund Burke, *Reflections on the Revolution in France* (1790).

2. Jaroslav Pelikan, *The Vindication of Tradition* 65 (1984).

3. Oliver Wendell Holmes, Jr., *The Common Law* 1 (1938).

Second, it is important for us today to go back nine centuries because it was then that our legal institutions were first formed; it was then that the Western legal tradition was conceived; it was then that the seeds of its future development were planted; it was then that there began to unfold the story that in the twentieth century has come to a crucial turning-point. We need a long time-perspective in order to understand the long-term character of the fundamental changes that are now taking place and in order to anticipate a long-term future.

Third, it is important for us to trace the development of our American law to the origins in the twelfth century of the English common law, which America has inherited; and also to trace the historical development of English common law from those origins to the revolutionary changes of the seventeenth and eighteenth centuries, when English law prevailed in the English colonies in America. But what has been missing in both English and American legal historiography is the close connection between the development of English and American law and the parallel development of comparable legal institutions in the other countries of the West. As late as 1765, Blackstone could write in his famous *Commentaries on the Laws of England* that the following kinds of law prevailed in England: natural law, divine law, the law of nations, the English common law, local customary law, Roman law (governing Oxford and Cambridge Universities), ecclesiastical law, the law merchant, statutory law, and equity.<sup>4</sup> As the great English legal historian Frederick Maitland wrote, "It was the idea of a law common to all the countries of Western Europe that enabled Blackstone to achieve the task of stating English law in a rational fashion."<sup>5</sup> And I might add that Blackstone's *Commentaries* was regularly studied by American law students until the early twentieth century. Indeed, it was required study at Yale Law School at least as late as 1897<sup>6</sup> and at least one other American law school, Wake Forest, I have been told by a graduate of that school, until the mid-1930s.

It is, of course, hardly necessary to remind a Louisiana audience that the United States has inherited important parts of its law not only from England but also from other countries of Europe. I think, for example, of Professor Shael Herman's recent book, *The Louisiana Civil Code: A European Legacy for the United States*.<sup>7</sup> And I note also the remarkable opinion of Supreme Court Justice Edward Douglass White, in whose honor these lectures are given, in the case of *Hovey v. Elliott*, in which he discusses at length, and relies on, canon law and

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4. William Blackstone, 1 *Commentaries on the Laws of England* 3-37 (1765) (reprinted 1966). See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* vii (1983).

5. See F. W. Maitland, *Why the History of English Law Has Not Been Written*, in *The Collected Papers of Frederic William Maitland* 480, 489 (H.A.L. Fisher ed., 1911).

6. See Arthur L. Corbin, *Sixty-Eight Years at Law*, 11 *Yale L. Rep.* 20, 21 (1965).

7. See Shael Herman, *The Louisiana Civil Code: A European Legacy for the United States* (1993). Professor Herman views the Louisiana Civil Code as primarily the product of French legal thought. Others have demonstrated the substantial influence of Spanish law on the substance the code provisions. See Robert A. Pascal, *Book Review, Louisiana Civil Code: A European Legacy for the United States*, by Shael Herman (New Orleans: Louisiana Bar Foundation, 1993. Pp. vi, 80), 54 *La. L. Rev.* 827 (1994).

Roman law doctrines relating to the right of a person to appear and be heard before being punished for contempt of court.<sup>8</sup>

Yet with few exceptions we have been victims, in the last two centuries, of an increasingly nationalistic legal historiography—not only in England and the United States but also throughout the West. It is only within the last few years that universities of Europe have begun to teach once again a transnational European legal history. The nations of the West are coming together again! And when our American law teachers teach American law, should they not at least *mention* Louisiana's Civil Code? Isn't Louisiana part of the United States? And when we teach so-called quasi-contracts should we not at least mention that this is a Roman law term applied not to the Anglo-American common law of contracts but to canon law and Roman law doctrines of unjust enrichment? And when we teach the Federal Rules of Civil Procedure should we not trace its basic principles to English equity jurisprudence derived by the English ecclesiastical chancellors from the canon law of the Church of Rome? One could go on for a very long time with such examples.

After this brief introduction let me now try to summarize—also much too briefly—the story of the rise and decline of the Western legal tradition.

#### A. *The Origin of the Western Legal Tradition in the Papal Revolution of 1075-1122*

It is a story, in the first instance, of the separation of the ecclesiastical and secular jurisdictions, accomplished originally by a revolutionary movement, in the late eleventh and early twelfth centuries, to free the Church of Rome from subservience to emperors, kings, and feudal lords, and to establish an independent hierarchy of the priesthood, under the papacy, including a hierarchy of professional ecclesiastical courts to resolve disputes and to enforce papal legislation. Led by Pope Gregory VII, the Gregorian Reformation, as it was called at the time, or the Investiture Contest, as it came to be called, or the Papal Revolution, as it has now properly come to be called, was marked by civil wars throughout Europe during a period of almost 50 years, from 1075 to 1122.<sup>9</sup> The pan-European Church of Rome became the first modern state. It established a body of law that was systematized in Gratian's great treatise of 1140, characteristically entitled *A Concordance of Discordant Canons*.<sup>10</sup> This was the first modern systematic treatise on an entire body of law, and it was accepted as an authoritative statement of the canon law. It was followed in the next century by authoritative treatises on English, on German, and on French and other systems of territorial secular law.<sup>11</sup>

8. See *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841 (1897).

9. See Berman, *Law and Revolution*, *supra* note 4, at 94-107, and 574-81 nn.1-26.

10. *Id.* at 143-48. See also Gratian: *The Treatise on Laws With the Ordinary Gloss* (Augustine Thompson, O.P. & James Gordley trans., 1993) (translating Gratian's treatment of the nature and functions of law).

11. An early example of such a treatise was Glanvill, *Tractatus de Legibus et Consuetudinibus Regni Angliae* (ca. 1187). Later examples include Bracton, *De Legibus et Consuetudinibus Angliae*

The secular law covered chiefly matters of royal and feudal and local jurisdiction, particularly matters involving property and violent crimes. The canon law was much broader in scope, covering all matters directly involving the clergy, including not only matters of ecclesiastical jurisdiction and ecclesiastical property but also many matters involving specifically the laity, including marriage and family relations, moral offenses, education, and poor relief. Indeed, laymen often chose to litigate their contract disputes in the ecclesiastical courts, especially because secular contract law was quite underdeveloped. There were many overlapping matters giving rise to the concurrent jurisdiction of ecclesiastical and secular courts, as there was also concurrent jurisdiction among royal, feudal, urban, and mercantile courts within the secular sphere.

The coexistence and competition of diverse autonomous legal systems and diverse autonomous jurisdictions within a given political community helped to make possible the supremacy of law within that community. The supremacy of law both within the Church and within each of the kingdoms was supported also by the rise in the twelfth century of a professionally trained class of people who engaged in legal activities as a more or less full time occupation—professional lawyers, professional judges, professional legal scholars, both ecclesiastical and secular. The texts of Roman law compiled in the sixth-century under the Byzantine Emperor Justinian, rediscovered in the West five centuries later—not accidentally—at the height of the Papal Revolution, were now analyzed and synthesized by a new method—later called scholasticism—of reconciling contradictions in authoritative texts and deriving general concepts from the disparate rules and cases set forth in those texts.

Finally, the concept of law as a coherent body or system of rules and principles was given vitality by the accompanying belief in its ongoing character, its capacity for continuous growth over generations and centuries—a belief that is uniquely Western. The law, like the Gothic cathedrals, was intended to be built and rebuilt over centuries. It was accepted that the body of law contains a built-in mechanism for organic change; and further, that the growth of the law, its changes over time, have an internal logic, are part of a pattern of changes. The law, it was thought, develops by reinterpretation of past rules and decisions to meet present and future needs.

