

EDITORS' INTRODUCTION

I.

In the field of law and religion, Harold J. Berman has been an inspired and inspiring leader. He has demonstrated that religion has a legal dimension, that law has a religious dimension and that legal and religious ideas and institutions are intimately tied. He has likewise shown that jurisprudence cannot be divorced from theology, that *Rechtsgeschichte* is inseparable from *Dogmengeschichte*. Through his efforts of the past four 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.

Berman was eminently prepared for this task. As a student at Dartmouth College in the mid-1930s, he came under the tutelage of Eugen Rosenstock-Huessy who imbued in him a deep appreciation of the Western tradition and of its religious foundations and dimensions. Rosenstock also directed him to study Roman law and canon law and to read the great legal historians—Savigny and Gierke, Story and Maitland. As a graduate student at the London School of Economics, Berman studied medieval and early modern legal history under Theodore Plucknett and prepared an incisive analysis of the emergence and decline of courts of equity in England. He also enrolled in courses with R. H. Tawney who impressed on him the cultural influence of religious ideas and led him to the writings of von Jhering, Weber and Durkheim. Berman continued his study of Western legal history at Yale University and, under Hajo Holborn's supervision, wrote a critical appraisal of the literature describing the reception of Roman law in sixteenth century Germany.

In his first two decades of teaching at Harvard Law School (1948–1968), Berman focused primarily on the Soviet legal system and international trade law. He developed a number of new courses in Soviet law, made frequent trips to the Soviet Union, served as an expert witness in some 40 cases involving Soviet law, undertook the translation of several Soviet legal codes and produced more than 70 articles and ten books on the subject, including his path-breaking work *Justice in the U.S.S.R.: An Interpretation of Soviet Law* (1950; 2d ed., 1963) and a more popular tract *The Russians in Focus* (1953; repr. ed., 1969). After 1960, Berman also lectured widely and wrote prolifically on the *lex mercatoria* and the legal problems of trade between eastern block and western countries.

Berman's commitment to the integration of law and religion, however, manifested itself strongly throughout this early period. He insisted on viewing the Soviet legal system in light of the "secular religion of Marxist-Leninism" on which it was founded and on tracing many of its legal institutions to earlier Christian eras. He gave prominent attention to the place of the Russian Orthodox Church in Soviet culture and law and to the problems of religious freedom for Soviet Jews and Christian dissenters. He taught a number of courses in legal history and sociology of law in which he explored, *inter alia*, the influence of religious ideas and institutions on the development of the Western legal tradition.

In the past two decades, Berman has maintained an active interest in Soviet law and international trade law but has shifted the focus of his work to the interaction of law and religion. He has treated this latter subject in a variety of courses offered at Harvard and (for the past three years) at Emory University. He has lectured widely in North America and Europe 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 Society of Christian Ethics, the Law and Religion Program 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 also produced a long series of publications that have brilliantly illuminated and integrated the field of law and religion. Two books have been particularly influential: (1) *The Interaction of Law and Religion* (1974), a methodological and historical treatment of the interrelation of legal and religious values, ideas and institutions; and (2) his prize-winning *Law and Revolution: The Formation of the Western Legal Tradition* (1983), an examination of the sources of the Western legal tradition in the revolutionary upheaval of church and state in the late eleventh and twelfth centuries.

II.

Professor Berman's commitment to integrate the study of law and religion is rooted in at least three interrelated concerns.

