

REVIEW ESSAY

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Durable Goods: A Covenantal Ethic for Management and Employees

Stewart Herman

(Notre Dame, Ind.: University of Notre Dame Press, 1997)

Perhaps no area of American economic life is as fraught with tension as are employee-management relations. In many ways, acrimony between management and employees has become a way of life in the industrial age. To resolve such conflicts, in his book *Durable Goods*, Stewart Herman attempts to develop a Christian ethical theory rooted in a conception of biblical covenants. While it is an interesting and valiant effort, it ultimately falls short of providing a solution to this intractable condition. In discussing this work, I will first describe Herman's argument and then offer criticism, from both within and outside the theory he constructs.

Based on the following account, Herman's theory may seem unconventional—it is—but the description that follows is an attempt to render his argument as accurately as possible. Herman, Professor at Concordia College, combines what he calls "Christian realism" with an interpretive approach to develop a "covenantal ethic." He derives the notion of a covenant from the Bible. Finding evidence for covenants in the Old and New Testaments, he explains that "a biblical covenant is generally understood to be similar to a contract in that it is an implicit or explicit agreement with some specified stipulations, such as the covenant at Mount Sinai."¹ On Herman's reading, two types of covenants, each of which represents a struggle between God and "the people in the Old and New Testaments," emerged over the course of this history.²

The first type of covenant resulted from efforts by God and the Israelites to fulfill certain needs. Through this type of covenant, God sought to fulfill his "goal" of fashioning "the people of Israel, and later the church, into a moral community faithful to this one God alone."³ As a consequence of this decision, God made Himself "vulnerable to the failure of the people to respond appropriately."⁴ The people, in turn, covenanted with God to gain deliverance from the

"vicissitudes" of "slavery, hunger, thirst, invasions," and the like.⁵ The second type of covenant Herman considers involved the "durable struggle between God and God's people to shape the action and character of each other."⁶ This struggle arose from the fact that the biblical authors portrayed each side in the struggle as bearing a unique spirit and having a will to "pursue and realize intentions, even in the face of resistance."⁷

The historical covenants Herman describes were not isolated phenomena. He finds that covenants manifested themselves throughout biblical history—from the time of the patriarchs through Roman occupation during New Testament times. That history, according to Herman, shows that "God is understood anthropomorphically" and as "an intentional being."⁸ In addition, he claims that this theory implicitly shows that biblical writers understood that "divine tactics are answered by human tactics, while human tactics are answered by divine tactics."⁹ He maintains that the Old Testament conveys a dynamic relationship in which the people both test and question God and repent and sacrifice before God. The New Testament changed this understanding; God is portrayed as "fulfilling covenantal promises unilaterally."¹⁰ Contrary to the give-and-take relations described in the Old Testament, believers in the New Testament were capable of influencing God only through "prayer and right action."¹¹ While the notion of God having engaged in negotiations with human beings might seem strange, Herman contends that the Bible reveals God as having made a durable commitment "not to destroy the world" or "let Israel wither away" despite the sometimes contentious nature of their relations.¹² For the covenants to have persisted, Herman argues, God employed a range of tactics, everything from punishment to instruction. God expected loyalty from his people while holding them to "a high standard of love, justice and fidelity in their relations with each other."¹³ What lessons are we to draw from this expansive history? According to Herman, it is significant because it portrays God and his people as resorting to an array of tactics and strategies in working through and struggling within the context of their covenantal relations.

What then does Herman's biblical exegesis have to do with contemporary employee-management struggles? Herman acknowledges that the "parallel cannot be pushed too far" but that "the way that God copes with the enduring contingency presented by God's people serves as a guide for the way management and employees ought to cope with the contingencies presented by each other."¹⁴ In other words, as God and the Israelites struggled in their covenantal relationships, so labor and management struggle today, even after they have begun to establish their own covenants. Moving from this observation, Herman surveys the last two hundred years of management-employee relations. In these chapters, Herman covers a whole panoply of events ranging from the Haymarket riots to the GM Saturn experiment. Rather than a continuum of increasing understanding and harmony, Herman illustrates how diverse tactics—everything from violence to worker democracy—have proceeded through a series of fits

and starts, overtures and rebuffs. He argues that when labor history is "viewed through the lens afforded by the biblical history, the rudiments of covenant making (and covenant breaking) become visible—not simply as a matter of aspiration but as a matter of fact."¹⁵ Through his description of positive developments in this history, such as collective bargaining, Herman discovers evidence, albeit in embryonic form, for increased understanding:

Out of this struggle, durable goods have emerged; these goods express, however tentatively, the lovingkindness and justice mandated by the biblical prophets.¹⁶

Note that Herman uses the term "lovingkindness" throughout the book but does not explain it. The Oxford Universal Dictionary defines it as "affectionate and tender consideration." Putting aside terminology, Herman's descriptive point is not that management-employee relationships are harmonious today but that *some basis* for a covenantal relation has emerged, however thin it might be. Herman analogizes the management-employee covenants of today to the covenants of the Bible. He bases this approach on the belief that for "the idea of covenant to have normative power, it must be shown to have a descriptive basis."¹⁷ Herman reasons that for something to be an "ought," it must at least be possible for it to *be*.

