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Jaroslav Pelikan put it well: »Tradition,« he said, »is the living faith of the dead;« while »traditionalism is the dead faith of the living.«¹ Harold Berman taught me the significance of this quotation during our time together at Emory University School of Law. It was a favorite of his – he used it often in conversation and in published work.²

I am a Catholic myself and I am well aware of the normative force of tradition in my Church. The *Catechism of the Catholic Church* defines tradition as »the living transmission« of the message of the Gospel and the Apostolic Age from that founding moment of God’s holy Church on earth to our own day.³ Scripture and Tradition, »then, are bound closely together and communicate with one another.«⁴ »Tradition transmits in its entirety the Word of God which has been entrusted to the Apostles by Christ the Lord and the Holy Spirit.«⁵ »Both Scripture and Tradition must be accepted and honored with equal sentiments of devotion and reverence.«⁶

What we learn from this distillation of the faith is that tradition is central to the life of the faith. But the *Catechism* begs the most important question: What is tradition that we may learn from it? For it seems, as the Pelikan quotation suggests, capable of dual meanings.

One meaning, of course, is strict adherence to the ancient ways of doing things. Tradition understood in this sense is a rallying cry for a political program: We must return to the wisdom of the past. Our present age is polluted with new and unproven ways of doing things. Or, in the same vein, tradition might be a summons to rote repetition of ancient forms – liturgy, say, or ceremonial – with an insistence on doing things as they have always been done. The past is seen as authoritative and our world is judged, approvingly or disapprovingly, on the basis of how well (or poorly) we follow the tried and the true.⁷

On the other hand, of course, tradition might be seen as Jaroslav Pelikan understood the concept – as dynamic, as fluid, as the response of an historically-grounded but still vital community to fresh challenges. Tradition becomes, on this model, a source of guidance. It provides continuity in disruptive times, but it is not itself constraining. It recognizes that an awareness of the past is necessary to prevent the fragmentation of society, to keep us committed to our shared story, to stop us from looking at one another as strangers. Social amnesia, as much as personal amnesia, is life-destroying.

The professional historian is obliged, I think, to hold this latter view of tradition close to his or her heart. Without it, the historian might pledge blind allegiance to a fixed and static conception of the old ways. Or, worse still, he or she might yield to the temptation of Heraclitus and say with him, »Everything flows and nothing remains still ... You can’t step twice into the same river.«⁸

Harold Berman was able to capture that balance between fidelity to the past and the exigencies of the moment as well as academic historian I have ever known. There are many examples from his work that I could draw upon to illustrate this point, but I should like to focus on his treatment of the Papal Revolution and its implications for someone like myself, a Catholic with deep training in history but also, as a lawyer and law professor, keenly interested in contemporary affairs.

I must begin with the axiomatic statement that there is a strong tendency within the Catholic Church to view her history as the story of the preservation of a deposit of faith, entrusted by Christ to the Apostles, and kept safe and secure to the present. Innovation, on this account, is to be denounced if not actively despised as heresy, as heterodoxy, as hostile to faith and morals. Thus Hippolytus (c. 170–230) condemned innovations

1 PELIKAN (1984) 64.

2 See, for example, BERMAN (1993) 243.

3 Catechism of the Catholic Church, para. 78 (1978).

4 Id. para. 80.

5 Id. para. 81.

6 Id. para. 82.

7 FELDMAN (2002) 135.

8 DORTER (2013) 44 (quoting Plato’s Cratylus, which is the sole surviving source for Heraclitus’ comments).

in his own day as heretical deviations from a pure and pristine apostolic age that must always be kept holy.⁹

Nearly two millenia later, one finds nearly identical language being used by ecclesial authority. Pope Benedict XV, whose witness for peace in the charnel house of World War I was truly heroic,¹⁰ was nevertheless reactionary in his denunciation of modernism: »Let there be no innovation. Keep to what has been handed down.«¹¹ Benedict's Latin was almost exactly parallel to the language used by the fifth-century theologian and defender of the papacy Vincent of Lérins.¹² Thus we come full circle – ancient and modern writers concurring on the necessity to preserve a closed and unchanging deposit of faith.

