

# FROM HOMER TO HEGEL: IDEAS OF LAW AND CULTURE IN THE WEST

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THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION. By *Donald R. Kelley*. Cambridge: Harvard University Press. 1990. Pp. xiv, 358. \$35

In a series of impressive publications, Donald Kelley has uncovered a rich tradition of European thinking on law and culture. Scores of obscure European writers from the Italian Renaissance to the French Restoration have come to light and life in his writings.<sup>1</sup> Their ideas on the nature and function of legal and cultural institutions now form an integral part of our understanding of Western intellectual history.

In *The Human Measure*, Kelley provides a much more ambitious account of the ideas of law and culture in the West — in part, he says, to “atone” for the shortcomings of his earlier work.<sup>2</sup> In some 280 pages of text, he traverses 2800 years of Western thinking about law and culture. He begins with the mythical speculations of Homer and the ancient Greeks and ends with the metaphysical syntheses of Hegel and the modern Germans. In intervening chapters, he treats in rapid succession the contributions of the Greek philosophers and Roman jurists, the Germanic peoples and early Christians, the medieval and Renaissance civilians and canonists, and the early modern legal “philosophers” and “historians,” pausing periodically to investigate discrete legal developments in classical Rome and early modern England and France.

The book is not entirely new and does not purport to be (p. xiii). It

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1. See particularly D. KELLEY, *THE BEGINNING OF IDEOLOGY: CONSCIOUSNESS AND SOCIETY IN THE FRENCH REFORMATION* (1981); D. KELLEY, *FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP: LANGUAGE, LAW, AND HISTORY IN THE FRENCH RENAISSANCE* (1970) [hereinafter D. KELLEY, *FOUNDATIONS*]; D. KELLEY, *FRANÇOIS HOTMAN: A REVOLUTIONARY'S ORDEAL* (1973) [hereinafter D. KELLEY, *FRANÇOIS HOTMAN*]; D. KELLEY, *HISTORIANS AND THE LAW IN POST REVOLUTIONARY FRANCE* (1984); D. KELLEY, *HISTORY, LAW AND THE HUMAN SCIENCES: MEDIEVAL AND RENAISSANCE PERSPECTIVES* (1984) [hereinafter D. KELLEY, *HISTORY*].

2. P. x. Kelley says that in his earlier work, particularly his *Foundations of Modern Historical Scholarship*, he “neglected some of the larger and more traditional views of human culture and . . . tended to undervalue the role of imitation and myth in historical scholarship.” *Id.*

duplicates some of the themes and language of Kelley's own earlier writings, particularly in its later chapters. It also repeats many of the commonplaces of Western legal and cultural historiography. Kelley, however, weaves this earlier work into his own sweeping synthesis, which goes well beyond any of his earlier efforts.

The book is not easy to read. It is elegant and eloquent enough and filled with pristine passages and witty aphorisms. But the discussion is terse and wide-ranging, at times even cryptic and convoluted. It is also peppered throughout with the technical language and lore not only of law, but also of anthropology, philology, sociology, theology, philosophy, and a host of other disciplines. Kelley demands of his reader considerable familiarity with the events and figures of Western history and considerable facility with the methodology and terminology of the cultural sciences.

The book compares in erudition and sophistication with several other classic treatments of the ideas and institutions of the Western legal tradition. Some readers will doubtless add it to their narrow shelf of indispensable books on the subject already graced by the works of Berman, Cairns, Coing, Dooyeweerd, Pound, Tierney, Villey, Vinogradoff, Watson, and a few others.<sup>3</sup> Yet, for all his erudition, Kelley devotes surprisingly little space in his volume to the evaluation, or even the citation, of many of his distinguished peers. He hardly mentions, for example, the work of Harold J. Berman, who popularized, if not coined, the phrase "Western legal tradition," which Kelley uses in his subtitle and throughout the volume.<sup>4</sup> He makes only ob-

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3. Among numerous sources for each author, see particularly H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983); H. CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* (1949); H. COING, *EPOCHEN DER RECHTSGESCHICHTE IN DEUTSCHLAND* (3d ed. 1976); H. COING, *GESAMMELTE AUFSÄTZE ZU RECHTSGESCHICHTE, RECHTSPHILOSOPHIE UND ZIVILRECHT* (1982) [hereinafter H. COING, G.A.]; H. DOOYEWEERD, *ENCYCLOPAEDIE DER RECHTSWETENSCHAP* (1946) [hereinafter H. DOOYEWEERD, *ENCYCLOPAEDIE*]; R. POUND, *JURISPRUDENCE* (1959); B. TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650* (1982); M. VILLEY, *CRITIQUE DE LA PENSÉE JURIDIQUE MODERNE* (1976); M. VILLEY, *LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE* (4th ed. 1975); M. VILLEY, *LEÇONS D'HISTOIRE DE LA PHILOSOPHIE DU DROIT* (1957); M. VILLEY, *PHILOSOPHIE DU DROIT* (1978); P. VINOGRADOFF, *OUTLINES OF HISTORICAL JURISPRUDENCE* (1920, 1922); P. VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* (3d ed. 1961); A. WATSON, *THE EVOLUTION OF LAW* (1985); A. WATSON, *THE MAKING OF THE CIVIL LAW* (1981); A. WATSON, *THE SOURCES OF LAW, LEGAL CHANGE, AND LEGAL AMBIGUITY* (1984). Other important accounts include R. CARLYLE & A. CARLYLE, *A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST* (1903-1936); W. FRIEDMANN, *LEGAL THEORY* (5th ed. 1967); C. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (2d ed. 1963); F. WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* (2d ed. 1967). Kelley makes only passing references to a few of these writings.

4. See H. BERMAN, *supra* note 3, a source that Kelley reviewed in 6 *HISTORY OF EUROPEAN IDEAS* 361 (1985). Berman has used the phrase "Western legal tradition" throughout his career. See, e.g., H. BERMAN, *JUSTICE IN RUSSIA: AN INTERPRETATION OF SOVIET LAW* 111 (1950); H. BERMAN, *JUSTICE IN THE U.S.S.R.* 175 (rev. ed. 1963). Kelley also uses, without attribution, the phrase "Papal Revolution," which Berman popularized. See p. 82 (referring to the "Papal Revolution, as it has been called"). See H. BERMAN, *supra* note 3, at 574-78 for the origin and use of this phrase.

lique references to many of his other peers, whose writings overlap, both chronologically and conceptually, with his own.

In this review, I provide an interpretive overview of the book, and then an evaluation of it, both on its own terms and in light of other accounts of the Western legal tradition.

## I. AN INTERPRETATION OF *THE HUMAN MEASURE*

Neither the contents nor the thesis of *The Human Measure* admit of easy summary. The book is a highly condensed summary of a subject that could easily occupy several dozen thick volumes. Even a naked recitation of the main points of the book would require a restatement of most of its contents. The principal theme of the book is intricate and intermittently and incrementally argued throughout. It is also interwoven with a variety of subthemes — some clearly related, some seemingly more tangential to the main argument. I shall offer an interpretation of the principal themes and subthemes in turn, drawing on various parts of Kelley's volume and other sources for illustration and amplification.

### A. *Culture Versus Nature in the Western Legal Tradition*

The principal theme of Kelley's book, as I understand it, concerns the character of Western thought in general and the unique role that law has played within it. Western thought, Kelley asserts, has from the beginning been sharply divided between "naturalist" and "culturalist" perspectives (pp. 1, 276). The naturalist perspective is focused on "the universe at large, its structure, texture, and transformations" (p. 1). It offers scientific knowledge, absolute truths, universal ideas, and axioms. The culturalist perspective, by contrast, is focused on "humanity, its creations, predicaments, and fate" (p. 1). It offers "practical" knowledge, rhetoric and discourse, ideas and ideals that are inevitably bound by human time and cultural space (pp. xi, 1-2, 24-25, 276-78). The clash between these two orientations is the "great dialectic of Western consciousness, the central topos and antithesis of Western thought" (p. 24). The West has occasionally been able to "transcend" and "suspend" the dialectic through religion and myth.<sup>5</sup> But it has never been able to eradicate it entirely.

