2005

Book Review: Ferrari & Durham, Law and Religion in Post-Communist Europe

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Recommended Citation
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David Fergusson, a member of the Church of Scotland, is a Professor of Divinity at the University of Edinburgh. *Church, State and Civil Society* is a revised edition of the 2001 Bampton Lectures delivered at the University Church of St. Mary the Virgin in Oxford. Its major thesis is that theology should move from what is, perhaps, an over-pre-occupation with church-state issues (itself a kind of residue from a medieval and early modern period where church and state interpenetrated) to a more differentiated approach which understands the church primarily in relation to a range of civil institutions within civil society. Churches can continue to be socially significant without aspiring to function as national or state institutions. Clearly, Fergusson is not enamored of established churches.

In the new secular and religious pluralism which characterizes modern societies, some theologians have seen the stark choices facing the church variations on either withdrawal (following the Anabaptist tradition of the church) or assimilation (what Gibson Winter once referred to as “the suburban captivity of the churches”). For Fergusson, whether one proceeds from scripture or theological argument, churches have an obligation to promote the well-being of the societies in which they are situated. They also retain important public functions. He sums up his themes:

> the separate though related functions under divine providence of church and state; the promotion of the common good by both ecclesial and civil bodies; the necessary interaction of the church with the institutions of civil society; the derivation of political authority from God and its necessary acknowledgement by the consent of those living under its jurisdiction; the dignity of political office; and the recurring injunction to seek the welfare of the city and to offer it critical support. (116)

Assimilation threatens a loss of evangelical and catholic identity; withdrawal evades an ineluctable duty to seek the welfare of the city under fidelity to God.

The initial chapter, “The politics of scripture,” reminds us that early Christianity’s conception of the church in society was rooted in a long Jewish tradition of being a diaspora. Even in Babylon, Jews
struggled both to maintain their religious identity yet still accommodate the concerns of the state and civil society. For Fergusson, a key text is *Jeremiah* 29:7 with its insistence that the exiles "seek the welfare of the city where I have sent you into exile and pray to the Lord on its behalf, for in its welfare you will find your welfare." (7) Early Christianity, unlike some Jewish sects of Jesus’ time, opted neither for complete withdrawal (e.g. The Essenes), nor for political resistance or complete assimilation. It recognized secular authority as deriving from God, mandating a real, if provisional, loyalty to Roman authority. *Romans* 13 minimally presents a low-key, qualified yet still positive account of the capacity of the civic realm to fit into the purposes of God. To be sure, the politics of Jesus (looking to a different kind of polity which reflects the eschatological Kingdom of God) serves to challenge current arrangements and demands, in its controversial assertion of the right to articulate its different vision for social life—even if it can be embodied, in anticipation, only in the church. The politics of Jesus never lends itself easily to Christianity’s serving as “the civil religion” of any state. (10)

A chapter which deals with theological traditions concerning church-state-civil society reminds us that there is no pervasively coherent Christian account of citizenship. *Philippians* 3:20 may speak of “an alien citizenship,” (24) but it would be preferable to speak of a stratified citizenship or one subordinated to the primacy of God’s rule rather than a simply alien identity. Some early Christian theologians (e.g. Augustine) and some of the Reformers (e.g. Luther) tended, following *Romans* 13, to limit the state to exercising its restraining ordinance (to ward off sin and evil). In our own time, many Evangelicals continue this tradition. Yet in Aquinas and Calvin, there is a wider sense of the capacity of the state to promote social goods and in its own real and limited way to anticipate divine rule. Aquinas’ notion of the common good expresses an underlying conviction that the end of each person can be fulfilled only where a range of social goods is realized. The church is no longer to be related only to the monarch (whose legitimate rule is indeed subject to his promoting the common good) but to a web of social groups, organizations and institutions. In Thomist thought, the state has no monopoly in defining or enacting the common good. For his part, Calvin was interested not only in serving God in the secular realm (Luther’s legacy) but actually transforming that realm in a more Godly direction. Unlike the Anabaptists who saw the social role of the church as primarily a Godly counter-cultural witness, Calvin, like Thomas, sought a social theology which conceived of the
rule of God not merely through ecclesial forms.

A chapter on the crises of liberalism serves as a kind of excursus. Fergusson agrees with critics who reject the liberal thesis (as found in the work of Rorty, Rawls, Dworkin, Berlin) that the state must be neutral about all particular conceptions of the good and only pursue procedural fairness. In point of fact, every state faces decisions which privilege one variant of the good over rivals. Liberalism, moreover, relies on what has come to be called "the unencumbered self" which makes any shared or common goods impossible \textit{a priori}. (59) Liberal individualism downplays the role of embedded selves or any legitimate claims to group rights or representation. As a result, it creates a kind of "establishment" which privatizes, trivializes or marginalizes the religious voice. (61) Religious people, in this view, are always constrained to make any public case in an alien language. Fergusson turns to more communitarian voices, such as Charles Taylor, to argue instead for a politics of recognition where one acknowledges the reality of communal identities. In place of a mere trading and trimming (using a utilitarian calculus or seeking a lowest common denominator), the church (constrained to speak and act in the public realm in fidelity to its beliefs) can form alliances and make common cause with other voices and perspectives. As in social Catholicism, Fergusson opts for a multilingual moral fluency which allows religious voices to construe their proposals for civic policy in both theological and secular warrants.

Drawing on the writings of Erasmus and the Geneva Reformer Sebastian Castellio, Fergusson argues that mere tolerance, in itself, is never enough—not itself a pursuit of the common good. But a theological case for religious toleration can be construed around the following major motifs: the example of Christ and his followers; the legitimate limits of state power in enacting the common good; the irrationality of coercion; the sanctity of each person's sincere conscience; the need for peace, social cohesion and the promotion of civil conversation among those who differ in order to approach a greater approximation to God's truth (on the indubitable assumption that God is at work in other religions and even in secular movements).

Fergusson claims in an argument akin to Tocqueville's that the main sociological function of the churches in service of state and society consists in moral formation. Congregations serve as the schools of virtue (including virtues necessary for civil flourishing) for any democratic polity needs. Fergusson's argument here resonates closely to that of Stanley Hauerwas but he seems firmer than Hauerwas on the ineluctable duty of seeking the welfare of the city and on the positive
contribution that secular authority can make in approximating and embodying elements of the Kingdom of God. Unlike Hauerwas, Fergusson has a notion not only of discipleship but citizenship. Not by chance, then, in a chapter contrasting the Barmen Declaration and the Vatican II document on “The Church in the Modern World,” Fergusson veers closer to the Catholic case based on subsidiarity, solidarity and the common good.

For this reviewer, the thesis that the churches can continue to play a public role, not through the state or nation but through a ramified web of civic organizations within civil society, is quite persuasive. I would have liked, however, some specific appeal to case studies of how this actually works (e.g. by looking at the role of churches in community organizing or interfaith and religious groups in social movements of reform). I would have also liked a chapter explicitly delimiting a Christian theory of citizenship. This learned and readable book, however, is more a theological account of how, eschewing both withdrawal or accommodation, and, without compromising its integrity, the church can and must (with a theological account of that must) not only work with others for the welfare of the city but also bring religious concepts such as forgiveness and reconciliation, respect and true dialogue to the secular realm.

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In the last decade, American constitutional jurisprudence has become increasingly fractured and fractious. Principles that have been mainstays of constitutional law for half a century or more have been cast into doubt by a new generation of judges, who have undertaken the project of revamping virtually every aspect of constitutional law. Of all the areas of federal constitutional law that have been cast into flux by the changing composition of the federal judiciary, the doctrine regarding the relationship between church and state has become the subject of some of the most contentious battles. It is also one of the areas most prone to an impending radical transformation. The country is poised on the brink of a brave new world in the constitutional law of church and state, and the general public has not even begun to understand the potential consequences of the transition from the old world to the new.

Ronald Flowers has entered this volatile field with a new edition of a book that has long been one of the best generalist overviews of this area of constitutional law. Professor Flowers is an emeritus professor of religion at Texas Christian University, and has published extensively in this area. He is from the old school of church-state jurisprudence, which is to say that he still takes the Madisonian separationist ideal seriously. This puts him at odds with the new wave of judges and scholars, who are systematically dismantling the wall that Madison, Jefferson, and their successors patiently erected over two centuries.

Flowers’s perspective is both the main strength and the main weakness of his book. It is a strength in that Flowers conscientiously reminds the reader of the various ways in which the ideal of religious liberty has always been tied closely to the prevalence of religious diversity within the framework of a secular government. He also reminds the reader of how tortuous the process of achieving that ideal has been. On the other hand, Flowers’s perspective is a weakness in that the structure and details of the book are dictated by the separationist themes that have dominated the Court’s church-state decisions during the last fifty years, but are now being eclipsed by systematic (and often wrong-headed) challenges from the ideological right.
At several points in his narrative, Flowers explicitly recognizes the clouds on the horizon, but he cannot quite bring himself to confront directly the prospect that in many areas of church-state doctrine, the Court may soon abandon the traditional Madisonian notion of religious liberty in favor of a regime defined by religious majoritarianism. Under this new regime, the government will be allowed to embrace the symbols and ideals of the religious majority and finance overtly religious activity with government funds. Flowers repeatedly criticizes some of the implications of the new religious majoritarianism, and harshly critiques the cases that serve as the foundation of the new regime, but he does not engage in the debate at a deeper, theoretical level. If the Madisonian project is going to survive the current attacks, Flowers and other defenders of the separationist ideal must confront in a sophisticated way the deeply problematic theories of democracy and religious liberty that lie behind the new interpretations of the First Amendment.

