

2007

Tribute to Bernard Meltzer

Richard A. Epstein

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

 Part of the [Law Commons](#)

Recommended Citation

Richard A. Epstein, "Tribute to Bernard Meltzer," 74 University of Chicago Law Review 427 (2007).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Richard A. Epstein†

It is always appropriate to write in celebration of any person who has lived a long, rich, and successful life. But undertaking that task is frequently tinged with one small note of regret. Too often the author is not old enough to have had the great fortune to know his subject in his prime.

It is therefore with some trepidation that I approach writing a tribute in memory of Bernard M. Meltzer, my friend and colleague for the past thirty-five years, who passed away this past January 4, 2007. Bernie was blessed with over ninety-two years of life, over sixty of which he shared a storybook marriage with his wife Jean and with their three children, Joan, Danny, and Susan. When I arrived at the University of Chicago Law School as a relative cub in the fall of 1972, Bernie was already fifty-seven years old, nearly twice my twenty-nine years of age. Clearly we were not of the same generation. Obviously, I never had the privilege to see Bernie in action when he first entered teaching in January 1946. I was fortunate enough, however, to get an unanticipated sense of the character of the early Bernie at the Revels Dinner held at the Quadrangle Club in April 2006 in honor of Bernie and Jean for their long and distinguished service to the Hyde Park community. The walls of the club were bedecked with a number of pictures spanning their life together, one of which was a perfect period piece of the two of them having dinner, Jean told me, at the now-defunct restaurant Yar in Chicago just after their engagement in December 1946. My wife Eileen and I stared at that picture for some time because we were struck by how vigorous and in love they were at the time of their marriage. Even then it was manifestly a match for the ages.

I picked up the thread with Bernie and Jean over twenty-five years later, and I do remember those early encounters well. He and Jean took it upon themselves to entertain Eileen and me for dinner on many occasions, at which Bernie showed much personal warmth and charm. Lunches at the Quadrangle Club, however, were a different proposition altogether. No one engaged in casual conversation about the law in Bernie's presence. The first glimmer of any controversial legal assertion brought forth Bernie's ingrained trial lawyer's instinct for relentless cross-examination. Time and again, Bernie would push, probe, and wheedle. Simple points merited extended discussion. Points

† James Parker Hall Distinguished Service Professor of Law, The University of Chicago; The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution.

of clarification offered at one moment became fatal concessions at the next. I quickly learned that any head-to-head confrontation with Bernie was a risky venture, and that intellectual positions had to be plotted out well in advance to avoid his rapier-like intelligence.

Nor, I discovered to my relief, was I alone in both relishing and fearing these exchanges with Bernie. By temperament, Bernie had a deep suspicion of people who constructed grand theories out of the messy materials of the law. Accordingly, his intellectual precision and persistence was directed to anyone, old or young, liberal or conservative, who chanced to come within his crosshairs. Those bracing experiences were an immense help to me as a young scholar trying to find my way in the world. After surviving, even wounded, cross-examination by Bernie, everything else seemed like a piece of cake.

So powerful was his persistence that the young faculty used to joke among ourselves that if we were ever in trouble with the law, Bernie was the man we would hire to ward off the battalions of lawyers that lay in wait. We had the supreme confidence that he could identify the one weakness in the adversary's case and exploit it so relentlessly until it became the only point in the case. Give Bernie control over the agenda and he would make sure that everyone else would dance to his tune.

This estimation of Bernie was shared by his students as well as his colleagues. I never sat in on any of his evidence or labor law classes, and regard myself as poorer as a result. But the students uniformly reported that no matter how hard they prepared, Bernie was always one step ahead of them. Let them read an entire chapter, and Bernie would hone in on that single footnote on which the entire argument turned. The students were always drained by their encounters with this Socratic master. But when the term was all over, they acknowledged that they had emerged stronger, wiser, and more confident from their educational struggle with him.