This vision of an unchanging set of practices and institutions, this belief in a body of truths always and everywhere the same has been applied by at least some Catholic historians to the papal office itself. One might take as an example of this approach the work of Augustin Fliche (1884–1951). Fliche possessed massive, encyclopedia learning in the field of Church history.¹³ The multi-volume history of the Church he co-edited with Victor Martin remains important today.¹⁴ Scholars continue to recommend cite his work as foundational.¹⁵

Like Berman, Fliche also wrote extensively about the pontificate of Pope Gregory VII (1073–1085).¹⁶ But Berman's and Fliche's respective starting points could not be more different. To be sure, in his edited history of the Church and in the books he authored about the medieval papacy, Fliche appreciated that there were discontinuities in the historical record and periods of rapid ideological and institutional change. But his sympathies were always for the »papal cause.«¹⁷ An early reviewer observed that »although Fliche tells the

truth, the papal truth is set forth with »the enthusiasm of a convinced partisan.«¹⁸

This is nowhere truer than in Fliche's treatment of the pontificate of Pope Gregory VII (1073–1085). His brief pontificate, and the political and religious upheavals that accompanied it, remain controversial today. Was Gregory a revolutionary? A restorationist? Berman saw Gregory as the former. Gregory understood himself as the latter.¹⁹ He was merely returning the papacy to its former glories, before the great decline in papal fortunes in the tenth century and the mid-eleventh-century »capture« of the papacy by German emperors. Fliche uncritically embraced Gregory's self-assessment. Gregory, in Fliche's view, was a conservative, a tragic figure who merely sought to restore to the Church ancient prerogatives that had fallen into temporary abeyance thanks to historical circumstance.²⁰

Berman, however, looked at the evidence and concluded that Gregory represented a sharp break with the past. A former student and life-long admirer of Eugen Rosenstock-Huessy,²¹ Berman deepened and developed Rosenstock-Huessy's historiography of western revolutions to make the case that Pope Gregory led the first great revolution of the modern era – the Papal Revolution of the late eleventh and early twelfth centuries.

The Papal Revolution, Berman convincingly argued, amounted to a total transformation of the western world. Politically, real power flowed to the Church, especially the papacy. The popes inspired, organized, urged on a series of Crusades to reconquer the Holy Land, which had been lost to Islam centuries before.²² The papacy helped to drive and set the pace for cultural change – from style of worship, to church architecture, to the redefinition of the relationship between clergy and laity.²³ The papal revolution was accompanied

9 EASTON (1934) 25.

10 BECKER (2012) 202, 208–209.

11 BENEDICT XV (1914) para. 25.

12 Benedict XV wrote: »Nihil innovetur, nisi quod traditum est.« Id. Vincent wrote: »Nihil innovandum, nisi quod traditum.« *Commonitorium*, 6.6., as quoted in GUARINO (2013).

13 Although Fliche certainly had an unsavory side too. He was Dean of the Faculty of Letters at the University of Montpellier in 1941, when that University was the first to invite Marshall

Philippe Pétain to speak after the Nazi occupation. FINK (1989)

264–265. A relentless anti-Semite,

Fliche made life miserable for his Jewish colleague Marc Bloch, who eventually died a hero's death in the service of the French Resistance. WEBER (1991) 253–254.

14 FLICHE/MARTIN (1934–1951).

15 See, for instance, STOLLER (1991) 259, 261 (recommending that students still have the »need to read Fliche«).

16 FLICHE (1924), FLICHE (1930), FLICHE (1946).

17 MCKINNEY (1932) 92, 93.

18 MCKINNEY (1932) 92, 93.

19 ROBINSON (2004) 1.

20 REID (1995) 433, 474.

21 Berman expresses his gratitude and his debt to Rosenstock-Huessy in *Renewal and Continuity*: BERMAN (1986) 19, 21. Cf., ROSENSTOCK-HUESSY (1938).

22 BERMAN (1983) 101.

23 BERMAN (1983) 103.

by violence – Gregory VII, after all, waged a sanguinary war against the Emperor Henry IV.²⁴ Similar struggles took place on a more localized level throughout Western Christendom – as in the contest of wills that was Henry II vs. Thomas Becket.²⁵

But Berman also knew that while the transformation worked was total, it was a transformation that built upon foundations that had been laid long before. Berman did not succumb to the Heraclitan temptation to see only the headlong flow of waters while missing the well-hewn banks that channeled the coursing stream.