The historicity of law, as it came to be understood in the West in the twelfth century and thereafter, was linked with the concept of its autonomy and of its supremacy over political rulers. The supreme political authority—the king, the Pope himself—may make law, it was said, but he may not make it arbitrarily, and until he has re-made it—lawfully—he is bound by it.<sup>12</sup> In Bracton's famous words,

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(ca. 1250), Eike von Repgau, *Der Sacherspiegel* (ca. 1225), Beaumanoir, *Coutumes de Beauvaisis* (ca. 1283), and the *Liber Augustalis* of the Norman Kingdom of Sicily (1231). For discussion of these treatises, see Berman, *Law and Revolution*, *supra* note 4, at 457-59, 503-05, 473-80, and 425-34.

12. The late twelfth century canonist Huguccio, for instance, wrote that the Pope himself could be tried and deposed for any notorious fornication, robbery, sacrilege, or other notorious and scandalous crime. See Brian Tierney, *Foundations of the Conciliar Theory: The Contributions of the Medieval Canonists From Gratian to the Great Schism* 53-58 (enl. ed. 1998).

written in the early thirteenth century, England is "not under the king but under God and the law."<sup>13</sup> And in the words of Bracton's German counterpart, Eike von Repgau, "God is law and therefore law is dear to him."<sup>14</sup>

*B. The Protestant Revolutions, (1) Lutheran Germany.*

The twelfth century vision of what was called at the time the Gregorian Reformation was a vision of the dialectical reconciliation of opposites: of the spiritual and the secular, the papal and the royal, the priesthood and the laity—and within the secular, the royal and the feudal, the feudal and the urban. The realization of this vision depended on the faithfulness of the priesthood, in wielding the powerful "spiritual sword," as well as on the responsibility of the royal and feudal and urban powers, in wielding the "secular sword." In the course of time, however, the "two swords" vision of the Papal Revolution underwent substantial impairment.

In the fifteenth century, the West experienced a widespread clamor for additional so-called reformations, both of the spiritual and of the secular regimes. However, religious revolts and humanist calls for more just, more humane ecclesiastical policies met with only a weak response from the papal hierarchy, which by that time had sunk into the deepest corruption. The demand for reformation extended also to the secular realm, but again, little came of it. In hindsight one can see that things were building up for an explosion. This was also recognized by many at the time. None of the changes that were made in order to forestall such an explosion, however, prior to the rise of Lutheranism in the early sixteenth century, addressed the crucial problem of the time, namely, that the Gregorian Revolution had finally failed. The secular world could no longer derive its ultimate meaning from the tasks set for it by the Church of Rome.<sup>15</sup>

In 1517, a German law-trained professor of theology, Martin Luther, broke the evolutionary process, started a revolution, by proclaiming, in effect, the abolition of the ecclesiastical jurisdiction. The church, Luther said, is not a lawmaking institution; the church is the invisible community of the faithful, in which all believers are priests, serving each other, and each is a "private person" in his relation to God. Each is to respond individually to the Bible as the Word of God. The secular political authority, the prince and his councilors, the high magistracy, the *Obrigkei*t, must undertake the lawmaking responsibilities that previously were within the jurisdiction of the Roman Catholic Church.<sup>16</sup>

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13. Henry de Bracton, 2 *De Legibus et Consuetudinibus Angliae* (on the Laws and Customs of England) 33 (George E. Woodbine, ed., & Samuel E. Thorne, trans., 1968).

14. "Gott ist selber Recht, deshalb ist ihm Recht lieb." This quotation is repeated often in literature on the *Sachsenspiegel*, but without citation of the edition and page number, and copies of the book itself are difficult to obtain. See, e.g., Justiz in Alter Zeit 10 (Hinckeldey, ed., 1984).

15. See generally Myron Gilmore, *The World of Humanism* (1952).

16. See Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 *So. Cal. L. Rev.* 1573, 1594-95, 1599-1600 (1989) and sources there cited.

Luther replaced the "two swords" theory of the Papal Revolution with a new "two kingdoms" theory: the invisible Church, the priesthood of all believers, he taught, belongs to the heavenly kingdom of grace and faith, which is governed by the Gospel; the earthly kingdom, the kingdom of "this world," including the visible institutional church, is governed by law, which is in the exclusive competence of the Christian prince.

Because Luther taught that the salvation of souls in the heavenly kingdom comes only by the grace of God to those who have faith, and is not earned by "works of the law," it is often supposed that Luther and his colleagues did not have a positive legal philosophy and a program of law reform. That is quite untrue. They taught that in the earthly kingdom, in which God is present, though hidden, law—including both the moral law of the Ten Commandments, the Decalogue, and the positive law of the secular ruler based upon it—is needed: first, by its moral principles to make sinners conscious of their sinfulness and thus help to bring them to repentance; second, by its threat of sanctions to deter sinners from anti-social conduct; and third, by its detailed combination of rules and doctrines to educate and guide righteous people in the paths of justice and the common weal.<sup>17</sup>

To accomplish these three "uses of the law," as they were called, Lutheran rulers of German principalities enacted comprehensive statutes, called *Ordnungen*, "ordinances," regulating matters that previously had been within the competence of the Roman Catholic hierarchy: These were called Church Ordinances governing the structure and functions of the Lutheran Church within the principality, Marriage Ordinances governing marriage and family relations, Disciplinary Ordinances governing moral offenses, School Ordinances governing public education of children, Poor Ordinances governing relief of the poor, the sick, widows and orphans, the homeless, the unemployed. Most of these princely ordinances were drafted by Lutheran law-trained theologians, including in some instances Luther himself and his close friend and colleague Philipp Melancthon.

In contrast to the scholastic method of the earlier Roman Catholic legal science, Lutheran jurists emphasized the unity of the entire body of law and its division into branches, first, of public and private law, and second, within private law, of property and obligations and then, within obligations, of contract, tort, and unjust enrichment.<sup>18</sup> This classification was based on Philipp Melancthon's topical method, which, in contrast to the earlier scholastic method, proceeded first from general topics, or truths, applicable to all science, and then from special topics

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17. See *id.* at 1585-1595 and sources there cited. See also Frank S. Alexander, *Validity and Function of Law: The Reformation Doctrine of Usus Legis*, 31 *Mercer L. Rev.* 509 (1980); and John Witte, Jr., & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 *J. L. & Religion* 433 (1994).

18. See Harold J. Berman & 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*, 20 *Syracuse J. Int'l L. & Com.* 1, 16-25 (1994). It was, for instance, the German Lutheran jurist Johann Apel, and not, as is commonly supposed, the French jurist Donellus, who first separated the law of property (ownership) from the law of obligations. See Robert Feenstra, *Dominium and Jus in re Aliena: The Origins of a Civil Law Distinction, in New Perspectives in The Roman Law of Property: Essays for Barry Nicholas* 111-22 (Peter Biks ed. 1989).



applicable to individual branches of science, of which legal science was one, and subdivided each topic into genus and species. Melanchthon's topical method was applied by scholars throughout Europe, including England, in treatises on what was conceived as a common law, a new *jus commune*, that embraced common principles and doctrines and rules derived from all the earlier universal legal systems—including canon law, Roman law, feudal law and mercantile law—as well as common features of the various systems of royal law and urban and local customary law.<sup>19</sup>

This was a professorial legal science, well adapted to university teaching of law, including, in Germany, the legal education of future councilors of princes as well as future professional judges who would preside over secular tribunals of laymen. It was also well adapted to the introduction of a new system of decision of cases by the professors themselves. This was the famous system of "the sending of the file"—*Aktenversendung*—of certain types of difficult cases by German courts to university law faculties for final decision, an institution that lasted in Germany until 1878. It was not only highly lucrative for the professors but also had an enormous influence on the substance as well as the style of German law.