Yet it would be a mistake to ignore Bernie's whimsical side. One day I talked to him about some paper that was giving me trouble, and Bernie did not show much sympathy to my plight. "You can't publish excuses, Brother Epstein," was his tart reply to my various difficulties. And he was of course right. On other occasions, he could be more cutting. In those days Bernie was a regular at the Quadrangle Club Tennis Courts, and used to grouse from time to time about one of his companions—I don't remember whom—who tended to make close line calls in his favor. Bernie was the perfect man of honor who from his Nuremberg experiences well knew the risks of allowing anyone to be a judge in his own cause. One day, Jay, as I shall call him, was sitting on chairs beside the court. As Bernie walked into lunch, he heard Jay

shout “out” as the ball whizzed down the line. “Practicing, Jay,” Bernie muttered under his breath as he walked on in.

There was at least one occasion in which I was the victim of Bernie and Jean’s developed sense of mischievous irony. The occasion was a dinner sometime in the mid-1970s at the home of the late Spencer Kimball, who was both a professor in the Law School and the head of the American Bar Foundation Research Center. Spencer organized the dinner for its Board of Directors, which had met earlier that day. I was asked to attend because the ABF had supported some of my work the previous summer. At dinner, I sat opposite an imposing gentleman on the ABF Board, and thought little of it, until the discussion turned to the question of airline deregulation and mandated service to small cities. As I gave my Chicago-like position for deregulation, I initially thought that he was just another lawyer. But his responses were so crisp and authoritative and his manner so imperial that I knew that I had gotten in over my head as I soldiered on. What kind of retired lawyer was this, I thought to myself? Throughout this exchange, Bernie and Jean just looked on from their seats nearby, saying nothing. From time to time I noted to my irritation that each allowed a sly smile to curl at the edge of their lips. Towards the end of this mini-marathon, I made some point about how things were at “the” Law School. And my interlocutor turned sharply on me and demanded to know what “the” Law School was. In a flash I recalled that Erwin Griswold was on the oversight Board and “the” Law School was, in his estimation, of course Harvard. Sometimes formal introductions had their place. But at least I learned how years of young Harvard professors felt, as Bernie and Jean broke out into broad grins.

As the years marched on, Bernie continued to be forever precise, but somehow he began to mellow, perhaps because he got a different view of law school education from Danny’s reports from Harvard, where he started in 1972, the same year that I arrived at Chicago. The mellowing process only accelerated in his retirement when Bernie became much loved by faculty, students, and staff alike for his unfailing courtesy, civility, attention, and devotion. In time his eyesight started to go, and he resorted to this clunky contraption that allowed him to read complex legal documents one large word at a time. But he never lost his heart or his mind. In one of the more moving occasions of recent years, Dean Saul Levmore had the inspired idea of asking Bernie to deliver short remarks to the graduating class of 2003 at the Law School Commencement in Rockefeller Chapel. Bernie was of course unable to read at that time, but he was not unable to think or to speak, and he delivered at 90 years of age a moving address of the glory and responsibility of the legal profession that received an instantaneous standing ovation from the newest generation of law students.

They well knew of his cheer and good humor from constant small encounters throughout the Law School, even though he had retired from teaching over twenty years before.

As he became weaker, he kept up a rigorous regimen of walking up and down the Law School steps, and over to his beloved Quadrangle Club for lunch. Unfortunately, his time was running out, and it was clear that Bernie sensed it, not with complaint but with acceptance and dignity. In his last days, even those trips became too difficult, and Bernie largely stayed at home. Eileen and I visited him and Jean on several occasions, where he took it upon himself to be the perfect host. He never dwelled on himself and his many aches and pains. He often alluded to past events at the Law School, but most of all he was concerned with the future of the institution which he came to in the fall of 1934 and where he stayed for virtually his entire professional life. Bernie's portrait hangs in the Hall Concourse as a constant reminder to us of a fine and generous man whose every action worked for the betterment of his family, friends, colleagues, and students—indeed of anyone and everyone who was fortunate enough to know him. He was indeed the perfect gentleman until the very end.