

ISSUES

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Answering to a Higher Authority: The Life and Legacy of Harold J. Berman

by Matt Sieger

Harold J. Berman, who taught law at Harvard for 37 years and at Emory University for two decades, said that he, like all children, started studying the subject at a very young age.

“Belief in law comes from early childhood,” he said. “A child says, ‘It’s my toy.’ That’s property law. A child says, ‘You promised me.’ That’s contract law. A child says, ‘He hit me first.’ That’s criminal law. A child says, ‘Daddy said I could.’ That’s constitutional law.”¹ *(continued inside)*



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Berman died at age 89 in 2007, a short time after celebrating his 60th anniversary as a law professor. He pioneered the study of law and religion. He is best known for his book, *Law and Revolution: The Formation of the Western Legal Tradition* (1983), of which the *American Political Science Review* said, “This may be the most important book on law in our generation.”² As recently as 2005, *Constitutional Commentary* called Berman’s book “the standard point of departure for work in the field.”³

Berman said it took him 40 years to write *Law and Revolution*. “Of course, I was doing others things as well,” he added.⁴

Born in Hartford, Connecticut, in 1918, Berman graduated from Dartmouth and then earned a master’s degree in history from Yale. He served in the U.S. Army from 1942 to 1945 as a cryptographer, for which he received the Bronze Star Medal. After completing a law degree at Yale, he began his Harvard career in 1948. Harvard requires professors to retire at 70, so at age 67 Berman joined the faculty of Emory Law School and continued teaching there the rest of his life.

Berman’s main contention is that law is a foundational principle of Western society that derives its moral and religious dimension from God as the first lawgiver.

“You can’t have law without beliefs,”⁵ said Berman, who became even more convinced of that principle after a great crisis in his life. In 1939, he was studying legal history at the London School of Economics. “At that time I was a lukewarm believer in Judaism,” he said. “I was, and still am, very conscious and proud of my Jewish heritage.”⁶ In fact, as a boy in school, when his classmates were singing, “Onward Christian Soldiers,” he and some friends changed the lyrics and sang, “Onward Jewish Soldiers!”⁷

Here is his account of his personal crisis in 1939:

To be a scholar is to search for truth. And to search for truth is to be open to the possibility that some

discovered truth will lay claim to one’s allegiance. In my own case, the truth that “set me free” first appeared to me at the outbreak of World War II, when I was twenty-one years old. I was in Europe, where I had been studying European history for a year. While I visited Germany, Hitler announced on the radio that Germany had invaded Poland. It was literally the outbreak of the world war, and many of us fled for France. The stations were crowded with peasants carrying potatoes and animals and personal effects. The earliest train I could catch left at midnight.

I thought that Hitler’s invasion of Poland would lead to the total destruction of human civilization. I felt as one would feel today if all the major powers were to become involved in a full-scale nuclear war. I was shattered—in total despair. There, alone on that train, Jesus Christ appeared to me in a vision. His face reminded me of one of the Russian icons that I would later see—heavily scarred and tragic—not suffering but bearing the marks of having suffered. I suddenly realized that I was not entitled to such despair, that it was not I but another, God himself, who bore the burden of human destiny, and that it was rather for me to believe in him even though human history was at an end.

When the train arrived in Paris early that morning, I walked straight to the Notre Dame cathedral and I prayed a personal prayer to God for the first time in my life. My wife, who is a Protestant, asks me how I could become a believer in Christ without having read the Gospels. My answer is that that is how the first disciples became believers.⁸

That encounter with Jesus never altered his appreciation of his Jewishness. In fact, it may have strengthened it. As

Edward McGlynn Gaffney, Jr., law professor at Valparaiso University, recalls:

To Jews troubled by his acceptance of Jesus, he could offer the reassurance that he was never a supercessionist. He did not imagine that the newness of the covenant into which he entered by becoming a Christian was defined by nullifying the older alliance between the divine and the human called the people of Israel. . . . No bigot could safely utter a word of contempt or scorn for Jews in the presence of this great Christian.⁹

