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The editors of The University of Chicago Law Review dedicate this issue to the memory of Bernard D. Meltzer.

Saul Levmore†

Bernard Meltzer occupied this Law School for much more than half of our existence. The occupation began with his arrival, as a transfer student, in 1934. He then returned here to join the faculty in 1946. That is a period of about 63 years in a school that is almost 105 years old. It is tempting to marvel at Professor Meltzer’s longevity. He knew people who were here at our founding more than a century ago. For that matter, he knew people who knew people (like Christopher Columbus Langdell, for instance) who shook hands with Abraham Lincoln. It is only a couple of degrees of separation more to Napoleon, and then, I suppose, but another several steps to Moses. But neither of these well-known lawmakers could match our Bernie’s ability to think about law with cool objectivity, and with an eye on what law might or might not accomplish. And neither displayed half the wit that Bernie brought to the enterprise.

It is fun to think of how the Law School and the world appeared when young Meltzer arrived here in 1934. The Law School was not in its present location, and baseball was played right here on this spot where we are gathered. The Great Depression was a real event, as was the rise of Hitler. Ping-pong was played in the Law School, and was said to have been introduced in order to displace rampant gambling,

† Dean and William B. Graham Professor of Law, The University of Chicago Law School. These observations were made at a memorial service in honor of Bernard D. Meltzer at the Law School on February 2, 2007.
though there was plenty of gambling on the ping-pong matches, as it turns out. One might wonder whether table tennis was actually around at that time, if only because those familiar balls seem so technologically sophisticated. But indeed, the game, more or less in its present form, was born some thirty years earlier, and was in something of a heyday. Students of that era needed to call faculty offices from the library telephone in order to ascend to the faculty offices for visits. And yes, phones had long been in existence, though it is doubtful that a single student had an automobile, and of course no one had a computer or cell phone. Ball point pens were unknown.

But longevity is a more appropriate topic for persons less accomplished than Bernard Meltzer. This was one accomplished person, and one life led to the fullest. He was remarkable. He was great with people, and great as a host, as a government officer, as a Socratically inclined instructor, as the leading labor law scholar, as a scholar of international law (he may well have taught the first law course in the country on international organizations), as a teacher of evidence, and as a stalwart of a great law school. When we celebrate and memorialize his life and career, we selfishly promote our own values: insight, inquiry, wit, biting wit, loyalty, charm, sharp edges with the best intentions, and intellectual intensity. Bernie and Jean Meltzer defined and define a way of life. It is a way that demands excellence of oneself, and encourages excellence in others through a mixture of questioning and wit, dignity, charm, and warmth. It is the demonstration that carrying oneself with these qualities is enjoyable and not oppressive. Theirs is a family that teaches us the value and attractiveness of personal dignity.

There are well known and less well known Bernie anecdotes. I begin with a chestnut. Bernie had served as a Major League Baseball salary arbitrator. He did so under the rules of final offer arbitration—a system that he had helped bring about. Following one of his rulings, the media called him ignorant and dumb. He quipped that he preferred the former, for it could be remedied.

Bernie consented to give the graduation address at our Hooding Ceremony a few years ago. The graduating class so appreciated his presence and remarks that they “adopted” him. In any event, a student’s parent came up after the ceremony and conversed with Professor Meltzer, complimenting the speech and so forth. The parent informed us that he had done some research on the notable speaker and that he had found a terrific quote by the great man. He had indeed memorized it, and I remember something like: “Use those talents you have.... The woods would be a very silent place if no birds sang except those who sang best.” I stood there thinking to myself that this quotation could not possibly have been uttered by Bernie. It was, after all, an ode to mediocrity. Bernie, meanwhile, gave a look of nonrecognition.
and seemed disinclined to say a word. I thought it my role to lighten the moment, and so I said in as friendly a tone as possible that it was a lovely sentiment but that I was sure this had been misattributed because sweetness and mediocrity had no place here at the Law School. I am sorry to say that I may even have mumbled something about how we do not sing “Kumbaya” in the Green Lounge. We all moved on to another, more agreeable topic. A few days later Bernie was in my office, and he asked me to try and reconstruct the quote, though not the flattering of his speech, which really was terrific. I recollected as best I could and suggested we Google it, and sure enough the quote really was from Bernard Meltzer! Fortunately, we had a closer look and it was by that other Bernard Meltzer of radio talk show fame. Bernie said that I was amazingly well read, but should probably try to read better material. I do not think he believed my claim that I had never seen the quote, but just could not imagine his saying such a mushy thing.

Bernie and I began to have different conversational patterns after I moved into the Dean’s office. When Bernie walked into the office, I knew that a small complaint or suggestion would begin the conversation. It might have been about a grammatical error in a law school publication, the supposed decline of the Socratic method, or the failure of new faculty members to come to dinner parties with U.S. Constitutions in their suit pockets. I must say that I have never understood his failure to memorize the document. When I first came to Chicago, I recall how surprised I was at my first Meltzer dinner when, during a discussion, all the law professors at the table (except the two of us who had recently arrived in Hyde Park) referred to pocket Constitutions they carried about. When he complained about those of us who were not Constitution carriers, I asked him about the failure to memorize. He insisted that it was fun to pull out the Constitution and be surprised by its language.

As a young teacher, Bernie was known for simplifying a question in class in order to “help” a student on call. When a reasonably complicated question brought about fear and paralysis in one student, Bernie apparently resorted to a professorial, patient tone and said, “Let me rephrase the question, and you answer just yes or no.” The student thought hard and then said, “Yes.” Bernie proceeded dryly: “I was looking for a shorter answer.”

I know from my own father-in-law and his classmates who were graduated from the Law School in 1951 that Bernie was loved but held in awe and fear from the outset. My father-in-law still remembers the grade Bernie gave him some fifty-five years ago, and—though I assure you that it was a fine grade and that he and his classmates were terribly fond of their great teacher—he still complains about the grade. I had an idea once, and asked whether, in the interest of nostal-
gia and fun, I could look for that old exam in the archives and then ask Bernie to regrade the exam and present it with comments at the class’s fiftieth reunion dinner. My father-in-law turned color and said, “Don’t you dare; he will probably lower the grade.”