Although rudimentary forms of this dialectic appear already among the earliest Sumerian and Greek poets, its first critical formulation came during the fifth and fourth centuries B.C. in the debate between "platonists" and "sophists" about the nature of law and government. Platonists argued that, at root, the law and government of the Greek polis were based on nature (*physis*), on universal ideas

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5. See further discussion *infra* note 24 and accompanying text, concerning Kelley's understanding of the role of religion and the church in Western culture.

and principles, and could thus be considered absolutely binding. Sophists argued that all laws and governments, whether Greek or barbarian, were perforce based on human custom and convention (*nomos*), and thus were binding only if cogent and consistent. In the writings of Aristotle and later Hellenistic philosophers, this earlier debate about the nature of law and government hardened into a dialectic about the character of reality and knowledge per se: the dialectic of culture and nature, *nomos* and *physis*.<sup>6</sup>

This ancient Greek contest of *nomos* and *physis* has brought forth numerous offspring in the West. Western thought has been a series of footnotes not so much to Plato's ideas alone, as to Plato's contests with his sophist adversaries. Numerous dualisms, such as those between Roman technicism and Greek mysticism, Renaissance humanism and medieval scholasticism, cultural science and natural science, rhetoric and philosophy, subject and object, *res cogitans* and *res extensa*, and numerous others are, for Kelley, essentially "modern versions of the old contest" (p. 1). Kelley states this thesis categorically in his introduction and conclusion and argues it repeatedly throughout the volume.

This grand characterization of Western thought, although largely lost on the current generation of historians, has ample and distinguished precedents. Similar arguments were offered at the turn of the twentieth century by such writers as Dilthey, Troeltsch, Cassirer, Kristeller, and Randall.<sup>7</sup> As a student of Kristeller (p. xiii) and editor of the *Journal of the History of Ideas* (which Kristeller, Cassirer, and Randall helped to establish), Kelley is deeply steeped in this historiography and reflects it adroitly in his writings.

Kelley moves beyond traditional intellectual historiography, however, in focusing the dialectic of culture and nature, *nomos* and *physis*, on the Western legal tradition. Traditionally, intellectual historians focused this dialectic on Western philosophers and theologians — Plato and Aristotle, Augustine and Aquinas, Locke and Leibniz. Kelley shifts this focus to Western jurists and judges — Gaius and Ulpian,

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6. Pp. 24-34. See also F. HEINIMANN, *NOMOS UND PHYSIS* (1945); E. VOEGELIN, *THE WORLD OF THE POLIS 305-19* (1957); Kees, *Nomos*, 17 PAULY-WISSOWA REALENCYCLOPÄDIE 833 (1941).

7. See, e.g., E. CASSIRER, *DAS ERKENNTNISPROBLEM IN DER PHILOSOPHIE UND WISSENSCHAFT DER NEUEREN ZEIT* (1911); E. CASSIRER, *THE INDIVIDUAL AND THE COSMOS IN RENAISSANCE PHILOSOPHY* (M. Domandi trans. 1963); E. CASSIRER, *THE MYTH OF THE STATE* (1946); 1-3, 19 W. DILTHEY, *GESAMMELTE SCHRIFTEN* (1921); P. KRISTELLER, *RENAISSANCE THOUGHT: THE CLASSIC, SCHOLASTIC, AND HUMANIST STRAINS* (1961); P. KRISTELLER, *RENAISSANCE THOUGHT II: PAPERS ON HUMANISM AND THE ARTS* (1965); J. RANDALL, *THE MAKING OF THE MODERN MIND* (1926); E. TROELTSCH, *Aufsätze zur Geistesgeschichte und Religionssoziologie*, in E. TROELTSCH, *GESAMMELTE SCHRIFTEN* (rev. ed. 1965); E. TROELTSCH, *DER HISTORISMUS UND SEIN PROBLEME* (1922); E. TROELTSCH, *Die Soziallehren der christlichen Kirchen und Gruppen*, reprinted in E. TROELTSCH, *GESAMMELTE SCHRIFTEN*, *supra*. See also a discussion of this theme in E. KAHLER, *MAN THE MEASURE: A NEW APPROACH TO HISTORY* 119 (1943); W. WALLIS, *CULTURE AND PROGRESS* (1930).

Gratian and Bartolus, Grotius and Savigny — with an eye to viewing their contributions to this ancient theme. Kelley makes numerous, and sometimes conflicting, points about these contributions, which he unfortunately does not summarize or synthesize adequately. His discussion can perhaps be best organized under the three manners in which the Western legal tradition has contributed to the *nomos-physis* dialectic in Western thought.

First, Kelley argues, the Western legal tradition has helped to perpetuate this dialectic through the age-old legal controversy between legal positivists and natural law theorists. Legal positivists contend that positive laws are essentially rules promulgated by those in power, and that these rules require no necessary religious, rational, or moral content for their authority or obligatory force. Natural law theorists argue, by contrast, that positive laws must reflect the higher principles of justice and equity known by reason and conscience in order to be authoritative and obligatory. This positivism-naturalism dialectic in law, Kelley contends, is simply a species of the broader *nomos-physis* dialectic in Western thought.<sup>8</sup>

The dialectic between legal positivism and legal naturalism can be seen, in various guises, throughout the Western legal tradition. Classical Roman jurists, for example, were torn between abstract principles of justice, equity, and right, on the one hand, and specific doctrines of actions, persons, and things, on the other (pp. 38-64). Medieval canonists and civilians distinguished between laws and authorities founded on immutable nature and those founded on mutable custom or political fiat (pp. 116-21, 132-40, 150-57). Sixteenth- and seventeenth-century English jurists debated whether judicial interpretation depends on a "natural" reason that transcends positive law or an "artificial" reason that is rooted in legal experience and expertise.<sup>9</sup> Continental jurists developed both a "rational jurisprudence" that derived principles of universal justice through mathematical logic, and a "his-

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8. "Naturalism," though itself a loaded term, is often used as a synonym for "natural law theory," and an antonym for "legal positivism." See H. ROMMEN, *DIE EWIGE WIEDERKEHR DES NATURRECHTS* (1950); Berman, *Toward an Integrative Jurisprudence: Politics, Morality, and History*, 76 CALIF. L. REV. 779 (1988). For further discussion of the positivism-naturalism dialectic in legal history, see generally E. BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* (rev. ed. 1974); 1 H. DOOYEWEERD, *ENCYCLOPAEDIE supra* note 3, at 133-226; W. FRIEDMANN, *supra* note 3; L. STRAUSS, *NATURAL RIGHT AND HISTORY* (1953); H. THIEME, *DAS NATURRECHT UND DIE EUROPÄISCHEN PRIVATRECHTSGESCHICHTE* (1947). A convenient sampling of positivist and naturalist writings is provided in *READINGS IN JURISPRUDENCE* (J. Hall ed. 1938).

9. Pp. 180-83. For further discussion, particularly of the importance of Sir Edward Coke to this debate, see Gray, *Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke*, in *CULTURE AND POLITICS FROM PURITANISM TO THE ENLIGHTENMENT* 25 (P. Zagorin ed. 1980); Lewis, *Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory*, 84 LAW Q. REV. 330 (1968); Vinogradoff, *Reason and Conscience in Sixteenth Century Jurisprudence*, 24 LAW Q. REV. 373 (1908). For the broader philosophical context in which these debates were worked out, see B. SHAPIRO, *PROBABILITY AND CERTAINTY IN SEVENTEENTH CENTURY ENGLAND* 163-93 (1983).

torical jurisprudence" that rooted legal ideas and institutions in the social representations and attitudes of a people and its rulers (pp. 213-22, 243-51, 264-65). Through these and numerous other controversies, the Western legal tradition provided "one of the principal arenas" in which the *nomos-physis* dialectic was played out (p. xi).

