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**A Prequel to Law and Revolution:  
A Long Lost Manuscript of Harold J. Berman Comes to Light**

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**Abstract**

*The late Harold Berman was a pioneering scholar of Soviet law, legal history, jurisprudence, and law and religion; he is best known today for his monumental Law and Revolution series on the Western legal tradition. In the early 1960s, Berman wrote a short book, Law and Language, which was only recently discovered and published in 2013. In this early text, he adumbrated many of the main themes of his later work, including Law and Revolution. He also anticipated a good deal of the interdisciplinary and comparative methodology that we take for granted today, even though it was rare in the intense legal positivist era during which he was writing. This Article contextualizes Berman's Law and Language within the development of his own legal thought and in the evolution of interdisciplinary legal studies. It focuses particularly on the themes of law and religion, law and history, and law and communication that dominated Berman's writing until his death in 2007.*

**Keywords:** Harold J. Berman; law and language; legal history; legal positivism; interdisciplinary legal studies; Cold War; Soviet Union; law and religion; rhetoric; legal anthropology; ritual; courtroom

*"I should like to revive and revitalize historical jurisprudence, and I think the way to do it is with linguistic jurisprudence. History is group memory. Language is the record*

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*of history. Speech is the recording of the remembered past, and the envisioned future. I shall no doubt be scorned or ignored for the identification of history, speech, and law.... But not in all quarters. More and more people are now ready for this message."*

-- Harold J. Berman (1966)<sup>3</sup>

*"Harold Berman is a giant, whose work defies the banalities of the age and allows us to take their measure. In a scholarly world drifting toward the particularistic exploration of 'unique' contexts, Berman points in a different direction—toward holistic descriptions of entire systems of legal thought.... Berman's work, and especially his Law and Revolution, will endure when almost everything is forgotten. He is the only American who might be paired with Max Weber in the depth of his historical and comparative understanding of the remarkable character of legal modernity."*

-- Guido Calabresi, Dean, Yale Law School (1996)<sup>4</sup>

## Introduction

"I need to get back to that book. It's just sitting there gathering dust. I just can't find the time." That was Harold J. Berman in September, 1982. We were sitting in his office at Harvard Law School, where I was getting my next assignment as his research assistant. The book manuscript in question was entitled "Law and Language: Effective Symbols of Community." Berman had completed a partial first draft of the book in 1964, but he just could not finish it. He had been writing and lecturing feverishly in the interim on Soviet law, international trade, legal philosophy, and legal history, and was always fighting deadlines. I asked him if he wanted me to take a crack at the "Law and Language" manuscript. "No, no, we have other things to do," he replied memorably. "We have the Reformation to conquer!" Then he handed me the first of many research assignments on the influence of the Protestant "revolutions" on the Western legal tradition—a topic that absorbed both of us for the next quarter century.<sup>5</sup>

Berman never did find the time to get back to the "Law and Language" manuscript, and I never got the chance to work on it either—until recently. After we moved from Harvard Law School to Emory Law School in 1985, the manuscript disappeared, somehow lost in transit. We looked for it a few times, but he eventually gave up. He had many more books and articles to write, many more deadlines to fight, and of course "the Reformation to conquer."

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<sup>3</sup> Excerpts from Letter to his Dartmouth College mentor, Eugen Rosenstock-Huessy (May 28, 1966) (on file in the Emory Law Library Archives), see below, note 15.

<sup>4</sup> Jacket Endorsement for Howard O. Hunter, ed., *The Integrative Jurisprudence of Harold J. Berman* (Boulder, CO: Westview Press, 1996). Dean Calabresi by this point had been appointed to the United States Court of Appeals for the Second Circuit.

<sup>5</sup> When using the "first person" voice herein, the author is John Witte.

When he died in 2007, I became Berman's literary executor, and spent many pleasant months digging through the veritable mountains of papers he left. Only near the end of that literary excavation did I come upon his old manuscript on "Law and Language." It was sitting in a rusty old filing cabinet in his unheated garage, buried under some old rags and newspapers. Mold, mildew and mice had all done their best to be sure the manuscript would never be found. But there it was, still readable, and still unfinished.

It has been a special privilege to be able to finish my late great mentor's old book and to publish it in a modern critical edition, just out with Cambridge University Press.<sup>6</sup> The book is a creature of its time and place—America in the 1960s. It reflects concerns over the Cold War, the violent student protests and union strikes, the rise of Marxism in the academy and McCarthyism in Congress. It talks easily of the gradual senescence of legal realism and legal positivism, and prophesizes grandly about the rise of world law and a new interdisciplinary legal studies movement. But the book is also a timeless statement about the intricacies of legal translation, transmission, and transplantation over time and the essential role and power of law and legal language in building culture and community both locally and globally. It's written in a buoyant and accessible style, which typifies a lot of Berman's writing, especially in this period of his career. Its main themes and recommendations about law and language are as relevant in our day as they were half a century ago when Berman wrote them—even if we now have fancier tools and terms of comparative hermeneutics, literary theory, legal philology and semiotics to describe them.

The book is not just an important lost artifact in the development of the field of "law and language" studies. It is also a wonderful prequel to Berman's monumental *Law and Revolution* series and his other books in legal history, legal philosophy, and law and religion. *Law and Language* outlines his theory of law and revolution in the Western legal tradition, his devotion to integrative jurisprudence and interdisciplinary legal studies, his call for deeper comparative legal studies and East-West rapprochement, and more. *Law and Language* also mines some of the deep religious sources and dimensions of historical and modern legal systems -- themes which would occupy him more fully in his famous title published ten years later: *The Interaction of Law and Religion*.<sup>7</sup>

In this Article, drawn largely from our Introduction to the work, we set *Law and Language* in the context of Berman's own evolving legal thought and in the contours of the emerging field of comparative and interdisciplinary legal study. It is especially apt to have this Article appear in this inaugural edition of the *Journal of Law and Religion* as a product of our Center for the Study of Law and Religion at Emory and as a publication

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<sup>6</sup> Harold J. Berman, *Law and Language: Effective Symbols of Community*, ed. John Witte, Jr. (Cambridge: Cambridge University Press, 2013).

<sup>7</sup> (Nashville, TN: Abingdon Press, 1974), partly reprinted and revised in *Faith and Order: The Reconciliation of Law and Religion* (Grand Rapids, MI: Wm. B. Eerdmans, 1993).

of Cambridge University Press. Berman was one of the founders of the *Journal* when it was launched in 1982, and he contributed the very first article to volume 1. Berman was also one of the founders of our Law and Religion Center at Emory University, along with Frank Alexander, another one of his former Harvard Law School students. We have come full circle.

### Berman's Biography

Harold J. Berman was one of the great polymaths of American legal education, and taught for sixty years before his death in 2007. Born and raised in a conservative Jewish family and community in Hartford, Connecticut, Berman went to Dartmouth College where he came under the inspiration of the great German intellectual, Eugen Rosenstock-Huessy, whose work would have a life-long influence on him. He completed his LL.B. and M.A. in History at Yale, but was interrupted by military service in World War II from 1942 to 1945, where he served as a cryptographer, breaking Russian code for the Allied Forces in Europe. He began his teaching career at Stanford Law School in 1947, but the following year moved to Harvard Law School, where taught until 1985. At Harvard, he first served as the Joseph Story Professor of Law and Legal History, then as the James Barr Ames Professor of Law. He also served as Founder and Director of Harvard Law School's Liberal Arts Fellowship Program in Law, Fellow of the Russian Research Center of Harvard University, and Member of the Legal Committee of the U.S.-U.S.S.R. Trade and Economic Council.

From 1985 to 2007, Berman taught at Emory Law School, serving as the first Robert W. Woodruff Professor of Law, a university professorship. He was also a Fellow in The Carter Center at Emory University, Founding Director of the American Law Center in Moscow, Founding Director of the World Law Institute at Emory Law School, and Senior Fellow of the Center for the Study of Law and Religion at Emory University.

In the first three decades of his career, Berman's scholarly energies were focused on the Soviet legal system and the law of international trade. He developed several new courses, testified frequently before courts, commissions, and Congressional committees, and traveled regularly to Europe and the Soviet Union—55 times to Russia alone. He spent the 1961–62 academic year at the Moscow Institute of State and Law, where he encountered, among others, a rising young star named Mikhail Gorbachev.<sup>8</sup> In the spring of 1982, he served as Fulbright Professor at Moscow

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<sup>8</sup> True story: It was the winter of 1982, with Brezhnev still in power in the USSR. The Bermans had me over for dinner. After a few rounds of drinks, Berman stood up and announced grandly: "I have a prophecy to make. I predict that, in a decade, the Soviet Union will be revolutionized, and the leader of the revolution will be a young man, I have been watching for a long time—Mikhail Gorbachev." Within a decade, *glasnost*, *perestroika*, and *demokratizatsiia* had become the watchwords of a new Russian revolution. See later Harold J. Berman, "Book Review of Mikhail Gorbachev, *PERESTROIKA: New Thinking for Our Country and the World* (1987)," *The Atlanta Constitution* (December 13, 1987): 12J; id., "Gorbachev's Law Reforms in Historical Perspective," *Emory Journal of International Affairs* 5 (Spring,

State University. He produced a massive body of new writing in this early period. Of these writings, his *Justice in the U.S.S.R.* (1950; rev. ed. 1963)<sup>9</sup> will long endure as a classic, as will several of his lengthy law review articles on the *lex mercatoria*.<sup>10</sup> Also important publications in this period, for purposes of his study of law and language, were his exquisite translations of sundry Soviet laws—nearly 2800 printed pages in English translation.<sup>11</sup>

In the first three decades of his career, Berman also developed a keen interest in bringing legal education into the undergraduate college—a different exercise in translation, now of professional legal language, concepts, and methods into something accessible to young students of the social, humane, and exact sciences. These pedagogical interests he distilled in two other signature titles, *On the Teaching of Law in the Liberal Arts Curriculum* (1956)<sup>12</sup> and *The Nature and Functions of Law* (1958; 6<sup>th</sup> ed., 2004),<sup>13</sup> the latter a standard text in American college courses on law. He extended this interest further in arranging a multi-lingual series of *Talks on American Law*, which started as Voice of America broadcasts. Here was yet another early example of legal translation and transmission—making the intricacies of American public, private, penal, and procedural law accessible to radio audiences throughout the Americas, Europe, Africa, Asia, Australia, the Middle East, and even the Soviet bloc countries.<sup>14</sup>

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1988): 1–10; id., “The Challenge of Christianity and Democracy in the Soviet Union,” in *Christianity and Democracy in Global Context*, ed. John Witte, Jr. (Boulder, CO: Westview Press, 1993), 287–96.

<sup>9</sup> (Cambridge, MA: Harvard University Press, 1950, 1963) and (New York: Random House, 1963).

<sup>10</sup> Harold J. Berman, “The Legal Framework of Trade Between Planned and Market Economies: The Soviet-American Example,” *Law and Contemporary Problems* 24 (Summer 1959): 482–528; Harold J. Berman and George L. Bustin, “The Soviet System of Foreign Trade,” in *Business Transactions with the USSR, The Legal Issues*, ed. Robert Starr (Chicago: ABA Press, 1975), 25–75; Harold J. Berman, “The Law of International Commercial Transactions (*Lex Mercatoria*),” *Emory Journal of International Dispute Resolution* 2 (Spring 1988): 235–310.