The numerous flaws in Herman's argument break down into roughly three categories. First, in the vocabulary and methodology he uses, second, in the assumptions he makes, and third, in the theoretical and practical implications of the theory. A discussion of each follows.

Herman's position rests on an exclusive treatment of the employee and management relation. While isolating these constructs from the broader social, cultural, economic, and legal contexts in which they arise might present problems, it is not my complaint here. A more fundamental problem, one that is of critical importance to normative ethics, arises from his failure to distinguish between management and employees on a conceptual level. At first glance, this oversight might seem reasonable, as they represent commonly understood terms, and as readers, we can suspend criticism to afford a writer the opportunity to make a larger, theoretical point. Yet as will be clarified later, Herman believes that, taken as unitary concepts, management and employees may claim the benefit of certain moral positions vis-à-vis the other party. Specifically, without defining what management actually *is*, he claims that it is entitled to certain property rights that employees must respect. Management, he explains, derives a "managerial prerogative" from "its right to private property."¹⁸ Without argument, he explains that "the ongoing legitimacy of private property and managerial prerogative as institutions rests on their enormous utilitarian value."¹⁹ Not only does he fail to justify any of these claims, he offers no explanation of where utilitarianism fits within the Christian ethical theory he advances. More problematically, by investing management with property rights over the corporation, he rewrites corporation law. Typical state corporate law in the U.S. holds that management runs the corporation on behalf of the board of directors.²⁰ The board,

in turn, oversees the corporation, including management and employees. By choosing to concentrate on *management* as a shorthand for the board of directors (to which he never refers) Herman begs the whole separation of ownership and control question, not to mention the implications of stakeholder theories and laws.

His use of the term *covenant* fares slightly better. Although he articulates a sense of what covenant means by considering biblical sources, the extrapolation of this concept from such narrative texts adds a smidgen of imprecision to his analysis. Put differently, it's a somewhat fuzzy notion. One need not be a proponent of logical positivism to see that the vagueness of the concept of covenant makes his conclusions—namely, that a covenantal relation has begun to take a foothold in modern America—easier to draw.

Putting aside these conceptual confusions, Herman rests his theory on a number of dubious assumptions and methodologies. The first, in which he reads the Bible literally and considers God anthropomorphically, casts doubt on the usefulness of his central analogy. It is also quite a difficult point to grant. Making such a leap would not be overly troublesome, were Herman not attempting to derive so much from his analysis of “the strategy of God in building covenants,”²¹ for example. Herman argues that to analyze the employment relation today, we must determine God's strategy once again. It is his use of the term *strategy* that highlights the extent to which he considers God as having anthropomorphic attributes. As a methodology, this approach seems questionable. Many theologians opt for non-literal readings of the Bible and consider biblical stories to be parables or heuristic in nature. Unfortunately, Herman does not consider such stories examples, and tries to derive too much from them to support his central claims.

A somewhat different assumption he makes involves the relative weight of management and employee interests. Herman argues that employees and management each have conflicting moral claims that “are deeply grounded and enjoy considerable moral worth.”²² As noted earlier, management has a moral interest in the corporation's property, according to Herman. For the sake of this discussion, I will grant Herman's point that management deserves such moral consideration. Employees, for their part, have asserted a countervailing moral interest in “self-representation,” he argues. Herman contends that the trick is to balance these moral principles. Balancing them requires “justice in a covenantal sense.”²³

Herman arrives at this point through a series of assumptions and conclusionary statements derived in the course of his analysis of U.S. labor history. That history, he reasons, shows that both labor and management have acted fairly and unfairly toward each other. From that fact, he argues that each side's position deserves equal moral consideration. Yet Herman rests that conclusion on the flawed assumption that labor and management hold equal power. To the contrary, in a country that adheres to the “employment-at-will” doctrine, I would argue that employees are at a severe disadvantage vis-à-vis management. Anyone who has ever been engaged in litigation of employment disputes or labor

negotiations understands this imbalance of power. Moreover, attempting to weigh the moral principles Herman articulates seems much more difficult to do than evaluating the relative strength of employee and management bargaining positions, for instance. From the tone and approach of this work, however, it seems that what he really wants is for the two parties to treat each other fairly. Fairness can most likely be achieved either by equalizing the resources and bargaining power of the two sides, or by ensuring that certain procedures are followed in negotiations. Weighing the questionable moral principles Herman posits seems much more speculative.

