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## A NEW CONCORDANCE OF DISCORDANT CANONS: HAROLD J. BERMAN ON LAW AND RELIGION

*John Witte, Jr.\**

In the field of law and religion, Harold J. Berman has been an inspired and inspiring leader. He has demonstrated that law has a religious dimension, that religion has a legal dimension, and that legal and religious ideas and institutions are intimately tied. He has shown that there can be no divorce between jurisprudence and theology, legal history and church history, legal ethics and theological ethics. He has argued that law and religion need each other—law to give religion its social form and function, religion to give law its spirit and vision. Through Berman's efforts over the past five decades, the work of generations of earlier scholars in law and religion has been brought into a common focus, and many new areas of inquiry have been opened. His impressive work in this field has earned him such titles as "our new Blackstone,"<sup>1</sup> "a true *doctor utriusque juris*,"<sup>2</sup> and "the founder of the modern discipline of law and religion."<sup>3</sup> For me, Berman is the new Gratian, a jurist with the vision and vigor to create his own "concordance of discordant canons."<sup>4</sup>

Berman's writings in this field alone are the envy of many productive scholars. We have about seventy scholarly articles on this subject.<sup>5</sup> We have three lengthy books—*The Interaction of Law and Religion* (1974), the prize-winning *Law and Revolution: The Formation of the Western Legal Tradition* (1983), and a new title *Faith and Order: The Reconcili-*

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\* Director of Law and Religion Program and Professor of Law, Emory University. This essay builds in part on the Editors' Introduction to *THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION—A TRIBUTE TO HAROLD J. BERMAN* at xiii-xx (John Witte, Jr. & Frank S. Alexander eds., 1988) [hereinafter *THE WEIGHTIER MATTERS OF THE LAW*]. I am deeply indebted to Frank Alexander for all of his advice and criticism in the preparation of this article. I would also like to thank Eliza Ellison, Don Fyr, Woody Hunter, and Charles Reid for their comments and suggestions.

<sup>1</sup> Gary L. McDowell, Book Review, 78 *AM. POL. SCI. REV.* 577, 578 (1984).

<sup>2</sup> Jaroslav Pelikan, *Foreword* to *THE WEIGHTIER MATTERS OF THE LAW*, *supra* note \*, at xi, xii.

<sup>3</sup> Thomas L. Shaffer, *Law and Religion*, 9 *CHRISTIAN LEGAL SOC'Y Q.* 26 (1989).

<sup>4</sup> See GRATIAN, *DECRETUM* (c. 1140) (also titled *CONCORDANCE OF DISCORDANT CANONS*), *reprinted in* 1 *CORPUS IURIS CANONICI* (Emil Friedberg ed., 1879).

<sup>5</sup> See the bibliography of Berman's writings at 42 *EMORY L.J.* 561 (1993).

*ation of Law and Religion* (1993). We have long portions of other books on Soviet Law, international trade, and legal philosophy that take up law and religion themes. We have some 900 pages of unpublished manuscripts at hand, some long forgotten collecting dust in the files, others awaiting final polishing before they are sent to the printer. We have hundreds of letters to students, friends, and fans, chock-full of erudite responses and rebuttals, witty aphorisms, and self-revelations about this field of law and religion.

These literary accomplishments are matched by institutional accomplishments. Berman has taken up the subject of law and religion in dozens of courses and seminars at Harvard and Emory. He has lectured widely in North America, Europe, and Russia on various aspects of law and religion. He has helped to establish a number of interdisciplinary institutions and colloquia devoted to the study of law and religion, notably, the Council on Religion and Law, the Law and Religion Section of the American Society of Christian Ethics, the Law and Religion Section of the Association of American Law Schools, the Jurisprudence Task Force of the Christian Legal Society, and the Law and Religion Program at Emory University. He has served as an expert witness in a dozen cases here and abroad concerning matters of church polity and canon law. He has long served as a behind-the-scenes advocate for the religious liberation of Soviet and East European Jews and Christians.

Such prodigious accomplishments take more than a brief essay to assay properly. Selection, truncation, and interpretation are necessary evils. In this essay, I provide an account of the origin and evolution, the genesis and exodus, of Berman's work in law and religion. Part I analyzes the sources of his inspiration and instruction in this field. Part II summarizes the principal themes of his work in law and religion. Part III outlines the challenges that Berman opens to us and leaves open for us. Part IV provides a few illustrations of work that I have pursued in response to these challenges.

## I. SOURCES

However great the temptation to deify Professor Berman on this happy occasion, it must be said that he did not create the study of law and religion *ex nihilo*. He drew on a rich tradition of literature and learning, with roots reaching back well into the nineteenth century. His shelf of

indispensable books on the subject is too long and too bowed to describe in full. But a few sources recur repeatedly in his conversations and writings. The classic historical works of Savigny,<sup>6</sup> Gierke,<sup>7</sup> Maitland,<sup>8</sup> and Maine<sup>9</sup> still grace his shelves, well worn and heavily marked. The profound writings of his college mentor, Eugen Rosenstock-Huessy, with their grand vision of Western history, occupy a prominent place in Berman's library and mind.<sup>10</sup> The tomes of his graduate instructors in the history of law and religion—particularly Hajo Holborn,<sup>11</sup> T.F.T. Plucknett,<sup>12</sup> and R.H. Tawney<sup>13</sup>—still work their influence. Lon Fuller's provocative account of the morality of law has long inspired Berman.<sup>14</sup> Distinguished historians

<sup>6</sup> See especially FRIEDRICH KARL VON SAVIGNY, *VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (1814).

<sup>7</sup> See especially OTTO VON GIERKE, *DAS DEUTSCHE GENOSSENSCHAFTSRECHT* (1868-1913) (4 vols.).

<sup>8</sup> See especially FREDERICK W. MAITLAND, *THE COLLECTED LEGAL PAPERS OF FREDERICK WILLIAM MAITLAND: DOWNING PROFESSOR OF THE LAWS OF ENGLAND* (Herbert A. Fisher ed., 1911); FREDERIC W. MAITLAND, *ROMAN CANON LAW IN THE CHURCH OF ENGLAND* (1898); FREDERICK POLLOCK & FREDERIC W. MAITLAND, *HISTORY OF ENGLISH LAW*, (1998) (2 vols.).

<sup>9</sup> See especially HENRY S. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM, CHIEFLY SELECTED FROM LECTURES DELIVERED AT OXFORD* (1883); HENRY S. MAINE, *ANCIENT LAW: ITS CONNECTIONS WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* (1861).

<sup>10</sup> See especially EUGEN ROSENSTOCK-HUESSY, *DIE EUROPÄISCHEN REVOLUTIONEN UND DER CHARAKTER DER NATIONEN* (1951); EUGEN ROSENSTOCK-HUESSY, *THE DRIVING POWER OF WESTERN CIVILIZATION: THE CHRISTIAN REVOLUTION OF THE MIDDLE AGES* (1949); EUGEN ROSENSTOCK-HUESSY, *OUT OF REVOLUTION: AUTOBIOGRAPHY OF WESTERN MAN* (1938). Berman dedicated his first monograph on law and religion to Rosenstock's memory. HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974) [hereinafter *INTERACTION*]. He has several times referred to himself as a "Rosenstockian." E.g., HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 324 (1993) [hereinafter *FAITH AND ORDER*]. He has also written a powerful endorsement of Rosenstock's historical work in an introduction to a forthcoming new edition of EUGEN ROSENSTOCK-HUESSY, *OUT OF REVOLUTION* (on file with the author) [hereinafter *Introduction*].

<sup>11</sup> See especially HAJO HOLBORN, *A HISTORY OF MODERN GERMANY, 1840-1945* (1969); HAJO HOLBORN, *A HISTORY OF MODERN GERMANY, 1648-1840* (1964); HAJO HOLBORN, *A HISTORY OF MODERN GERMANY: THE REFORMATION* (1959); HAJO HOLBORN ET AL., *THE INTERPRETATION OF HISTORY* (1943).

<sup>12</sup> See especially THEODORE F. PLUCKNETT, *A CONCISE HISTORY OF ENGLISH LAW* (5th ed. 1956); THEODORE F. PLUCKNETT, *STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* (1922).

<sup>13</sup> See especially R.H. TAWNEY'S *COMMON PLACE BOOK* (J.M. Winter & D.M. Joslin eds., 1972); R.H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* (1926).

<sup>14</sup> See especially LON L. FULLER, *ANATOMY OF THE LAW* (1968); LON L. FULLER, *LEGAL FICTIONS* (1967); LON L. FULLER, *THE MORALITY OF LAW* (1964); LON L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L.*

like Brian Tierney,<sup>15</sup> R.H. Helmholz,<sup>16</sup> and others have convinced Berman of the profound influence of canon law on the Western legal tradition. Equally influential have been the works of Emile Durkheim,<sup>17</sup> Christopher Dawson,<sup>18</sup> Robert Bellah,<sup>19</sup> and others who have shown that every legal and political culture has some civil religion, some common ideas and ideals, some "belief system" that gives it cohesion and inspiration.

Berman's work, however, is more than a synthesis of the ideas and insights of his peers and predecessors. He has cast these insights into his own distinctive ensemble, with his own emphases and his own applications. The precise shape of this ensemble has shifted over time and across subject matters. Berman does not cling stubbornly to ideas that fail in the archives or in the hands of a critic. His method is inherently flexible and genetic. But several cardinal convictions imbue and integrate all of his work in law and religion; these I shall call (1) pedagogical; (2) jurisprudential; and (3) theological sources.

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FULLER (Kenneth I. Winston ed., 1981).

<sup>15</sup> See especially BRIAN TIERNEY, *RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650* (1982) [hereinafter *GROWTH OF CONSTITUTIONAL THOUGHT*]; BRIAN TIERNEY, *CHURCH LAW AND CONSTITUTIONAL THOUGHT IN THE MIDDLE AGES* (1979); BRIAN TIERNEY, *ORIGINS OF PAPAL INFALLIBILITY, 1150-1350* (1972); BRIAN TIERNEY, *FOUNDATIONS OF CONCILIAR THEORY: THE CONTRIBUTION OF THE MEDIEVAL CANONISTS FROM GRATIAN TO THE GREAT SCHISM* (1955).

<sup>16</sup> See especially R.H. HELMHOLZ, *ROMAN CANON LAW IN REFORMATION ENGLAND* (1990); R.H. HELMHOLZ, *CANON LAW AND THE LAW OF ENGLAND* (1987); R.H. HELMHOLZ, *CANON LAW AND ENGLISH COMMON LAW* (1983); R.H. HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND* (1974).

<sup>17</sup> See especially EMILE DURKHEIM, *DURKHEIM AND THE LAW* (Steven Lukes & Andrew T. Scull eds., 1983); EMILE DURKHEIM, *ON MORALITY AND SOCIETY: SELECTED WRITINGS* (Robert N. Bellah ed., 1973); EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (1965).

<sup>18</sup> CHRISTOPHER DAWSON, *RELIGION AND THE RISE OF WESTERN CULTURE* (1950); CHRISTOPHER DAWSON, *RELIGION AND CULTURE* (1948).

<sup>19</sup> See ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* (1991); ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985) [hereinafter *HABITS OF THE HEART*]; ROBERT N. BELLAH & PHILLIP E. HAMMOND, *VARIETIES OF CIVIL RELIGION* (1980); ROBERT N. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN A TIME OF TRIAL* (1975).