<sup>11</sup> Harold J. Berman and James W. Spindler, trans. and eds., *Soviet Criminal Law and Procedure: The RSFSR Codes* (Cambridge: Cambridge University Press, 1966); Harold J. Berman and Peter B. Maggs, trans. and ed., *Disarmament Inspection Under Soviet Law* (Dobbs Ferry, NY: Oceana Publications, 1967); Harold J. Berman and John B. Quigley, trans. and eds., *Basic Laws on the Structure of the Soviet State* (Cambridge, MA: Harvard University Press, 1969); Harold J. Berman, ed. and trans., *Soviet Statutes and Decisions, A Journal of Translations I–V* (Fall, 1964–Spring-Summer 1969). [This is correct, as it conforms with the archived copies of this journal on Hein; I reviewed the L&L introduction, and it was cited like this as well.]

<sup>12</sup> (Brooklyn, NY: Foundation Press, 1956).

<sup>13</sup> (Brooklyn, NY: Foundation Press, 1958); with William R. Greiner and Samir N. Saliba, 6th rev. ed., (New York: Foundation Press, 2004).

<sup>14</sup> Harold J. Berman, ed., *Talks on American Law* (New York: Random House, 1961); Portuguese translation published in Rio de Janeiro, 1963; Arabic translation published in Cairo, 1964; French translation published in Paris, 1965; Spanish translation published in Chile and Mexico, 1965; Vietnamese translation published in Saigon, 1968; Japanese translation published in Tokyo, 1963 and 1969.

In the last three decades of his career—with *Law and Language* coming right at the transition point in his scholarly focus and thinking—Berman expanded his legal scholarship to include legal philosophy, legal history, and law and religion. He produced a series of path-breaking volumes, most notably *The Interaction of Law and Religion* (1974),<sup>15</sup> *Faith and Order: The Reconciliation of Law and Religion* (1993),<sup>16</sup> and his massive *Law and Revolution: The Formation of the Western Legal Tradition* (1983)<sup>17</sup> and *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (2003).<sup>18</sup> The final volume of this series—on the American, French, and Russian revolutions—was on his writing desk when he died, along with a dozen articles in progress.

Berman left a scholarly legacy of 25 books and 458 articles, book chapters, and book reviews. These writings were collectively published in 21 languages; a few of his books are still being translated, and his new book on *Law and Language* will deserve translation, too. A comprehensive collection of his writings and some of his correspondence from 1948 to 1985 are included in the “Red Set” of faculty publications in the Harvard Law Library.<sup>19</sup> Digital and hard copies of all his (published and unpublished) non-book writings from 1938 to 2007 are available through the Emory University libraries.<sup>20</sup> His work continues to be mined and cited with alacrity in the main fields that he worked. This new book on *Law and Language* will provide a further window, if not gateway, into his writings and the development of his legal thought.

Berman taught some 8000 law students at Harvard and Emory, more than 300 of whom have become professors, in at least 33 countries. His students and colleagues honored him with three *Festschriften*,<sup>21</sup> and three law journal symposia are dedicated to his work.<sup>22</sup> He was a member of both the American Academy of Arts and Sciences and the Russian Academy of Sciences. He received more than a hundred prizes and awards for his scholarly achievements, including the prestigious Scribes Award from the

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<sup>15</sup> (Nashville, TN: Abingdon Press, 1974).

<sup>16</sup> (Atlanta, GA: Scholars Press, 1993; repr. ed., Grand Rapids, MI: Wm. B. Eerdmans, 1996).

<sup>17</sup> (Cambridge, MA: Harvard University Press, 1983).

<sup>18</sup> (Cambridge, MA: Harvard University Press, 2003).

<sup>19</sup> Harvard Law School Library, Collections, The Red Set, (accessed January 1, 2013), [http://www.law.harvard.edu/library/special/collections/red\\_set/index.html](http://www.law.harvard.edu/library/special/collections/red_set/index.html)

<sup>20</sup> Emory Libraries, EmoryFindingAids, Harold J. Berman Papers, 1938–2007, (accessed January 1, 2013), <http://findingaids.library.emory.edu/documents/L-027/>; Zotero, Harold J. Berman Collection, (accessed January 1, 2013), [https://www.zotero.org/harold\\_j\\_berman/items](https://www.zotero.org/harold_j_berman/items).

<sup>21</sup> John Witte, Jr. and Frank S. Alexander, eds., *The Weightier Matters of the Law: Essays on Law and Religion in Tribute to Harold J. Berman* (Atlanta, GA: Scholars Press, 1988); William E. Butler, Peter B. Maggs, and John B. Quigley, Jr., eds., *Law after Revolution: Essays on Socialist Law in Honor of Harold J. Berman* (Dobbs Ferry, NY: Oceana Press, 1988); and Hunter, ed., *The Integrative Jurisprudence of Harold J. Berman*.

<sup>22</sup> “A Conference on the Work of Harold J. Berman,” *Emory Law Journal* 42 (1993): 419–589; “The Foundations of Law,” *Emory Law Journal* 54 (2005): 1–376; “In Praise of a Legal Polymath: A Special Issue Dedicated to the Memory of Harold J. Berman (1918–2007),” *Emory Law Journal* 57 (2008): 1393–469.

American Bar Association, and honorary doctorates from the Catholic University of America, the Virginia Theological Seminary, the University of Ghent, and the Russian Academy of Sciences. The newly dedicated Harold J. Berman Library in the Center for the Study of Law and Religion at Emory University houses some of his personal books and effects. The Harold J. Berman Lecture Series at Emory Law School offers regular lectures on the many legal topics that Berman long championed.

### Berman's Main Scholarly Themes

Throughout his long career, Berman had the remarkable ability to think above, beyond, and against his times. In the 1950s and '60s, the dominant Cold War logic taught that the Soviet Union was a lawless autocracy. Berman argued to the contrary that the Russians would always honor contracts and treaties that were fairly negotiated.<sup>23</sup> His views prevailed and came to inform various nuclear treaties, trade agreements, and East-West accords. In the 1970s and 1980s, the conventional belief persisted that the Middle Ages were the dark ages as the West waited impatiently for Enlightenment and modernization. Berman argued the contrary, that the medieval era was the first modern age of the West and the founding era of our Western legal tradition.<sup>24</sup> This view is now standard lore. In the 1980s and 1990s, jurists fought fiercely over whether legal positivism or natural law or some other perspective was the better legal philosophy. Berman called for an integrative jurisprudence that reconciled these views with each other and with other perspectives on law, particularly historical jurisprudence.<sup>25</sup> This view now prevails in a world dedicated to interdisciplinary legal study. And, in the 2000s, with the world hell-bent on waging "a clash of civilizations,"<sup>26</sup>

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<sup>23</sup> See sources above, note 10. [Correct] See further Harold J. Berman, "The Challenge of Soviet Law," *Harvard Law Review* 62 (December 1948 and January 1949): 220–65, 449–66; id., "The Law of the Soviet State," *Soviet Studies* 6 (January 1955): 225–37; id., "Suggestions for Future U.S. Policy on Communist Trade," *Export Trade and Shipper* 35 (July 16, 1956): 11–12; id., "Negotiating Commercial Transactions with Soviet Customers," *Aspects of East-West Trade, American Management Association Report No. 45* (1960), 68–75; id., "The Dilemma of Soviet Law Reform," *Harvard Law Review* 76 (March 1963): 929–51; id., "Law in American Democracy and Under Soviet Communism," *New Hampshire Bar Journal* 5(3) (April 1963): 105–13; id., "Soviet Law Reform and its Significance for Soviet International Relations," in *Law, Foreign Policy and the East-West Detente*, ed. Edward McWhinney (Toronto: University of Toronto Press, 1964), 3–17; id., "Law as an Instrument of Peace in U.S.-Soviet Relations," *Stanford Law Review* 22 (1970): 943–62.

<sup>24</sup> This is the central thesis of his *Law and Revolution* series.

<sup>25</sup> See esp. Harold J. Berman, "Toward an Integrative Jurisprudence: Politics, Morality, History," *California Law Review* 76 (1988): 779–801; and elaboration in id., *Faith and Order*, 239–310. See analysis in Peter Teachout, "Complete Achievement: Integrity of Vision and Performance in Berman's Jurisprudence," in Hunter, ed., *The Integrative Jurisprudence of Harold J. Berman*, 75–98. Already in his 1958 edition of *The Nature and Functions of Law*, 25ff., Berman had formed his basic, three-part analytical framework for jurisprudence, combining natural law, legal positivism, and historical jurisprudence.

<sup>26</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996).

Berman called for a world law, grounded in global structures and processes, and universal customs and principles of peace, cooperation, and reconciliation.<sup>27</sup> This view holds so much more promise than the jingoism and jihadism of the past decade and more.

“First it was Russian law, then it was Western law, now it is world law. What’s next, cosmic law?” This is how Professor Berman’s beloved wife, Ruth, once summarized for me (with a blend of exasperation and astonishment) the stages of Berman’s storied and story-ed legal career. There is keen insight in this statement. For Berman, every legal system—even the budding legal system of the world—must ultimately be founded upon cosmic commandments and contemplation, divine examples and exemplars. Berman has long prophesied that those legal systems that build on immanent and material foundations alone will fail. The spectacular failure of the Soviet legal system in the later twentieth century was ample vindication of his insight into the essential religious foundations of law.

Berman repeated this message in China, too, when in 2006, as a still energetic 88-year old, he gave a series of lectures on law to packed houses in a dozen universities. One of his Chinese respondents asked whether one needed to believe in God in order to have a just legal order. “It would certainly help!” Berman quipped immediately. “But no,” he went on diplomatically:

You don’t necessarily have to believe in God, but you have to believe in *something*. You have to believe in law at least. If you can’t accept God, then just focus on the law that God has written on all of our hearts. Even children intuitively sense this law within us. Every child in the world will say, “That’s *my* toy.” That’s property law. Every child will say, “But you *promised* me.” That’s contract law. Every child will say, “It’s not my fault. He hit me first.” That’s tort law. Every child will say, too, “Daddy said I could.” That’s constitutional law. Law ultimately

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<sup>27</sup> Harold J. Berman, “Law and Religion in the Development of a World Order,” *Sociological Analysis: A Journal in the Sociology of Religion* 52 (Spring 1991): 27–36; id., “Law and Logos,” *DePaul Law Review* 44 (Fall 1994): 143–65; id., “The Tri-une God of History,” *The Living Pulpit* (April 1999): 18–19; id., “World Law in the New Millennium,” *Twenty-First Century* 52 (April 1999): 4–11 (in Chinese); id., “The God of History,” *The Living Pulpit* (July–September 2001): 27; id., “Integrative Jurisprudence and World Law,” in Manuel Atienza, et al., *Rechtstheorie: Theorie des Rechts und der Gesellschaft: Festschrift für Werner Krawietz zum 70. Geburtstag* (Berlin: Duncker & Humblot, 2003), 3–16; id., “The Holy Spirit: The God of History,” *The Living Pulpit* (April–June 2004): 32–33; id., “Faith and Law in a Multicultural World,” in Mark Juergensmeyer, ed., *Religion in Global Civil Society* (Oxford: Oxford University Press, 2005), 69–89; id., “World Law: An Ecumenical Jurisprudence of the Holy Spirit,” *Theology Today* 63 (October 2006): 365–74.

comes from our human nature, and our human nature is ultimately an image of God.<sup>28</sup>

Such views reflect, in part, Berman's life-long effort to integrate his religious faith with his legal learning. In his chapel talks delivered in the Harvard Memorial Church over more than 30 years, Berman contrasted "the wisdom of the world" with "the wisdom of God." The wisdom of the world, he declared, "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 and intellect are "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>29</sup>

Early on, Berman made clear that dialogue was essential to our relationships with God, neighbor, and self, and that language was an essential sinew of all our relationships. God is a God of words, Berman believed, drawing on the Bible. "In the beginning was the Word, and the Word was with God, and the *Word was God*," reads John 1. "In the beginning God created the heavens and the earth," Genesis 1 reads. And he did so by speech: "And God *said*, 'Let there be...'" is how each day of creation starts. When it came to the creation of men and women, it was by dialogue, by conversation, first among the members of the Trinity, then between God and humanity: "Let *us* make man in our image, after our likeness," the Trinitarian God says to its members. And thereafter, God "walked and talked" with the man and the woman whom he created, though he talked with no other creature. For Berman, humans, created in the image of God, are given the capacity for language and dialogue with each other and with God.<sup>30</sup> In a 1969 sermon in Harvard's Memorial Church he proclaimed:

If we see Christianity as a dialogue which God has initiated with man, I think we can see that Christians are called to transform this dialogue into a dialogue also among men, in which we are brought into relationships with each other, so that we share common convictions, undertake common tasks, and recognize a common authority.... All life is a great

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<sup>28</sup> This is based in part on my memory of a conversation with Professor Berman after his return from China. These same sentiments are conveyed in a newspaper article about this trip. See Meredith Hobbs, "Translating Western Law into Chinese; Emory Professor Harold J. Berman Toured China, Speaking to Halls Packed with Chinese Students," *The Daily Report* 117 (Fulton County, GA) (June 1, 2006): 1.