First, throughout his career Berman has sought to integrate not only law and religion but all legal and liberal education.¹ Since the mid-nineteenth century in America, he argues, legal studies have been "artificially excised"

¹See H. Berman, "Law in the University," *Legal Studies Forum* 10 (1986): 53; H. Berman and W. Greiner, *The Nature and Functions of Law*, 4th ed. (Mineola, NY, 1980), 1-26; H. Berman, "The Secularization of American Legal Education in the Nineteenth and Twentieth Centuries," *Journal of Legal Education* 27 (1975): 382. (A complete bibliography of Professor Berman's writings dealing in whole or in part with the subject of law and religion is provided on pp. 337 ff. herein.)

from the college curriculum, and liberal studies have been banished from the law school curriculum. College students are thus taught the principles and doctrines of sociology, religion, history and other disciplines but receive only a rudimentary understanding of law and legal institutions. Law students are taught the principles and doctrines 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. Law enriches liberal education by (1) offering a unique method of analysis, logic and reasoning; (2) cultivating an informed sense of justice and fairness and a capacity for reasoned discernment and responsible judgment; and (3) demonstrating that legal institutions and doctrines are an integral part of Western thought and action and thus an indispensable subject for such other liberal disciplines as politics, history, sociology, economics and many others. Liberal studies, in turn, enrich legal education by (1) demonstrating that the legal system is a living social process which shapes and is shaped by politics, economics, ethics, religion, history and other subjects; (2) revealing that legal doctrines and concepts have antecedents and analogues in the subject matter of other disciplines—such as the relation between sin and crime, covenant and contract, ritual and procedure; (3) showing that ideas of the origin, nature and purpose of law and authority, of justice and equity, are rooted in deeper philosophical and theological beliefs and values.

Berman has translated many of these pedagogical concerns into practice. Since 1950, he has taught undergraduate courses in law and developed a widely used text, *The Nature and Functions of Law* (1958; 4th ed., 1980). 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. In 1960, he organized a series of radio broadcasts to introduce uninitiated listeners to basic legal doctrines and categories; these broadcasts were collected in a volume entitled *Talks on American Law* (1961; rev. ed., 1971). In the early 1960s, he created and (for 25 years thereafter) administered the Liberal Arts Fellowships in Law Program at Harvard Law School designed to provide liberal scholars the opportunity 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 studies. Since his arrival at Emory, Berman has cultivated new relations between the Law School, Theology School and College and helped to develop new interdisciplinary programs, courses and colloquia.

Second, Berman's commitment to integrate law and religion is part of his critique of prevailing positivist concepts of law and privatist concepts of religion. Throughout much of the West, he argues, law is conceived as a body of rules and statutes designed to govern society; religion is conceived 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. Such concepts, Berman argues, are far too narrow to recognize the mutual dependence 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 of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation. Religion is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life—it is a shared intuition of and commitment to transcendent values. Law helps to give society the structure, the gestalt, it needs to maintain inner cohesion; law fights against anarchy. Religion helps to give society the faith it needs to face the future; religion fights against decadence. These are two dimensions of social relations—as well as of human nature—which are in tension with each other: law through its stability limits the future; religion through its sense of the holy challenges all existing social structures. Yet each is also a dimension of the other. A society's beliefs in an ultimate transcendent purpose will certainly be manifested in its processes of social ordering, and its processes of social ordering will likewise be manifested in its sense of an ultimate purpose. . . . [L]aw and religion . . . need each other—law to give religion its social dimension and religion to give law its spirit and direction as well as the sanctity it needs to command respect. Where they are divorced from each other, law tends to degenerate into legalism and religion into religiosity."²

Law and religion, therefore, exist not in dualistic antinomy but in dialectical harmony. They share many elements (such as authority, tradition, ritual, universality), many concepts (such as obligation, fault, justice, atonement) and many methods (such as interpretation, judgment, restitution, reformation). They also balance each other by counterposing justice and mercy, rule and equity, law and love. It is this dialectical harmony that gives law and religion their vitality and strength.