### A. *Pedagogical Sources*

Berman has, throughout his career, sought to integrate not only the subjects of law and religion but law and all other humane disciplines.<sup>20</sup> Since the mid-nineteenth century in America, he argues, legal education and liberal education have become increasingly balkanized. Legal studies have been artificially excised from the humanities curriculum. Liberal studies have been improperly banished from the law school curriculum. Humanities students are thus taught the principles of sociology, religion, history, and other disciplines but receive only a rudimentary understanding of law. Law students are taught the principles of law but receive little exposure to its social, religious, historical, and other dimensions.

Legal studies and liberal studies, Berman argues, must be brought together, both in the mind of the student and in the makeup of the university. Legal studies enrich liberal education. Legal studies offer a unique method of language, logic, analysis, and reasoning. They cultivate in the student an informed sense of justice and fairness, a capacity for reasoned discernment and responsible judgment. They demonstrate that legal ideas and institutions are an integral part of Western thought and action and thus an indispensable subject for such humane disciplines as politics, history, sociology, economics, and many others. Liberal studies, in turn, enrich legal education. Liberal studies demonstrate that law is but one thread in the fabric of social life and is invariably colored and shaped by politics, economics, ethics, religion, and other subjects. They reveal that legal doctrines and concepts have antecedents and analogues in many humane disciplines and that ideas of law, justice, and authority are rooted in deep philosophical and theological soils.<sup>21</sup> To see these interconnections, Berman argues, the wall of separation—not just between law and religion, but between law and the humanities altogether—must be torn down. The artificial boundaries between schools and scholars must be rent asunder.

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<sup>20</sup> See Harold J. Berman, *Law in the University*, 10 *LEGAL STUD. F.* 53 (1986); Harold J. Berman, *The Crisis of Legal Education in America*, 26 *B.C. L. REV.* 347 (1985); Harold J. Berman, *The Secularization of American Legal Education in the Nineteenth and Twentieth Centuries*, 27 *J. LEGAL EDUC.* 382 (1975).

<sup>21</sup> Berman enthusiastically endorses Oliver Wendell Holmes, Jr.'s advice to the budding lawyer: "Your business as lawyers is to see the relation between your particular fact and the whole frame of the universe." *Quoted in* HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* at vii (1983) [hereinafter *LAW AND REVOLUTION*].

Legal and liberal education must be brought together by emphasis upon their common values and visions.<sup>22</sup>

Berman has translated many of these pedagogical concerns into practice. Since 1950, he has taught undergraduate courses and seminars in law and developed a widely used text, *The Nature and Functions of Law*, now in its fourth edition.<sup>23</sup> In 1954, he organized a conference devoted to a discussion of the teaching of law in the liberal arts curriculum, which catalyzed the development of several new undergraduate courses, concentrations, and colloquia in law at Harvard and elsewhere.<sup>24</sup> In 1960, he organized a series of Voice of America radio broadcasts to introduce uninitiated listeners to basic American legal doctrines and categories; these broadcasts were collected in a volume and widely published in English and in various translations.<sup>25</sup> In the early 1960s, he created, and administered for twenty-five years thereafter, the Liberal Arts Fellowships in Law Program at Harvard Law School designed to provide scholars of the arts and sciences with opportunities to study law from the perspective of their disciplines. In the early 1970s, he helped to establish Vermont Law School and to develop a law curriculum heavily infused with liberal and interdisciplinary studies.<sup>26</sup> Since his arrival at Emory in 1985, Berman has become an ardent apostle of the great pedagogical vision of the integration of knowledge that President James T. Laney has imbued in Emory University. He has helped to cultivate new relations between various

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<sup>22</sup> Berman's commitment to the integration of legal and liberal learning also has a deep religious foundation. Law, for him, has its ultimate source in the Bible, particularly the Ten Commandments and Jesus' reproach of those who interpret the law as merely a technical exercise or an instrument of power. Berman often quotes Jesus' words, "Woe to you, scribes and Pharisees, hypocrites! for you tithe the mint and dill and cumin, and have neglected the weightier matters of the law, justice and mercy and faith; these you ought to have done without neglecting the others." *Matthew 23:23* (Revised Standard Version). Berman likes to stress the last phrase to nonlawyers: legal technicalities are important, provided that they serve the law's larger ends. Those larger purposes connect law with all other fields of social and human thought and action. See, e.g., FAITH AND ORDER, *supra* note 10, at 381; Harold J. Berman, *The Moral Crisis of the Western Legal Tradition and the Weightier Matters of the Law*, 19 CRITERION 15 (1980); Harold J. Berman, *The Weightier Matters of the Law*, 9 ROYALTON REV. 32 (1975) [HEREINAFTER *The Weightier Matters of the Law*].

<sup>23</sup> HAROLD J. BERMAN & WILLIAM R. GREINER, *THE NATURE AND FUNCTIONS OF LAW* (4th ed. 1980) [hereinafter *NATURE AND FUNCTIONS*].

<sup>24</sup> ON THE TEACHING OF LAW IN THE LIBERAL ARTS CURRICULUM (Harold J. Berman ed., 1956).

<sup>25</sup> HAROLD J. BERMAN, *TALKS ON AMERICAN LAW* (rev. ed. 1971).

<sup>26</sup> See *The Weightier Matters of the Law*, *supra* note 22 (an address at the opening of Vermont Law School, July 15, 1973).

schools and departments, and to develop new interdisciplinary programs, courses, and colloquia, notably the Law and Religion Program at Emory University (started by our colleague Frank S. Alexander).

### B. *Jurisprudential Sources*

Berman's commitment to this interdisciplinary field is also rooted in his critique of prevailing positivist concepts of law and privatist concepts of religion that dominate the legal academy. Many jurists today, he argues, conceive law simply as a body of rules and statutes designed to govern society. Likewise, they conceive religion simply as a body of doctrines and exercises designed to guide private conscience. Law has no place in the realm of religion. Religion has no place in the public square.<sup>27</sup>

Such concepts, Berman argues, are altogether too narrow for us to recognize the mutual interdependence of law and religion. "Law is not only a body of rules; it is people legislating, adjudicating, administering and negotiating." It is a living process, a functional process of allocating rights and duties, of resolving conflicts, of creating channels of cooperation among a variety of different individuals and institutions.<sup>28</sup> Law is rules, plus the social articulation, implementation, and elaboration of those rules. Religion is not only a set of doctrines and exercises of the private conscience, of the individual heart. It is also "people manifesting a shared intuition of and collective concern for the ultimate meaning and purpose of life"—for "the idea of the holy."<sup>29</sup> Religion involves creeds, cults, codes of conduct, confessional communities. It involves beliefs plus the social articulation, implementation, and elaboration of those beliefs.<sup>30</sup>

Every society, says Berman, needs both law and religion. Law helps to give society the structure, the order, the harmony, the predictability it needs to "maintain inner cohesion. Law fights against anarchy." Religion

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<sup>27</sup> See, e.g., FAITH AND ORDER, *supra* note 10, at 280; INTERACTION, *supra* note 10, at 26-30; LAW AND REVOLUTION, *supra* note 21, at 4-5; Harold J. Berman, *Some False Premises of Max Weber's Sociology of Law*, 65 WASH. U. L.Q. 758 (1987).

<sup>28</sup> INTERACTION, *supra* note 10, at 24-25; NATURE AND FUNCTIONS, *supra* note 23, at 25-36. Berman organizes much of *The Nature and Functions of Law* in accordance with this definition of law.

<sup>29</sup> RUDOLF OTTO, *THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR IN THE IDEA OF THE DIVINE AND ITS RELATION TO THE RATIONAL* (2d ed. 1950).

<sup>30</sup> See INTERACTION, *supra* note 10, at 24-25.



helps to give society the faith, the vision, the destiny, the telos it needs "to face the future. Religion fights against decadence" and malaise.<sup>31</sup> Law and religion also need each other. Law gives religion its order and stability as well as the organization and orthodoxy it needs to survive and flourish. Religion gives law the spirit and vision as well as the sanctity and sustenance it needs to command obedience and respect. Without religion, law tends to decay into empty formalism. Without law, religion tends to dissolve into shallow spiritualism.

Law and religion, therefore, exist not in dualistic antinomy but in dialectical harmony. They share many elements, many concepts, and many methods. They also balance each other by counterpoising justice and mercy, rule and equity, discipline and love. This dialectical harmony gives law and religion their vitality and strength. From this cardinal conviction, Berman draws much of his inspiration and understanding of this field.

### C. *Theological Sources*

The deepest source of Berman's commitment to this interdisciplinary field is his personal faith and theology. The study of law and religion is a direct product of Berman's life-long effort to integrate his religious faith with his learning. In his chapel talks delivered in the Harvard Memorial Church, Berman contrasts "the wisdom of the world" with "the wisdom of God." The wisdom of the world, he declares, "assumes that God's existence is irrelevant to knowledge, and that truth is discoverable by the human mind unaided by the Spirit." Jewish and Christian wisdom, by contrast, "seeks God's guidance . . . in order to discover the relationship between what we know and what God intends for us." Knowledge, intellectual understanding, "is intimately connected with faith, with hope, and with love." "God does not call us to be merely observers of life; rather he calls all of us—even the scholars in all that we do—to participate with him in the process of spiritual death and rebirth which is fundamental religious experience."<sup>32</sup>

Such spiritual sentiments could shackle the narrow-minded. They liberate Berman from conventional habits of mind and traditional divisions of

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<sup>31</sup> *Id.*

<sup>32</sup> These chapel talks are published under the title *Judaic-Christian Versus Pagan Scholarship*, in *FAITH AND ORDER*, *supra* note 10, at 319-22.

knowledge. Some of the most distinctive features of his work in law and religion are rooted in these sentiments.

For example, Berman's religious beliefs in *reconciliation* have inspired in him a deep yearning for the integration of knowledge. Christian theology teaches that persons must reconcile themselves to God and to each other. In the "knowledge of Christ," Scripture tells us, there can be no division between Jew and Greek, slave and free, male and female.<sup>33</sup> For every sin that destroys our relationships, there is grace that reconciles them. For every Tower of Babel that divides our voices, there is a Pentecost that unites them.<sup>34</sup>

Berman takes this bold message of reconciliation directly into his scholarship. He rebels, almost reflexively, against dualism, the juxtaposition of opposites. He parses the most cherished dualisms of Western thought—between subject and object, soul and body, individual and community.<sup>35</sup> He criticizes the dualism of faith and reason in Anselm,<sup>36</sup> of mind and matter in Descartes.<sup>37</sup> He exposes the fallacies of all the great dualisms of Western politics—the two cities theory of Augustine, the two powers theory of Gelasius, the two swords theories of the High Middle Ages, the two kingdoms theories of the Reformation, the church-state theories of modern times.<sup>38</sup> He castigates Karl Marx for his juxtaposition of

<sup>33</sup> *Colossians* 3:10-11; *Ephesians* 2:14-15; *Galatians* 3:28; see also Judaic-Christian versus Pagan Scholarship, *supra* note 32, *passim*; Harold J. Berman, *Is There Such a Thing—Can There Be Such a Thing—As a Christian Law School*, in *FAITH AND ORDER*, *supra* note 10, at 341, 348; Harold J. Berman, *Law and Language: Effective Symbols of Community* ch. 2, 24-25 (1965) (unpublished manuscript, on file with the author) [hereinafter *Law and Language*].

<sup>34</sup> See *Genesis* 11:1-19 (on the Tower of Babel); *Acts* 2:5-13 (on Pentecost).

<sup>35</sup> See *INTERACTION*, *supra* note 10, at 110; Harold J. Berman, *Individualistic and Communitarian Theories of Justice: An Historical Approach*, 21 *U.C. DAVIS L. REV.* 549 (1988).

