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The Early Harold Berman On »Public Opinion«

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Among exemplary thinkers of high intellectual standing and a broad and continuing academic and cultural outreach, few reveal their genius as early as age twenty. The twenty-year-old Friedrich Schleiermacher, the greatest Protestant theologian of the nineteenth century, wrote a short commentary on the ethics of Aristotle, in which – in a ground-breaking fashion – he connected ethical and theological thinking with basic thoughts on a theory of feeling and a theory of communication, thereby providing an alternative to Aristotelian and Kantian modes of thought. He generated a new way of thinking – even ten years before his famous »Reden über Religion« – which inspired twentieth-century hermeneutical thought from Dilthey to Gadamer and beyond.¹ At age twenty, Dietrich Bonhoeffer, probably the German theologian with the greatest radiance worldwide in the twentieth century, wrote a doctoral dissertation titled »Sanctorum Communio: A Theological Study of the Sociology of the Church,« which is still one of most stimulating texts in ecclesiology.² In May 1938, the twenty-year-old Harold Berman handed in a 284-page college thesis at Dartmouth College, Hanover, New Hampshire, entitled »Public Opinion,« a work that clearly displays all the signs of a young genius.³

Berman acknowledges his deep indebtedness to his teacher »for the past two years« (V), Eugen Rosenstock-Huussy, a brilliant historian and social philosopher. His teaching and his work »The Multifariousness of Man«⁴ as well as Edmund Burke's »Reflections on the French Revolution,«⁵ Alexis de Tocqueville's »Democracy in America,«⁶ and Waldo David Frank's books »Our America«⁷ and »Rediscovery of America«⁸ decisively formed Berman's thought. »The impact of these writings gave

me my vocabulary, and shaped the viewpoint through which the books of the other men to whom I am indebted were filtered. The spirit of these four men is in all four chapters of the thesis« (279).

The thesis starts with the diagnosis of a deep crisis of public opinion, revealed by its overt vulnerability to ideologies after the World War. It contrasts opinion, conviction and spirit (»a word that has almost gone out of use since the advent of the Age of Reason ... a deep-seated feeling that animates or inspires the individual or the group – as opposed to an opinion, which the individual forms and can change at any time«) (7). The thesis sets out to contrast »Public Spirit and Public Opinion« in history and in contemporary America (31 ff.). Its brilliance becomes obvious in chapters II and III, when the young author turns to a complex analysis of the role of the media and the press (II) and the »public spirit and the judiciary« (III).

In part II he reconstructs the development of the »modern newspaper« since the seventeenth century in England (first for military purposes) and characterizes »three Eras of Journalism in America«: the party press, the personal press, and the corporate press. He describes the moral and political loadedness of what is regarded as »the news« and the »praise and blame« strategies involved (105 ff.). In his day he sees the emergence of a »group press,« connected already with the challenges of global resonance and keeping the reader's interest and loyalty. Part III starts with a view on the dangerous developments in Germany and Italy in his days and the prophetic vision: »When law becomes arbitrary ... government becomes despotic, and you can be sure there will be revolution«

1 SCHLEIERMACHER (1788); it only became accessible in print as late as 1984 in SCHLEIERMACHER (1984); see the first pages for the decisive arguments; cf. WELKER (1999).

2 BONHOEFFER (2009); cf. »Bonhoeffer's wegweisende frühe Ekklesiologie,« in WELKER (2009) 83–102.

3 The text is not published, but is part of *The Collected Writings of Harold J. Berman: Essays, Articles, and Unpub-*

lished Manuscripts (1938–2008), Volume 1 (1938–1948), Harold J. Berman Library, Center for the Study of Law and Religion, Emory University. The original title in 1938 may have been *The Place of Public Opinion in the New Society*. For a summary of the perspectives of the later Harold Berman on the issues already present in his thesis, see BERMAN (2003b), especially the chapter »Toward an Integrative

Jurisprudence: Politics, Morality, and History in the Concept of Law,« reprinted in WELKER/ETZELMÜLLER (eds.) (2013). See also the Symposium, »In Praise of a Legal Polymath« (2008); especially ALEXANDER (2008).