Second, Kelley avers, the Western legal tradition provided a laboratory to test various ideas and ideals that were designed to resolve the dialectic of culture and nature, *nomos* and *physis*. The early Greeks and Christians offered religious ideas. The Greeks viewed both human customs and natural laws as earthly representations of Olympic gods such as Themis (order), Dike (justice), Eunomia (harmony), and many others. The Olympic pantheon ensured the order and unity of both nature and culture (pp. 14-20). The Christians viewed Christ as the ruler of the world who called both culture and nature to His divine service (pp. 67-75). The individual and corporate Christian life thus transcended and integrated both human conventions and natural inclinations. Later Western thinkers sought the source of legal unity and uniformity in secular myths. Philosophers postulated a mythical state of nature that antedated and integrated human laws and natural rights. Italy appealed to its utopic Roman heritage, England to its immemorial custom, France to its Salic law, and Germany to its ancient liberties to unify and sanctify their national legal traditions.<sup>10</sup>

Each of these integrative ideas, however, ultimately failed to resolve the core dialectic of *nomos* and *physis*, according to Kelley. Olympic mysticism faded from Greek consciousness. Greek and later Roman writers came to view justice, order, and peace not as divine gods but as secular legal principles, encapsulated and elaborated by human rules (pp. 20-24, 35-38, 56-61). Jurists were left to debate which legal principles and rules were natural, which merely conventional.<sup>11</sup> Christian spiritualism gave way to Romanized institutionalism (pp. 75-88, 148-57). Christ's divine authority was made human, first in the Roman emperor, then in the Roman pope. Christian spiritual ideals were reduced to human rules, first those of Roman law, then those of canon law. Biblical theology gave way to "juristic" or "political" theology, first in Catholic, then in Protestant forms.<sup>12</sup> De-

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10. P. 10. See further discussion in E. CASSIRER, *THE MYTH OF THE STATE*, *supra* note 7, ch. 14, at 176; S. HANLEY, *THE Lit de Justice OF THE KINGS OF FRANCE: CONSTITUTIONAL IDEOLOGY IN LEGEND, RITUAL, AND DISCOURSE* (1983); J. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1967); Cassirer, *The Technique of Our Modern Political Myths*, in E. CASSIRER, *SYMBOL, MYTH AND CULTURE* 242 (D. Verene ed. 1979).

11. This discussion among the Roman jurists yielded the classic distinctions among *ius naturale*, *ius gentium*, and *ius civile*, arranged in order of universality. These basic distinctions were developed by the canonists and civilians after the twelfth century. See pp. 121-27, 190-96; see also R. CARLYLE & A. CARLYLE, *supra* note 3; E. CASSIRER, *NATUR- UND VÖLKERRECHT IM LICHT DER GESCHICHTE UND DER SYSTEMATISCHEN PHILOSOPHIE* (rev. ed. 1963).

12. P. 81, 150-51. The terms are from E. KANTOROWICZ, *THE KING'S TWO BODIES: A*

spite its emphasis on transcendent grace and spiritual liberty, Christianity could not escape the dialectic of *nomos* and *physis*. It remained torn between law and gospel, structure and spirit,<sup>13</sup> *adiaphora* and dogma.<sup>14</sup> Likewise, secular philosophical and nationalist myths dissipated under the hot lights of philosophical skepticism and revolutionary iconoclasm. State-of-nature motifs were dismissed as logical artifices, ancient constitutions as historical constructs.<sup>15</sup> The Western legal tradition, like all other Western traditions, has found the *nomos-physis* dialectic ineradicable.

Third, Kelly contends, the Western legal tradition has played a critical role in the development of Western social and cultural thought, in the "definition of *Nomos*." The Western legal tradition has been "the headquarters and homeland of *Nomos*" (p. xii). It has set out "the principal questions, terminology, and lines of investigation of the study of humanity" (p. xi) that now occupy the sciences of anthropology, sociology, and economics (pp. 6-13, 257-65). While philosophers and theologians have debated the condition of the individual and the community, jurists and judges have defined it. As Oliver Wendell Holmes once put it, all the great problems of theology and

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STUDY IN MEDIEVAL POLITICAL THEOLOGY (1957) and W. ULLMANN, *THE GROWTH OF PAPAL GOVERNMENT IN THE MIDDLE AGES* 359 (1955). For further discussion of the Romanization of Christianity, see C. COCHRANE, *CHRISTIANITY AND CLASSICAL CULTURE* (1940); *THE CONFLICT BETWEEN PAGANISM AND CHRISTIANITY IN THE FOURTH CENTURY* (E. Monigliana ed. 1963); R. MACMULLEN, *CHRISTIANIZING THE ROMAN EMPIRE (A.D. 100-400)* (1984).

13. On the tension within Christianity between the emphasis on structure (*i.e.*, formal legal definitions of order and orthodoxy in the church) and the emphasis on spirit (*i.e.*, charismatic expression and spiritual freedom in the church), see, *e.g.*, J. PELIKAN, *SPIRIT VERSUS STRUCTURE: LUTHER AND THE INSTITUTIONS OF THE CHURCH* (1968); Adams, *Introduction* to R. SOHM, *OUTLINES OF CHURCH HISTORY ix-xv* (M. Sinclair trans. 1958). It was precisely this issue that divided two of the greatest German church historians of the twentieth century, Adolf von Harnack and Rudolph Sohm. Von Harnack regarded legal structures as imperative to the survival of the Christian church, and traced their rudiments to the earliest apostolic church. Sohm regarded charismatic authority and spiritual freedom essential to the church, and emphasized this theme in the ancient and medieval church. Compare A. HARNACK, *THE CONSTITUTION AND LAW OF THE CHURCH IN THE FIRST TWO CENTURIES* (1910) with Sohm, *Wesen und Ursprung des Katholizismus* 27 *ABHANDLUNGEN DER KÖNIGLICH SÄCHSISCHEN GESELLSCHAFT DER WISSENSCHAFTEN PHILOLOGISCH-HISTORISCHE KLASSE* 133 (1912), reprinted in R. SOHM, *WESEN UND URSPRUNG DES KATHOLIZISMUS* (1967); R. SOHM, *WELTLICHES UND GEISTLICHES RECHT* (1914).

14. Pp. 70-88, 148-64. On the adiaphorism controversies in Christianity (concerning the distinction between central and penumbral beliefs and activities in the church), see B. VERKAMP, *THE INDIFFERENT MEAN: ADIAPHORISM IN THE ENGLISH REFORMATION TO 1554* (1977); Stelzenberger, *Adiaphora*, 1 *REALLEXICON FÜR ANTIKE UND CHRISTENTUM* 84 (T. Klauser ed. 1950); D. Bowen, *John Calvin's Ecclesiological Adiaphorism* (1985) (unpublished dissertation).

15. See generally E. CASSIRER, *THE MYTH OF THE STATE*, *supra* note 7; *THE SOCIAL AND POLITICAL IDEAS OF SOME REPRESENTATIVE THINKERS OF THE AGE OF REACTION AND RECONSTRUCTION* (F. Hearnshaw ed. 1949); *THE SOCIAL AND POLITICAL IDEAS OF SOME REPRESENTATIVE THINKERS OF THE REVOLUTIONARY ERA* (F. Hearnshaw ed. 1950); L. STRAUSS, *supra* note 8.

philosophy, and of society and culture, have ultimately come to the law for their solution.