<sup>36</sup> See *INTERACTION*, *supra* note 10, at 110-11; *FAITH AND ORDER*, *supra* note 10, at 326.

<sup>37</sup> *Id.*; see also Harold J. Berman, *Introduction* to CHAIM PERLMAN, *JUSTICE, LAW AND ARGUMENT* ix (1980); Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Science [in the Lutheran Reformation]* (1992) (unpublished manuscript, on file with the author) [hereinafter *The Transformation of Western Legal Science*].

<sup>38</sup> See generally Harold J. Berman & John Witte, Jr., *Church and State: An Historical Overview*, in 3 *ENCYCLOPEDIA OF RELIGION* 489 (Mircea Eliade ed., 1987) [hereinafter *ENCYCLOPEDIA*]. For more specific criticisms, see *LAW AND REVOLUTION*, *supra* note 21, at 92; Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 *S. CAL. L. REV.* 1573, 1585 (1989) [hereinafter *Transformation in Lutheran Germany*]; Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, 39 *EMORY L.J.* 149 (1990). In a similar vein, Berman criticizes the sharp distinctions conventionally drawn among the classic Aristotelian forms of government—monarchy, aristocracy, and democracy—arguing that all cultures, even

structure and superstructure, intellect and passion.<sup>39</sup> He challenges Max Weber for his separation of fact and value, is and ought.<sup>40</sup> He criticizes Alexander Solzhenitsyn for his contradistinction of law and morals, law and love.<sup>41</sup> He fights against the divisions of the very world itself into East and West, old and new. His favorite jurists are Gratian, Matthew Hale, and Joseph Story, who wrote concordances of discordant canons. His favorite philosophers are Peter Abelard, Philip Melanchthon, and Michael Polanyi, who developed integrative holistic philosophies.

The era of dualism is waning, Berman declares with the boldness of a seer.<sup>42</sup> We are entering ineluctably into an "age of synthesis." "Everywhere synthesis, the overcoming of dualism, is the key to the new kind of thinking which characterizes the new era that we are entering." Either-or gives way to both-and. "Not subject versus object, but subject and object interacting. Not consciousness versus being, but consciousness and being together. Not intellect versus emotion or reason versus passion but the whole man thinking and feeling."<sup>43</sup>

Berman applies this gospel of reconciliation and integration most vigorously to his legal studies. He calls for the reintegration of the classic schools of legal positivism, natural law theory, and historical jurisprudence—which have been separated since God was cast out of the legal academy.<sup>44</sup> He calls for the integration of public law and private law, of

American culture, strike a balance among these three forms. See Harold J. Berman, *Christianity and Democracy in the Soviet Union*, 6 EMORY INT'L L. REV. 22, 33-34 (1992); Harold J. Berman, *The Religion Clauses of the First Amendment in Historical Perspective*, in RELIGION & POLITICS 49, 70-73 (W. Lawson Taitte ed., 1989).

<sup>39</sup> See HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R. 15-24 (rev. ed. 1963); LAW AND REVOLUTION, *supra* note 21, at 538.

<sup>40</sup> See FAITH AND ORDER, *supra* note 10, at 239, 280; LAW AND REVOLUTION, *supra* note 21, at 546.

<sup>41</sup> See Harold J. Berman, *The Weightier Matters of the Law: A Response of Solzhenitsyn*, in FAITH AND ORDER, *supra* note 10, at 381. For similar criticisms of the Lutheran theologian Emil Brunner, see INTERACTION, *supra* note 10, at 81-91; Harold J. Berman, *Law and Love*, 56 EPISCOPAL THEOLOGICAL SCH. BULL. 11 (1964) [hereinafter *Law and Love*].

<sup>42</sup> INTERACTION, *supra* note 10, at 110-11.

<sup>43</sup> *Id.* at 114; see also Harold J. Berman, *Law and Religion in the Development of the World Order*, 52 SA: SOC. ANALYSIS 27, 35 (1991) [hereinafter *Development of the World Order*].

<sup>44</sup> See Harold J. Berman, *Toward an Integrative Jurisprudence*, 76 CAL. L. REV. 779 (1988) [hereinafter *Integrative Jurisprudence*], and his earlier writings cited therein. An early version of these sentiments, not cited in this more recent article, appears in chapter four of *Law and Language*, *supra* note 33 ("The Development of Legal Language"), which includes a lengthy discussion of Savigny, Maine, and Burke.

common law and civil law, of Western law and Eastern law.<sup>45</sup> He urges that law be given a place among the humanities and enrich itself with the ideas and methods of sundry humane disciplines. Most importantly for our purposes, he urges that the subjects and sciences of law and religion be reconciled to each other. Their separation is, for him, a theological "heresy" and a jurisprudential "fallacy" that cannot survive in the new era of synthesis and integration.<sup>46</sup> "[L]aw and religion stand or fall together," he writes. "[I]f we wish law to stand, we shall have to give new life to the essentially religious commitments that give it its ritual, its tradition, and its authority—just as we shall have to give new life to the social, and hence the legal, dimensions of religious faith."<sup>47</sup>

Berman's talk of the death of dualism and the birth of an age of synthesis points to a second example of how he manifests his religious faith in his legal works. Berman's religious beliefs about the nature of *time* shape his account of law and religion in Western history. Both Jewish and Christian theology teach that time is continuous, not cyclical, that time moves forward from a sin-trampled garden to a golden city, from a fallen world to a perfect end-time (*eschaton*). Christian theology teaches further that the imperfect world and its sinful sojourners must come into judgment and die so that a perfect world with its saintly citizens can be reborn.<sup>48</sup>

Berman's grand account of evolution and revolution in Western history is rooted in this basic belief about the nature of time.<sup>49</sup> There is a distinc-

<sup>45</sup> See especially FAITH AND ORDER, *supra* note 10, at 278.

<sup>46</sup> See FAITH AND ORDER, *supra* note 10, at 314; *Law and Love*, *supra* note 41, *passim*.

<sup>47</sup> See FAITH AND ORDER, *supra* note 10, at 13.

<sup>48</sup> INTERACTION, *supra* note 10, at 119-20; LAW AND REVOLUTION, *supra* note 21, at 166-72. See as well REINHOLD NIEBUHR, FAITH AND HISTORY: A COMPARISON OF CHRISTIAN AND MODERN VIEWS OF HISTORY 1-54 (1949); Jon P. Gunnemann, *The Promise of Democracy: Theological Reflections on Universality and Liminality*, in CHRISTIANITY AND DEMOCRACY IN GLOBAL CONTEXT 131, 135 (John Witte, Jr. ed., 1993), and the essays of Emil Brunner, Wolfgang Pannenberg, Arnold Toynbee, and Herbert Butterfield in GOD, HISTORY, AND THE HISTORIANS: AN ANTHOLOGY OF MODERN CHRISTIAN VIEWS OF HISTORY (C.T. McIntire ed., 1977).

<sup>49</sup> See LAW AND REVOLUTION, *supra* note 21, at 18-33; Harold J. Berman, *Law and Belief in Three Revolutions*, 18 VAL. U. L. REV. 569 (1984), reprinted in FAITH AND ORDER, *supra* note 10, at 83; Harold J. Berman, *Religious Foundations of Law in the West: An Historical Perspective*, 1 J.L. & RELIGION 3 (1983) [hereinafter Berman, *Religious Foundations of Law in the West*]. Berman notes his dependence on, and his departures from, Rosenstock's view of revolution in Western history in *Introduction*, *supra* note 10; Harold J. Berman, *Law and History After the World Wars*, 3 JAHRBUCH DER EUGEN ROSENSTOCK-HUESSY GESELLSCHAFT 46 (1990), reprinted in FAITH AND

tive Western legal tradition, he argues, a continuity of legal ideas and institutions, which grow by accretion and adaptation. The exact shape of these ideas and institutions is determined, in part, by the underlying religious belief systems of the people ruling and being ruled.<sup>50</sup> Six great revolutions, however, have punctuated this organic gradual development: the Papal Revolution of 1075, the German Lutheran Reformation of 1517, the English Puritan Revolution of 1640, the American Revolution of 1776, the French Revolution of 1789, and the Russian Revolution of 1917. These revolutions were, in part, rebellions against a legal and political order that had become outmoded and ossified, arbitrary and abusive. But, more fundamentally, these revolutions were the products of radical shifts in the religious belief-systems of the people—shifts from Catholicism to Protestantism to Deism to the secular religion of Marxist-Leninism. Each of these new belief-systems offered a new eschatology, a new apocalyptic vision of the perfect end-time, whether that be the second coming of Christ, the arrival of the heavenly city of the Enlightenment philosophers,<sup>51</sup> or the withering away of the state. Each of these revolutions, in its first radical phase, sought the death of an old legal order to bring forth a new order that would survive the Last Judgment. Eventually, each of these revolutions settled down and introduced fundamental legal changes that were ultimately subsumed in and accommodated to the Western legal tradition.

Today, Berman believes, the Western legal tradition is undergoing a profound integrity crisis, graver and greater than any faced in the past millennium.<sup>52</sup> The old legal order of the West is under attack both from

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ORDER, *supra* note 10, at 323.

<sup>50</sup> See FAITH AND ORDER, *supra* note 10, at xi (The law of any culture is "intrinsically connected with fundamental beliefs concerning the ultimate meaning of life and the ultimate purpose of history."); LAW AND REVOLUTION, *supra* note 21, at 558 ("Without the fear of purgatory and the hope of the Last Judgment, the Western legal tradition could not have come into being."). Berman has only recently added to his definition of religion a society's concern for the "ultimate purpose of history." This new emphasis might well be connected with his growing attraction to a providential view of history. See *infra* notes 56-57, 87 and accompanying text.

<sup>51</sup> See CARL L. BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS (1932); J.B. BURY, THE IDEA OF PROGRESS: AN INQUIRY INTO ITS ORIGIN AND GROWTH (1932).

<sup>52</sup> See especially LAW AND REVOLUTION, *supra* note 21, at 33-41; Harold J. Berman, *The Crisis of the Western Legal Tradition*, 9 CREIGHTON L. REV. 252 (1975); see also John Witte, Jr. & Frank S. Alexander, *The Study of Law and Religion: An Apologia and Agenda*, 14 MINISTRY & MISSION 4 (1988).

within and from without. From within, Western law is suffering from the skeptical and cynical attacks recently issued by jurists and judges. These skeptics have dismissed legal doctrine as malleable, self-contradictory rhetoric. They have depicted the law as an instrument of oppression and exploitation of women, of minorities, of the poor. They have derided the legal system for its promotion of the political purposes of the powerful and the propertied. This assault from within the law, from within the legal academies and within the courts—devoid as it is of a positive agenda of reconstruction—reflects a cynical contempt for law and government, a deep loss of confidence in its integrity and efficacy. The “secular priests of the law,”<sup>53</sup> its officials and its educators, no longer seem to believe in what they are doing.<sup>54</sup>

From without, the radical transformation of economic life and the rapid acceptance of new social forms and customs, many born of Eastern, Southern, and new-age thinking, have stretched traditional Western legal doctrines to the breaking point. Each of the major branches of Western law—contract, property, tort, family, criminal, commercial, and constitutional law—has transformed several times over in the past two generations. Many of these changes may well be necessary to modernize the law, to conform it to contemporary social needs and ideals, to purge it of its obsolete ideas and institutions. But as a consequence, Western law—always something of a patchwork quilt—has become more of a col-

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<sup>53</sup> This is Hugo Grotius' phrase, which Berman has often used in personal conversations. See Hugo Grotius, [*The Poem*] *Het Beroep van Advocaat* [*The Calling of the Advocate*] (February 18, 1602), reprinted in HUGO GROTIUS, *ANTHOLOGIA GROTIANA* 33 (1955). Berman writes,

In the Western political tradition, and especially in that of the United States, the legal profession constitutes a secular priesthood. Lawyers are given a primary role both in proclaiming and in administering the secular ideals and values of their society, especially as those ideals and values are embodied in the legal system itself. The claim upon a lawyer to think and act responsibly as a lawyer in helping to maintain unity within the society, resolve conflict, and allocate power—this too is a religious claim.