From this analysis of labor history, Herman concludes that a covenantal relationship has sprouted. While I think Herman makes somewhat excessive claims regarding what this history means, the problem is more deep-seated. It consists of the way in which Herman sees this covenantal relation as having developed. The crucial basis for such a relation manifesting itself in American business is law. He writes:

The internalized restraint mandated by collective bargaining and labor contracts needs to be seen as the template for asserting and enlarging the commitments by both parties to each other, rather than as a legalistic obstacle to the kind of justice and lovingkindness which are the hallmarks of covenantal relations fully flowered.²⁴

In other words, without the support of a legal framework, the covenantal relation he favors would not have developed. Similarly, he remarks that “during the 1930s and 1940s, collective bargaining was an important crude step, for management and employees to begin to trade external coercion for internalized restraint.”²⁵ The question raised by this position is whether law itself is the answer, rather than the amorphous notion of a covenantal relation. Moreover, Herman notes that in many cases in which either management or employees have acted unfairly, the law has fixed itself. After discussing the supposed unfairness of the sit-down strike, for instance, Herman notes that “[n]ot surprisingly, sit-down strikes were outlawed by the Supreme Court in 1939.”²⁶ Herman is correct in suggesting that law suffers from shortcomings—the gap between procedural versus substantive equality is one—but when weighed against the somewhat vague notion of the covenantal relation, law seems the better alternative.

What does this notion of a covenant mean, and how would it work? In terms of what it means, Herman suggests that it is a basis for establishing “lovingkindness and justice” between management and employees. Certainly these are admirable goals. Yet as a proponent of “Christian realism” Herman is not so glib. That is, he recognizes that management and employees will continue to struggle and negotiate to construct their relationships. Rather than seeking to eliminate such negotiations, Herman hopes the two sides can conduct themselves fairly and work in a spirit of cooperation. To appropriate Ockham's razor, it seems reasonable to ask whether the notion of the covenant he describes really requires anything more than *good faith* in bargaining. Most of us would agree

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that some element of good faith is needed in negotiating, for both practical and moral reasons. In this book, however, Herman seems to have spun a rather elaborate explanation for what appears to be a rather straightforward point.

At the same time as Herman's theory promotes rather unremarkable goals, it suffers from certain utopian aspirations. In recounting the sordid history of employee-management relations over two hundred years, Herman shows that conflict is as much, if not more, frequent than cooperation. He notes that "[i]f the business history of the past two hundred years is a reliable guide, the current frenzy of enthusiasm for cooperation and employee self-management will subside."²⁷ Indeed it may. But if the outlook for such cooperative ventures is so shaky, then what makes Herman think "lovingkindness" can really achieve permanency in a capitalist system? To the extent that he views the covenantal relation as a solution to this intractable situation—I, for one, think that conflict is inherent to the situation and that law must set boundaries—Herman seems utopian, or at least, Pollyannish.

The notion of the covenantal relation Herman propounds is also Hobbesian. It's the world of the Chicago School of economics. He argues implicitly that the free market is an overarching goal, which requires employees to scale back their expectations against the demands of the free market. Confronted by the reality that employees are more insecure in today's economy, Herman remarks that "[e]xpectations need to be negotiated."²⁸ Moreover, he does not define any limitations as to what can and cannot be the proper subject of bargaining. On the face of his argument, management and employees are free to covenant even if such arrangement were to involve human rights violations. Would it violate the covenantal relation for employees to negotiate freely a wage below what is required for their basic needs? What if such below subsistence wage was the best they could hope to earn? To be fair, one could argue that implicit in the substantive notion of "lovingkindness" arising from the covenantal relation, is a sense of respect for human rights. Yet to the extent that Herman contends free market pressures will require employees to reduce their expectations, complications arise. Herman needs to explain what the threshold is, and when the human rights of employees will trump economic realities. The fact that "lovingkindness" is neither defined alone nor in reference to the covenantal relation, makes it difficult to untangle these confusions.

In attempting to straddle the conflicting demands of morality and the market, Herman has stumbled over a flaw inherent in many business ethics tracts. Like many business ethicists, he assumes the moral grounds of the free market economy, while offering little in terms of a more global theory on which to base such assumption. Scrambling to find some foundations upon which to justify his adherence to the free market, he reaches wide and far. He writes, "[t]he sanctity of private property historically rests upon the social-contract theory of John Locke which informed interpretations of Anglo-American law."²⁹ Alternatively, he states that "no denominational strands of U.S. Christianity are willing to abandon the right to private property, however much they might qualify it" as grounds to

support such right and the free market generally.³⁰ That it might be financial suicide for organized religion to take such criticisms too far goes unstated. Yet this dubious argument is not even justified by the sources Herman cites. Digging into the endnote supporting these claims uncovers near sophistic logic buried underneath.