<sup>29</sup> Berman, *Faith and Order*, 319–22.

<sup>30</sup> Berman and I sometimes did devotions together, and I remember spending weeks discussing the meaning of these quoted statements, which in his view said a lot about the dialogical nature of God.

conversation, a discourse, a speaking together, which goes back to the very beginning, to God Himself.<sup>31</sup>

Dialogue was key, in Berman's view, to teaching and reaching reconciliation, and for building community both locally and globally. Both Jewish and Christian theology, he reminded his church listeners, teach that persons must reconcile themselves to God, neighbor, and self. For Berman, building on St. Paul, this meant that there can be "no real division between Jew and Gentile, slave and free, male and female"<sup>32</sup>—or, for that matter, black and white, straight and gay, old and young, rich and poor, citizen and sojourner. For every sin that destroys our relationships, there must be grace that reconciles them. For every Tower of Babel that divides our voices, there must be a Pentecost that unites them and makes them understandable to all.<sup>33</sup>

Such spiritual sentiments could shackle the narrow-minded. They liberated Berman from conventional habits of mind and traditional divisions of knowledge. He challenged Max Weber, Karl Marx, and Jeremy Bentham for their separation of fact and value, is and ought.<sup>34</sup> He criticized Alexander Solzhenitsyn for his contradistinction of law and morals, law and love.<sup>35</sup> He fought against the divisions of the very world itself into East and West, old and new, developed and undeveloped. His favorite jurists were Gratian, Matthew Hale, and Joseph Story, who wrote concordances of discordant canons.<sup>36</sup> His favorite philosophers were Peter Abelard, Philip Melancthon, and Michael Polanyi, who developed integrative holistic philosophies.<sup>37</sup>

"The era of dualism is waning," Berman wrote in 1974. "We are entering into a new age of integration and reconciliation. Everywhere synthesis," the overcoming of false opposites, is "the key to this new kind of thinking and living." Either-or must give way to both-and. Not subject versus object, not fact versus value, not is versus ought, not soul versus body, not faith versus reason, not church versus state, not one versus

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<sup>31</sup> See Berman, *Law and Language*, 161.

<sup>32</sup> Galatians 3:28; Ephesians 2:14–15; Colossians 3:10-11. See also John Witte, Jr., "A New Concordance of Discordant Canons: Harold J. Berman on Law and Religion," *Emory Law Journal* 42 (1993): 523–60, at 531.

<sup>33</sup> See sources in note 27, [Correct] and Tibor Várady's Afterword, "From Babel to Pentecost," in *Law and Language*, 163–85. [Correct]

<sup>34</sup> See Berman, *Justice in the U.S.S.R.*, 15–24; id., *Faith and Order*, 239, 280; id., *Law and Revolution*, 538, 546. For criticisms of Bentham, see Berman's unpublished, "World Law and the Crisis of the Western Legal Tradition," *The William Timbers Lecture, Dartmouth College, Hanover, NH*, April 21, 2005 (on file in Emory Law School Library archives). [Ok]

<sup>35</sup> See Berman, *Faith and Order*, 314, 381. For similar criticisms of Emil Brunner, see Berman, *Interaction*, 81–91.

<sup>36</sup> See Berman, *Law and Revolution*, 144–48; id., *Law and Revolution II*, 100–30; id., *Faith and Order*, 170ff.

<sup>37</sup> See Berman, *Law and Revolution*, 132; id., *Law and Revolution II*, 77–80.

many, “but the whole person and whole community thinking and feeling, learning and living together”—that is the common calling of humankind, Berman wrote.<sup>38</sup>

Berman applied this gospel of reconciliation and integration most vigorously to his legal studies. He called for the reintegration of the classic schools of legal positivism, natural law theory, and historical jurisprudence—which, in his view, had been separated since God was cast out of the legal academy. He called for the integration of public law and private law, of common law and civil law, of Western law and Eastern law into a global legal system. He urged that law be given a place among the humanities and enrich itself with the ideas and methods of sundry humane disciplines. He urged that legal language be cast in terms understandable to all, and be enriched by the power of poetry, liturgy, literature, and art. And he urged most strongly that the subjects and sciences of law and religion be reconciled to each other. Their separation was, for him, a theological “heresy” and a jurisprudential “fallacy” that cannot survive in the new era of synthesis and integration. “[L]aw and religion stand or fall together,” he wrote. “[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>39</sup>

Berman’s talk of the death of dualism and the birth of an age of synthesis points to his further belief in a teleological, if not, providential view of history. Both Jewish and Christian theology, he reminded his readers, teaches 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. Berman was convinced that slowly but surely all the peoples of the world would come into contact with each other, and ultimately, after revolutionary struggle and even apocalyptic explosion, would seek finally to be reconciled with each other forever.<sup>40</sup>

Berman’s grand account of evolution and revolution in Western history, set out in his *Law and Revolution* series, is rooted in this basic belief about the nature and pattern of time. There is a distinctive Western legal tradition, he argued, 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. 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,

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<sup>38</sup> Berman, *Interaction*, 113; id., “Law and Religion in the Development of World Order,” 35.

<sup>39</sup> Berman, *Faith and Order*, 13.

<sup>40</sup> See Berman, *Interaction*, 119–20; id., *Law and Revolution*, 166–72.

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, 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.<sup>41</sup>

In this new millennium, Berman believed, the Western legal tradition is undergoing a profound integrity crisis, graver and greater than any faced in the past millennium. The old legal order of the West is under attack both from within and from without. From within, Western law is suffering from the critical and cynical attacks relentlessly issued by jurists and judges – a “form of lawyerly self-loathing,” he once called it. These legal 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, of the different. 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,” its officials and its educators, no longer seem to believe in what they are doing.<sup>42</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—have 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 collection of disjointed pieces, with no single

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<sup>41</sup> See a good summary in the “Introduction,” to Berman, *Law and Revolution II*, 1–28.

<sup>42</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* (The Hague: Martinus Nijhoff, 1955), 33. See Berman, *Faith and Order*, 351; id., “The Prophetic, Pastoral, and Priestly Vocation of the Lawyer,” *The NICM Journal* 2 (1977): 5–9.

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.<sup>43</sup>

For Berman, these are signs of end times. We are reaching the end of an age and the end of the Western legal tradition, as we have known it. Western law is dying, he wrote, a new common law of all humanity is struggling to be born out of the counterforces of violent balkanization, radical fundamentalism, and belligerent nationalism that now beset us all. Western law, rooted in the soils and souls of Christianity, Judaism, and their secular successors, 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 in this new millennium, Berman challenged his readers, is a comprehensive new religious belief system, a new pattern of language and ritual, a new eschaton, that will give this common law of humanity its cohesion and direction. We need a new common law and a new common faith on a world scale, a new *ius gentium* and *fides populorum* for the whole world. We need global structures and symbols, global processes and principles. These cannot be found only in world-wide science and commerce, or in global literature and language. They must also be sought in a new “world law” and a new “world religion.” For law and religion are the only two universal solvents of human living that can ultimately bring true peace, order, and justice to the world.

A streak of mystical millenarianism colors Berman’s historical method—much of it already conceived while he was a young man witnessing the carnage of World War II and still brimming with the heady instruction of his Dartmouth mentor, Eugen Rosenstock-Huessy.<sup>44</sup> Description and prescription run rather closely together in his account, occasionally stumbling over each other. Historical periods and patterns are rather readily equated with providential plans and purposes. But here we have one of the deepest sources of many of Berman’s insights and ambitions as a legal scholar. He was, as he put in an April 17, 1966, letter to Rosenstock, on a scholarly “pilgrimage.”

It is a very long, slow, hard journey. It goes through law and language, history, comparison of legal systems and cultures, the Great Revolutions, the communification of the nations,

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<sup>43</sup> See Harold J. Berman, “The Crisis of the Western Legal Tradition,” *Creighton Law Review* 9 (1975): 252–65; id., “The Moral Crisis of the Western Legal Tradition and the Weightier Matters of the Law,” *Criterion* 19(2) (1980): 15–23; id., “The Crisis of Legal Education in America,” *Boston College Law Review* 26 (1985): 347–52.

<sup>44</sup> See, e.g., Eugen Rosenstock-Huessy, *Speech and Reality* (Norwich, VT: Argo Books, 1970); id., *The Christian Future, or The Modern Mind Outrun* (New York: Charles Scribner’s Sons, 1946); id., *Out of Revolution: Autobiography of Western Man*, introduction by Harold J. Berman, (Providence, RI: Berg, 1993). For Berman’s assessment of his mentor, see, e.g., Harold J. Berman, “Renewal and Continuity: The Great Revolutions and the Western Tradition,” in *Eugen Rosenstock-Huessy: Studies in His Life and Thought*, eds., M. Darrol Bryant and Hans R. Huessy (Lewiston, NY: Edward Mellen Press, 1986): 19–29; id., “Recollections of Eugen [Rosenstock-Huessy], 1936-1940,” March 29, 1999, unpublished (on file in Emory Law School Library archives).

trade between planned and market economies, the hard struggle for peace, the reconciliation of man to his destiny and to God.... I have hope that I can make meaningful and important what you have taught me—and can possibly rescue a good deal of scholarship and make a contribution to peace—by showing, first, that American law is a human, creative response to the continued danger of disintegration and alienation, and that law altogether is a great hope for uniting mankind. But law, to fulfill this hope, must be felt to be Speech, and a response to God's Word.<sup>45</sup>

### **The Emergence of *Law and Language***

All of these cardinal themes of Berman's life work can already be seen in this little book on *Law and Language*, written right in the middle of his legal career. The book distills some of the keen insights he had developed in his earlier international and comparative law work. It anticipates crisply some of the key themes that he went on to explore at great length in his *Law and Revolution* series and other writings in legal history, law and religion, and legal philosophy. And the book has a typical Berman-like interdisciplinary edge, with the methods and insights of jurisprudence, history, sociology, psychology, anthropology, theology, philosophy, and more all adeptly and seamlessly integrated into his analysis.

