1986

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Angels and Infidels: Hierarchy and Historicism in Medieval Legal History

GUYORA BINDER*

I. PROLOGUE: NO SOCIAL CHANGE WITHOUT POLITICS

The basic argument of this Essay is that there is a fundamental contradiction between two of our most cherished values: the idea that law should be a vehicle for social change and the idea that law should be autonomous from politics.

The occasion for this argument is a recent, greatly ambitious, and greatly acclaimed work of legal history that attempts to demonstrate that the two values mentioned above are, after all, reconcilable. Authored by Harold Berman, a recognized giant in the field of comparative law, Law and Revolution: The Formation of the Western Legal Tradition,1 has received the Scribes book award of the American Bar Association and has been praised in the Yale Law Journal as “an impressive achievement, a towering contribution to comparative legal history, [that is] indispensable to anyone who wishes to understand the distinctive features of Western civilization.”2 The American Political Science Review concluded that this “magnificent volume . . . may be the most important book on law of our generation.”3

Harold Berman argues that our society’s commitment to law’s

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autonomy and to law's efficacy for social change are persuasively synthesized in the ideal of a legal science. His purpose seems to be to save the traditional value of law's autonomy from politics, which he perceives to be under attack from proponents of the more modern idea that law should facilitate social change. Since he identifies the autonomy of law from politics as the essence of western civilization, his purpose is nothing less than the salvation of that civilization. His strategy involves arguing that the idea of a legal science, no less than the autonomy of law from politics, is an enduring feature of western civilization. Accordingly, he asserts that law has both served and been conceived as a vehicle for social change for a very long time. Specifically, he argues that, since the eleventh century, (1) legal thought has been the moving force in western history, and (2) legal scholars have sought social progress.

In this Essay, I demonstrate that both claims are incorrect. First, I argue that medieval social change generated "scholastic" legal thought rather than vice versa. Second, I show that "scholastic" legal thought was hostile to social change. Third, I suggest that the reason Berman believes that medieval legal scholars applauded social change is that he systematically identifies hierarchical authority with social progress. Fourth, I assert that the reason Berman believes that law's autonomy from politics is compatible with its use as a vehicle for social change is that he identifies the autonomy of law with hierarchical authority. Accordingly, Berman is forced to attribute historical thinking to medieval scholastics by his own misguided effort to superimpose an image of legal scholarship as social engineering over an image of it as a monastic retreat from society. At the same time, he is forced to deny the ideological nature of his own account of medieval society by his insistence that legal scholarship is apolitical. In a concluding section, I demonstrate that Berman's belief that hierarchical authority is compatible with social progress is typical of modern legal scholars in the field of Berman's specialty, comparative law, but that medieval legal scholars, while sharing Berman's enthusiasm for hierarchy, viewed it as incompatible with social change. I suggest finally, that Berman's confusion on this point reflects the influence of an early mentor who was more interested in a religious escape from history than in the inevitably political experi-

4. H. Berman, supra note 1, at 120-64.
The notion that scholars should view themselves as participants in history may strike the reader as strange; yet one of the premises that this Essay shares with *Law and Revolution* is that the reconstruction of the legal past is an integral part of contemporary political struggle. Neither Harold Berman nor myself is a professional historian. This Essay, like Berman’s tome, is largely a synthesis of good secondary sources available to the educated layperson. Yet, I share with Harold Berman the conviction that the reconstruction of law’s role in history is too vitally important to be confined to professional historians. Thus, my attack on the accuracy of Berman’s conclusions is in no way designed to demonstrate that legal scholars should steer clear of the business of interpreting the history of western civilization. It is merely designed to demonstrate that the history of western civilization cannot be marshalled to show that law can achieve social change without the “taint” of politics. Rather, western history indicates that social change is the product of violent political struggle in which legal coercion and legal thought are both used as weapons.

II. THE LAST DAYS OF LEGAL SCIENCE

“A screaming comes across the sky. It has happened before, but there is nothing to compare it to now. It is too late.”

“Judgment Day is gettin’ nearer
There it is in the rearview mirror
If you’d duck down I could see a little clearer
All over this world.”

With the turn of the first millenium, the literate class of Europeans became enamored of allegory. While the consolidation of feudalism induced anxiety in a society suspicious of change, allegory enabled its scholars at once to chronicle events and to contain them. Wherever they looked—at the raising of a cathedral, the suppression of a peasant revolt, the ordination of a cleric, or the reclamation of the Promised Land—the same narrative was

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6. Goodman & Prine, *The Twentieth Century is Almost Over*, recorded on S. Goodman, Say It in Private. Courtesy and copyright 1977 Asylum Records. Published in the U.S.A. by Asylum Records. All rights reserved.
revealed: every defeat was a crucifixion, every victory was a resurrection, and all of history was a perpetual incarnation—a debasement of the sacred, but also a christening of the profane.

The agonistic relationship between heaven and earth provided medieval scholars with a model for explaining conflict wherever it manifested itself. The presence of evil in the world was justified by the contrast it provided for virtue. The infinite grandeur of God was demonstrated by His capacity to love even those who displeased Him, while the lesser virtue required to please Him necessitated no such generosity. The erection of such a hierarchy made it possible to reconcile conflict and change with a static and monistic model of the universe. The deployment of this model for the purpose of transcending any contradiction is what came to be known as the “scholastic” method. The application of this method to the study of canon and Roman legal texts initiated the profession of legal scholarship. This event, argues Harold Berman in *Law and Revolution*, was the birth of western civilization. The turn of the second millenium, he laments, is witnessing a disenchantment with scholasticism which threatens to bring that civilization to an end.

The source of Berman's apocalyptic anxiety is his sense that the essential feature of legal scholarship is a commitment to the autonomy of law from politics. That commitment, he claims, is now being eroded by the onslaught of third world infidels, and undermined by the disaffection of heretics within the academy. Yet, the decline of faith in the distinction between law and politics is a logical consequence of the spread of the belief that law should be a vehicle for social change. The notion that law is an empirical science, commonly identified with the late nineteenth century, reflected an attempt to avert this consequence. Science, after all, was supposed to be “objective”; yet, it was also expected to generate “progress.” If contemporary legal scholars doubt the autonomy of law it is because the nineteenth century concept of a legal science now seems outmoded. Berman attempts to defend the idea of a legal science by presenting it as an enduring and essential

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8. *Id.* at 7, 8, 37, 38.
9. *Id.* at 33-34.
10. *Id.* at 40 (referring to Roberto Unger); *id.* at 590-91 (referring to Duncan Kennedy).
feature of western civilization rather than as a naive expression of nineteenth century positivism.11 Berman's defense has two elements: first, he argues that law and legal thought have been the moving forces in the history of the West since the eleventh century. Second, he attributes this determinative role of law and legal thought to the deliberate effort of legal scholars to achieve social progress through the discovery of truth. These two claims merge in his characterization of the development of scholastic legal thought as a "revolution."

This Essay will demonstrate that neither of Berman's two principal claims are convincing. An examination of social histories of the middle ages shows that the social changes Berman attributes to scholastic legal thought preceded and probably shaped its emergence. A review of intellectual histories of the period confirms that scholasticism was premised on an allegorical, rather than an historical, sense of time. This meant that the scholastics could scarcely acknowledge, let alone approve, fundamental social change. Their image of transcendence was synchronic rather than diachronic; they valorized hierarchy rather than progress. Allegory enabled medieval scholastics to reinterpret all change as a manifestation of hierarchy.

In a mirror image of medieval allegory, Berman consistently interprets images of hierarchy as expressions of faith in progress. In endorsing Cromwell's remark that "[m]an never reaches so high an estate as when he knows not whither he is going,"12 Berman reorients the figure from the vertical to the temporal dimension: "Society," claims Berman, "moves inevitably into the future. But it does so by walking backwards, so to speak, with its eyes on the past."13 The difficulty with Berman's interpretation is that it equates ignorance of the future with knowledge of the past. As the social historian Marc Bloch said of medieval chroniclers: "[b]y a curious paradox, through the very fact of their respect for the past, people come to reconstruct it as they considered it ought to have been."14 In a later era, Harold Berman finds himself careening down the road to apocalypse, anxiously eyeing the rearview mirror for signs of the times. As a result, his image of

11. Id. at 8, 591 n.88.
12. Id. at 41.
13. Id.
the past is accurate as to detail, but arrayed exactly backwards.

III. Berman's Narrative: Social History by Legislation

According to Berman, western civilization and modern times both began abruptly in 1075 with what he calls the "Papal Revolution." Berman constructs this "revolution" out of three distinct elements: the Cluniac reform, the Gregorian reform, and the development of the scholastic method.

The Cluniac reform began around the turn of the millenium, when a proliferating group of monasteries under the authority of a single abbot became increasingly powerful in France. This order attacked the local priesthood as "impure" and criticized the traditional practices of simony and clerical marriage. The Gregorian reform began in 1075 when Pope Gregory VII claimed authority over all other bishops and secular princes, including the Holy Roman Emperor. This event touched off fifty years of civil war in Germany, at the end of which the papacy had considerably more influence over the selection of prelates, and more authority over the church as a whole. One of the Gregorian goals realized in this process was the institution of clerical celibacy. The scholastic method developed in the late eleventh and twelfth centuries and provided for the systematic study of theology, canon law, and Roman law.

How are these three events connected? Berman argues that the Cluniac order was inspired by a millenarian vision of reform which provided the European clergy with a translocal class consciousness. Pope Gregory, he continues, led this new class in a revolutionary struggle to free itself from the domination of lay persons. The new scholastic theologians and lawyers developed theories to justify the new unity and independence of the church, integrated the new papal edicts into existing church

15. H. Berman, supra note 1, at 85-88.
16. Id. at 88-91.
17. Id. at 87, 96.
18. Id. at 96-99.
19. Id. at 227.
20. Id. at 100.
21. Id. at 89-90, 107-09.
22. Id. at 108.
23. Id. at 215-21.
doctrine,\textsuperscript{24} and staffed the Pope’s new bureaucracy. Thus, concludes Berman, the scholastics attempted to realize the project of reform initiated by the Cluniac order.\textsuperscript{25} Berman’s conclusion that the “papal revolution” initiated modern times rests on his claim that it precipitated five additional events during the twelfth and thirteenth centuries: (1) an increase in agricultural production;\textsuperscript{28} (2) the decline of serfdom;\textsuperscript{27} (3) the development of commerce;\textsuperscript{28} (4) the establishment of cities;\textsuperscript{29} and (5) the establishment of centralized monarchies.\textsuperscript{30}

In order to understand Berman’s account of the rise of agricultural production and the amelioration of peasant circumstances, we must review Berman’s description of the origins of the manorial system of agriculture. According to Berman, the cause of this harsh system was external to Western Europe. Invasive raids by Arabs, Vikings, and Magyars terrorized the inhabitants of Western Europe during the eighth, ninth, and tenth centuries.\textsuperscript{31} In order to repulse these attacks it became necessary to mount a heavy armed cavalry. Because military equipment was expensive and agriculture was inefficient, the labor of dozens of people was required to support each soldier.\textsuperscript{33} Accordingly, lords—the people owning most of the arable land—awarded land to their soldiers.\textsuperscript{33} Peasants worked this land for the soldiers “semivoluntarily”\textsuperscript{34}—presumably in return for protection. Serfdom and other forms of peasant subjugation, in other words, reflected a rational division of labor in the face of external threats. This division of labor was subject to abuse by the soldiers only because it was not legally regulated.\textsuperscript{35}

The rise in agricultural production in eleventh and twelfth century Europe is explained by Berman as the product of condi-

\begin{itemize}
  \item \textsuperscript{24} Id. at 202.
  \item \textsuperscript{25} Id. at 227.
  \item \textsuperscript{26} Id. at 101.
  \item \textsuperscript{27} Id. at 103.
  \item \textsuperscript{28} Id. at 102.
  \item \textsuperscript{29} Id.
  \item \textsuperscript{30} Id. at 113-15.
  \item \textsuperscript{31} Id. at 301.
  \item \textsuperscript{32} Id. at 302.
  \item \textsuperscript{33} Id. at 302-03.
  \item \textsuperscript{34} Id. at 317.
  \item \textsuperscript{35} Id. at 318.
\end{itemize}
tions of peace and a new spirit of progress. Conditions of peace were the byproducts of two factors—the successful resistance of foreign invaders resulting from the erection of castles and the development of heavy cavalry, and the administration of “peace oaths” by propapal monks and clerics. The spirit of progress, Berman argues, was inherent in Christianity because it distinguished humanity from nature and urged human beings to master nature. Propapal monks took the lead in expressing this spirit by clearing land and spreading agriculture.

This increase in agricultural production was only one of the papal revolution’s many contributions to the lot of peasants. Employment opportunities multiplied for peasants as a result of the democratizing influence of the papal revolution. The Pope needed vast armies for his project of reforming the world: monks to spread spiritual and agricultural enlightenment; crusaders to liberate Byzantium and the Holy Land from the infidel. Peasants could join religious orders or crusades. Alternatively, they could migrate to the newly chartered cities and participate in the revival of commerce. Yet, the peasants’ new bargaining power might have meant little without a new respect for bargains. Peasants might have been unable to take advantage of their opportunities had they not come to realize their own capacity for choice. An image of social relations as the product of individual choice and mutual agreement was developed by scholars of canon law and permeated society with the proliferation of professionally trained lawyers. Among the many new legal institutions that emerged in this period were manorial courts, regulating relations between lord and peasant. Here, the peasants learned that they were possessors of rights. Because serfdom was inconsistent with this new self-image, peasants realized, and persuaded their masters, that it

36. Id. at 319.
37. Id. at 302.
38. Id. at 90, 301.
39. Id. at 62, 158.
40. Id. at 101.
41. Id. at 170.
42. Id. at 320.
43. Id. at 319.
44. Id. at 168-72, 183, 188, 192, 228.
45. Id. at 162, 328.
46. Id. at 323, 326-29.
was unjust.\textsuperscript{47}

The rise of commerce was a product of another "papal" idea: the crusades. In their zeal to reform the world, Popes urged for the liberation of the East from the infidel. This turned Europe "outward" and made the Mediterranean into a "route for Europe's own military and commercial expansion."\textsuperscript{48} This commercial expansion was facilitated by the foundation of commercial courts by merchants. Such legal sophistication among merchants reflected the influence of the new professional lawyers, trained in the techniques of scholasticism.\textsuperscript{49} In addition, the expansion of commerce was facilitated by the development of cities.

The cities were founded as a result of papal influence as well; they were established by collective oaths modeled on the "papist" peace oaths.\textsuperscript{50} These oaths were administered by propapal clerics to merchants who thought their bishops too impure to rule the new commercial centers.\textsuperscript{51} These oaths developed into charters: elaborate written constitutions defining the structure of city government.\textsuperscript{52} Again, such legal sophistication reflected the presence of scholastically trained lawyers.\textsuperscript{53}

Centralized monarchies were also a product of the papal revolution. The hierarchical and bureaucratic structure developed by the papacy in the twelfth century offered European monarchs a model for the centralization of power.\textsuperscript{54} This model was consciously adopted by ambitious monarchs, who built their power by issuing new legislation in imitation of the Pope.\textsuperscript{55} Pope Gregory VII had justified his effort to supplant secular authorities in the selection of new prelates by reminding the Emperor Henry IV that "Christ said 'I am the truth.' He did not say 'I am the custom.'"\textsuperscript{56} Twelfth century monarchs showed a similar disregard for custom;\textsuperscript{57} however, they also accepted the Pope's demonstra-

\begin{itemize}
  \item[47.] Id. at 321, 331-32.
  \item[48.] Id. at 101.
  \item[49.] Id. at 344-46.
  \item[50.] Id. at 362.
  \item[51.] Id. at 90, 364, 387.
  \item[52.] Id. at 395-96.
  \item[53.] Id. at 363, 392, 401, 402.
  \item[54.] Id. at 405.
  \item[55.] Id. at 412, 415.
  \item[56.] Id. at 112.
  \item[57.] Id. at 513, 514, 518.
\end{itemize}
tion that royal authority could be lawfully resisted.  

IV. ASSESSING BERMAN'S SOCIAL HISTORY

An examination of various social histories of feudalism suggests that the social changes chronicled by Berman were not caused by the Gregorian Reform, and that it is inappropriate to characterize those changes as a papal revolution. I shall begin this Section by summarizing an influential account of the origins of manorial agriculture that differs markedly from Berman's. This account suggests a quite different explanation for the rise of agricultural productivity, paints a different picture of peasant life under feudalism, and provides a different chronicle of the origins of commerce and urban communities. Finally, I shall assess Berman's claims that the modern state was inspired by the Gregorian Reform. Ultimately, the Gregorian Reform shall appear as an expression of the social changes of the eleventh century, rather than their cause.

Berman's account of the rise of manorial agriculture presupposes the presence of powerful lords in firm possession of most of the land in Western Europe. These lords offer employment to aspiring knights, compensating them with land. These knights, in turn, offer employment to frightened, landless peasants, compensating them with protection and a share of the harvest. Yet, such leading social historians of the period as Perry Anderson, Marc Bloch, and Georges Duby have noted that the manorial system emerged in Germanic tribal societies with traditions of collective ownership of land by "free" peasant communities. Originally, the members of these communities shared military responsibilities

58. Id. at 504.
59. P. ANDERSON, PASSAGES FROM ANTIQUITY TO FEUDALISM 130-31 (1978); M. BLOCH, supra note 14, at 243; G. DUBY, EARLY GROWTH OF THE EUROPEAN ECONOMY 33 (1974). Berman apparently shares my respect for these historians; see infra note 381.