This was also Biblical law. As Roman Catholic jurists had systematized the canon law on the basis of the sacraments, so Lutheran jurists used Melanchthon's topical method in basing the various branches of the law on the Ten Commandments. Thus Johann Oldendorp, whose principal treatise three centuries later was in the library of our Supreme Court Justice Joseph Story, founded criminal law on the commandment "Thou shalt not kill," property law on the commandment "Thou shalt not steal," family law on the commandment "Thou shalt not commit adultery," the law of contract and delict on the commandments "Thou shalt not bear false witness" and "Thou shalt not covet." He founded the law of taxation, by the way, on Jesus' summary of the law, "Thou shalt love thy neighbor as thyself."<sup>20</sup> These were "topics" not only in the sense of categories or headings but also in the sense of general principles—theologically based moral principles in light of which subordinate species of legal rules were to be interpreted. This was a new method of legal synthesis which transcended the earlier divisions among co-existing legal systems within the same polity.

Repercussions of the German Lutheran Revolution were felt everywhere in Europe. Where Protestantism triumphed, as in England and Holland, a state church, headed by the monarch, was introduced, to which all persons in the kingdom were required by law to belong. Also in countries that remained Roman Catholic, such as France and Spain, and Austria, princely powers over the Church within the kingdom greatly increased. Papal power declined everywhere, including in the Italian city-states.

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19. See Berman & Reid, *supra* note 6, at 25-31.

20. See Berman & Witte, *supra* note 18, at 1641 (discussing Oldendorp's theory).

C. *The Second Protestant Revolution, (2) Anglo-Calvinist England*

Both in Protestant and in Roman Catholic countries, however, many problems came in the wake of the German Revolution and became acute in following generations. A religious crisis arose from the spread of Calvinism as well as from the continued antagonism of Roman Catholic and Protestant rulers, leading eventually to the Thirty Years' War that raged intermittently on the European continent from 1618 to 1648. A closely related political crisis arose from the emergence in Europe of "absolute" monarchs who, as supreme legislators, supreme judges, and supreme executors of the laws, were themselves "absolved" from subjection to such laws. Early in the sixteenth century Henry VIII, in inaugurating the English Reformation, expressly claimed such absolute power, as did the Roman Catholic French monarch Francis I. In the middle of the century Jean Bodin wrote a treatise expounding the doctrine of absolute monarchy, and it became widely accepted among the ruling circles of most countries of Europe.<sup>21</sup>

In the seventeenth century, however, the concept of monarchical rule came increasingly under attack, first, by international Calvinism, which taught an aristocratic, as opposed to a monarchical, principle of government; and second, by members of the landed gentry as well as by other classes that suffered from real or imagined oppression at the hands of royal courts and their bureaucracies. In the mid-seventeenth century, various countries of Europe experienced anti-monarchical revolts roughly parallel, though on a smaller scale, to the massive English Revolution that broke out in 1640, with its Civil War of 1642-1649, and its subsequent periods of Puritan Commonwealth from 1649 to 1660, Restoration from 1660 to 1688, and finally the so-called Glorious Revolution of 1688-1689.

The English Revolution of 1640 to 1689 established the supremacy of Parliament over the Crown. This is not to be confused with democracy: only some two or three percent of the adult population were eligible to vote. It was in effect, the rule of an aristocracy made up principally of some eight or ten thousand landed gentry, who replaced the approximately 120 titled nobility as the most important segment of the ruling class.<sup>22</sup> In Parliament, the House of Commons now for the first time assumed greater power than the House of Lords.

England remained Protestant Christian. However, the Church of England, now under the control of Parliament, was reduced from a state church, to which all Christian subjects were required to adhere, to an established church, that is, a church supported by the state but co-existing, under the 1689 Act of Toleration, with the Calvinist denominations that had initiated the Revolution in 1640. In fact,

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21. See Jean Bodin, *On Sovereignty* (Julian H. Franklin ed. & trans., 1992). Bodin's work strongly influenced the thought of King James I of England, who authored a defense of absolute monarchy. See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 Yale L. J. 1651, 1670-73 (1994).

22. These numbers increased at the end of the seventeenth and throughout the eighteenth century. See Gordon E. Mingay, *English Landed Society in the Eighteenth Century* 6 (1963); John A. Cannon, *Aristocratic Century: The Peerage of Eighteenth-Century England* 10 (1984); and Michael L. Bush, *The English Aristocracy: A Comparative Synthesis* 40-41 (1984).

Anglicanism, as it came to be called, had absorbed much of the Calvinist belief system that had motivated the Puritans, in the first phase of the Revolution, to rise up against the state church.

The Revolution also produced a fundamental and lasting transformation of the English legal system. Judges were no longer to serve at the will of the monarch but were given independence and life tenure. The so-called prerogative courts established by the Tudor monarchs, of which the High Court of Star Chamber and the Court of High Commission were the most notorious, were abolished, and the common-law courts were made supreme over the courts of Chancery and Admiralty. Jury trial was transformed: the jury could no longer be dominated by the judge, and witness proof and rules of evidence were introduced. The ancient forms of action were preserved but were now used to help modernize the English law of property, contract, and tort. The doctrine of precedent—the hallmark of the English common law—was given its modern meaning by the introduction of the distinction between holding and dictum. As the German emphasis on the consistency of legal principles was related to the emergence of the monarchical civil service state, the Prince and his councilors, so the English emphasis on the historical continuity of the law was related to the emergence of the aristocratic parliamentary state, with its party system of Whigs and Tories and its guilds of judges and barristers. The conceptualism of the former led to a legal science in which every question was to be “placed” within a system of genus and species.<sup>23</sup> The empiricism of the latter led to a legal science in which the principles, being drawn from cases, were subject to argument in an adversary procedure.

These seventeenth and early eighteenth century innovations in English law were rooted partly in Anglo-Calvinist concepts. The belief that human history is wholly within the providence of God, coupled with the belief that England is God's elect nation, destined to reveal and incarnate God's mission for mankind—these beliefs underlay both the movement to bring about the second Protestant Reformation, what the great poet John Milton at the time called “a Reformation of the Reformation,” and the movement to build that new Reformation on the traditions of the English past. Pre-Tudor history was invoked—Magna Carta and the early common law—to support revolutionary political change. Anglo-Calvinist thought contributed to a new historical jurisprudence, which was added to the diverse natural law theories of Roman Catholic and Lutheran legal philosophy.<sup>24</sup>

#### *D. The French Revolution. Deist rationalism and individualism.*

As the sixteenth century German Revolution produced a body of law that reflected a Lutheran belief-system, and the seventeenth century English Revolution produced a body of law that reflected a Calvinist belief system, so the French

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23. The German word for “discussion,” *Erörterung*, has as its root *Ort*, “place,” which is the German translation of the Latin *locus* and the Greek *topos*.

24. See generally Berman, *Origins of Historical Jurisprudence*, *supra* note 21. See also Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 Cal. L. Rev. 779 (1988).

Revolution of 1789 to 1830 produced a body of law that reflected a Deist belief system.