What makes the book all the more interesting is that Berman wrote this manuscript in the early 1960s when interdisciplinary approaches to legal study—including the study of law and language<sup>46</sup>—were only in their infancy. The regnant legal philosophy at the time was still the legal positivism that had dominated American, and broader Western, legal education for the first half of the twentieth century. Law, according to legal positivists, was simply the sovereign's rules. Legal study was simply the analysis of the rules that were posited, and their application in particular cases. Why these rules were posited, whether their positing was for good or ill, how these rules affected society, politics, or morality were not relevant questions for legal study. It was rather common to read in legal textbooks of the day that law is an autonomous science, that its doctrines, language, and methods are self-sufficient, that its study is self-contained. It was rather common to think that law has the engines of change within

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<sup>45</sup> Harold J. Berman, Letter to Eugen Rosenstock-Huessy (April 17, 1966) (on file in the Emory Law School Library archives).

<sup>46</sup> The first prominent discussion of law and literature in American legal scholarship came with Judge Cardozo's essay, "Law and Literature," in his 1931 collection, *Law and Literature, and Other Essays and Addresses* (New York: Harcourt, Brace & Co, 1931), 3–40. See collection of later materials in William R. Bishin and Christopher D. Stone, *Law, Language, and Ethics: An Introduction to Law and Legal Method* (Mineola, NY: Foundation Press, 1972) and James Boyd White, *The Legal Imagination* (Boston: Little, Brown, 1973 [rev. ed., Chicago: University of Chicago Press, 1985]), discussed further below.

itself; that, through its own design and dynamic, law marches teleologically through time “from trespass to case to negligence, from contract to quasi-contract to implied warranty.”<sup>47</sup>

To be sure, American legal positivism was not without its detractors. Already in the 1920s and 1930s, sociologists of law argued that the nature and purpose of law and politics cannot be understood without reference to the spirit of a people and their times—of a *Volksgeist und Zeitgeist* as their German counterparts put it.<sup>48</sup> The legal realist movement of the 1930s and 1940s used the new insights of psychology and anthropology to cast doubt on the immutability and ineluctability of judicial reasoning.<sup>49</sup> The revived natural law movement of the 1940s and 1950s saw in the horrors of Hitler’s Holocaust and Stalin’s gulags the perils of constructing a legal system without transcendent checks and balances.<sup>50</sup> The international human rights movement of the 1950s and 1960s pressed the law to address more directly the sources and sanctions of civil, political, social, cultural, and economic rights.<sup>51</sup>

By the 1960s, the confluence of these and other movements had exposed the limitations of a positivist definition of law standing alone. Berman was in the vanguard of leading jurists—which included his colleagues Roscoe Pound and Lon Fuller as well as Jerome Hall, Karl Llewellyn, and others—who were pressing for a broader interdisciplinary philosophy of law. Of course, they said in concurrence with legal positivists, law consists of rules—the black letter rules of contracts, torts, property, corporations, and sundry other familiar subjects. Of course, law draws to itself a distinct legal science, an “artificial reason,” as Sir Edward Coke once put it.<sup>52</sup> But law is much more than the rules of the state and how we apply and analyze them. Law is also the social activity by which certain norms are formulated by legitimate authorities and actualized by persons subject to those authorities. The process of legal formulation involves legislating, adjudicating, administering, and other conduct by legitimate officials. The process of legal actualization involves obeying, negotiating, litigating, and other conduct by legal subjects. Law is rules, plus the social and political processes of

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<sup>47</sup> Barbara Shapiro, “Law and Science in Seventeenth-Century England,” *Stanford Law Review* 21 (1969): 728.

<sup>48</sup> See, e.g., Julius Stone, *The Province and Function of Law: Law as Logic, Justice, and Social Control* (London: Stevens, 1947); Gustav Radbruch, *Der Geist des englischen Recht* (Heidelberg: A. Rausch, 1946).

<sup>49</sup> William W. Fisher, Morton Horowitz, and Thomas Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993); Wilfred E. Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaca, NY: Cornell University Press, 1968).

<sup>50</sup> Charles Grove Haines, *The Revival of Natural Law Concepts* (New York: Russell & Russell, 1965); Roscoe Pound, *The Revival of Natural Law* (Notre Dame, IN: University of Notre Dame Press, 1942).

<sup>51</sup> John Witte, Jr. and Johan D. Van der Vyver, eds., *Religious Human Rights in Global Perspective*, 2 vols. (The Hague: Martinus Nijhoff, 1996).

<sup>52</sup> Anthony Lewis, “Sir Edward Coke (1552–1633): His Theory of ‘Artificial Reason’ as a Context for Modern Basic Legal Theory,” *Law Quarterly Review* 84 (1968): 330.

formulating, enforcing, and responding to those rules.<sup>53</sup> Numerous other institutions, besides the state, are involved in this legal functionality. The rules, customs, and processes of churches, colleges, corporations, clubs, charities, and other non-state associations are just as much a part of a society's legal system as those of the state. Numerous other norms, besides legal rules, are involved in the legal process. Rule and obedience, authority and liberty are exercised out of a complex blend of concerns, conditions, and character traits—class, gender, persuasion, piety, charisma, clemency, courage, moderation, temperance, force, faith, and more.<sup>54</sup>

Legal positivism could not, by itself, come to terms with law understood in this broader sense. In the 1960s, American jurists thus began to turn with increasing alacrity to the methods and insights of other disciplines to enhance their legal formulations. This was the birthing process of the modern movement of interdisciplinary legal study. The movement was born to enhance the province and purview of legal study, to refigure the roots and routes of legal analysis, to render more holistic and realistic our appreciation of law in community, in context, in concert with politics, social sciences, and other disciplines.<sup>55</sup>

Berman's pithy little volume on *Law and Language*, like his equally pithy little volume on *The Interaction of Law and Religion* published ten years later, is a valuable artifact from these early days of interdisciplinary legal study in America. N.E.H. Hull calls this kind of early work "*bricolage* jurisprudence," given its "marvelously far-ranging and free-thinking eclecticism."<sup>56</sup> Hull got this term from French anthropologist, Claude Lévi-Strauss, who used it to refer to the work of creative French handymen—*bricoleurs*—who worked with "whatever [was] at hand," tools that were not designed for the present task.<sup>57</sup> Berman and other early interdisciplinary legal scholars, like Pound and Llewellyn, similarly "collect[ed] ideas from their vast reading of their predecessors in jurisprudence, as well as of economists, social psychologists, sociologists, and historians."<sup>58</sup> Eclecticism was the spirit of the times, and Berman was exuberantly broad in his use of sources from all manner of disciplines to aid his study of law.

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<sup>53</sup> Berman, *Law and Revolution*, 44ff.; Jerome Hall, *Comparative Law and Social Theory* (Baton Rouge: Louisiana State University Press, 1963), 78ff. See also Berman, *Law and Language*, chapter 2.

<sup>54</sup> See further John Witte, Jr., "Introduction," to John Witte, Jr. and Frank S. Alexander, eds., *The Teachings of Modern Christianity on Law, Politics, and Human Nature*, 2 vols. (New York: Columbia University Press, 2006), xx–xxxvii.

<sup>55</sup> See, e.g., Richard A. Posner, "The Present Situation in Legal Scholarship," *Yale Law Journal* 90 (1981): 1113–30; Robert C. Clark, "The Interdisciplinary Study of Legal Evolution," *Yale Law Journal* 90 (1981): 1238–74; Symposium, "American Legal Scholarship: Directions and Dilemmas," *Journal of Legal Education* 33 (1983): 403–11.

<sup>56</sup> N.E.H. Hull, *Roscoe Pound & Karl Llewellyn: Search for an American Jurisprudence* (Chicago: University of Chicago Press, 1997), 8–10.

<sup>57</sup> *Ibid.*, 9.

<sup>58</sup> *Ibid.*, 10–11.

Not only was intellectual eclecticism the new fashion of legal education in the early 1960s, but political danger was the perennial worry. The world was gripped by deep fear born of the Cold War and the Cuban Missile Crisis, while still reeling from the devastation of World Wars I and II. For Berman, the academy was no ivory tower refuge. “Two world wars, and the threat of a third,” he wrote, with the Cuban Missile Crisis just averted, “have joined all mankind in a common destiny. We are all in contact with each other. Paradoxically, the human race is becoming unified by its capacity for self-destruction.”<sup>59</sup>

The Cold War between the United States and the USSR, in particular, shaped Berman’s efforts in *Law and Language* to work out a theory of “communification”: to form sympathetic bonds of community through better mutual understanding of each other’s cultures, languages, and laws, and more conversation to overcome the “tragic disunity which now threatens to destroy us.”<sup>60</sup> In the 1950s and 1960s, he wrote a series of popular articles in the American press, designed to bring greater understanding of Russian families, farms, and workers, of Russian religion, morality, and values, of Russian science, education, and sports.<sup>61</sup> He also wrote popular articles and longer law reviews recommending concrete legal measures to open up commerce, trade, and travel between the USSR and the United States—a theme to which he returned many times.<sup>62</sup> He saw more international trade and travel to be essential initial steps of communication and intercourse that would lead to deeper and more stable understanding and peace.<sup>63</sup> He also arranged to have broadcast into the Soviet Union and Eastern Europe his series of *Talks on American Law*, to give Russian listeners a better and a clearer understanding of what American law was all about.

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<sup>59</sup> See Berman, *Law and Language*, 162.

<sup>60</sup> *Ibid.*, 48.

<sup>61</sup> Harold J. Berman, “Divorce and Domestic Relations in Soviet Law,” *Virginia Law Weekly* 2(2) (April 1950): 28–33; *id.*, “Soviet Planning,” *Atlantic Monthly* (December 1951): 11–12, 14; *id.* “The Soviet Family,” *Atlantic Monthly* (February 1952): 18–20; *id.* and Miroslav Kerner, “Soviet Military Discipline,” *Military Review* 32(3) (June 1952): 19–29; *id.* and Miroslav Kerner, “Soviet Military Discipline,” *Military Review* 32(4) (July 1952): 3–15; Harold J. Berman, “The Soviet Worker,” *Atlantic Monthly* (July 1952): 8–10; *id.*, “The Soviet Soldier,” *Atlantic Monthly* (September 1952): 4, 6, 8; *id.*, “The Soviet Peasant,” *Atlantic Monthly* (March 1953): 15–18; *id.*, “Soviet Education,” *Atlantic Monthly* (April 1953): 16–19; *id.*, “Soviet Trade,” *Atlantic Monthly* (August 1954): 14–17; *id.*, “Real Property Actions in Soviet Law,” *Tulane Law Review* 29 (June 1955): 687–96; *id.*, “Impressions of Moscow,” *Harvard Law School Bulletin* 7(3) (December 1955): 7–8; *id.*, “The Current Movement for Law Reform in the Soviet Union,” *American Slavic and East European Review* 15 (April 1956): 179–89; *id.*, “Soviet Legal Reforms,” *The Nation* 182 (June 30, 1956): 546–48. “Soviet Law and Government,” *Modern Law Review* 21 (January 1958): 19–26; *id.*, “Limited Rule of Law,” *Christian Science Monitor* (April 29, 1958): 9; *id.*, “The Devil and Soviet Russia,” *The American Scholar* 27 (Spring 1958): 147–52.

<sup>62</sup> Harold J. Berman, “The Problems that Unite Us,” *The Nation* 192 (February 18, 1961): 132; see also, interview by Michael J. Ryan, “Berman: Losing Enemies by Making Friends,” *Harvard Law Record* (February 25, 1965): 5–6.

<sup>63</sup> Harold J. Berman, “Thinking Ahead: East-West Trade,” *Harvard Business Review* 32(5) (1954): 147–58; *id.*, “The Legal Framework of Trade Between Planned and Market Economies”; *id.*, “Negotiating Commercial Transactions with Soviet Customers.”