FAITH AND ORDER, *supra* note 10, at 351; see also Harold J. Berman, *The Prophetic, Pastoral, and Priestly Vocation of the Lawyer*, 2 *NICM J.* 5 (1977).

<sup>54</sup> A similar assessment is offered by Donald Kelley, who argues that in the later twentieth century, Western law has experienced “an intellectual fall from grace,” falling prey to “conceptual and moral disarray” and methodological “fragmentation.” DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 277-78 (1990). Whereas Kelley seeks a secular solution to this crisis in the resurrection of Graeco-Roman learning and “the restoration of man to the center of the universe,” Berman seeks a religious and global solution further described in the text. See generally John Witte, Jr., *From Homer to Hegel: Ideas of Law and Culture in the West*, 89 *MICH. L. REV.* 1618, 1626-28 (1991) (reviewing Kelley's volume).

lection of disjointed pieces, with no single thread, no single spirit holding it in place and giving it integrity and direction. This also has led to profound disillusionment with and distrust of the law.

For Berman, these are signs of end times. We are reaching the end of a millennium and the end of the Western legal tradition, as we have known it. Western law is dying, a new common law of all humanity is struggling to be born (to adopt Matthew Arnold's famous phrase). Western law, rooted in the soils and souls of Christianity, Judaism, and their secular pretenders, will have a place in this new common law of humanity. But so will the laws of the East and the South, of the tribe and the jungle, of the country and the city, each with its own belief system. What needs to be forged on the eve of this new millennium is a comprehensive new religious belief system, a new pattern of language and rituals, a new *eschaton*, that will give this common law of humanity cohesion and direction.<sup>65</sup>

A hint of mystical millennialism colors Berman's historical method—much of it already conceived while he was a young man witnessing the carnage of World War II.<sup>66</sup> Description and prescription run

<sup>65</sup> Berman has only hinted at what this common law of humanity and its interactions with religion might entail. His strongest statements appear in his writings of the past decade. Consider, for example, the following statement made in 1983:

Ultimately, that future involves new relationships between the West and other civilizations, other traditions. In the past nine centuries, the peoples of Western Europe have moved from a society of plural polities within an overarching ecclesiastical corporate unity to a society of national states within an overarching but invisible religious and cultural unity, and finally, in the twentieth century, to a society of national states lacking an overarching Western unity but seeking new forms of unity on a world scale. The breakdown of the Western legal tradition has been accompanied in the latter half of the twentieth century by the rapid emergence of transnational legal institutions of a global character. We are witnessing the incipient development of a common legal language for mankind—a new legal tradition that will be worldwide in character. Such a global legal tradition will also involve new relationships between law and other aspects of social life, other elements of community. The Western belief in the autonomy and supremacy of law—historically based, as it is, on the dialectic of church and state—can hardly serve as the principal foundation of legality in a world that is only partly Christian.

*Religious Foundations of Law in the West*, *supra* note 49, at 42-43; see also *Development of a World Order*, *supra* note 43; *Integrative Jurisprudence*, *supra* note 44, at 797-801 (see the section titled "Integrative Jurisprudence as a Key to Understanding the Development of World Law"). Berman and I plan to take up these themes in greater detail in forthcoming volumes of the *Law and Revolution* series.

<sup>66</sup> See, e.g., FAITH AND ORDER, *supra* note 10. Berman describes views of Rosenstock that he finds congenial: "[I]n the first millennium of the Christian era the numerous pagan tribes of Eastern and Western Europe were converted to a belief in one God; and during the second millennium of the

closely together in his account, occasionally stumbling over each other. Historical periods and patterns are perhaps too readily equated with providential plans and purposes.<sup>57</sup> But here we have the deepest source of Berman's interest in law and religion. The Western legal tradition is where he finds the clearest examples of multiple interactions between systems of belief and systems of law, between religious dogma and legal doctrine. And, as we look to the future, he writes, "An analysis of the respective roles of law and religion helps us to understand, on the one hand, the ways in which conflicts among constituent elements of the world order can, *in time*, be regulated and resolved, which is law, and on the other hand, the fundamental beliefs about the ultimate purpose and meaning of our ongoing experience, *in time*, the ultimate purpose and meaning of history itself, with its deaths and rebirths, which is religion."<sup>58</sup>

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Christian era the Western Europeans created a political-legal order which was founded on a belief in one world of nature and which ultimately, through religious and military and economic colonization, and above all through science and technology, brought that one world of nature to all parts of the globe. The task of the third millennium of the Christian era . . . is to create one human society." *Id.* at 325. Berman has indicated in conversations that he ties the three millennia of the Christian era to the three persons of the Christian Trinity. In the first millennium, God the Father and reconciliation with Him in the heavenly city was the emphasis. In the second millennium, God the Christ, the legal and political ruler, the King of kings and Lord of lords, has been the emphasis. In the third millennium, God the Holy Spirit, the source of a universal language and ethic, will be the emphasis.

<sup>57</sup> In recent years, Berman has become increasingly drawn to a "providential view of history," described in the Bible and first given theological prominence by seventeenth century Puritans and later Christian historical jurists. See, e.g., *Law and Belief in Three Revolutions*, *supra* note 10, at 107 (discussing Donald McKim, *The Puritan View of History, or Providence Without and Within*, EVANGELICAL Q. 215 (1980)); *Integrative Jurisprudence*, *supra* note 44, at 800 ("The Western belief in a providential view of history is built into the Western concept of historical jurisprudence."); *Introduction*, *supra* note 10, at 4-5 ("For Rosenstock, history is purposive, and its purposes become apparent in its unfolding. In that sense, he might have said that history is revelation; it is a revelation of our destiny. For Western Man, the purposes of history are revealed especially in its periodicity, its patterns of development, and its recurrent motifs."). For illustrative modern expositions on this "providential view of history," see GOD, HISTORY, AND THE HISTORIANS, *supra* note 48. On the origins of this view, not only in Puritan-Calvinist thought, but also in German romanticism and historical jurisprudence, see ERNST CASSIRER, THE PROBLEM OF KNOWLEDGE: PHILOSOPHY, SCIENCE, AND HISTORY SINCE HEGEL 256, 294 (William H. Woglom & Charles W. Hendel trans., 1950); R.G. COLLINGWOOD, THE IDEA OF HISTORY 46 (1956); EMERY E. NEFF, The Poetry of History: THE CONTRIBUTION OF LITERATURE AND LITERARY SCHOLARSHIP TO THE WRITING OF HISTORY SINCE VOLTAIRE (1947).

<sup>58</sup> *Development of the World Order*, *supra* note 43, at 35.



## II. THEMES

What is this field of law and religion that Berman has helped to break all about?

It must be immediately stated that Professor Berman comes to the study of law and religion first and foremost as a jurist—not as a theologian, philosopher, sociologist, or anthropologist. He has done masterful work in these non-legal fields, and has harvested and sowed a bounty of insights in them. But the principal aim of his work in law and religion is to enhance our understanding of the origin, nature, and purpose of law. Berman pursues interdisciplinary legal study in the best sense of the term—to enlighten the subject and science of law through the methods and insights of other disciplines, without losing track of law and the legal profession in the process.<sup>59</sup>

Viewed as a whole and with sufficient abstraction, Berman's wide-ranging work in law and religion can be distilled into three themes: (1) law has a religious dimension, an inner sanctity and spirit; (2) religion has a legal dimension, an inner normative and structural character; and (3) historically and currently, the spheres and sciences of law and religion cross-over and cross-fertilize each other. These themes are both normative and descriptive. They reflect Berman's deep-seated normative beliefs about law and religion, which the empirical data do not always corroborate. But these themes are also derived from Berman's long study of various historical and contemporary cultures, and he adduces abundant empirical support for each of them.

A. *Religious Dimensions of Law*

Law has a religious dimension, an inner sanctity and spirit that are essential to its normativity and obligatory force.<sup>60</sup> Law itself, in all socie-

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<sup>59</sup> See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 42-66 (1992) (criticizing interdisciplinary legal scholarship and pedagogy for its deprecation, if not outright ignorance, of law and the legal profession).

<sup>60</sup> See LAW AND REVOLUTION, *supra* note 21, at 165-98; *Development of the World Order*, *supra* note 43, at 32-34; Harold J. Berman, *Law and Religion: An Overview*, in 8 ENCYCLOPEDIA, *supra* note 38, at 463 [hereinafter *Overview*]; Harold J. Berman, *Law and Religion in the West*, in ENCYCLOPEDIA, *supra* note 38, at 472 [hereinafter *Law and Religion in the West*]; Harold J. Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 J.L. & RELI-

ties, Berman writes, encourages the belief "in its own sanctity. It puts forward its claim to obedience in ways that appeal not only to the material, impersonal, finite, rational interests of the people who are asked to observe it but also to their faith in a truth, a justice, that transcends social utility."<sup>61</sup>

This inner religiosity of law is manifested in several elements or attributes of law. For example, law has ritual and liturgy—ceremonial procedures, actions, and words that reflect and dramatize deeply felt values concerning the objectivity and uniformity of the law. Think of the routinized procedures and decorum of the courtroom and the legislature. Think of the solemn procedures attending the consecration of a marriage, the consummation of a contract, the execution of a felon. Think of the ceremonial language of legal documents ("know by all these presents") and legal maxims ("reason is the soul of the law"; "that rule of conduct is to be deemed binding which religion dictates"; "it is so written").<sup>62</sup> These elements are all part of the ritual, the liturgy of the law, that prevails in rudimentary and refined societies alike.<sup>63</sup> Law has tradition—a continuity of institutions, language, and practice, a theory of precedent and preservation. Just as religion has the Talmudic tradition, the Christian tradition, and the Islamic tradition, so law has the common law tradition, the civil law tradition, the constitutional tradition.<sup>64</sup> As in religion, so in law, we abandon the time-tested practices of the past only with trepidation and with explanation. Law has authority—written or spoken sources of law, texts or oracles, which are considered to be decisive in themselves. Religion has the Bible and the Torah and the pastors and rabbis who expound them. Law has the constitutions and the statutes and the judges and agencies that apply them. Law has universality—a claim to embody

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GION 103 (1986) [hereinafter *The Religious Sources of General Contract Law*]; Harold J. Berman, *The Religious Foundations of Western Law*, 24 CATH. U. L. REV. 490 (1975) [hereinafter *The Religious Foundations*]; Harold J. Berman, *The Influence of Christianity upon the Development of Law*, 12 OKLA. L. REV. 86 (1959) [hereinafter *The Religious Foundations of Western Law*].

<sup>61</sup> FAITH AND ORDER, *supra* note 10, at 7.

<sup>62</sup> Respectively, "*Cessante ratione legis cessat ipsa lex*;" "*Summa ratio est quae pro religione facit*;" "*Ita lex scripta est*." For others, see WILLIAM T. HUGHES, *THE TECHNOLOGY OF LAW: A CONDENSUS OF MAXIMS, LEADING CASES, AND ELEMENTS OF LAW* (1893).