Bernie asked me once what I had thought of his son Danny’s colleagues at the Harvard Law School. I suggested that one or two members of the old guard there took themselves just a bit too seriously. I reported that when I had visited there, and was at lunch one day, the nomination of Justice Souter was announced. A senior faculty member, whom we might call Professor A, left the table and then returned a few minutes later to say that he had checked his old grade sheets, and that Souter was unimpressive, as he had received only an X grade in A’s first year course. I thought I was communicating my amusement at the prospect of anyone taking a single old grade so seriously. But Bernie loved it, and said, “Well, you should know that I hear A is an easy grader.”

We love Bernie in part because he represented our values and in part because he mellowed. He taught us how to age, and then in recent times he taught us about illness and death, and how to be a good sport about dying. We know from experience that some of us will harden as we age and others will mellow. Those of us who start out as curmudges can only hope that we will mellow, and we wonder whether to try and accelerate the process and become kinder and gentler sooner rather than later. If we could be sure of longevity, the right strategy might be toughness followed by kindness, for eventually it would be clear that our tough love was just a pedagogical strategy. But as we have learned from the passing of Chicago’s old guard, none of us is assured of longevity. I suspect that Bernie’s many kindnesses were especially meaningful because he had established his sincerity with all that rigor, wit, and critical thinking. And so, thank you, Bernie, for the tough love, for the vigor and rigor, and then for the mellow phase. Thank you for your amazing family; for connecting Jean to us; for Danny, Joan, and Susan; and for your remarkable nephews whom I have also come to admire. Thank you for the prominence you brought this Law School; for your sage advice; and for your criticisms, so perfectly delivered. It was okay that we knew we could never quite live up to your standards for us. You, at least, lived up to ours, and you improved us. If there is a pleasant afterlife, or at least a metaphoric one, we know you are there, starting all over again, relying on your wit and critical thinking, figuring that you can develop some mellowness after you get something of a reputation up there. Either way, we could not have a better representative at that Roundtable in the sky.
Saul Levmore’s talk reminds me of a story about Judge Learned Hand in the last years of his life. As you remember, he lived a very long and full life. It seems that one of his law clerks found himself discussing with Judge Hand the recent death of another distinguished lawyer, who was a contemporary and friend of the Judge. The young man suddenly realized that it might be inappropriate to discuss death and dying with Judge Hand, who was obviously in failing health, so the clerk apologized for raising the subject. Hand responded as follows:

There’s no reason for you to apologize. I know that I don’t have much longer to live; I also know what will happen when I die. I will go directly to Heaven, because I have led a good life. Once there, I will be able to sleep late in the morning, something I’ve always wanted to do, but never allowed myself. When I wake up I will have a nice breakfast and take my time reading the daily newspapers. I never seemed to have enough time to do that. Then, I will go to the park to join a football game. The teams will be evenly matched, but I will score the winning goal. Then, it will be time for lunch; I will have a lovely lunch with fine German wine, after which I will attend to my correspondence. I receive many nice letters complimenting me on my opinions and other writing. I’ve never had enough time to respond as I should. I will then take a nap, after which I will dress for dinner. At dinner there will be a huge table presided over by the Lord; ranged up and down the table will be the great men and women that our civilization has produced. The food will be excellent, the wines outstanding and the conversation scintillating. At one point during the evening the Lord will lean forward and say, “That’s enough Voltaire, I’d like to hear Hand for a while.” That’s what will happen when I die; I’m not at all afraid.¹

Astronomers and some poets tell us that eons after a star has ceased to burn, we on earth may continue to see its light. So it is with Bernie Meltzer, whose life continues to light our own.

¹ Although I heard this anecdote at an ALI meeting some years ago, my attention has since been called to a written account in Professor Gerald Gunther’s biography of Judge Hand, Learned Hand: The Man and the Judge 679–80 (Knopf 1994).
You all know of his personal achievements: marrying the lovely Jean Sulzberger; fathering and helping to raise three exceptional children and, through them, six grandchildren, all of whom gave him great pleasure and pride.

He loved this country and was a patriot in the truest sense. To use the current vernacular, he not only talked the talk, but he walked the walk. The day after the attack on Pearl Harbor he attempted to enlist as an apprentice seaman in the U.S. Navy. As he told the story, after he had his eye examination, the doctor said “Young man, do you know where I’d like you to be in this war?” “No sir,” Bernie replied. “Well, I’d like you to be a gunner on a Japanese boat.” Bernie was outraged, but, resourceful as ever, he obtained the necessary eyesight waivers and an officer’s commission; he served with distinction.

I hope you will always remember the broad scope of Bernie’s service to this country: at the SEC, at the State Department, with the OSS, as a naval officer, as a key prosecutor at Nuremberg, and in roles on numerous advisory commissions. He worked closely with the profession’s greats: Felix Frankfurter, Jerome Frank, Dean Acheson, Robert Jackson, and Edward Levi. He learned from them; and, I daresay, they from him, for inevitably, and irresistibly, Bernie was a teacher.

You all know of his outstanding role as a teacher at this law school that was so dear to him. The mention of his name to former students always brings forth a smile and often an amusing anecdote—mostly true; after all, Bernie was an icon.

I am honored to be speaking this afternoon. I’ve puzzled for weeks about what I could possibly say that you haven’t heard before, and that would help to explain why he was so special. Why we miss him so.

My answer is that fundamentally Bernie was a great and continuing teacher. “Always the teacher,” his adult children would say. Of course, he was a scholar, and he was a “doer,” accomplishing many important things in the law, for his country, and for private clients, both the well heeled and those who could never afford to pay; but I think his most important role (after those of husband, father, and grandfather) was as a teacher. For Bernie, class was always in session.

I did not attend this law school, so his instruction of me was informal, but it was nonetheless constant. On hearing last year that I proposed to teach a seminar on national security issues, he loaded me up with books, pamphlets, a supplemental reading list, and a promise that I’d receive more from Dan, which I did. For a time, our late afternoon conversations took on the aspect of private tutorials. “I just want to be sure you do a good job”, he would say.