These were first steps in Berman's gradual development of the field of comparative legal studies—especially comparisons of the Soviet and American legal systems, analyses of particular Soviet legal institutions, and linguistic analysis and translation of Soviet codes, statutes, and other legal materials.<sup>64</sup> Mastering the legal language and legal concepts of another people would prove to be a lasting feature of Berman's scholarly work not only on Russia in these early days, but also eventually on other big foreign legal systems like China and Japan.<sup>65</sup> He pressed his students relentlessly to learn foreign languages and to translate their work to and from foreign languages. He also urged his readers to learn to parse closely the letter and spirit, the anatomy and physiology of foreign legal materials. He demonstrated that hermeneutic brilliantly in his many translations of Russian private, public, and military laws, and in his careful linguistic analysis of the recent Soviet Criminal Code, where he showed the many layers of ancient Christian morality and socialist innovation in the palimpsest of Soviet criminal law.<sup>66</sup>

For Berman, a comparative legal scholar had to understand not only the law on the books, but also the law in action. And that required him to be on site in the nations he studied—to interview judges and lawyers, to observe the legislature and courts in session, to have open talks with fellow scholars, ambassadors, and state officials about their legal systems and the American legal system. Russia was again his most critical laboratory in the years that he wrote *Law and Language*. In the late 1950s and 1960s he pressed relentlessly to get visas to travel to Russia. When state bureaucrats on both sides blocked him, he began writing directly to Soviet Chairman Nikita Khrushchev. On February 13, 1955, he sent this cable:

NIKITA KHRUSHCHVEV THE KREMLIN MOSCOW USSR  
NEW YORK TIMES REPORTS TODAY YOU DESIRE MORE  
NORMAL TRADE RELATIONS BETWEEN UNITED STATES  
AND SOVIET UNON PERIOD.... I APPLIED ONE YEAR

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<sup>64</sup> Harold J. Berman, "The Comparison of Soviet and American Law," *Indiana Law Journal* 34 (1959): 559ff.; id., "Law in American Democracy and under Soviet Communism"; id. and James W. Spindler, "Soviet Comrades' Courts," *Washington Law Review* 38 (1963): 842–910.

<sup>65</sup> Harold J. Berman, "Soviet Perspectives on Chinese Law," in Jerome A. Cohen, ed., *Contemporary Chinese Law* (Cambridge, MA: Harvard University Press, 1970), 313–28; id., Susan Cohen, and Malcolm Russell, "A Comparison of the Chinese and Soviet Codes of Criminal Law and Procedure," *The Journal of Criminal Law and Criminology* 73 (Spring 1982): 238–58; Harold J. Berman, "The Role of Law in Trade Relations Between the United States and Japan," *A Talk Given to the Industrial Association in Osaka May 23, 1981, and to the Industrial Law Center in Tokyo May 27, 1981*, unpublished (on file in Emory Law School Library archives); id. and Van R. Whiting, Jr., "Impressions of Cuban Law," *The American Journal of Comparative Law* 28 (Summer 1980): 475–86.

<sup>66</sup> See Harold J. Berman, "A Linguistic Approach to the Soviet Codification of Criminal Law and Procedure," in Donald D. Barry, F.J.M. Feldbrugge, and Dominic Lasok, eds., *Codification in the Communist World* (Leiden: A. W. Sijthoff, 1975), 39–52. See his earlier work id., *Soviet Criminal Law and Procedure*; id., "Principles of Soviet Criminal Law," *Yale Law Journal* 56 (May 1947): 803–36; id. and Donald H. Hunt, "Criminal Law and Psychiatry: The Soviet Solution," *Stanford Law Review* 2 (1950): 635–63.

AGO FOR SOVIET VISA TO DISCUSS WITH EXPORT AND IMPORT OFFICIALS CONCRETE COMMERCIAL AND LEGAL PROBLEMS OF TRADING IN VARIOUS COMMODITIES PERIOD. I HAVE RECEIVED NO REPLY.... PERIOD.<sup>67</sup>

Within a month, Berman had his visa, and took the first of his many trips to the USSR. A few years later, he applied for a visiting law professorship in Moscow, and again got caught up in miles of red tape. He again wrote to Chairman Khrushchev revealing his belief in comparative legal study as a source of better mutual understanding between nations:

I am taking the liberty of writing to you about a matter which deeply concerns me as an American jurist who is working for better relations between the United States of America and the Soviet Union—namely, the matter of exchanges of visits between Soviet and American jurists....

I am convinced that Soviet officials charged with responsibility for cultural exchanges with the United States have failed to grasp a very simple point: that the very best Soviet propaganda in the United States is to send us your jurists. The United States is governed by jurists more than by any other professional group. [But] the view is very widespread in the United States (even among our jurists, who should know better), that law and legality play a very minor role in the Soviet Union. Many Americans are surprised to learn that jurists even exist in the Soviet Union....

Perhaps what I have written so far might give the impression that I am thinking only in terms of the benefit to the Soviet Union which can result from visits by Soviet jurists to the United States. But I am thinking primarily of the benefit to both of our countries, and to the cause of peace. Frankly, I believe that the Soviet Union has at least as much to learn about the United States, and especially about our legal system, as the United States has to learn about Soviet law. Even more important is what we can learn from each other about the

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<sup>67</sup> Quoted by Robert C. Clark, "Preface to A Conference on the Work of Harold J. Berman," *Emory Law Journal* 42 (1993): 428.

necessary conditions for establishing better legal relations between our countries, and among all countries.<sup>68</sup>

Berman followed this up with a direct appeal to Chairman Khrushchev at a reception in New York, following Khrushchev's famous shoe-banging speech at the United Nations. When he met the Chairman in the receiving line, he explained urgently -- in fluent Russian, which impressed the Chairman -- why he wanted to come to the Soviet Union to teach. Khrushchev listened intently, nodded, then instructed an aide to "take care of him." Berman soon got his visa to teach in Moscow for a year.<sup>69</sup> There he finished the new edition of his classic monograph, *Justice in the USSR*.

### **The Main Themes of Law and Language**

It was in that same year of 1963, flush with interdisciplinary and international ambition, that Berman began work in earnest on *Law and Language*.<sup>70</sup> In five chapters, he laid out his interdisciplinary theory of language, of legal language, and of the development of legal language -- in general, in comparative perspective, and in American history. A stirring conclusion, "Can Communication Build One World?" sets out his optimistic agenda for the development of a world law and world community -- no small dream in the bitterly divided 1960s -- and a call for Christians, in particular, to take up the great cause of fostering justice, peace, and unity within diversity.

Berman's basic aim in his book is to provide an understanding of law that reveals its ability to build community and foster peaceful relationships among individuals and nations. Berman was convinced that the Western legal tradition, and the world community altogether, had the resources in its linguistic heritages to overcome its most dangerous tensions and divisions. Candid, learned, empathetic, and peaceful conversation across religions, cultures, and nations was the key.

"Communification" was Berman's new term for the process by which humans make and sustain communities, from the local to the global.<sup>71</sup> Language plays a critical role in this process, since language is ultimately a social phenomenon. Though words mean particular things, language as a practice is as much about meaning-making as it is about the "reciprocal transfer of meaning."<sup>72</sup> We need a new verb, "speak-listen,"

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<sup>68</sup> April 16, 1960, quoted in Clark, "Preface," 430-31.

<sup>69</sup> See Erwin N. Griswold, "Preface to A Conference on the Work of Harold J. Berman," *Emory Law Journal* 42 (1993): 424-26.

<sup>70</sup> In a letter to his mentor, Eugen Rosenstock-Huessy, September 3, 1963, Berman wrote: "I am particularly anxious to have your opinions on the first chapter 'Law and Language.'" (on file in Emory Law School Library archives).

<sup>71</sup> See Berman, *Law and Language*, 47.

<sup>72</sup> *Ibid.*, 38.

Berman wrote, to capture this reciprocal dynamic in language.<sup>73</sup> This heritage of language, its socializing function, defends society from dissolution and disintegration:

[L]anguage is a social event, not only in the sense that it brings together the participants in a conversation or dialogue ... but also in the sense that it brings together all the members of the language-community—those who have created the expressions we use, those who have taught them to us, our ancestors, our nation, our family, our teachers, our colleagues.<sup>74</sup>

Language is also the historical deposit of a community's social life, Berman continued. Each community has, in a sense, its own language, and we all inhabit many communities with distinctive languages. The loss of these linguistic communities, or their inability to speak to each other, is a grave threat. This was particularly true during the Cold War, whose propaganda machines and censorship campaigns on both sides violated the vital community-building power of language. The Cold War divisions were exacerbated by the inability of both sides to understand the other's language, culture, and law, which stymied meaningful negotiation. But since all humans speak language and all language bears similar marks and performs similar functions in each community, broader communities, even between bitter enemies, can be formed through the common experience and judicious translation of their most essential texts, not least their legal texts. Translation and conversation, Berman argued, are the beginning of making peace and the basis for lasting peace. The words we share, the common language we build, become symbols of our budding new community. Though there are no easy solutions to deep conflicts, especially those as vast as the Cold War, understanding the other in our own language, and having a common language to understand the tensions that exist on both sides, is an essential beginning point.

“Conviviality”—from “con” and “vivere,” meaning “living together”—is another term that captures part of Berman's efforts in *Law and Language*. While words are important, Berman always moves outward, towards the whole. Words are part of language, which is the substance of a community's social life. This social life takes shape in rituals and rites that are marked by “conviviality.”<sup>75</sup> Language and tradition are the stable ground of a community's life together, giving those people with common cause the common means to talk together, to work together, and to live peaceably together. “Even faculty meetings serve a necessary function in this respect,” Berman writes, “and academicians are wrong to disparage them.”<sup>76</sup> (Professors: please lower your eyebrows, and read on.)

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid., 44.

<sup>75</sup> Ibid., 61.

<sup>76</sup> Ibid., 62.

This also serves as a reminder to traditionalists that traditions serve the purpose of allowing individuals to share life together—amidst conflict—rather than to obfuscate and exclude. Berman was quite aware of the dangers of specialization in modern, industrialized society: “all are threatened by a polyglot culture, in which the only words that everybody hears or reads are the slogans of commercial advertisements and of political propaganda. Our common speech is threatened with debasement.”<sup>77</sup> The tension between expertise and generality, between cultures and legal traditions, is the same: “the health of any society depends upon its ability to maintain and develop its common language without destroying the identity of the separate languages into which the common language is continually being broken.”<sup>78</sup> Law is especially susceptible to this problem, since legal language is almost continually maligned as an alien tongue.

When it functions properly, however, legal language creates venues for speaking of and hearing about conflict and how to resolve it. Legal language also creates channels of negotiating, cooperating, and planning our lives together. In this way, law serves an important communifying function, since it works to prevent disintegration and injustice in a community, “creating order and giving orders,” convincing and exhorting. Instead of just “referring” to things, Berman wrote, legal terms create relationships and rights among persons. For these purposes, legal language needs formality and ceremony—words which show the legal relationships overlaying the parties, and a setting like a court room to show that justice is being done with impartiality and authority:

Especially in primitive societies, and in primitive situations in modern societies, that is, when passions run high, the law-speaking authority needs words which characterize the grievance (or the economic or social problem demanding solution) to the satisfaction of both sides and which at the same time command the respect of the community as a whole.<sup>79</sup>

Given the essential relationship between language, experience, community, and law, Berman argued further for an historical approach to law. Such an approach gives proper place to tradition in the process of creating law and maintaining legal meaning:

[T]he ability of a society to maintain traditions is absolutely essential to progress, for it alone makes it possible to introduce changes that will themselves, in turn, have stability. The capacity to change is a negation of progress when it is not linked with the capacity to preserve. For, without the capacity

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<sup>77</sup> Ibid., 63.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid., 92.

to preserve, there is no change in the sense of taking a new direction but only a perpetual series of changes, each cancelling the other.<sup>80</sup>

This historical view of language is important for the American legal tradition, Berman wrote, a vital part of the distinctive American understanding of the “rule of law.” “America inherited the idea of the historicity of law from England, and ultimately from the Western concept of historical development. But America embodied that idea both in its vital doctrine of precedent, as well as in a written document, thereby fixing permanently the language of American Constitutional law.”<sup>81</sup> The Constitution itself is an example of the developmental power of tradition and stabilizing force of tradition.