It is on the level of the specific and the concrete that Professor Flowers's book is most useful. In this edition of his book, as in the first edition, Flowers comprehensively surveys the many different variations on the theme of church and state. He includes a very good brief synopsis of the domestic history of church and state, both before and after the adoption of the Constitution. In the sections dealing with the modern era, he covers the full range of both Establishment and Free Exercise Clause decisions, as well as related statutes such as the Religious Freedom Restoration Act. The book is intended to appeal to a nonspecialist audience, so he also includes a brief description of the Supreme Court's operation and its role in adjudicating church-state issues. In sum, Professor Flowers's treatment of the entire range of church-state topics is sufficiently sophisticated to appeal to lawyers and academics in subjects relating to law and religion, as well as members of the general public.

Professor Flowers's discussion of specific cases is divided into four broad subject areas. He begins by addressing cases involving the free exercise of religion. He then proceeds to discuss three different types of Establishment Clause cases, involving the state financing of religious activity, the injection of religion into public schools, and the governmental endorsement of religion outside the school context. In each of these areas, Professor Flowers provides a very helpful overview of the relevant case law. Readers of the entire text will come away with a broad understanding of the trajectory of constitutional law relating to church and state, and also will have enough information to provide a
starting point for further research on specific cases.

The only quibble that can reasonably be mustered about Professor Flowers's treatment of the specific cases is the sharp disjunction between his discussion of the traditional cases and the more recent cases that announce the new era in church-state case law. In his discussion of the free exercise cases, for example, Professor Flowers offers a brief summary of all the most important cases from the early part of the twentieth century, then shifts gears abruptly with a discussion of the Supreme Court's 1990 decision in Employment Division of Oregon v. Smith.1

As Professor Flowers notes, Smith marks a major turning point in the Court's treatment of free exercise issues. In Smith, the Court abandoned the requirement that the government must demonstrate a compelling interest whenever it substantially burdens religious activity, in favor of a standard that allows the government to impose laws of general applicability on everyone in society, including those acting on the basis of religious convictions. Professor Flowers is not happy with this turn of affairs, labeling the Smith decision "disastrous" (44) and noting that the abandonment of the compelling interest analysis dealt religious freedom "a virtually devastating blow." (50)

Professor Flowers's unhappiness is understandable, and is shared by many people (including representatives of many traditional religious groups). But there are three problems with Professor Flowers's discussion of Smith. First, his discussion of the pre-Smith cases neglects to highlight the inconsistencies between the Court's articulation of a very protective standard and its frequent refusal to enforce that standard in particular cases. In theory, Smith was a major deviation from the norm; in practice, it may not significantly have changed the way the courts actually resolve church-state disputes.

Second, Professor Flowers treats the pre-Smith standard as an unfettered victory for religious liberty, although several of the cases Flowers discusses raise troubling questions of religious favoritism that potentially conflict with the Establishment Clause dictate that the government must remain neutral with regard to religion. It is not altogether clear, for example, that it was a victory for religious liberty when the Supreme Court allowed members of the Amish community to deny their children formal education beyond junior high school. From the perspective of at least the more adventurous and intellectually curious children, their liberty might have been fostered by permitting

them to consider religious and secular perspectives other than the one their parents preferred.

The third problem with Professor Flowers’s account of the free exercise cases is his failure to link *Smith* with the recent attacks on the separation principle in the Establishment Clause area. Ironically, the same group of conservative judges who are eliminating protections of religious practitioners from state regulation are also in favor of allowing the political and religious majority to use their influence over government to advance their own religious ideals. These two trends—reducing the protections of both the Free Exercise and Establishment Clauses—are part of the same agenda of religious majoritarianism, and the book’s criticisms of the modern Court would be more effective if these linkages were made more explicitly.

The quibbles with Professor Flowers’s treatment of the three main areas of Establishment Clause jurisprudence are largely a function of the timing of the book’s publication. This book is being published before the counterrevolution in Establishment Clause jurisprudence is complete, so the book sometimes takes on a schizophrenic tone—treating the remaining areas of strongly separationist doctrine as if they were consistent with those areas that now reflect the rising ideology of religious majoritarianism. In the section dealing with government financing of religion, for example, the final five pages deal with three recent cases in which the Court has permitted both direct and indirect government aid to religious schools. But this discussion comes after a twenty-four page description of cases in which such aid was largely prohibited or strictly limited. Although Professor Flowers acknowledges the shift in the Court’s approach, it will not be immediately evident to the lay reader that the recent cases have in effect overruled much of the case law carefully described in the first part of the chapter. Nor will it be immediately evident to those not already familiar with the area that the new cases are based on a radically different view of religious liberty than the fifty years of jurisprudence that preceded them.

This disjunction between the old and the new is less evident in the other two Establishment Clause sections. The section on government endorsement of religion outside the school context suffers from the fact that the book does not include the newest cases on the Ten Commandments. The discussion in this section will probably age quickly in light of Justice O’Connor’s departure from the Court. Justice O’Connor was the fifth vote in favor of retaining fairly substantial limits on the government’s authority to endorse religious ideas and symbols.
Her replacement by another conservative will undoubtedly lead to major changes in this area of Establishment Clause doctrine.

The section dealing with religion in public school, on the other hand, is the strongest Establishment Clause section, mostly because this is the area in which the Court has itself been the most consistent. This section is also least likely to be outdated quickly. In recent years, Justice Kennedy has refused to vote with the other conservatives to remove Establishment Clause protections in the school cases, so Justice O'Connor's departure from the Court will not have the same dramatic effect in the school cases as it will in other areas of Establishment Clause doctrine.

None of the criticisms stated above should in any way detract from the many positive attributes of Professor Flowers's book. It borders on the churlish to criticize a book that manages so successfully to summarize such a complex and contradictory area of law for such a wide audience. Unfortunately, we will probably be living in a very different country five years from now than the one described in *That Godless Court?* Thus, the story Professor Flowers has told about the Establishment Clause may be eclipsed very quickly as the new appointees to the Supreme Court begin adjudicating Establishment Clause cases.

Viewed pessimistically, the country we are moving toward will be one with less religious liberty, escalating religious divisiveness, and a greatly increased infusion of the political majority's religious values into law, especially at local and state levels in religiously homogenous areas of the country. The Madisonian fortress Flowers is defending has already been breached. When the time comes for a third edition of this necessary book, Professor Flowers will need to take a different tack than that taken in the present edition. By that point the counterrevolution in Religion Clause jurisprudence will be nearing its apogee, and it will be necessary for Professor Flowers and others who still cherish the legacy of Madison and Jefferson to aggressively—and even caustically—defend the cause of religious liberty against those who are moving just as aggressively to renounce it.

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The subtitle of Jordan’s book clues the reader into his two principal arguments, namely that the current debates about same-sex marriage are rampant with confusion not only about the “tradition”—the history and theology—of Christian marriage, but also with confusion among gays and lesbians about what kind(s) of queer unions, if any, are desirable or fitting. Jordan’s argument is a complex one. In fact, if one reads the first few chapters and then jumps to the Epilogue, the first line will seem confusing: “Christian churches should bless same-sex unions.” (206) For didn’t the first chapters, one after another, inveigh against the rush among gays and lesbians to ape commercially created, theologically empty other-sex marriage rituals masquerading as Christian? But Jordan’s Epilogue continues:

They [Christians] should do it [recognize same-sex marriage] as a matter of justice, after reading the signs of the times, with prayerful enthusiasm for the Gospel, and by way of securing some credible future for their marriage theology.

For Jordan, the current controversy over same-sex unions offers the Christian churches an opportunity to deal with the dysfunctional, unjust, and fundamentally un-Christian set of codes, customs and ceremonies that we call Christian marriage today. Just as lesbians in the women’s movement were often the radicals pushing the movement to re-examine unequal gender norms, so marginalized gays and lesbians who demand Christian marriage make crystal clear the bankruptcy of the tradition and its exclusions.

Christian theologians, beginning with the New Testament, argued that the principal justification of marriage was the avoidance of sin: those who were not morally strong enough to be celibate needed a morally acceptable sexual outlet. Jordan demonstrates that bishops and theologians continuously intervened for over a millennium and a half in marital sex to regulate when couples could have sex, in what positions, and with what intentions, because the true Christian ideal was celibacy. For Christians, concessions to sexual desire should be minimized as much as possible. This, Jordan reminds us, is the historical Christian tradition that is absent in the accounts of those Christians who would
“protect” Christianity from queer corruption and save the “traditional Christian family tradition.” He unmasks the de-sexualizing of marriage in Christianity, and suggests that the (sinful) sex that was crushed out of marriage was then projected onto adulterers and fornicators, the most demonized of whom were queers, who represented and still represent unregulated and undomesticated sex. Much of the horror in those who oppose queer unions is precisely a fear of untamed sex. More precisely, theirs is a fear of losing the justification for distinguishing good sex and bad sex. Labeling all marital sex acceptable and all non-marital sex immoral makes no demands on people to develop a conscience. It does not require us to examine the sex itself—how consensual, how affectionate, how respectful it is. To marry gays and lesbians might mean that we could no longer decide sexual morality based solely on the legal status of persons, but might have to examine all sexual relationships for violence, abuse and lack of respect.