Third, Berman's commitment to the integration of law and religion is part of his response to a foreboding sense of crisis—a crisis both of Western law and of Western religion. In law, he argues, political, economic and social transformations of unprecedented magnitude—the massive growth of government and bureaucracy, the radical centralization and regulation of economic life, the rapid emergence of new social forms and customs—have drastically changed traditional legal doctrines, institutions and concepts. The growing prominence of eastern and southern cultures has led many to question the utility and efficacy of Western law and to consider new alternatives. The skeptical attacks of legal realists, nihilists and deconstructionists have inspired in many a cynical contemptuousness for law and

²H. Berman, *The Interaction of Law and Religion* (Nashville, TN, 1974), 24–5.

government.³ Likewise in religion, new philosophies, customs and social movements have challenged traditional religious doctrines and institutions. Many have grown disillusioned with traditional dogma and distrustful of traditional ecclesiastical forms. A range of new sects, both theistic and secular, have emerged, offering radical new teachings and new experiences.⁴ Twentieth century Western culture, therefore, Berman writes, is undergoing "an integrity crisis, . . . a deep loss of confidence in fundamental religious and legal values and beliefs, a decline in belief in and commitment to any kind of transcendent reality that gives life meaning, and a decline of belief in and commitment to any structures and processes that provide social order and social justice. Torn by doubt concerning the reality and validity of those values that sustained us in the past, we come fact to face with the prospect of death itself."⁵

Berman does not regard the integration of law and religion, of jurisprudence and theology, as a panacea for this crisis. But by exploring the interaction of law and religion in the past, by retracing the experience through which law and religion have become alienated from themselves and from each other, by summoning the insights and ideas of both disciplines, we shall find signposts to guide us in the future.

III.

Through Professor Berman's efforts, six branches of study have been brought within the purview of law and religion: (1) the legal dimensions of religion; (2) the religious dimensions of law; (3) the institutional interaction of law and religion; (4) the conceptual interaction of law and religion; (5) the methodological interaction of law and religion; and (6) the professional interaction of law and religion. Berman did not invent any of these branches of study, nor did he give equal attention to all of them. He has, however, helped to categorize each of these branches and to adumbrate many of their constitutive themes.

First, religion has a legal dimension, a concern for law, which manifests itself in a variety of forms. Legal structures and legal processes form part of the organization and government of the religious community—such as the Torah and the Talmud in the Jewish community, the canon law in the Roman Catholic community, the *Kirchenordnungen* in Protestant communities. Laws and legal concepts structure and guide the inner spiritual life

³See H. Berman, "The Crisis of Legal Education in America," *Boston College Law Review* 26 (1985): 347; id., *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA, 1983), 33–41; id., "The Moral Crisis of the Western Legal Tradition and the Weightier Matters of the Law," *Criterion* 19 (1980): 15.

⁴Ibid. See also Berman, *Interaction*, 23, 95–96; H. Berman, "Religious Foundations of Law in the West," "An Historical Perspective," *Journal of Law and Religion* 1 (1983): 3–5, 37–43.

⁵Berman, *Interaction*, 23.

and discipline of the believer and of the religious community. Ideas of law, order, justice, restitution, obligation and others are an integral part of theological dogma. Berman writes: "In all religions, even the most mystical, there is a concern for social order and justice, a concern for law. . . . In both Judaism and Christianity law is understood to be a dimension of God's love, faith and grace; both Judaism and Christianity teach that God is gracious and just, that he is a merciful judge, a loving legislator, and that these two aspects of his nature are not in contradiction with each other."⁶

Second, law has religious dimensions, attributes that have religious antecedents and analogues.⁷ Like religion, law has ritual—ceremonial procedures and actions which reflect and dramatize deeply felt values concerning the objectivity and uniformity of the law, such as the procedures of the court room, the decorum of the legislature, the practices of punishment and many others. Like religion, law has tradition—a continuity of language and practice, a theory of precedent which reflects a belief in the ongoingness of law, its time-tested wisdom, its adaptability to new social issues and ideas. Like religion, law has authority—written or spoken sources of law, texts or oracles, which are considered to be decisive in themselves and which symbolize the bindingness, the obligatory force of law on all subjects. Like religion, law has universality—a claim to embody universally valid precepts and truths. "These four elements," Berman writes, "are present in all legal systems as they are present in all religions. They provide the context in which in every society (though in some, of course, to a lesser extent than in others) legal rules are enunciated and from which they derive their legitimacy. . . . [T]hey symbolize man's effort to reach out to a truth beyond himself. They thus connect the legal order of any given society to that society's beliefs in an ultimate transcendent reality . . . and give sanctity and sustenance to legal values."⁸