Boris Ossipian first met Berman when he was a visiting lecturer at Moscow State University. Berman invited Ossipian, who now manages a Moscow law firm, to serve as a visiting scholar at Emory University in November 1992. Ossipian's first memories of that visit are invitations to the Berman home to celebrate Thanksgiving, Hanukkah, and Christmas.¹⁰

Berman's newfound faith had a significant impact on his academic work. "God is the Lord of our minds as much as he is the Lord of our 'hearts,'" Berman explained. "Nothing is discovered without his help"¹¹

When the American Center for Law and Justice (ACLJ) invited Berman in 2005 to co-author a brief to the Supreme Court, it was no shot in the dark. The ACLJ wanted Berman because he was a prominent legal historian. The brief in *Van Orden v. Perry* argued that the state of Texas had the constitutional right to display a monument of the Ten Commandments on the grounds of the State Capitol. The high court upheld the constitutionality of the display.

Jay Sekulow, chief counsel of the ACLJ, co-wrote the brief with Berman. Berman wrote the entire first half of the brief. When Sekulow received it, there was no need for any editing.

"You don't want to do any correcting of what Harold

Berman wrote," he explained. Sekulow first met Berman while completing his last year of law school at Emory University.

Sekulow, who like Berman is a Jewish believer in Jesus, explained the basis of the Supreme Court decision: "The fact that the Commandments hold a religious meaning for many does not render them unconstitutional. The Texas decision recognizes the fact that the Commandments have played a vital role in the development of Western law."¹²

In an interview, Berman made it clear that he was not arguing in favor of government establishment of religion. "I'd be outraged," he said, "if someone wanted to place a painting of Jesus' Last Supper in a courthouse."¹³

The courts have used Berman's legal histories to support several judicial writings about church-state relations. In 2003, upholding a Ten Commandments monument outside a Pennsylvania courthouse, a panel of the Third Circuit referenced Berman's statement that English common law, on which American law is based, was founded on the Ten Commandments.¹⁴

Berman's interest in law and religion was frowned upon in his earlier days of teaching.

"I remember asking the Dean of Harvard Law School

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when I was an assistant professor whether we shouldn't have a course in law and Christianity," Berman recalled, "because . . . Christianity had such an important influence on the development of the history of law in the West. And he looked at me and said . . . well, it might be an extra curricular seminar not for credit."¹⁵

But Berman pressed on. In the 1950s the *Oklahoma Law Review* published some of his articles on law and religion. In the late 1960s and early 1970s he began to write more extensively on the subject. The series of lectures he delivered at Boston University in 1973 was published as *The Interaction of Law and Religion*, which laid the foundation for more work in the field.

A college student, John Witte, Jr., wrote to Berman in 1982 to ask whether he should go to Harvard Law School to study with him or do graduate work in law, history or philosophy elsewhere. Berman wrote Witte a warm letter, encouraging him to find a place for his faith in his legal studies. Witte decided to study law at Harvard.

A couple of years after Berman joined the staff at Emory, he recruited his former pupil to join him. Witte now serves as director of Emory's Center for the Study of Law and Religion. "He shaped my work at its

foundations, and I am still building on what he taught me," says Witte. "How could I not be influenced by a man who wrote such sentiments to a youngster he had never met?"¹⁶

Witte was not the only young person impressed by Berman's kindness and humility. Author Kelly Monroe Kullberg tells of her initial encounter with Berman:

With fear and trembling I, then a 28-year-old visiting grad student, "cold call" approached the office of the prodigious scholar Harold Berman at Harvard Law School. I asked him to write for our collection of stories, *Finding God at Harvard*. He couldn't have been kinder to me. He said he'd do his best to write something. He did. It was on the nature of Judeo-Christian versus pagan scholarship.