Many of the "permanent features" of Western culture and cultural thought, Kelley argues, originated in Greek thought (pp. 10, 33-34). The Greeks "discovered" the "individual 'person'" (p. 153). They drew the "fundamental distinction between private and public consciousness and behaviour" (p. 33). They identified the basic features and forms of social and political order. They tied the world of *nomos* to positive law, custom, and legal memory and experience (pp. 24-34).

What the Greeks established in their minds, the Romans reified in their laws. Roman jurists provided sharp legal distinctions between ruler and citizen, public and private, right and duty. They set forth enduring canons of legal discourse and rhetoric, legal systematization and codification (pp. 38-48). They separated the legal categories of persons, actions, and things, and through this "juridical trinity" indelibly shaped Western cultural and legal thought (pp. 48-51). Western thought thereafter was permanently focused (1) on the individual, his free will, subjective rights, and social obligations; (2) on property and the means of acquiring, maintaining, using, and alienating it; and (3) on various forms of legal interaction among persons in both the public and the private spheres (pp. 8-9, 48-52, 59-61). Through these efforts, the Roman jurists "provided the vocabulary — the terminology, conceptualizations, formulas, premises . . . for much of civilized life in Western terms" (p. 64).

In the hands of medieval and Renaissance jurists, this Greek and Roman cultural vocabulary was both refined and extended. Like their Roman predecessors, medieval and Renaissance jurists strove to systematize (and even codify) the canon law and civil law, using Greek dialectical method (pp. 116, 157, 196-202). They also accepted "Gaius's trichotomization of the law" into persons, things, and actions, and under those loci developed elaborate doctrines of contract and crime, property and inheritance, procedure and evidence, respectively (pp. 117-19, 156). The medieval and Renaissance jurists went beyond their "Roman tutors," however. They reworked Roman ideas of social classification and hierarchy and made great advances in the theories of legal office, corporation, and representation (pp. 151-52). They treated both custom and statute as legitimate sources of positive law. They reduced customs to writing, classified them by geography and language, and distinguished them closely from mere conventions and conveniences (pp. 85-108, 140-47, 156). They parsed statutes into letter and spirit and set forth elaborate theories of legal and equitable hermeneutics (pp. 132-44, 148, 154-55). They developed detailed rules of "conflicts of law" and systematic theories of the forms and interrelationships among civil law, common law, canon law, and the law of nations (pp. 121-27, 190-96). In all this, the medieval and Ren-

aissance jurists provided "a major link between ancient legal science and modern social thought" (pp. 113, 128).

Early modern jurists proved to be more effective conduits of traditional cultural ideas than contributors of novel ones. To be sure, these jurists made strong advances in theories and practices of legislation, adjudication, and codification (pp. 209-13). French and English jurists also produced comprehensive new classifications of national custom, based partly on traditional Roman methods, partly on indigenous methods (pp. 165-74, 199-202). But the pretensions of the seventeenth- and eighteenth-century "philosophical" school led by Grotius, Pufendorf, and Domat ultimately deprived Western law of much of its cultural influence. Proponents of the philosophical school became preoccupied with the quest for a "perfect jurisprudence," a "true method," and a "pure language" of law (pp. 209-22). They made pretentious claims about the autonomy and the universal applicability of their legal science (pp. 222-28). Although this effort produced considerable advances in legal hermeneutics and systematization, it led primarily to sterile formalism and empty encyclopedism (pp. 252-57). The German historical school of jurisprudence, led by Hugo and Savigny, strove mightily to overcome this abstract and arid philosophical method of law, and to restore both a healthy respect for Roman legal lore and a new appreciation for the interactions among law, culture, and custom. But these efforts ultimately proved futile even in Germany. Historical jurisprudence was ultimately eclipsed by the rise of Hegelian and Marxist dialectics, on the one hand, and the codification movements, on the other (pp. 246-57).

Since the dawn of the twentieth century, Kelley argues in his brief final chapter, the Western legal tradition has experienced an "intellectual fall from grace" (pp. 277-78). For more than two millennia the law had served as the principal science of humanity, the chief organizer and interpreter of Western culture. Now it has fallen prey to "conceptual and moral disarray" and become fragmented into numerous competing "sectors" which have "little in common, hardly even a professional memory" (p. 278). When legal history is studied, it is curiously "detached from the study of the human sciences and even from history itself."<sup>16</sup> When interdisciplinary approaches to law are offered, the product is "technical or ideological rather than historical or anthropological" and serves "the legal profession rather than . . . human understanding in any broad sense" (p. 278). Various cultural sciences like economics, anthropology, and sociology have assumed the role that legal science has abdicated. Although these sciences retain many of the terms and concepts first forged in the Western legal

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16. P. 278; *see also* p. 5 (on the "surveys and a massive monographic literature devoted to the 'external history' of the law and aimed at uncovering the 'original' meaning of legal texts beneath successive layers of interpretation").

tradition, they no longer look to the law either for instruction or inspiration.

### B. *A Challenge to Conventions*

*The Human Measure* is not only an account of the contributions of the Western legal tradition to the dialectic of nature and culture. It is also a challenge to the conventions of legal philosophy, cultural science, and historiography.

Kelley challenges contemporary jurists to view custom as a legitimate source of law and historical jurisprudence as a legitimate school of legal philosophy. Contemporary jurists, Kelley argues, have taken too narrow a view of the sources and types of law. Positivists emphasize statutes and constitutions. Naturalists emphasize rational and moral principles. But custom, says Kelley, is "the most rudimentary [and] most fundamental form of law" (p. 1), which gives shape and meaning to both statutory rules and moral principles. Inattention to this insight has enmeshed contemporary legal philosophy in a network of antinomies.<sup>17</sup> Likewise, contemporary jurists have taken too dim a view of historical jurisprudence. Historical jurists have seen more clearly than others the indispensable connections among rules, principles, and customs and among law, culture, and the state. According to Kelley, they deserve a far more prominent place in the Anglo-American legal academy than they currently occupy.<sup>18</sup>

Kelley also challenges both the lamentations of some cultural scientists and the pretensions of others. Against the prophets of cultural decay and doom in the West, Kelley offers a vigorous gospel of cultural tradition.<sup>19</sup> The solution to our modern Western crisis lies principally in the removal of (what C.S. Lewis once called) our "chronological snobbery" and in the "restoration of memory" of the cultural wisdom of the Western past.<sup>20</sup> Against the pretentious claims of certain economists, sociologists, and anthropologists that theirs is

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17. For similar contemporary perspectives, see C. FRIEDRICH, *supra* note 3, at 233; Berman, *supra* note 8; Black, *Introduction* to O. GIERKE, *COMMUNITY IN HISTORICAL PERSPECTIVE* xiv-xxx (A. Black ed. & M. Fischer trans. 1990); see also J. PELIKAN, *THE VINDICATION OF TRADITION* (1984) (on the comparable place of custom and tradition in Christianity); E. SHILS, *TRADITION* (1981) (on the comparable place of custom and tradition in philosophy).

18. There has been a considerable resurgence of interest in English and American legal history in the past two decades, and this has given historical jurisprudence fresh life. See generally Berman, *Introductory Remarks: Why the History of Western Law Is Not Written*, 1984 U. ILL. L. REV. 511 (1984); Black, *supra* note 17; Woodard, *History, Legal History and Legal Education*, 53 VA. L. REV. 89 (1967).