Jordan realizes that in the last few hundred years Christianity has been moving away from this celibate ideal (though this shift did not begin as early as many Protestants assume). There is a certain historical irony at work here, in that during the many centuries when depopulation was a constant local and regional threat due to famines, wars and epidemics, the Christian ideal was celibacy, and sex in marriage, while required to be aimed at procreation, was limited in numerous ways. During the modern demographic transition, after death rates around the world decreased due to improved sanitation and epidemic control and birth rates took decades (South America) to centuries (Europe and the U.S.) longer to drop, population densities exploded. Due to a different set of new conditions during this period of population explosion, Christian churches ended both their regulation of marital sex and their penalties for non-marital sex. It was only in the mid-twentieth century, faced with a fait accompli among members, that churches began approving various forms of contraception. Given this history, there is no basis for the arguments that marriage is centered on procreation, or that the establishment of families is the foundation of the church itself. On the contrary, the Christian church was, for most of its history, a theological alternative to the natural family in which all the members were brothers and sisters of the same Almighty Father, and younger siblings of Jesus himself.

At least half of Blessing Same-Sex Unions concerns the debates within gay and lesbian communities, which Jordan describes as constituting a broad range, from those who buy into the entire contemporary other-sex wedding package—from wedding planners to
permanent vows—to those who reject any form of stable unions, whether permanent or not, as aping other-sex norms and customs. Jordan’s critique of contemporary U.S. wedding customs is acute. Anyone who has put on one of these affairs, for themselves or their children, will be embarrassed to realize in Jordan’s analysis just how much they had been brainwashed by the commercialized “romance” of weddings, even without the wedding planners Jordan so ridicules.

Jordan leaves the reader convinced that the issue before the Christian churches is not whether to admit gay and lesbian couples to the ranks of those sanctified in holy matrimony. Rather, the issue is one of seriously considering the nature and meaning of marriage itself. What is it for? How desirable are children within marriage? How does marriage—if it does—sanctify us? Is it possible/desirable for marriage to be permanent? Is it necessary for marriage to be sexually exclusive? We should look at the marriages around us—the many marriages without children, the many that are not sexually exclusive, and the many that end in divorce. Jordan insists that when we connect this reality to the realization that the norms so long lifted up for Christian marriage were designed by churchmen whose ultimate goal in regulating and limiting sex was to strengthen Christians so that sex and marriage were not necessary, we will realize the need to rethink marriage. That rethinking, he suggests, will involve returning to the Gospel for the vision of the kind of persons that Christians should be. It will require consulting sacramental theology and ritual studies, and it will need to examine at great depth the variety in human sexual desire and human sexual relationships. And it will need to include some comedic satire.

Jordan does not pretend to resolve all of the very real issues lurking under the debates on same-sex unions. Throughout the book, he periodically frames parts of his argument as a comedy of manners, as in his treatment of weddings and wedding planners, or his treatment of the relationship of camp to liturgy. Some of his last words in the book revisit this theme:

Can comic opera possibly be enough? No other genre will do, either for queer romance or Christian marriage. Camp is the condition of queer critique—and of Christian liturgy. Every serious theology laughs at itself. (207)

This reminder is important. Any new theology of marriage will be a kind of floating island, subject to transformation from a huge variety of variables. Theologies of marriage are not alone in this, of course. Christians have been long accustomed to thinking that there was in the Bible, in nature, or in the historical tradition of the church, a firm
foundation for norms of all kinds which only needed to be tweaked a tiny bit in order to “fit” with the demands of the times. Many Christians in the pews are desperately holding on to the remnants of this assumption, which has been under attack by scholarship, both religious and secular, during the last decades. Jordan reminds us that on marriage and sex, the Bible gives little guidance, that historical ecclesial tradition on sex/marriage has been implicitly disavowed by the churches for a century or more, and that human sexual desire seems similarly subject to construction and reconstruction. He similarly wants us to acknowledge that there is a huge range in sexual relationships that seem effective in creating interlocking friendships and communities in which persons speak each other into free, just and loving persons. While this view may be disconcerting for those seeking bedrock, it may harbor good news for those who have been persecuted under the traditional norms.

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What is the new relationship between church and state in Central and Eastern Europe? Law and Religion in Post-Communist Europe gives an intelligent and measured answer in seventeen carefully-wrought country studies. (Russia receives two chapters; there are also introductory and concluding chapters). Laws on Religion and the State in Post-Communist Europe supplements the first volume, reproducing and analyzing many of the key national laws. The two volumes are the initial members in a series, Law and Religion Studies, published under the auspices of the European Consortium for Church and State Research.

As the editors, Silvio Ferrari of the University of Milan and W. Cole Durham, Jr. of Brigham Young University, point out in their Preface (5-6):

after decades of official atheism suddenly religion has become a factor to be seriously taken into account in any field of the public domain. Every country in the former Communist bloc has experienced major changes in the laws governing religion and the state.

The introductory chapter, by Giovanni Barberini of the University of Perugia, sets the stage by putting the new developments in church/state relations in the general context of the process of democratization of Central and Eastern Europe. (7-21) Barberini submits that moving Central and Eastern Europe to a "standard of broad religious freedoms" is "a transition that is all but complete." (7) Dating the beginning of the transition to 1975 and the Helsinki Act, he gives principal credit to the

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1. Except for one mention of the second volume below, all page references, quotations, and remarks relate to the first volume.
Vatican for insisting during the negotiations that the Act's embrace of human rights include the freedom of conscience, religion, and belief. Barberini calls the Vatican's insistence "an extremely important moment because it helped to set in motion the evolution that progressively affected all of Europe that lived under a Marxist-Leninist ideology." (8)

After reminding us that neither history nor Marxism-Leninism treated the region's different countries uniformly, Barberini provides a useful summary comparison of constitutional norms, registration and regulatory norms and agreements relating to church/state relations.

It is unlikely that many readers will approach the two books as a single "read." More likely, the two volumes will be useful as a storehouse, valuable either as a source for individual country studies or for researching a specific aspect of church/state relations. The country studies are, with one exception, ordered alphabetically: Albania, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Ukraine, and the former German Democratic Republic.

Let me look in detail at just one of the country studies, Latvia, to give the reader an idea of what will be found here. The Latvian chapter, (141-175) entitled "Church and State in Latvia," by Ringolds Balodis of the University of Latvia, is structured in categories similar to those used in the other country studies. The Latvian chapter, along with the others, provides a very valuable compendium:

1. Historical Background. (141-149) Latvia became a state only in 1918. The region it now encompasses was conquered and inhabited by many peoples and for a long time has been multi-confessional. The Latvian Baltic folk religion, Dievturiba, was a form of Indo-European paganism, comparable to the mythology of ancient Greece and Rome. German crusaders introduced first Catholicism and then Lutheranism to the territory. Neighboring Russia brought the Orthodox faith. After centuries of German domination, Sweden conquered Riga and the surrounding area in 1621, banning Catholicism and enforcing Protestantism. The southern region of Latgale, however, fell to Poland which converted their subject population to Catholicism. When Russia conquered Latvian territory in the 18th century, it tried, mostly unsuccessfully, to impose Russian Orthodoxy. In 1918, the Tsarist Empire fell and Latvia became a state, conglomerating the Lutheran provinces, Vidzeme, Kurzeme, and Zemgale, and Catholic Latgale. In its first independent period, 1918-39, Latvia was committed to religious tolerance. Communist Russian occupation (1945-90), though hostile to religion, did not extinguish Latvia's multi-confessional tradition. In
2001, in a population of less than three million, Latvia counted three large denominations: Roman Catholics (500,000), Lutherans (350,000), and Orthodox (250,000), and twenty-nine smaller denominations of which the three largest were: Old Believers (70,000), Jews (15,000), and Pentecostals (10,000).


In 2000, as provided by the amended law, the Latvian Cabinet of Ministers created what to the reader seems to be a rather powerful Board of Religious Affairs (the "Board") which, in the words of Professor Balodis, "implements state policy, coordinates religious affairs, manages issues relating to the church-state relationship and evaluates the effectiveness of regulations affecting religious practices." (149) The Board may make proposals for protecting religious human rights guaranteed under the Latvian Constitution and pursuant to Latvia's international treaty obligations. The Board is subject to the supervision of the Ministry of Justice. Religious institutions are not required to register with the Board, but they may only take advantage of legal rights and protections if they do so. The Board has the authority to reject a registration application and has the power to ask the courts to restrain religious organizations if they fail to coordinate their activities with municipalities or to follow proper procedures in organizing public events. Latvian law prohibits public broadcasting of political or religious advertisements, except to give notice of the place and time of religious events. There are also legal prohibitions on infringing religious feelings, inciting religious hatred, and disturbing religious rituals.

3. Freedom of Religion and Separation of Church and State. (153-155) At the founding of the Latvian state in 1918, the national inclination was to protect religious freedom, making it one of "the most advanced in Europe" at the time. (153) Nowadays, reports Professor Balodis, "religious freedom in Latvia is largely a reality—not just an empty expression in the law." (153) However, in his view, "one of the
major abuses of religious freedom stems from the principle, ‘one church for one confession.’” (153) The Board rejects the registration of alternative religious associations within what it deems a single faith e.g. of Lutheran, Orthodox, Old Believer and Whitsunday congregations.