Deism was an eighteenth century Western belief-system that was shared outside of any organized church by people who did not believe in the divinity of Christ, and were, indeed, in many cases avowed anti-Christians, but who did believe that the universe was originally created by God, who appointed a purpose for everything in it, and that human beings were given by God certain faculties—above all, reason—to enable them to secure their own welfare. Eighteenth century French *philosophes* such as Voltaire, Diderot, Rousseau, and other “lights,” as they were called, *lumières*, taught that human beings are born free and equal, with the capacity to achieve, by use of reason, both knowledge and happiness.<sup>25</sup> Deism’s faith in the natural goodness of man, in the purity and power of reason, and in the promise of science, challenged Christian beliefs in the inherent sinfulness of man, and in the providential character of human history, beliefs emphasized by Lutheranism and Calvinism, as well as Christian beliefs in ecclesiastical traditions and in the corporate character of faith, beliefs emphasized by Roman Catholicism. Yet Deism was certainly a product of both Roman Catholicism and Protestantism; it shared their common moral values, it shared their confidence in law as a means of reforming the world.

The Deism of the eighteenth century French *philosophes*, including especially its essential rationalism and individualism, was reflected in fundamental changes in public and private law introduced as a consequence of the French Revolution.

In contrast to the emphasis of the German Revolution on monarchy and royal prerogatives, and of the English Revolution on aristocracy and aristocratic privileges, the emphasis of the partisans of the French Revolution was on democracy and civil rights and liberties—in the words of the French Declaration of 1789, “the rights of man and citizen.” Indeed, the French Revolution was fought, in the first instance, to abolish the oppressive and irrational system of customary privileges of the French aristocracy, and in the second instance, the oppressive and irrational exercise of autocratic powers by the monarchy. Supreme power was given to a democratically elected legislature charged with carrying out policies reflecting the public opinion of the propertied middle class that elected it. A series of written constitutions introduced a system of strict separation of powers, by virtue of which the executive was only to execute and the judiciary was only to apply in individual cases the law that the legislature alone had power to create.

Second, in addition to establishing a new constitutional system, the French Revolution introduced a new legal science. As the Germans emphasized the professorial “placing” of legal principles in a topical system of genus and species,

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25. Immanuel Kant was the first to use the term “Enlightenment” (*die Aufklärung*) to signify an enlightened age. See Roland Mortier, *Clartés et Ombres du Siècle des Lumières* 22-26 (1969). Prior to World War II, scholars generally confined the use of the term “Enlightenment” to the eighteenth century German movement which numbered Kant as its most prominent member. See John Lough, *Who were the Philosophes?*, in *Studies in Eighteenth-Century French Literature* 139 (J.H. Fox et al., eds., 1975). Cf. Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 *Yale J. L. & Human.* 311, 311-12 (1992).

and the English emphasized the judicial "debating" of legal questions in the context of historical precedents, so the French now came to emphasize the "clarification" of legal doctrine through interpretation of comprehensive legislative codes. Principles and precedents were subordinated, in France, to doctrines and rules laid down by the legislature. The natural law theory that had predominated in the sixteenth and seventeenth centuries and the historical jurisprudence that had been placed alongside it in the seventeenth and eighteenth centuries yielded to a positivist theory of law, which became increasingly accepted in the nineteenth century and has virtually dominated Western legal science in the twentieth century.

#### *E. The American Revolution*

Turning now, in the remaining minutes of this presentation, to the impact of the American Revolution on the Western legal tradition, I would add to conventional historical scholarship only one point that places the American Revolution in the context of the European Revolutions, namely, that the American Revolution represents a compromise between the legacy of the seventeenth century English Revolution and the eighteenth century Enlightenment philosophy that prevailed in the French Revolution.<sup>26</sup> The American Revolution had two conflicting aspects. On the one hand, it was the War of Independence, a secession from the mother country, fought to obtain for the colonists the traditional privileges of their cousins in England, privileges won in the English Revolution of the previous century but denied to the colonists, including the right to be represented in Parliament, the right to elect their governors, life tenure for their judges, the right to jury trial, the right to habeas corpus, the right to common law statutes enacted before colonization. On the other hand, it was the Revolutionary War, a fight for democracy and for inalienable civil liberties. The transformation of law that came out of the American Revolution combined these two belief-systems—combined the English Calvinist emphasis on tradition, on community, on aristocracy, and in law, on historicity and the common law, with the Deist emphasis on rationalism, individualism, and democracy, and in law, on a written constitution, on legislation responsive to public opinion, and on civil liberties of religion and speech and press and assembly.

#### *F. Conclusion*

If we take a stance in 1914, at the outbreak of the First World War, we can look back upon the evolution of a legal tradition in the West, which, on the one hand, was interrupted in the course of centuries by four violent total revolutions, each directed against the existing legal system in the name of a new vision of a transcendent justice; but which, on the other hand, survived those revolutions and

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26. See Berman, *Impact of the Enlightenment on American Constitutional Law*, *supra* note 25 at 319-21.

was reformed and ultimately renewed by them. The origins of the tradition date from the Papal Revolution of the late eleventh and early twelfth centuries.

Surviving from these origins, in the early twentieth century, was the concept of the co-existence of integrated legal systems, "bodies" of law; surviving also was the technique, formerly called "scholastic," of reconciling contradictions in authoritative texts and deriving general concepts from the legal rules and cases presented in those texts; surviving also was a belief in the ongoing character of law in time, its capacity for growth over generations, its historicity; surviving also was a belief in the capacity of law to resolve conflicts between competing political authorities within a territory and its ultimate supremacy over political authorities.

These fundamental characteristics of the Western legal tradition were founded ultimately on Christian faith, first in its Roman Catholic form, later in its Lutheran and Calvinist forms. Deism, the religious faith of the French Enlightenment, substituted for the Christian belief in a divine law a belief in God-given reason. Nevertheless, in 1914 it continued to be widely believed, at least in the United States, that the ultimate sources of positive law are divine law, especially the Ten Commandments, and natural law as expressed in historical sources such as Magna Carta and the constitutional requirement of due process.

The widespread belief in the religious sources of law underlay the belief in its historical evolution as well as the acceptance of the historical necessity that had arisen periodically in the history of the West to replace the existing legal system violently, because of its abject failure to realize its transcendent goals. Every nation of the West traced its legal system back to such a Revolution. The slogans of each of the Great Revolutions were derived from Jesus' reproach to the Pharisees: "Woe unto you, lawyers, for you tithe mint and dill and cummin"—you stick with the technicalities and formalities—"and neglect the weightier matters of the law, which are justice and mercy and good faith."

As of 1914, different forms of legal systems and different forms of legal science co-existed in the West within a common tradition. The Roman Catholic version of separation of Church and State co-existed with Lutheran, Calvinist, and Deist versions. Monarchy co-existed with aristocracy and democracy. The prerogatives of the German Kaiser co-existed with the privileges of the ruling classes represented in the British Parliament and the rights of the citizen represented in the French Estates General and the American House of Representatives. Also within each country of the West there co-existed, in different proportions, the Aristotelian concepts of the rule of the one, the rule of the few, and the rule of the many.

In legal science, the scholasticism of what is miscalled the High Middle Ages—but should be called the First Modern Age—coexisted in 1914, again in various proportions in different countries, with German conceptualism, English empiricism, and French doctrinalism. Everywhere in the West, code law coexisted with case law—again, in various proportions.

That was in 1914, at the end of the long nineteenth century that began in America in 1776 and in Europe in 1789. I leave until Part II a discussion, first, of the crisis of the Western legal tradition in what may be called the true twentieth

century, inaugurated by the First World War and the Russian Revolution, and second, of the future of the Western legal tradition in the third millennium of the Christian era.

## II. PROPHECY

I would like to welcome back those who attended Part I of these lectures—I congratulate you on your fortitude.