As a young lawyer, he once tried, without success, to teach one of my predecessors at the head of Mayer, Brown—its name was then Mayer, Meyer, Austrian & Platt. Bernie, a junior associate, at a time
when good law firm jobs were scarce, was sitting through a diatribe by Karl Meyer, whose name was on the door, against the New Deal and its taxes. On being asked whether he agreed, Bernie said, “Noooo,” and proceeded to explain, politely I’m sure, why not. Mr. Meyer was very upset; he remonstrated to the client, for whose benefit this scene was being played, that that showed what was wrong with these young people, who had good grades but no sense. The client said, “Hold on Karl, I think young Mr. Meltzer has made some good points.” As Bernie told me the story, “I knew right then that I had no future at Mayer, Meyer,” so he left to return to government service. What a loss for us!

As luck would have it, after many turns in the road, he returned in the last years of his life to consult with us. Indeed, that work continued into December of last year. Changed times; changed law firm; no change in the character or intellect of Bernard Meltzer.

It is only in recent years that I came really to know and love Bernie Meltzer. How could I not?

I have not attempted to capture the whimsical humor of Bernie Meltzer; I couldn’t do that, but you all know it was there—another constant.

He shared so much with us; and, as with that star, his light, his humane light, continues to shine.
Bernard Meltzer was a giant long before anyone in my generation went to law school. He so dominated the academic debate about labor law that you just couldn’t talk about it without talking about him. He epitomized all that is distinctive about our vocation. You read his work and you saw how to confront the tough questions and the hard choices.

Even for those of us who did not have the good fortune to study law here, Meltzer was the stuff of legend. But one part of the legend made you nervous—at least if you were just about to become a very young assistant professor at the Law School. By the standard account, merely going to a faculty lunch at Chicago was an ordeal by fire. As one person put it, Meltzer would expose in you “the too theoretical, the insufficiently theoretical, the unprincipled, the thoughtless, the less than meticulous, the doctrinaire, the fashionable, the bureaucratic, and the heartless.” He was the master of cross examination. Others put it less delicately: “Hamburgers are not the only thing grilled at the Quad Club.”

Fortunately, what you discovered when you arrived here was different. You were, of course, naturally awed by the sheer brilliance of his mind, his laser-like ability to find the smallest cracks in any line of analysis, but there was another side too. It wasn’t Bernard Meltzer, but rather Bernie, a mentor who gently (and sometimes not so gently) helped you find your way. Whatever you thought you knew before you got here, your legal education began only once you did.

Bernie cared as much about your work as his own. He helped you understand your ideas; he was the person who pressed you before, during, and after every workshop you gave. Not that you could ever completely satisfy him. He did not like it when you acknowledged his help in the first footnote, as is the academic custom. It was not false modesty. He worried that people who saw that he had helped would think either that he had not noticed the flaws or, worse yet, had failed as an advocate to persuade you of the error of your ways.

Most of all, Bernie made you feel like a colleague, even if you were only twenty-six and really had no idea what you were doing. The Law School has long been a special place where complete strangers come from afar and find a home. For generations of us, our first few
months at the Law School began with a succession of dinners with those whose commitment to the place equaled their passion for the law: Walter and Natalie Blum, Phil and Mary Jane Kurland, Edward and Kate Levi, and, of course, Bernie and Jean Meltzer.

Dinner at the Meltzers is a tradition that spans the decades. Whether it was 1981 or 2006, those evenings had a magical quality for colleagues and students alike. Jean was the impeccable host and Bernie was the master raconteur who could explain the finest point with humor and a sparkle in his eye.

Last spring Bernie and Jean were entertaining a group of students and the conversation somehow shifted to a nuance in the law of evidence. A judge is required to distinguish between his personal knowledge and his knowledge based on the evidence. To illustrate, Bernie drew from his own experience. There was a hearing he was conducting as a special master. Jean was curious and came to watch. The issue was whether a group of Teamsters, all of whom were gathered in the hearing room, had engaged in violence and coercive threats.

When the first witness was called, Bernie granted a motion to sequester other potential witnesses. Everyone lumbered out except the witness on the stand and Jean. Opposing counsel then asked, rather gruffly, who she was and why she was there. Bernie, ever attuned to such things, understood that in his capacity as a special master he did not know who this woman was. So he looked toward his wife and without dropping a beat asked, "Madam, could you please stand and identify yourself?"

Especially here and especially now, we should also remember how much our Law School is Bernie's law school. An architect of Lend-Lease, a protégé of Dean Acheson, a wartime member of OSS (the predecessor of the CIA), and a prosecutor at Nuremberg, Bernie brought experiences sufficient to fill several lifetimes when he joined the faculty in the fall of 1946.

The fall of 1946. This school has had many splendid moments—and we can be confident it will have many more—but among the most splendid must have been then. Walter Blum, Harry Kalven, Edward Levi, and Bernard Meltzer came together to teach law and the sparks flew.

Everything that is great about the Law School today can be traced to the tireless energy and vision each brought to the school that autumn. Walter was the born senior partner who immediately leapt to the heart of the matter, Harry was the idealist and passionate advocate, Edward possessed a great, overarching vision of the Law, and Bernie was the lawyer's lawyer.

From evidence to labor law, Bernie brought rigor and structure and insight to fields that sorely needed them. From Nuremberg to Rwanda, from the 1940s to 9/11 and beyond, his understanding of war crimes
and all the difficulties associated with them made him the clearheaded and unflinching voice of reason. Bernie was also the counselor without parallel. Over the decades, Bernie was the person at the Law School the Dean called late on Sunday nights when he was in real trouble.

Like all great counselors, Bernie was the soul of discretion, and he carried it off with great style and aplomb. When he was doing baseball arbitration, and we pressed very hard for details, Bernie replied simply that, for the first time in his professional life, he was allowed to state only his conclusion and had to skip the reasons. His lifelong ambition to be in the Major Leagues had been fulfilled: He had become an umpire.

Bernie showed us how to live well in the law. He worked at the Law School every day for sixty years. Last year, one of us caught him by the elevator with a coat on at 3:00 PM and asked if he was now keeping banker's hours. He smiled as he stepped onto the elevator, turned around, and said with the characteristic twinkle in his eye, "Oh no. It's just a change of venue."