4. Legal Status of Religious Organizations. (156-158) The Board is required to process registration applications within one month. If they are approved, churches become not-for-profit organizations. “[E]veryone in Latvia has the right to join a congregation.” (157) All registered churches must adopt statutes providing, for example, a distinctive name, a commitment to follow Latvian law, and regular procedures for membership and finance. Although outsiders sometimes criticize the regulatory system imposed by the Board, Professor Balodis supports the system: “Registration helps the state fulfill its basic responsibilities in safeguarding religious freedoms.” (158)

5. Financing of Churches. (158-161) Pursuant to the principles of the Latvian Constitution, church funds are to be kept separate from state financing. Churches may raise money and own property. Real property owned by a church and used for religious purposes is free of property tax. Companies and individuals contributing to a church are eligible for tax relief. Tax relief may be denied by the Board if a church violates the law. Churches must submit an annual financial report to the Board.

6. Religion and the Mass Media. (161-163) Religious literature may be distributed only by religious organizations. In Riga, Latvia’s capital and largest city, there are two Lutheran bookstores, a Baptist bookstore, and an inter-confessional bookstore. There are some thirty-nine registered religious periodicals. There is no restriction on the right of persons or organizations to propagate their religious views. However, publication of views of religious superiority or intolerance are prohibited.

7. Activities of Religious Organizations at Public Institutions. (163-165) An Advisory Council of the Traditional Confessions (the “Advisory Council”) was established by the Latvian Ministry of Justice in 1996. “The Advisory Council’s purpose is to facilitate consensus and understanding among representatives of different churches and followers of different religious convictions.” (163) Although the Advisory Council has no formal authority, it may make non-binding recommendations.

The Board, not the Advisory Council, is responsible for appointing public chaplains. These include chaplains in the armed forces and at public facilities such as airports and ports. Prison chaplains, however, are appointed by the Prison Administration, which is part of the Ministry
of the Interior rather than the Ministry of Justice, which is responsible for the Board and the Advisory Council.

8. Labor Law. (165-167) Churches are subject to the same labor law as any Latvian company. Accordingly, it is difficult to dismiss religious employees. Refusing to recognize the distinctiveness of religious employment, Latvian courts have held, respecting the dismissal of church employees on grounds of “un-belief,” that “reference to religious conviction was false and could not justify non-compliance with the labor law” and that “the Latvian Labor Law provided for no exceptions with respect to religious organizations.” (166) Professor Balodis remarks that such decisions would not have been countenanced in the earlier period of Latvian independence and have “adversely affect[ed] the morale of the religious community.” (166)

9. Religious Education in Schools. (167-169) Religious or ethical instruction was compulsory in schools in Latvia’s first independent period, but all religious instruction in schools was prohibited during Communist Russian occupation (1945-90). In 1990, immediately following independence, Latvia again permitted religious instruction in schools. Nowadays, it is available in state schools so long as at least ten students wish it, but only for five faiths: Catholic, Lutheran, Orthodox, Old Believer, and Baptist. Other religious groups, however, are demanding that the government provide religious instruction. These include the Muslims, Jews, Latvian pagans, and Methodists. Professor Balodis believes that religious instruction in the state schools is actually a violation of the principle of the separation of Church and State in the Latvian Constitution; it is “a poorly considered state policy . . .” (169)

10. The Faculty of Theology at the State University. (170-171) The Faculty of Theology, was effectively muted during the Soviet occupation. It has been reborn and is now “a multi-confessional institution providing the highest level of theological education.” (171)

11. Matrimonial and Family Law. (171-172) During the Tsarist Empire before 1918, there was no centralized marriage system, but the Orthodox, Lutheran, and Catholic churches could all register marriages. In Latvia’s first independent period, ten churches were authorized to register marriages; all marriages had to be reported to the state. Since 1993, Latvian law has permitted marriages to be registered either at the Marriage Registry Office or with one of eight denominations: Lutheran, Catholic, Orthodox, Old Believer, Methodist, Baptist, Seventh Day Adventist, or Jewish. Nowadays, however, only one-third of registered marriages are recorded in churches. Moreover, most marriages, as in Scandinavia, are not registered at all in either a state office or a church
but are simply consensual.

12. Conclusion: Future Perspective. (173-175) Many issues remain. Should persons be permitted not to fulfill military duties because of religious convictions? Should religious holidays be granted to members of the Orthodox and Old Believer churches? Do Latvia's laws about religious instruction violate the European Convention on Human Rights? Does religious education in state schools violate the Latvian Constitution? Should the Latvian labor law be reformed to take special account of church employment? Similar useful detail and helpful commentary are to be found throughout these two volumes, which are a wonderful and thoughtful collection of seventeen country studies. I could readily see using this book as a text in a course on religion and the state/civil society.

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Jeffry H. Morrison, Assistant Professor of Government at Regent University, argues in this brief, abundantly-documented work, that John Witherspoon (1723-94), Presbyterian pastor and president of the College of New Jersey (Princeton University), though long ignored by historians and Americans, has a legitimate claim to recognition as a founder of the republic, indeed, as "a quintessential American founder." (128)

Witherspoon was born and raised in Scotland, educated at the University of Edinburgh at the height of the Scottish Enlightenment, and called to the presidency of the College of New Jersey in 1768 where he served until his death. Perhaps best known as the only clergyman to sign the Declaration of Independence, he sat in the provincial and state legislatures of New Jersey, in the Continental and Confederation Congresses, and in the New Jersey Convention that ratified the U.S. Constitution.

As the foremost pastor in one of the most influential churches in colonial America, Witherspoon was one of the most notable clergymen of his era. His writings were far-ranging, including works in natural philosophy (science), political economy, and moral philosophy. Witherspoon linked private morality and public order, and he encouraged pastors to watch over the personal lives of their congregants for the public good. True religion, he held, contributed to virtue, and virtue provided the foundation for a strong republic. While he insisted that the state should not coerce individuals on matters of religion, magistrates should, he believed, encourage religion, even to the point of providing for public worship.

The College of New Jersey under Witherspoon was a nursery of future political leaders including President Madison, Vice President Burr, twenty-eight U.S. senators, forty-nine U.S. representatives, and three Supreme Court justices. In his lectures on moral philosophy, Witherspoon became the chief conveyor to America of the moral system of Francis Hutcheson and the Scottish Common Sense Realism of Thomas Reid and Dugald Stewart. This Scottish moral philosophy and Common Sense epistemology would, thanks in large part to Princeton graduates, come to dominate nineteenth century American culture.
An early and enthusiastic supporter of American independence, Witherspoon was named a delegate to the Second Continental Congress in June 1776. He suggested that America was ordained by God for a special mission and that American independence was God's plan for the colonies. These religious claims were buttressed with the more secular argument that independence reflected a natural progression in political and economic development for America.

Witherspoon supported a permanent confederacy to promote defense and ensure sectional and commercial harmony. Though he had no direct role in writing the federal Constitution, he supported its ratification and influenced James Madison and Alexander Hamilton, the primary authors of The Federalist Papers. He was a significant player in the formation of a national Presbyterian Church (with structural similarities to the federal government), and was elected as the first moderator of the General Assembly of that church in 1789.

In his adoption of Lockean social compact theory, Scottish philosophy, Reformed Protestantism, and, to a lesser degree, classical republicanism, Witherspoon reflected various intellectual influences on the founding of America. For that reason, Morrison suggests, Witherspoon provides a unique representation of "the American mind at the founding[.]" (127)

Morrison does an admirable job of showing the connections between Witherspoon's theological and philosophical commitments and his political convictions. He seems, however, more at home when he is discussing political rather than religious history. The claim, for example, that "New Jersey was not easily identifiable with the religious zeal that ignited the First Great Awakening in Massachusetts and Connecticut" (47) would surprise Presbyterians, located primarily in the Middle colonies, who divided in the 1740s over issues surrounding the Great Awakening.

While Witherspoon's importance in religious and educational circles has long been acknowledged, his significance as a founder of the republic, as Morrison contends, has not been emphasized. His influence, both as a major voice at critical junctures in the revolutionary era and through those who studied under him, does merit his inclusion as one (among many) founders of the republic. Morrison, however, rides his thesis too hard in trying to elevate Witherspoon in the constellation of the country's founders. While he was clearly a noteworthy individual, Morrison's claim that Witherspoon was a "quintessential American
founder" begins to strain. Even so, this is a useful study of the political influence of a very significant eighteenth century Presbyterian clergymen.

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Developments in biotechnology continue to prompt a range of social concerns, and careful reflection on the social regulation of biotechnology is still very much needed. Further, for those of us who believe that religion has a place in the public square, reflection guided or influenced by particular faith traditions holds considerable interest. For these reasons, I turned to *The Christian Religion and Biotechnology* with anticipation. For the reasons given below, I cannot wholeheartedly recommend this book, but I applaud the author for taking on a difficult task in a complex field.

A focus on Christianity, as opposed to a range of religious perspectives, is clear from the title. In the introduction, Smith notes that his focus is on the Roman Catholic tradition. However, it is not entirely clear how that tradition shapes the analysis. Smith reviews papal encyclicals and other pronouncements relevant to particular topics, but his conclusions seem to reflect a commitment to some form of teleology close to utilitarianism. For example, he states that evaluation of cases or issues "can be undertaken by a template shaped by a balancing of costs versus benefit." (37)

Concerning the relationship between religion and developments in science and technology, Lisa Sowle Cahill has recently identified two general postures:

While some thinkers are influenced by their settings to be more concerned about the integrity of their shaping traditions and values, and to resist what they perceive as threatening cultural trends, others are more concerned about adequacy to contemporary experience and challenges and welcome innovative practices.¹

Judging by this book, Smith belongs in the latter category. One of his overarching themes is how to render a pre-modern world view relevant to the present. Smith identifies traditional ethical norms of fairness, justice, love, and promotion of the integrity of the human person as useful touchstones in framing guidelines, and he suggests that the aim of

minimizing or ameliorating suffering unites religion and medical science.