To those who are newcomers, I should explain that in the first part I discussed the origin of the Western legal tradition in the Papal Revolution of the eleventh and twelfth centuries and the impact on it of the successive national revolutions that broke out in the sixteenth to eighteenth centuries—the German, the English, the American, and the French. I focused principally on changes in constitutional law from monarchy to aristocracy to democracy, from royal prerogatives to aristocratic privileges to democratic rights; and on changes in legal science from German professorial conceptualism to English judicial empiricism to French doctrinal codification, and in the United States to a combination of the English legacy of historicity and the French model of rationalism. I stressed the impact of evolving belief systems on the evolving Western legal tradition—the successive impacts of twelfth century Roman Catholicism, sixteenth century German Lutheranism, seventeenth century Anglo-Calvinism, eighteenth and nineteenth century French and American Deism. I stressed that the national revolutions that reflected those belief-systems were not only national but pan-Western in their causes and consequences, and in that context I should have quoted—and will quote now—the statement of the great eighteenth-century English political philosopher and statesman Edmund Burke, that “Europe is virtually one great State having the same basis of general law. The whole of the polity and economy of Europe has been derived from the same sources.” My theme was that only if we remember the origins and historical evolution of our legal institutions, how they came to be, can we know what they are and foresee what they will become.

Now I turn from history to prophecy. I turn first to the crisis of the Western legal tradition in the twentieth century and second to the future of the Western legal tradition as we enter a new millennium, in which a multicultural East and West and North and South are beginning to forge a new tradition of world law.

### A. *The Crisis of the Western Legal Tradition*

Our word “crisis” is derived from the Greek *krisis*, meaning “turning-point.” It is rendered in Chinese by two characters, one meaning “danger,” the other meaning “opportunity.”

One does not have to be a prophet or a seer to know that following the two World Wars the West, Western Man (as we used to be called), Western Civilization (as we used to call it), has been at a sharp turning-point in its history, facing, on the one hand, the danger of loss of identity and, on the other hand, the opportunity of partnership in a new world order. Its identity, like the personal identity of each of

us, is derived from its memory of the past, how it came to be what it is, and its anticipation of the future, where it is headed. This time perspective is what has been most seriously threatened in the twentieth century.

In the past millennium, Western Europe, through its military, its merchants, and its missionaries, gradually made a world around itself. Now the West is rapidly ceasing to be the center of that world. For the first time in the history of the human race all peoples have been brought into more or less continual relations with each other and are joined together in a common destiny through global communications, global science and technology, global markets, on the one hand, and, on the other hand, through challenges of global pollution and environmental destruction, global disease, global poverty, and ethnic and territorial wars.

The emergence of a world economy, and with it, the gradual emergence of elements of a world society and of a world law, might have strengthened our awareness of the sources of the origin and evolution of Western law. In fact, however, awareness of those sources, and awareness even of the existence of a Western legal tradition, has diminished substantially in the twentieth century. This, indeed, is the crisis—a crisis in conceptions of law, a crisis in legal thought, a crisis of confidence in our law as an integral part of an ancient and ongoing heritage linked with historically developing religious and philosophical belief-systems as well as with historically developing political institutions. The crisis of our legal tradition lies in our ignorance of it, and when we are confronted with it, our repudiation of it.<sup>27</sup> We want to know what the law is now, what changes in it should be made now, not how it came to be what it is and how it should evolve in the future. Increasingly, we have come to live only in the present. We suffer from acute social amnesia.

Constitutional law, to be sure, is something of an exception; there it is required that we remember the legacy of our forebears, since they put it in a written document whose words, even after two centuries, must continuously be interpreted and re-interpreted. Yet even in our constitutional law, the language of the framers and the interpretations of their successors have become increasingly immaterial as the doctrine of precedent has yielded to the shifting winds of so-called policy science.<sup>28</sup> Even the Constitution is seen increasingly solely in instrumental

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27. Rebecca Redwood French has borrowed the term "detraditionalization" from the social sciences in depicting "modern society [as] a post- or detraditional world, a world that has gone beyond, that has lost sight of tradition." See Rebecca Redwood French, *New Direction: Lamas, Oracles, Channels, and the Law: Reconsidering Law and Society Theory*, 10 *Yale J. L. Human.* 505, 520 (1998). Although she generally approves "detraditionalization," Professor French would not abandon tradition entirely. Borrowing from Buddhist notions of the cyclical nature of time, she argues "that our most stable tradition has become constant change and impermanence. This is a very Buddhist idea, a stable religious canon advocating the concept of unceasing change and impermanence; but it has been, and is becoming, very American." *Id.* at 535. For an excellent survey of the current debate concerning the role of tradition in the reaching of judicial decisions, see A. C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 *N. C. L. Rev.* 409, 415-45 (1999).

28. The interpretation of law as a "policy science" was advocated in the influential article by Harold D. Lasswell & Myre S. MacDougal, *Legal Education and Public Policy: Professional Training*



terms—as a means of advancing political and economic and social ends and not as a declaration of its own ends, ends of liberty, equality, and the pursuit of happiness, which, as stated in the Declaration of Independence, are inherent in the human nature with which we have been endowed by our Creator.

If we look for causes and consequences of the crisis of the Western legal tradition, we may single out two major developments in the twentieth century. The first is the emergence of the bureaucratic state. The second is the state's use of law to shape the beliefs and attitudes of the people who are its subjects.

In virtually all countries of the West, governmental bureaucracies in the twentieth century have come to control directly and actively the economy, communications, education, health care, conditions of work, and other aspects of economic and social life. To a large extent these are governed by administrative regulations. By no means entirely, of course, but nevertheless to a considerable extent, administrative regulation has invaded the civil code in France, common law precedents in England, and professorial principles in Germany, as a major source of law. In the United States as well, though not to the same extent, both legislatures and courts have yielded to governmental agencies much of the control over large parts of economic and social life. At the same time, American courts have themselves become to a certain extent agencies of active control of economic and social life, as judicial activism has increasingly become openly accepted.

(I cannot help thinking of the recent headline in the *New York Times* above a full-page article on the economic role of the Chairman of the Federal Reserve Board: "He's Got the Whole World in his Hands." I cannot help also thinking of the fact that I cannot lawfully prune a branch of a tree next to our summer house on Martha's Vineyard without the prior permission of the town's Conservation Commission. And let me add that I am not now either approving or complaining about these twentieth century facts of life—I am only reporting them as such and trying to understand their relation to the Western legal tradition.)

The use of law to implement state regulation of economic and social activities has been linked in the twentieth century with the explicit use of law to influence people's beliefs and attitudes, to educate people to be socially responsible and to treat each other equally regardless of differences in race or gender or age or class. More and more we have seen the socializing functions of the family, the school, the church, the factory, the commercial enterprise, and other voluntary associations, subjected to direct legislative, administrative, and judicial controls. Again, this is a necessary fact of twentieth century life. The law of the state has come to play the role of parent or teacher in nurturing attitudes officially considered to be socially desirable.

In the words of the Polish-American poet and prophet Czesław Miłosz, "In the twentieth century the state has swallowed up society."

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*in the Public Interest*, 52 Yale L. J. 203 (1943). The authors identified values drawn from economics, political science, psychology, and other disciplines which, they argued, it should be the policy of law to maximize. Legal values such as due process and equal protection were strangely absent from this purely instrumental legal science. On the harmful influence of the Lasswell-MacDougal theory, see Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 201-08 (1993).

