

IN PRAISE OF HAROLD J. BERMAN

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I first heard of Hal Berman when I was a student at Harvard Law School in the 1950s. He appeared to be a remote and isolated figure, engaged in the eccentric task of taking seriously the Soviet legal system. How little I then knew of the man or of his enterprise!

We became friends in a casual way when I was in practice in Boston and he was still teaching at the law school. I began to appreciate his range and depth.

But it was only after he had moved to his second career at Emory that I came to see his openness to new ideas, his intellectual vitality, his Christian commitment, and his ecumenical embrace of truth wherever present. It is with this sense of Hal that I dedicate the following thoughts to his memory.

“Tantum religio potuit suadere malorum.”—“Such are the great evils that religion is able to excite.” So Lucretius generalized from the slaughter of Iphigenia on the altar at Aulis in order that the Greek fleet might have “a happy and hallowed” start on its expedition against Troy. I read this line from *De rerum natura* in a class at Harvard University in 1944, and it has stayed in my memory, a succinct reminder of the harms that can be done by religion or in the name of religion.

A Latin aphorist might have made a similar judgment on law. How many evils it has produced! How many harms it produces! I need not set out the catalogue of crimes effected by law or done in its name. A similar saying could be coined of sex. How many evils it has produced! How many harms have been caused by it or are carried out to satisfy its demands!

The truth is that no universal human activity is totally benign. If it is human, it will have repercussions and side effects and apparently ineradicable deficiencies that deform its practice and make the practice grotesque or hideous.

Today, atheists are making a stir in Britain and America. Only recently I saw on local television in San Francisco a program in which a noted British

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author lamented that at the time of Christ there had not been a lunatic asylum in Jerusalem. The atheists arm themselves with a catalogue of the crimes perpetrated by the religious or in the name of religion. Their evident message is that, if only religion could be done away with, the world would be saner and safer. They ignore the crimes committed by such outstanding secularized ex-Christians as Hitler and Stalin and such militantly secular non-Christians as Chairman Mao and Pol Pot and the fact that the twentieth century, the most secular in history, was also the bloodiest in the destruction of human lives.

“By their fruits you shall know them” is authoritative advice. Let us be sure what trees bear bad fruit. At this time of atheistic attack, it is peculiarly desirable that a scholarly center concentrate on two of the great enterprises of humankind—law and religion—and explore with equanimity the interactions between them and the difficulties and deficiencies that have marred these two analogous efforts to make sense of, and give order to, the tumult of life.

The Center for the Study of Law and Religion at Emory, which Harold Berman and his students Frank Alexander and John Witte have triumphantly established, not only permits the exchange of insights and fraternal correction. Study at the Center enables scholars to identify the large contribution of law to the edifice of religion and the many building planks from religion that have given structure to the law. Are not the concepts of personal responsibility and of the human being as person theological innovations that have provided the foundations of our law? Does not the legal concept of agency permit a minister, priest, or rabbi to function in the name of God and so provide a structure for what is unsympathetically called ‘organized religion?’ Is not marriage in the tradition familiar to us a legal and a religious event at the same time, the legal ceremony and legal effects encasing the pledge of persons to one another in a commitment for life in a religious transcendence of the transitory flow of human emotion and expectation?

Religion and law both deal in words. It has occurred to me, writing of the First Amendment guarantee of free speech, that all or virtually all religious activity could be subsumed under speech and given protection under this popular secular category as well under the exact language of the First Amendment. Without words, religion is a dumb show. As for law, how can it be communicated or applied but by words? Law is not the policeman’s baton, but the ordinance he enforces, the rules that restrain his own conduct, and the verbal proceedings that follow the arrest he effects. It is on account of their dependence on words that both religion and law have proved to be resistant to

any deconstruction depriving words of their stability and their ability to transmit with tolerable clarity an idea from one human being to another. In a word, both enterprises must and do take words seriously.

Each deals with the intangible—the obedience of human beings not to force but to verbal guidance. The authority they invoke is invisible. They march together—not art, not science. They assume an order in the world.