### ***Law and Language, Law and Revolution***

These themes and concepts are also at the basis of Berman’s *magnum opus*, *Law and Revolution: The Formation of the Western Legal Tradition*, published in 1983, but in early stages of writing already when he was writing *Law and Language*. Though masterful as a path-breaking history of medieval law, *Law and Revolution* was deeply informed by the historical-linguistic jurisprudence developed in *Law and Language*. Berman found, in the centralization of political and legal authority in the medieval Catholic Church, an expansive historical laboratory for exploring law, language, and community.

While the book may be remembered for its broad revision of Western legal history, Berman devotes the many pages of his introduction to developing a more concrete picture of the communicative-historical view of law he formed in *Law and Language*. There is a sense in which *Law and Language* sets the theoretical stage for Berman’s history of legal unification.

Berman begins *Law and Revolution* with a discussion of the role of tradition and history in legal change. The object of Berman’s study, “the West,” is both a “historical structure” and a “structured history.”<sup>82</sup> He is quick to point out, as he did in *Law and Language*, that legal change inevitably involves the legal and cultural past of the society experiencing the change. The historical structure of revolution always involves an engagement with the past. “The concept of law as a particular kind of enterprise ... becomes meaningful in the context of the actual historical development of the living law of a given culture.”<sup>83</sup>

Even before the legal cultures of the pre-West were melded into the first modern legal system through the Papal Revolution, Berman writes, the folk law of pre-modern

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<sup>80</sup> *Ibid.*, 129.

<sup>81</sup> *Ibid.*, 143.

<sup>82</sup> Berman, *Law and Revolution*, 2–3.

<sup>83</sup> *Ibid.*, 5

Europe revealed the role of communication and language in law. Law was a matter of poetics and persuasion, deeply intertwined with the religious beliefs of early societies. What began as a legal system characterized by fatalism and war<sup>84</sup> became transformed by the influence of Christianity in Germanic folk communities.<sup>85</sup> The transference and tension between separate communal languages is on full display in the conflict between their fatalistic, pagan law of the early Germanic tribes and the distinct concepts and stories of early Christianity. This theological influence became predominant in the period after the Papal Revolution.<sup>86</sup>

The ability of a common language to shape law, and more importantly, the ability of a common law to shape community, is shown in Berman's extensive treatment of the cultural sources, institutional supports, and rhetorical methods of medieval canon law, the one universal law of Western Christendom. The unification, indeed creation, of the West, Berman writes, began in the crucible of the Papal Revolution, the revolutionary change introduced by Pope Gregory VII and his successors in the later eleventh and twelfth centuries. Berman's abstract picture of communication is filled out in this moving historical picture. Community and law are shaped in particular through social institutions, rhetorical-analytical strategies, and political maneuvering.<sup>87</sup> According to Berman, the dialectical analytical methods of distinction and synthesis allowed legal scholars at the West's first universities to reconcile the differences among the diverse legal and political systems represented early Europe.<sup>88</sup> From an institutional perspective, legal scholars were permitted to exercise a great deal of freedom in questioning and debate, which contributed to the creative jurisdictional, procedural, and substantive legal advances of newly unifying Europe.<sup>89</sup> Greek philosophy, Roman law, and Christian theology formed the common language of the new universities. Berman recognized that, despite the humanizing possibilities of dialogue, the unification of medieval Christendom also came by political stratagem and the sword.<sup>90</sup> But, he says, the common conceptual languages of philosophy and theology, the common spoken language of Latin, and the common system of canon law all helped to consolidate and expand the medieval papal regime.

### **Berman's Sources and Foils in *Law and Language***

Berman's argument in *Law and Language* was grounded in the best philosophical and social science literature of the day. While the text is rife with

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<sup>84</sup> Ibid., 60.

<sup>85</sup> Ibid., 61–62.

<sup>86</sup> Ibid., chap. 5.

<sup>87</sup> Ibid., chap. 2 (political analysis) and chap. 3 (institutions and analytical tools).

<sup>88</sup> Ibid., 131ff.

<sup>89</sup> Ibid., 127–31.

<sup>90</sup> Ibid., chap. 2.

references, Bronislaw Malinowski, Edward Sapir and Benjamin Lee Whorf, and Kenneth Burke deserve special mention. Each of these theorists prized cultural particularity, the bounded-ness of language to thought, the subjectivity of the individual, and the dramatic, dialogical character of human existence. Each of them also challenged the naïve objectivism and false universalism of some earlier social scientists—criticisms that Berman took to heart in *Law and Language*.

Prior to Bronislaw Malinowski's work, it was commonly thought that "savage" societies were developmentally inferior, having few social or cultural conventions. According to anthropologists, Jane Hill and Bruce Mannheim, the intellectual life of the late nineteenth and early twentieth centuries was marked by "a naïve ... universalism in grammar, and an equally vulgar evolutionism in anthropology and history."<sup>91</sup> Malinowski's field work with the Trobriand islanders showed that "primitive" culture was as complex and refined in its cultural objects and systems of meaning as that of modern European nations. Through his fine-grained studies of Trobriand life, Malinowski became the "father" of ethnography in anthropology.<sup>92</sup> His fieldwork manifested the anthropological necessity of first-hand, fact-based, empirical analysis obtained through living together with the communities being studied. At the same time, Malinowski challenged anthropologists and ethnographers to understand the challenges of the ethnographer, who is both "chronicler and historian." There is an interpretive distance between the ethnographer, his anthropological facts, and his final presentation, Malinowski insisted, which required critical exercises of subjective judgment and interpretive discretion.<sup>93</sup>

The problem of subjectivity in scientific work was addressed in detail by anthropologist Edward Sapir and his student Benjamin Lee Whorf. On several occasions in *Law and Language*, Berman acknowledged his debt to both men. While allowing that there is some objective and universal "fact" at the heart of understanding, Whorf and Sapir argued that these facts are construed through the idiomatic and habitual patterns of language which shape the thought and method of anthropology. Even this binary fact-language picture is problematic, since language is more than just a cultural "label" for objective facts, but is constitutive of the entire process and object of research. The "real world," the world of "facts," is as mediated by cultural and linguistic habits and particularities as the most idiomatic English expression.<sup>94</sup> Sapir and Whorf's emphasis on the fundamental, constitutive importance of language was a critical reference point for Berman's argument in *Law and Language*. It shaped his response to Jeremy Bentham's attempt to reduce language to its "neutral, objective" meaning, and it

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<sup>91</sup> Jane H. Hill and Bruce Mannheim, "Language and World View," *Annual Review of Anthropology* 21 (1992): 384.

<sup>92</sup> Dominik Bartmanski, "How to Become an Iconic Social Thinker," *European Journal of Social Theory* 15 (2012): 433–36.

<sup>93</sup> Lodewijk Brunt, "Thinking About Ethnography," *Journal of Contemporary Ethnography* 28 (October 1999): 502.

<sup>94</sup> Hill and Mannheim, "Language and World View," 383–85.

leads him to endorse Friedrich Carl von Savigny's emphasis on history and cultural particularity in law reform.<sup>95</sup>

The final important social science touchstone for Berman was rhetorician and philosopher Kenneth Burke. His major work, *A Rhetoric of Motives*, translated this view of language into a holistic account of human interaction with other humans and with the world. For Burke, the material world is already cast through the "filter" of language when humans come to understand it. These syntheses of material reality and linguistic symbol are called motives. Rhetorical devices, scientific viewpoints, and moral systems are all interpretive lenses for material reality, which can lead to different ideas of what is important about material reality or even what material reality is. The sharing and identification of these motives among groups of people leads to "consubstantiality," that is, a shared identity through shared interpretations of a common symbol. Burke used the United States Constitution as an example, which may have inspired Berman's appropriation of Burke in the legal context. Since we are speaking beings, our common nature is produced through the dramatic and rhetorical sharing of common symbols and motives; law is especially relevant as an example of shared identity through communication.<sup>96</sup>

These debates in linguistics and anthropology were accompanied by analogous disputes and developments in mid-twentieth century philosophy. These Berman also followed, albeit at a greater distance; technical philosophy was never his thing. By the early 1950s, Ludwig Wittgenstein's *Philosophical Investigations* had decisively put to rest the efforts of Anglo-American philosophers to render a pure and perfectly rational language. Wittgenstein's *Investigations* explored the roots of linguistic meaning in social forms of life. Words are not primarily or only arrows that point to things; words are used in different ways as parts of social practices.<sup>97</sup> Similarly, Hans-Georg Gadamer, a student of Martin Heidegger, had just finished his magisterial *Truth and Method*, where he declared that hermeneutics was ontology—that is, language and interpretation preceded and undergirded our most basic philosophical understanding of the *being* of anything at all. Things, in a certain sense, have "existence" through language.<sup>98</sup> Almost every discipline in the university experienced a "turn to language" in the middle of the twentieth century. This was the intellectual climate of Berman's foray into the most linguistic of disciplines—that of law.

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<sup>95</sup> See Berman, *Law and Language*, chaps. 2 and 3.

<sup>96</sup> Jeffrey W. Murray, "Kenneth Burke: A Dialogue of Motives," *Philosophy & Rhetoric* 35(1) (2002): 31–34.

<sup>97</sup> Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Oxford: B. Blackwell, 1953); see id., *Tractatus Logico-Philosophicus*, trans. Frank P. Ramsey and C.K. Ogden (New York: Harcourt, Brace & Co., 1922) for Wittgenstein's earlier, partly repudiated reference theory of meaning. See A.J. Ayer, *Language, Truth, and Logic* (London: Victor Gollancz, 1936) for a traditional Anglo-American account of language as simple reference between word and thing.

<sup>98</sup> Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall, 2d rev. ed., (New York: Continuum, 2000); originally published as *Warheit und Methode* (Tubingen: J.C.B. Mohr, 1960).

Two other critical figures for Berman in *Law and Language* are the later eighteenth-century English political philosopher, Edmund Burke, and the nineteenth-century German jurist, Friedrich Carl von Savigny. Both of these scholarly giants anticipated many of the developments in linguistics and anthropology that Berman found attractive.<sup>99</sup> Savigny and Burke were alike in viewing law as the unique achievement of a culture. As the law responds to its particular problems, they argued, it develops common solutions that have wide consensus and moral weight. These insights led both men to oppose needless or hasty law reform or legal codification by whoever happened to be in power. Law, they said, is a fragile, interdependent historical heritage of the entire people, rather than a series of neutral and transient commands of a sovereign. Each nation has its own character and its own legal needs, and their law has moral force because it builds on the customs of a people responding to their common needs. Berman took to heart this historical, communitarian view of law, and adapted it to address the international tensions that so shaped the 1960s. If law is a product of communities, citizens of all communities need to form an international community, and each of their legal systems needs to be discussed, understood, and sifted for their convergences, common elements, and creative tensions.