*B. The Russian Revolution: Atheist Socialism*

Here the revolutionary change was first introduced by Soviet Russia, and the extreme example of the Soviet total state remains an important lesson for us all. Many would not agree that Russia is part of the West, or that Russian history is part of Western history, or that the Russian Revolution belongs in the same series of Great Revolutions as the German, the English, the American and the French. Historically, Eastern Orthodox Russia strongly opposed the Papal Revolution of the late eleventh and early twelfth centuries and its creation of a Church-State and a system of canon law. Nor did Russia experience the Lutheran and Calvinist and Deist Revolutions and the corresponding formations of a monarchical High Magistracy and an aristocratic Parliament and a democratic separation of powers. Until its demise in 1917, the Russian tsardom proclaimed itself to be an autocracy, with supreme spiritual as well as supreme secular authority. Moreover, Russia first came into close contact with the West only in the eighteenth century, when its ruling classes came under the influence of the French Enlightenment. Its first university was founded in Moscow in 1756, almost seven hundred years after the founding of the first Western university in Bologna. And only in the nineteenth century, after the Napoleonic Wars, did there gradually emerge in Russia legal institutions similar to those that had existed in the West for seven centuries: a class of learned jurists, the systematization of the laws, a body of legal literature, and finally, in the 1860s, a hierarchy of courts with a professional judiciary and a professional class of lawyers.

Nevertheless, Russia was, indeed, "Westernized" in the eighteenth, nineteenth, and early twentieth centuries. Indeed, the Marxian socialist belief-system and political program of the 1917 Russian Bolshevik Revolution itself was a Western belief-system and a Western political program. Like Deism, Marxist atheism was a Christian heresy. The Leninist Communist Party was a secular priesthood. Even the utopian Marxist-Leninist vision of a future classless society that would have no need for a state or for a body of law was a utopian Western vision, paralleling the antinomianism of the earliest radical phases of the German, English, and French Revolutions. There was much, indeed, that was purely Russian in twentieth century Russian socialism, just as there was much that was purely national in the earlier German, English, American, and French national revolutions, but there was also much that had been foreshadowed in nineteenth century Western socialist movements, and much that later spread to other countries in the West, including the United States.

We usually draw very sharp contrasts between Western legal systems and Soviet Russian law as it existed prior to the collapse of the Soviet Union. We stress the absence in Soviet Russia of the concept of a law that is higher than the state and that binds the top leadership of the state; the absence of private ownership of land and of the means of production; the repression of freedom of speech and press and religion and other basic civil liberties; the dictatorship of the Communist Party and, within the Party, of the General Secretary and the Politburo. But if we

study carefully the Soviet legal system as it developed in the course of seventy-five years, and especially in the post-Stalin decades, culminating in the seven years under Gorbachev, and if we look critically at the development of our own European and American legal systems since the Great Depression of the late 1920s and 1930s, we can see many parallels.

The post-Stalin Soviet civil and criminal codes and judicial system had much in common with contemporary Western civil and criminal codes and Western judicial systems. Not rule of law but nevertheless rule by law came to play an increasingly important role the Soviet Union in the late 1950s, 1960s, 1970s, and 1980s. There were some 300,000 university trained lawyers in the Soviet Union when it dissolved in 1991. Until the end, however, two essential differences—even apart from Communist Party domination—remained between Soviet law and the law of Western countries: first, the far greater extent to which law, and especially administrative regulation, was used by the Soviet state to operate and control economic and social activities, and second, the far greater extent to which the Soviet state used law to guide and train and discipline the beliefs and attitudes of the Soviet people. This was what the Soviets called “the educational role of law,” or more precisely, “the nurturing role of law.”<sup>29</sup> Fifty years ago Karl Llewellyn called it “parental law,” and added that our own law “moves in a parental direction.”<sup>30</sup>

Not only in Communist countries but elsewhere as well, the bureaucratic state consciously uses law to educate the citizenry to accept, and to observe, the belief-system on which it rests its authority. In 1961, the Soviet state issued and circulated through all its institutions a document called the Moral Code of the Builder of Communism, calling on all Soviet citizens to be altruistic, honest, hard-working, loyal, cooperative, patriotic and *atheist* Marxist-Leninists. At the foundation of Soviet socialist morality and law was an atheist vision that postulated the fundamental goodness of human nature, the inherent ability of humankind to build a society in which each person would now receive income according to his work and eventually according to his needs, and the willingness of a people, when freed from economic class exploitation and hence from addiction to the “opiate” of religious beliefs, to respond positively to the will of its leadership.<sup>31</sup>

I believe that it was the loss of faith in this vision, more than any other factor, that caused the collapse of the Soviet Union.

A major weakness of the twentieth century bureaucratic state is that its legal controls of economic and social life often exceed, in Roscoe Pound's telling phrase, the limits of effective legal action.<sup>32</sup> Despite many experiments in the balancing of state plan with state enterprise autonomy, the Soviet planned economy

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29. The same Russian word, *vospitat'*, means “to educate” and “to nurture or nourish.” On the Soviet concept of the educational or nurturing role of law, see Harold J. Berman, *Justice in the U.S.S.R.* 277-84 (1963).

30. On Karl Llewellyn's use of the term “parental law,” see *id.* at 284.

31. See Harold J. Berman, *Atheism and Christianity in the Soviet Union, in Freedom and Faith: The Impact of Law on Religious Liberty* 127 (Lynn Buzzard ed., 1982).

32. See Roscoe Pound, *The Limits of Effective Legal Action*, 3 A.B.A.J. 55 (1917).

eventually could not be made to work efficiently. Similarly, stringent Soviet legal controls of voluntary associations, including the workplace, neighborhood relations, schools, and the family, only contributed to the eventual weakening of those associations. A similar, albeit lesser, weakening is threatened in the welfare states of non-Communist countries.

That is the danger side of the crisis.

The opportunity, on the other hand, is to restore and renew our legal tradition—not by attempting to recreate a *laissez-faire* state but by creating a law that will not dominate and thus weaken, but undergird and thus strengthen, the voluntary associations that make up what has come to be called “civil society.” Such law must come not only from the state but from the voluntary associations themselves. Indeed, in the Western legal tradition, especially in its earlier phases, it has been taken for granted that law comes not only, and not primarily, from the lawmaking power of the state but also, and primarily, from relationships created on the ground by individuals and groups in their interactions with each other. Not the state, not the governmental authorities, but people, the community, has been understood to be a primary source of law. People forming associations of various kinds, employers and employees establishing reciprocal rights and obligations, businessmen making agreements with each other, parents bringing up children—establish unofficial legal relations, make what is properly called *customary law*. In the past it has been understood that customary law, unofficial law, is a primary source of state law, official law, and that one of the principal functions of state law is to enforce the rights and obligations that arise from customary law.<sup>33</sup>

### C. *The Formation of a World Legal Tradition*

This leads to my final major point: that the danger presented by the crisis of the Western legal tradition in the twentieth century is accompanied not only by the opportunity to return to the sources of law that have constituted that tradition, including its source in custom, but also by the opportunity to participate in a new legal tradition that is now in its formative stage, namely, a world legal tradition that is bringing together the diverse legal traditions of the various cultures of the world, West and East, North and South.

