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TRIBUTE TO CURTIS J. BERGER

*Michael H. Schill**

As he did with so many people, Curt Berger touched my life in many different ways. Curt was my teacher, my mentor, my colleague, and my friend. My first exposure to Curt was in the classroom. Although Curt was well known as an expert large-classroom teacher, I feel extremely fortunate that my class, a graduate seminar on Law and Urban Planning that he taught as a visitor at Princeton's Woodrow Wilson School of Public and International Affairs, had only nine students. I was one of four college juniors with a fledgling interest in urban policy who enrolled in the course. Curt taught us in the same style he used for his large classes, pacing around the tiny seminar room, using a humane, yet rigorous Socratic method, and beginning the first class with his renowned watch trick.

The watch trick crystallized (no pun intended) one of the intellectual and emotional strands that ran through Curt's teaching and scholarship. He would ask a student for her watch and then explore why the student thought she was entitled to get it back. As the dialogue with the "owner" of the watch progressed, all of the issues that we would soon cover in the course also unfolded. In particular, Curt made us understand that property law is ineluctably intertwined with power, by underscoring how the law repeatedly steps in to mediate the tension between social needs and the owner's Blackstonian "sole and despotic dominion" over resources.¹ Importantly, it also limits the ability of property owners to assert dominion and control over people.

This idea that property law exists to protect the powerless as well as the strong was a continuing theme of Curt's life and work. One of the first cases that a Berger student would encounter was *State v. Shack*.² In that case, a farmer who employed migrant farm workers filed trespass charges against a legal services attorney and a farm worker's advocate. The two defendants had come onto the farmer's property for the purpose of assisting migrant workers with their health care and legal needs. In overturning their convictions, the New Jersey Supreme Court wrote, "Property rights serve human values. . . . Title to real property cannot

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1. 2 William Blackstone, Commentaries *2. For a brilliant exploration of the tensions underlying property law, see Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 Buff. L. Rev. 205, 313-46 (1979).

2. 277 A.2d 369 (N.J. 1971), reprinted in Curtis J. Berger & Joan C. Williams, Property: Land Ownership and Use 96 (4th ed. 1997).

include domination over the destiny of persons the owner permits to come upon the premises.”³

Curt’s scholarship often explored the appropriate balance between property rights and the needs of the powerless. Along with Charles Haar of Harvard University, Curt was the leading pioneer of the movement to integrate housing law and policy into the legal academy. In many ways, Curt created and shaped the study of housing in law schools, making it a legitimate enterprise in the process. At a time when most property professors were seemingly permanently anchored to the fifteenth century, Curt’s teaching and writing concerned issues that affected the material well-being of people who are alive today. An entire generation of housing practitioners and academics owe him a great debt of gratitude.

In housing law, in general, and landlord-tenant law, in particular, Curt found a rich setting for analyzing the relationship between power and property rights. Indeed, his article “Hard Leases Make Bad Law,”⁴ written twenty-five years ago, continues to be widely cited in discussions and debates about the alleged disparity in bargaining power between tenants and landlords. Curt’s spirited and thoughtful defenses of rent regulation remain required reading for any serious analysis of the issue.⁵ In particular, although one might disagree with his conclusions, the ingenuity of Curt’s arguments for treating landlords in cities like New York as regulated industries is patent.

Perhaps one of Curt’s best known housing articles is a piece he wrote for a symposium issue of the *University of Miami Law Review* on homelessness.⁶ In that article, he called upon government and private industry to establish an entitlement to housing: “Affordable shelter must be seen as a fundamental right, as part of that entitlement to an adequate standard of living that every humane society—certainly one as fortunate as our own—should wish to assure every one of its residents.”⁷ To Curt’s credit, the article did not merely contain lofty sentiments as so much writing in the area does. Curt was a pragmatist. He described both the difficulties of paying for a universal entitlement and what this entitlement might comprise.