*Law and Language* is not without its sympathetic villains. The English utilitarian philosopher and law reformer, Jeremy Bentham, stands in for an entire perspective on law, scholarship, and language that Berman rejected. This is not only the legal positivism for which Bentham was famous, but also the reference theory of word-meaning, a legal reformism insensitive to the historical framework and cultural context of law. Berman did not begrudge Bentham his accomplishments as a reformer and theorist of legal language. Nor did he begrudge the keen insights of Bentham's modern disciple, the preeminent Oxford jurist, H.L.A. Hart. While admiring Bentham for his energetic attack on self-deception in the law, Berman also criticized Bentham for his single-minded attempt to neuter legal language.<sup>100</sup> As Berman explained in *Law and Language*, Bentham attempted to root out the emotional and rhetorical characteristics of legal language. If legal language is neutered, however, Berman argued, the critical "communitizing" function of law is impaired. By the same token, if legal scholars choose to separate the moral (and emotional and rhetorical) characteristics of law from its positive "legal" content, they lose their perception of the critical role law plays in shaping a group's moral life and uniting individuals into enduring bonds of community. Here we see, in the ripples of Kenneth Burke's *A Rhetoric of Motives*, a tacit interdisciplinary response to the new legal positivism.

Bentham's linguistic reformism was taken up by practicing lawyer and UCLA law professor David Mellinkoff, in his classic text *The Language of Law*, published just as Berman was finishing the first draft of *Law and Language*. Legal scholars at the time

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<sup>99</sup> See Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge University Press, 1980) and Symposium, "Savigny in Modern Comparative Perspective," *American Journal of Comparative Law* (Winter 1989): 1-169.

<sup>100</sup> See Berman, *Law and Language*, chap. 2, part 1.

viewed this book as a novel and important achievement. “Here is a book unlike any other,” said reviewer Saul Cohen in 1964.<sup>101</sup> Early reviewers seemed to agree that Mellinkoff’s book was an important *cri de coeur* against the problems of antiquated linguistic habits that prized ambiguity and esotericism, and they praised his efforts to bring about a critical program of legal and linguistic reform.<sup>102</sup> The book was popular enough to end up in the hands of distinguished poet and “ex-lawyer” Archibald Macleish, who carved out a space in public letters for him: “Mr. Mellinkoff is wittier than Mencken as well as being considerably more civilized.”<sup>103</sup> Berman’s copy of the Mellinkoff text is well-marked, and his comments on the history and poetics of legal language are at least a partial, albeit tacit, response to Mellinkoff’s path-breaking text.

In a late-life reflection, Mellinkoff recalled the early days of his corporate law practice. As a young associate, he wrote, “I did as I was told. I followed the office pattern: Sentences long enough to choke a horse. I looked at the opinions: Words repeated endlessly in different forms: *by and with, each and every, null and void, made and provided, keep and maintain*. On and on. English grammar became a matter of twists and turns.”<sup>104</sup> His magnum opus, *The Language of the Law*, recounts the history of Anglo-American linguistic habits, from the argot of Law French, twinned in the synthesis of English and French legal traditions, to the constant criticism of legal-ese from the colonial period to today.<sup>105</sup> What has resulted is a legal language and a legal profession that is “wordy,” “unclear,” “pompous,” and “dull.”<sup>106</sup> Though Berman was most interested in Mellinkoff’s presentation of the history, Mellinkoff himself hoped to provoke the development of a durable, intelligible, precise, and concise language for practitioners which would redound to the benefit of clients, judges, and juries who live by and interpret this work-product.<sup>107</sup> Deferring to Mellinkoff, Berman himself recognized these problems in legal language: “if the roots of law in the whole body of living language of the community are neglected, the power of law to hold it together is weakened.”<sup>108</sup>

Altogether, Berman is to be admired for his open-minded and fair appropriation of the leading social scientists and historical jurists in his interdisciplinary approach to the study of law and language. While many of the scholars he used may now only be remembered in dusty books and on fading tombstones, their work did set the stage for our post-modern academy. The problems of language-relativity, subjectivity, and objectivity in observation and method continue to haunt social science, post-colonial

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<sup>101</sup> Saul Cohen, “Book Reviews,” *UCLA Law Review* 11 (1964): 461.

<sup>102</sup> Brainerd Currie, “Book Reviews,” *Journal of Legal Education* 17 (1964): 227–30; Susan Westerberg Prager, “David Mellinkoff: An Affectionate Tribute,” *UCLA Law Review* 33 (June 1985): 1247–49.

<sup>103</sup> Archibald Macleish, “Book Reviews,” *Harvard Law Review* 78 (1964): 490.

<sup>104</sup> David Mellinkoff, “Plain English: Why I Wrote *The Language of the Law*,” *Michigan Bar Journal* 79 (January 2000): 28.

<sup>105</sup> David Mellinkoff, *The Language of Law* (Boston: Little, Brown, 1963), 136–79, 230–31, 265.

<sup>106</sup> *Ibid.*, 24.

<sup>107</sup> *Ibid.*, 285.

<sup>108</sup> Berman, *Law and Language*, 103.

scholarship, and every shade of critical and cultural studies. The role of history and tradition in shaping morality and legality are now hot topics of American constitutional theory, and in modern American cases dealing with fundamental rights and the appropriate constitutional relationships between citizens, states, and the federal government. And these matters are taken up in earnest by the law and language movements in the legal academy today.

### The Modern Law and Language Movement

The modern study of law and language can be divided, roughly, into two groups: a “rhetorical-humanistic” group and a “linguistic” group. While there are many treatments of language and law that fall outside or in between these groups, these are the mainstays in modern scholarship. Berman’s *Law and Language* book anticipated a number of important themes at work in both these schools.<sup>109</sup>

The rhetorical-humanistic school of the “law and language” movement had an important early start in the 1984 conference on hermeneutics and law at the University of Southern California. The hefty symposium issue of the *Southern California Law Review* that resulted was marked by an exuberant diversity of methods and styles without a common approach, methodology, or theme.<sup>110</sup> A more systematic approach came the next year with the publication of University of Michigan law professor, James Boyd White’s *The Legal Imagination*. This was an elegant and judiciously assembled collection of literary excerpts, legal texts, and exercises in the style of a casebook, designed to help students understand the rhetorical aspects of legal practice and the moral and humane motives that should inform a humanistic practice of the law.<sup>111</sup>

James Boyd White’s work in this and subsequent books has two principal themes that are congenial with the insights that Berman had proffered a generation earlier. First, White’s theory of law and language emphasizes the role of language and dialogue in making community. Second, White brilliantly analyzes the rhetorical and moral content of American law and American community—the relationships between speaker and listener and the moral and communal values implicit in judicial and legal language. Unlike Berman, whose focus was legal history and comparative law, White focuses on American law today. In his *Living Speech*, for example, White observes that the inhumanity and dehumanization of persons in war, in advertising, and in electioneering are based on speech and its capacity to frame the world. Learning how to speak in a humanizing way is the first step to understanding the empire of force and learning how

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<sup>109</sup> See, e.g., the papers collected in Anne Wagner, et al., *Interpretation, Law and the Construction of Meaning: Collected Papers on Legal Interpretation in Theory, Adjudication and Political Practice* (Dordrecht: Springer, 2007) and Janet Cotterill, ed., *Language in the Legal Process* (New York: Palgrave MacMillan, 2002) for important contributions that are not be addressed in this sample here.

<sup>110</sup> Collected in volume 58, nos. 1 & 2 of the *Southern California Law Review* (1985).

<sup>111</sup> James Boyd White, *Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little, Brown and Co., 1973).

not to respect it. Sentimentalities, trivialities, slogans, falsities, and denials, White argues, are all forms of dead speech that dehumanize persons and corrode the community.<sup>112</sup>

Also like Berman, White claims that the law *translates* ordinary life into legal argument, and vice versa. The incidental character of Supreme Court opinions calls the public and the Court into a continual practice of making meaning, making sense, and making justice in life. The language of justice is critical for White, as it was for Berman: So is naming injustice, rather than reducing our discourse to “gratification,” “power,” or “instrumentalism.” Practicing meaningful language, free from sentiment and cliché, is a necessary foundation for the difficult process of just judicial decision-making which is a *sine qua non* of the rule of law.<sup>113</sup>

Advertising and sloganeering, White continues, reduces our world into commodities more than communities, and reduces individuals into consumers more than citizens or communal actors. A common theme of White’s work is that living speech respects each individual as a source and site of narrative and meaning. Meaning-making is the essence of speech, and speech is the cornerstone of community. Courts must take account of the value of speech, with this in mind—not only in interpreting the First Amendment Free Speech Clause, but in crafting the language of their opinions in all cases. Speech as mere information for consumption is not valuable in the same way. “[The Court] would see the world as a world of people talking, not making deals or transactions.”<sup>114</sup>

Like Berman, White further notes that the danger of legal translation is abstraction, loss of context and cultural nuance. In his *Justice as Translation*, White argues that language makes a culture, with its own assumptions, values, and pictures of the world. “Conceptual” language is anti-linguistic, because it assumes that language is just pointing, rather than constitutive of thought and knowledge. This view of the world is imperialistic, says White, because one language is assumed to express a concept completely or sufficiently; the differences between languages and cultures are elided as mere differences in clarity. This view of language is also antagonistic, ruling out contradictions and conflicts in experience and other languages. This view reduces writing and speech to rationalistic outline.<sup>115</sup>

White’s alternative view is this: language does not express concepts, but makes meaning; indeed, language is the very act of meaning and of being. Words get their

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<sup>112</sup> James Boyd White, *Living Speech: Resisting the Empire of Force* (Princeton: Princeton University Press, 2006), 1–13.

<sup>113</sup> *Ibid.*, 196–206. White also submits American constitutional case law to critical, rhetorical analysis in his *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), “Part Two: The Judicial Opinion as Form of Life.”

<sup>114</sup> White, *Living Speech*, 206–11.

<sup>115</sup> White, *Justice as Translation*, 27–33.

meaning through their cultural, textual, and practical contexts. How they are used—in sentences, in books, in poems, in literature, or in judicial opinions alike—gives these words meaning, form, practicality, and identity-marking functions. This means that language is individualized by context and by the speaker, who gains meaning, identity, understanding, and direction through the experience of language. The meaning we express isn't in an idea, concept, or sense datum, but in language as it is expressed in its entire context.

White would agree with Berman that good translation—across space, time, culture, discipline, and social place—is a preeminent example of the “communitizing” characteristics of language. The effort of translating words, speeches, and texts reflects an ethic of respect for the other person, the other language, the other culture. If done well, translation reflects an ethic of fidelity to the other, rather than dominance or replacement of a critical marker of identity and meaning. The practice of law, White argues, reflects this view of translation, too. Lawyers must speak lay language as well as legal language, respecting and taking up the client's story into the language of law, and using legal language to draw out meanings from the client's story that may not be as significant in the client's language. That, for White, is a fundamental ingredient of legal professionalism.<sup>116</sup>

All of life, in fact, White continues, involves this kind of translation, because each person is a unique source of meaning; the object is, in life as in law, to be individuals who respect the other without losing their sense of self. Out of this reciprocal engagement with others, we create ourselves and together we create community. The question for lawyers and the law is: will the law be a place for this reciprocal exchange and engagement, a place for “multivocality,” or will it be the blunt object of “bureaucratic and theoretical power”? Human community and language lives through this process of reciprocal interaction, response, and translation.<sup>117</sup>

The problem of translation into legal argument, especially within the courtroom, is taken up in earnest by Milner S. Ball in *The Promise of American Law*. Ball, a longstanding friend and admirer of Berman, moves from the translation of legal languages to the translation of law into dramatic enactment. Ball conceives the entire legal process along the lines of theater, where justice must be done, but just as importantly, justice must be seen to be done. The trial itself, for Ball, is an event of community ratification and belonging. Just as Malinowski would describe the rites of initiation, marriage, or reconciliation in primitive societies as absolutely necessary to community solidarity and social order, Ball describes the modern American courtroom as a place that reaffirms the commitment of every participant to the covenant of law in American society—whether litigants or advocates, judges or court officials, witnesses or

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<sup>116</sup> Ibid., 34ff.