"Community" is a deliberately vague term, meant to embrace group households, kin groups, blood brotherhoods, legislative judicial councils, and even strong friendships. William Miller indicates that each of these forms of association may have had a role in the resolution of disputes in the relatively egalitarian society of medieval Iceland. Nor were these different associations always entirely distinct—the boundaries of a kinship group might be socially constructed in the context of a particular dispute. See Miller, Avoiding Legal Judgment: The Submission of Disputes to Arbitration in Medieval Iceland, 28 AM. J. LEGAL HIST. 95 (1984) [hereinafter Miller, Arbitration in Medieval Iceland]; Miller, Choosing the Avenger: Some Aspects of the Bloodfeud in Medieval Iceland and England, 1 LAW & HIST. REV. 159 (1983).
These historians agree, however, that the emergence of a distinct military class preceded its establishment on the land. As Anderson tells the story, contact with the trading civilization of the declining Roman Empire tended to generate mercenary bands among the Germanic tribes. These bands provided the imperial marches with the ambiguous service of "protection." As these tribes moved deeper into the Empire, the mercenary bands became raiding armies, thriving on captured booty. It was in this manner, argues Georges Duby, that the Frankish Empire developed. The Empire was the product of rapid expansion, and the authority of the emperor over his retinue was more the result of his largesse in distributing the fruits of war—including slaves—than of his control over land or peasantry. While the enormous estates characterizing the Roman Empire persisted in Carolingian times, it appears that the proliferation of smaller estates that were to characterize later feudalism had not yet developed. It seems likely that most peasants farmed their own land, individually or collectively. The inefficiency of Frankish agriculture prior to the eleventh century can be explained in part by the rather limited demands made upon the land by the military class,

61. P. Anderson, supra note 59, at 140; M. Bloch, supra note 14, at 248; G. Duby, supra note 59, at 44.
64. P. Anderson, supra note 59, at 123, 141; M. Bloch, supra note 14, at 171, 243, 246; G. Duby, supra note 59, at 33-54; Hilton, Introduction to P. Sweezy, The Transition from Feudalism to Capitalism 14-15 (1978). Conditions were similar in pre-conquest England. M. Bloch, supra note 14, at 245, 420. We must resist the temptation to present an overly rosy picture of early Germanic society, however. The presence of a substantial alloidal peasantry should by no means be equated with an egalitarian society. Nobles existed in Anglo-Saxon society and not all peasants were independent. See P. Blair, An Introduction to Anglo-Saxon England 260-63 (1966). M.M. Postan argues that by the time of the conquest Germanic society may have been almost as fully stratified as it was ever to be. M.M. Postan, The Medieval Economy and Society: An Economic History of Britain in the Middle Ages 94 (1975). Icelandic society was less stratified, although it did contain leaders or godis, servants and other disenfranchised free persons. Yet, there does appear to have been a substantial stratum of enfranchised, economically independent "householders" or boendr, farming individually or collectively. Even among these householders there were inequalities of power and wealth. The most grievous indictment of Icelandic society, and of early Germanic societies in general, however, was the prevalence of slaves—who, incidentally, appear to have been the principal victims of bloodfeuds between householders. See Miller, Arbitration in Medieval Iceland, supra note 59, at 97-99, 104, 115, 126.
before the "invasions" lamented by Berman.\textsuperscript{65}

To characterize the military confrontations with the Vikings, Magyars, and Arabs as "invasions of Europe" is to ignore the aggressive, expansionist nature of the Frankish Empire. For Duby, the important consequence of these confrontations was that the Frankish Empire ceased to expand. Viking raids—aimed primarily at the acquisition of precious metals and slaves—appear to have had less effect on agricultural production than scholars originally believed. The chief threat to the peasants came not so much from foreign invaders as from the local military class. Deprived of the booty traditionally acquired by leading military raids, the Frankish kings lost their hold over their own armed bands. Deprived of opportunities for looting abroad, the royal retinues made war on the peasants.\textsuperscript{66} Thus, it was the peasants, rather than the kings, who were compelled to offer the military class employment on their land;\textsuperscript{67} and it was against the violence of that class, rather than against any invaders, that the peasants chiefly sought "protection."

This account of the origins of a dependent peasantry in Western Europe suggests an explanation of the eleventh and twelfth century increase in agricultural production very different from that advanced by Berman. The increase was the product, not of the peaceful conditions that followed the Viking "invasions," but of the violent conditions that followed the end of the Frankish invasions. Peasants began to produce more because the new military class demanded more of them. While the cultivation of new lands took place partly at the impetus of these new masters, it also reflected the efforts of peasants bent on escaping domination.\textsuperscript{68} The peace associations mentioned by Berman represented another effort on the part of peasants to resist the depredations of the military class.\textsuperscript{69} These associations did not generate peace in Europe; what eventually did was the military triumph of the knightly class and the resumption of expansionist raiding, repre-

\begin{itemize}
\item \textsuperscript{65} G. Duby, \textit{supra} note 59, at 87-93.
\item \textsuperscript{66} M. Bloch, \textit{supra} note 14, at 245; G. Duby, \textit{supra} note 59, at 162-65; G. Duby, \textit{supra} note 63, at 150-61.
\item \textsuperscript{67} M. Bloch, \textit{supra} note 14, at 171, 243.
\item \textsuperscript{68} P. Anderson, \textit{supra} note 59, at 188-89; G. Duby, \textit{supra} note 59, at 181, 200, 202-03; Hilton, \textit{supra} note 64, at 27.
\item \textsuperscript{69} G. Duby, \textit{supra} note 63, at 135-39, 186-89.
\end{itemize}
sented by the crusades. Nevertheless, the peace movement, and the many subsequent peasant movements it spawned, indicates that peasants never fully accepted the legitimacy of knightly claims to their land.

This reinterpretation casts the evolution of peasant circumstances over the next several centuries in a new light. The peasants did not, as Berman suggests, begin the new millenium in a uniform state of subjection, nor did their lot improve in the wake of the Gregorian reform. Manorial law did not elevate them from a condition of subjection, but appears to have been a principal means by which that subjection was enforced and legitimized. While agricultural production expanded in the first third of the new millenium, peasants by and large ate no better. Instead, the excess was absorbed by a corresponding increase in population and by the greater demands of the new ruling class. The growth of cities may have provided dispossessed peasants with new opportunities, but the projects of the church during this period by and large did not. Those peasants that joined religious orders did not thereby cease to be peasants; they tilled the monastic lands while wellborn monks were educated for more prestigious tasks and more comfortable circumstances. The ruling orders envisioned the Crusades primarily as a knightly enterprise, while clerics encouraged the peasants to forswear arms. Those peasants that heeded Peter the Hermit's call to liberate Jerusalem mostly starved before they ever saw the Promised Land. If anything, the social and cultural barriers between peasants, knights, and clerics increased after the turn of the millenium.

If there was little material improvement in peasant life after the Gregorian Reform, neither was there any rise in social status. While there was some commutation of compulsory labor services

71. G. Duby, supra note 59, at 171, 174, 178.
72. Id. at 183.
73. Id. at 220.
76. N. Cohn, supra note 74, at 89-90.
77. See generally G. Duby, supra note 63 (analysis of the trifunctional model of feudal society).
to monetary payments, particularly in France, this was accompanied by the association of such payments with servitude, and by the absorption of most free peasants into the servile class.\textsuperscript{78} German serfdom, developing somewhat later, seems to have depended more heavily on fees right from the outset.\textsuperscript{79} Here too, the class of peasants considered unfree seems to have expanded after the Gregorian Reform.\textsuperscript{80}

What role did manorial law play in the commutation of compulsory service to rents and tolls? In the eleventh century, for a variety of reasons, both secular and clerical landlords became desirous of money. Money enabled them to store and accumulate the enormous surpluses they were extracting from the peasants.\textsuperscript{81} Contact with the Arab and Viking trading societies regenerated some of Europe's dormant commerce and inspired the lords to consume more extravagantly.\textsuperscript{82} The availability of money as a pricing mechanism contributed to the efficiency of agriculture as well, as some lords began to hire wage labor to till their own demesnes, paid for by rents collected on peasant lands.\textsuperscript{83} Where lords were principally bent on acquiring funds, they found manorial justice a handy tool. The increasing importance of manorial, as opposed to royal, courts in determining the obligations of French peasants in the twelfth and thirteenth centuries, permitted the progressive increase of "customary" rents and tolls.\textsuperscript{84} Duby concludes that the fines generated by the exercise of manorial jurisdiction were probably more lucrative than either ground rents or tolls for the use of mills and other manorial monopolies. "Of all seigneurial rights over people, justice was the one that would most readily permit lords to relieve workers of the money they had managed to earn."\textsuperscript{85}

That manorial justice enabled lords to extract money from the peasants, however, does not mean that it enabled peasants to

\textsuperscript{78} M. Bloch, \textit{supra} note 14, at 263, 323; Hilton, \textit{supra} note 64, at 14-17.
\textsuperscript{79} G. Duby, \textit{supra} note 59, at 157 (German feudalism does not reach maturity until end of twelfth century); M. Bloch, \textit{supra} note 14, at 244-45.
\textsuperscript{80} M. Bloch, \textit{supra} note 14, at 267.
\textsuperscript{81} Hilton, \textit{supra} note 64, at 18.
\textsuperscript{82} G. Duby, \textit{supra} note 59, at 120-54, 216, 232-35.
\textsuperscript{83} \textit{Id.} at 226.
\textsuperscript{85} G. Duby, \textit{supra} note 59, at 227-28.
escape compulsory service. Where lords showed an interest in retaining or increasing compulsory service, they again found manorial law a useful tool. While it is generally acknowledged that the English peasantry experienced a general decline in status throughout the twelfth century, Rodney Hilton has argued that there was no legal status of servitude recognized in England until late in that century. At this point, shire courts suddenly began attributing villein status to peasants who had previously performed customary services. The result was that the peasants could be compelled to serve at the master's beck and call, and that their personal mobility and the alienability of their tenure in land could both be restricted. While individual peasants brought suit to challenge their own villein status throughout the thirteenth century, they thereby accepted the courts' characterization of the bulk of the once free English peasantry as villeins. "When the onslaught came, they accepted the lords' battleground. They did not argue that the doing of labour services did not imply unfreedom."8

86. P. ANDERSON, supra note 59, at 161; M. BLOCH, supra note 14, at 270. It should be noted that I am by no means equating a decline in legal status with a decline in economic fortune. M.M. Postan has speculated that English peasant fortunes may have actually improved in the mid-twelfth century because civil war conditions reduced the ability of landlords to enforce the peasant obligations increasingly specified by law. When conditions stabilized at the end of the century, however, Postan has acknowledged that the recently systematized manorial law provided a ready tool for avaricious lords. M.M. POSTAN, supra note 64, at 105-110, 166-69. One factor deemphasized in Postan's conclusion is the possibility that English peasants in the mid-twelfth century might have faced added exploitation from other than their lords, for as he admits: "the worst effects of party war and of the weakened government were to let loose upon the country a swarm of strong men capable of preying on their neighbours." Id. at 107. The one conclusion that cannot be drawn from this controversy is Berman's: that manorial law improved peasant status or wealth.

87. R. HILTON, Freedom and Villeinage in England, in PEASANTS, KNIGHTS AND HERETICS 174-91 (1976). The shire courts were royal. See 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 532-40 (1968). Nevertheless, the fact that twelfth and thirteenth century peasants attempted to redress their grievances against their lords in the royal courts evidences their dissatisfaction with manorial jurisdiction. Such dissatisfaction is not surprising—peasants could not sue their lords in manorial courts. Id. at 361. The shire courts employed the new status of villeinage to deny peasants standing on the grounds that villeins were subject to manorial jurisdiction alone. By linking manorial jurisdiction to villeinage, the shire courts actually weakened the peasants' position in the manor-courts and justified the imposition of sterner obligations than custom had allowed. This in turn increased the incentive for individual peasants to appeal to the royal courts for release from manorial jurisdiction.

88. R. HILTON, supra note 87, at 189. Prior to the late twelfth century, the word villein was in use to describe peasants who were, to some extent, economically dependent on
The distribution of royal jurisdiction to English landlords allowed them to further restrict peasant mobility. Originally designed as a means of making freeholders responsible for one another's appearance before the royal courts, the institution of frankpledge evolved into a device by which lords could hold their tenants responsible for one another's presence on the manor. When the bubonic plague dramatically reduced the agricultural labor supply in the fourteenth century, Parliament sought to protect the profitability of estates by passing the Ordinance and the Statute of Laborers that restricted the movement and froze the wages of agricultural workers. "[T]hose very lords who were resisting, through the manor courts, their tenants' attempts at self-improvement were, in their alternative roles as justices of laborers and J.P.s, administering through the public courts the statutory wage freeze of 1351." Legal repression of this sort inspired peasant revolts throughout Europe in the fourteenth century; only in their wake did peasant conditions improve to reflect the decreasing labor supply. That English peasants despaired of succeeding by means of any legal strategy is indicated by the fact that a major objective of their revolt was the destruction of manorial records and the annihilation of all lawyers.

This is not to say that all European peasant movements eschewed legal struggle; but few peasants saw the courts administered by their lords, as vehicles by which they could achieve freedom. To the contrary, according to Bloch, vulnerability to manorial jurisdiction was among the principal criteria available in medieval culture for the identification of the unfree. If anything, it was the collective effort to escape manorial jurisdiction

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their landlords. Yet, it never denoted the kind of thoroughgoing constraint that it came to represent in the thirteenth century. Postan speculates that some villeins may have been descended from freed slaves, but slaves appear to have been concentrated in those portions of Anglo-Saxon England that were heavily settled by the Romans. See M.M. Postan, supra note 64, at 92-93; H. Hallam, Rural England 1066-1348, at 24 (1981). Those areas of England devoted to allodial agriculture in Roman times experienced a steady decline in the independence of their peasantry both before and after the conquest. P. Blair, An Introduction to Anglo-Saxon England 261-328 (1966); H. Hallam, supra, at 23 (postconquest); M.M. Postan, supra note 64, at 92-96 (preconquest).

89. M. Bloch, supra note 14, at 271.
90. R. Hilton, supra note 84, at 152.
91. R. Anderson, supra note 59, at 201-04.
altogether that constituted the medieval peasant's most successful legal strategy. Rodney Hilton has shown that most peasant struggles for "freedom" in twelfth and thirteenth century France and Italy involved efforts to gain recognition for entire villages as politically autonomous communes. One of the forms of collective self-government most frequently demanded by such communities was the right to administer their own courts. Were these democratic impulses inspired, as Berman suggests, by peasant participation in the manorial courts? Hilton offers an alternative explanation: "There seems little doubt that control of village commons provided an important early focus for the development of self-administrations in northern Italy." Duby suggests that parish churches, which before the Gregorian Reform were considered the common property of their members, also provided a focus for organization. Berman offers no reason to conclude that peasants needed to learn from their masters that they were oppressed.

The marked increase in commerce that took place during the twelfth and thirteenth centuries may well have increased economic opportunities for peasants during this period, although it was probably made possible by the lords' accumulation of wealth at the expense of the peasants. Much of this wealth was accumulated by monasteries. Nevertheless, to attribute this boom to the Gregorian Reform is perverse. In the first place, monasteries acquired much of their wealth through the largesse of the military class. Second, the ethics preached by the church were fundamentally hostile to commerce. Berman grudgingly admits that
canon law forbade profit-making for the purpose of accumulating private capital.\textsuperscript{108} In fact, the growth of monastic orders appears to have been fueled by revulsion at the spread of commerce.\textsuperscript{104} Third, the expansion of commerce began prior to the Gregorian reform, in response to the "invasions."\textsuperscript{105} Duby reports that trading cities in Italy and Spain had begun to engage in periodic raiding campaigns against Muslim settlements long before the Pope called for the defense of Byzantium.\textsuperscript{108} Pilgrims, too, had conducted trade in the Eastern Mediterranean for some time.\textsuperscript{107} Berman's remaining ground for attributing the increase in commerce to the Gregorian reform, that commerce was facilitated by the rise of independent cities, rests on his claim that this development too, was papally inspired.

This last claim rests in turn on two related assertions: that the eleventh century phenomenon of peace associations was papally inspired and that urban communes were an outgrowth of this movement. Berman traces the origin of the peace movement to the drafting of a "Truce of God" by the Abbot of Cluny toward the middle of the eleventh century.\textsuperscript{108} He dates the urban movement from the investiture struggle late in the eleventh century. In fact, both movements had earlier and deeper roots.

The band of free peasants, holding land in common, was a form of social organization traditional among Germanic tribes.\textsuperscript{109} Membership in such a clan or group entitled one to the protection of its law or "peace."\textsuperscript{110} Such associations functioned as courts and persisted in Germany as forums for dispute resolution well into the feudal era.\textsuperscript{111} Participation in these tribunals, which often entailed collective oathtaking,\textsuperscript{112} was an important criterion of free-

\textsuperscript{108} Id. at 248.
\textsuperscript{104} G. Duby, supra note 59, at 179.
\textsuperscript{105} Id. at 120-54.
\textsuperscript{106} Id. at 139-48. In early medieval societies, trading and raiding were often functionally similar acts. See Miller, Gift, Sale, Payment, Raid: Case Studies in the Negotiation and Classification of Exchange in Medieval Iceland, 61-1 Speculum 18 (1986).
\textsuperscript{107} G. Duby, supra note 59, at 150-51, 159-60.
\textsuperscript{108} Id. at 90.
\textsuperscript{109} P. Anderson, supra note 59, at 108, 130-31, 174. See generally Miller, supra note 64.
\textsuperscript{110} G. Sabine, A History of Political Theory 200 (1961).
\textsuperscript{111} M. Bloch, supra note 14, at 268.
\textsuperscript{112} Id. at 124.
Sometimes, such communities were established or reaffirmed by collective oaths. In England, "peace guilds" flourished before the Norman Conquest and provided the basis for the later Norman institution of frankpledge. "Peace," in this context, hardly implied pacifism: members of one English guild swore perpetual unity "for friendship as well as for vengeance." In Carolingian France, such groups formed to actively resist the manorialization of the countryside, sometimes burning castles. In the eighth century, Charlemagne, identifying such associations as pagan, prohibited "guilds." A century later, when many bound peasants were escaping to the woods to join free bands, his successors prohibited "conjunctions" or conspiracies. During this period, Bishop Hincmar of Rheims vigorously condemned peasant drinking associations. Monks, too, lamented the formation of peasant associations. Even in the eleventh century, when bishops began to administer peace oaths, they continued to condemn associations that formed without clerical participation. According to Duby, many such associations were largely indifferent to the Cluniac project of reforming the clergy:

Heresy—radical, disruptive, appearing shortly after the year 1000 as one sign, perhaps the most convincing sign, of that tumultuous vitality that impelled Western civilization forward in its sudden advance—did not consist in criticism of priests, or denunciations of their impurity. It lay rather in the wish to forego their services, in the desire to deny the clergy's usefulness.