Bernie is much missed, but then again we must also remember that, as long as the Law School is still here and maintains its values and traditions, then Bernie—like Walter, Harry, and Edward—will be here as well.
Last summer I found a greeting card with a sweet old photograph of a mother and child, with this quotation as the caption: “The things that count most in life usually cannot be counted.” The author of the quotation was Bernard Meltzer. It wasn’t “our” Bernie Meltzer, though! It was his contemporary, a radio host of an advice call-in show in Philadelphia whose little proverbs are very quotable, as a visit to Google will show. But the card was so sweet that I bought it and sent it to “our” Bernie Meltzer, suggesting that we were overdue for lunch.

Bernie Meltzer was my teacher and friend. I graduated from the Law School in 1982, so I was in the last generation of his Law School students. (That was so long ago that in my class’s Third Year Show, Cass Sunstein and Douglas Baird were played by the little children of one of my classmates!) In law school I knew Bernie as my labor law teacher and as an advisor to the Law Review. He was a wonderful and demanding teacher. But I learned far more from him in the next twenty-five years.

In the early years after I left law school, I attended several dinner parties at the Meltzers’ home, when maybe a dozen people would gather for an evening of conversation. Later, my law partner Barry Alberts, who had also been one of Bernie’s law students, began teaching at the Law School as an adjunct professor, and Barry and Bernie and I began having lunch every few months. And when my oldest son, Isaac, was in high school, he was interested in politics and history, and liked talking with adults, so I suggested that he would like to meet Bernie; and that suggestion led to a series of lunches with Bernie and Isaac and me.

All of these occasions were remarkable. In part, they were fun because Bernie was a great storyteller. I think my favorite was a story about his trip to traffic court. As he told it, he was driving in Hyde Park at a time when street construction was underway. He came to a red light, but the cross street was under construction and closed to traffic, and since the traffic light wasn’t serving any purpose, he drove right through. But a traffic cop followed the letter rather than the spirit of the law and ticketed him. Fired up with heady jurisprudential arguments about the failure of the fundamental purpose of the traffic law, he decided to fight the ticket. When the court date came and he

† Partner, Schiff Hardin LLP. These observations were made at a memorial service in honor of Bernard D. Meltzer at the Law School on February 2, 2007.
was waiting for court to begin, he struck up a conversation with one of the others who was there waiting for his hearing, a kid of about 18, and they compared notes about their cases. Bernie's case was called first, and he approached the bench, ready for battle, and began, "May it please the Court," whereupon the judge said, "Case dismissed!" As Bernie turned to leave, the kid asked him, "How did you do that?!

I think the best part about this story was Bernie's conversation with the kid. It is so characteristic that he would engage whomever he encountered, bringing all of his formidable experience without flaunting it, and acting with empathy and humanity. At the dinner parties at his house, he would draw each person into the conversation, moderating the discussion but not dominating it. His experience was so rich and deep—at the SEC, the State Department, the OSS, the Nuremberg Tribunal, in academic life, even in the practice of law—that he could have made himself a riveting focus of the conversations. But he didn't. When Bernie was about to retire from law school teaching, my then-husband asked him what he would do in retirement. He answered that maybe he would read Proust. I don't know whether he did read Proust, but I do know that he did not spend his time just remembering things past. In all those lunches, the conversation never lagged, and never drifted into the trivial. We discussed issues of politics and law, public affairs and human affairs. To spend a little time with Bernie was a tonic.

Even as he became physically frail, he remained informed, insightful, and funny. His failing eyesight was not a topic of conversation except incidentally—when he told about cutting the hours that he recorded for consulting at Sidley or Mayer Brown to allow for the extra time he had to spend, or when he asked for help reading a menu. And he discussed his more serious illness with me only to express empathy for someone else.

The last time I saw him was in November. He called to say that this time we had better come to his house, because he was unable to go out. Barry, Isaac, and I brought lunch to him. He was as bright, gracious, and engaging as ever, treating his use of a wheelchair matter-of-factly, and not mentioning his apparent discomfort. A young man attended him as an aide, and Bernie treated him with affection and respect. As always, we had a rich conversation.

When I think about Bernie I'm reminded of a short story by Tolstoy about a king who seeks the answers to three questions: What is the most important time for action? Who is the most important person? And what is the most important thing to do? The king's advisers give him a lot of silly and contradictory answers, but this is what he eventually learns from experience:
There is only one time that is important—Now! It is the most important time because it is the only time in which we have any power. The most necessary man is he with whom you are, for no man knows whether he will ever have dealings with anyone else: and the most important affair is to do him good, because for that purpose alone was man sent into this life!

This is how Bernie really was. He was always engaged in the present moment, giving those he was with his full attention and empathy.

Isaac really captured the essence. He is a now a student in the College, and was the first to tell me of Bernie’s death when he saw the notice posted in the Quadrangle on his way to an early class. After he read the Law School’s obituary, Isaac said that Bernie was even more accomplished and important than he had realized—and how much he liked him without having known that. Isn’t that the nub? It’s not just a trophy case of accomplishments that made Bernie great; it was himself and his interactions with others in every moment.

In 2005, the SEC Historical Society recorded an interview with Bernie as part of an oral history project. You can go to the website and listen to his voice. But even without a recording, his voice, and the many lessons he taught, will always remain with me.
My first exposure to Bernie was at a Law School Association meeting in Philadelphia just after Christmas in 1961. There had been talk of my moving from Stanford to Chicago—a daunting prospect, especially in midwinter—and my introduction to a few of the Chicago faculty was at a reception at the Philadelphia art museum. My chief recollection of that occasion is how completely captivated I was by Jean and Bernie Meltzer. I promptly formed the conviction that if Bernie was representative of the law faculty at the University of Chicago it was the place I wanted to be.

My next experience with Bernie came a few months later, when Mary and I came to Chicago to find a house. Jean and Kate Levi already had a house to propose, which we immediately decided to take. At that point Bernie took over. He became both the negotiator and the conveyancer, and that was all we had to do about it. Talk about the now-faded ideal of the all-around lawyer—Bernie was it, in spades.