<sup>63</sup> See, e.g., INTERACTION, *supra* note 10, at 32-34, 148-51; LAW AND REVOLUTION, *supra* note 21, at 78-81, 572-74; LAW AND LANGUAGE, *supra* note 33, at ch. 2 ("The Language of Law").

<sup>64</sup> See, e.g., LAW AND REVOLUTION, *supra* note 21, at 7-10; Harold J. Berman, *Introductory Remarks: Why the History of Western Law Is Not Written*, 1984 U. ILL. L. REV. 511.

universally valid precepts and truths, which can be adapted and applied to the most diverse individual circumstances. Berman argues that these four religious elements of law—ritual, tradition, authority, and universality—can be found in all legal systems, even in the avowedly pagan regimes of Stalinist Russia or Nazi Germany.

Berman's theory of the inner religiosity of law complements his good friend Lon Fuller's theory of the inner morality of law. To be legitimate, Fuller argued, laws must have an "inner morality," which is reflected in several elements—their public promulgation, uniformity, stability, understandability, non-retroactivity, consistency of enforcement, and the like.<sup>65</sup> Fuller's theory accounts for the legitimacy of law; it leaves open the question why legitimate law is feared, respected, and obeyed by authorities and their subjects. Berman fills this void by explaining that law has an inner sanctity manifested in various attributes that command the obedience; respect, and fear of both political authorities and their subjects.<sup>66</sup>

### B. *Legal Dimensions of Religion*

Conversely, Berman argues, religion has a legal dimension, an inner structure of legality, which gives religious lives and religious communities their coherence, order, and social form. Legal "habits of the heart" structure the inner spiritual life and discipline of religious believers, from the reclusive hermit to the aggressive zealot.<sup>67</sup> Legal ideas of justice, order, atonement, restitution, responsibility, obligation, and others pervade the theological doctrines of countless religious traditions. Legal structures and processes—the Christian canon law, the Jewish Halakkha, the Muslim Shari'a, the Hindu dharma—organize and govern religious communities

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<sup>65</sup> See FULLER, *THE MORALITY OF LAW*, *supra* note 14, at 33-94.

<sup>66</sup> See INTERACTION, *supra* note 10, at 31-39; FAITH AND ORDER, *supra* note 10, at xii-xiii; Harold J. Berman, *The Rule of Law and the Law-Based State (Rechtsstaat)*, 4(5) HARRIMAN INST. F. 1 (May 1991).

<sup>67</sup> I borrow this phrase from Bellah, *HABITS OF THE HEART*, *supra* note 19, who apparently borrowed it from Alexis de Tocqueville. Berman emphasizes the legal dimensions of *collective*, rather than *individual*, religious experience and action. Nonetheless, he writes that law and religion "are two dimensions of social relations—as well as human nature—which are in tension with each other." INTERACTION, *supra* note 10, at 24. Moreover, with seeming approval, he discusses the traditional Christian understanding of a natural law written on the hearts and consciences of each person and that guides the person's conduct. See LAW AND REVOLUTION, *supra* note 21, at 4-11, 144-47; *Integrative Jurisprudence*, *supra* note 44, at 780-88; *Transformation in Lutheran Germany*, *supra* note 38, at 1604-11, 1615-25, 1638-42.

and their distinctive beliefs and rituals, mores and morals.<sup>68</sup> These structures are all examples of the legal dimensions of religion, which, for Berman, are as vital a part of our legal tradition as the rules and statutes promulgated by the state.

Berman has laid particular emphasis on the Roman Catholic canon law of the twelfth and thirteenth centuries as the first autonomous and comprehensive legal system known to the West.<sup>69</sup> During the Papal Revolution, when the Catholic episcopacy gained freedom from their secular rulers, the canon law was transformed from a multiplicity of rules governing the structure, doctrine, and liturgy of the church to a comprehensive system of public and private law that prevailed throughout much of the West. At its peak, the canon law was comprised of separate subsystems of bodies: corporate, associational, and administrative law; substantive and procedural criminal law; civil procedure and evidence; and laws for education, charity, public morality, contracts, torts, property, family, and inheritance. These laws were administered by a pan-European hierarchy of ecclesiastical courts and officials, with a system of legislation and adjudication headquartered in the papal curia. The canon law penetrated rival systems of civil law, common law, and equity, and became a staple part of the Western legal tradition, even in Protestant lands.<sup>70</sup>

### C. *The Interaction of Law and Religion*

Besides being dimensions of each other, Berman argues, the spheres and sciences of law and religion are in constant dialectical interaction and influence each other. To be sure, every religious tradition has known both theonomism and antinomianism—the excessive legalization and the excessive spritualization of religion. Furthermore, every legal tradition has known both theocracy and totalitarianism—the excessive sacralization and the excessive secularization of law.<sup>71</sup> But the dominant reality in all eras and cultures, Berman insists, is that law and religion stand in dialectical

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<sup>68</sup> INTERACTION, *supra* note 10, at 15, 77-106.

<sup>69</sup> See LAW AND REVOLUTION, *supra* note 21, at 199-254.

<sup>70</sup> See, e.g., Harold J. Berman, *Medieval English Equity*, in FAITH AND ORDER, *supra* note 10, at 55; *The Religious Foundations*, *supra* note 60; see also CANON LAW IN PROTESTANT LANDS (R.H. Helmholz ed., 1992).

<sup>71</sup> INTERACTION, *supra* note 10, at 78-80; see also *Overview*, *supra* note 60, at 472; *Law and Religion in the West*, *supra* note 60, at 463.

interaction.<sup>72</sup> Every religious tradition strives to come to terms with law by striking a balance between the rational and the mystical, the prophetic and the priestly, the structural and the spiritual.<sup>73</sup> Every legal tradition struggles to link its formal structures and processes with the beliefs and ideals of its people. If we adopt broad enough functional definitions of law and religion, Berman argues, we can see numerous forms of dialectical interaction and interdependence between them.<sup>74</sup>

Law and religion, for example, are conceptually related. Both disciplines draw upon the same underlying concepts about the nature of being and order, of the person and community, of knowledge and truth. Both law and religion embrace closely analogous concepts of sin and crime, covenant and contract, righteousness and justice, redemption and rehabilitation that invariably combine in the mind of the legislator, judge, or juror. The modern legal concept of crime, for example, has been shaped by a Christian theology of sin and penance.<sup>75</sup> The modern legal concept of absolutely obligating contracts was formed in the crucible of Puritan covenant theology.<sup>76</sup> The modern legal concept of criminal rehabilitation was

<sup>72</sup> Berman realizes the danger of excessive integration of law and religion. His answer is studied, but short:

The danger that faces us today, in contrast with earlier times, is, I believe, not the danger of excessive sanctification of law or excessive legalization of religion; it is not a crisis of their excessive integration but rather a crisis of their excessive fragmentation. We are threatened more by contempt for law than by worship of it, and more by skepticism regarding the ultimate meaning and purpose of life and of history than by some great all-embracing totalitarian eschatology. Emphasis on the dualism of church and state, spiritual and secular, faith and order, religion and law, makes sense as an answer to monistic claims of the total state or of the total church. In the West today, however, we are threatened more by anarchy than by dictatorship and more by apathy and decadence than by fanaticism.

FAITH AND ORDER, *supra* note 10, at xii-xiii; *see also* INTERACTION, *supra* note 10, at 133-42.

<sup>73</sup> *See* CHRISTIANITY AND DEMOCRACY IN GLOBAL CONTEXT, *supra* note 48, at 12-13; FAITH AND ORDER, *supra* note 10, at xi; INTERACTION, *supra* note 10, at 133; LAW AND REVOLUTION, *supra* note 21; Witte, *supra* note 54, at 1623-25.

<sup>74</sup> The following paragraphs are drawn in part from Witte & Alexander, *supra* note 52. Given that the principal aim of his work in law and religion is to enhance our study of law, Berman devotes most of his writing to theological and ecclesiastical influences on law—rather than legal and political influences on religion. *See* the numerous articles listed in Berman's bibliography at 42 EMORY L.J. 563 (1993); *see also* INTERACTION, *supra* note 10, at 49-76 (*see* the section entitled "The Influence of Christianity on the Development of Western Law"); LAW AND REVOLUTION, *supra* note 21, at 166-98 (*see* the section entitled "Theological Sources of the Western Legal Tradition").

<sup>75</sup> *See* LAW AND REVOLUTION, *supra* note 21, at 166-98.

<sup>76</sup> *See The Religious Sources of General Contract Law*, *supra* note 60.

shaped by Roman Catholic doctrines of penance, purgation, and punishment. Both law and religion draw upon each other's concepts to devise their own doctrines. The legal doctrine that the punishment must fit the crime rests upon theological doctrines of purgation and penance. The Christian theological doctrine of humanity's fallen sinful nature is rooted in legal concepts of agency, complicity, and vicarious liability.

Law and religion are institutionally related—principally in the relation between church and state, but also in the relations among sundry other religious and political groups. Jurists and theologians have worked hand-in-hand to define the proper relation between these religious and political groups, to determine their respective responsibilities, to facilitate their cooperation, to delimit the forms of support and protection one can afford the other. Many of the great Western constitutional doctrines of *regnum et sacerdotium*—two cities, two powers, two swords, two kingdoms—are rooted in both civil law and canon law, in theological jurisprudence and political theology.<sup>77</sup> Much of our American constitutional law of church and state is the product both of Enlightenment legal and political doctrine and of Christian theological and moral dogma.<sup>78</sup> Much of the current agitation for the drafting and ratification of a universal declaration of religious human rights builds on the work both of legal and religious groups. “The interrelationship of church and state,” Berman writes, “is not solely a political-legal matter. It is also a religious matter. Analysis of it should begin . . . with a consideration of the interaction between our religious belief . . . and the legal process. . . . It is in the context of the interaction of religion and law, the interaction of our sense of the holy and our sense of the just—it is in that more general context that the more specific question arises of the proper relation between religious and political institutions.”<sup>79</sup>

Law and religion are methodologically related. Both have developed analogous hermeneutical methods, modes of interpreting their authorita-

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<sup>77</sup> See sources cited *supra* note 38.

<sup>78</sup> See, e.g., FAITH AND ORDER, *supra* note 10, at 221-22; Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777 (1986) [hereinafter *Historical Perspective*]. For similar arguments, see John Witte, Jr., *The Integration of Religious Liberty*, 90 MICH. L. REV. 1363 (1992); John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489 (1991) [hereinafter *Theology and Politics*].

<sup>79</sup> *Historical Perspective*, *supra* note 78, at 777.

tive texts. Both have developed logical methods, modes of deducing precepts from principles, of reasoning from analogy and precedent. Both have developed forensic and rhetorical methods, modes of arranging and presenting arguments and data. Both have developed methods of adducing evidence and adjudicating disputes. Both have developed methods of organizing, systematizing, and teaching their subject matters. Historically, law and religion often shared the same methods. The scholastic *sic et non* method, for example, was used to systematize and teach both Roman Catholic theology and canon law. The early modern topical or *loci* method was used to systematize and teach both Protestant theology and civil law. The case method has long been used as a method to teach both pastoral and adversarial skills.<sup>80</sup>

Law and religion are professionally related. In many earlier societies and among certain groups still today, the legal profession and the religious profession are undifferentiated. Legal and sacerdotal responsibilities are vested in one person or in one office. Even when these professions are differentiated, however, they remain closely related. The professions are similar in form. Both require extensive doctrinal training and maintain stringent admissions policies. Both have developed codes of ethics and internal structures of authority to enforce them. Both seek to promote cooperation, collegiality, and *esprit de corps*. The professions are also parallel in function. There have always been close affinities between the mediation of the lawyer and the intercession of the pastor, between the adjudication of the court and the arbitration of the consistory, between the beneficence of the bar and benevolence of the diaconate. Both professions serve and minister to society. Both seek to exemplify the ideal of community and calling.<sup>81</sup>

Berman did not invent these categories of interaction between law and religion, nor does he give equal attention to all of them in his scholarship. Nonetheless, his writings have helped to uncover each of these categories and to adumbrate some of their constitutive themes.