19. Kelley singles out for criticism in this volume, E. HUSSERL, *DIE KRISIS DER EUROPÄISCHEN WISSENSCHAFTEN UND DIE TRANZENDENTALE PHÄNOMENOLOGIE* (1954). Kelley shows the same impatience with such crisis-mongering in his other writings. See, e.g., Kelley, *supra* note 4, at 361-62 (criticizing Berman's "rather small-minded lament"); D. KELLEY, *HISTORY*, *supra* note 1, at xi. Kelley would doubtless have even less patience with A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1988).

20. Pp. 279-83. Kelley's views on tradition bear a strong resemblance to those of Alasdair

the true, universally applicable cultural science, Kelley offers the sobering example of Western legal science. It was the pretentious claim of early modern jurists that legal science is autonomous and universal that ultimately destroyed the law both as a subject and a science.<sup>21</sup> The same fate awaits any other pretender.

Finally, Kelley challenges both the methods and the emphases of contemporary historiography. Many historians have shifted from intellectual history toward social, economic, and institutional history. Kelley adopts an unabashedly intellectual and idealist genre and spurns what he calls "external history" (p. 5). Many historians have traced the origins of much of Western law, culture, science, and philosophy to the twelfth and thirteenth centuries.<sup>22</sup> Kelley traces most of these origins to the ancient Greeks and Romans, and views the high middle ages more as a watershed than a wellspring in Western history.<sup>23</sup> Many historians have emphasized the formative influence of religion and the church on Western culture, particularly legal culture.<sup>24</sup> Kelley emphasizes "anthropocentric" and "secular" influences (pp. 8-9, 31-34, 279-83). He favors *ius* over *fas*, methodology over mythology, civil law over canon law. He stresses the secular, not the religious character of Greek, Roman, and Germanic law and culture;

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MacIntyre. See A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); A. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

21. Pp. 257-75, 278-79. See further discussion in A. BRECHT, *POLITICAL THEORY: THE FOUNDATIONS OF TWENTIETH-CENTURY POLITICAL THOUGHT* 165ff. (1959); H. DOOYEWEERD, *A CHRISTIAN THEORY OF SOCIAL INSTITUTIONS* 31-58 (J. Witte ed., M. Verbrugge trans. 1986); H. DOOYEWEERD, *IN THE TWILIGHT OF WESTERN THOUGHT* 1-60 (1980).

22. Among numerous others, see H. BERMAN, *supra* note 3; H. BUTTERFIELD, *THE ORIGINS OF MODERN SCIENCE: 1300-1800* (rev. ed. 1957); M. CHENY, *NATURE, MAN & SOCIETY IN THE TWELFTH CENTURY* (J. Laylor & L. Little eds. and trans. 1959); C. HASKINS, *THE RENAISSANCE OF THE TWELFTH CENTURY* (1957); P. KRISTELLER, *MEDIAEVAL ASPECTS OF RENAISSANCE LEARNING* 95-114 (1974) (chapter on contributions of religious orders); *RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY* (R. Benson & G. Constable eds. 1982); G. TELLENBACH, *LIBERTAS: KIRCHE UND WELTORDNUNG IM ZEITALTER DES INVESTITURSTREITES* (1936); B. TIERNEY, *supra* note 3.

23. Kelley writes that "[t]he modern legal tradition was born, or reborn, in the general cultural revival of the twelfth century," but much of his discussion concerns "rebirth" rather than new birth. P. 109.

24. For an introduction to this literature, see, among numerous others, E. BRUNNER, *CHRISTIANITY AND CIVILIZATION* (1948-49); C. DAWSON, *THE HISTORICAL REALITY OF CHRISTIAN CULTURE* (1960); C. DAWSON, *RELIGION AND CULTURE* (1948); C. DAWSON, *RELIGION AND THE RISE OF WESTERN CULTURE* (1950); H. DOOYEWEERD, *ROOTS OF WESTERN CULTURE: PAGAN, SECULAR AND CHRISTIAN OPTIONS* (J. Kraay trans., M. Vander Vennan & B. Zylstra eds. 1979); G. FLOROVSKY, *CHRISTIANITY AND CULTURE* (1974); H. NIEBUHR, *CHRIST AND CULTURE* (1951); K. HOLL, *THE CULTURAL SIGNIFICANCE OF THE REFORMATION* (1959). For more specialized treatments of religion and legal culture, see, among numerous others, H. BERMAN, *supra* note 3; H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974); K. BÜNGER & H. TRIMBORN, *RELIGIÖSE BINDUNGEN IN FRÜHEN UND ORIENTALISCHEN RECHTEN* (1952); *CHRISTENTUM, SÄKULARISATION UND MODERNES RECHT* (L. Vallauri & G. Dilcher eds. 1981); H. DOMBOIS, *DES RECHT DER GRADE* (1961-1983); H. DOOYEWEERD, *ENCYCLOPAEDIE*, *supra* note 3; Z. FALK, *LAW AND RELIGION: THE JEWISH EXPERIENCE* (1981); *NUOVI MOTI PER LA FORMAZIONE DEL DIRITTO* (1988) (proceedings of a European conference on H. BERMAN'S *LAW AND REVOLUTION*, *supra* note 3).

the pagan Romanist, not the Catholic canonist influences in the middle ages; the Renaissance humanist, not the reformed Protestant contributions to early modern times. "Man is the measure of all things," the Greek philosopher Protagoras pronounced, and Kelley takes this secular lesson to heart both in entitling his book and in executing it.<sup>25</sup>

## II. CRITICAL REFLECTIONS

Although impressive in erudition and imaginative in argument, Professor Kelley's book is not immune from criticism. Notwithstanding its dustjacket raves, the book has several problems that, at least to my mind, detract appreciably from its quality and value.

First, the book bears some evidence of scissors and paste. Kelley has not been entirely successful in weaving some of his earlier published essays into a coherent volume. The opening chapters, which are largely new, appear at times to be hastily constructed and heavily dependent on selected secondary sources. This is particularly true of the chapters on Hellenic Greece and Republican Rome.<sup>26</sup> But Kelley's main thesis about Western law and culture is clearly argued in these opening chapters. The later chapters, which were published in part before, are clear, concise, and carefully culled from the primary sources. The chapters on Italian and French jurisprudence in particular are simply brilliant. But Kelley's main argument appears only intermittently in these later chapters, at times almost as an afterthought. The writing of a synthetic summary of the volume would perhaps have

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25. THE OLDER SOPHISTS: A COMPLETE TRANSLATION 80 (R. Sprague ed. 1972). See text accompanying *infra* note 47 on Kelley's "secular historiography."

26. In these two chapters, Kelley does not deal with several pertinent sources, particularly legal sources, that both confirm and challenge his interpretation. The chapter on the Greeks would have benefited considerably from closer attention to R. BONNER & G. SMITH, THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE (1930); G. CALHOUN, THE GROWTH OF CRIMINAL LAW IN ANCIENT GREECE (1927); E. COHEN, ANCIENT ATHENIAN MARITIME COURTS (1973); R. STROUD, DRAGON'S LAW ON HOMICIDE (University of California Publications: Classical Studies Vol. 5, 1968), as well as the numerous primary sources discussed therein. The chapter on republican Rome, although conversant with the classic European literature, pays only scant attention to the rich corpus of writings by the eminent Romanist Alan Watson, whose interpretations of the Roman texts and their cultural effect are radically different from those of Kelley. See, e.g., A. WATSON, LAW MAKING IN THE LATER ROMAN REPUBLIC (1974); A. WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC (1965); A. WATSON, THE LAW OF PERSONS IN THE LATER ROMAN REPUBLIC (1967); A. WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC (1968); A. WATSON, THE LAW OF SUCCESSION IN THE LATER ROMAN REPUBLIC (1971); A. WATSON, ROMAN SLAVE LAW (1987); A. WATSON, ROME OF THE TWELVE TABLES: PERSONS AND PROPERTY (1975). Kelley's discussion both of Roman law itself, and of its significance in the Western legal tradition, would also have been aided by closer consideration of D. DAUBE, FORMS OF ROMAN LEGISLATION (1956); D. DAUBE, ROMAN LAW: LINGUISTIC, SOCIAL AND PHILOSOPHICAL ASPECTS (1969); J. DECLAREUIL, ROME THE LAW-GIVER (1926); H. JOLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW (1957). Only a pedant would insist that Kelley cite and discuss every source that bears on a topic as vast as he has tackled. But Kelley has ignored too many standard works that challenge or contradict his discussion.

given him the distance he needed to prune his data and integrate his discussion more fully.