A year later I had been in residence for only a short time when Edward Levi was called to higher office in the University, and not long thereafter I found myself chairman of a committee to find his successor. The only reward of that assignment, but a great one, was that Bernie and I took a barnstorming trip together around Eastern universities, looking for the right person. Our effort wasn’t ultimately successful, but the experience brought me closer to Bernie and deepened my appreciation for his judgment and personal skills.

I had a similar experience with Bernie several years later when the local office of the EEOC issued a charge against the Law School. The faculty believed the charge was unjust, and Bernie went with me to Washington to discuss the matter with the agency’s General Counsel. Thanks in no small part to Bernie’s skillful advocacy, the General Counsel agreed that the charge should be dropped.

Looking back, it is clear to me that I leaned on Bernie many times. He unfailingly came through with a keen appreciation of the problem and with helpful insights, although he never tried to impose his own views. (Needless to say, that distinguished him from most of our colleagues.)

I’ve often thought that some of Bernie’s leading traits as an advocate were epitomized in the traffic court incident that has been de-

† Partner, Neal, Gerber & Eisenberg, LLP. These observations were made at a memorial service in honor of Bernard D. Meltzer at the Law School on February 2, 2007.
scribed. It reflected his respect for the law's institutions—even one of its less edifying examples—as well as his instinct for the right approach. But above all it exemplified his always impeccable demeanor.

A major clue to Bernie's genius as a teacher and scholar is the fact that his academic work was infused by his rich experience in the outside world. As others have noted, despite his sixty years here, he had crammed into his early career an immensely varied set of responsibilities, and he continued to take on selected outside assignments throughout his career. His grasp of the real world was nowhere better shown than in his influential pieces on the labor arbitration process, inspired by what he viewed as a wrong-headed indictment that had been issued by a prominent judicial commentator on labor law.

Other academic lawyers have brought outside experience into their work, of course, but I doubt that many have done so as instinctively and pervasively as Bernie—not as a teller of war stories, although he had stories to tell, but simply because that was how he thought about the abstractions of the law and the issues they deal with.

Of course one cannot think of Bernie without thinking of his wit, and how he often used it in the service of some serious message. I think of the time we had an eminent federal judge visit the school for some event and in the evening Mary and I had a dinner party for him. Jean and Bernie were among the guests, as well as some of the younger generation from our two families. The company lingered after the judge had left, and almost immediately Danny observed to the group, in his best impertinent fashion, "Why does he always talk as if he's senile?" Without a second's pause Bernie answered, "He was just trying to bridge the generation gap."

Finally, one must comment on the strong devotion Bernie inspired in all who came to know him well. I remember visiting Justice Frankfurter in his home after his retirement from the Supreme Court. The Justice had had a stroke, and it was an effort for him to talk, but one of the things he wanted to talk about was Bernie, and so we did. It had been almost thirty years since the Justice had spent any substantial time with Bernie, but it was evident that his deep affection for Bernie had not dimmed. As I took my leave, the Justice's last words to me—literally the last words I ever heard him speak—were, "Take care of Bernie."

I think if he were here now he would probably want to say, as I say, "Take care of Bernie's spirit." I know that Bernie's spirit will always be a presence in my life.
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

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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 case. 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 Quadangle 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.
Unlike most of my colleagues, since I joined the Law School in 1995, I got to know Bernie only when he was already eighty years old. For the next twelve years I always looked forward to running into him when I entered the building each day. His vigor, curiosity, and courtliness both astonished and delighted me. He would doff his hat and say, "Professor Nussbaum, I believe," and we would walk together to the elevator—at which point Bernie usually headed for the stairs and I (coming from my morning run, I hasten to add in self-justification) took the easy way up.

One day in around 2001, I ran into Bernie on the way to the Quad Club for lunch, and said apologetically, "I'm sorry, Bernie, I have to walk fast, because I am late to meet someone." And I began to stride on ahead of him. "Oh," said Bernie, "do you think I can't keep up with you?" And, very soon, it was I who was struggling to keep up with him, as we race-walked along University Avenue. This episode evidently tickled him, since Jean tells me that he repeated it to her with relish.

Even in his last few years, when his failing eyesight made walks to the Quad Club more difficult, we often walked there together, arm in arm. He would say that he was happy to see me because otherwise he would have had to walk all the way around to Woodlawn to cross by the traffic light, since Jean and his doctor insisted on that unless someone was walking with him. The idea that he might be driven to the Quad Club, or even stop going altogether, never entered the picture.

Until his final illness, undaunted by the vision problems, he was learning all the new voice-op technologies, and he never stopped taking pleasure in conversation. In those last few years, I knew that I had to greet him vocally, so I would say, "Good day, Professor Meltzer," and he would turn in my direction and say, "Good day, Professor Nussbaum," and remove his hat.

Thinking about Bernie gave me hope about the later years of life. The sheer joy in life and talk that he radiated until the very end was profoundly moving and more than a little exemplary, though exemplary is the last thing he would ever have wanted or tried to be. He went to more or less every work-in-progress workshop, and he always had some excellent question to pose. He came to the office every day,
and he loved seeing his colleagues. He would stop by my office to bring me articles on some topic from my work that we had discussed, and later we would run into one another in the stacks and chat about it.

Importantly, too, the later years of Bernie’s life gave him time to think again about international justice, revisiting his wartime and postwar experiences and writing about the philosophical and legal issues they raised.

Twice, in 2001 and 2004, Bernie came to the class on decisionmaking that Douglas Baird and I teach to talk about his experience heading the Foreign Funds division of the State Department during the Second World War. Baird and I like to use historical examples of difficult decisionmaking to show the complex interrelationships between people’s thought processes and the social context in which they are working. So we asked Bernie to talk about his plan to rescue the Romanian Jewish children. This was an idea that Eleanor Roosevelt and various Jewish groups had, that somehow funds could be directed to bribe the Romanian guards to release around a thousand children who would otherwise be killed. Bernie’s job was to devise a plan to get that money to the guards without risk that it would fall into the hands of the Axis powers. He worked out a plan, it was acceptable to Morgenthau at Treasury—but then, Breckinridge Long, an anti-Semite who was in charge of refugee affairs in the State Department and who had Roosevelt’s ear, vetoed the plan. The children died.