Background chapters on the roles of law and religion in the "Age of Biotechnology" are divided into short sections, in many cases no more than two to three paragraphs in length. These chapters attempt to capture quite a spectrum of material. The chapter on law, for example, covers everything from the role of bioethicists as expert witnesses, the general purposes of law, and the utility of a Biological Science Court to weird adventures in cryobiology and cloning from the pages of the National Enquirer and Sun. Unfortunately, the rapid review of much disparate material gives these chapters a choppy quality.

Later chapters address specific areas of biotechnology, in particular, technologically assisted reproduction, genetic engineering, and the use of medical technology to postpone or cause death. Smith seems generally to side with proponents of biotechnology, although at times he recommends legal limits that he views as necessary to preserve important social institutions (e.g. legal restrictions on unmarried women’s access to new reproductive technologies to preserve the concept of marriage and the institution of the family). The following statement is illustrative of Smith’s overarching perspective on genetic engineering: "If actions are undertaken and performed with the goal of minimizing human suffering and maximizing the social good, then the noble integrity of evolution and genetic progress will be preserved." (96) His discussion of eugenics, in particular, exudes confidence in science-driven "positive" eugenics, that is, the improvement of the species through persuading people to make particular choices rather than through coercion. No consideration of racist ideology clouds a description of the history of such programs in the United States that begins:

The noble ideals of positive eugenic programs sought to encourage those with what were perceived as socially beneficial traits to consider basic eugenic principles when choosing a marriage partner and deciding family size. (151)

My reading of the work of Paul Lombardo and others has made me a skeptic, but no doubt Smith is not alone in his optimism.²

In several respects, this volume would have benefited from more thorough editing. First, the experience of this reader would have been greatly enhanced had the introduction or the background chapters been focused on a clear presentation of a framework that would then guide

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² Scott Christianson, Bad Seed or Bad Science?, N.Y. Times B9 (Feb. 8, 2003).
and give coherence to the discussion in the chapters focused on specific aspects of biotechnology. Some of the elements of such a framework can be discerned: the need for a better informed public and for specialized courts to address legal issues related to science and technology; a cost-benefit ethic that also somehow incorporates norms of love, justice, and human dignity; and the benefits of excavating the common foundations for religion and biomedical science as a basis for mutual understanding. But these elements are not systematically developed and integrated into a meaningful whole.

Second, in at least two instances, substantial portions of the text are repeated nearly verbatim (14, 15, 66-68, 93-94), typographical errors are not infrequent, and some of the statements are confusing or misleading. For example, the Transgenic Animal Patent Reform Act is described as passing in 1988, and some of the provisions of this “law” are then described. (91) In fact, although the bill passed the House, it did not pass the Senate, so it never became law. Elsewhere the author refers to Louise Brown’s “extracorporeal birth” (versus conception). (93)

Finally, parts of the book would have benefited from updating. For example, one section concludes with a statement that initial clinical trials of gene therapy “will focus” on treatment of adenosine deaminase (ADA) deficiency and metastatic melanoma. The citation is to an article from 1985. There is no mention of the first gene therapy trial in 1990, involving patients with ADA. There is also no mention of the subsequent experience with gene therapy research, including the death of Jesse Gelsinger in 1999, an event of enormous importance not only for gene therapy but also for the entire field of biotechnology. While biotechnology is a moving target and any account is bound to become dated in some respects shortly after publication, these omissions are surprising in a volume with a publication date of 2005.

In sum, through the lens of both law and religion, Smith addresses a broad range of phenomena. Indeed, the true target of his examination appears to be what he describes as the core concern of bioethics: “the technology of control of man’s body, his mind and quality of life.” (2) This large ambition separates The Christian Religion and Biotechnology from accounts that do no more than itemize technologies or regulatory approaches and their respective pros and cons. It is to be hoped that
other scholars exploring the nexus of religion, law, and biotechnology will emulate Smith in this respect.

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Don’t be put off by the prosaic title of this book. It’s the kind of label university presses like and academic professors propose so that their works will be adopted for course use. And this is altogether reasonable. But Mohammed Abu-Nimer’s title does not begin to indicate the rewards of this treasure house of research and wisdom. In fact, I have added it to a list that the Center for the Study of Islam and Democracy in Washington, DC, is recommending to the Undersecretary of State for Public Diplomacy to be translated into Arabic, Persian, Urdu and other major languages of the Muslim world. It is that good and that important. There is simply no other work that combines a profound treatment of the fundamental human values in Islam, as conceived by the Prophet Muhammad and found in the Koran and traditions of the Prophet, and the art and science of nonviolent peace building and conflict resolution practice in Muslim societies.

Abu-Nimer tells us his goal early on.

The use of the sacred scriptures in this study is mainly intended to support the assumption that Islam is a lived religion and tradition that promotes peace building and the nonviolent settlement of conflicts. I will endeavor to show how such practices can be extended further in modern Islamic culture. Neither defensive, apologist, nor proselytizing Islamic faith, this study seeks to actively promote peace-building and nonviolence strategies and values rooted in indigenous Islamic cultural and religious contexts, focusing on the identification of Islamic values, rituals, stories, and worldviews. (3)

As this review is being written, violent Muslim demonstrations have been taking place in Muslim and European countries to protest the publication in Danish and other European newspapers of cartoons caricaturing the Prophet. Mobs have burned foreign embassies and commercial buildings and police have killed more than a handful of demonstrators. It’s hard to imagine Muslim nonviolence these days. But Abu-Nimer explains in detail what Muslims have to work with by drawing on their religious values and culture, even though he admits that they lack comprehensive knowledge of those values and the ability to
interpret sacred texts that support these values.

Abu-Nimer makes extensive use of Abdulaziz Sachedina’s *The Islamic Roots of Democratic Pluralism,*¹ which has emerged as a classic analysis of the human values in the Koran and early traditions of the Prophet. He cites Sachedina saying that:

> if Muslims were made aware of the centrality of Koranic teachings about religious and cultural pluralism as a divinely ordained principle of peaceful coexistence among human societies, then they would spurn violence in challenging their repressive and grossly inefficient governments. (20)

But one has to deal with the issue of *Jihad* today and the variety of its interpretations. Some more conservative writers believe that Islam is inherently violent, and not at all susceptible to exhortation to nonviolent resolution of political conflict. The writings of the late Sayyid Qutb, himself tortured in Egyptian jails, called for violence against Arab regimes that he wrote could no longer be considered Muslim because of their use of violence against their own citizens. Osama Bin Laden may not have been tortured by the Saudi authorities, but he engaged in violence enthusiastically against the Soviet forces in Afghanistan in the 1980s with weapons and support equally enthusiastically supplied by the U.S. and its allies. Ayman al-Zawahiri, the Egyptian physician and alleged number two to Bin Laden, was again beaten continuously by his Egyptians jailers. Zawahiri was the founder of Egyptian Islamic Jihad which he merged with Bin Laden’s al-Qaeda. The use of revolutionary violence is the heart and soul of these movements.

But these doctrines are not rooted in Islam. Certainly, the reality of human recourse to violence and warfare was recognized by the early Muslims. Pacifism was not an acceptable ideology. Abu-Nimer cites Abdullah Yusif Ali’s commentary on Koranic verses about the use of violence and war.

> War is permissible in self-defense, and under well-defined limits. When undertaken, it must be pushed with vigour (but not relentlessly), but only to restore peace and freedom of worship of Allah. In any case, strict limits must not be transgressed: women, children, old and infirm men should not be molested, nor trees and crops cut down, nor peace withheld when the enemy comes to terms[]. (28)

Another aspect of reality, however, was that the founding philosophy of Islamic warfare, specifically, for defense of the community, was over

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the years more broadly interpreted. As political leaders pushed the boundaries of the community—the Ummah—legal scholars found ways to justify what was essentially imperial expansion of Islam, if often with the support and even collusion of populations who despised their rulers.

The preoccupation of rulers and especially scholars in Islam was not with war but with the pursuit of justice, an essential element of the nonviolent pursuit of the resolution of conflict. Social justice is one of the major goals of Islam. Peace-building for Muslims requires justice, mercy, compassion, wisdom, service, faith and love. The dominant values are social justice—for instance, the abolition of slavery and racial prejudice—and the equality and innate value of all human beings in God’s eyes. The practical applications of these doctrines include charity, which is called for at least twenty-five times in the Koran. The Prophet was an orphan, and his concern for the weakest and most needy in any community dominated his teaching. In this, he was very much like Jesus in his commitment to the social gospel—blessed are the poor, the meek, the sick, the hungry, the imprisoned and the naked in need of clothing.