Second, the book contains too few definitions of terms and principles of selection. Kelley spends a page defining *nomos* but then admits that his definition is "a large and metahistorical idealization" (pp. 8-9). Other key terms, such as "society," "culture," "legal science," "legal philosophy," the "Western legal tradition," and many others that he uses repeatedly and variously throughout the book are left largely undefined. Without such definitions, the reader is given little insight into what has guided Professor Kelley's selection of writers and movements. He describes his book as "an exploration of the legal canon as it unfolded and was interpreted and transformed" in the West (p. 5). But why focus so carefully on Greek mythology and ignore Western Jewish jurisprudence, which was equally, if not more, influential?<sup>27</sup> Why study the Lombard and Salic laws, and only mention in passing the Burgundian, Visigothic, Celtic, and Saxon codes? Why devote fifteen pages to the canonists and more than fifty to the civilians? Why recite the history of French and English law and barely touch on developments in Germany, Spain, or Italy? Why spend ten pages on Vico and only a paragraph on Blackstone? Why dwell at length on the law of nations and barely touch the laws of delict, crime, and inheritance, among others? Selectivity is, of course, essential to the success of a sweeping summary such as this. But with little sense of Kelley's principles of selection, the reader is left to wonder at his apparent omissions and peculiar emphases.

In some instances, Kelley seems simply to be playing to his strong expertise on early modern French and Italian legal literature. When discussing the influence of the Reformation on Western law and culture, for example, he briefly mentions Luther and Calvin, and then discourses at length on his old favorites François Hotman and Charles Dumoulin.<sup>28</sup> Whatever the influence of Hotman and Dumoulin may have been in France, Luther and Calvin clearly had a more enduring and embracing influence on the Western legal tradition.<sup>29</sup> When discussing Germanic laws, he emphasizes the Salic and Lombard laws — subjects intimately familiar to the French and Italian humanists of the Renaissance, and thus to Kelley. Recent scholarship, however, has demonstrated that other Germanic codes were more critical to the de-

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27. See, e.g., E. DORFF & A. ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* (1988); A. SCHREIBER, *JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME* (1979).

28. Pp. 161-64, 187-88, 201-09. See similar discussion of these writers in D. KELLEY, *FOUNDATIONS*, *supra* note 1, at 151-82; D. KELLEY, *FRANÇOIS HOTMAN*, *supra* note 1, *passim*.

29. See generally J. BOHATEC, *CALVINS LEHRE VON STAAT UND KIRCHE* (1937); J. TONKIN, *THE CHURCH AND THE SECULAR ORDER IN REFORMATION THOUGHT* (1971); Berman & Witte, *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 S. CAL. L. REV. 1573 (1989).

velopment of the Western legal tradition.<sup>30</sup> But, beyond such hints, the reader is left to guess at Kelley's principles of selection.

Third, the book contains many questionable assertions of fact. Kelley states, for example, that the Greeks and Romans developed doctrines of subjective rights and individual liberties (p. 50). But such doctrines were first developed by the canonists of the twelfth and thirteenth centuries and the nominalists of the fourteenth.<sup>31</sup> Kelley asserts repeatedly that the "juridical trinity" of persons, things, and actions set forth in Gaius' *Institutes* was the organizing principle of Roman law, with which the Romans were "obsessed" (pp. 48-52, 61-64). But even Gaius himself abandoned this trichotomy, and the authors of the meandering Theodosian Code and Digest certainly paid it little heed.<sup>32</sup> Kelley argues that the Christian "principle of Trinity . . . merited a special title in the collections of civil law since Theodosius" (pp. 155, 78), and its inclusion in the law "symbolize[d] the new ideological unity (if not uniformity) of Roman civilization" (p. 63). But the Trinity does not appear as a title in any books of the Theodosian Code or the *Corpus Iuris Civilis* — except the *Codex Iustinianus* of 529 A.D. — and, although the doctrine was amply discussed in some theological circles, it did not have nearly the central and centralizing significance for law that Kelley describes.<sup>33</sup> Kelley asserts that Pope

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30. See, e.g., G. KÖBLER, *DAS RECHT IM FRÜHEN MITTELALTER: UNTERSUCHUNGEN ZU HERKUNFT UND INHALT FRÜHMITTELALTERLICHER RECHTSBEGRIFFE IM DEUTSCHEN SPRACHGEBEITE* (1971); K. KROESCHELL, *HAUS UND HERRSCHAFT IM FRÜHEN DEUTSCHEN RECHT* (1968); Berman, *Individualistic and Communitarian Theories of Justice: An Historical Approach*, 21 U.C. DAVIS L. REV. 549, 557-66 (1988); Reynolds, *Law and Communities in Western Christendom, c. 900-1140*, 25 AM. J. LEGAL HIST. 205 (1981).

31. See Coing, *Zur Geschichte des Begriffs subjektives Recht*, in 1 H. COING, G.A. *supra* note 3, at 245; Heymann, *Zur Geschichte des jus ad rem*, in FESTGABE O. GIERKE 1167 (1911); Tierney, *Villey, Ockham, and the Origin of Individual Rights*, in THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION 1 (J. Witte, Jr. & F. Alexander eds. 1988) [hereinafter THE WEIGHTIER MATTERS OF THE LAW]; Villey, *La Genèse du droit subjectif chez Guillaume d'Occam*, 9 ARCHIVES DE PHILOSOPHIE DU DROIT 97 (1964).

32. Although in I.8 of his *Institutes* ("On the division of the law"), Gaius writes, "All our law is about persons, things or actions," he divides his analysis into four commentaries, which treat (1) types and divisions of laws, and then persons; (2) things; (3) testate and intestate succession; and (4) actions. Not only does the commentary on "succession" depart from his schema, but Gaius also smuggles a good deal of his discussion of persons into the commentary on actions. See THE *INSTITUTES OF GAIUS* (W. Gordon & O. Robinson trans. 1988). The *Codex Theodosianus* and *Digest*, which were the two most famous collections of classical Roman law known to the West, are divided into 16 and 50 books respectively and manifest little allegiance to Gaius' trichotomy. See THE THEODOSIAN CODE AND NOVELS AND THE SIRMUNDIAN CONSTITUTIONS (C. Pharr ed. 1952) [hereinafter THE THEODOSIAN CODE]; THE DIGEST OF JUSTINIAN (T. Mommsen & P. Krueger eds., A. Watson trans. 1985); cf. H. GOUDY, *TRICHOTOMY IN ROMAN LAW* (1910) (stressing the symbolic and heuristic importance of the number 3 at Roman law). Goudy shows, however, that Gaius was not the source, but merely an example of this trichotomy. He shows further, in this and other works, that the numbers 2, 4, 7, and 12 also had important symbolic and heuristic value for the Roman jurists, among other ancient cultures. *Id.* at 2-7, 73-77.