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<sup>80</sup> See LAW AND REVOLUTION, *supra* note 21, at 120-64; Harold J. Berman, *Legal Reasoning*, 9 INT'L ENCYCLOPEDIA SOC. SCI. 197 (1968). Berman also deals with some of these matters in two unpublished manuscripts: Law and Language, *supra* note 33; The Transformation of Western Legal Science, *supra* note 37.

<sup>81</sup> See Faith and Order, *supra* note 10, at 341-51.

### III. CHALLENGES

What are the challenges that Berman opens to us and leaves open for us in the field of law and religion?

In one sense, Berman's whole career has been a challenge to legal conventions. Many of the cherished idols (the "isms") of our legal profession have felt his sharp rebuke—positivism, individualism, nationalism, historicism, rationalism, subjectivism, realism, to name a few. Many of our conventional categories of knowledge have been defied—our schoolboy divisions of Western history into ancient, medieval, and modern, our convenient distinctions among civil law, common law, and canon law, our comfortable separation of law from art, science, and the humanities. Many of our traditional assumptions have been challenged—that the Middle Ages were dark and devoid of law, that the Protestant Reformation produced only spiritual and ecclesiastical change, that the Soviet Union of Lenin and Stalin was a lawless autocracy.

Such general challenges of Berman's legal scholarship accompany specific challenges to those who work in the field of law and religion. Berman challenges theologians to develop a comprehensive theology of law. Berman the jurist has prepared an integrative jurisprudence that accounts for the religious foundations and dimensions of law, at least in the West. Berman the theologian, however, has not developed a corresponding integrative theology. He has suggested that religion has legal foundations and dimensions, but he has left much of the proof and refinement of this assertion to others. Theology needs its own Berman, a religious scholar with the comparative vision and catholic insight to take this interdisciplinary theme into the sacred precincts of systematic theology, church history, scriptural studies, theological ethics, and comparative religion. Distinguished theologians such as Adolf von Harnack,<sup>82</sup> Philip Schaff,<sup>83</sup> Emil Friedberg,<sup>84</sup> Ernst Troeltsch,<sup>85</sup> and others have laid strong foundations for

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<sup>82</sup> ADOLF VON HARNACK, *HISTORY OF DOGMA* (1961) (7 vols.); ADOLF VON HARNACK, *THE CONSTITUTION AND THE LAW OF THE CHURCH IN THE FIRST TWO CENTURIES* (1910); ADOLF VON HARNACK, *DAS WESEN DES CHRISTENTUMS* (1907).

<sup>83</sup> PHILIP SCHAFF, *HISTORY OF THE CHRISTIAN CHURCH* (1882-1910) (7 vols.); PHILIP SCHAFF, *CHURCH AND STATE IN THE UNITED STATES; OR, THE AMERICAN IDEA OF RELIGIOUS LIBERTY AND ITS PRACTICAL EFFECTS* (1888).

<sup>84</sup> *CORPUS IURIS CANONICI*, *supra* note 4; EMIL FRIEDBERG, *LEHRBUCH DES KATHOLISCHES UND EVANGELISCHEN RECHTS* (1909); EMIL A. FRIEDBERG, *DIE GELTENDEN VERFASSUNGS GESETZE*



this work. A comprehensive theology of law remains a desideratum.<sup>86</sup>

Berman's work on Western history opens whole new vistas of learning for us. Berman has focused on law and religion in this second millennium of the Western Christian era. He has emphasized the interactions between law and medieval Catholicism at the beginning, law and early Protestantism in the middle, law and Marxist-Leninism at the end of this millennium. Many subjects still beckon analysis. Consider the ongoing relationships between law and Catholicism, and between law and Protestantism in more recent times. Think of the multiple interactions among law and Orthodox Christianity, Judaism, and Islam, already at the time of the Papal Revolution and thereafter. Consider the interactions of law and religion in the previous millennium—in pagan and Christian Rome, in Eastern Orthodox lands, in nativist and Christian Germanic tribes, in Christian and Muslim Iberia, in the Carolingian and Merovingian empires. Think of law and religion before Christ and the common era—in ancient Palestine, Sumeria, Egypt, Greece, Carthage, republican Rome. These and other fresh fields of Western history are waiting to be broken, or rebroken, with the new interdisciplinary tools that Berman has forged.

Berman's most formidable challenge to us, however, lies not in deconstruction of the past, but in reconstruction for the future. For more than three decades, Berman has warned us of a pending crisis of law, religion, and culture on a world scale. His apocalyptic prophesies now seem to be coming true. On the eve of the third millennium, the world is torn by crisis and paradox, by a moral Armageddon, if not a military one. We see the great paradoxes of incremental political unification versus violent balkanization, gentle religious ecumenism versus radical fundamentalism, sensitive cultural integration versus rabid diversification. Law and religion, Berman insists, together must parse these paradoxes and craft a new

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DER EVANGELISCHEN DEUTSCHEN LANDESKIRCHEN (1895) (4 vols.); EMIL A. FRIEDBERG, DIE ALLGEMEINE RECHTLICHE STELLUNG DER EVANGELISCHEN KIRCHE UND STAAT (1887); EMIL A. FRIEDBERG, DE FINIUM INTER ECCLESIAM ET CIVITATEM REGUNDORUM JUDICIO QUID MEDII SEVI DOCTORES ET LEGES STATUERINT (1861); EMIL A. FRIEDBERG, DAS RECHT DER EHE-SCHLIESSUNG IN SEINER GESCHICHLICHEN ENTWICKLUNG (1885); EMIL A. FRIEDBERG, DER STAAT UND DIE BISCHOFSWAHLEN IN DEUTSCHLAND (1874).

<sup>85</sup> See, e.g., ERNST TROELTSCH, THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES (Olive Wyon trans., 1931); ERNST TROELTSCH, GESAMMELTE SCHRIFTEN (Hans Baron ed., 1900).

<sup>86</sup> For good prototypes, see, for example, HANS DOMBOIS, DAS RECHT DER GNADE (1961-1983) (3 vols.) and several of the essays included in CHRISTENTUM, SÄKULARISATION UND MODERNES RECHT (Luigi L. Vallauri & Gerhard Dilcher eds., 1981) (2 vols.).

*ius gentium* and new *fides populorum*, a new common law and common faith on a world scale. We need global structures and symbols, global processes and principles to foster a true global dialogue. These cannot be found only in worldwide science and commerce, or in global literature or language. Law and religion are the only true forces that can produce such unification and unity, for they are the "two great forces, which . . . constitute the outer and the inner aspects of social life."<sup>87</sup> And so, Berman tells us, the great Western story of the interaction of law and religion must now be writ large. We must discover and develop the inner religiosity of all law (not just Western law), the inner legality of all religion (not just Western religion), and the interactions and alliances of law and religion in all cultures (not just Western culture).

#### IV. RESPONSES

All of us must respond to the challenges of Berman's work in our own way. For this young legal historian, clutching his archives ever more firmly as Berman's challenges become ever loftier, my response is the traditional response of historians: "Back to the sources!"—but now newly enlightened. With Berman's interdisciplinary method and challenge in mind, one can gain wholly new insights even into sources and subjects that no longer seemed capable of new interpretation.

In the concluding part of this essay, I use Berman's "binocular of law and religion"<sup>88</sup> to view afresh three familiar subjects: (1) the evolution of marriage and family in the West; (2) the place of religion in current national and international discussions of human rights; and (3) the collaboration and contestation of law and religion in inducing and suppressing private and public violence throughout the world. Through Berman's binocular, one can see much more in these subjects than conventional viewpoints have allowed.

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<sup>87</sup> FAITH AND ORDER, *supra* note 10, at xii.

<sup>88</sup> I borrow this phrase from Jaroslav Pelikan, *Foreword* to THE WEIGHTIER MATTERS OF THE LAW, *supra* note \*, at xii.

### A. *Marriage and Family*

Even a superficial sketch of the history of Western marriage and the family provides a dramatic illustration of the virtue and value of this interdisciplinary analysis.<sup>89</sup> Many of the cardinal questions of contemporary Anglo-American marriage and family law are of considerable vintage, and have drawn to themselves long traditions of theological reflection and action. A number of basic legal terms and doctrines concerning the family have roots in ancient Hebraic, Roman, and Christian canon law. Many of the basic rules concerning the formation and dissolution of marriage, and the legal relationship of husband and wife and of parent and child are subjects of long theological reflection and controversy.

Western marriage and family law has been radically transformed five times over. The first three transformations were catalyzed principally by religious ideas and institutions. The last two transformations have sought, in part, to eradicate traditional religious influences on, and ecclesiastical participation in, marriage and family law.

The *first* transformation occurred in the fourth through sixth centuries, when the Christian (and, less so, the Jewish) concept of marriage as a monogamous, heterosexual, life-long union came to dominate Roman and later Germanic law. Biblically-based concepts of marital consent and impediments, and of annulment and divorce were prescribed. Traditional Roman and Germanic practices of polygamy, concubinage, incest, homosexuality, abortion, and infanticide—that were part of the Roman legal tradition—were proscribed. Spiritual clergy were on the one hand discouraged from participation in the institution of marriage and the family, but on the other hand given enormous legal and moral authority to govern sexual and marital practices.

The *second* transformation occurred in the twelfth and thirteenth cen-

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<sup>89</sup> The following section is drawn in part from John Witte, Jr., *The Reformation of Marriage Law in Martin Luther's Germany: Its Significance Then and Now*, 4 J.L. & RELIGION 293 (1986), and notes in preparation for a volume on law, religion, and the family in the West. Among the numerous other useful accounts, see, for example, JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987); MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989); STEVEN E. OZMENT, *WHEN FATHERS RULED: FAMILY LIFE IN REFORMATION EUROPE* (1983); LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800* (1977).

turies, when a systematic Roman Catholic theology and canon law of marriage and the family came to dominate the West. Marriage was viewed as an institution of creation, a sacrament of the Church, and a legal relation between two fit parties. Marriage was instituted at creation to permit persons to beget and raise children and to direct their natural passion to the service of the community. Yet marriage was subordinated to celibacy; propagation was made less virtuous than contemplation. Marriage was also raised to the dignity of a sacrament. It symbolized the indissoluble union between Christ and His Church and thereby conferred sanctifying grace upon the couple and the community. Couples could perform the sacrament in private, provided they were capable of marriage and complied with rules for marriage formation. As a legal relation, properly contracted, marriage prescribed a relation of love, service, and devotion and proscribed unwarranted recission of, or disregard for, one's obligations under the marriage contract.

The Catholic Church built an intricate body of marriage and family law upon this conceptual foundation. Because marriage was a holy sacrament, the Church claimed exclusive jurisdiction over it, appropriating and expanding the laws of nature, scripture, and morality. The canon law punished contraception, abortion, and child abuse as violations of the created marital functions of propagation and childrearing. It proscribed unnatural relations, such as homosexuality and polygamy. It protected the sanctity and sanctifying purpose of the marriage sacrament by deeming valid bonds indissoluble and by impeding or dissolving numerous invalid unions such as those between Christians and non-Christians, between parties related by legal, spiritual, blood, or familial ties, or between parties who could not or would not perform their connubial duties. It supported celibacy by dissolving unconsummated vows to marriage if one party made a vow to chastity, by prohibiting remarriage to those who had married a priest or monastic, and by punishing clerics or monastics who contracted marriage. It ensured free consensual unions by dissolving marriages contracted by mistake or under duress, fraud, or coercion.