113. Id. at 255, 257, 272-74; G. Duby, supra note 59, at 33.
114. M. Bloch, supra note 14, at 355; G. Duby, supra note 63, at 28, 135.
117. G. Duby, supra note 59, at 94; G. Duby, supra note 63, at 187.
118. G. Duby, supra note 65, at 28; M. Bloch, supra note 14, at 416.
119. G. Duby, supra note 59, at 94-95.
120. Id. at 137.
121. G. Duby, supra note 63, at 186-89.
122. Id. at 31. According to Jeffrey Russell, eleventh century heretics "preached that the kingdom of God was in the hearts of the saved and that there was no need for priests or the church." J. Russell, WITCHCRAFT IN THE MIDDLE AGES 64 (1984). Such heresies, according to Edward Peters, offered "new kinds of association, new bonds of the spirit." E. Peters, HERESY AND AUTHORITY IN MEDIEVAL EUROPE: DOCUMENTS IN TRANSLATION 63 (1980). Heretical groups of the twelfth and thirteenth centuries were also condemned for dispensing with priests, both for preaching and for the sacraments. See infra notes 201, 210, & 214 (Waldensians, Henry of Le Mans, Heretics in Rhineland, Almoricrians, Brethren of the Free Spirit). That the touchstone of heresy was unauthorized association is revealed by the fate of the Beguines. Groups of pious women, joining in religious communities to
The urban movements were heretical in this sense: "[T]heir form of organization," wrote Michael Tigar and Madeleine Levy, "challenged the rule of the Church as the only institution authorized to mediate between the Trinity and the mass of individual sinners on earth."123 Thus, the communes were outgrowths of peace associations, but not of any propapal "Peace of God" movement. It was the knights who ultimately embraced the "Peace of God"; by defining the peasants and the clergy as "noncombatants," the "Peace of God" movement gave the knights a monopoly on legitimate force.124 The "Peace of God" was a means of channeling unrest, not an inspiration for it.125 Late in the twelfth century, when new peace associations appeared without clerical sponsorship, they were condemned as heretical and brutally suppressed.126 In the thirteenth century, urban associations that formed without royal approval were condemned by the French jurist Beaumanoir.127

It is against this continuing background of social struggle that the emergence of urban communes must be understood. The cities were focal points for heresy in the eleventh century,128 but they were also centers of peasant population. They were largely populated by artisans and laborers of peasant origin, and even

work and live, they were attacked as heretical despite the fact that their beliefs were entirely orthodox. The accusation was based on the fact that they had not received papal authorization, they followed no rule, and were not administered by ordained priests or monks. "Since these women promise no obedience to anyone and do not renounce their property or profess an approved Rule, they are certainly not 'religious,'" concluded the Council of Vienne in 1312. By 1274, such associations had already been condemned by the Council of Lyons and over the course of the fourteenth century Beguine communities were dissolved and forced into approved orders. E. Peters, supra, at 236; R. Southern, supra note 101, at 329-31.

123. M. Tigar & M. Levy, supra note 116, at 88-89. See also infra note 325 and accompanying text.
125. G. Duby, supra note 63, at 161.
126. M. Bloch, supra note 14, at 416-17; G. Duby, supra note 63, at 330-33.
128. G. Duby, supra note 63, at 131, 216. Cities and towns remained centers of heresy after the eleventh century as well. They flourished in the Italian City-States where the enforcement of orthodoxy was weak. R. Brooke & C. Brooke, supra note 70, at 102. Cities provided the crucible for many popular religious movements in the thirteenth and fourteenth centuries. R. Southern, supra note 101, at 303-09; see generally N. Cohn, supra note 74. Many of the Cathars worked as weavers in the Flemish towns, R. Brooke & C. Brooke, supra note 70, at 100, as did the Waldensians. E. Peters, supra note 122, at 153. The Beguines too, were an urban phenomenon. Id. at 236.
farmers.\textsuperscript{129} The urban movement can thus be understood as part of a wider movement for peasant enfranchisement. The chartering of cities, spreading at the end of the eleventh century, was contemporaneous with the chartering of peasant villages and towns.\textsuperscript{130} Moreover, urban collectivism did not begin in the eleventh century; some charters appeared earlier. In any case, the chartering of a commune indicated only its recognition by a lord. Because Berman is anxious to present the Gregorian Reform as the inspiration for urban collectivism, he only discusses urban uprisings transpiring after the Reform was under way; but urban collectivism actually anticipated the Gregorian Reform.

Berman’s explanation of the rise of urban communes is illustrated by his account of the emergence of such a commune in Cambrai. While this is only one of many such stories in Berman’s narrative, it is the first and serves as a paradigm:\textsuperscript{131}

In 1075, shortly after Pope Gregory VII had declared the political and legal unity of the church and its independence from the empire, the population of Cambrai, led by a papalist priest and wealthy merchants, rose up against the authority of the emperor and his bishop and ‘swore a commune.’ This revolt was quickly put down. However, two years later, when a new bishop left the diocese to receive imperial investiture, a second revolt succeeded. Under the leadership, once again, of a Gregorian priest and the wealthiest merchants, the citizens swore oaths of fidelity to the commune and pledged themselves to defend it against a restoration of episcopal authority. In 1106, however, the emperor intervened to repress the commune once again. Only after the end of the Investiture Struggle (1122) did Cambrai receive a modern charter of liberties, the oldest extant copy of which is dated 1184.\textsuperscript{132}

While Berman does not say so explicitly, his reader is certainly left with the impression that the 1075 insurrection against the bishop was the first of many in Cambrai, and was a response to the Pope’s actions. In fact, the citizens of Cambrai joined in an oath against their bishop as early as 958.\textsuperscript{133} In the 1020s Bishop Gerard of Cambrai was plagued by heretical conjurations in his see, which he apparently identified with the contemporary peace movement,

\begin{itemize}
  \item \textsuperscript{129} M. Bloch, supra note 14, at 277; G. Duby, supra note 59, at 57; M. Tigar & M. Levy, supra note 116, at 80-83.
  \item \textsuperscript{130} R. Hilton, supra note 84, at 74-85.
  \item \textsuperscript{131} “Other episcopal towns of Picardy . . . followed the example of Cambrai.” H. Berman, supra note 1, at 366.
  \item \textsuperscript{132} Id. at 364.
  \item \textsuperscript{133} G. Duby, supra note 59, at 136; M. Tigar & M. Levy, supra note 116, at 95.
\end{itemize}
as well earlier pagan associations.\textsuperscript{134} Another anti-episcopal insurrection appeared at Liege in the tenth century.\textsuperscript{135} As early as 967, some French cities were even receiving charters.\textsuperscript{136} Elsewhere, particularly in England, Northern Germany, and the Pyrenees, relatively independent urban settlements seem to have emerged in the tenth century without much fuss.\textsuperscript{137}

Later movements were not necessarily inspired by, or even aligned with, the papacy and the monasteries. Perhaps the one clear instance of the papacy intervening on behalf of an urban communal movement was in Milan in 1077. Yet even here, it intervened reluctantly in support of a movement that had already struggled for decades.\textsuperscript{138} While the Milanese movement in particular was anti-episcopal, what seemed to unite the urban movements was their antipathy to all clergy, rather than their preference for some clergy over others. For example, early in the twelfth century the townspeople of Vézelay, lacking a bishop, rose against their abbot.\textsuperscript{139} And what are we to make of the irrepressible Arnold of Brescia? Originally an abbot, he is described by Otto of Freising as a heretic. In 1135 he began to preach priestly poverty and lay communion and participated in a revolt against the bishop of Brescia. Having excited the hostility of a Pope, a king, and the leader of the Cistercian Order, he traveled eventually to Rome, where he led a communal movement in revolt against a Pope, only to be executed by an Emperor.\textsuperscript{140}

Berman's picture of the papacy as a prototype of the modern state is suggestive, but his claim that the papacy provided monarchs with a model is not convincingly supported. His chief example of papal influence is the Norman Kingdom of Sicily, which developed a highly centralized administrative structure. Berman notes that Pope Gregory succeeded in forming an alliance with his powerful neighbor, but is compelled to acknowledge that its terms were dictated by the Norman rulers, who rejected the
Pope's claim to authority over the entire church. Similarly, he admits that when the Normans arrived in Southern Italy early in the eleventh century they found sophisticated Arab and Byzantine administrative institutions in place. They appropriated many of these institutions, but continued to staff them with Arabs and Greeks. In light of this concession, Berman's unsupported claim that the structure of the Norman state was "probably" influenced by that of the papacy has a decidedly speculative ring. The Arab and Byzantine Empires developed bureaucracies before the papacy did. Both of these empires were present in Italy in the tenth and eleventh centuries; perhaps they inspired the administrative design of the papacy as well as that of the Kingdom of Sicily.

Berman's claim that the investiture struggle introduced the theme of constitutional limitations on royal power into European politics is a part of his larger account of the progressive influence of the reformed church. Berman's notion that Pope Gregory's dispute with the Emperor persuaded the European nobility of their right to resist the will of their monarchs dovetails with Berman's notion that peasant unrest was, albeit indirectly, inspired by scholastic legal thought.

There are two difficulties with Berman's explanation for the restiveness of the nobility. First, the investiture struggle took place towards the end of a sustained decentralization of power in Western Europe. French and German monarchs had lost their hold over the military class. In challenging royal power, therefore, the Pope was joining the victorious side in a dispute already well under way. Second, the nobility had no need to appeal to divine law to justify restraining royal power because they could invoke customary law. Customary law was understood to be the product of collective experience rather than that of a king's will. The king was viewed as guardian and exponent of his people's customs and

141. H. Berman, supra note 1, at 409-11.
142. Id. at 414-15; see also P. Anderson, supra note 59, at 167.
143. Berman concludes that "[T]here seem to have been virtually no direct contemporary... Islamic influences on the development of Western legal systems in their formative era," while acknowledging "Arab influence... on certain specific governmental institutions and practices." H. Berman, supra note 1, at 160-61. Since Berman seems to view bureaucratic organization and bureaucratic rationality as defining characteristics of western legal systems, this distinction between "legal systems" and "governmental institutions" is puzzling.
144. G. Duby, supra note 63, at 149-61.
his accession, even if hereditary, was often understood to be authorized by popular consent.\textsuperscript{146} Thus, nobility and peasantry alike were amply provided with anti-authoritarian ideology before the Gregorian Reform.

In fact, if Pope Gregory can be said to have introduced a new theme into medieval political thought, it would be the theme of unlimited authority. Berman describes the investiture struggle as a dispute between church and state; but it can also be seen as a struggle between Pope and parish. Rosalind and Christopher Brooke note that “the process of forming new parishes... became fossilized in the 12th century... because of a strengthening of episcopal authority which made the informal establishment of parishes impossible, and of the Church’s courts and common law, which provided a legal framework much more difficult to break.”\textsuperscript{146} Prior to the investiture struggle priests had been seen as employees of their parishes. Even bishops were ostensibly elected, rather than selected.\textsuperscript{147} The role of monarchs and lesser lords in the appointment of priests was derivative from the authority of their subjects. They purported to act as representatives or agents of disenfranchised villages.\textsuperscript{148} By assuming ultimate authority over the appointment of all priests, the Pope challenged the assumption that the church was even nominally responsible to its members,\textsuperscript{149} and, incidentally, legitimized their disenfranchise-ment by the lords.

Neither the papacy nor the monasteries created feudal society, but they did attempt to take advantage of it. The last two centuries had seen the rise to power of an undisciplined military class in France and Germany, at the expense of royal institutions and peasant communities. Late in the eleventh century, this class had already triumphed in France and was feeling its strength in Germany. Pope Gregory chose this moment to challenge the emperor, precipitating:

\textsuperscript{145} G. Sabine, \textit{supra} note 110, at 200-08.
\textsuperscript{146} R. Brooke & C. Brooke, \textit{supra} note 70, at 82.
\textsuperscript{147} M. Bloch, \textit{supra} note 14, at 351.
\textsuperscript{148} \textit{Id.} at 251-52.
\textsuperscript{149} Brooke & Brooke recount the tale of a twelfth century parish priest who was condemned as a heretic for urging his parishioners to minister to the poor among them rather than paying for sacraments or going on pilgrimages. R. Brooke & C. Brooke, \textit{supra} note 70, at 125.
generalized civil war in Germany, as the local nobility seized the opportunity to rise against the Emperor, with Papal blessing. During fifty years of constant strife, a great social change now occurred in Germany: in the conditions of ruthless depredations, anarchy and social violence, the German aristocracy destroyed the alodial basis of the non-noble free population that had always predominated in Saxony and Thuringia and been a pervasive presence in Bavaria and Swabia . . . . The peasantry was reduced to serfdom.  

The reform of the church was part of the general decline of royal authority and peasant autonomy that characterized what Duby has called "the feudal revolution."  

One of the royal institutions weakened during this period was episcopal authority. One of the communal institutions weakened during this period was the parish church. The Pope and the monks gained ascendency within the church by affixing themselves to the victorious knights. They did not initiate the military expansion of Western Europe toward the Eastern Mediterranean, but they glorified it. They did not initiate the peace movement, but they channeled it away from resistance and toward acquiescence. The twelfth century witnessed the remarkable phenomenon of the knights engrossed in foreign military adventures without losing their hold over the peasants. If the Gregorian Reform helped produce any important social change during the eleventh century, it was that:  

The merits attaching to willing acceptance of the laborer's lot were held up for popular admiration. In the world of the dead the people were promised redemption, which indulgence would soon be promised to the crusades. An attempt was made to convince them that there was in fact a mutual exchange of services, that they were themselves served, that the 'great,' the 'nobles' sacrificed themselves for the populace, in virtue of which their privileges were rendered legitimate.  

V. Berman's Explanation: The Idea of Progress  

If I have correctly estimated the church's role in the social changes of the eleventh century, then it was more a beneficiary than a cause. The chief agent of change in this period was the newly unfettered military class; of secondary, but still substantial

150. P. Anderson, supra note 59, at 163-64.  
151. G. Duby, supra note 63, at 147.  
152. Id. at 141.  
153. Id. at 161.
importance, was the peasant class—resourceful in resisting the establish-
ment of feudalism. If the church made a causal contribu-
tion to the establishment of feudalism, it was ideological: the re-
formed church justified feudalism by discouraging peasant
resistance.

Berman agrees that the chief causal contribution of the
church to social change in this period was ideological. He dis-
agrees, however, as to the nature of the social change, the impor-
tance of ideology in producing it, and the content of that ideol-
ogy. For Berman, the eleventh and twelfth centuries witnessed,
not the establishment of feudalism, but its decline. This decline,
he argues, was attributable to the ideological content of the legal
culture nurtured by the church.154 According to Berman, that cul-
ture was informed by a commitment to an idea of progress devel-
oped by scholastic theologians. Thus influenced, he suggests, early
legal scholars saw law as a device for continuously reforming so-
ciety in order to bring about its gradual improvement.

The notion that medieval scholastics believed in the possibil-
ity of human progress will probably strike readers as strange. We
tend to associate faith in human history as a vehicle for the im-
provement of society with the nineteenth century. Historians of
the idea of progress have traditionally assumed that Western Eu-
rope was an extremely inhospitable environment for the incuba-
tion of that idea before the advent of humanist historiography in
the sixteenth century.155 The chief barriers to the idea’s implantation,
moreover, are generally thought to have been religious and
legal traditions. For the church, belief in the realizability of the
good by human agency is thought to have been precluded by the
idea of original sin. Intertwined with this idea, in the highly influ-
ential thought of Augustine, was a classically inspired contempt
for the temporal. The church fathers followed Plato and the stoics
in attributing value to the eternal only; from this standpoint,

and the Feudal Law 18 (1967) (Roman law first invoked as evidence that the source of law
is legislative rather than customary, in sixteenth century France); id. at 30-35 (sovereign
legislator inconceivable in English legal culture before influence of French historiography
in seventeenth century); id. at 248 (historicism a product of the eighteenth century with
seventeenth century roots). On humanist legal history see J. Franklin, Jean Bodin and the
change was understood as "corruption." The hostility to change implicit in this attitude was reinforced by legal traditions brought to Western Europe by the Germanic tribes before their conversion to Christianity. According to these traditions, law was identified with custom persisting "from time immemorial." From this perspective, change was per se illegitimate.

Berman nevertheless insists that worldly change was valued and sought by scholastic theologians and legal scholars. He derives this conclusion principally from the stress laid upon the idea and imagery of the incarnation within the reformed church. Beginning in the late eleventh century, he argues, the church saw its role as the progressive realization of divine virtue within human society. According to Berman, the eleventh century monks that initiated the papal revolution, were inspired by an apocalyptic faith that the millenium was at hand. Human history, they are supposed to have felt, would soon involve a victorious struggle against the forces of the antichrist, leading to a better world. This spirit was articulated by twelfth century intellectuals, especially Joachim of Fiore. It was institutionalized in a papal bureaucracy, the innovative spirit of which is revealed by the fact that it issued legislation. The proliferation of legislation reflected a new belief in the worldly efficacy of individual will.