33. See *The Code of Our Lord the Most Sacred Emperor Justinian*, Bk. I, Title 1, in 12 THE CIVIL LAW 9 (S. Scott ed. 1932). The *Theodosian Code* does touch on the Christian doctrine of Trinity sporadically in Book 16, Title 1 (On the Catholic Faith), Title 2 (On Bishops, Churches,

Gelasius I developed the biblical principle of the two swords (pp. 119, 151). But Gelasius referred, without biblical citation, to "two powers," which he divided into priestly authority (*auctoritas*) and royal power (*potestas*).<sup>34</sup> The biblical principle of "two swords" was fully developed only in the course of the Papal Revolution and then with considerably different political implications from those Kelley describes.<sup>35</sup> Kelley argues that the medieval canonists' emphasis on the "free will" of the "person," was of "immense significance" for the development of doctrines of marriage, crime, and contract (p. 153). But the critical impetus for the development of these doctrines came from sacramental theology, not canonist casuistry, and in these writings the themes of "free will" played only a minor part.<sup>36</sup> Kelley asserts that the English writs were "more or less equivalent to the ancient Roman legal actions" (p. 166). But except for a few superficial analogies, the Roman actions and English writs had little in common.<sup>37</sup> Kelley asserts that until Fortescue and St. Germain, "English common law . . . lacked . . . a full-fledged jurisprudence, a philosophy of law comparable to that formulated by Ulpian and his classical colleagues" (p. 169). But the classical Roman jurists developed only the most rudimentary legal philosophy, and it was certainly no more "full-fledged" than that of Bracton and other medieval common lawyers. Dozens of such questionable assertions throughout the volume mar Kelley's analysis.

In a sweeping synthesis such as this, there are, of course, bound to be several such errors that can be easily corrected in subsequent print-

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and Clerics), and Title 5 (On Heretics). See THE THEODOSIAN CODE, *supra* note 32, at 440-76. Discussion of the doctrine of Trinity also appears periodically in the Justinian's *Novellae* but, again, not as a separate title and not with the prominence that Kelley describes. See further discussion of the "Gaian" and "Christian Trinity," *infra* note 42 and accompanying text.

34. See copy of the letter in PUBLIZISTISCHE SAMMLUNGEN ZUM ACACIANISCHEN SCHISMA 20-21 (E. Schwartz ed. 1934), with English translation in B. TIERNEY, THE CRISIS OF CHURCH & STATE 1050-1300, at 13-15 (1964).

35. See B. TIERNEY, *supra* note 34, at 8; see also Hoffmann, *Die beiden Schwerter im hohen Mittelalter*, 20 D.A. 78 (1965); cf. G. CASPARY, POLITICS AND EXEGESIS: ORIGEN AND THE TWO SWORDS (1979) (tracing antecedents of the high medieval doctrine to patristic interpretations of Luke 22:38, but not suggesting an earlier political two swords doctrine).

36. See J. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE (1987); Witte, *The Reformation of Marriage Law in Martin Luther's Germany: Its Significance Then and Now*, 4 J.L. & RELIGION 293, 298-307 (1986) and the numerous sources cited and discussed therein.

37. See, e.g., F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 73-74 (A. Chaytor & W. Whittaker eds. 1936); Watson, *The Fifth Annual Brandan Brown Lecture — Roman Law and English Law: Two Patterns of Legal Development*, 36 LOYOLA L. REV. 247, 253-63 (1990). In the same passage, Kelley says that "the Qu[o] warranto proceedings beginning in the thirteenth (and appearing again in the sixteenth) century" illustrate how "written documentation and procedures were fixed and easily subject to political control, 'strict interpretation,' and the subversion of customary arrangements." P. 166. The quo warranto writs did not depend on "subversion" of custom, however, but rather the punctilious insistence on customary "franchise." Moreover, the quo warranto writs of the thirteenth century differed considerably in form and function from those of the sixteenth. See generally D. SUTHERLAND, QUO WARRANTO PROCEEDINGS IN THE REIGN OF EDWARD I 1278-1294 (1963) (explaining the history of quo warranto writs).

ings. But some of these errors are symptomatic of a fourth problem with the book, namely, Kelley's questionable interpretation of the Western legal tradition. Kelley does not intend or pretend to rewrite the history of the Western legal tradition. He is interested in this tradition not so much as a subject in its own right but as a fertile source of Western cultural ideas, which most intellectual historians have overlooked. Two curious tendencies in his approach, however, lead him to distort some of the legal data in arguing for his thesis.

On the one hand, Kelley adopts too static and modern a view of legal terms. He uses technical legal terms like contract, property, marriage, inheritance, succession, rights, liberties, procedure, office, corporation, and numerous others with little evident sensitivity to their dramatic semantic and substantive shifts over time and across legal systems.<sup>38</sup> He uses pregnant political terms such as public and private, person and association, welfare and responsibility in a manner that would perhaps satisfy Leibniz or Locke, but would confuse Gratian or Gaius.<sup>39</sup> Many of these terms change their colors and contents radically as one moves from Greek to Roman to Germanic law, from canon to civil to common law.<sup>40</sup> Although Kelley masterfully parses the etymology and evolution of many philosophical and theological terms in this text, he does not give the same attention to legal and political terms.

On the other hand, Kelley adopts too abstract and ahistorical a view of the Western legal tradition. He focuses on legal ideas, not legal institutions. He studies jurisprudential summaries, not judicial

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38. Kelley's static use of legal terms does not seem to be entirely accidental, for he writes that "the language of the law has been preserved — through intellectual habits, professional conventions, technical terms, proverbs, maxims, and the like — across many centuries and has ostensibly permitted an endless and fairly continuous dialogue which has formed the canon and shaped the scholastic character of western jurisprudence." Pp. xii-xiii.

39. On early interpretations of these distinctions, see, for example, H. MÜLLEJANS, *PUBLICUS UND PRIVATUS IM RÖMISCHEN RECHT UND IM ÄLTEREN KANONISCHEN RECHT* (1961). On later interpretations, see H. DIESSELHORST, *PRIVATUS EN PUBLICUS VAN GRATIAN TOT GROTIUS* (1914).

40. An enormous body of legal scholarship has been devoted to the evolution of various legal terms. On the evolution of "contract" and "obligation," for example, see G. DÍÓSDI, *CONTRACT IN ROMAN LAW FROM THE TWELVE TABLES TO THE GLOSSATORS* (1981); P. NANZ, *DIE ENTSTEHUNG DES ALLGEMEINEN VERTRAGSBEGRIFFS IM 16. BIS, 18 JAHRHUNDERT* (1985); L. SEUFFERT, *ZUR GESCHICHTE DER OBLIGATORISCHEN VERTRÄGE DOGMENGESCHICHTLICHE UNTERSUCHUNGEN* (1881); *TOWARD A GENERAL LAW OF CONTRACT* (J. Barton ed. 1990); Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 *J.L. & RELIGION* 103 (1986); Feenstra, *Pact and Contract in the Low Countries from the 16th to the 18th Century*, in *TOWARDS A GENERAL LAW OF CONTRACT* 197 (1990). On the evolution of "corporation" and "association," see B. TIERNEY, *supra* note 3, at 19-42; O. VON GIERKE, *DAS DEUTSCHE GENOSSENSCHAFTSRECHT* (1887). On the various meanings of "crime" and "fault," see H. BERMAN, *supra* note 3, at 52-60, 68-84, 181-98; W. ENGELMANN, *DIE SCHULDLEHRE DER POSTGLOSSATOREN UND IHRE FORTENTWICKLUNG* (1965); S. KUTTNER, *KANONISTISCHE SCHULDLEHRE VON GRATIAN BIS AUF DIE DEKRETALEN GREGORS IX* (1935); Durham, *Religion and the Criminal Law: Types and Contexts of Interaction*, in *THE WEIGHTIER MATTERS OF THE LAW*, *supra* note 31, at 193.

and legislative records.<sup>41</sup> He emphasizes the intellectual sources of the law, not its social, political, and economic conditions. By abstracting legal ideas and terms from their institutional and cultural contexts, Kelley is able "to view this tradition apart from particular historical movements and environments" and to wander freely "over many centuries and across national boundaries" to support his thesis (p. 6).