In the twentieth century, for the first time in the history of the human race, virtually all the peoples of the world have been brought into more or less continual relations with each other. We speak without hesitation of a world economy, a world technology, world wide communications, world organizations, world science, world literature, world scholarship, world travel, world sports. We speak almost as confidently of an emerging world society, despite the forces of ethnic and

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33. Cf. Francesco Parisi, *Toward a Theory of Spontaneous Law*, 6 Const. Pol. Econ. 211 (1995), and Francesco Parisi, *Customary Law* (Typescript).

territorial disintegration that threaten it. We have also begun to speak of world law.<sup>34</sup>

World law is, in part, the customary law of the world economy. We live not only in an "international" economy of "foreign" trade and "foreign" investment but also in a "world" of interdependent economies. The law that governs a contract for the sale of goods, say, by a business firm in New York to a purchaser in California may be not only New York law or California law but also world law. For example, the bill of lading issued by the carrier to the seller to be transferred to the buyer will normally have the same legal character as a bill of lading in an export-import transaction between enterprises in any two countries in the world: it will constitute the carrier's receipt for the goods, evidence of the contract of carriage, and a transferable document of title. If payment for the goods (whether shipped by vessel, by rail, or by air) is by letter of credit, such credit will normally be subject to the same rules that govern letter-of-credit transactions throughout the world. If payment is by a negotiable instrument, it is subject to the same rules of negotiability that exist throughout the world. The exporters and importers of the world, the shipowners of the world, the bankers of the world, the marine insurance underwriters of the world, and others associated with them, including their lawyers, form a world community that over the centuries has made, and continues to make, the customary "law merchant" by which their various types of transactions are governed.<sup>35</sup> Formally, the law applicable to a commercial transaction may be national law, but the national court will enforce the contract terms, which may be the customary terms used throughout the commercial world and, in that sense, are part of world law.

The law of world trade is, of course, also regulated in part by public international law, including multilateral treaties and conventions such as that establishing the World Trade Organization, as well as by the public controls of national states. But so far as its strictly commercial aspects are concerned, its primary source is in the patterns and norms of behavior or those who engage in it. Blackstone and his predecessors called it *jus gentium*, the law of nations, "the law of peoples," which included, in addition to what we now call public international law, not only mercantile and maritime law but also natural law, defined as rules of law common to all civilized peoples.<sup>36</sup> It was Blackstone's student Jeremy Bentham who invented the word "inter-national"—at first with a hyphen—to refer solely to the legal rules governing relations between and among national states.<sup>37</sup>

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34. On the use of the term "world law," see Percy E. Corbett, *From International to World Law*, Research Monograph No. 1, Department of International Relations, Lehigh Univ. (1969); Harold J. Berman, *World Law*, 18 *Fordham Int'l. L. J.* 1617-22 (1995). See also C. Wilfred Jenks, *The Common Law of Mankind* (1958); Philip C. Jessup, *Transnational Law* (1956).

35. The binding character of the law merchant to fill gaps and to resolve ambiguities is expressly recognized in comments (1-203), (2-103b) and (2-301) of the Uniform Commercial Code.

36. See Mark W. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 *Am. J. Int'l L.* 405 (1984).

37. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 296 (J. H. Burns & H.L.A. Hart eds., 1970). Cf., Berman, *World Law*, *supra* note 34, at 1617-18 and note 2.

To speak of "world law" is to go back to the older concept, the *jus gentium*, the common law of the peoples of the world.

The law of transfer of goods is only one part of world economic law. The law governing transfer of currencies and related financial transactions is another. Parts of the law governing direct foreign investment is a third. Public international law and national law play a greater role in the regulation of foreign exchange transactions and direct foreign investment than in the regulation of world trade transactions. Yet a customary world law based on the contract practices of economic actors plays an important role even with respect to money and direct investment. In addition, parallel developments in the national legislation of different countries as well as the adoption of intergovernmental agreements have made substantial contributions to world law in those areas, as they have also in the area of transfer of goods. When one speaks of world law, therefore, one must include within it not only world customary law but also public international law in the conventional sense of the treaty law and customary law agreed to by national states.

In addition to the world communities of persons engaged in world trade, finance, investment, and other economic activities, there are many other types of world communities, including those represented by some thousands of voluntary not-for-profit non-governmental world organizations registered with the United Nations, so-called INGOs, often with members from many countries.<sup>38</sup> These include organizations engaged in the world-wide advancement of medicine and health, human rights, world peace, world science, civil and political rights, charity and relief, environmental protection, world travel and tourism, world sports, and a large number of other activities. The interests that these associations represent constitute a vast infrastructure of world intercourse, involving patterns and norms of behavior that give rise to universally recognized rights and duties. It is not mere coincidence that the rules of air traffic control, to take one example, are identical at every major airport in the world. This, surely, is customary world law.

Yet the questions remain: Do these and other examples of customary world law constitute the emergence of a world legal tradition? And if so, what is the relationship of an emerging world legal tradition to the Western legal tradition? These questions are too big to answer fully in a few minutes. We can nevertheless begin an answer by returning to a millennial perspective, in which we may foresee the gradual development of the world economy into a more just world society and eventually the gradual development of the world society into a world community. The Western legal tradition has already come to play a leading role in the emergence of the body of world economic law. Western businessmen and their lawyers, in participating in cross-cultural economic relations, will often, to be sure, accept—indeed, must accept—practices and standards of their partners who come

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38. John Boli estimates there to be about 6,000 INGOs that have an international presence and an international membership. See Berman, *World Law*, *supra* note 34, note 37 and accompanying text. If all so-called INGOs are counted, including those with purely national memberships, the number is approximately at 35,000.

from Islamic, Chinese, Japanese, African, and other cultures. On the whole, however, the commercial law of sales, the law of business associations, the law of financial transactions, and other branches of economic law, have been more highly developed, more thoroughly and precisely articulated, in the West than in any of the other great cultures, and they have been very largely received in those cultures, at least insofar as cross-border transactions are concerned. Even the Chinese, with a Confucian legal tradition, on the one hand, that distinguishes sharply between law and morals and between legal norms and social rituals, between *fa* and *li*,<sup>39</sup> and, on the other hand, a Communist legal tradition that distinguishes sharply between public interests and private interests, are, like the Soviet Russian Communists before them, glad to accept customary Western legal terms in their cross-border economic contracts.

Yet if we speak of a legal tradition, we speak not only of the law applicable to certain types of transactions but also of law as a whole. Also we speak not only of means of ordering relationships through the application of legal rules and procedures but also of means of doing justice, which in the West since the twelfth century has been identified partly with enforceable rights—rights of persons not only in their economic and social relationships with each other but also in their relationship to the lawmaking authority itself.<sup>40</sup> Moreover, since the late eighteenth century the West has spoken of universal human rights to be guaranteed by national states—“the rights of man”—and in the twentieth century these have been expanded to include the provisions of the two United Nations Conventions on Civil and Political Rights and on Economic, Social, and Cultural Rights. The latter Convention speaks of “the inherent dignity and the equal and inalienable rights of all members of the human family” as “the foundation of freedom, justice and peace in the world.”

Some representatives of non-Western cultures have challenged the very concept of human rights presented in the U.N. Covenants as a Western concept that is alien to them.<sup>41</sup> They emphasize duties rather than rights, mutual trust rather than elaborate rules, mediation of disputes rather than formal judicial remedies. Nevertheless, the fact that the United Nations Conventions have been ratified by most nations of the world, and the fact that there is debate among and within the nations of the world concerning the meaning and the validity of the concepts of human rights contained in them, testify to the emergence in the twentieth century of a world society that has begun to establish a body of world law. As President Roosevelt said shortly before his death in April 1945, in speaking of the larger

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39. See Frederick Tse-Shyang Lee, *The Confucian View of World Order*, in *The Influence of Religion on the Development of International Law* 31, 35-37 (Mark W. Jonis ed., 1991).

40. See Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (1997); Charles J. Reid, *Thirteenth-Century Canon Law and Rights: The Word *ius* and Its Range of Subjective Meanings*, 30 *Studia Canonica* 295 (1996); and Charles J. Reid, *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 *B.C. L. Rev.* 37 (1991).

41. See Raimundo Pannikar, *Is the Notion of Human Rights a Western Concept?*, 120 *Diogenes* 75 (1982).

meaning of the Second World War, "[T]he whole world is one neighborhood."<sup>42</sup> That all the neighbors do not share the same belief-system, and that they sometimes quarrel with each other, is not surprising. What makes it a neighborhood is that they live side by side, they recognize their mutual interdependence, and they accept a common body of norms of behavior. To that extent they constitute a *society*.