Traditional Roman and Germanic laws governing the legal—and, in particular, the property—relationships between husband and wife and between parent and child were liberally appropriated by the canonists. Traditional rules of arranged marriages, patriarchal restrictions on the marital estate, male-dominated inheritance laws, protections of the *pater-*

*familias* and restrictions on the wife's capacities to contract, to transfer property, and the like remained firmly in place.

The *third* transformation occurred during the Protestant Reformation, particularly in Lutheran and Calvinist polities. The Protestant reformers, like the Roman Catholics, taught that marriage is a natural, created institution. Yet they rejected the subordination of marriage to celibacy. The person was too tempted by sinful passion to forgo marriage. The family was too vital a social institution in God's redemption plan to be hindered. The celibate life had no superior virtue, no inherent attractiveness vis-à-vis marriage, and was no prerequisite for ecclesiastical service.

The Protestant reformers replaced the sacramental concept of marriage with a social concept. The marital unit, though divinely ordained, was viewed as an institution of the earthly kingdom. Participation required no prerequisite faith or purity and conferred no sanctifying grace, as did true sacraments. Marriage and the family had distinctive uses in the life of the individual and of the community. It revealed human sin and the need for God's marital gift. It restricted prostitution, promiscuity, and other public sexual sins. It taught love, restraint, and other public virtues and morals. Any fit man and woman were free to enter such a union, provided they complied with the laws of marriage formation.

As part of the earthly kingdom, marriage and the family were subject to civil, not ecclesiastical, authority and law. Church officials could and should cooperate with the civil authorities to communicate divine and moral principles respecting marriage and family life. Church members, all of whom were viewed as members of the priesthood of all believers, were required to counsel those who contemplated marriage and to admonish those who sought annulment or divorce. But the church no longer had formal legal authority over marriage.

Much of the traditional canon law of marriage and the family was appropriated by civil authorities in both Protestant and Catholic countries. Prohibitions against unnatural relations and infringement of marital functions remained in effect. Impediments that protected free consent, that implemented Biblical prohibitions against marriage of relatives, and that governed the couple's physical relations were largely retained. But the new Protestant theory of marriage and the family also yielded legal changes. Because the reformers rejected the subordination of marriage to

celibacy, they rejected laws that forbade clerical and monastic marriage, that denied remarriage to those who had married a cleric or monastic, and that permitted vows of chastity to annul vows of marriage. Because they rejected the sacramental nature of marriage, the reformers rejected impediments of crime and heresy and prohibitions against divorce on grounds of adultery, desertion, cruelty, or frigidity. Because persons by their lustful nature were in need of God's remedy of marriage, the reformers removed numerous legal, spiritual, and consanguineous impediments to marriage not countenanced by Scripture. Because of their emphasis on the pedagogical role of the church and the family, and the priestly calling of all believers, the reformers insisted that both marriage and divorce be public. Marriage promises required parental consent, witnesses, church consecration and registration, and priestly instruction. Couples who wished to divorce had to announce their intentions in the church and community and petition a civil judge to dissolve the bond.

The *fourth* transformation occurred (at least in England and America) during the later nineteenth century. Traditional marriage and family law had been focused on the contracting and dissolving of marriages; the governance of marriages once formed and families once dissolved was left largely to the discretion of the parties and their spiritual superiors. In the nineteenth century, state law came to govern much more precisely the relationships between husband and wife and between parent and child, both during marriage and thereafter. Sweeping new legislation was introduced concerning marriage formalities, divorce, alimony, prenuptial contracts, marital property and its control and division, contraception, abortion, wife abuse, marital rape, child custody, adoption, child support, child abuse and neglect, juvenile delinquency, education of minors, and numerous similar subjects. The state, as Benjamin Cardozo once quipped, became at once a third party to every marriage and the third parent to every child.

Such sweeping legal changes had several intended consequences. Marriages became easier to contract and easier to dissolve. Wives received greater protections of their person and properties from their husbands, and greater independence in their relationships outside the family. Children received greater protection from parental abuses and neglect, and greater access to benefit rights. Finally, and perhaps most importantly for our purposes, the state came to threaten, if not outright displace, the church and the synagogue as the principal external authority governing

marriage and family life.

Nonetheless, many traditional assumptions, rooted in Protestant, Catholic, and Jewish theology, remained firmly in place. The status of marriage was extended only to monogamous heterosexual unions properly contracted between a fit man and woman of the age of consent. The status of family included only married couples, widows, and widowers, together with their natural children, adopted children, or stepchildren, and in some jurisdictions, next of kin, such as grandparents or grandchildren. Moreover, the sharp distinctions between husband and wife and between father and mother were also maintained. The husband-wife distinction often worked to the advantage of the husband, and to the disadvantage of the wife, while the marriage was intact. Husbands were still treated as leaders and representatives of the family for purposes of marital property and commerce, inheritance, and taxation, among others. Wives were still restricted in their ability to hold, use, or alienate marital property, to enter into many contracts, to testify against their husbands, or to act independently in a variety of other legal transactions. Dower rights, prenuptial contracts, and the like helped to mitigate these restrictions, but only partially and only for a select few. The father-mother distinction, by contrast, worked to the advantage of the mother in legal contests. Mothers were considered to be the primary nurturers, educators, and caretakers of their children, and contests between paternal and maternal rights of custody, care, and parentage were often resolved in favor of the mother, especially during separation or divorce.

The *fifth* transformation is occurring as we speak. Since the 1960s, both in Europe and America, traditional marriage and family law has come under increasing attack for its excessive moralism, paternalism, and bias toward heterosexual, monogamous unions and against all other forms of intimate association. There is a growing agitation for a purely private, contractual model of marriage, where each party has equal and reciprocal rights and duties and where two parties, of whatever gender or sexual orientation, have full freedom and privacy to form, maintain, and dissolve their relationship as they see fit. Neither the state nor the church, under this model, have much of a role to play in the formation, maintenance, or dissolution of marriage.

Courts and legislatures have responded to this agitation. The past two decades have seen, in Mary Ann Glendon's words, "a progressive with-

drawal of legal regulation of marriage formation, dissolution, and the conduct of married life, on the one hand, and increased regulation of the economic and child-related consequences of formal or informal cohabitation, on the other.<sup>90</sup> Elaborate prenuptial contracts, determining in advance the respective rights and duties of the parties during and after marriage, have gained prominence. No-fault divorce statutes are in place in every state, often rendering the divorce proceeding largely a formality. Requirements of parental consent and witnesses to a marriage have been softened considerably. The functional distinction between the rights of the married and the unmarried has been narrowed by a growing body of constitutional law of sexual and familial privacy. Homosexual, bisexual, and other intimate associations have gained increasing acceptance at law.

At the same time, the law has come to circumscribe much more narrowly the traditional role of the church and the synagogue in the family.<sup>91</sup> Religious organizations are prohibited from lobbying on marriage and family issues, on pain of losing their tax exempt status. They are discouraged from active pastoral intercession in delicate marriage and family disputes, in part because of the relaxation of evidentiary rules of priest-penitent privilege, in part because of the growing body of tort suits against clerics and the church by disgruntled parishioners. Clerics are not readily drawn into legislative or judicial deliberations on marriage and family questions because of a growing concern to disestablish religion, and to separate church and state. Few cases are now referred to ecclesiastical courts for resolution (although churches have become increasingly active

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<sup>90</sup> MARY ANN GLENDON, *STATE, LAW, AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* 1 (1977).

<sup>91</sup> Classic Western law gave organized religious communities a prominent role in questions of marriage formation and dissolution and family governance and its erosion. Before the sixteenth century, the Catholic church held plenary jurisdiction over marriage and family life, which it discharged through a refined system of canon law and ecclesiastical courts. After the sixteenth century, jurisdiction over marriage and family life shifted to the state, yet the church retained a formidable formal role in marriage and family law. Marriages could be contracted and consecrated in a church or synagogue. Clerics presided at wedding ceremonies. Theologians and clerics served as expert witnesses before civil legislatures and courts that dealt with marital and family issues. Pastors and rabbis exercised considerable influence on public perceptions of marriage and family life through their preaching, pamphleteering, and writing. Ecclesiastical regulations and interventions into the marital and family lives of parishioners were respected, indeed encouraged, by the state. When parishioners brought their familial and marital disputes to civil courts, they could be assigned to an appropriate ecclesiastical court for resolution. When parties appealed ecclesiastical judgments in marital cases to civil courts, the civil courts would often deny the parties standing or simply uphold the ecclesiastical judgment.



in mediation and arbitration and have had marital and family cases referred to them in that capacity; a few states are also experimenting with new cooperative relationships with religious tribunals).

Although the state has largely withdrawn from the intimate relationship between consenting adults, it has increased dramatically its protection of children. Sweeping changes have been introduced in the formulation and enforcement of laws governing adoption, child custody, child support, child abuse and neglect, juvenile delinquency, education of minors, and numerous similar subjects that first received concerted legal attention in the nineteenth century. As traditional family forms and functions have eroded, the state's parental role has dramatically increased.<sup>92</sup>

Berman's binocular of law and religion gives us a view of the evolution of marriage and family that traditional social, legal, and church histories of the subject have not allowed us to see. The binocular allows us to see that marriage and family law have religious foundations and dimensions, that both legal and religious authorities have played a role in the governance and development of marriage and the family, and that changes in the religious authorities and in attitudes respecting marriage and the family all have had dramatic legal consequences.

### *B. Religion and Human Rights*

A second example of the importance of linking legal and religious analysis is drawn from contemporary debates about religious human rights.<sup>93</sup>

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<sup>92</sup> Berman has often emphasized the parental and pedagogical role of state law, but in the *Soviet Union*, not in America. See, e.g., JUSTICE IN THE U.S.S.R., *supra* note 39, at 282-84; Harold J. Berman, *The Use of Law To Guide People to Virtue: A Comparison of Soviet and U.S. Perspectives*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 75 (June L. Tapp & Felice J. Levine eds., 1977). Berman's theory of revolution, however, can be used to parse this paradox. Each of the five most recent revolutions, he argues—the German Lutheran, English Puritan, American, French, and Bolshevik—though centered in one nation inevitably wrought changes over time in the legal systems of other Western nations. For example, the growing parental role of the *American* state (along with the rise of the American welfare state altogether in the past six decades) can be viewed as one of the inevitable after-effects of the Bolshevik Revolution.

<sup>93</sup> The following section is drawn, in part, from a forthcoming volume, "The State of Religious Human Rights in the World Today: A Comparative Legal and Religious Analysis," as well as various articles on church-state themes principally in America. See, e.g., Witte, *Theology and Politics*, *supra* note 78; John Witte, Jr., *The South African Experiment in Religious Human Rights: What Can Be Learned from the American Experience?*, 14 J. JURID. SCI. (Bloemfontein, South Africa) (forthcoming 1993). For valuable comparative studies, see, for example, ABDULLAHI AHMED AN-

Discussions of religious human rights, of course, have occupied Western jurists and theologians since the eleventh century, if not before.<sup>94</sup> But the current discussions of the subject first came to prominence in the aftermath of World War II. Several factors contributed to the sudden interest in the subject—the horrors suffered by Jews and Christians in Nazi Germany, Stalinist Russia, and Maoist China, the repression of Christian missionaries and emigrés to Africa and Asia, the sudden proliferation of new religions demanding protection and treatment equal with that of older religions, among other factors. In response, jurists and theologians began to produce elaborate theories of religious and other human rights. Religious communities issued bold confessional statements and manifestoes on the subject. The United Nations, regional international organizations, and individual states began to outlaw religious discrimination. Voluntary associations were established to monitor the plight of religious minorities, to litigate and lobby on their behalf, and to educate their constituents.