Berman finds evidence of this individual voluntarism in a diversity of surprising locations. The reformed church, he argues, valued intellectual freedom, encouraging empirical science and doctrinal debate. Its law of marriage and wills implied that individual decision makers could control the future. Its inquiry into the mental state of accused criminals—especially heretics—implied that individuals were responsible for their own sin. Conversely, its new concept of purgatory implied that indi-

158. H. Berman, supra note 1, at 103, 158, 178-79.
159. Id. at 109-12.
160. Id. at 112, 128.
161. Id. at 111, 202.
162. Id. at 95.
163. Id. at 156, 159.
164. Id. at 228.
165. Id. at 236-37.
166. Id. at 182-85 (penance implies individual responsibility for sins); id. at 189-92
Individuals were responsible for their own salvation and could achieve it over time.\textsuperscript{167} Berman believes that the church as a whole strove similarly to improve itself over time. He finds potent evidence of this in the fact that the church and other political institutions were often described by medieval scholars as "bodies."\textsuperscript{168} To Berman, this means that such institutions were characterized by "organic growth."\textsuperscript{169} The means by which such "organic growth" was realized included not only legislation, but legal scholarship.\textsuperscript{170} The typical activity of the medieval scholar, Berman argues, involved the attempt to reconcile an apparent contradiction, generally by moving to a higher level of abstraction.\textsuperscript{171} This, Berman concludes, entailed the achievement of progress, not only on paper, but in the world.\textsuperscript{172} Berman's overall claim is that medieval legal scholars were motivated by the belief that as "bodies" of law "grew," divinity would be progressively embodied in human life.\textsuperscript{173} I will argue that this image of the incarnation is an anachronism—a modernist collage of ideas torn from their original context in the tapestry of medieval thought. The effect, like Marcel Duchamp's "Nude Descending Staircase" is to impart the illusion of motion to a static image. To the medieval eye, the nude had always been, belonged, and would irredeemably remain, at the bottom of the staircase. Berman consistently reinterprets this faith in hierarchy as a sense of history.

VI. ASSESSING BERMAN'S INTELLECTUAL HISTORY

Berman's claim that the scholastics believed that good was capable of being cumulatively achieved in the world by human agency, rests upon his assertion of the importance of millenarian prophecy in medieval thought. One should be hesitant in attributing millenarian enthusiasm to the scholastics, however. While

\begin{itemize}
  \item \textsuperscript{167} Id. at 169-72, 197.
  \item \textsuperscript{168} Id. at 9, 216-17, 286.
  \item \textsuperscript{169} Id. at 9, 119, 202-03.
  \item \textsuperscript{170} Id. at 254.
  \item \textsuperscript{171} Id. at 157, 164.
  \item \textsuperscript{172} Id. at 158, 197.
  \item \textsuperscript{173} Id. at 178-79.
\end{itemize}
many of medieval Europe's millenarian movements seem to have been aimed at transforming the social world, these movements were generally external to and often opposed to the established church. According to Duby, "[t]he indictment of papal tyranny, expressed in the dream of a Holy Spirit which would invade the world and render the priesthood meaningless, lay at the heart of the prophecies of Joachim of Fiore." Accordingly, the writings of Joachim—a Cistercian abbot—were condemned by the main center of scholastic thought, the University of Paris. While many eleventh century monks showed an interest in apocalyptic prophecy, they generally took the imminence of judgment as a mandate to withdraw from the social world rather than attempt to reform it. They saw history as determined, and saw human attempts to interfere with the divine plan as dangerous sources of disorder. Nor is it appropriate to identify scholastic thought with monastic millenarianism. The militant monks of the eleventh and twelfth centuries tended to be anti-intellectual and opposed the systematic theology being developed in the cathedral schools (hence "scholastic") under the jurisdiction of their traditional enemies, the bishops. The success of scholasticism reflected a resurgence of episcopal power within the church at the expense of the monasteries.

The day of judgment had significance in scholastic as well as monastic thought, but it implied nothing like the modern idea of progress. It was not a goal to be realized in human history or by human agency; rather, it was to be the product of divine intervention. It was something "to be suffered, not achieved." For Augustine, judgment day need not have been heralded by any whole-

174. See also infra notes 175, 201. See generally N. Cohn, supra note 74.
176. E. Peters, supra note 122, at 218.
177. G. Duby, supra note 175, at 58; G. Duby, supra note 63, at 140-44.
178. G. Duby, supra note 63, at 189-90.
179. G. Duby, supra note 175, at 65-70 (Cluniac Order); id. at 119-21 (Cistercian Order); E. Peters, supra note 122, at 87-90 (Cistercian Order); cf. J. Leclercq, Love of Learning and the Desire for God (1961).
180. G. Duby, supra note 175, at 139; G. Duby, supra note 63, at 206.
181. M. Bloch, supra note 14, at 84.
sale change in society; redemption would be offered only to the few. When later thinkers expected judgment to be preceded by dramatic events, they nevertheless saw those events as the unfolding of a preexisting divine plan. Aquinas, the great scholastic, might grudgingly acknowledge that the world could be improved, but only by divine creation, not by human adaptation:

[T]he universe cannot be better than it is, because of the supremely befitting order which God has assigned to things, wherein the good of the universe consists. If any one of these things were [separately] better, the proportion which constitutes the order of the whole would be vitiating . . . . Nevertheless, God could make other things than he has, or could add others to the things he has made; and this other universe would be better.

Because judgment was divine, the scholastics did not really think of it as a future historical event. Instead, they thought of it as already present in the mind of God. Dante defined eternity as "the point at which all times are present" and the scholastics viewed historical events as expressions of an unchanging divine plan. To the discerning eye, therefore, judgment, no less than creation, was implicit in every human experience. From the age of Augustine to that of Aquinas, commented Georges Duby:

[T]ime had offered [theologians] a homogeneous whole in which by divine example past and future were inseparable from the present and entertained mystic relations with it. The creation and the end of the world merged, in relation to eternity, mingling with actual experience. This conception of duration had been expressed by Saint Augustine and Dionysus the Aeropagite. On it rested Suger's concordances, the biblical examples of Peter le Mangeur, and the entire symbolical structure in which cathedral art reduced time to the cosmic whirling of rose windows. Past events did not explain the present, they prefigured it while completing it.

The apocalyptic anxiety that gripped Western Europe in the eleventh century failed to inspire the established church with a sense of history because it could be so easily absorbed into existing allegorical images. These allegories depicted events as static hi-
erarchies rather than dynamic processes. Duby quotes Dionysus, an early writer he believes influenced Abbot Suger, the originator of Gothic architecture. According to Dionysus, God stirs "the passive part of our soul, which lifts itself toward the most divine realities by correctly combining allegorical symbols in figurative representations."\(^{188}\) "[God] institutes us in hierarchy so that we may participate in the liturgy of their heavenly hierarchies through the resemblance."\(^ {189}\) The incarnation, which came to dominate ecclesiastical thought even more than the last judgment in the twelfth and thirteenth centuries, was such an allegorical figure—a framework for interpreting, not changing, every life and death.\(^ {190}\)

Berman treats the great moments of Christian eschatology as social changes to be achieved over time, rather than as enduring aspects of an ordered universe. As a consequence, he assumes that the scholastics viewed human will as an agent of social change. Thus, he lays great stress on the fact that Pope Gregory VII claimed the power to "'create new laws in accordance with the needs of the times.'"\(^ {191}\) Berman identifies the power to legislate in response to social change with a power to legislate in order to bring about or facilitate social change. To the scholastics, however, legislation in no way implied social innovation. They had inherited the classical view of legislation as a device for fixing social institutions. The Greeks favored legislation because they believed that a single discerning lawmaker was best able to frame institutions worthy of enduring. Any deviation from such institutions they viewed as "corruption."\(^ {192}\) Since the scholastics, too, saw virtue in enduring order, they also saw social change as corruption. When scholastically trained lawyers attacked any particular custom, they generally argued that it was not authentically old.\(^ {193}\) New legislation might be necessary to correct, but never to generate, social change. According to Duby, the notion of law inherited by the scholastics from Augustine and Dionysus the Aeropagite entailed the maintenance of hierarchy for "'the aim of hierarchy

\(^{188}\) Id. at 56.
\(^{189}\) Id.
\(^{190}\) G. Duby, supra note 175, at 164-65, 156.
\(^{191}\) H. Berman, supra note 1, at 202 (quoting Pope Gregory VII).
\(^{192}\) J. Bury, supra note 155, at 11.
\(^{193}\) M. Bloch, supra note 14, at 113.
is, so far as possible, assimilation and union in God.'”

If—and here lay the evil, the worm in the fruit, the rot—this movement should fall into disorder, men, obedient to God's intentions, should then work with all their hearts to restore calm and regularity to the cycle. The Dionysian notion of hierarchy thus required continual reformation of that which was constantly undergoing deformation.

There was a kind of perpetual motion implicit in the allegorical vision of the scholastics, but it was not progress in the world. Instead, it was a semiotic movement between the visible world and the heaven of divine meaning. The redemption of the world's inhabitants, however, required law to keep them in their place.

According to Alan [of Lille], just as everything in the human body . . . has imposed upon it by an exchange of services—as in a seigniory or state—an order, so the eternal goal . . . can be achieved only if, in the visible world, every man accepts his assigned condition and remains where God has placed him—unmoving, awaiting resurrection.

Thus, it is incorrect to assume that an increase in legislative activity implied any increased respect for individual human will. The function of legislation was to replicate and preserve a divine order, rather than to realize the discretion of the legislator. It was corrective rather than creative.

A similar attitude pervaded the scholastic conception of natural science. The very few scholastics that took an interest in natural science apparently viewed it as a contemplative activity. They catalogued creation as a means of understanding the creator, rather than imitating him. Scientific knowledge was not valued as a means of changing or manipulating the natural world, but of detaching oneself from it. For the scholastics, understanding the world was a very different thing from living in it. Perhaps for this reason, familiarity with the natural world was not an important part of the scholastic project. Instead, natural science flourished in medieval Arab society and in those areas of Italy most influenced by Arab culture.

194. G. Duby, supra note 63, at 113 (quoting Dionysus).
195. Id.
196. Id. at 317.
197. J. Buru, supra note 155, at 14 (description of Roman stoic attitude toward science). Id. at 27-28 (ascription of this attitude to the medieval scientist Roger Bacon).
198. See infra text accompanying note 247.
199. G. Duby, supra note 175, at 180.
Berman's case for the intellectual independence of the scholastics therefore appears overdrawn. Certainly scholastic thought was riven with conflict, but that hardly implies that it welcomed diversity of opinion. The church of the high middle ages required simultaneous belief in the transcendance and the immanence of God. However, works that asserted the latter position too vigorously were liable to be condemned; and, the advocacy of either position to the exclusion of the other was an index of heresy. Scholasticism was encouraged and supported by secular and ecclesiastical powers in the thirteenth century as an antidote to these heresies. Its chief function was to clarify, to defend, and, above all, to fix Catholic dogma. This made possible the development of a pervasive church bureaucracy for the policing and surveillance of heresy that assumed its most notorious form in the

200. Id. at 173; A. Lovejoy, supra note 184, at 72-73 (Abelard condemned for urging the necessity of the created world); E. Peters, supra note 122, at 218, 227; id. at 120-21 (millenarian prophecies of Joachim of Fiore and Averroist doctrine of the eternity of the temporal world condemned); see id. at 87.

201. The leading heresies condemned by the church held diametrically opposed positions. I have alluded to eleventh century heresies that viewed priests as unnecessary, a position that Duby identifies with the view that "every man was a member of God and therefore untainted with sin." G. Duby, supra note 175, at 136. In the twelfth century, the Vaudois or Waldensians of Lyons were condemned for worshiping without priests. Id. at 132. The Waldensians viewed the priests as supernumerary exploiters, Passau Anonymous, On the Origins of Heresy and the Sect of the Waldensians, in E. Peters, Heresy and Authority in Medieval Europe 154 (1980), while favoring a universal priesthood of believers and the lay right to preach. Id. at 141. Perhaps incorrectly, they were accused of gluttony and excess. J. Russell, supra note 122, at 126. Although hardly libertines, they apparently approved of clerical marriage. E. Peters, supra, at 160. The Alamarins of the early thirteenth century similarly extended a pantheistic belief in God's immanence to the point of declaring themselves God, and, combining this with the Millenarian prophecies of Joachim of Fiore, concluded that the established church was no longer necessary. J. Russell, supra note 122, at 138-39. These ideas, condemned in 1210, see E. Peters, supra, at 218, were taken up later in the thirteenth century by the "Brethren of the Free Spirit" that permeated Italy, Germany, and the low countries. According to the Jeffrey Russell, materialism, pantheism, and the priesthood of believers were frequently related themes in the heresies of this period. See J. Russell, supra note 122, at 140-41; G. Duby, supra note 175, at 12.

The Albigensians or Cathars, by contrast, refused to believe that God had become man and condemned the priesthood as necessarily profane, because of their profound disgust for everything created. See J. Russell, supra note 122, at 134. See generally readings on Cathars, E. Peters, supra, at 103-37; J. Russell, supra note 122, at 121-23. Similar criticisms of the excessive worldliness of the church were reported among heretics in the Rhineland, Everinus of Steinfeld, Letter to St. Bernard 1143 in E. Peters, supra, at 92, and attributed to the "heretical" Arnold of Brescia, Otto of Freising, Arnold of Brescia in Rome 1148-55 in E. Peters, supra, at 79, in the mid-twelfth century.

202. G. Duby, supra note 175, at 96, 137-38.
Inquisition.  

The Inquisition's inquiry into the beliefs of accused heretics did not reflect any particular appreciation for individuality. As Berman stresses, inquisitorial judges sought to elicit knowledge about their witnesses that the witnesses did not themselves have—for knowledge of the soul was only possible through the accumulated wisdom of the church. Since it was the church, rather than the individual, that was supposed to have privileged access to such knowledge, there is no reason to think that there was anything "private" or "individual" about the object of such knowledge. Moreover, it should not be assumed that heresy was chiefly a crime of belief. Recall that heresy was not only a form of group worship, but a form of political organization. Its chief identifying feature was the effort to dispense with the clergy as a device for unifying the group. Thus, heresy was chiefly a crime of association. The significance of articulating deviant beliefs was partly evidentiary; it was an index of membership, or of not having been properly instructed by the true church. The inquisitors, however, were generally less interested in the witnesses' beliefs than in their associates. It should be recalled that most of those interrogated by the Inquisition had already been named by others, and that an important means of eliciting confessions

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203. Id. at 144. For the origins of the Inquisition see J. Russell, supra note 201, at 153-55.
204. H. Berman, supra note 1, at 184.
205. Consider these instructions in the Manual for Inquisitors at Carcassonne, 1248-49:
After taking an oath to abjure heresy and to harbor no heretics, the person is diligently questioned about whether he saw a heretic or Waldensian, where and when, how often and with whom, and about others who were present; whether he listened to their preaching or exhortation and whether he gave them lodging or arranged shelter for them; whether he conducted them from place to place or otherwise consorted with them or arranged for them to be guided or escorted; whether he ate or drank with them or ate bread blessed by them; whether he gave or sent anything to them; whether he acted as their financial agent or messenger or assistant; whether he held any deposit or anything else of theirs; whether he received the Peace from their book, mouth, shoulder, or elbow; whether he adored a heretic or bowed his head or genuflected and said "Bless us" before heretics or . . . whether he was otherwise on familiar terms with or associated with heretics or Waldenses in any way . . .
Almost as an afterthought is added "whether he believed in the heretics or Waldenses or their errors." A Manual for Inquisitors at Carcassonne, quoted in E. Peters, supra note 122, at 201-02. See also id. at 211.
206. G. Duby, supra note 175, at 144; J. Russell, supra note 122, at 153.
from those so named was physical torture.\textsuperscript{207} The Inquisition, in short, physically punished guilt by association.

If the church's regulation of belief showed little respect for individual will, neither did its law of marriages or wills. In the eyes of the church, these activities were less expressions of personal discretion than of religious obligation. From this perspective, consent was neither a necessary, nor a sufficient condition for marriage. On the one hand, it is difficult to characterize marriage as voluntary when communities of pious women, such as the Beguines, could be condemned for rejecting it.\textsuperscript{208} On the other hand, one can hardly conclude that canon law founded marriage on consent when it refused to recognize wedding vows unless administered by a priest. While such unauthorized weddings were customary in many parts of Europe,\textsuperscript{209} they came to be viewed as symptoms of heresy.\textsuperscript{210}

Like the common laws of marriage, the laws of wills reflected the expansion of clerical authority, rather than individual liberty. While canon law recognized bequests that secular law often did not, Berman acknowledges that a principal beneficiary of these bequests was the church itself. As part of their role as administrators of penance and extreme unction, priests would encourage their parishioners to improve their eternal odds by making a final gift. Legation was virtually, like marriage, a sacrament.\textsuperscript{211}

The sacraments conferred membership in the church, but not necessarily as an expression of the consent of the members. Indeed, some members were condemned as heretical for failure to grasp this point. In the twelfth century, many Christians challenged the necessity of baptism on the grounds that infants were incapable of consenting to membership in the church. The theologians responded that the church consented for the infants; they

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\item H. Berman, supra note 1, at 252.
\item These views were first forcibly expressed by . . . Bruno, bishop of Olmuetz, writing to the pope in 1273. He complained that . . . the women used their liberty as a veil of wickedness, in order to escape the yoke of obedience to their priests and 'the coercion of marital bonds.' Bruno had a single remedy: 'I would have them married or thrust into an approved Order.'
\item R. Southern, supra note 101, at 329.
\item R. Brooke & C. Brooke, supra note 70, at 113.
\item E. Peters, supra note 122, at 77.
\item Id. at 231.
\end{enumerate}
\end{footnotesize}
were baptized in the faith of the church.\textsuperscript{212} Gratian, the great codifier of canon law, held that consent was irrelevant to the effectiveness of a sacrament, while form was essential.\textsuperscript{213} Thus, if consent was unnecessary for participation in a sacrament, neither was it sufficient. Communion and penance, like baptism and marriage, came to be placed in the hands of the priest rather than the hearts of the worshipers. Groups that felt that priests were unnecessary for the performance of these sacraments were condemned as heretics during the twelfth and thirteenth centuries.\textsuperscript{214} Yet, these groups had simply attempted to preserve the experiences of communion and confession—still available within the church during the eleventh century— as relationships among worshipers. By the end of the twelfth century those sacraments had become primarily priestly rites.\textsuperscript{215}

The idea of purgatory should also be viewed in light of this new conception of the sacraments. Purgatory was where most Catholics expected to perform the penances assigned by their priests. Thus, it did not denote that individuals were responsible for their own salvation—indulgence for time in purgatory was subject to the jurisdiction of the church. The imagining of a time and space intermediate between heaven and earth reflected the new conception of the church as a necessary mediation between God and humanity, rather than a human community itself. Purgatory reflected not so much the replacement of the community with the individual as moral agent, as the substitution of one conception of association for another. Because it made salvation unintelligible to the uneducated, the new doctrine met with resistance among the common folk.\textsuperscript{216} Because it enhanced the power of the priesthood, the doctrine of purgatory was consistently rejected by heretical movements, beginning with those condemned

\textsuperscript{212} S. Chodorow, Christian Political Theory and Church Politics in the Mid-Twelfth Century 81-85 (1972). \textit{See also} E. Peters, supra note 122, at 158 (Waldensians); \textit{id.} at 99 (German Heretics); \textit{id.} at 74, 79.

