

Harold Berman

Law and Revolution

Among the authors I read for *The Language of Liberty: A Citizen's Vocabulary* and from whom I learned the most, legal historian Harold Berman stands out. Berman, who died in 2007, was a giant in that field, author of dozens of books and hundreds of articles, as well as an influential teacher at Harvard and Emory for decades.

He is best known for a project he did not complete, but for which he did write two remarkable volumes, *Law and Revolution: The Formation of the Western Legal Tradition* and *Law and Revolution: The Impact of the Protestant Reformations on the Western Legal Tradition*. These were recognized from the time of their publication as extraordinary, magisterial works. They cover the whole of the western legal tradition, from the 11th century to the present. Their scope is balanced by Berman's command of detail, through which he charts the major developments of western law during this wide time frame.

Berman's theme, law and revolution, focuses on the way changes in the law kept pace—or failed to—with developing societies. It was his belief that societies often underwent social, religious, and economic changes while the law, generally conservative in practice, tended to fall behind. As the distance between society and law grows, the discordance becomes unsustainable, until at some point the law lurches forward to catch up in weighty seismic shifts.

Such seismic events have come at crucial moments in western history, in the wake of the Protestant Reformation in 17th century Britain, for instance, or at the time of the French Revolution. And in these upheavals, whole swaths of law might be jettisoned and new codes adopted to bring law into step with dramatically changed societies.

For me, one of the lasting impressions from Berman's work in law and revolution concerns the sheer amount and density of thought that has gone into the building of western law, even into edifices that fell in the law's historical breaks. Consider, for example, the labors of the 11th and 12th century scholars who pored over recently recovered classical legal texts, including the Digests of Justinian. Their work, which lasted generations, involved translating, literally out of Greek and into Latin, but also figuratively from the conceptually classical and pagan into terms that Christian societies could embrace. This was a prodigious work, accomplished through the efforts of hundreds and thousands of scholars, applying all the concentration and logic they could muster. Their studies were near the heart of the new university movement, which saw schools established in Bologna, Paris, Oxford, and elsewhere, which, of course, survive to the present.

There is another quality in Berman's work, alongside the remarkable combination of scope and detail, worth calling attention to. That is a kind of magnanimity in his thought. Berman was inclined to honor the effort to develop the law, despite the inevitable shortcomings that have always resulted. Two examples come to mind. In the first, Berman wrote about the "folk law," as he called it, of pre-medieval, tribal Europe. Among the ancient Teutons, Franks and Goths, the institutions of law were exceedingly primitive, to put it delicately, and embraced, for instance, trial by ordeal and trial by fire. In a dispute over some perceived injustice, right and wrong might be determined by which party could out-slug the other in a fight or which could endure the pain of burning the longest.

This hardly qualifies as justice in our eyes, but Berman refused to dismiss such rites. The tribes, however benighted, were groping toward truth and toward standards by which actions might be judged. They did so honestly and with at least some sense of a transcending order to obey.

It was likewise with a much bigger project within Berman's career, his analysis of the Soviet Union's legal system. Berman knew Russian and made a close study of that system, and though he found it fatally flawed in its founding assumptions, he refused here, as well, to dismiss it as worthless. He made every

effort to understand Soviet law from within its own belief system and saw where it worked as well as where it was arbitrary or unjust.

Berman managed to analyze a system he found profoundly misguided, while treating it with a measure of respect and there is something genuinely decent that. And it is a quality that seems in short supply just now, when hectoring criticism seems so much more the order of the day. If Harold Berman was magnanimous, his example shines in part because our current discourse is so lacking in generosity.

And not only generosity, but perspective. In our own time of political trench warfare, we may be losing sight of long-term dangers to our polity and desperately need a clearer view of our political and constitutional fortunes. Here, given the scope of his studies, Berman's work is of enormous value. And he, for what it is worth, thought we were due for one of the seismic shifts he made it his business to understand.

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