This sudden new interest in religious human rights was part of the broader “rights revolution” that erupted in America and other Western European nations in the 1950s and thereafter. In America, this rights revolution yielded a powerful new grassroots civil rights movement, a welter of bold judicial opinions issued by the Warren Court and lower court followers, an array of new rights legislation punctuated by the Civil Rights Act of 1964, and an unprecedented outpouring of legal and political literature on human rights. At the international level, the Universal Declaration of Rights of 1948 offered a grand statement of human rights, which brought forth several declarations, covenants, and conventions on more discrete rights. The United Nations developed a Human Rights Centre and a number of subcommissions and special rapporteurs on select topics. Continental and regional groups developed their own commissions, courts, and protocols on human rights. Academies and institutes

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NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (1990); DAVID LITTLE ET AL., HUMAN RIGHTS AND THE CONFLICT OF CULTURES: WESTERN AND ISLAMIC PERSPECTIVES ON RELIGIOUS LIBERTY (1988); MAX L. STACKHOUSE, CREEDS, SOCIETY, AND HUMAN RIGHTS: A STUDY IN THREE CULTURES (1984); RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND IN RELIGIONS (Leonard J. Swidler ed., 1986).

<sup>94</sup> See, e.g., GROWTH OF CONSTITUTIONAL THOUGHT, *supra* note 15; William R. Garrett, *Religion, Law, and the Human Condition*, 47 SOC. ANALYSIS 31-34 (1987); Charles J. Reid, Jr., *The Canonist Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 B.C. L. REV. 37 (1991); Brian Tierney, *Villey, Ockham, and the Origin of Individual Rights*, in THE WEIGHTIER MATTERS OF THE LAW, *supra* note \*, at 1.

throughout the world produced a prodigious new literature on human rights.

After expressing some initial interest, however, intellectual and political leaders of this "rights revolution" largely consigned religious human rights to the bottom of, what Henry Abraham called, "The Honor Roll of Superior Rights."<sup>95</sup> Both in America and in Europe, civil rights legislation, litigation, and lobbying efforts were directed elsewhere: to the removal of discrimination based on sex, race, and culture; to the enhancement of freedoms of speech, press, and association; and to the safeguarding of criminal and civil procedural rights. Likewise, the international law of human rights was focused principally on the protection of civil, political, social, economic, and cultural rights, as well as on the eradication of sexual, cultural, and ethnic discrimination.

Since the early 1980s, this has begun to change. Religious human rights have begun to capture the attention of American and European courts and legislatures. Yet no uniform or refined law on the subject has yet emerged. The United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief was finally promulgated in 1981. Yet, without an attendant covenant or convention, this Declaration holds only moral authority for the voluntarily compliant.

Such "official" neglect of religious human rights has had several deleterious effects. First, it has "impoverished" contemporary discourse about human rights as a whole.<sup>96</sup> The right to religion lies at the root of most other individual and institutional rights. For the religious individual, the right to believe leads ineluctably to the rights to assemble, speak, worship, proselytize, educate, parent, travel, or to abstain from the same on the basis of one's beliefs. For the religious institution, the right to exist leads ineluctably to the rights to incorporate, hold property, self-govern, discipline, set standards for entrance and egress, and to a host of other rights. To ignore religious rights, therefore, is to overlook the historical and intellectual source of many other individual and institutional rights.

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<sup>95</sup> Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991) (quoting HENRY J. ABRAHAM, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 74 (5th ed. 1988)). See also a powerful treatment in MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) [hereinafter *RIGHTS TALK*].

<sup>96</sup> See *RIGHTS TALK*, *supra* note 95.

Second, the neglect of religion has sharpened the divide between Western and non-Western theories of rights. Many non-Western traditions, particularly those of Islamic, Buddhist, Hindu, and Confucian extraction, can neither comprehend nor accept a system of rights which excludes religion. For these traditions, religion is inextricably integrated into every facet of life, and no system of rights that ignores this fundamental axiom is worthy of adoption or enforcement. Since Western notions of rights have tended to dominate both international diplomacy and international law, many non-Western societies have not easily accepted the basic international declarations and covenants on human rights.

Third, the neglect of religion has curiously abstracted the current understanding of rights. Religious human rights, as understood by many Christian, Judaic, and Islamic writers, combine rights and responsibilities. A religious individual or institution has the right to be free, not just in the abstract but in order to act affirmatively to discharge certain responsibilities in both the religious and the broader civic communities. Religious human rights provide the best example of the organic linkage between rights and responsibilities. Without the example of religious human rights readily at hand, official lore has lost sight of these organic connections between rights and responsibilities, and has tended to treat rights in the abstract.

In this example, too, one sees the value of Berman's interdisciplinary method. Religion and law are inextricably linked, and the cultivation of a legal concept of human rights that deprecates, and even ignores, the role of religion invariably impoverishes itself and distorts our understanding of the concepts of both "humanity" and "right."

### *C. Law, Religion, and Violence*

In a final example, we use the binocular of law and religion to view "violence," a subject very much in our media and our minds today. As we have seen in Ireland, Sudan, Ethiopia, Algeria, the former Soviet Union, and the former Yugoslavia, both law and religion are intimately involved both in the inducement and in the suppression of violence. Both law and religion distinguish among forms of legitimate and illegitimate violence, and include violence-inducing and violence-suppressing elements in their

teachings and actions.<sup>97</sup>

Law has defined sundry forms of legitimate violence and aggression. In earlier societies, and among radical and belligerent groups still today, law has served to legitimate pogroms and inquisitions, crusades and jihads, genocide and slavery. Even in modern urbane societies, law remains an important instrument to define and implement violence. Criminal laws, for example, embrace forms of violence as innocuous as adversarial interrogation and cross-examination and as brutal as official torture and execution. Family laws accept and encourage a range of corporal discipline of children and, in some cultures, of wives and elders. Public laws of democracies and autocracies alike define and legitimate police aggression and violence against citizens. International laws allow for various just acts of violence between nations ranging from the imposition of sanctions designed to starve the enemy to the infliction of bloody warfare. The determination of what forms of violence are legitimate is not based on legal casuistry alone. Legitimacy is also a social judgment, often predicated on the religious and moral values and traditions of state officials and citizens.

Conversely, law has also served to deter and punish sundry forms of illegitimate violence and aggression. Virtually every legal system proscribes private and public wrongs and punishes their commission. Gratuitous and random threats to or violations of the person, property, or integrity of another are (potentially) torts, punishable by injunctions and civil damage awards, as well as crimes, punishable by criminal sanctions. Gratuitous and random threats to and violations of the public order, ranging from public drunkenness to public insurrection, are considered crimes and subject to criminal sanction. Both tort law and criminal law inquire closely into the state of mind that accompanies the defendant's acts of aggression and violence—an inquiry that invariably tests both the reason and the conscience of the defendant. Defendants generally are held liable only if their aggressive or violent act was intended or at least expected. Aggression and violence born of inadvertence, incompetence, necessity, du-

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<sup>97</sup> Within the vast literature on religion and violence, see, for example, RENÉ GIRARD, *VIOLENT ORIGINS* (1987); RENÉ GIRARD, *VIOLENCE AND THE SACRED* (1977); BRUCE B. LAWRENCE, *DEFENDERS OF GOD: THE FUNDAMENTALIST REVOLT AGAINST THE MODERN AGE* (1989). Among countless legal writings, see the provocative work of the late Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986); Robert M. Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983).

ress, or self-defense are generally not subject to legal sanctions.

Like law, religion serves both to define forms of legitimate violence and to deter forms of illegitimate violence. On the one hand, religion makes routine and legitimate certain forms of violence within and without the religious community. Many religious communities preach and practice various forms of ritual masochism, cathartic flagellation, spiritual fasting, arduous pilgrimages, and liturgical sacrifices. Such forms of violence to oneself and to one's religious peers are considered not only legitimate, but spiritually mandatory. Participation in them by religious adherents, either directly or vicariously, is considered spiritually edifying and enhancing. Many religious communities also sponsor violence that serves to protect their totems and beliefs, to stamp out heresy and heathendom, or to extend their regimes. Both Western and Eastern religious traditions have known crusades, jihads, and religious warfare, inquisitions, pogroms, and religious persecution. Fundamentalist groups, whether of Christian, Judaic, or Muslim extraction, maintain similar patterns of violence and aggression still today. On the other hand, institutional religions of all types serve to deter and punish violence and aggression. The moral codes of most religious traditions teach respect for the person and property of another and responsibility for the peace and order of the religious and the civic communities. Religious communities, like Quakers and Hutterites, and a number of native American, Caribbean, and Southeast Asian tribal communities go even further and teach pacifism and passive acceptance of violence and brutality against their members.

Through Berman's binocular of law and religion, we see the immense complexity of violence in both its mundane daily forms and its grand episodic explosions. Law and religion can, together, catalyze violence and, together, counsel peace. Law and religion can also work at cross purposes, sometimes opposing the violent or pacific tendencies of the other. Such insights are valuable not only to the jurist and theologian, but also to the anthropologist and the peacemaker. The task of the anthropologist is to describe the triologue of law, religion, and violence in all its complexity; the task of the peacemaker is to harness the pacific dimensions of both law and religion in the deterrence and suppression of violence.

## CONCLUSIONS

My first contact with Professor Berman was in 1982, when I took the liberty of writing to ask his advice on whether to go to Harvard Law School. I had read much of his work in law and religion and legal history by the time and somehow felt a strange kinship with him that emboldened me to write. Within a week, he responded with a letter brimming with wise advice—not the least of which was to come to study with him. At the end of his letter he wrote:

I wish you every success in your spiritual and intellectual pilgrimage into the world of law. I am glad that you have been studying the formation and transformation of the Western legal tradition, and the historical interaction of law and religion. These historical studies, even more than the philosophical studies you are contemplating, will protect you against the skeptical, and even nihilistic, assaults upon the law to which you will be exposed. . . . But most of all, my young friend, keep your faith and find a place for it in your legal learning. For only then will you find rest for your reason and for your conscience.<sup>98</sup>

Such sentiments speak volumes about the sources and themes of Berman's work in law and religion. This work is a spiritual and intellectual pilgrimage for him, which he beckons students and readers to join. Several deep concerns have motivated him to undertake this pilgrimage—pedagogical concerns about the integration of legal and liberal knowledge; jurisprudential concerns about the narrow concepts of law and religion that dominate the legal academy; theological concerns about the relationship of his personal beliefs and legal learning. Several insights have come to him in the course of his pilgrimage—that law has religious dimensions, reflected in its ritual, authority, tradition, and universality; that religion has legal dimensions, reflected in its internal structures of order, organization, and orthodoxy; that the spheres of law and religion interact conceptually, institutionally, professionally, and methodologically. These cardinal insights cannot be lost on us as we continue the struggle to understand the concepts and commandments of law, justice, and order, and as we prepare our lives and cultures for the emergence of a common law of humanity in the next millennium.

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<sup>98</sup> Letter from Harold J. Berman to John Witte, Jr. (Feb. 9, 1982) (on file with the author).