\textsuperscript{213} S. Chodorow, supra note 212, at 87.

\textsuperscript{214} E. Peters, supra note 122, at 159; \textit{id.} at 202 (Waldensians view priests as unnecessary for penance and communion); \textit{id.} at 92 (German heretics taking communion without priests).

\textsuperscript{215} R. Brooke & C. Brooke, \textit{supra} note 70, at 115 (communion); \textit{id.} at 118 (confession).

by Gerard of Cambrai early in the eleventh century.\textsuperscript{217}

In sum, the scholastics did not value the individual will as a force capable of improving the world. It is a major distortion to present the scholastics as social reformers bent on realizing progress in the world. To the contrary, they were focused on preserving and defending an order which they regarded as fixed. They could hardly regard temporal history as a means of realizing the good, for they clung to a contempt for the world as the locus of sin. Movements that sought to bring about redemption on earth, they regarded as heretical. At the same time, they were committed to the legitimacy of contemporary authority, for it was "ordained of God."\textsuperscript{218} Therefore, progress was doubly precluded: first because the world was inherently bad; second because the world was good beyond improvement.\textsuperscript{219}

Whatever instability might be found in scholastic thought is the product of this contradiction between God's transcendence of, and immanence in, the world. But it is a mistake to think that only the idea of progress could reconcile this contradiction. As Arthur Lovejoy and Georges Duby have each demonstrated, the medieval church found the idea of order, or hierarchy, a sufficient response to this problem. It was only by virtue of God's generosity that imperfect creatures were allowed to exist. Tolerance of inferior creatures by superior ones, in turn, mirrored divine virtue—but such tolerance in no way implied equality. To the contrary, the early church fathers had written, "if all things were equal, all things would not be."\textsuperscript{220} The church saw sin as the source of the world's baseness. Yet that sin, originating in Adam's desire, was identified with Adam's punishment—servitude. Superimposed upon the feudal distinction between free warrior and servile peasant, the church erected a new distinction between the free celibate and the slave of sin.\textsuperscript{221} Either criterion of freedom justified a kind of stewardship of the unfree.

David Brion Davis has shown that the tension between God's

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  \item \textsuperscript{217} Id. at 168-73, 268-70. E. Peters, supra note 122, at 78 (Henry of LeMans in 1135-1136); id. at 94 (Heretics in Rhineland in 1143); id. at 155, 160-61, 163 (Waldensians).
  \item \textsuperscript{218} T. Aquinas, Summa Theologiae (question 93 article 3).
  \item \textsuperscript{219} A. Lovejoy, supra note 184, at 70-71.
  \item \textsuperscript{220} Id. at 67. See id. at 60-66 (on classical origins of this idea). See also G. Duby, supra note 63, at 70-71.
  \item \textsuperscript{221} G. Duby, supra note 63, at 7-8.
\end{itemize}
immanence and the doctrine of original sin enabled scholastic thought to simultaneously lament and justify slavery. The church in particular, by mediating between God and the mass of sinning humanity, brought sinners into a (distant) relationship with God, and made God immanent in their world. The church represented its members to God and represented God to its members. Why could not all human beings be as free of sin as the clergy? The answer was that the clergy could not be perfect, but only relatively good. It was only in the clergy's superiority to and benevolence toward the laity that their resemblance to God consisted. Without evil creatures, wrote Aquinas, "all possible grades of goodness would not be filled up, nor would any creature be like God in having pre-eminence over another." Indeed, the Creator's own perfection might be suspect in a world without hierarchy: "Thus the supreme beauty would be lost to the creation if there were lacking that order by which things are dissimilar and unequal . . . a dead level of equality in things . . . would be a manifest derogation from the perfection of creation." Only hierarchy made possible the analogical chain linking the base to the divine—hierarchy was the sinner's ladder to heaven.

It should be obvious that this ladder was not one that the sinner could ascend in person, or of his own volition. Redemption was conveyed from God by way of the clergy to the sinner; the sinner could not reach heaven by assuming the lifestyle of the clergy—that way lay heresy. The "great chain of being" described by Lovejoy was not, therefore, a pathway along which individuals or even society could move. Rather, it was a static structure existing until the end of time. What scholasticism made possible was the apprehension and description of that structure. One scholastic approach to the problem of transcendence and immanence held that the world was base—incoherent, multiple, particular, ephemeral—only as perceived by human beings; as perceived by the mind of God, however, the world was an enduring unity. An important respect in which the clergy resembled—even represented—God, was in their relatively superior understanding.

223. A. Lovejoy, supra note 184, at 76 (quoting Aquinas).
224. Id. at 77.
225. T. Aquinas, supra note 218 (question 93, articles 1 and 2; question 94, article 2).
"God's will," insisted Aquinas, "is intelligence itself." In order to grasp the unity of the world, argued Aquinas, it was necessary to employ ideas. These were concepts exemplified by entities in the world, but—like God himself—transcending them. The church itself was such a concept, including but transcending its members.

It must be stressed that the ideas that occupied scholastic thought were not utterly divorced from the world. They were a means of understanding the world, but not a means of understanding the world as a process of change. To the contrary, for scholastics to understand a worldly phenomenon meant to grasp that which was unchanging about it. Ernst Kantorowicz has indicated that this project necessitated the development of a new conception of time—sempiternity—that was intermediate between the eternal and the temporal. If divine law was eternal and human law was temporal, natural law was sempiternal. While the individual human body was ephemeral, embodiment itself—the nature of the species—was enduring. It was the sempiternal aspect of the world—its enduring or regular features—that indicated that it was a divine creation. If sempiternity did not redeem the world, it revealed the world's capacity, its potential worthiness, for redemption.

How did the scholastics discover the sempiternal realm? From the perspective of hindsight the task seems easy. All the scholastics had to do was read Aristotle. Certainly classical essentialism provided the inspiration for the abstractions that haunted scholastic thought. Nevertheless, the integration of classical philosophy into catholic dogma was no mean feat. To the cautious Catholic, Aristotelian essences could (and did) appear to be pagan idolatries, rivals of God. How could the Catholic believe in the reality of transcendent abstractions and yet avoid pantheism? The ingenious solution hit upon by the scholastics was to imagine ideas as divine creations analogous to the only incorporeal creatures in whom belief was justified by biblical authority: angels.

226. Id. (question 93, article 4).
227. Id. (question 93, article 2; question 94, article 2).
228. E. KANTOROWICZ, supra note 185, at 275-80.
229. See E. PETERS, supra note 122, at 227-30 (especially propositions 3, 66, 72, 80, 209, 218 regarding the condemnation of pantheistic implications of Aristotelian thought).
230. E. KANTOROWICZ, supra note 185, at 280-82.
realm was occupied by angels. These were the creatures that administered purgatory, identifying those souls capable of redemption and administering their penance.\textsuperscript{231}

Of course, the representatives of these angels on earth were the clergy. Like the angels, the clergy could hasten redemption by imposing penances for sins committed. Their roles were not temporally circumscribed—they could, properly persuaded by the living, intercede on behalf of souls already departed;\textsuperscript{232} alternatively, if sufficiently impressed by a donor’s pious generosity, they could redeem sins as yet uncommitted.\textsuperscript{233}

While the legal system administered by the clergy focused unprecedented attention on time, it did so for the ultimate purpose of upsetting its sequence and erasing its effects.\textsuperscript{234} Rosalind and Christopher Brooke acknowledge that the remission of penalties by indulgence was expressed in terms of time. Nevertheless, they warn us against the misapprehension that indulgence or purgation were temporal processes: “Days and years of purgatory . . . were never intended to be taken literally but only to indicate the scale of the benefit; but . . . they soon deceived some of the faithful—and even more profoundly many modern students—into thinking that purgatory could be measured in time.”\textsuperscript{235} Indeed, the very vastness of the periods of purgation available for purchase indicates their distance from individual, or even collective, historical experience. Thus, canon law sought to transcend the temporality of individuals by joining them in a sempiternal church.

Much of Berman’s argument that the church of the high middle ages was bent on worldly progress rests upon the increasing

\textsuperscript{231} J. Le Goff, \textit{supra} note 216, at 211.
\textsuperscript{232} Id. at 211.
\textsuperscript{233} See R. Brooke & C. Brooke, \textit{supra} note 70, at 127 (popular belief that rich man’s soul could "pass through the eye of the needle" if he gave enough to the church). The practice of granting prospective indulgences began with the plenary indulgence offered (in advance) to all who died in the Crusades. Id. at 59. By the beginning of the fourteenth century wealthy individuals could purchase such plenary indulgences, to be granted at death by a confessor, from the Pope. Eventually, individuals could purchase such plenary indulgences from lesser figures; they could purchase prospective indulgences in the event of sudden, unconfessed death; or, they could even purchase plenary indulgence of past sins automatically renewable by every future confession. See R. Southern, \textit{supra} note 101, at 137, 139, 140. See also B. Tuchmann, \textit{A Distant Mirror} 26, 28, 121 (1978).
\textsuperscript{234} See J. Le Goff, \textit{supra} note 216, at 209.
\textsuperscript{235} R. Brooke & C. Brooke, \textit{supra} note 70, at 153.
emphasis placed on the idea of incarnation. The clergy, argues Berman, was bent upon realizing the incarnation of God on earth. This way of writing reflects an anachronistic understanding of the concept of incarnation. Scholastics did not imagine that the church would erect the heavenly city on earth, in time. They continued to believe, as Augustine had instructed, that the heavenly city existed already and eternally. They did not see the church as a vehicle for bringing about the incarnation in the future—rather, they saw the church from its inception as the incarnation. That they saw the church as God's incarnation does not, however, mean that they now saw the church as more worldly than before. The church had been identified with Christ's body since the time of Paul.  

286 What made the identification of the church with God increasingly acceptable was a change in the conception of the church that made it less carnal, less human. When Carolingian prelates described the church as Christ's body, they meant that Christ's body was present in the physical bodies of church members. The church was the community of Christians. This "real body" of Christ was merely symbolized by the "mystical body" of the host, taken in the ritual of communion.  

287 When, by contrast, scholastics described the church as God's incarnation, they meant that the church represented or personated God on earth; it was the "mystical body" of Christ. The "real body" of Christ was now the host.  

288 Membership in the church was now constituted, rather than merely symbolized, by the receipt of communion from an ordained priest.  

289 Thus, the church that "incarnated" God was distinct from its members. It was not a group of particular people existing at a particular time, but an artificial person existing for all time.  

290 In short, it was not a body, but a corporation.  

291 In characterizing the church as a corporation, the scholastics treated it as a creature, but nevertheless distanced it from the world it governed. The church corporate was not

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236. E. Kantorowicz, supra note 185, at 195.
237. Id. at 195-96.
238. Id. at 196.
239. See S. Chodorow, supra note 212, at 81-94. See also R. Southern, supra note 101, at 37-38. Christopher and Rosalind Brooke describe the declining involvement of lay people in the rite of communion during the twelfth century. C. Brooke & R. Brooke, supra note 70, at 115.
240. E. Kantorowicz, supra note 185, at 206, 209.
241. Id. at 202-03.
human. It did not grow, develop, decay, or die. It was an enduring order, a sempiternal abstraction: an angel.\textsuperscript{242}

Even as the clerical hierarchy began to conceive of the church as an angel, some worshipers struggled to preserve the older meaning of the church as the flesh and blood of Christ. In a letter to St. Bernard in 1143, Everinus of Steinfeld described as heretics those who

\begin{quote}

daily at their tables . . . according to the form of Christ and his apostles, do consecrate their meat and drink into the body and blood of Christ, by the Lord's prayer, to nourish themselves therewith, as being the members and body of Christ . . . But as for us, they say we hold not the truth of the sacraments, but only a kind of shadow.\textsuperscript{243}
\end{quote}

For these heterodox Christians, the truth of the sacrament remained that they themselves became "the body and members of Christ." Assumption of the dead's identity through contact with their body or blood was perfectly possible within the magical worldview of the early middle ages;\textsuperscript{244} nor was the fusion of a group into a single body beyond imagining. However, the Aristotelian conception of causation, increasingly embraced by the hierarchy, rendered such events as strange to them as they are to us.\textsuperscript{245} Compared to the visceral communion of the heretics, the hierarchy's church was indeed a shadow—or, more precisely, an angel.

This sheds light on the one cliché about scholasticism that all modern schoolchildren must know and none must understand. To express the incomprehensibility of the medieval mind to the modern, it is sufficient to recall that its exponents argued about how many angels could dance on the head of a pin. When, however, one adds that the church was a corporation, and the corporation an angel, the practical importance of the question may be appreciated.

Aquinas indicates the significance of the problem in the course of his discussion of law. Much of this discussion is aimed at demonstrating that law may be simultaneously conceived as a unity and a multiplicity. Eternal law, Aquinas concludes, is a single principle in the mind of God, though perceived by man as a multi-

\begin{itemize}
    \item \textsuperscript{242} Id. at 282-83.
    \item \textsuperscript{243} E. Peters, \textit{supra} note 114, at 92.
    \item \textsuperscript{244} See, e.g., Miller, \textit{supra} note 59, at 175-94.
    \item \textsuperscript{245} J. Russell, \textit{supra} note 122, at 193.
\end{itemize}
plicity of particular applications. Natural law, similarly, is derived from the single principle of reason. This principle is innate in human beings; nevertheless, they may not be aware of it, even when performing particular actions. There is a difference between exemplifying and understanding a concept:

[A] truth is self-evident at two stages, one, in itself, two in our minds. A proposition is self-evident in itself when the predicate is of the essence of the subject. At the same time the proposition may not be self-evident to a man who does not know the definition of the subject. For instance, ‘man is a rational animal,’ is a self-evident proposition of its nature, since to say ‘man’ is to say ‘rational.’ Yet to someone who does not grasp what man really is, the proposition is not self-evident.

If God is more capable of understanding the unity of law than man, then understanding law as a unity makes one closer to God. According to Berman, this was the sort of understanding of law which scholastic legal scholars sought to cultivate. According to Aquinas, such understanding requires an awareness of concepts.

Yet, the next example offered by Aquinas reveals that to understand a concept one must realize that it does not merely unify the particulars that exemplify it, but that it also transcends them. Aquinas continues:

Sometimes . . . propositions are self-evident only to the well-informed, who know what the terms of the proposition mean. Thus to one who appreciates that an angel is not a bodily substance it is self-evident that an angel is not circumscribed in place. This, however, is not manifest to those who are uninstructed and do not grasp what is meant.

How many angels can dance on the head of a pin? If this strikes us as an idle question, it is only because we are—as were most members of medieval society—uninstructed. A scholastic would realize that, having no bodies, an infinite number of angels could occupy a space at the same time; but would wonder whether, without bodies, angels could dance at all. Not to see that these two answers—infinity or zero—were the only possibilities, implied a failure to grasp that sempiternal concepts transcended any particular space and time.

From the perspective of the clergy, whether sempiternal be-

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246. T. Aquinas, supra note 218 (question 93, articles 1 and 2).
247. Id. (question 94, article 2).
248. H. Berman, supra note 1, at 163-64.
249. T. Aquinas, supra note 218 (question 94, article 2).
ings were transcendent or immanent was not merely a question of philosophical interest. Given their assertion that the church was such a being, the capacity of such beings to transcend space and time was a question of the utmost political importance. Someone who thought that angels could be “circumscribed as to place” might think the same of a corporation. Such a person might think of a church as a group of parishioners living together in a particular village. She might mistake the decisions of those parishioners for the decisions of their church. To the contrary, argued Alvarus Pelagius, “[t]he mystical body of Christ is where the head is, that is, the Pope.” In the political context of the times, the church’s ubiquity implied its hierarchical governance. “[T]he notion corpus mysticum . . . which formerly served to exalt the Church united in the Sacrament, began to be used in the hierarchical Church as a means to exalt the emperor-like pope,” concludes Kantorowicz.

To misconceive the nature of angels was to challenge the authority of the clerical hierarchy. If angels could walk upon the earth, the church was as temporal as its members—and that, pace Professor Berman, was the one thing scholastic thought could not think.

