

THE CUSTOMARY LAW OF HAL AND RUTH

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Harold J. Berman was a giant among scholars, a kind and gracious colleague, and a committed proponent of the values of global legal education and justice. Others can pay more suitable homage and tribute to his enormous and everlasting contributions to the fields of Soviet (and now Russian) jurisprudence, law and religion, and legal history. I would like, instead, to memorialize his endeavors in the disparate fields of public and private international law and their relationship to the sources of law in contemporary legal traditions. Hal's approach to these subjects quite literally changed the way I that profess and teach in these areas¹ and will, I firmly believe, revolutionize our understanding of globalizing legal trends, ushering in a new era of world law.²

My most vivid memory of collaborating with Hal was when we co-taught a one-credit-hour course on customary law. We instructed it together on four occasions during the late 1990s and drew a packed audience of Emory Law students. The course unfolded over seven two-hour lectures and tried to answer a deceptively simple question: Is all law ultimately derived from legislation or administration or adjudication, or is it also formed from the informal usages and understandings that are considered to be legally binding by those who practice or share them? Traditionally, such binding usages and practices have been called "customary law." But one peculiarity of the modern law school curriculum is that we do not give much reflection now to the sources of law in contemporary legal culture,³ and law students reflexively assume that all law must be derived from a legislature passing statutes or judges deciding cases. In short, we implicitly train law students from virtually their very first day of studies that law is a "top down" social construct, an

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¹ As just one example, Hal's work profoundly influenced the theoretical construct for my forthcoming volume, *GLOBALIZATION AND INTERNATIONAL LAW* (forthcoming 2008).

² See Harold J. Berman, *World Law*, 18 *FORDHAM INT'L L.J.* 1617 (1995), where, in six pages of elegant and passionate prose, Hal outlined his vision of a new global legal order.

³ One exception is Emory's first-year, first-semester course Legal Methods, a curricular project that Hal championed. See also Harold J. Berman et al., *THE NATURE AND FUNCTIONS OF LAW: AN INTRODUCTION FOR STUDENTS OF THE ARTS AND SCIENCES* (5th ed. 1996) (1958) (carefully considering the sources of law).

Austinian vision of authoritative commands. Hal's insight for a course on customary law was to serve as an antidote to this assumption, to remind law students (as future lawyers and leaders) that law is as much made from the "bottom up" by relevant communities.

The customary law course surveyed the subject historically and comparatively, with material derived from anthropology and sociology (such as the law used by pre-literate peoples) and legal history (especially the origins and evolution of the Western legal tradition and the English common law). But the parts of the course that drew the most excitement (and epiphanies) from the students were the discussions of the use of custom in contemporary American tort, property, commercial, and even constitutional law. When students realized that custom was all around us as lawyers (whether trade usages in the Uniform Commercial Code,⁴ or industry practices as establishing a standard of care,⁵ or in separation of powers disputes⁶) it became easier to accept its role in contemporary legal practice. This was especially so after Hal's set of lectures on international commercial custom—the *lex mercatoria*—for millennia used by global communities of merchants to regulate such aspects of trade as the content of bills of lading and cargo insurance (for ocean transport), letters of credit, and other forms of international documentary transactions. Hal's scholarship in this area was extensive⁷ and immensely influential in his thinking about the contours of world law.

There is a central set of paradoxes for customary law, and students were quick to recognize and exploit these paradoxes in their questions and discussion: Isn't there something more that makes a community practice into a binding custom? Customs can be both good and evil; how does one distinguish between them? Is a custom binding even before it has been recognized by a court or legislature? In response, Hal told a simple story, one that says much about him as a clever teacher, an insightful scholar, and as a

⁴ See U.C.C. §§ 1-103, 1-205 (2004) (recognizing industry customs and trade usages).

⁵ See *The T.J. Hooper*, 53 F.2d 107 (S.D.N.Y. 1931), *aff'd*, 60 F.2d 737 (2d Cir. 1932) (industry practice of using radios as evidence of seaworthiness).

⁶ See *Dames & Moore v. Regan*, 453 U.S. 654, 678–83 (1981) (using evidence of long-standing practice and inter-branch acquiescence to sustain a presidential exercise of power).

⁷ See Harold J. Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 LAW & CONTEMP. PROBS. 354 (1965); Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISP. RESOL. 235 (1988); Harold J. Berman & Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy*, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 21 (Thomas E. Carbonneau ed., rev. ed. 1998).

devoted family man. As we all know, Hal was married to Ruth for sixty-six years before he passed away. According to Hal, every Sunday for those sixty-six years, Hal would prepare a brunch for Ruth (provided they weren't traveling away from home). By any measure of consistency ("every Sunday") and duration (sixty-six years), this was an established usage and practice of a particular community—the Berman household. But, Hal asked the class (with an inevitable grin and accompanying laughter from the students), is this a binding custom? What if, Hal mused, one Sunday morning he just didn't feel like making brunch, or (in a fit of pique) he was angry with Ruth and wanted to withhold a meal? Could Ruth sue him for specific performance? Had an informal usage ripened into a legally-binding custom?

We never, of course, reached a resolution on this simple example, freighted with great wisdom. As with many of the central jurisprudential problems that Hal wrestled with over his exemplary career, he left us with memorable—and powerful—insights. 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, enjoying Sunday brunch together—the apotheosis of a scholarly life balanced with a deep appreciation of what makes life worth living.