Although such a methodology produces provocative insights into the Western legal tradition, it also produces many problematic interpretations of it. Two such problems merit particular emphasis.

Kelley's method of interpretation allows him to associate and analogize ideas far too freely. For example, he draws several curious connections between the "juridical trinity" of persons, things, and actions in Roman law and the "Holy Trinity" of Father, Son, and Holy Ghost in Christian theology. Kelley writes that the Christian "myth" of the Trinity was "imperfectly converted" from pagan Roman legal antecedents and "formulated authoritatively in the first ecumenical council of Nicaea in 325 under the auspices of the emperor" (pp. 118-19). But the doctrine of the Holy Trinity was formulated by the Church Fathers long before Nicaea, and their formulations were certainly inspired more by Christian traditions and canons than by Roman law and learning.<sup>42</sup> Kelley argues that the doctrine of the Holy Trinity organized patristic and medieval Christian theology, much in the same way that the Gaian Trinity organized Roman and Romanist law (pp. 61-78, 109-26). But even a cursory comparison of standard legal texts like Justinian's *Digest* or Accursius' *Glossa Ordinaria* and standard theological texts like Augustine's *City of God* or Lombard's *Book of Sentences* indicates that these two "trinities" were neither organizing nor analogous. Kelley states that the two trinities were "fateful[ly] interpenetrat[ed]" in Roman legal texts, symbolizing and catalyzing "the new ideological unity (if not uniformity) of Roman civilization" (p. 63). But references to the Christian Trinity appear only sporadically in the Roman legal texts. Moreover, the Christian doctrine of Trinity spawned enormous discord and division within the Church of the first millennium, splitting the Greek and Latin Fathers, and ultimately the Orthodox and Catholic branches of the Church. Had Kelley placed these trinitarian ideas in their institutional and cultural

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41. This focus is deliberate. See, e.g., p. 5 (he will not "chronicle Western legal thought in a professional or a disciplinary way," or dwell on "the 'external [that is, institutional] history' of the law [or] the 'original' meaning of legal texts").

42. See, e.g., T. DE RÉGNON, *ÉTUDES DE THÉOLOGIE POSITIVE SUR LA SAINTE TRINITÉ* (1892-98); E. FORTMAN, *THE TRIUNE GOD* (1972); J. PELIKAN, *THE EMERGENCE OF THE CATHOLIC TRADITION (100-600)*, at 172-225 (1971); 1-2 G. PRESTIGE, *GOD IN PATRISTIC THOUGHT* (1959). An important antecedent to the Nicene formulation of this doctrine of Trinity was that of the Apostles' Creed (c. 200 A.D.). See J. KELLY, *THE EARLY CHRISTIAN CREEDS 1-6* (1950); I P. SCHAFF, *THE CREEDS OF CHRISTENDOM WITH A HISTORY AND CRITICAL NOTES 14-29* (1877).

contexts, he would perhaps not have drawn associations and analogies between them so freely.

Kelley's method of interpretation also leads him to exaggerate the antiquity and continuity of the Western legal tradition. In effect, he treats this tradition as a seamless and timeless web. According to his interpretation, most of the basic terms, methods, and doctrines of law were set forth by the ancient Greeks and Romans. Instances of such terms, methods, and doctrines in later texts are treated as indications of ongoing Greek and Roman influence. Thus, for example, Kelley attributes the "scientific" and "intellectual revolution" of Roman law in the late republic to the infusion of "Platonic ideals, Aristotelian categories, sophistic *topoi*, and dialectical method."<sup>43</sup> He describes the twelfth-century "revival of legal science" as a "recapitulation" of "the pre-Ciceronian 'scientific revolution'" (pp. 109-18). He argues that the writings of such diverse figures as Bracton, Bartolus, Calvin, Grotius, and Hegel maintained allegiance to basic Roman legal language and lore and that many early modern societies experienced ongoing "receptions of Roman law" (pp. 122-23, 128ff., 162, 167ff., 213ff., 252ff.). This interpretation may be accurate as far it goes, but it is rather misleading. The scientific revolution of law in republican Rome was catalyzed more by Rome's desire to control its wayward provinces and to accommodate new social and economic patterns than by its new appetite for Greek philosophy.<sup>44</sup> The twelfth-century revolution of legal science was not so much a recapitulation of the Roman revolution as the product of the new struggles between church and state, canon law and civil law, Christian theology and ancient learning.<sup>45</sup> European jurists and philosophers from Bracton to Hegel looked for inspiration and instruction in many other sources before they turned to the texts of Roman law. The "receptions" of Roman law were not the "full-fledged . . . Romanization[s] of law" (p. 122) and importations of classic Roman law and learning that Kelley describes. They were attempts by legal professionals and pedagogues from the fourteenth to the eighteenth centuries to integrate and organize the laws of their polities and curricula. Such laws, to be sure, included classic Roman and Romanist law, but also Catholic and Protestant canon law, feudal law, manorial law, mercantile law, and other sources that comprised the *jus commune* of Western Europe.<sup>46</sup>

The genius of the Western legal tradition is not only its continuity and antiquity. It is also its creativity and adaptability to the many

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43. Pp. 44-45. He prefaces this remark by saying "the channels of transmission are obscure" and cites several secondary sources who make this same admission. P. 44.

44. See sources cited *supra* note 26.

45. See sources cited *supra* note 22.

46. See generally W. TRUSEN, ANFÄNGE DES GELEHRTEN RECHTS IN DEUTSCHLAND (1962); F. WIEACKER, *supra* note 3, at 124-248.

transformations and revolutions that have occurred in the history of Western culture. Western law has been constantly recast into new ensembles, with new terms, new doctrines, new methods, and new emphases that sometimes supplement, sometimes supplant traditional ones. Had Professor Kelley viewed the Western legal tradition more as a patchwork quilt than as a seamless web, he would perhaps have emphasized both the continuity and the discontinuity, both the antiquity and the novelty of Western law.

Finally, Kelley's stridently "anthropocentric" perspective distorts his descriptions of the past and dilutes his prescriptions for the future. Kelley describes *The Human Measure* as an "atonement" for his earlier works which had "undervalued" the role of myth and religion in the West (p. x). This book is not an adequate atonement. Kelley discusses religion, but ascribes to it a largely prefatory and perfunctory role in the development of Western law and culture. The early Delphic and Olympic religions of Greece are treated as "primitive" and "protolegal" and given little part to play after the "legal revolutions" of Draco and Solon. The "peculiar cosmology" of the Romans is described as a "rudimentary jurisprudence" that fell into desuetude after the "codification" of the Twelve Tables. The Christian religion, while more institutionally formative in the middle ages, is said to have made only marginal contributions thereafter. The historiography of the past three decades, however, has confirmed the once universally accepted view that religious ideas and institutions — in Olympic, Judaic, Germanic, and Christian forms — have had a remarkably enduring and embracive influence on the Western legal tradition.<sup>47</sup>

Kelley's concluding prescription is equally anthropocentric. The "moral" to his story is that "self-knowledge in the social and cultural spheres does not come easily" but it is coming (p. 282). True self-knowledge will be finally achieved when the West undertakes a "Copernican Counter-Revolution, in which the 'person' is indeed, in terms of experience, at the center of the universe."<sup>48</sup> This primitive individualistic teleology, however, belies the traditional Western belief that every person is inextricably part of a communion of saints, a community of associations, and a commonwealth of nations.

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47. See *supra* notes 23-25 and accompanying text.

48. Pp. 292-93. A few paragraphs later Kelley writes that "man's central position in the world has been undermined by various intellectual revolutions." P. 283.