However, over time the vision for the book became more clearly personal, confessional really—the kind of writing that academicians can find quite difficult. Sheepishly, I hiked over again to Professor Berman's office. He said he'd consider adjusting his essay. A few weeks later a letter and floppy disk arrived in my mailbox. It was postmarked "Harold Berman" and I rejoiced as I read the final two pages of his testimony of escaping Hitler's armies invading Poland, and on that train having such an encounter with Jesus Christ.

I thought, "I'm glad I asked." And I began to show other writers Professor Berman's story, which gave courage to the many other contributors to tell their own, so deeply and honestly. Many of us are grateful for his life, and his powerful testimony in *Finding God at Harvard*.¹⁷

David Bederman, a law professor at Emory University, remembers his colleague this way: "What always impressed me was not just Hal's incredible productivity and brilliance, but his abiding faith and his love of family. So whenever I think of Hal, I picture him with Ruth and their children and grandchildren,



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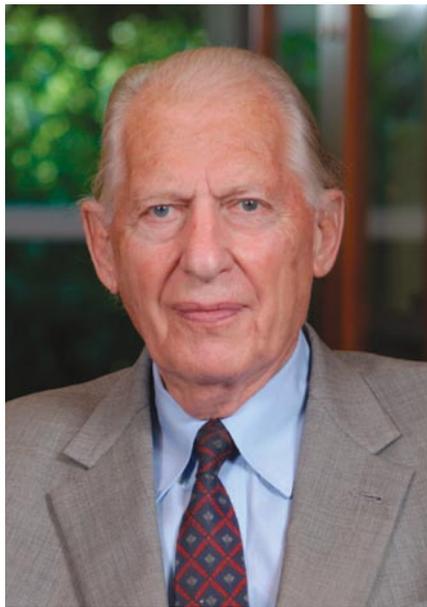
enjoying Sunday brunch together—the apotheosis of a scholarly life balanced with a deep appreciation of what makes life worth living.”¹⁸

Berman took twenty years to complete the second volume of *Law and Revolution*, published in 2004. He planned to write Volume III to cover the American and French Revolutions. At age 88, Berman told an interviewer that he also wanted to write about the Russian Revolution. He said that would probably need to go into a fourth volume.

“There’s a Volume IV?” the interviewer asked in surprise, given Berman’s advanced age.

“I might not have time for it,” Berman admitted regretfully, with a smile. “It’s up to God if he wants to read it or not.”¹⁹

Witte, his friend and colleague at Emory for 22 years, spent time alongside Berman’s hospital bed the week before he died. In between animated conversations, Berman



Harold Berman

would drift off into a nap. Witte describes Berman’s fourth nap on the final day of his visit:

When he fell asleep this time, however, it was different. He lay on his back and slowly a big smile crept over his face. He kept reaching straight up into heaven with both hands, grasping eagerly and mumbling excitedly about what he was seeing. His family and caretakers said he had done the same thing at home the last few days—seeing scrolls in the mirror, then books on the ceiling,

which he sought to reach and to open. When he awoke from this last nap, Hal smiled and said, “I think it’s time for you to go. It will soon be time for me to go, too.” And then, with a big hug, we said our final goodbye.²⁰ ■