Abu-Nimer states it flatly:

According to Islam, a nation cannot survive without making fair and adequate arrangements for the sustenance and welfare of all the poor, underprivileged, and destitute members of every community. The ultimate goal would be the elimination of their suffering and poverty. (57)

Particular Islamic values that support a philosophy of conflict resolution are the universality and dignity of humanity, the equality of all races, ethnic groups and tribal identity groups, and the sacredness of human life (“And if any one saved a life, it would be as if he saved the life of the whole people.”)²

Forgiveness plays a key role in the Koran and the Muslim value system: “God fills with peace and faith the heart of one who swallows his anger, even though he is in a position to give vent to it.”³ The great commentator on the traditions of the Prophet, Ibn Is’haq wrote,

The Prophet always prayed when he was persecuted during the Mecca period, [when the Muslims were persecuted intensely by the pagans of the city] saying, “Forgive them, Lord, for they know not what they do.” (67)

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³. Id. at 42:37.
Perhaps Abu-Nimer, a Muslim, can be forgiven himself for not noting that these exact words are attributed to Jesus as he hung on the cross and asked God's forgiveness for the Romans who were killing him.

There is a chapter rich in description of traditional Arab-Muslim mechanisms for dispute resolution. Long before the rise of Islam, the custom of third party mediation and arbitration in individual and inter-family or clan conflicts was well established. After Islam, the person likely to be called to mediate was one with a strong reputation for moral probity and religious piety. Apology and asking forgiveness has been a key element of the traditional reconciliation process just as modern political psychologists in conflict resolution contend today. Traditionally, the perpetrator will apologize publicly to the victim and ask his forgiveness. As Abu-Nimer explains,

Such an apology in itself restores the victim's [self-]respect and brings shame on the offender, while at the same time reintegrating the offender through his or her affirmation of the community's social order and traditional values. (108)

The author tells of a special ritual for handling murder cases in parts of North Africa. The perpetrator confesses his guilt and agrees to lie down beside a sheep. A family member of the victim approaches the two with the option of killing the man or the sheep. The sheep is always the choice. However, as Abu-Nimer tells us,

the fact that the victim has had the opportunity to take revenge (but decided to kill the sheep) restores the respect, dignity, and the honor of the victim's family. Thus, they will not be socially stigmatized as weak or unable to revenge their victim. (108)

There is a moving measure of wisdom among such people whom many would call primitive.

Toward the end of the book, the author provides a case study on the ambiguity of violence in the first Intifada that began in 1987. It is nuanced and fascinating and much more than can be described in this limited space. But as a brief example, there is the question of stone-throwing by Palestinian youth. Clearly considered violence by the Israelis and many Palestinians, Abu-Nimer found that at least some of the stone throwers did not. The author quotes Ahmad saying, "The stones are just to tell the soldiers what we want. You cannot talk to machine guns. Stones are not violence." Ahmad continued, "We are not afraid to die . . . . and we have heavy stones, we have our hands—and we have guns. We have surrounded soldiers in our neighborhoods many times, but we choose not to kill them." (141)
The book concludes with guidelines for conflict resolution interventions, emphasizing that Islam contains within its broad system of social and ethical values the means for peace-building as well as violence. And long-term conflict resolution, to be effective, must be integrated with socioeconomic development projects so that material incentives reinforce the instinct toward peaceful resolution of conflict. This makes sense and ends a uniquely valuable contribution to the world’s knowledge of Islamic values and the place of conflict resolution in Muslim societies.

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WHY THE MEDIEVAL TRIAL OF JOAN OF ARC IS OF PARTICULAR INTEREST TODAY


Joan of Arc was a courageous and combative woman, a resistance fighter who lived in a man’s world during the Middle Ages. The official records of her infamous trial in 1431 reveal peculiar traits of the medieval legal system and of the women who lived in an era when religion was a major preoccupation of the people and a significant influence in the courts. Small, pious, and unaccustomed to the art of combat, Joan of Arc continuously claimed she was driven by voices sent to her directly from God to save France from English rule during the Hundred Year’s War. Despite her unimpeachable piety, virginity and moral purity, her sacrificial loyalty to France, and her miraculous bravery in combat, she was burned alive at the stake for wearing men’s clothing and for heresy! In fact, Joan of Arc was tried and unjustly convicted in France by the very same Frenchmen whom she saved from the dreaded English. No one came to her aid, not even the French King Charles VII, whom Joan saved from the clutches of the English and the apathy of the French and whom she brought to power through her own vision and military leadership.

In his excellent work, The Trial of Joan of Arc, Professor Daniel Hobbins has translated the court proceedings from Latin into English. Hobbins is an Assistant Professor of History at the University of Texas at Arlington. In his informative introduction, Professor Hobbins places the trial in its legal and historical context, provides an overview of the trial and its major players, discusses extensively the nature of the inquisitorial procedure,¹ and explains how the trial records were compiled. Hobbins also explores the woman, Joan of Arc, and her place in fifteenth-century French society. For Hobbins, Joan was a product of her times. Thus, it was not unusual for a pious woman to hear voices from God. But wearing men’s clothing and adopting the role of a military leader was unusual in the Middle Ages and cost Joan her life,

¹ See Henry Ansgar Kelly, Inquisitions and Other Trial Procedures in the Medieval West (Ashgate Publg. 2001).
even though she claimed that she had to wear these clothes to protect herself from being raped by soldiers and ultimately by her jailers.

Hobbins also explains why there is a French and Latin version of the trial transcript. The notary, Guillaume Manchon, and a Parisian lawyer, Thomas de Courcelles, took notes quickly in French during the trial. At the end of each day, they both compared notes and wrote the official French Minutes of the day. Unfortunately, the original French Minutes of the trial have disappeared and only two partial copies derived from them have come down to us. These are known as the Orléans manuscript ("O") located in the Bibliothèque Municipale in Orléans and the Urfe manuscript ("U") located in the Bibliothèque Nationale in Paris.

When and why did the Latin record of the court proceedings come about? Soon after the end of the trial, the Chief Judge, Pierre Cauchon, ordered Thomas de Courcelles and Guillaume Manchon to gather all the documents relating to the trial, to translate the French interrogations into Latin, and to put all this material in order as a new copy of the entire proceedings. This Latin text is more than just a compilation. It is a highly mediated work of authorship, a narrative tissue weaving together the French Minutes and the supporting documentation. In other words, it is a perfect law and literature text to be examined and interpreted. Like Martin Luther King's *Letter from the Birmingham Jail,* the Latin text was cast in the form of an open letter addressed "to all who will read the present letter or public instrument." The Latin record "is a hybrid text that is both documentary and literary." Three of the five original Latin manuscripts survive, one by Jules-Etienne Quicherat (1841-49), another by Pierre Champion (1920-21) and the third by Pierre Tisset and Yvonne Lanhers (1960-71). Even though the original Latin text was generated by Joan of Arc's opponents, Hobbins prefers to work from the Latin text because, as he demonstrates persuasively, it is more reliable than the French text for the following reasons. The Latin text is an original manuscript composed immediately after the trial. The original French Minutes have disappeared. The

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3. Two other versions of the French Minutes are available, one in French and one in English: *La Minute française de l'Interrogatoire de Jeanne la Pucelle, d'après le réquisitoire de Jean d'Estivet et les manuscrits de d'Urfe et d'Orléans* (Paul Doncoeur & Yvonne Lanhers eds., Melun, France: d'Argences 1952) and Walter Sidney Scotts, *The Trial of Joan of Arc; Being the Verbatim Report of the Proceedings from the Orleans Manuscript* (Associated Booksellers 1956).
claims made by Scott, the author of an English translation of the *French Minutes*, that Pierre Cauchon deliberately ordered Courcelles to falsify the Latin record in order to blacken the memory of the victim are unsubstantiated. (9-10) Hobbins prefers to work with the official Latin compilation because it includes many more documents than the *French Minutes*: numerous letters, consultations, opinions of individual lawyers, and conclusions of the faculty of theology and canon law at the University of Paris. (10) The Latin text also includes the seventy charges against Joan and her selected responses. But some people concerned about the reliability of the Latin text remind us that Courcelles, the Latin translator, was one of only three people who recommended in favor of torture for Joan. (10) Hobbins even admits that a few discrepancies between the French and Latin texts indicate a possible attempt by Courcelles to modify Joan’s testimony. (11) There is also talk of conspiracy and cover-up by Courcelles and others placing doubt on the reliability of the Latin text. (10-11) Nevertheless, Hobbins demonstrates that the Latin text taken as a whole is more reliable than the *French Minutes*.

If all these translated texts of the trial records are available, why do we need Hobbins’ new English translation? Without directly answering this question, Hobbins explains that his English translation of the Latin text is more reliable than a translation of the *French Minutes* and is more convenient to use than the lengthy and complete English translation of the Latin text by W.P. Barrett, *The Trial of Jeanne d’Arc*.6

The historic trial of Joan of Arc has fascinated writers for centuries. Anatole France, Andrew Lang, Jules Michelet, Jules-Etienne-Joseph Quicherat, Voltaire, Jean Anouilh, Mark Twain, Friedrich Schiller, and George Bernard Shaw all wrote about the trial of Joan of Arc. Shaw wrote a play about Joan’s trial, *Saint Joan*, and also wrote an important Preface to that play in which he brilliantly analyzes Joan’s innocence or guilt and the general failures of the legal system.7 As a law professor, I plan to use Daniel Hobbins’ book in my law and literature class when I discuss George Bernard Shaw’s work and the important legal issues embedded in that text. In addition, I plan to refer my students to Daniel Hobbins’ book for my course on Women and International Human Rights Law. The usefulness in a law school curriculum of this book containing a competent translation of a medieval trial court record is clear, especially if law scholars and teachers want to bring reality into

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the classroom as well as history and comparative analysis.