Berman denies that the scholastic conception of the ecclesiastical corporation was excessively hierarchical. He particularly objects to the critique of scholasticism offered by the leading exponent of German historical jurisprudence, Otto Gierke. Gierke distinguished between two conceptions of the group: an association formed and governed by its members, and an institution established and governed by a higher authority, for its members’ benefit. Gierke identified the former conception with “Germanic” society, and the latter conception with Roman Law. In Gierke’s view, the church, during the thirteenth and fourteenth centuries, increasingly favored the “Roman” conception. Berman characterizes Gierke’s views as “overdrawn,” or “thoroughly disproved,” while adding that “Gierke’s thesis is weakened by the fact that the medieval canonists themselves were apparently not

250. E. Kantorowicz, supra note 185, at 204 (quoting Alvarus Pelagius).
251. Id. at 203.
252. H. Berman, supra note 1, at 220, 607. See generally A. Gierke, Political Theories of the Middle Ages (1900) (discussing the medieval theories of the state and the corporation).
253. H. Berman, supra note 1, at 220.
aware of either of the two concepts.”

By contrast, he argues that under canon law, corporations could be formed without approval from a higher authority and often could not act without the consent of their members.

These claims do not bear close scrutiny. What Berman characterizes as “overdrawn” are Gierke’s beliefs “that corporate personality in a legal sense can ever emerge solely from within a group” and that corporate personality could be imposed by a higher authority “without the prior existence of a group.” This is in the nature of a confession and an avoidance: it is an effort to justify hierarchy within the church, rather than deny its presence.

What Berman characterizes as “thoroughly disproved” is Gierke’s claim that Pope Innocent IV viewed corporate personality as the artificial creation of a higher authority. He directs us to works by Brian Tierney and Pierre Gillet—yet, Tierney says little more than that Gillet systematically misunderstood Gierke.

Tierney agrees with Berman that canon lawyers did not concern themselves with the question of whether the church was an association or an institution—but only because they all agreed that the church was an institution. However, the assertion that they were ignorant of any alternative conception of the group cannot be sustained. Spontaneous associations had been part of the fabric of European social and religious life for hundreds of years. Conjurations, peace guilds, and communes had been identified and condemned by religious and secular authorities since the ninth century. The fact that canon lawyers failed to recognize spontaneous associations as legal entities was precisely what Gierke objected to. While denying the possibility of such associations, Berman nevertheless insists that canon law permitted them. Yet the source he cites, Gillet, discusses Roman law rather than canon law.

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254. Id.
255. Id. at 219.
256. Id. at 220.
257. On the page of Foundations of the Conciliar Theory cited by Berman, Tierney indicates only that Gierke’s views have been criticized. A few pages later, Tierney explains that in La Personnalité juridique, Gillet set out to prove that members of ecclesiastical corporations had some voice in governing the corporation. Gierke, by contrast, sought to prove only that ecclesiastical corporations existed independent of their members, by which he meant that representatives of the corporation could sometimes act for the corporation without the members’ consent. Id. at 607 n.45.
259. H. Berman, supra note 1, at 219, 606-07.
over, there were certainly influential Roman lawyers of Pope Innocent’s era (the mid-thirteenth century) who objected to charterless associations. Berman offers no support for his claim that ecclesiastical corporations were governed by the consent of their members, and it is belied by his own sources. “On the central issue,” writes Tierney, “the location of jurisdiction in a corporation, the view of [Pope] Innocent [IV] was . . . forceful and uncompromising . . . favour[ing] a strict authoritarianism.” Tierney acknowledges that under canon law, prelates were expected to consult their chapters on many matters, but notes that Innocent successfully promoted the view that consultation did not entail consent. A century earlier, Gratian took a similar position. “[A]uthority had to be seen as being within the community for there to be a possibility of constitutional government,” argues Stanley Chodorow. “According to Gratian’s theory of papal legislative and judicial power,” he concludes, “the possibility of constitutional control was very slight indeed.”

There can be little doubt that scholastic thought was deeply authoritarian. The concepts that Berman treats as processes of social change—purification, incarnation, corporation—were understood by the scholastics as enduring patterns of regulation and control.

VII. READING BERMAN’S RHETORIC: HISTORY AS HIERARCHY

Berman’s thesis that scholasticism was a revolutionary force consists of two questionable claims: (1) that scholasticism determined social change; and (2) that scholastic thought called for social change. We have seen that Berman’s second claim—that scholasticism called for social change—relied upon a distinctive pattern of interpretation. Berman consistently interpreted manifestations of hierarchy in medieval society as expressions of a yearning for progress. His identification of progress with hierarchy can be explained in terms of an affinity for hierarchy expressed in his rhetoric. This affinity may also explain Berman’s

261. B. TIERNEY, supra note 258, at 106-07.
262. Id. at 108-09.
263. S. CHODOROW, supra note 212, at 147.
264. Id. See also id. at 206-10 (Gratian rejects doctrine that what effects all requires consent by all).
tendency to overemphasize the historical impact of the ideas of elites.

Berman's narrative is structured by a series of hierarchical oppositions between progressive and regressive forces. Berman begins with a distinction between western and nonwestern in which the "western" is also identified as the "modern." The nonwestern, however, is not simply the complement to the more modern western, it is a perennial threat to it. "Constantly attacking the periphery of Europe, and always ready to swoop into the central parts, were the Norsemen, the Saracens, the Magyars." These attacks were an obstacle to progress: "A crucial aspect of the enormous growth in prosperity that occurred during the late eleventh and early twelfth centuries was the final cessation of military attacks from the north, east, and south."

Yet, it was not simply the fact of invasion that threatened western progress, but the character of the invaders—the more eastern they were, the less civilized:

The Hungarian kings had close connections with other European rulers and attempted to imitate them, but their successes always proved to be temporary . . . the fact that the population was predominantly Magyar, not Germanic . . . made a difference. Then in the middle of the thirteenth century the Mongol invasion wiped out whatever progress had been made . . . .

Even today, things western are threatened by the inscrutable east. "Since the end of World War II, 'East' and 'West' have often been used to distinguish Communist from non-Communist countries," Berman reminds us. What have been the effects of communist "influence" in the west? "[I]t was proposed . . . that law and lawyers should be eliminated, or at least greatly restricted in importance, as unnecessary and harmful to society." However, "[t]he breakdown of the Western legal tradition springs only in part from the socialist revolutions that were inaugurated in Russia." The real danger is nationalism: "[W]e still suffer from the nationalist historiography . . . that supported the disintegration of

265. H. Berman, supra note 1, at 3-4.
266. Id. at 301. See also id., at 101.
267. Id. at 319.
268. Id. at 514.
269. Id. at 2.
270. Id. at 37.
271. Id. at 39.
a common Western legal heritage."\textsuperscript{272} Berman identifies such nationalism with the nonwestern:

In the past, Western Man has confidently carried his law with him throughout the world. The world today, however, is suspicious—more suspicious than ever before—of Western 'legalism.' Eastern and Southern Man offer other alternatives. The West itself has come to doubt the universal validity of its traditional vision of law, especially its validity for non-Western cultures. Law that used to seem 'natural' [now] seems only 'Western.'\textsuperscript{273}

To be western is to be not only modern but universal; to surrender the claim to universality is to cease to be western.

Built upon the distinction between western and nonwestern is a second value-laden distinction—that between the Germanic and the Roman Catholic. Western civilization is the successor to Greece and Rome;\textsuperscript{274} yet, it is also modern, dating from the eleventh century.\textsuperscript{275} Earlier law and society in Europe were "Germanic" and "Prewestern."\textsuperscript{276} Indeed, "Germanic and other European folk law had much in common with certain Eastern legal philosophies."\textsuperscript{277} In all of these legal cultures, "the traditional, collective, and intuitive sides of life were emphasized, and the intellectual, analytical, and legal sides were fused with and subordinated to them."\textsuperscript{278} To emphasize the collectivity over the individual is to be intuitive, even "sub-conscious."\textsuperscript{279} The resulting law is "vague, confused, and impractical, technically clumsy."\textsuperscript{280} We have seen that Berman minimizes the influence of Germanic folk law on "modern" civilization. The reason is simple: Germanic folk law was "primitive."\textsuperscript{281} "[A] belief in the sacredness, or potential sacredness, of all things, such as existed among the Germanic peoples and also in Eastern Christianity, inhibits objective, skeptical, open, rational investigation."\textsuperscript{282} Vague and confused law was appropriate for "Germanic man" with "his magic and super-

\begin{itemize}
\item \textsuperscript{272} Id. at 17.
\item \textsuperscript{273} Id. at 33-34.
\item \textsuperscript{274} Id. at 2.
\item \textsuperscript{275} Id. at 4.
\item \textsuperscript{276} Id. at 3.
\item \textsuperscript{277} Id. at 78.
\item \textsuperscript{278} Id.
\item \textsuperscript{279} Id. at 77.
\item \textsuperscript{280} Id.
\item \textsuperscript{281} Id. at 76.
\item \textsuperscript{282} Id. at 158.
\end{itemize}
This 'naive and inexact' manner of expression was well suited to the needs of peoples who had not yet acquired a scientific outlook with its subject-object dualism. For the peoples of Europe in the Germanic era, life was much less compartmentalized than it later became, much more a matter of total involvement; hence poetic and symbolic speech, which is closely associated with the whole being and with the unconscious, was more appropriate than prosaic and literal language.

For a people bent on progress, however, the Christian world view was more appropriate. Western Christianity revealed that "all the ... phenomena of nature were created by God to serve man and were not haunted (as the Germanic peoples believed) by hostile supernatural deities, and that therefore it was possible for the wandering, warring tribes to settle on the land without fear." In the church's new legal system, progress was further realized. Canon law procedure was more regular than Germanic procedure ("systematized" rather than "plastic") but also more flexible ("rational" rather than "formalistic"). If these claims seem contradictory, Berman attempts to reconcile them by a scholastic maneuver: the regularity and flexibility of canon law procedure were "more modern," those of Germanic law were "more primitive."

What made canon law more modern than Germanic law was not simply the fact that its language was more prosaic; an additional advantage of that language was its privileged accessibility. Canon law "was soon being studied and discussed by educated En-
Englishmen, who must have been impressed by its intellectual superiority over the almost entirely unwritten secular law. 287 Corresponding to Berman's preference for the western over the eastern and the Christian over the Germanic, is his valorization of the written over the oral. One form that this takes is a preference for legislation over custom. "[U]pon his conversion to Christianity," Berman tells us, "a Germanic tribal leader would often promulgate a set of laws consisting largely of the customs of his people." 288 Berman celebrates a growth in the "objectivity" of secular law as a result of the spreading influence of canon law. 289 By this he means that "[t]here was a movement away from mere custom in the sense of usage . . . to a more carefully defined customary law . . . . The specificity of the norms . . . increased as they were increasingly reduced to writing." 289 Berman persistently identifies progress with accretions of writing: canon law's "principle of conscious development, of growth, of reform, was manifested concretely in the stream of legislation which proceeded from the papacy . . . . It was manifested also in the continuity of legal scholarship, as canons, glosses, decretals and other sources were collected and treatises were written." 290

Perhaps the source of this faith in the progressive influence of writing is a sense that history itself cannot take place without being recorded. "Prior to the eleventh century," Berman assures us, "one cannot speak of the Italian cities . . . in terms of their own organic development." 292 By way of illustration he recounts a series of invasions of Northern Italy, from the third to the tenth centuries, concluding that "[a]ll this is important as chronicle, and also as the history of the Lombards and of the Frankish Empire, but it hardly forms the basis of a serious history of the city of Milan." 293 Part of this conclusion is a sense that history belongs to the victors (Lombard and Frankish invaders). Berman dismisses "peasant revolts . . . loosely organized, spontaneous . . . anarchistic or communistic," as historically unimportant by comparison to

287. H. BERMAN, supra note 1, at 256.
288. Id. at 53.
289. Id. at 273-75, 303-04, 321-22, 341.
290. Id. at 341.
291. Id. at 254.
292. Id. at 386-87.
293. Id.
"the great revolutions—the great successful revolutions—of Western history ... well organized and politically sophisticated ... on whose fringes they appeared." But, part of this belief is a sense that history is written by the victors. To be "well organized and politically sophisticated" means to accept the necessity of obtaining formal recognition from ruling authorities. Because Berman associates legitimacy with literacy, he tends to assume that historical events are made by writing. Thus, the beginning of urban history is the issuing of a municipal charter.

The emphasis Berman places on writing is implicit in his periodization of European history. If Berman notices a sharp break in the eleventh century, it may be because the eleventh century witnessed a great increase in literacy. Georges Duby has shown that there is little evidence that ninth and tenth century Europe were significantly less prosperous, peaceful, orderly, or dynamic than eleventh century Europe. In fact, ninth and tenth century Europe produced little documentary evidence of any kind; that is why historians have irritably referred to these and earlier centuries as the "dark ages." Granted, such chronicles as do remain paint a dark picture. But these chronicles, of necessity, were written by clerics; and clerics—having accumulated most of the movable wealth of society—were the principle targets of the frequent raids that characterized the period. Because few laypersons were literate, any account of the feudal period that focuses on writing will inevitably evaluate events from the perspective of the church.

It is, therefore, no surprise that the subsequent "revolution" that Duby describes as "Feudal" is assumed by Berman to be "Papal." This "Papal revolution" was, above all, an act of writing:

There was no legal forum to which either the papacy or the imperial authority could take its case .... This ... was the principal revolutionary element in the situation. In 1075 Pope Gregory VII responded to it by 'looking within his own breast' and writing a document—the Dictatus Papae (Dictates of the Pope)—consisting of 27 terse propositions, apparently addressed to no one but himself .... This document was revolutionary.
Even "primitive," nonwestern revolutions apparently cannot take place without the stroke of a pen: "[Marx's] famous statement, 'Revolutions are the locomotives of history,' which was true of the West, was not true of non-Western cultures when he made it; partly because he did make it, it has since become true of some non-Western cultures."\(^9\) Berman's model of revolution—the locomotive of Western history—is dictatorial legislation.

Perhaps because of his commitment to the determinative power of writing, Berman assigns a greater role in his narrative to individuals than to social movements. In a chapter devoted to the rivalry between Henry II and Thomas a Becket, Berman tells us that "[t]he two men represented not just themselves, but two great competing forces in Western history, the ecclesiastical and the secular."\(^3\) Later, he informs us that "Henry II created the English Common Law by legislation."\(^3\) One chapter is largely devoted to "[J]ohn of Salisbury, Founder of Western Political Science."\(^3\) Despite Berman's emphasis on the democratic character of cities, he concludes that "[t]he rulers of Europe, especially the ruling authorities in the various leading commercial cities, helped to develop the system of mercantile law by codifying the commercial customs."\(^3\)

In this narrative, powerful individuals are not simply instruments of historical forces; often they make history their instrument. "In attempting to discover the causes of legal development," Berman reports, "one is aware that individual personalities may play a significant role."\(^3\) Berman obliges by offering sections entitled "The Personality of Roger II,"\(^3\) "The Personality of Henry II,"\(^3\) "The Personality of Philip Augustus,"\(^3\) and "The Personality and Vision of Frederick Barbarossa."\(^3\) "Was there something in Roger's personality," Berman muses, "that

\(^{299}\) Id. at 540.
\(^{300}\) Id. at 258.
\(^{301}\) Id. at 457.
\(^{302}\) Id. at 276.
\(^{303}\) Id. at 355.
\(^{304}\) Id. at 417.
\(^{305}\) Id.
\(^{306}\) Id. at 438.
\(^{307}\) Id. at 463.
\(^{308}\) Id. at 488.
drew him to law?" Yes, concludes the critic of nationalist historiography, "Roger's achievement, which was embodied in the Assizes of Ariano (1140), was closely related to his personality and character, and especially to the combination of his Norman, Byzantine, and possibly Arab qualities." "Like his fellow Norman, King Roger of Sicily," Berman continues, "Henry Plantagenet had great personal qualities . . . especially adapted to the development of a strong system of royal law." Philip Augustus of France "resembled other great lawmakers of his time . . . in personal traits: according to contemporaries he had great physical strength, was a lover of good cheer, wine, and women, and was an indefatigable hunter and swordsman." Frederick Barbarossa was "a man of great personal power, striking in appearance, with a fine physique and red beard . . . ." Not a sissy among these fathers of "The Western Legal Tradition": "To be a successful ruler in the Twelfth century required a strong physical constitution." Even Pope Gregory, upon retiring to his chamber to make his revolution, "was ready to exercise the enormous will and pride and personal authority for which he was notorious."

The formation of the "Western Legal Tradition" seems to be largely attributable to remarkable personalities. "Canon law and royal law, especially, had strong charismatic elements, looking to the pope or the king as the divinely appointed oracle of the law . . . ." Berman criticizes Weber's concept of "charismatic authority," but only because Weber identifies such authority as "a specifically revolutionary force," rather than a characteristic element of Western legal systems. By contrast, Berman praises "Weber's concept of routinization of charisma," for "introducing a dynamic element into what is otherwise an essentially static model." This is especially interesting in light of the fact that

309. Id. at 418.
310. Id. at 419.
311. Id. at 438.
312. Id. at 464.
313. Id. at 469.
314. Id. at 488.
315. Id. at 94.
316. Id. at 551.
317. Id. at 549.
318. Id.
319. Id. at 550.
Weber viewed the routinization of charisma as a stabilizing force, in contrast to the revolutionary energy expressed in charismatic authority. For Berman, however, progress is identified with law—accordingly, progress is the product of remarkable personalities once they have achieved authority.

The historical importance Berman accords the personalities of powerful individuals exemplifies a figure informing many of Berman's explanations and value judgments. Law and Revolution abounds in images of transcendence and hierarchy. The rational or the ideal is first distinguished from, then elevated above, and finally placed in control of, the natural or worldly. Progress is identified with the determinative power of intellectual elites.