Although I have concentrated on Curt’s housing scholarship in this tribute, partly because of my own academic interests, I would be remiss if I failed to mention his work in a multitude of other areas. Curt was one of the early scholars to recognize the importance of the condominium

3. *Shack*, 277 A.2d at 372.

4. 74 Colum. L. Rev. 791 (1974).

5. See Curtis J. Berger, *Home is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 Brook. L. Rev. 1239 (1989); Curtis J. Berger, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 733 (1983); Curtis J. Berger, *A Public Utility View of Rental Housing*, 50 Pa. B. Ass’n Q. 234 (1979).

6. Curtis J. Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. Miami L. Rev. 315 (1990–1991).

7. *Id.* at 324–25.

form of ownership and wrote at length about the subject in a very important article.⁸ Curt's casebooks and teaching included not just property,⁹ but also real estate transactions and partnership taxation.¹⁰ Curt was intellectually open to new ideas and new methodologies throughout his entire career. Indeed, in the last decade of his life he wrote an excellent paper that employed law and economics to understand the law of real estate contract remedies.¹¹

Beyond his scholarship and teaching, Curt was a caring and giving man. Over the course of his career, he was involved in an enormous number of professional and civic activities that allowed him to put his knowledge to good use. In 1974, Judge Jack Weinstein appointed Curt the special master to create a neighborhood and school integration plan for Coney Island, an experience he later described in a fascinating article published in the *Columbia Law Review*.¹² More than a decade later, Curt served as the Executive Director of the West Side Task Force, a group that was charged with the unenviable job of creating a plan for a scaled down West Side highway and park in Manhattan. In the 1990s, Curt remained active in community and professional groups, serving as a board member (and president emeritus) of The Bridge, a social service agency for the mentally ill, a board member of the Citizens Housing and Planning Council, and president of the Association of American Law Schools.

I myself was the repeated recipient of Curt's generosity. Seven years after I completed his seminar at Princeton, I showed up at Curt's doorstep one day looking for advice about how to obtain a position as a law school professor. As always, Curt was extremely gracious and unselfish with his time and assistance. In many ways, he had more confidence in my ability to land a good teaching job than I had myself. Throughout my years as a professor, Curt was always willing to pitch in to help. His comments on drafts of my articles were consistently insightful and promptly delivered, and he was always happy to come down and participate in a panel or roundtable. Indeed, the last time I saw Curt, he was enthusiastically participating in a session I had put together for an AALS workshop on combining community work with scholarship.

8. Curtis J. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 *Colum. L. Rev.* 987 (1963).

9. See Berger & Williams, *supra* note 2.

10. See Curtis J. Berger & Quintin Johnstone, *Land Transfer and Finance: Cases and Materials* (4th ed. 1993); Curtis J. Berger & Peter J. Wiedenbeck, *Cases and Materials on Partnership Taxation* (1989).

11. Curtis J. Berger, *The Influence of Law and Economics on Real Estate Contract Enforcement* (unpublished manuscript, on file with the *Columbia Law Review*).

12. Curtis J. Berger, *Away From the Court House and into the Field: The Odyssey of a Special Master*, 78 *Colum. L. Rev.* 707 (1978). Indeed, legions of law students at the Yale Law School, Curt's alma mater, including the author of this tribute, were introduced to the principles of Civil Procedure in a case study of the Mark Twain Junior High School that made use of Curt's report and article.

Curt has made a lasting impact on my life and on the lives of thousands of students, colleagues, friends, and family members. Personally, his warmth and friendship enriched my life. Professionally, his pioneering work on the intersection of housing and law has had a tremendous impact on the legal academy and has made it possible for me to engage in a kind of scholarship that brings me enormous satisfaction. I am sad that Curt is no longer with us engaging in impassioned discussions or sharing comments on drafts of articles. Nevertheless, the next time I teach property and ask some unaware and innocent first-year student for her watch, I have a feeling Curt will be next to me, in spirit, smiling at us both with his mischievous grin.