Bernie discussed the whole episode with calm and detachment, with deep regret for the loss of the children’s lives, but without any trace of personal resentment. Students sat in rapt attention, hearing an unwritten piece of history. And they asked him all sorts of questions, which he answered gently, modestly, reflectively, with neither vanity nor anger. Asked whether he thought that Long’s attitude to him was related to the fact that Bernie was only the second Jew in the State Department, Bernie shied away, saying that he didn’t know how far that came into it. Asked how he personally felt as a Jew dealing with these events, he said, “You’d have to psychoanalyze me to find out.”

We often talked about Nuremberg, and in 2003 he gave a memorable presentation on “Victors’ Justice” at our law and philosophy workshop when our topic was “War.” His description of his interview with Göring sticks with me: the man, he said, had “the charisma of evil.” Having been in the midst of crafting Nuremberg’s new approach to international justice and responsibility, he later had some hesitations, wondering how fair it was for the winners to impose judgment on the losers in a manner that held them to international standards not previously in force and public. Just having him there to speak about his life was amazing, being in the presence of a living part of the
history of one of the world’s darkest hours out of which emerged some of its most promising legal developments.

I often told Bernie that he should write his memoirs, and there was even a graduate student who, having heard him in the law and philosophy workshop, volunteered to be his amanuensis, taking down his experiences. For a long time, Bernie hesitated. He wasn’t sure, he told me, that his life had enough in it as a whole to warrant a memoir. Then finally, one day, he told me that he had decided against the plan. The interesting bits about the war had already appeared through interviews he gave for books about other, more major figures, and he thought large parts of his life were simply uninteresting. I doubted this, and I doubt it still. There is a fine book to be written there, a book that would tell us a great deal about the War, about justice after war, about labor law, and about Chicago. Also, importantly, about what it is to have an old age that is happy and that brings happiness to others.

This book I have in mind needs to be written by a narrative artist, who could get onto the page Bernie’s sui generis combination of quickness and insight, toughness and sparkle. Quite a few writers of fiction have dealt well with the unhappiness of old age, not least the aging Philip Roth in the recent Everyman. Few indeed, however, have dealt with the happiness of old age, its capacity for wit, serenity, and generosity. (The only novelist I can think of who did it really well is John Galsworthy in The Forsyte Saga.) Such a writer would also need to have a delicate sense of social distinctions in order to capture the complexities of Bernie’s generation, as Jews made their way into leading roles in American life, not without friction. (Again, Galsworthy had what it takes, though he never wrote about Jews.)

So, would a Jewish Galsworthy, learned in the law, curious about the history of international accountability for crimes against humanity, please step forward?
When I started teaching at the University of Chicago Law School in 1969, the dominant figures on the faculty (besides Dean Phil C. Neal) were Philip Kurland and, even more so, Bernard Meltzer. They set the tone for the law school. The tone was that of the Harvard Law School as I remembered it from my time there as a student, a decade earlier (1959–1962). I did not much like that tone at either time, but that was my youthful rebelliousness.

After a quarter century as a judge, I have come to appreciate the great strengths that Meltzer brought to legal teaching and scholarship, and to lament the passing of the model of the academic lawyer that he exemplified.

What has happened since the 1960s—that watershed decade in modern American history—is the growing apart, especially but not only at the elite law schools, of the lawyer and the judge on the one hand and the law professor on the other hand. Law professors used to identify primarily with the legal profession and secondarily with the university. The sequence has been reversed. Law professors in that earlier era were hired after a few years of practice, on the basis of evidence (heavily weighted by performance as a law student) of possessing superlative skills of legal analysis. A law professor was expected to be a superb lawyer and to see his primary role as instructing generations of law students so that they would become good, and some of them superb, lawyers— instructing them by precept but also by example, by being a role model; and the role was that of a practicing lawyer. The scholarship that law professors did tended to be either pedagogical, as in the editing of casebooks, or to be of service to the practicing bar and the judiciary, as in the writing of legal treatises, articles on points of law, and contributions to legal reform, exemplified by the American Law Institute’s restatements of the law.

By the late 1960s this model was almost a century old and ripe for challenge. The challenges came from two directions, which though opposed to each other turned out to be complementary in their effect on the traditional model. One, the direction from social science, and in particular from economics, complained because the conventional model did not enable its practitioners to articulate concrete social goals for law and to test legal doctrines against those goals. Conven-

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tional analysis could not tell judges and legislators when, for example, the rule of tort liability should be negligence and when strict liability; or how to decide when a land use should be deemed a nuisance, when a preliminary injunction should be granted and when denied, when solicitations by police to commit a crime should be deemed entrapment, whether a rescuer of a lost item should have a legal claim to the reward posted by the owner though unaware of the offer of the reward, or whether spendthrift trusts should be allowed because they reduce, or forbidden because they increase, the likelihood of bankruptcy.

The second challenge, the challenge inspired by the left-wing politics that helped to define the late 1960s and early 1970s, complained that the conventional approach was a mask for decisions reached on base political grounds. The "crits" resurrected the legal realism of the 1920s and 1930s in a more strident form and rejected the legal-process school of the 1950s that had sought to reconcile legal realism with traditional theories of law.

These challenges to the conventional model of the law professor's vocation so far succeeded as to bring about a fundamental change in the character of legal teaching and scholarship and the method of recruitment into academic law. From the challenge mounted by social science came a novel emphasis on basing legal scholarship on the insights of other fields, such as economics, philosophy, and history, and from the challenge mounted by the Left came a reinforcing skepticism about the capacity of conventional legal analysis to yield intellectually cogent answers to legal questions. These ideologically opposed challenges complemented each other by agreeing that the traditional model was narrow and stale.

The model was largely buried in these twin avalanches, especially in the elite law schools. The older generation, the generation committed to the conventional model, responded in part with bitterness and in part with silence. Not all, of course, and signal not Bernie Meltzer, who carried on imperturbably and into extreme old age in the style of the famous "old school" professors, such as James Casner, Barton Leach, and Robert Braucher at Harvard, and of Harvard judges such as Felix Frankfurter and Learned Hand (Hand of the Bill of Right lectures, in particular). Meltzer was in fact a favorite of Frankfurter, who taught Meltzer at Harvard (where Meltzer took an LL.M., after graduating first in his class from the University of Chicago Law School.) Meltzer's skillful cross-examinations at Nuremberg marked him as a master of practical lawyering, and he continued to demonstrate that mastery throughout his academic career.