<sup>117</sup> Ibid., 267.

audience members.<sup>118</sup> Ball provides a helpful analogue and extension to Berman's insights in *Law and Language*; he fills out the challenges and possibilities of translation, drama, and community.

Berman's basic picture of law is consonant with the "metaphor" of law as a "medium of social relationships" recommended in Milner Ball's signature title, *Lying Down Together*. According to Ball, the prevailing metaphor for law today is "law as bulwark of freedom." Though this metaphor has inspired protection of minority rights, it also underwrites laws that are firm, hard, unmoving, brutal—guaranteeing justice and equality only when law has been established with total authority. Seeing law as the medium of social relationships is better, Ball argues; law is a time-bound management of and coping with ineradicable features of human life.<sup>119</sup>

While Berman anticipated many of the themes in what we have called the "rhetorical-humanistic" school of law and language, represented by White and Ball, many scholars in this field today rely on literary analysis and critical theory which goes far beyond anything Berman found interesting.<sup>120</sup> What is lacking is the foundation in linguistics that Berman was careful to lay. This has led many critics, including federal Judges Richard Posner and Harry Edwards to question the merit of this school of the law and language movement.<sup>121</sup> The ability of Berman to integrate the meaningful goals of the rhetorical-humanist movement with the scientific basis of contemporary linguistics suggests that there may still be common ground to be found between the economists, linguists, and literary theorists. As Posner himself has suggested, the legal academy cannot do without "the methods of scientific and humanistic inquiry" which "enlarge our knowledge of the legal system" as a whole.<sup>122</sup>

The second contemporary school of law and language that has emerged since Berman's seminal tract of 1964 can be termed the "linguist school." Lawyer-linguists Peter Tiersma and Lawrence Solan are exemplary; they have done much to show the contemporary relevance of linguistics to legal scholarship, especially in a time when textualism is a dominant method of statutory interpretation. Their co-edited *Oxford Handbook of Law and Language* is notable for its breadth of coverage in terms of theory

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<sup>118</sup> Milner S. Ball, *The Promise of American Law: A Theological, Humanistic View of Legal Process* (Athens, GA: University of Georgia Press, 1981), ch. 4.

<sup>119</sup> Milner S. Ball, *Lying Down Together: Law, Metaphor, and Theology* (Madison, WI: University of Wisconsin Press, 1985), chs. 2 & 4.

<sup>120</sup> See, e.g., the diverse and provocative essays in Guyora Binder and Richard Weisberg, *Literary Criticisms of Law* (Princeton: Princeton University Press, 2000).

<sup>121</sup> Richard A. Posner, *Law and Literature*, 3d ed. (Cambridge, MA: Harvard University Press, 2009), 382–85. See also Harry T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession," *Michigan Law Review* 91 (1992): 34–78; Harry T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript," *Michigan Law Review* 91 (1993): 2191–219.

<sup>122</sup> Richard A. Posner, "The Decline of Law as an Autonomous Discipline: 1962–1987," *Harvard Law Review* 100 (1987): 778–79.

and contemporary concrete issues.<sup>123</sup> Solan's two monographs, *The Language of Judges* and *The Language of Statutes* offer expert linguistic analyses of the grammatical canons applied in judicial and statutory reasoning.<sup>124</sup> Solan ultimately concludes that, while linguistic analysis is helpful in some circumstances of legal ambiguity, ultimately, judges and politicians have to make political judgments. Candor about the ultimate ambiguities at the heart of language would be better for the legal system than strained linguistic analysis. Vagueness, indeterminacy, and ambiguity are critical issues for many philosophers of law as well.

Much contemporary work on law and language within the "linguistic school" is done to improve the conduct of trials before juries. The "plain language" movement has been an American echo of Bentham's original cry for clarity in legal vocabulary, later echoed by Mellinkoff. The basic goal of the movement is to form legal language that quickly and easily allows readers to understand and act based on the text; the text should be as simple as the complexity of the ideas permits.<sup>125</sup> According to Mark Adler, plain language is: 1) more precise, 2) less erroneous, 3) less expensive and more efficient, because lawyers do not have to translate legalese for their clients, 4) more persuasive by virtue of being easily understood, 5) more democratic and accessible, and 6) less tedious, more elegant, and more pleasant to use.<sup>126</sup>

This plain language movement goes beyond what Berman called for in *Law and Language*. Yes, Berman did argue that, especially in contexts where laypeople must understand the laws that apply to them, legal language should be clear, and lawyers and judges must work to translate the law into terms that laymen, even children, understand.<sup>127</sup> But Berman, like Milner Ball later on, focused further on the critical role of courtroom liturgy, pageantry, and ornate formal language to underscore the majesty, the justice-making power of the law.<sup>128</sup> Modern legal linguists may disagree with the latter accent. As Gail Stygall notes, courtroom discourse, though highly predictable if understood, is at a distance from ordinary language. This makes the trial itself, as well as the law writ large, incomprehensible to most laypeople. Given the importance of language in legal proceedings, Stygall argues, the trial should be positioned closer to ordinary language, or better explanations of the process should be given to citizens, at the risk of delegitimizing the court.<sup>129</sup> These problems in the courtroom can present problems for Berman's communicative account of law and legal language, if legal

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<sup>123</sup> Peter M. Tiersma and Lawrence M. Solan, eds., *The Oxford Handbook of Language and Law* (Oxford: Oxford University Press, 2012).

<sup>124</sup> Lawrence M. Solan, *The Language of Judges* (Chicago: University of Chicago Press, 1993); id., *The Language of Statutes* (Chicago: University of Chicago Press, 2010).

<sup>125</sup> Mark Adler, "The Plain Language Movement," in Tiersma and Solan, eds., *Oxford Handbook*, 67–68.

<sup>126</sup> *Ibid.*, 71–72.

<sup>127</sup> See Berman, *Law and Language*, chap. 3.

<sup>128</sup> See esp. Berman, *Interaction*, 31–39.

<sup>129</sup> Gail Stygall, "Discourse in the US Courtroom," in *Oxford Handbook*, 369–70.

language actually ends up alienating most of the community, rather than gathering it together and representing its basic norms and mores.

Translation has long been a critical issue for Berman, though he does not include detailed analyses of concrete problems of translation in his *Law and Language*. Nevertheless, Berman's view of law and language, as a communifying practice oriented towards shared experience, has a concrete example in European Union legislators and courts. As these institutional bodies struggle to adopt common legal standards amidst a plurality of languages, modern linguists have wondered whether a common legal language is possible. Shared experience may indeed be a basis for a unified law of the European Union.<sup>130</sup> "Strong" language theorists reject this possibility, but "weak" language theorists, who emphasize the flexibility of language, suggest that language meaning can be shared across tongues and stabilized through common experience and dialogue.<sup>131</sup> The practice of EU legislators—writing without a source language, in a collaborative process of translation across each of the primary languages—is seeking the balance between a hegemony of a single legal language, and an incoherent mess of every European tongue having equal currency.<sup>132</sup>

The EU faces another problem in the development of a new "Court French" among the clerks of the European Court of Justice. As Karen McAuliffe warns, the use of French by the court, coupled with the judicial clerks and law clerks who are not native French speakers, has led to a highly formalized version of "Court French," which obstructs simplicity and creativity, but allows for easy translation of opinions into the 23 official languages of the EU. The lawyer-linguists responsible for translating ECJ law must master two disciplines, since their work is comparative law as much as translation.<sup>133</sup>

Nevertheless, facing this situation, Lawrence Solan is optimistic. Using a theological analogy that may have pleased Berman, Solan suggests that the proliferation of languages in the European Union may end up helping the European Court of Justice discover the meaning of a common legal text by helping the justices "triangulate" the meaning when there is no "original" text. This is an "Augustinian" approach to legal interpretation, as Saint Augustine compared translations of the Bible to ascertain its "true" meaning. If there is a common "original" meaning amidst the various versions, multiple legal texts will help the ECJ ascertain the shades of legal

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<sup>130</sup> Jan Engberg, "Word Meaning and the Problem of a Globalized Legal Order," in *Oxford Handbook*, 176–81.

<sup>131</sup> Michel Bastarache, "Bilingual Interpretation Rules as a Component of Language Rights in Canada," in *Oxford Handbook*, 170ff.

<sup>132</sup> *Ibid.*, 182–85.

<sup>133</sup> Karen McAuliffe, "Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ," in *Oxford Handbook*, 204–12.

meaning in a text. Solan is hopeful that as citizens in the EU have more, common experiences, the divergence in shades of meaning can be overcome.<sup>134</sup>

## Conclusions

Berman understood that he was up to something very new and very controversial in his little volume on *Law and Language*. He was calling for a new understanding of law, language, and history that he thought would bring community and peace to a world torn asunder—by World Wars, the Korean War, the Cold War, and the Vietnam War, by the violent student riots and union strikes at home, by the savage Marxist and critical scholarly attacks on churches, states, and economies, on traditions, canons, and cultures alike. Many at the time would have viewed this argument as a fool's errand. Perhaps that reality, as much as his incessant busyness, was what kept Berman from finishing and publishing this book. "I shall no doubt be scorned or ignored," he confessed to his mentor Rosenstock-Huessy two years after completing the preliminary manuscript of this book.<sup>135</sup> He had the same trepidation ten years later in publishing his equally novel and equally controversial little book, *The Interaction of Law and Religion*. To his last days, he was smarting that his Harvard Law School colleagues just ignored his law and religion book.<sup>136</sup>

*The Interaction of Law and Religion*, however, helped to launch the modern law and religion movement, now embracing several hundred law professors in North America and Europe alone, with dozens of centers, programs, journals, and associations around the world.<sup>137</sup> While Berman's *Law and Language* manuscript, unpublished and largely unknown, obviously did not have the same catalytic and generative effect, the field of law and language studies, and related fields of legal translation and legal interpretation (hermeneutics, semiotics, and philology), have certainly blossomed in the half century since Berman's wrote this early work. At minimum, Berman's little book can be viewed as an interesting artifact, even a missing link, in the evolution of the field of law and language studies. But even more, it can be viewed as a profound prophetic example and call for deep legal scholarship that is at once rigorously interdisciplinary, international, and intercultural in reach and ambition,

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<sup>134</sup> Lawrence M. Solan, "The Interpretation of Multilingual Statutes by the European Court of Justice," *Brooklyn Journal of International Law* 34 (2009): 286–94.

<sup>135</sup> See above note 3. [Ok] Berman loved to quote the old adage of the scholar: "Though my sins be like scarlet, let my works be read."

<sup>136</sup> See Harold J. Berman, "Foreword," to Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella, eds., *Christian Perspectives on Legal Thought* (New Haven, CT: Yale University Press, 2001), xii.

<sup>137</sup> See John Witte, Jr., "The Study of Law and Religion in the United States: An Interim Report," *Ecclesiastical Law Journal* 14 (2012): 327–54.

and that is resolutely directed toward greater understanding of the “weightier matters of the law: justice and mercy and faith.”<sup>138</sup>

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<sup>138</sup> Matthew 23:23. Berman often used this biblical trope. See, e.g., Harold J. Berman, “The Weightier Matters of the Law,” *Address to the Opening of Vermont Law School, 1974*, repr. in *Royalton Review* 9(1 & 2) (1975): 32; id., “The Weightier Matters of the Law,” in Ronald Berman, ed., *Solzhenitsyn at Harvard* (Washington, DC: Ethics and Public Policy Center, 1980), 99–113; id., “The Moral Crisis of the Western Legal Tradition and the Weightier Matters of the Law.”