The United Church of Christ in a statement . . . in the 1980s does not include property among basic human rights, but acknowledges the enviable productivity of corporations and presses for economic democracy, which implies some legitimization of property rights as control over economic resources. [emphasis added]³¹

Rather than a clarion call for management's right to private property, to the writer "economic democracy" suggests socialism, or, at a minimum, some form of worker democracy. In sum, Herman's argument that Christianity supports corporate managers' property rights, even if accurate in terms of the views of conventional organized religions, seems inconsistent with the New Testament the source for his theory.

Apart from these theoretical problems, Herman's position faces numerous practical hurdles. For one, it is not clear what we are to do with this theory. We all want harmonious employee-management relations, but how should we apply the covenantal relation? Should we demand legislation to create boundaries within which covenantal relations can flourish? Do we simply show management and employees the way by recounting the history Herman discusses? He doesn't say. Without being overly cynical, Richard Posner's recent writing on the irrelevance of moral philosophy to our practical moral thinking, seems *apropos* to this situation.

There is also a problem of scale, which he does not address. As anyone who has worked in a small family business or close corporation can attest, relations can become quite intimate in such situations. Friendships develop and lives are shaped around a business. In some of these firms, the ideal of "lovingkindness" Herman envisions is present. Yet the "strong form of industrial love" that Herman proposes seems uniquely possible in such smaller firms. With firms employing hundreds, or even thousands, of employees, creating a loving environment is more challenging. Indeed, it becomes difficult to see what it would involve in such situations. The fact that Herman does not dispute the need for "one party to reduce, unilaterally, the expectations of another" given the exigencies of doing business in a free market economy suggests that larger firms may have greater priorities than creating the vast internal machinery necessary to make every employee feel loved. To the employees in such larger firms, the need for an employer's love may be of lesser importance than the need to earn a decent living in a reasonably pleasant environment.

The final practical problem I will consider involves, what one might call marketing considerations. Herman's idea of a covenantal relation might be a worthy ideal, but selling it to corporate managers or boards of directors might be a Herculean task. Can you picture yourself sitting down with "Chainsaw" A

Dunlop to explain that, like Yahweh with the Israelites, he needs to enter a covenantal relation with his employees? Facetiousness aside, it might be easier to opt for a secular formulation of this ethic, before pushing for corporate acceptance.

Which leads to my last point about the usefulness of this endeavor at all. Is Christianity a useful source for articulating a business ethic? For one, biblical sources for the most part are not codes or even systematic attempts to articulate rules. While arguably richer and of greater practical value than mere normative commands, given the Bible's reliance on stories, parables, and allegories, wide variations in interpretation may occur. As a moral philosopher or business ethicist, it is difficult to separate the relevant from the irrelevant in such texts. The complexities of the issues involved in today's business world—one searches in vain for a biblical discussion of greenmail, for instance—renders the Scriptures of questionable utility for normative ethics. In addition, since many people in the U.S., not to mention the world, do not share the same religious beliefs, a secular approach may be far more palatable to a much wider audience. Herman notes that “[p]rofessing Christians on both sides need to believe that God wants them to overcome” the divisions that separate employees and management.³³ With this quote, offered in conclusion, Herman suggests that he is quite literally preaching to the converted. It's not that I reject Herman's aim of developing more harmonious employee-management relations, nor do I object to finding a basis for business ethics within Christianity. I do, however, think that if Herman is seeking to write for a philosophical audience, he should consider adopting a different approach. But that, of course, is my own bias.

Notes

¹Stewart Herman, *Durable Goods: A Covenantal Ethic for Management and Employees* (Notre Dame University Press, 1997), p. 44.

²Ibid.

³Ibid., p. 45.

⁴Ibid.

⁵Ibid.

⁶Ibid., p. 46.

⁷Ibid.

⁸Ibid., p. 43.

⁹Ibid., p. 49.

¹⁰Ibid.

¹¹Ibid.

¹²Ibid., p. 50.

¹³Ibid.

¹⁴Ibid., p. 55.

¹⁷Ibid.

¹⁸Ibid., p. 80.

¹⁹Ibid.

²⁰See, e.g., Delaware General Corporate Law, Sec. 141.

²¹Herman, p. 129.

²²Ibid., p. 80.

²³Ibid., p. 81.

²⁴Ibid., p. 133.

²⁵Ibid., p. 129.

²⁶Ibid., p. 116.

²⁷Ibid., p. 175.

²⁸Ibid., p. 143.

²⁹Ibid., p. 80.

³⁰Ibid., p. 81.

³¹Ibid., p. 216 n.7.

³²Richard Posner, *The Problems of Moral and Legal Theory* (Cambridge: University Press, 1999).

³³Herman, p. 199.