In exemplifying the traditional model of the engaged, the worldly, teacher-scholar, Meltzer reminded us of its strengths. Even at the most intellectually ambitious of the modern law schools, a large majority of
students will become and remain practicing lawyers; and there is a good deal more to the practice of law than economics, or philosophy, or feminism, or theories of race. There is the knack of reading cases and statutes creatively, there is a largish body of basic legal concepts that every practicing lawyer should internalize, there is a bag of rhetorical tricks to be acquired along with a professional demeanor, a procedural system to be mastered, a subtle sense ("judgment") of just how far one can go in stretching the limits of established legal doctrines to be absorbed. These things cannot be the entirety of the modern lawyer’s professional equipment, and their inculcation cannot be the entirety of a first-rate modern legal education, because the law has become too deeply interfused with the methods and insights of other fields—and the law schools are still lagging badly in attempting to overcome the shameful aversion of most law students to statistics, math, science, and technology. Maybe at the law schools that have the brightest students only a third of the instruction should be in the traditional mold. But to reach that level the law schools will have to start hiring teachers who identify more strongly with the practicing profession than they do with academia.

The loss is not only in the kind of teaching that Meltzer exemplified, but also in his style of scholarship. In a system of case law, which is the dominant American system of law even in primarily statutory fields such as labor, which was Meltzer’s principal field of teaching and scholarship, the principles and rules of law are not found in authoritative texts—in legal codes—but instead have to be inferred from statutory and constitutional texts, yes, but even more from judicial opinions, whether they are common law opinions or statutory or constitutional glosses. Inferred law is "unwritten" in the significant sense that it is constructed by the judges and lawyers from scattered, sometimes inconsistent, and often ambiguous, incomplete, or poorly informed materials, mainly, as I said, judicial opinions. The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability (not only brains and knowledge and judgment, but also Sitzfleisch) to organize dispersed, fragmentary, prolix, and rebarbative materials. These are tasks that lack the theoretical breadth or ambition of scholarship in more typically academic fields. Yet they are of inestimable importance to the legal system and of greater social value than much esoteric interdisciplinary legal scholarship.

Because of the enormous financial rewards that today await the successful practitioner, and the alienation of the academic legal profession from the practice of law, superlawyers of the caliber of Bernie Meltzer will no longer dominate law school faculties. He was almost
the last survivor of an era. With his example before us, we can reflect on what has been lost and consider how some of it might be regained.
Few current students at the University of Chicago Law School knew Bernie Meltzer, although they pass his portrait every day on their way to class and often passed him in the hall. They would have seen him as a little man, slightly stooped, with large glasses. If they happened to ride with him in the elevator, he undoubtedly asked them a question. Bernie was like that.

Bernie Meltzer was one of the giants of the University of Chicago Law School. Along with his close friends and colleagues Edward Levi, Harry Kalven, and Walter Blum, he was one of four towering figures who redefined and reconstituted the University of Chicago Law School after World War II.

Edward, Harry, Wally, and Bernie were products of the University of Chicago. All four attended both the College and the Law School. (Levi, Kalven, and Blum also grew up in Hyde Park and graduated from the University of Chicago Laboratory Schools. Meltzer, a late bloomer, grew up in Philadelphia and didn’t make it to the University until College.)

Levi graduated from the Law School in 1935, Meltzer in 1937, Kalven in 1938, Blum in 1941. Each was a virtuoso student, a Law School legend while still taking exams. After serving their country (Meltzer was a prosecutor at Nuremburg), Levi and Kalven joined the faculty in 1945, Blum and Meltzer in 1946. They quickly became the intellectual core and the heart and soul of the University of Chicago Law School. Their lives were intertwined in innumerable ways. Blum and Kalven were coauthors; Levi and Meltzer were brothers-in-law.

When I arrived at the Law School as a first-year student in 1968, Levi had just been named President of the University. Meltzer, Kalven, and Blum were at the center of everything in the Law School. Then in their mid-fifties, they had become dominant figures in their respective fields. Blum was a national leader in tax law, Meltzer in labor law and evidence, Kalven in torts and the First Amendment. They were great teachers as well as great scholars, and they were thor-

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1 I would be remiss if I failed to note that Jean Meltzer, Kate Levi, Betty Kalven, and Natalie Blum were the “first ladies” of the Law School for a generation. Like every young member of the faculty, I was welcomed into their homes and into their families, and they played a central role in creating and nurturing the very special community that is the University of Chicago Law School.
oughly devoted to the Law School, its students, and its alumni. They were constantly accessible, incessantly curious, and forever young.

The four of them brought a distinctive intellectual style to the Law School. Although each had his own peculiar quirks and traits of personality, they were all questioners. They questioned everything. In class and out, on every subject, in every conversation, they asked, probed, interrogated, and wondered. If you have found that our Law School is sometimes obsessive about asking questions, that is an essential part of the legacy of Bernie, Wally, Harry, and Edward. You are who they were because of the power of their minds and the gift of their example.

They were lawyers by training and intellectual inclination. Although each was extraordinarily well read and deeply interested in interdisciplinarity (they were among the leaders of the national movement to bring such disciplines as economics, sociology, and philosophy into legal analysis), they were first and foremost lawyers. They brought both to the classroom and to their scholarship a fascination with the law, both in principle and in practice. They were unalterably committed above and beyond all else to legal discourse and to the rule of law.

As a student, I had Bernie for Evidence. It was one of the truly memorable educational experiences of my life. Bernie was a brilliant teacher. His favorite expression was “Sup-pose. . . .” The “o” was always drawn out a very, very long time. Whether this was to enable Bernie to frame his question perfectly or to leave the student hanging miserably in suspense, was a mystery I never solved. But in the duration of that “o” many a student (present company included) experienced the dread of anticipation.