Endnotes

1. Meredith Hobbs, “Translating Western Law into Chinese,” June 14, 2006, <http://www.law.emory.edu/home/news-article/article/translating-western-law-into-chinese.html>
2. Douglas Martin, “Harold J. Berman, 89, Who Altered Beliefs About Origins of Western Law, Dies,” November 18, 2007, <http://www.nytimes.com/2007/11/18/us/18berman.html>
3. Ibid.
4. Hobbs, op. cit.
5. Jonathan Ringel, “Law Professor Backs Commandments Displays,” March 2, 2005, <http://www.law.com/jsp/article.jsp?id=1109597703111>
6. Harold J. Berman, “Judeo-Christian Versus Pagan Scholarship,” in *Finding God at Harvard*, edited by Kelly Monroe Kullberg (Intervarsity Press: Downers Grove, IL, 2007), p. 291.
7. W. Cole Durham Jr., “Revivifying the Field of Law and Religion,” *Emory Law Journal*, Volume 57, no. 6, 2008, <http://www.law.emory.edu/fileadmin/journals/elj/57-6/Durham.pdf>
8. Taken from *Finding God at Harvard: Spiritual Journeys of Thinking Christians* by Kelly Monroe Kullberg. Copyright(c) 2007 by Kelly Monroe Kullberg. Used by permission of Intervarsity Press, P.O. Box 1400 Downers Grove, IL 60515. www.ivpress.com
9. Edward McGlynn Gaffney, Jr., “In Memory of an Interactive Pioneer, Harold Joseph Berman (1918–2007),” *Emory Law Journal*, Volume 57, no. 6, 2008, <http://www.law.emory.edu/fileadmin/>

[journals/elj/57-6/Gaffney.pdf](http://www.law.emory.edu/journals/elj/57-6/Gaffney.pdf)

10. Boris Ossipian, “How Professor Harold Joseph Berman Became My Teacher and Friend,” *Emory Law Journal*, Volume 57, no. 6, 2008, <http://www.law.emory.edu/fileadmin/journals/elj/57-6/Ossipian.pdf>
11. Berman, op. cit., pp. 293–294
12. Anonymous, “ACJL: Thousands of Ten Commandments Monuments Stay in Place with Supreme Court Ruling on the Issue,” June 27, 2005, <http://www.aclj.org/News/Read.aspx?id=1684>
13. Ringel, op. cit.
14. Ringel, op. cit.
15. Center for the Study of Law and Religion, Emory University, interview with Harold J. Berman, October 2007, <http://www.law.emory.edu/index.php?id=4577>
16. Ibid.
17. Kelly Monroe Kullberg, personal communication with the author, January 9, 2009.
18. David J. Bederman, “The Customary Law of Hal and Ruth,” *Emory Law Journal*, Volume 57, no. 6, 2008, <http://www.law.emory.edu/fileadmin/journals/elj/57-6/Bederman.pdf>
19. Hobbs, op. cit.
20. John Witte, Jr., “A Tribute to Harold J. Berman,” *Emory Law Journal*, Volume 57, no. 6, 2008, http://www.law.emory.edu/fileadmin/journals/elj/57-6/Witte_2.pdf



THE LAW AND THE TABLETS

by Matt Sieger



How do the interpreters of the law handle the Law these days? A recent case before the Supreme Court regarding free speech concerned a group named Summum, which wanted to post its “Seven Aphorisms” alongside a Ten Commandments monument in a public park in Pleasant Grove, Utah.

Summum Bonum Amen Ra, born Claude Nowell, said he was visited by extraterrestrial beings, inspiring him to found the Church of Summum in 1975. The church, whose rites include sacramental nectar, pyramids and mummies, believes that Moses intended to deliver the Seven Aphorisms to the Hebrew people, but gave them the Ten Commandments instead! A sampling of the Seven Aphorisms reveals this “gem”: “Nothing rests; everything moves; everything vibrates.”

Summum’s attorneys reasoned that its Seven Aphorisms are comparable and complementary to the Ten Commandments, so the city should display them in the park. Jay Sekulow, Chief Counsel for the American Center for Law and Justice, representing the city of Pleasant Grove, responded that a city’s decision regarding what objects to install permanently

is government speech. Therefore, he argued, private parties do not have a First Amendment right to display their message without city approval.

The Berman Connection

A few years earlier, Sekulow filed a brief in a similar case, *Van Orden v. Perry* (2004), in which the Supreme Court considered a



Jay Sekulow

nearly identical Ten Commandments monument displayed on the grounds of the Texas State Capitol. Sekulow co-wrote the brief with the late Harold J. Berman, a law professor at Emory University. Scholars consider Berman the father of the field of law and religion.