We have seen that Berman views law as intellectually superior to custom and that their mingling debases law: where "the traditional, collective, and intuitive sides of life were emphasized . . . the intellectual, analytical and legal sides were fused with and subordinated to them." Fusion is identified with subordination. The fact that Berman opposes the individual to the collective suggests that he is concerned that immersion in the group will lower the status of an intellectual elite. This suspicion is confirmed by his assumption that mingling of the religious and the secular represents the inevitable corruption and "the subordination of the clergy." Berman's identification of community as a kind of subordination is significant in light of his tendency to describe progress in terms of vertical imagery. Consider his interpretation of the Gothic cathedral: "Perhaps the most dramatic illustration of the new sense of time, and of the future, was provided by the new Gothic architecture. The great cathedrals expressed . . . a dynamic spirit of movement upward, a sense of achievement." Such upward movement was held in check by the fusion of rational and natural, spiritual and temporal.

The sundering of these unions, conversely, permitted progress. The separation of spiritual and temporal represented the liberation of the clergy, and generated a "release of energy and

320. Id. at 78.
321. Id. at 89.
322. Id. at 92.
323. Id. at 118.
324. Id. at 93-94.
creativity analogous to a process of nuclear fission."\textsuperscript{325} One of the products of that creative outburst was that great engine of progress, science. Because of "its subject-object dualism,"\textsuperscript{326} "it was no accident that [science] emerged at the time when there was a separation between ecclesiastical and secular polities."\textsuperscript{327} Dualism made possible "the progress of science," which depended upon "dialectical reasoning from contradictory positions,"\textsuperscript{328} "and the intense effort to reconcile them by legal principles and concepts on ascending levels of generalization."\textsuperscript{329} Thus, scientific progress, dependent upon fission, proceeded along a vertical trajectory.

The pinnacle to which such science aspired was not only "truth,"\textsuperscript{330} but authority: "dialectical reasoning from contradictory positions would result in . . . authoritative declarations of the true faith."\textsuperscript{331} The product of scientific progress, then, was power—power appropriately described in vertical imagery:

> The phrases ‘old law’ and ‘new law,’ which are usually attributed to the period just after Gratian, were actually implicit in his division of the legal sources of canon law into two groups, the (old) conciliar canons and the (new) papal decretals. Gratian’s pupil Huguccio developed the doctrine that ‘a decretal prevails over a canon,’ . . . ‘according to law.’\textsuperscript{332}

In this passage, Berman characteristically sees a temporal distinction implicit in a vertical ordering; the vertical ordering here expresses not only a normative evaluation, but a recognition of power.

Altitude implies not only value for Berman, but causal force as well—the high has influence over the low. "Secular law," for example, "had the task of lifting up and transforming the secular relationships which it regulated," and did so.\textsuperscript{333} Yet, even the relatively high can be influenced by the higher still. By comparison to canon law, " [s]ecular law emerged on the ground,"\textsuperscript{334} rather than in the universities. "It was less programmatic. Partly for that

\textsuperscript{325} Id. at 88.
\textsuperscript{326} Id. at 59.
\textsuperscript{327} Id. at 158.
\textsuperscript{328} Id. at 156.
\textsuperscript{329} Id. at 157.
\textsuperscript{330} Id. at 120.
\textsuperscript{331} Id. at 152.
\textsuperscript{332} Id. at 202.
\textsuperscript{333} Id. at 532.
\textsuperscript{334} Id.
reason its growth was much less clearly marked.\textsuperscript{335} By the time university-trained jurists began to 'summarize' [it], it was already there."\textsuperscript{336} Nevertheless, "[s]ecular law was supposed to emulate the canon law" and, according to Berman, it did.\textsuperscript{337}

Recapitulating Berman's rhetoric, then, it seems that cultures in which reason and nature are fused restrain and oppress intellectual elites. The separation of reason from nature "frees" them to "progress" toward "truth." This "ascent" to "intellectual superiority" confers "authority"—power over that which is lower.

This is the relationship which Berman suggests the church envisioned between humanity and the rest of nature. The separation of spirit and nature implicit in a transcendent God and an immortal soul not only elevated "man" to moral and intellectual superiority over the rest of nature, it meant that "nature [was] created . . . to serve man . . . ."\textsuperscript{338} The church gave humanity authority over nature merely by separating the two.

Canon law, by Berman's account, gave the clergy a similar relationship to humanity:

On the one hand, the new tendency to identify the church primarily with the clergy, the 'hierarchy,' led to a sharp distinction between the clergy and the laity. On the other hand, this distinction carried the implication that the clergy were not only superior to, but responsible for, the laity. In other words, the class consciousness of the clergy was at the same time a social consciousness in the modern sense, a conscientiousness respect to the future of society.\textsuperscript{339}

This passage is the crux of Berman's argument: the separation of the ecclesiastical and the secular gave an intellectual elite authority over the rest of society, \textit{and properly so}. This is the connection between Berman's peculiar social history of feudalism and his peculiar intellectual history of scholasticism. Berman interprets social change in medieval society as the product of scholasticism because he is committed to the belief that ideas ought to rule history; he interprets scholasticism as progressive because it legitimized rule by an intellectual elite. "Western civilization" was, for

\begin{itemize}
  \item \textsuperscript{335} Perhaps Berman means that because secular law was less "programmatic" its growth was not as clearly recorded as was the growth of canon law. The word "program" is derived from the Latin word for "forward" and the Greek word for "writing."
  \item \textsuperscript{336} H. Berman, \textit{supra} note 1, at 274.
  \item \textsuperscript{337} \textit{Id.}
  \item \textsuperscript{338} \textit{Id.} at 62.
  \item \textsuperscript{339} \textit{Id.} at 109.
\end{itemize}
Berman, the time and place within which history was determined, not only by ideas, but by an elite of professional ideologists. Berman summarizes “the Western legal tradition” as follows:

In the West . . . law is considered to have a character of its own, a certain relative autonomy [from “religion, politics, morality and custom”]. Connected with the sharpness of this distinction is the fact that the administration of legal institutions, in the Western legal tradition, is entrusted to a special corps of people . . . . The legal professionals . . . are specially trained in a discrete body of higher learning identified as legal learning, with its own professional literature and its own professional schools or other places of training. The body of legal learning in which the legal specialists are trained [is] . . . a legal science, a meta-law, by which [law] can be both analyzed and evaluated . . . . [Accordingly] [t]he growth of law is thought to have an internal logic . . . an inner necessity . . . [t]he historicity of law is linked with the concept of its supremacy over the political authorities.\textsuperscript{340}

The determination of history by ideas is represented, for Berman, by the political authority of law; yet, he sees that authority as dependent upon the autonomy of law from politics, an autonomy which in turn rests upon the intellectual isolation of the law school. Law is a form of politics, but must remain autonomous from politics; legal scholarship is crucial to western culture, but must remain isolated from it. How does Berman resolve this apparent contradiction? He resorts to a scholastic maneuver: The relationship of law to politics is that of the spiritual to the temporal, of essence to existence. In \textit{Law and Revolution}, Berman defends the insulation of legal scholarship and education from all other cultural and political influences, by identifying the law school as the \textit{incarnation} of all of western civilization.

VIII. \textsc{Scholasticism, Historicism, and Progress: A Concluding Inquisition}

\textit{"This ascent will be betrayed to Gravity. But the Rocket engine, the deep cry of combustion that jars the soul, promises escape. The victim, in bondage to falling, rises on a promise, a prophecy, of Escape . . . ."}\textsuperscript{341}

This Essay has been about one book, two times, and two ideas. The book is \textit{Law and Revolution}, in which Harold Berman attempts to characterize the relationship between medieval and

\textsuperscript{340} \textit{Id.} at 8-9.
\textsuperscript{341} T. Pynchon, \textit{supra} note 5, at 758.
modern legal thought. The relationship he sees between the thought of these two times is fundamentally one of identity. This Essay, too, is about the relationship between medieval and modern legal thought. It reflects an attempt to shed some light on this question by explaining why one of our most eminent legal scholars identifies medieval legal thought with our own. The explanation offered turns on the relationship between two ideas: hierarchical authority and social change. Medieval legal scholars, viewing the two as incompatible, rejected social change in favor of hierarchical authority. Berman, viewing the two as compatible, feels no need to reject social change in order to preserve hierarchical authority. What permits Berman to identify with medieval legal scholars is a shared enthusiasm for hierarchical authority. What distinguishes Berman's thought—and modern legal thought generally—from medieval legal thought, is the faith that hierarchical authority and social change are compatible. This faith is otherwise known as the idea of progress.

In this Section I will describe and criticize the idea of progress that I believe animates much modern legal scholarship, particularly in Harold Berman's field of comparative law. My criticism is at once intellectual and political. My intellectual objection to the idea of progress is that it deemphasizes the conflict entailed by social change. My political objection is that, as a result of this deemphasis, it disguises the costs of social changes that do occur and obscures the need for social changes that do not. While the idea of progress may be no more appealing than the more static conception of hierarchical authority preferred by the scholastics, the two are distinct. Because Berman's tendency to confuse the two is not unique, it is worth exploring the sources of his confusion. Accordingly, the final paragraphs of this Essay will address that task.

The idea of progress that we have inherited from the nineteenth century reflects our culture's effort to synthesize two quite incompatible value frameworks. One of those frameworks—developed by classical thinkers, reinterpreted and rigidified by medieval Christianity, and carried forward into the modern age by the secular natural law tradition—we may call essentialism. Its basic value postulate is that only that which is universal and eternal is real, true, and good. This postulate is so basic to our experience of valuing that it is difficult to talk coherently
about values if we abandon it. Unless it can be a criterion of comparison—a tool for "treating like cases alike"—we are reluctant to call a passion a value. Nevertheless, essentialism has always been undermined by the experience of valuing the ephemeral and the particular, and it has increasingly been challenged intellectually.

One particularly ominous challenge to essentialism that arose during the nineteenth century was evolutionism. While evolutionism originated in the realm of social theory, it developed scientific authority in the field of biology. The "Theory of Evolution" mocked the fundamental values of essentialism—eternity, stability, and universality—by showing that survival over time required adaptation and specialization. Evolutionism accorded with much nineteenth century social theory—and much eleventh century social theory, particularly that of the monks—in identifying isolation with purity. J. Burrow has shown that enthusiasts of progress, who anticipated the realization of universal values over time, tended to feel ambivalently toward evolutionism.

One of the arenas of nineteenth century social thought in which this tension appeared was the incipient discipline of comparative law. A major figure in the development of comparative law scholarship in English was Henry Sumner Maine. Chiefly remembered for his thesis that western legal systems had gradually replaced jural relations based on status with relations based on contract, Maine was an ardent enthusiast of progress. Believing that different societies had much to learn from one another, he saw the comparative study of legal systems as a contribution to legal progress. Hence, where evolutionists of his era saw isolation as a prerequisite to development, Maine warned against the "morbid growth of isolation." Where evolutionists equated development with divergence from a norm, Maine equated development with convergence upon truth. Where evolutionists saw development as an unconscious, natural process, Maine saw development

342. See J. Burrow, Evolutionism in Social Theory (1966); R. Hofstadter, Social Darwinism in American Thought (1944). For an early example, see De Sade, Philosophy of the Boudoir, in The Marquis De Sade (P. Dinnage ed. 1953).
345. J. Burrow, supra note 341, at 163.
as a conscious process of civilization. Yet, Maine hardly saw civilization as universal or all inclusive. Like Berman, he confined his comparative impulses to the western or "Aryan" tradition. Even within this tradition, civilization was differentially distributed. Maine was inclined to view non-European legal systems as residues of a more primitive stage of development, petrified evidence of early Germanic customary law. Two historical events had initiated civilization, and their memory divided the civilized world from the uncivilized. One of these was the codification of the Roman Law, making possible conscious progress. The other was the incarnation. Even though Christianity and the Roman Law were culturally specific, Maine saw them as exclusive avenues to civilization. From this followed the familiar justification of the British Empire as the white man's burden, and in fact, much of Maine's civilizing research in comparative law was conducted as a colonial official.

It will be apparent to the reader that many of the themes of Maine's thought are reflected in Law and Revolution. Berman's conception of development reveals the same tension between particularity and universality that Maine's did. According to Berman, a certain measure of isolation is a prerequisite to legal progress. The western legal tradition has developed "organically," that is, autonomously. In particular, it has developed in isolation from politics and from the nonwestern cultures currently threatening it. This organic development became possible as a result of the supercession of Germanic customary law by written Roman law. This path to progress, moreover, was prepared by Christianity's triumph over paganism.

If Berman's image of civilization is as ethnocentric as Maine's, it is also as cosmopolitan. Berman laments modern nationalism, and sees nationalist historiography as a threat to the western legal tradition. For Berman, as for Maine, the function of comparative law is not simply to contrast different legal systems, but to discover values common to a group of "related" legal systems.

346. Id. at 161.
347. Id. at 170-75.
348. Id. at 165-68.
349. Id. at 159.
350. Id. at 170-75.
351. H. BERMAN, supra note 1, at 17-18.
Each of the legal systems may then be evaluated, criticized, and improved by reference to the values "common" to all. For such progress to take place, the legal systems must be sufficiently different, so that some are subject to correction. Accordingly, some criterion other than similarity must be employed in order to determine which legal systems are "related." For comparative law to be practiced in the service of "progress," some transnational, extralegal framework of values must be invoked. Thus, reference will be made to Christianity or western civilization—"cultures" neither historically specific nor universal.

The ambivalence between planetary and parochial perspectives manifested in Law and Revolution is typical of comparative law scholarship, particularly in the field of law and development. Such ambivalence is inherent, however, in any form of social inquiry animated by the idea of progress. The idea of progress involves a basic conflict between historicism and natural law. Historicism posits that human nature is historically determined. To the extent that human nature is viewed as a source of value, historicism treats value as historically relative, that is, different for different people. This obviously implies that people living in different times are not bound by the same standards and obligations. But historicism has a further implication. It implies that even people alive at the same time are bound by different values if they have different histories.

Historicism has been bedeviled from its eighteenth century inception, by the recognition that people living in different cultures have different historical experience. Recently, anthropologists have been struck by the fact that different cultures experience history—perhaps "the same" events—in different ways. For this reason, historicism tends to push one in the direction of cultural relativism—seeing human nature and human value as culturally determined. In other words, historicism implies that human nature cannot be a source of objective value. This conclu-


sion directly challenges a modern form of essentialist thought commonly called natural law. Partisans of natural law assume that human nature has been fixed for all time and that it is the same for all cultures. Accordingly, they believe that human nature is a source of objective value. From this perspective, normative variety among cultures is an index of normative failure—of deviation from human nature.

The tension between historicism and natural law causes problems for the idea of progress. Progress seems to partake of features of both ideas, notwithstanding their contradiction. It offends essentialists by assuming that history is a source of value. This means not only that moral standards change over time, but that moral standards improve or ascend with time. Thus, if earlier people cannot be expected to behave like later people, later people can be expected to behave better than earlier people. The assumption that later people can be compared favorably to earlier people seems to run against the grain of historicism, by implying the existence of an objective standard of value by which all people can be compared. The historicist will wonder if this objective standard of value is derived from a fixed human nature.

The progressive may answer that human nature is different at different times, but improves because historical experience is cumulative. Therefore, later people are everything that earlier people are, but more. They have "more" historical experience and thus "more value." Alternatively, the progressive will argue that human nature remains the same but that knowledge of human nature increases with historical experience. People with more historical experience, later people, know more about human nature; therefore, their values are better informed, or "better," for short. Not that earlier people are "valueless" or "no good." They have some knowledge of human nature—and their values reflect this—just not very much.

There are thus historicist and natural law variants of the idea of progress. Both variants, however, are faced with the same difficulty. The progressive natural lawyer—progressive lawyer for short—\textsuperscript{355} is committed to the idea that historical experience

\textsuperscript{355} I use this phrase because the alternative, "the progressive naturalist," would sound too much like a believer in biological evolution, which acknowledges that the natures of species change.
ANGELS AND INFIDELS

yields progressively more knowledge of human nature. As knowledge of human nature increases, ignorance of human nature decreases. Thus, as the histories of different cultures progress they become similar. Later people are more alike than earlier people, as well as better, and similarity is better than difference. The progressive variant of natural law denies that the historical experiences of different cultures are, ultimately, different. At the same time, it condemns observed difference. It offers no criterion by which to judge other cultures except human nature, of which everyone is ignorant. However, since each culture’s values are based on partial knowledge of human nature, progressive lawyering justifies each culture in condemning the other, even though from the standpoint of natural law, none is better than any other. Natural lawyers sacrifice their image of all humanity joined by a common nature, when they worship at the altar of progress.

What of the progressive historicists? The progressive historicists believe that historical experience “improves” values. But by what criterion? If the same criterion is employed for evaluating each culture, then the historicists must assume, like the progressive lawyers, that all cultures develop similarly. The historicists must give up their cultural relativism in defense of the idea of progress. Perhaps they will respond that each culture “improves” on its own terms. This would have to mean that earlier people would applaud the doings of later people, or else the same criteria are not being employed. The historicists, however, will view this as unlikely because those doddering old early people lack the experience and the maturity to appreciate their children’s refinements. Indeed, the historicists are committed to the idea that earlier and later people are not members of the same culture. The historicists must give up their historical, as well as their cultural, relativism in order to adhere to the idea of progress.

The idea of progress, in sum, blinds historicists to cultural diversity, and turns natural lawyers into nationalists. The great difficulty that the idea of progress poses for historicists lies in explaining how any change can be counted as an improvement. Historicists have difficulty identifying a normative vantage point from which change can be evaluated. Natural lawyers, however, have no difficulty identifying such a vantage point—their headaches begin when they try to fit the data to their normative criteria. Thus, the great difficulty that the idea of progress poses for
natural lawyers lies in explaining how all change can be worthy of praise.

Both difficulties stem from the same basic problem—the idea of progress combines incompatible ideas. On the one hand, progress means social change. The experience of social change shows people that past social arrangements were contingent. Often the difficulties encountered in changing society make people think that the new social arrangements are contingent as well. Social change involves disagreement, struggle, nerve, and risk. The desire for social change is subjective; it is not shared by everyone. On the other hand, progress means the right outcome. It is objectively correct, necessary, and foreordained. Even though "progress" reveals the contingency of past social arrangements, it implies the necessity of current social arrangements. The idea of progress depends on the contradictory assumptions that value is determined by history and that history is determined by value. The first assumption is the condition for the historicist's assent; the second is the condition for the natural lawyer's.