The trial of Joan of Arc has particular relevance today when our political leaders calmly sit around discussing justifications for the use of torture and when outraged listeners accuse these leaders of being "medieval." Daniel Hobbins' new English translation of the Latin record of the court proceedings is a convenient resource for comparative law discussions about medieval law, the procedure of ecclesiastical trials, the difference between canon law and civil law, and the nature of medieval trials in France.

What went wrong in Joan's trial? Joan of Arc's trial is considered by many legal scholars to be a travesty of justice as well as a perfect example of a medieval ecclesiastical trial conducted as an inquisitional procedure characterized by secrecy and torture. The trial was so unfair that about twenty years later King Charles VII demanded a re-trial in order to rehabilitate Joan of Arc's reputation as well as the reputation of the King of France himself, who was crowned as a result of Joan's superhuman efforts. In 1920 Joan of Arc was actually sainted, an ironic reversal that sheds light on the unfairness of her trial.

Historians, lawyers, judges, writers, artists, and filmmakers all over the world continue to be intrigued by the unfairness of the trial that may reflect on our own modern-day trial procedures. The trial records reveal the corruption and lack of independence of the judges. Joan is being tried for heresy, and her judges are bishops. Joan is being tried for wearing men's clothing when she saved France from being occupied by the English, and her judges are pro-English. The Chief Judge, Pierre Cauchon, was the Bishop of Beauvais, a paid advisor for the English occupational government, and a careerist in search of a better post under English rule. When Joan of Arc was captured in Compiegne, the English paid handsomely to acquire her as a prisoner. The English paid for the trial and its interrogations. They had a vested interest in her conviction. Cauchon was in charge of the whole trial and worked with

9. Canon law is defined as the legal institutions established by the Church in the twelfth to the sixteenth century. Canon law includes the law of elections, complex rules of clerical ordination, the remedy of restitution, the protection of the poor, the use of oaths and vows, the law of property and economy, the law of baptism, the crime of blasphemy (or heresy), the protection against double jeopardy, laws of papal privileges, the law of excommunication and religious discipline. Canon law was considered to be the law of love and was instituted in contrast to Roman civil law that was notorious in its brutality. See Review Essay: In the Steps of Gratian: Writing the History of Canon Law in the 1990s, 48 Emory L. J. 647 (1999).
the Inquisitor of France and over a hundred clerical legal assistants. To the pro-English Chief Judge, Joan represented nothing less than the enemy who wanted to give France back to the French. The record reveals the political nature of the trial, the packing of the jury with bipartisan members who were pro-Burgundian and in favor of English rule, the brutality of the trial proceedings and interrogations, and the use of threats and torture to extract a confession. It also illustrates the overwhelming presence of Church doctrine during the trial, the unjust conviction of the accused, the horrific nature of the sentence, as well as the blatant disregard for the rights of the accused. Joan was denied the right to counsel and the right to be confronted with the witnesses against her. Joan did not even have the right to hear the seventy charges against her that were eventually read aloud to her in a language she could not understand. Moreover, the court clerk’s notes were occasionally falsified, the number of pro-English judges was arbitrarily increased, and the public and secret interrogations were brutal and designed to entrap Joan by forcing her to answer irrelevant questions destined to exhaust the accused. Even though Pierre Cauchon consistently and painstakingly attempted to be procedurally correct throughout the trial in order to withstand any objections regarding the unfairness of the trial, the list of the procedural errors of this trial is overwhelming. A discussion of these trial defects in a law class would be an effective tool for learning the law and how it should work.

Susan Tiefenbrun


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The field of neuroethics has been described as an amalgamation of 
two branches of inquiry: the ethics of neuroscience and the neuroscience 
of ethics. The ethics of neuroscience, which has received considerable 
attention over the past three to four years, is concerned with the ethical 
principles that should guide brain research and the treatment of 
neurological disease, as well as the effects that advances in neuroscience 
have on our social, moral, and philosophical views. The neuroscience of 
ethics, which has received considerably less attention, may be described 
as a scientific approach to understanding ethical behavior.¹ Psychiatrist 
and lawyer Laurence Tancredi makes a significant and early 
contribution to the neuroscience of ethics in Hardwired Behavior: What 
Neuroscience Reveals About Morality.

Tancredi begins by developing a historical framework for 
understanding community notions of morality. Moral proscriptions on 
behavior originated in ancient philosophy, were illustrated in classic 
literature, and continue to be identified by the western Judeo-Christian 
tradition and the religions of Islam and the Far East. Common precepts 
of morality include bans on negative behaviors such as murder, 
infidelity, greed, sloth, and manipulation. Sigmund Freud, Jean Piaget, 
Lawrence Kohlberg, and other early experts in moral development 
viewed these negative behaviors through the lens of mentalism, a focus 
on the mind as separate from the brain and the body. Central to 
mentalism are the concepts of free will and intentionality—the belief 
that individuals can choose whether to engage in immoral acts.

Tancredi chronicles the transition from mentalism to physicalism, 
which emphasizes the primacy of the physical brain. Although 
physicalism dates back to Aristotle and the principles of natural law, 
advances in neuroscience have brought it to the level of brain biology. 
Tancredi’s focus is the role of biology in immoral behavior, which he 
examines through a series of case studies, beginning with infamous 
Ricky Green. (46-68) Green, who had a long history of physical and

¹ Adina Roskies, A Case Study of Neuroethics: The Nature of Moral Judgment, in 
sexual abuse, sexually mutilated and killed at least two women and two men. Tancredi avoids the nature-nurture dichotomy by suggesting that Green’s behavior resulted from a combination of selection factors (the genetic capacity for transferring a trait) and instruction (an environmental agent that triggers the innate capacity present in the genes). (64-66, 81) Stated another way, Green’s genes and biology (including an ineffective limbic system and an abnormal prefrontal cortex), as well as environmental influences, may have contributed to his behavior.

Tancredi uses additional case studies and research findings to further illustrate the role of the brain in moral decision-making. A case study involving a failed heterosexual relationship is used to suggest that men who have structural and functional abnormalities in the orbitofrontal gyrus, left superior frontal gyrus, posterior cingulate gyrus, and superior temporal sulcus may have reduced capacity for empathy, an essential component for developing a moral sense. (112) Hypersexuality may result from damage to the limbic system, and poor financial planning skills may be due to frontal lobe injury. The cases of Andrea Yates, Susan Smith, Martha Stewart, and Enron allow for a discussion of the role of the brain in cases involving “madness” and “badness,” as well as individual and corporate greed. Drawing on his experience as a psychiatrist, Tancredi believes that criminal money-related behaviors frequently stem from bipolar illness, obsessive-compulsive disorder, and a pathological fear of failure—disorders involving major parts of the brain, including the prefrontal and temporal lobes and the amygdala.

In his final chapter, Tancredi considers a hypothetical legislative program set in the year 2100 that supports the use of functional neuroimaging technology and brain treatments to curtail immoral behavior, ensure acceptable expressions of sexual desires, and limit wasteful spending activities, including gambling. Among other measures, the hypothetical reforms require genetic and functional neuroimaging testing of all babies to identify their potential range of behavior, as well as the augmentation or replacement of the areas of the brain that contribute to immoral decision-making. The program’s underlying assumption is that free will, if it exists at all, plays a minor role in morality. Briefly switching approaches from the neuroscience of ethics to the ethics of neuroscience, Tancredi compares the issues raised

2. Texas mother Andrea Yates, who suffered from psychotic hallucinations and delusions, drowned her five children in a bathtub in 2001. South Carolina mother Susan Smith rolled her Mazda—and her two children—into a lake in an attempt to secure the affection of her lover in 1995.
by his hypothetical program to current questions relating to the proper use of Prozac and Ritalin. Tancredi concludes by arguing that we need to balance the merits of a moral (and monolithic) society against the loss of individuality and diversity that could result from legislative reforms. (171-172)

Scientists who believe that modern brain imaging techniques only reveal the neural correlates of behavior, not the "hardwiring" of behavior, may struggle with Tancredi's broad notion of defective brain wiring. Other individuals may question the diminished role Tancredi assigns to free will. Still others may disagree with Tancredi's speculation that law enforcement agencies, educational institutions, and the health care system will extensively incorporate neuroimaging technology into their business processes. And, scholars in religion may wish to inquire further about neuroscience's implications for religious understandings of morality. However, *Hardwired Behavior* more than accomplishes Tancredi's goal, which is to generate discussion about the effect of recent neuroscientific findings on our moral and religious precepts.

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3. See e.g. Elizabeth A. Phelps & Laura A. Thomas, *Race, Behavior, and the Brain: The Role of Neuroimaging in Understanding Complex Social Behaviors*, 24 Political Psychol. 747, 754 (2003) ("Showing a behavior 'in the brain' does not mean that it is innate, 'hardwired,' or unchangeable.").

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This is the second volume in Professor Harold J. Berman's projected trilogy of works concerning the forces which have shaped the western legal tradition. The first, *Law and Revolution: The Formation of the Western Legal Tradition*¹ appeared in 1983. It won considerable acclaim and gained for the author the 1984 SCRBES Book Award of the American Bar Association for the best new book on a legal subject. It set out a clear and cogent argument that the western legal tradition had been shaped by the Papal revolution in government which flowed from the Hildebrandine reforms at the end of the eleventh century, reforms which led to the creation not only of the canon law system of the western Church but also to the development of constitutive legal systems by secular rulers across western Christendom. The work exhibited broad learning across the national and institutional boundaries which had tended to confine the study of European legal history, and it also challenged the chronology which had in large measure been accepted by generations of historians writing not only of law but of European history generally.