Berman argued in the brief that the Ten Commandments are an integral part of Western civilization’s legal heritage. Therefore, he stated, their display by the government is not an endorsement of religion, as they convey primarily a secular message. The Court agreed, ruling that the monument did not violate the establishment clause of the First Amendment.

A Family Squabble

In the case of Summum and the Ten Commandments, you might presume that this would be one of those rare occasions when all Jews could line up on the same side of an issue. But you would be wrong.

The American Jewish Congress (AJC) filed a brief in support of Summum. The Jewish Social Policy Action Network, the Jewish Council for Public Affairs, and the Jewish Alliance for Law and Social Action wrote a brief in support of Pleasant Grove. They argued that the lower court’s ruling in favor of Summum “implies, for example, that if a city displays a Holocaust memorial in a park, it can be compelled to allow a display glorifying the Nazis.”¹ And the American Jewish Committee joined in a brief in support of neither party! All of which goes to prove a Jewish (not a Summum) aphorism: “If you have two Jews, you will have three opinions.”

And what if one of the Jews involved believes in Jesus? Sekulow does, and he presented the oral argument on behalf of Pleasant Grove before the Supreme Court. He has argued several landmark cases before the high court.

Chief Justice John Roberts and Justice Ruth Bader Ginsburg asked Sekulow why the display of the Ten Commandments in the public park is not a government endorsement of religion. Sekulow noted that the Supreme Court building displays a frieze of Moses holding the Ten Commandments with the words written in Hebrew.

“That’s not an endorsement of the religion or of the commandments,” he told the justices. “It’s representative of the history.”²

Attorney Pamela Harris, representing Summum, argued



that the park is a public forum, so everyone should be allowed to have a display. Chief Justice Roberts used Sekulow’s line of reasoning in response:

“How far do you push that?” he asked Harris. “I mean, you have a Statue of Liberty; do we have to have a statue of despotism? Or do we have to put any president who wants to be on Mount Rushmore?”³

Sekulow’s argument won out. In February, the Supreme Court unanimously ruled that the city of Pleasant Grove has the right to reject the Summum display and retain the display of the Ten Commandments.

Changing Times

Early twentieth century Americans commonly acknowledged that the legal system was rooted in Judaic and Christian religious and ethical beliefs. Berman noted with regret that the law has become more fragmented and subjective, geared more to expediency rather than morality.

He observed that natural law theory, which

predominated in the West before the sixteenth century, “identifies law primarily with a morality higher than the state, a morality arising from human nature itself, and especially from our inborn reason and conscience.”⁴

Sir Edward Coke, one of the most eminent jurists in the history of English law, wrote in 1610 that the Law of Nature or Moral Law was “written with the finger of God in the heart of man . . . before that Law was written by Moses, who was the first Reporter or Writer of Law in the world.”⁵

Unchanging Commandments

Are the Ten Commandments an expression of a universal inborn knowledge of right and wrong? Berman writes:

In all religions there are norms concerning respect for parents as well as prohibitions of some types of homicide, some types of stealing, some types of sexual offenses, some types of perjury, and some types of fraud. Thus, it can be said that the last six of the Ten Commandments have counterparts in all known cultures.⁶

Berman says that although we often speak of what law requires of religion, we seldom think about what religion requires of law. He states that the Ten Commandments make “implicit assertions that all human law is founded ultimately on divine law and that the ultimate purpose of human law is to create conditions in which love of God and love of neighbor may flourish.”⁷

If that is true, then we ignore them at our own peril—whether or not they are displayed in your local park.