This appreciation for the deep origins of civilization led Berman to look at the legal order of Western Europe. And Berman traced this legal order far back into Western history. He recognized that Quintus Mucius Scaevola at the end of the second century BC employed a form of dialectical reasoning to arrange the components of the Roman law.²⁶ He notes that Scaevola's system provided the backbone for the work of later classical and post-classical jurists.²⁷ And he understood the significance of legal maxims as representing maximal statements of legal principles, reflecting the law's underlying jurisprudential commitments.²⁸

But Berman also knew what was transformative in the law. Preeminently, this was the emergence of a body of canon law that relied somewhat on Romanist sources, that borrowed somewhat from older Romanist forms of reasoning, but that fundamentally differentiated itself in its ambition and its subject-matter. Gratian, the author of the famous *Concordance of Discordant Canons*, also known as the *Decretum*, was, for Berman, the hero of this story.²⁹ While we have learned much about Gratian since Berman wrote in 1983 – we know now that Gratian's *Decretum* went through two recensions in a span of some two decades and that »Gratian« himself was probably a composite figure³⁰ – Berman's bold assertion that the *Decretum* »was the first comprehensive and systematic legal

treatise in the history of the West« rings as true today as when it was penned.³¹

In a close and detailed review of Gratian's text, Berman considered both the ways in which Gratian adapted ancient sources and means of reasoning about the law and the great innovations he introduced, such as his ideas about constitutional law and the ways in which both Church and state were bound by the dictates of the natural and divine law.³²

Berman's story of revolutionary change is therefore not nihilistic nor is it the complete supplanting of all that is old. It is rather the story of how at a time of extreme upheaval, social leaders – popes, bishops, kings, princes, and, above all, learned, active lawyers – created a new ensemble of ideals and principles borrowing from old sources and inventing new ones.

A Catholic can accept Berman's account of the papacy because it is a story of such borrowing and adaptation. Popes of the high middle ages stood at the apex of an international network of bureaucrats and legates and claimed powers that would have rendered speechless the popes of late antiquity or the early middle ages.³³ Still, these popes invoked the names of their predecessors and saw themselves as building on an edifice worthily constructed by Leo the Great, Gregory the Great, and other important medieval popes like Zachary and Nicholas I.

Berman's account of a papacy that is fixed and steadfast, yes, but also subject to adaptation in the light of historical contingency actually serves Catholics well. For the modern history of the papacy has experienced nothing less than a powerful dialectic between lines of continuity and grand historical shifts. Consider the gulf that separates Pope Pius IX (1846–1878) from his immediate successor Leo XIII (1878–1903).

Pope Pius IX was the crowned head of the Papal States. He commanded armies, he signed the death warrants of prisoners, he conveyed every appear-

24 BERMAN (1983) 103–105.

25 BERMAN (1983) 255–269.

26 BERMAN (1983) 136.

27 BERMAN (1983) 137.

28 BERMAN (1983) 139–140.

29 BERMAN (1983) 143.

30 Important recent work includes, but is not limited to: WINROTH (2004), WINROTH (2006) 1–29, LARSON (2006).

31 BERMAN (1983) 143

32 BERMAN (1983) 143–151.

33 BERMAN (1983) 203–215.

ance of being the worthy temporal and spiritual successor of Gregory VII. But all of that was taken away when the papal army gave way before the cannonades of Garibaldi's men and surrendered the City of Rome.³⁴

Leo was forced to reconstruct papal authority shorn of all the trappings of earthly sovereignty. And he succeeded by carefully husbanding the diplomatic resources of the Holy See,³⁵ by commenting judiciously on church-state relations,³⁶ by promoting thomistic philosophy,³⁷ and, above all, by making the Holy See the defender of the voiceless poor, offering, in the encyclical *Rerum Novarum* a halfway house between revolutionary socialism and reactionary capital.³⁸

The papacy is faced today with the need to transform itself once again. Battered by scandal and confronting a series of first-order questions of

the highest magnitude – is there a future for institutional religion? has scientific inquiry finally overthrown God? – a new Pope once again faces an uncertain future. Church leaders – Australian bishops, the theologian Hans Küng, and others – yearn for an »Arab Spring« to sweep from the Church its accumulated cobwebs and respond adaptively to the needs of the modern world.³⁹ Whatever direction the new Pope Francis chooses to lead the worldwide Catholic Church, he should know, if he chooses to read Harold Berman, that the Church has long had to face crises and that the Church fares best when it adapts itself to the temper of the times without losing the essentials of faith. ■

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34 Although written from a partisan perspective, the old work by John Gilmary Shea on Pope Pius IX remains an enjoyable read: SHEA (1877).

35 WARD (1966) 47–61, WARD (1962) 392–414.

36 THOMAS (1980).

37 HENNESEY (1978) 185–197.

38 KAVANAGH (1992) 215–221 (a wonderful review of a century of papal social teaching).

39 FRAZER (2013) (reporting on the activities of Australian bishops); KÜNG (2013); and D'ANTONIO (2013).

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