The current volume marks the turning of the author's attention from the effect of the formation of the western legal tradition in the reforms of Pope Gregory VII, to the transformation wrought by the religious and political upheavals of the sixteenth and seventeenth centuries. He describes the changes wrought first by the Protestant Reformation on mainland Europe which fractured the unity of Catholic Christendom, and secondly by the English Revolution of the seventeenth century, which Professor Berman argues should be taken to include the entire period from the summoning of the Long Parliament in 1640, through the Civil Wars and the Commonwealth, and on through the years following the Restoration of the monarchy in 1660 to the so-called "Glorious" Revolution of 1688-89. At that time, a new constitutional and religious settlement was achieved, in what was shortly to become

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Professor Berman's works are not only aimed at demonstrating the importance of the central events described to the development of the legal tradition which he argues they shaped. Candidly, he states that he is promoting another agenda as well. He believes that the western legal tradition is the product not merely of political, social and economic forces, but also religious influences, which have not been accorded the significant place due to them by much modern historical writing. He states openly that he believes that

the rediscovery and revival of the historical connections between the Western legal tradition and the Western religious tradition will not only strengthen both but also facilitate dialogue and cooperation among adherents of the major cultures of the world in the development of universal legal standards and common legal institutions.(xii)

He believes that a proper appreciation of the role of religion in shaping western legal systems is vital in shaping the law of the future. Given the author's candor, it is only proper that your reviewer should be equally frank and state that this is a view with which he finds himself in entire agreement.

The West which Professor Berman describes is essentially that part of Christendom which was once united in its allegiance to the Catholic Church, while for him tradition is "the sense of an ongoing historical continuity between past and future," which in law manifests itself in the "organic development of legal institutions over generations and centuries, with each generation consciously building on the work of its predecessors." (3) He approves of Jaroslav Pelikan's contrast between traditionalism, the dead faith of the living, and tradition, the living faith of the dead. The projected final volume of the trilogy is intended to be an examination of the effects of the American, French and Russian revolutions on the western legal tradition. One wonders whether in that volume more attention will be given to Roman republican models in the constitutional development of the western nations. Clearly, those models cannot have been shaped by the Christian religious tradition of the west, but their influence deserves to be considered even if any decisive influence may be denied. There is something odd in the fact that in anticipating his consideration of the American Revolution and more particularly the French Revolution at the close of his Introduction, Roman republican models are not even mentioned. Odd too is the claim that "Soviet Marxist atheism was a Christian heresy." (18) While the addition of the adjective "Soviet" might be pleaded as the decisive
element in this phrase, the Marxist view of history has roots which lie more in Judaism and the history of the people of ancient Israel than in Christian doctrine, and Marx' own cultural background supports this.

The author divides his work into two parts, the first of which deals with "The German Revolution and the Transformation of German Law in the Sixteenth Century," while the second addresses "The English Revolution and the Transformation of English Law in the Seventeenth Century." The balance in the wording of the titles of these parts continues into the structure of the sections, with successive chapters dealing with an outline of the background history of each period, an examination of the legal philosophy of the time, followed by four chapters dealing in turn with the transformations in legal science, criminal law, civil and economic law, and social law. This approach is somewhat rigid, but ensures ease of reference for those whose interests lie in particular aspects of Professor Berman’s thesis.

The thrust of the first section of the volume is that the break from Rome, which resulted from Luther’s rebellion against the Catholic Church, led to a transformation of legal arrangements in Germany, and that Luther, and more particularly his followers, in accommodating this transformation in their legal writings, in turn transformed western legal science. The Papal Revolution of the twelfth century had resulted in a Europe in which different legal systems addressed different facets of individual and communal life. The punishment of serious wrongs belonged to the royal jurisdiction; suits for land in the feudal. Matrimonial and testamentary matters, together with the punishment of sins, belonged to the Church courts, while matters relating to trade and the affairs of merchants went to specialist mercantile tribunals. The decision of some of the rulers of Germany to support Luther and thereby deny the jurisdiction of the Catholic Church within their lands led directly to a need to assimilate the former ecclesiastical jurisdiction within their own “secular” order. Professor Berman emphasizes that this was not a secularization of the Church’s former jurisdiction; he argues forcefully that it marked rather a spiritualization of the erstwhile temporal jurisdictions of the German princes. In any event, the upshot was the development of legal systems which embraced all aspects of social life within one political and geographical jurisdiction.

Within these new comprehensive legal jurisdictions, the rulers were bound to accommodate certain charitable endeavors which had previously been the province of the Catholic Church. Thus, Professor Berman provides interesting and valuable discussions of the development of education and poor relief in the Protestant jurisdictions,
and also examines how the theology of the reformers impacted upon the law of marriage in the states within which their doctrines were accepted. Professor Berman is perhaps at his best in the German part of the volume when he considers the legal philosophy of the reformers and the importance of their work to the development of legal science. He looks in some detail at the writings of Melanchthon, Apel, Oldendorp, Lagus and Vigelius. He claims for Apel the introduction of the distinction between ownership and obligation in western legal theory, and a key role in the development of systematic presentation. Lagus, he argues, applied the traditional four causes of Aristotle to his legal analysis and combined Roman and canon law in his works, producing compendia of both civil and Saxon law. The author sees the distinction between private and public law, as set out by Vigelius, as only becoming "basic to legal analysis" at this time (124–125). The pride of place usually accorded to French jurists, such as Hugh Doneau, in developing the civil law is impliedly questioned; they are described as having applied Melanchthon’s topical method to the mass of legal materials in Justinian’s texts.

Professor Berman has importantly presented his readership with an account of the development of German legal science at this period which corrects what has been a clear neglect. Nevertheless, your reviewer is unable to accept all that the author claims. He is uneasy with Professor Berman’s emphasis on the unity of Germany at this time. It is noticeable that, in comparison to France for instance, religious refugees had merely to move from one territory to another, while in France, men such as Calvin or Doneau had to flee the kingdom. Nor does Professor Berman give due recognition to the manner in which the scheme of Justinian’s Institutes played a key role in the fresh systematization of legal sources. He believes that the changes in religion shaped the changes in the law and legal science, but does not give due weight to how far the general questioning of received knowledge which was part of the “spirit of the age”—leading to a need to reconsider basic ideas such as the shape of the world and the shape of the universe—caused questioning of existing structures in both religion and the law. This despite the fact that he acknowledges that some key developments in legal science in Germany, such as Schwarzenberg’s Bambergensis, antedated Luther’s attack on the Catholic Church. Professor Berman’s thesis, however, is always clearly argued, often with considerable passion, written—like the juristic works he describes—from the heart.

Turning to the English Revolution, Professor Berman lists among its consequences the development of constitutional monarchy, a measure
of religious tolerance, the development of the doctrine of precedent, the adversarial style in procedure, and once more the emergence of a comprehensive legal system. In legal science, he examines the works of Fortescue, Hooker, Coke and Hale—the last-mentioned very much the hero of the story, possibly as much for his life as for his work. Collectively he believes they created an English tradition in legal science which was a harbinger of what would later be termed historical jurisprudence. The demise of the prerogative courts of Star Chamber and High Commission, and the need to accommodate their work within the jurisdiction of the common law courts, undoubtedly played a major role in the shaping of much of English law thereafter, but to what extent religious factors, particularly Calvinism, can be credited with a significant part in this history is questionable. Nevertheless, Professor Berman’s view that the Calvinist theology of covenant influenced the decision in *Paradine v. Jane*, that liability for breach of contract was strict, remains interesting.

Professor Berman is again convincing when he argues that in England as in Germany, the changes which flowed from religious reformation spiritualized the secular order rather than secularized the spiritual, although this seems more true of the Tudor and early Stuart reigns than of the post-Restoration period. Poor relief, he argues, contrary to the views of some Marxist historians, was not grounded in economic motives, but undertaken, as Hale wrote, because it was in accordance with God’s will, exhibited common humanity and was sound social policy.

As with the first volume, the breadth of Professor Berman’s analysis occasionally leaves the reader uneasy with regard to his grasp of some of the detail, and there are pitfalls for the unwary. Some errors are probably typographical—Philip II was not king of Spain in 1640 (204) and Littleton did not write his *Tenures in the sixteenth century* (294); others are not. The comments on the Roman law of contracts (156–57), the description of the decision in *Slade’s case* (338), and the dating of the introduction of judicial divorce into England (353) are all misleading. The distinction between murder and manslaughter based on killing in hot blood went back to the sixteenth century. (325–326) The treatment of the common law’s use of legal fictions strains the author’s argument. (280) Less importantly, the continual reference to the pre-Reformation Catholic Church as “Roman Catholic” irritates.

Despite these caveats, Professor Berman’s work is one which cannot in the future be ignored by those who seek to understand the development of law and of the idea of law in the western world. That he
has brought the juristic work of the German Protestant reformers into the limelight in itself is deserving of gratitude. At the end of the volume, the author responds to the charge that he has confused history with prophecy. Professor Berman rightly refuses to demarcate so sharply between the two vocations. His own work is prophetic in the best sense; he interprets events in the light of experience in order to enable sound, informed choices to be made for the future. It is a worthy contribution to the tradition it describes.

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