Bernie could be sly, elusive, crafty, nit-picky, and pedantic. He was masterful. The distinctions he drew among the various applications of the hearsay rule were always subtle and utterly confounding. They often left me gasping in wonder. When I later joined the faculty, the first upper-division course I taught was Evidence. Even though I’d never seen a trial or even the inside of a trial courtroom, I felt well prepared and passionate about the subject. I have taught Evidence more than twenty times now, and I never fail to hear Bernie’s voice in my questions and comments in class.

During the years I served as Dean of the Law School (1987–1993), Bernie was a constant source of advice, guidance, encouragement, and ever-so-gentle chiding. His concern for our students, curriculum, teaching, and intellectual standards was unsurpassed. Of course, Bernie could be maddeningly legalistic. He could dance on the head of a pin while juggling the angels. When he warmed to an argument, his eyes twinkled behind his glasses, and no point was too fine, no distinction too subtle, to skewer an adversary. Bernie was feisty and
he was merciless. He could slice and dice and shred even the best of us. But at heart he was a sweetie, and everyone knew it.

Bernie was an inspiration to generations of University of Chicago law students. He, Edward, Harry, and Wally were remarkable figures. Products of the Depression, of the University of Chicago, and of World War II, they shaped not only the Law School, but the law. It is fitting that their portraits should hang side-by-side in the Classroom wing, that each has a named professorship at the University in his honor, and that each lived—and died—within a stone’s throw of the Law School they so loved.
Cass R. Sunstein†

It is 1982. About six months ago, the Professional Air Traffic Control Organization (PATCO) launched a massive strike against the federal government—the first nationwide public employee strike in the history of the United States. President Ronald Reagan fired the strikers on the very day that they struck. The world of American labor law is attempting to make some sense of these events.

Bernard Meltzer, the most distinguished labor law teacher in the United States, is interested in writing something about the strike—on its causes, its nature, and the many legal issues it raises. He enlists a young law teacher as coauthor. The young coauthor was the present writer; the product was published in the University of Chicago Law Review.

Bernie was no kid at the time; when the article was complete, he was nearly seventy. But he was a real workhorse, he had endless patience, and he was insistent on getting the details right. Bernie wrote every word of the account of the underlying facts, which occupies about a third of the article. (Bernie was also responsible for the vast majority of the footnotes.) Of course Bernie was a master of the theoretical issues, including the reasons for the ban on public employee strikes and the constitutional questions raised by the government’s response. But he was insistent on being precise about every claim, however small, which he documented with his endless array of long, yellow sheets filled with his indecipherable handwriting.

I had the distinct impression that Bernie did not much like PATCO and its leader, Robert Poli. But Bernie showed real emotion at only one point in our long collaboration. After reading some of the source materials, he said to me, “Poli was concerned with only one thing—raw power.” He made a fist as he said the final words. At the time, I could make no sense of the intensity of that statement; a quarter of a century later, I can still feel its sheer force.

The article’s conclusion was also written entirely by the senior author. Bernie said that while the ban on public employee strikes is justified, responsive administration is a corollary of that ban. If public employees are to be deprived of the strike weapon, officials must “expand the participation of employees and enlist their ingenuity in solving the

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problems of the workplace.” Bernie added that public officials must take seriously the recommendations of task forces appointed in the aftermath of public crises, in part to ensure that the views of employees, transmitted to such task forces, “were seriously evaluated and given life, day by day, unless good cause for not doing so is shown.” Bernie emphasized that public officials who question the prohibition on public employee strikes should not use the union hall as “the forum for supporting an impending strike,” especially “when strike fever is high.” He emphasized that politicians must not use “bureaucrats as scapegoats for the failures of national policy,” in part because rhetoric of that kind “tends to intensify ill will on both sides and is likely both to add to the strains on the antistrike policy and to undermine morale and loyalty.”

There is an intimate relationship among Bernie’s intense concern for details, his objection to “raw power,” and his recommendations. Bernie was a craftsman because he was a proceduralist—one who believed, with Justice Frankfurter, that “the history of liberty has largely been the history of the observance of procedural safeguards.” For Bernie, concern for the details is a kind of procedural safeguard—one that disciplines one’s own judgments and exemplifies while helping to ensure fairness to all sides. In the end, what bothered Bernie about the PATCO strike was not in any sense political (as I suspected, wrongly, at the time). What bothered him was the union’s willingness to exercise power without the slightest attention to legal requirements and legitimate procedure. (Bernie cut his legal teeth during World War II, and he was an active participant in the Nuremberg trials.)

I had one other chance to work with Bernie, this time in the very recent past. The Department of Defense had the good judgment to consult Bernie, on an informal basis, about several questions raised by the war on terror, specifically involving the detention and trial of suspected terrorists. I was privileged to work with him, again as a kind of junior associate. Now in his late eighties and early nineties, Bernie had a complete command of the historical analogies and an intense concern for the current details. But he had these above all: an unshakable opposition to raw power, even when exercised by the United States, and an unyielding commitment to fair procedure.

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2 Id at 798.
3 Id.
4 Id at 799.
5 Id at 798.
Let me close with a passage from an unpublished speech delivered by this modest, careful, gentle, and wise man. The date was September 12, 2001:

Yesterday's infamous assaults against the United States have evoked the deepest concern for the direct victims and those they left behind and for countless indirect victims, all those who cherish the idea of civilization and ordered liberty. . . . [W]e must, as the President and others have reminded us, identify and hold accountable those responsible for yesterday's horrors.

But there are obvious caveats: We must have reliable evidence about who the perpetrators were before we unleash our power. Our desire for retribution, revenge, or deterrence must not be allowed to outdistance our evidence about the perpetrators and their accomplices. We must, of course, also avoid a backlash against Arab-Americans and Islamic-Americans, as such. Having been victims, we should be careful not to become victimizers of those who happen to have something in common with plausible suspects. . . .

And so we have much hard work and many hard choices in front of us. In making them, we must not forget our traditions of due process and fair play. We cannot, of course, give the protections of a criminal trial to those who orchestrate terrible crimes and hide in distant and dark places. But we must, to repeat, have reliable evidence before we unleash our power. By honoring the core values behind our worthiest traditions we might, in time, even get a sliver of consolation for the grievous loss that all of us have suffered and should not and will not, I am certain, ever forget or disregard.