Thus, the real problem with the idea of progress is that it tries to make social change appear objectively good and necessary. In so doing it effaces the political, "subjective" quality of social change. "Progress" is normally conceived of as growth—it preserves everything that went before and adds to it. It is dependent on the illusion that "progressive" social change can be achieved without sacrificing what is changed. It is a sort of Pareto optimality standard for evaluating social change, excluding any social change that makes anyone worse off. Hence, the idea of progress has two unfortunate effects, one blinding and one paralyzing. The blinding effect is at work whenever social change is praised as "progressive." The implication is that no one could ob-

356. For an appealing expression of this conception of progress see R. COLLINGWOOD, supra note 183, at 321-34; for a less appealing expression of it see R. NISBET, HISTORY OF THE IDEA OF PROGRESS 101-03 (1980).

357. Pareto optimality is a standard of economic efficiency favored by scholars in the Law and Economics movement. According to these scholars, a group of rational utility maximizers, participating in an unregulated market involving no transaction costs, will arrive at a stable distribution of resources when no party can be made better off without some other party being made worse off. The allocation of resources under these conditions is optimally efficient—although the optimal distribution of resources might be different if the initial distribution were different. This conception of efficiency is attributed to the Italian social theorist Vilfredo Pareto. See R. POSNER, ECONOMIC ANALYSIS OF LAW 34-39 (1977); Mishan, Pareto Optimality and the Law, 19 OXFORD ECON. PAPER 255 (1967).
ject—at least not without being terribly selfish. The invocation of progress blinds one to the fact that social change, indeed social choice, is always the product of conflict, which necessarily entails people getting hurt. The flip side of this blinding effect is its paralyzing effect. The paralyzing effect of the idea of progress can be deployed whenever social change is proposed by the disadvantaged. Since reducing their disadvantage necessitates reducing somebody's advantage, such social change fails to meet the Pareto optimality criterion of the idea of progress. Characterizing social change as resource redistribution places it outside the discourse of legitimacy defined by the idea of progress. It is "backbiting"; "complaining" instead of "contributing." "Progress" evokes images of a harmonious world—a great and lazy river. Only a fool would resist it; those who would strike their own course are reminded, gently, by the river itself, which way the river flows.

One of the ways in which the idea of progress denies the conflict inherent in social change is by claiming to keep faith with the past. Harold Berman's claim that the modern idea of progress is an outgrowth of medieval scholasticism represents an example of this stratagem. Thus, even though Berman's commitment to the idea of progress is what distinguishes his thought from medieval scholasticism, it is also what impels his embrace of the past.

Because Berman's choice of ancestry is a particularly awkward one for an enthusiast of progress, it requires some explanation. Part of this explanation must be the political one already suggested: scholasticism advocated and facilitated the increasing institutionalization of the church; Berman's identification with this process suggests that he looks fondly upon institutional authority.

This explanation is supported by the fact that Berman is not the only admirer of institutional authority to associate scholasticism with progress. A similar claim has been made by the neo-conservative social theorist Robert Nisbet. Remarkably, he bases his conclusions on some of the same texts—Lovejoy, Kantorowicz—in which we found evidence that scholasticism concerned itself primarily with the preservation of vertical structures of authority. This is not surprising in light of Nisbet's identification of institutional authority with progress: "The major periods of efflorescence, growth, and diffusion of the idea of progress

358. R. Nisbet, supra note 356, at 88-93.
have been periods in which popular trust in reigning institutions . . . has been high.” Like Berman, Nisbet sees the close of the second millenium as a time of catastrophic decline in the authority of institutions, with apocalyptic overtones, especially for the west: “The west is . . . no longer either feared or respected, much less regarded as a model, in the communist and most of the third world countries . . . . Most devastating, however, is the signal decline in America and Europe themselves of faith in the value and promise of Western civilization.” Berman and Nisbet share a sense that western intellectuals have betrayed the institutions that have made their civilization great. Berman’s association of progress with scholasticism can be partially explained by his association of progress with hierarchical institutions. What requires further explanation, however, is his especially close association of progress with the particular institution of the medieval church.

This further aspect of Berman’s association of scholasticism with progress, his affinity for the medieval church, must be explained in terms of the influence of one of his early teachers, Eugen Rosenstock-Huessy. Rosenstock-Huessy, a religious visionary, perceived the idea of progress in medieval scholasticism. Yet, an examination of Rosenstock-Huessy’s thought will reveal a conception of progress purged of any trace of historicism. Rosenstock-Huessy found scholasticism quite familiar and contemporary because he shared with the scholastics the allegorical sense of time in which “all times are present.” To find a warrant for social change in scholastic thought—whether of the twelfth century or the twentieth—requires more “vision” than this reader possesses. I must conclude that Berman’s admirable effort to keep faith with a teacher has distorted his image of the past. The sad result is that he has been untrue, not only to his own historicism, but to the historian’s task.

Any modern conception of progress, even Berman’s, contains an irreducibly historicist element. To expect progress, even the natural lawyer must believe that historical experience is a source of knowledge about human nature. This the scholastics surely did.

359. Id. at 332.  
360. Id. at 332-33.  
361. Id. at 3, 317-51.  
362. Id. at 331.  
363. See E. KANTOROWICZ, supra note 185 (quoting Dante).
not believe. They thought that the principal source of knowledge about human nature was authoritative scripture.

How can Berman equate the scholastic posture towards history with his own? How can Berman attribute a belief in progress to the scholastics? The answer to these questions is that Berman's conception of progress commits him not only to some historicist premises, but to some essentialist ones as well. These essentialist beliefs form the basis of his felt affinity with the scholastics. Berman argues that the scholastics viewed scripture as history, but his rhetoric reveals his own profound discomfort with historicism:

[C]ontemporary European cases were too close to home to be analyzed objectively in terms of political theory; they could only be analyzed objectively in terms of legal theory, because there the terms of analysis were narrower and were ultimately limited by textual authorities. Contemporary cases were also too complicated; that is, too much was known about them, and hence they were much more difficult to simplify. Examples from antiquity were, for John of Salisbury and his contemporaries, rather like examples from other cultures used by modern political theorists.  

For the eminent comparative law scholar, the comparison is hardly accidental. Berman imagines that John of Salisbury sought the explanation for the emerging state in scripture for the same reason that he himself seeks the essence of modern civilization in medieval scholasticism. In each case, an ancient text gains authority because it is so remote from experience. The implication is that involvement in history precludes knowledge; conversely, political claims about one's own society can appear objective if made in reference to an ancient one. If, however, one believes that human nature remains the same, claims about the remote past continue to apply. The great power of the idea of progress in legitimating the present lies in its promise of channeling change, rather than preventing it. Its adherents share with scholasticism the faith that the future is contained in—and contained by—the past.

In a sense, Berman is right: for the scholastics, scripture and history were inseparable. This was not because scripture was an account of a remote time, but because scripture was a description of the structure of everyday experience. The scholastics did adhere to one half of the idea of progress—the assumption that his-

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364. H. Berman, supra note 1, at 285-86.
tory was determined by values—even as they rejected the other—that values were determined by history. For them, events were structured by the narrative of the gospel. However, the gospel was not the narrative of history; history was not a linear movement from a human nature debased by sin to one redeemed by grace. Rather, the gospel was the structure of all experience and of all authoritative texts. All experience—and all scripture—revealed the dual relationship between humanity and God, what Lovejoy has called, “the way up” and “the way down.”

This understanding of events can only be equated with the idea of progress if one means something very different by the term “progress” than it has come to mean. To reconcile the idea of progress with an allegorical, rather than an historical, sense of time one would have to reorient progress as a vertical, rather than a temporal, figure. Progress is used in this sense when one refers to the “progress of the soul.”

This is the conception of progress advanced by Eugen Rosenstock-Huessy, the undergraduate teacher who, by Berman’s own testimony, inspired Law and Revolution almost fifty years ago. Rosenstock-Huessy, described in an introduction to one of his books as a “visionary,” wrote on history, religion, law, and language. A German of Jewish extraction, he fled the Nazis in 1933, and in 1935, was appointed Professor of Social Philosophy at Dartmouth. Berman attributes to Rosenstock-Huessy “[t]he concept of the Papal Revolution...as the first of the great revolutions of Western history.” It is to Rosenstock-Huessy, also, that we may attribute Berman’s conclusion that the scholastics pursued progress. Yet, for Rosenstock-Huessy, it was not the scholastics that invented the idea of progress. The inventor of progress was He that had no need of it:

The idea of progress was not invented in 1789 or 1492. Jesus promised that his followers would do greater works than he had done (Jn. 14:12). The Church fathers championed progress as the Christian view in opposition to the pagan belief in cycles of fate, with the golden age lying in the past; they proclaimed the resurrection of life and love after and through suffering,

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365. A. Lovejoy, supra note 184, at 83-84.
366. H. Berman, supra note 1, at 636.
368. H. Berman, supra note 1, at 574-75.
whereby God himself made progress in the hearts of the faithful.\textsuperscript{369}

For Rosenstock-Huessy, progress unifies, whereas "[p]aganism . . . meant—and means—disunity, dividedness of mankind."\textsuperscript{370} Because it is opposed by paganism, however, progress is not possible for all of humanity:

If I wish to understand the progress from the feudal state to the modern state, it is no use to look at the states of Ethiopia, Nepal, Paraguay, and Liberia although they all call themselves modern. I must know from another source that though they are given the privileges of modern states, they really do not disclose this progress to me. They are mere applications of a principle established in the center of modern history . . . .\textsuperscript{371}

The "other source" is Christianity: for Rosenstock-Huessy, progress is not only limited to the western world, but contained by Christianity. Hence, those in the west who identify progress with the advance of science and technology are mistaken. Progress is properly identified with the pilgrim's "progress of the soul . . ."\textsuperscript{372} This means that progress is equally available to any Christian at any time—it is not dependent on the advance of society as a whole. Yet, it also means that progress is constantly available to society as a whole, at any time. Rosenstock-Huessy's commitment to essentialism makes him the first to acknowledge that progress presupposes the persistence of a single standard of value over time:

While 'evolution' makes us lift ourselves by our own bootstraps, progress makes us stay more and more in the palm of our maker, and makes fewer and fewer fall less and less out of his hand . . . . The greatest height of our destiny is already ours when we use the term progress, as we otherwise could not measure the individual event by a standard.\textsuperscript{373}

That same essentialism implies that nothing really changes. Rosenstock-Huessy agrees with Dante that all events are present at one time: "what has happened and everything that is going to happen are all of a piece, and neither is complete without the other."\textsuperscript{374}

Given the simultaneous presence of all events, the progress of

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{369} E. ROSENSTOCK-HUESSY, supra note 367, at 75.
\item\textsuperscript{370} Id. at 62-63.
\item\textsuperscript{371} Id. at 78.
\item\textsuperscript{372} Id. at 77.
\item\textsuperscript{373} Id. at 82-83.
\item\textsuperscript{374} Id. at 71.
\end{enumerate}
\end{footnotesize}
the soul and the progress of humanity are indistinguishable. The
great events of Christian eschatology are all experienced by every
good Christian. Similarly, all events are simply manifestations of a
divine plan, foreordained and encoded in the human soul. Thus,
for Rosenstock-Huessy, there is a necessary and exact correpon-
dence between the path of the Christian soul and the path of
human history. The path of the soul is defined by the sacraments:

The Papal Revolution is successful, in so far as it gives to everybody's life
some tinge of a spiritual mission as a pilgrim. The seven sacraments, from
baptism to extreme unction, were established in the twelfth century, creat-
ing a psychic biography, adding to every "body's" physical experience the
"soul's" psychic pilgrimage.\textsuperscript{375}

This pilgrimage was not horizontal but vertical. For Rosen-
stock-Huessy, as for Berman, progress is a movement upwards,
symbolized by the Gothic cathedral: "The Papal Revolution goes
against the laws of gravity. The vaults of a Gothic cathedral are an
inverted ship."\textsuperscript{376} The Gothic cathedral, according to Rosenstock-
Huuss, was a diagrammatic representation of the progress of the
soul.

The new 'theologians,' . . . declared the bible to be down below, in the crypt
of the Church, as its foundation; their new science, however, had to erect up
from the ground the eight stories of theological thinking. The walls of the
new cathedral of theology were to reflect the mysteries of the sacraments. In
this programme, Hugo de St. Victor in Paris pictured the future architec-
ture of the Gothic cathedral.\textsuperscript{377}

In thus diagramming the progress of the soul, Hugo of St. Victor
recapitulated the biblical eschatology. But, according to Rosen-
stock-Huessy, he did much more: he determined all subsequent
human history.

Hugo de St. Victor 'overroofed' the crypt of the Bible by his idea of the
eight Orders of the Sacraments of Divinity which correspond exactly to the
ideologies of Revolutions:

\begin{center}
\begin{tabular}{l}
1. Creator \hspace{1cm} \hfill 2. Creation of Matter \hspace{1cm} \hfill 3. Freedom of Will and Fall of Man (Adam) \\
\hline
\hline
1917 \hfill 1789
\end{tabular}
\end{center}

\textsuperscript{375} E. Rosenstock-Huessy, Out of Revolution: Autobiography of Western Man
544-45 (1938).
\textsuperscript{376} Id. at 544.
\textsuperscript{377} Id. at 547.
The making of such a chart reflects a sense of time which is allegorical rather than historical. Only someone who shared the essentialism of the scholastics could look at history in quite this way. Rosenstock-Huessy identifies the scholastic sense of time with his own because they are, in fact, identical. That Berman equates Rosenstock-Huessy's conception of progress with his own suggests the extent to which any partisan of progress is drawn to the essentialist premises of scholasticism. This is a matter not only of style, but of politics. Rosenstock-Huessy commends scholasticism for trying "to unify and Christianize the people of its time because they were slipping back into paganism." For reasons of his own, Rosenstock-Huessy preferred to regard twentieth century practitioners of genocide as pagan, rather than Christian. Nevertheless, the eleventh and twelfth century "pagans" Rosenstock-Huessy refers to were groups attempting to live, work, and worship in self-governing communities of their own definition.

Of course, to concern oneself with the customs and aspirations of ordinary people is to step outside the scholastic world view. We have only come to appreciate the importance of medieval communities organized outside of the feudal and clerical hierarchies, by consulting the work of leading social historians, a practice that Rosenstock-Huessy condemns:

History is back to the chronicles since it became 'social' history: it narrates mere sequences of events and customs; there are no true periods. Conscientiousness forbids to have ever a fully new story begin. And none is fulfilled.

378. Id. at 547-48.
379. Id. at 548.
380. "The future of Christianity and the future in Christianity are both denied by millions today. That Nazis, Fascists, Communists and Japanese deny the Christian orientation of history is ominous . . ." E. ROSENSTOCK-HUESSY, supra note 369, at 73.

Whenever modern planning has seceded from Christianity, war and slavery have seemed quite normal to the secular mind. So today, economic order without respect for the human soul will mean, and already means, class war, racism, and the return of bloody sacrifices. The latter, prophesied by the neo-paganism of D.H. Lawrence, has been carried out by Hitler and Stalin.

Historians who insist on being merely scientific do not ask and cannot ask how faith makes an epoch... for this we learn exclusively from our own faith in the future.831

Rosenstock-Huessy correctly identifies eschatology of the sort practiced by Berman as incompatible with conscientious social history.

Still, there is much to be said for eschatology. Practiced in the proper spirit, it is easy and fun. Let us regard Rosenstock-Huessy’s chart as a kind of puzzle, and try to fill in the blank.832 The chart consists of two numbered lists of events. The events on the left side are the moments of Christian eschatology, beginning the instant before creation and ending with the last judgment. The corresponding numbers increase in this same order. The events on the right side are “revolutions” in Western history, beginning with the first celebration of All Soul’s Day around a thousand years after the birth of Christ, and ending with a predicted revolution that occurs at some point later than the Russian revolution of 1917. These revolutions are indicated by the dates at which they occurred. Accordingly, the numbers corresponding to these revolutions increase in the order in which those events have been occurring. The striking thing about the chart is that the numbers on the left side and the numbers on the right side move in opposite directions. As we move up the chart, we move forward in temporal terms, but backward in eschatological terms. We move backward from a last judgment in which the Creator determines the value and the fate of everything that has ever existed, to a universe in which nothing but He exists. What human event could bring about such a state of affairs? And when will it occur? Quoting Norman O. Brown, Berman reminds us that “[t]he Christian prayer is for the end of the world: that it may come quickly.

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831. E. ROSENSTOCK-HUESSY, supra note 369, at 87. Berman himself is of two minds about social history, respectful when referring to “leading social and economic historians,” Marc Bloch and Georges Duby by name, H. BERMAN, supra note 1, at 297, condescending when referring to unnamed “Marxist historians.” Id. at 295. He characterizes the entire concept of “feudalism” as a marxist misnomer, id. at 540, 295, contending that the term “feudal” should be limited to legal relations between lords and vassals, notwithstanding the fact that Bloch—himself no Marxist—rejected this idiosyncratically British use of the term. Id. at 295-96. See Postan, Introduction to M. BLOCH, supra note 14; Hilton, supra note 64, at 30. Berman identifies Anderson and Hilton as “more sophisticated Marxist historians,” H. BERMAN, supra note 1, at 543, 635, and cites them approvingly, id. at 317, 323, 325, 326, although he also criticizes some of Anderson’s conclusions. Id. at 325, 328, 544.

832. See supra text accompanying note 378.
The aim is to bring this world to an end; the only question is how. A mistake here might prove quite costly.\textsuperscript{383} It may take a hard rain indeed, to bring the intellectual tradition likened by Berman to nuclear fission, at the knell of the millenium, to its appointed end.

\textsuperscript{383} H. Berman, \textit{supra} note 1, at 27.