Third, law and religion are institutionally related—principally in the relation between church and state, but also in the relation between other religious and political groups. A variety of constitutional and political arrangements have been devised in the past to define the respective jurisdictions and responsibilities of these groups, to protect them from each other, to facilitate their cooperation and to define the liberties and duties of their subjects. A variety of theories have been devised to define the relation

⁶Ibid., 15; see also *ibid.*, 77–106.

⁷See especially Berman, *Law and Revolution*, 165–198 (a discussion of "Theological Sources of the Western Legal Tradition"). See also *id.*, "Law and Religion: An Overview," *Encyclopedia of Religion*, ed. M. Eliade (New York, 1987), 8: 472; *id.*, "Law and Religion in the West," *Encyclopedia of Religion*, 3: 463; *id.*, "The Religious Sources of General Contract Law: An Historical Perspective," *Journal of Law and Religion* 4 (1986): 103; *id.*, "The Religious Foundations of Western Law," *Catholic University Law Review* 24 (1975): 490; *id.*, "Love for Justice: The Influence of Christianity Upon the Development of Law," *Oklahoma Law Review* 12 (1959): 86.

⁸Berman, *Interaction*, 31, 25.

between state and church, between *regnum* and *sacerdotium*—the two powers theory of Gelasius, the two swords theory of the Scholastics, the two kingdoms theory of the Reformers and many others. A variety of concepts and terms of art have been devised to describe these institutional relations—religious accommodation, religious establishment, religious toleration, religious pluralism, caesaropapism, Erastianism, separatism and others. Such arrangements, theories and concepts, Berman writes, can be understood only if viewed in the broader context of the interaction of law and religion. "The interrelationship of church and state is not only 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*."⁹

Fourth, law and religion are conceptually intertwined. They share the same fundamental concepts of being and order, man and community, knowledge and truth. They embrace analogous concepts of sin and crime, covenant and contract, grace and equity, righteousness and justice, redemption and rehabilitation and many others. They draw upon each other's concepts in devising their own doctrines. The theological doctrine of man's fallen nature, for example, is rooted in legal concepts of agency, complicity and vicarious liability. The legal doctrine that the punishment must fit the crime rests upon theological concepts of purgation, righteousness and the right order of the universe.

Fifth, law and religion are methodologically interrelated. Both have developed hermeneutical methods, modes of interpreting authoritative texts. Both have developed logical methods, modes of deducing prescriptions 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 matter. These legal and religious methods have frequently crossed over and cross-fertilized each other. The scholastic *sic et non* method, for example, was used to systematize

⁹H. Berman, "Religion and Law: The First Amendment in Historical Perspective," *Juris: For Jurisprudence and Legal History* 1 (1987): 1. See also H. Berman and J. Witte, "Church and State," *Encyclopedia of Religion*, ed. M. Eliade (New York, 1987), 3: 489; H. Berman, "Some Reflections on the Differences Between Soviet and American Concepts of the Relations Between Church and State," *Christian Legal Society Quarterly* 5 (1984): 12; *id.*, *Law and Revolution*, 113–115, 206–215.

both theological dogma and legal doctrine. The ordeal method was used to adduce evidence in both religious and legal procedures.¹⁰

Sixth, 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. Sacerdotal and legal responsibilities are vested in one office or one person. 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 requirements. Both have developed codes of ethics and internal structures of authority to enforce them. Both promote collegiality, cooperation and *esprit de corps*. The professions are also parallel in function. There are 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 the benevolence of the diaconate. Both professions render essential services and reveal essential information to the public. Both seek to exemplify the ideals of community and vocation.¹¹

These six branches of study are not the province of jurisprudence and theology alone. They summon the insights and ideas of a variety of other disciplines—anthropology and sociology, politics and government, history and philosophy, linguistics and logic. They require us to move beyond traditional compartments of knowledge and to explore the interaction between them.