To become a *community*, however, and to have an evolving common legal *tradition*, requires more. It requires a common set of spiritual values, common concepts of human nature, of the relation of persons to society, of the purpose of life—a common language, a common belief-system. And by definition, the various great cultures of the world have different languages and different belief-systems.

That, of course, is the extraordinary fact: that in the twentieth century the diverse cultures of the world have been joined together in a world economy and in an emerging world society, with branches of a common world law and the beginnings of a world legal tradition. And that is the great challenge to humanity in the third millennium of the Christian era: to transform the world society into a world community and to transform the branches of world law into an evolving world legal tradition.

There are, indeed, among the different major cultures of the world common spiritual beliefs that can support the gradual development of a world community and a world legal tradition. The great theist religions—Christianity, Judaism, and Islam—share with each other a common foundation in the Hebrew Bible, and together with Deism, a common belief in one God. Other great religions, especially Hinduism and Buddhism, as well as philosophies such as Taoism and Confucianism, share with Theism and Deism a belief in spiritual realities that transcend material self-interest, that are higher than economic wealth and political power.<sup>43</sup> Many forms of humanism also share such a belief in transcendent spiritual values. A Christian may say that the world society and world law have been created by the Holy Spirit. Indeed, for the believing Christian, for the believing Jew, and for the believing Muslim, the fact that all inhabitants of Planet Earth have come to be in communication with each other and to share a common destiny is a manifestation of divine providence. The truth of St. Paul's prophetic statement that God has created all nations of one blood has been proved scientifically and is now being tested in the flesh, so to speak.

To be sure, despite similarities among them, the spiritual values of the different religions and different cultures of the world differ from each other, and

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42. Quoted in the Franklin D. Roosevelt Monument, Room Four, "Unless the peace that follows recognizes that the whole world is one neighborhood and does justice to the whole human race, the germs of another world war will remain as a constant threat to mankind."

43. In recognition of the universality of certain spiritual realities, a Parliament of World Religions that met in 1993 issued a declaration, drafted by Hans Küng, stating that "[b]y a global ethic we do not mean a global ideology or a single unified religion beyond all existing religions," but rather "a fundamental consensus on binding values, irrevocable standards, and personal attitudes." See *Parliament of World Religions' Global Ethic*, Nat'l Cath. Rep. Sept. 24, 1993, at 11. See also sources cited *infra* note 47.



commitment to the spiritual integration of the world has not matched commitment to its economic integration. The flesh is willing but the spirit is weak! Despite the material forces of integration, the worship of ethnic and national gods may eventually destroy us all. On the other hand, there is also a legitimate concern that the creators of a world economy may be in the process of constructing a global Tower of Babel. Do we want a McDonald's in every village and the personal data of every inhabitant of the world on the Internet?

True spiritual integration, however, involves not suppression of loyalties of blood and soil, and surely not the homogenization of diverse local and regional and national communities, or their subordination to some sort of world state, but rather their transcendence by a common faith in a sacred spiritual reality that will guide the processes, including the legal processes, by which all the cultures of the world are gradually being brought together and their common concerns met.

### C. *Interaction of Western and World Legal Traditions*

I turn finally to the question of the contribution which the Western legal tradition can make to the origin and evolution of a world legal tradition and, conversely, the question of the contribution which the formation of a world legal tradition can make to the revitalization of the Western legal tradition.

With regard to the first of these two questions, perhaps the greatest contribution which the Western legal tradition can make to a world legal tradition is the Western concept of the nature of a legal tradition. The West is accused of "legalism" by representatives of other cultures; what is uniquely Western, however, is the conscious historical evolution of law over generations and centuries, the historicity of law, its conscious balancing of continuity and change, its concept of an ongoing autonomous legal tradition that can even survive great revolutions and be renewed by them. If there is to emerge from the present elements of a world society a world community, it must accept the concept of such an ongoing, evolving legal tradition.

It should be added that the Western concept of a legal tradition rests on the integration of the three main schools of legal philosophy—positivism, natural law theory, and historical jurisprudence—which trace law respectively to political will, to moral reason and conscience, and to historical experience.<sup>44</sup> Only in the twentieth century has natural law theory in the West been almost wholly subordinated to positivism, and the historical school almost entirely eliminated.<sup>45</sup>

Second, the greatest contribution that the evolution of a world legal tradition can make to the Western legal tradition is to challenge it to rediscover its religious roots and its threefold source in—once again—politics, morality, and history. The present domination of a positivist theory of law, which reduces law to rules now

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44. See Berman, *Toward an Integrative Jurisprudence*, *supra* note 24.

45. In a work dedicated to examining the historical development of law, Alan Watson examined positivist and natural law theories of law but expressly declined to discuss historical jurisprudence, stating that it "is today universally rejected." See Alan Watson, *The Evolution of Law* 48 (1985).

in effect that have been laid down by the lawmaking authorities, the state, and which sharply separates the "is" of political will from both the "ought" of moral reason and the "was and is becoming" of historical memory, cannot survive juxtaposition of the Western legal tradition with other legal traditions. The moral and historical basis of law in other cultures challenges the West to re-examine the moral and historical basis of its own legal tradition and to reconcile the various religious influences that in the past have played significant roles in the formation of that tradition.

The formation of a world legal tradition, combining the Western legal tradition with that of other cultures, will inevitably challenge each legal tradition to examine the belief-system that it reflects and to compare that belief-system with the belief-systems underlying the others. All such belief-systems share a common commitment to a spiritual reality that guides the process by which love of neighbor is to be practiced.<sup>46</sup> Such a commitment is necessary if the forces of world integration are to overcome the forces of disintegration, and if the integration is to take place not in the unholy spirit of the Tower of Babel but with full respect for the pluralism of its constituent elements.

#### D. Conclusion

I believe that the third millennium of the Christian era will be the age of the Holy Spirit and ultimately the transformation of the emerging world society into a world community. I believe that the gradual creation of a world legal tradition will be an important part of that transformation.

A skeptic may say, "Let him believe what he wants, but where's the proof?" Of course, no one can prove scientifically what will happen in the future. A nuclear war may break out and disprove all predictions except the prediction of a nuclear war. But if my analysis of the origin and evolution of the Western legal tradition during the past millennium is correct—and that is something that *can* be proved—then that is some evidence that the forecast of the future millennium that I have presented is also correct. And if, on the other hand, the forecast of the future that I have presented is plausible, then that is some evidence that the analysis of the past that I have presented is also plausible. Of one thing there is no doubt, and here I have the latest researches in cognitive psychology to support me: what we remember of the past is based on our anticipations of the future, and our anticipations of the future are based on our memories of the past.<sup>47</sup>

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46. See Wilfred Cantwell Smith, *Toward a World Theology* (1989).

47. See *supra* note 43. See also M. Darrol Bryant, *Woven on the Loom of Time: Many Faiths and One Divine Purpose* (1999); Mircea Eliade, *Sacred and Profane* (1961); S. G. McKeever, *Paths are Many Truth is One* (2d ed. 1998); Ulrich Neisser, *Five Kinds of Self-Knowledge*, 1 *Phil. Psychol.* 35, 46-50 (1988). Neisser defines "the extended self" as "the self as it was in the past and as we expect it to be in the future, known [to itself] primarily on the basis of memory." *Id.* at 46. "What we recall depends on what we now believe as well as on what we once stored." *Id.* at 49. For a more extended discussion of this point, see Harold J. Berman, *Law and Logos*, 44 *DePaul L. Rev.* 143, 152-53 (1994).