Law and religion not only use words to shape stubborn realities. They are each—at least in our traditions, broadly understood—themselves shaped by realities. In the case of law, it is what human nature prescribes or permits. In the case of religion, revelation provides an additional structure and stability. In neither case are the outer boundaries of change or even the essential, nonshakeable core, free from argument.

Each has its fictions. Legal fictions are an established category of law—for example, the fiction that an illegal alien imprisoned in the middle of the country, say Leavenworth, Kansas, has not entered the United States. Fiction is not a favorite term in theology. But do not favorite images of theology fit this category? In the most familiar of Christian prayers, the Father is firmly localized in heaven. In each area, the force of metaphor carries the mind beyond the physical reality of space.

Each discipline plays a part in the other. Consider the fate of law if, as some jurists try to think, it could be understood as a mere reading of bloodless print, and if conscience did not control and animate the reader. Consider what religion would consist in if there were no authority, no rules, no cohesive bonds framing the community. It could consist in Emersonian meditation. It would not be a message binding generations and continents.

Each has made contributions to the other by the offer of models or methodology. Judaism and Christianity present a picture of authority that is a projection of the legal structure of an absolute monarchy. God is a sovereign subject to no cabinet or parliament or court. He makes laws and judges cases as he sees fit. In Christian theology, he has a royal court composed of angels and saints. The latter act as courtiers, asking the monarch's kindness on behalf of their friends or clients. Of them, Mary is the chief advocate, not in the sense of being a lawyer but of being an effective intercessor. There are no lawyers in heaven. The line has been drawn here on the projection of legal images. In fantasy, the devil and St. Michael may tussle for a soul, but the ordered, verbal battle of the courtroom is not a feature of heaven.

Theology, in turn, has influenced the shape that the state will bear. God is sovereign, so his will cannot be challenged. The state is sovereign, so it is, by its very nature, immune from suit. It may graciously concede an area in which a court may hold it liable. In some cases of civil rights, for example, its agents may be held accountable on the theory that their offenses were personal, not those of the office they held or the sovereign they served. The sovereign is, even today, leviathan or God on Earth with the power to make its soldiers risk death and the power to remove criminals from life. A power that today many Christian theologians would reserve to God remains the state's godlike power of deciding when death shall occur. Add that the state has the divinity to decide who shall count as human and to exclude from this category of protected lives the lives of those whose humanity is inconvenient to admit.

Law and religion have again interacted in the discovery that bribery shall not be done. Deuteronomy tells us that God in judging does not take a bribe. The judges of Israel are instructed to do likewise. The movement of thought appears to go from the divine case to the human, but one might suspect that the making of this momentous discovery—I don't know any true precedent—began with consideration of human judges and ended by projecting the human on the divine. In any event, this interchange of law and theology has left a paradox perhaps better classified as a mystery: the response of God, a just judge, to the sacrifice of his son. Shakespeare has explored the question and perhaps offered a key to its solution in *Measure for Measure*, where insistence on the letter of the law is trumped by a redemptive act of mercy.

It is a sign of their affinity that their practitioners mock each other by assigning their own professional associates to the other field when they disapprove of them. Thus, Christopher Columbus Langdell was derided by lawyers as a legal theologian, and I have harbored the same thought about the master of federal jurisdiction, Henry Hart. Thus, a long and constant tradition in theology has attacked theologians as legalistic when they stick too righteously to the letter of the text. Partners in the practice of phrasing commands, differentiating situations, and bringing realities under verbal control, theologians and lawyers are quick to see the notes in the other's eye.

I could go on multiplying examples of how law and religion interact. My point is evident. The Center here at Emory, inspired and guided by the holistic learning and teaching that my friend Hal Berman exemplified in his life and work, is a splendid specimen of the kind of study that goes beyond college courses and graduate departments. With the care, money, and talent that have

been invested here, this kind of collaboration could be superbly replicated with vigorous variations throughout the scholarly spectrum and well beyond the worlds of law and religion. This Center, and the work of Hal Berman within it, exemplify what can be done. Its example can be contagious, engaging other creative scholars, energizing them to do likewise.