IV.

The essays collected in this volume—contributed by students, friends and colleagues in a variety of disciplines—are offered as a tribute to Professor Berman and as a testimony to his path-breaking work in the field of law and religion.

The first group of essays treat various historical aspects of the interaction of law and religion. Brian Tierney offers a critical appraisal of Michel Villey's thesis that the idea of subjective rights was first developed by the fourteenth century nominalist philosopher William Ockham and demonstrates that the idea is already evident in the work of earlier writers, notably Johannes Monachus and John Peter Olivi. Charles Donahue describes a number of plea rolls of the ecclesiastical Court of Canterbury in the later thirteenth

¹⁰Cf. H. Berman, "Legal Reasoning," *International Encyclopedia of the Social Sciences* (New York, 1968), 6: 197; see also Berman, *Law and Revolution*, 120–164, which treats the "Origins of Western Legal Science in the European Universities." Berman has also dealt with some of these matters in two unpublished manuscripts, "Law and Language" and "The Transformation of Legal Science in the Lutheran Reformation."

¹¹Cf. H. Berman, "The Prophetic, Pastoral and Priestly Vocation of the Lawyer," *The NICM Journal* 2 (1977); reprinted in *CORAL Newsletter* (July, 1977).

century, analyzes the subject matter and disposition of cases summarized in the rolls and hypothesizes that such rolls were modelled on the rolls of the English royal courts. John Witte describes how the Lutheran reformers displaced the Roman Catholic sacramental concept of marriage with a social concept of marriage and, on that basis, shifted marital jurisdiction from ecclesiastical to civil authorities and transformed the law of marital consent, impediments and divorce. Douglas Sturm analyzes the development of Gerrard Winstanley's unique communal concept of natural law and its influence on the theological beliefs and communitarian practices and proposals of the seventeenth century Diggers. George Williams analyzes the emergence of Harvard College in the revolutionary society of Puritan New England, the influence of biblical concepts of covenant, community and authority on the structure of the university's polity and the influence of the doctrine of the prophethood, priesthood and kingship of believers on the requirements and responsibilities of its teachers. William Butler explores the contributions of V. F. Malinovskii, a prerevolutionary Russian diplomat, pacifist and moralist, to the development of a universally acknowledged law of war and peace.

The second group of essays treat a variety of contemporary aspects of the interaction of law and religion. James Luther Adams compares and contrasts Ernst Troeltsch's and Harold Berman's ideas and assessments of legal history, particularly the history of natural law theory. Cole Durham outlines a method for analyzing the interaction of religion and criminal law, setting forth and illustrating a variety of types and contexts of such interaction. John Orth demonstrates how John Austin's analytical separation of divine law and human law and of moral values and legal doctrines—however well intentioned—laid the foundation for late nineteenth and twentieth century legal positivism. Frank Alexander argues that in devising new theories of law, critics of legal positivism must inquire not into the nature of legal rules and legal systems but into the purposive nature of human individuality and human community, and that the theological doctrines of creation, covenant and redemption offer indispensable insights for this inquiry. Lois Forer demonstrates that judicial cases pose far more trying issues of conscience than is generally assumed and that conventional theories of judicial decision-making offer little guidance to the conscientious judge. Milner Ball argues that the biblical understanding of the Kingdom of God provides a radically different perspective on the interrelation between religion and law and between church and state than is conventionally taught in America. Thomas Shaffer questions the role of law in a secular society for a religious people—a particular people laying claim to a tradition of caution and prophecy.

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