Endnotes

1. “Brief Amici Curiae of The Jewish Social Policy Action Network, The Jewish Council for Public Affairs and The Jewish Alliance for Law and Social Action in Support of Petitioners,” *Pleasant Grove City v. Summum* (No. 07-665).
2. U.S. Supreme Court, *Pleasant Grove City v. Summum* (No. 07-665), Oral Argument, November 12, 2008.
3. Ibid.
4. Harold J. Berman, “Religious Foundations of Law in the West:

- An Historical Perspective,” *Journal of Law and Religion*, Vol. 1, No. 1 (Summer, 1983), p. 42.
5. Sir Edward Coke, *The Selected Writings and Speeches of Sir Edward Coke*, ed. Steve Sheppard (Indianapolis: Liberty Fund, 2003), Vol. 1.
6. Harold J. Berman, “Law and Logos,” *DePaul Law Review*, Volume 44:143 1994.
7. Ibid.



In The Little Shtetl Of Vaysechvoos

Settling a legal dispute in the shtetl of Vaysechvoos is no easy thing. After all, the czar had made sure that Jews were prohibited from the civil court system, and that was probably a good thing, since what kind of justice would a Jew find in the czar's Russia? But disputes occurred, even in Vaysechvoos, and it was the rabbi who was designated to serve as the judge. The rabbi, of course, is looked upon as one imbued with traits of both wisdom and fairness, and so his decision is "the law."

But what do you do when one of the parties in the dispute is the rabbi himself? And so it was in the story of the missing rabbi. It all started when the parent of one of the rabbi's young students arrived at the synagogue in the middle of the school day, only to find that while the students were busy at their tablets, there was no rabbi in sight.

"Where is the rabbi?" asked Feivel the Tailor of his son. Heshie responded, "Papa, he is out feeding the chickens." "Does he do this every day?" "No Papa, some days he goes out to feed the goat." Well, Feivel was more than a little upset at this news. After all, the rabbi was receiving payment from the parents to educate their sons; no one wanted to have their hard earned kopeks wasted.

The parents tried to reason with the rabbi, but he calmly replied that he would continue to spend part of his students' time feeding the animals. Word soon spread and many of the townspeople of Vaysechvoos got embroiled in the controversy—even though their own sons were grown and it wasn't their kopeks being wasted. Still they felt it their duty to be concerned over whether their rabbi was wasting their neighbors' money in activities that had no bearing on his duty as a teacher and spiritual leader.

Well, the rabbi couldn't settle this dispute, since he was hardly a disinterested party, so another "judge" was needed for this situation. But who?

Shimmon the Butcher was a sensible man and the first to be asked, but he sensibly pointed out he should not be the judge because, after all, he was not without a bias: well-fed animals were very important to his livelihood.

Menachem the Milkman was approached as well, but since a shidduch between his daughter and the rabbi's son was in the making, he would not be an objective party either.

And so it went with Nahum the Tanner and Chaim-Meyer the Bookbinder and Mendel the Merchant. Each had good reason why he would be less than fair in adjudicating this situation and should therefore decline. Finally someone suggested that perhaps the rabbi's brightest pupil, Shmuel, would be the proper choice. After all, although he was only eleven years old, the boy could recite the holy writings from memory and was without guile.

Shmuel did not know the first thing about being a judge, and since he was only a boy, he also didn't know that he could decline—so he was made the temporary judge for this one case. Shmuel listened to the parents who insisted that the rabbi should refrain from other duties while teaching their sons. Then he listened to the rabbi, who in his own defense offered only the following words, "Shmuel, you have been a good student of the holy books. Use them to make your decision."

And the boy took that advice.

The townspeople assembled in the meeting room the next morning. All eyes were on Shmuel, who took a deep breath and then said, "Last night I asked the Almighty for wisdom, and words of the writer of the book of Proverbs came to my mind: 'A righteous man cares for the needs of his animal, but the kindest acts of the wicked are cruel.'

"I know that I am just a boy, but it seems to me that you would want your children taught by someone who is regarded as a righteous person according to the standards of the Almighty. In feeding the animals and caring for their needs, our rabbi daily teaches us by his example how we can be righteous too. That is a good thing . . . isn't it?"

As the rabbi beamed at his student, the townspeople agreed that indeed, it was a good thing. A fair judge had ruled on a righteous rabbi.

Glossary

shidduch: an arranged marriage; a "match."