4 1936, ROSENSTOCK-HUUSY (2000).

5 BURKE (2009).

6 TOCQUEVILLE (2002).

7 1923, FRANK (2012).

8 1929, FRANK (2006).

(143). A healthy constitution should learn from English Common Law and the French »Rights of Natural Man.« Common Law, which for him »symbolizes the Public Spirit of a nation« (152), is broadly reflected in its contemporary American version and illustrated with respect to several specific cases. He clearly states: »All the law is judge-made law« (191). Therefore, the endangerment by all sorts of distortions and corruptions can lead to the »Collapse of Public Spirit« (206, cf. 206 ff.). Berman asks for »The Future of the Common Law,« which on a global level is meant to work on taming the spirit of nationalism, which »today involves war and destruction only« (213). But it also has to develop an alternative to »the spirit of individualism.«

In the last chapter, which makes frequent use of the term »revolution,« Berman comes close to developing a theory of a global »civil society.« As a basic reference point he uses the multitude of »social groups« in each society. This multitude of social groups needs what one might term »moral markets,« a moral texture and a moral fluidity, but it also needs trust in the shaping power of the law. »Each group must have an ideology, a rationale, a Public Opinion. It must have a newspaper. It must face problems from its own particular standpoint. Yet its ideology must be short-lived: its faith, its morale, its Public Spirit must be strong enough to enable it to change its principles with changing conditions. It must have complete confidence in its judiciary and its growing Common Law« (258 f.).

The burning question is: How can the stability and fluidity of group morale be balanced and reconciled? On the one hand Berman envisions the cultivation of a normative Public Spirit, which is, in an almost naïve-Hegelian perspective, an »expression of the Public Spirit of the world as a whole« (260). On the other hand, he sees the need to strengthen the individual persons in the obligations that they have to belong to many groups in their lifetimes and to integrate many social expectations, professional duties and lifestyles. He brilliantly asks for a differentiation between problematic individualism and badly needed concepts of privacy and personality. He asks for the organiza-

tion of societies into groups that can protect the »functional and spiritual personality« (261). And he constantly warns against the danger of a totalitarian state. This leads him to search for the protection of society by elites governed by common law (cf. 264 and often).

The young Berman writes at a time that has not yet seen the full extent of demonic Fascist dictatorship. He thus concludes with a partly brilliant and partly dangerous vision: A future society with a stable and fruitful Public Spirit »must allow for the continuity of tradition inherent in hereditary monarchy, the common spiritual values fostered by constitutional aristocracy, the freedom to expand and conquer offered by democratic individualism, the central power and efficiency obtained under totalitarian dictatorship« (265). Convinced that »the masses cry out to be organized« (271), he asks for *an alliance of elites governed by faith and by common law*. He refers to Harold J. Laski,⁹ »who is perhaps the most famous political scientists of the day.« Laski had set out »to build a world order and an elite on the basis of rationalism and individualism« (266). But now his affirmation of individualism and pluralism has been absorbed and is moving into communism, into the belief »in national socialization of industry« (266). Over against this trust in the united forces of politics and economy, the young Berman appeals already to the mutually critical combined powers of faith and the common law, both cultivated by responsible elites.

To support his belief in the fruitful combination of the spiritual powers of law and religion, he finally draws on imaginations of the poet Walt Whitman and on Waldo Frank's conclusion in »Our America«: »We must begin to generate within ourselves the energy which is love of life. For that energy, to whatever form the mind consign it, is religious. Its act is creation. And in the dying world, creation is revolution« (277).¹⁰ It is here already that we can listen to a cantus firmus in the scholarly work of Berman's life. ■

9 1935, LASKI (2008).

10 For Harold Berman's mature view in this area see BERMAN (1974), but also his main works BERMAN (1983) and

BERMAN (2003); cf. also WITTE (2006), Introduction, especially 4 ff.

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