

Paul Bator

Paul Bator has left us the most precious inheritance of all; he has enriched us with a distinctive sense of the possibilities for achieving grace in all our works and days. There is a wonderful unity, over time and across domains, about everything he put himself into: his family, his friends, his teaching and his scholarship, his legal practice, and his avocations—sports, music, dance, art, travel. They resonated with each other. Federal jurisdiction, his field of professional preeminence, is after all not the most luscious of legal topics, as law may well be one of the drier disciplines. Yet from the very beginning—in his great article on habeas corpus, published in 1963—the music of his mind played with a refinement of elegant correctness that he worked for in every communication I ever had from him. It was there when I last spoke with him. There was then, as there always was, that hesitating syncopation of expression, as he almost visibly took the trouble to put his thought just right—in the way that would best do justice to the truth he was trying to express and most delight his hearer (and him) with the justness of his expression.

Here he speaks more than twenty-six years ago:

The problem of finality in criminal law raises acute tensions in our society. This should not, of course, occasion surprise. For the processes of the criminal law are, after all, purposefully and designedly awful. . . . No wonder that our instinct is that we must be sure before we proceed to the end, that we will not write an irrevocable *finis* on the page until we are somehow truly satisfied that justice has been done.

But the general tendency to hesitate before pronouncing a final judgment in a criminal case is, I think, reinforced today by some rather special currents in our thought. . . .

. . . our fear (and, in some, conviction) that the entire apparatus of the criminal process may itself be fundamentally unjust makes us peculiarly unwilling to accept the notion that the end has finally come in a particular case; the impulse is to make doubly, triply, even ultimately sure that the particular judgment is just, that the facts as found are “true” and the

law applied "correct."¹

The voice is one that has not changed. We can almost feel Paul working to tie some very technical and intricate matter to the most basic stuff of our intuitions as thoughtful, decent citizens. And there is the underlying faith that there are thoughtful, decent persons—judges, students, lawyers—that they can understand and will respond.

It may be because for a while that faith was shaken that he fell relatively silent. Yet he found his voice again. His wonderful family, whose love refreshed any faltering faith in the goodness and sweetness to be found in this world, surely helped in that recovery, as did many of his friends, colleagues, and students. But I do not want to overemphasize this aspect of his life; in fact Paul's voice did not diminish for a moment in the classroom and to his friends.

He found his voice again, and when he found it it was richer, with deeper resonance. There was his magisterial writing in federal jurisdiction and a steady stream of shorter, always arresting work. And he assumed another, more public stage too. Surely the Supreme Court podium has rarely heard his special mix of eloquence and hesitant spontaneity, as he wove a web whose warp was logic and the woof of which was common sense and decency—wove it before the Court's very eyes. I recall his main criticism of my first argument to the Supreme Court: "Charles, you should try—somehow—to be more—*friendly*." But the friendliness he had in mind was not an unctuous or false bonhomie; it was a friendship born of the sense that the argument was a collaboration into which he managed to draw the Justices. And they loved him for it.

I think that voice is nowhere stronger than in what must surely be one of the great briefs filed in the Supreme Court, Paul's brief for the Sentencing Commission in the *Sentencing Guidelines* case.² This, of course, is more than a brief; it is a vision (one I must say I do not share) of constitutional relationships and structures that harks back to and completes the vision of the masters of the tradition from which Paul, the legal scholar, emerged—the tradition of Thayer, Frankfurter, Henry Hart, Louis Jaffe. Indeed in that one writing he attains a sureness, a definiteness, a magisterial quality that I had not quite seen in his work before.

¹ Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 Harv L Rev 441, 441-43 (1963).

² *Mistretta v United States*, 109 S Ct 647 (1989).

But I do not wish to get the wrong emphasis. Paul's ambition was wider and subtler than that of the scholar driven to get some field right. Above all he sought to get life, his life, right. And that was in the end a work of grace under the sign of beauty. His friendships, his love, his work, his play all converged. His style and his substance converged too. And he did it on purpose, with delight.

Shortly after Paul's death, as I was thinking of what I would write in this space, an envelope arrived for me with a manuscript and a handwritten note from Paul. It was dated February 21, a week before he died. The note said:

Charles, I have asked Geoff Stone whether they might print this [referring to the enclosed manuscript] in their alumni magazine. I said all changes have to be cleared with you. If you like it and they don't print it (or if they do) will you send it around to my friends?

Well "they" liked it very much and have printed it. It captures exactly that note I mean to convey here. I will "send [at least a small part of] it around to his friends" now. He is speaking to the entering class at the University of Chicago Law School in the fall of 1987:

The law has an intimate relationship with the written language too. Learn, as quickly as you can, that one of the huge aesthetic (and in a deep sense moral) delights of doing law is to engage in an intense romance with the English language. You will constantly be writing—and it is possible to write in the law with precision and elegance and power and wit. Keynes, of course, said that the lawyer turns poetry into prose and prose into jargon. (Unlike the economist?) And it is all too true that many lawyers believe that effective legal expression must be pompous, impersonal, official, euphemistic, and bureaucratic. Don't believe it. In the law, as everywhere, the effective piece is the one that doesn't just do the job, but the one that sings. . . . The chance to become a master of virtuoso prose is a pleasure available to lawyers; seize it if you can; like all forms of virtuosity, it provides deep satisfactions.³

And this is how he ended that talk:

The inner excellences of doing law, I have said, include

³ Paul M. Bator, *Talk to the First Year Class*, 35 U Chi L Sch Record 5, 6-7 (Spring 1989).

moral scruple in expression, virtuoso writing, scholarly truthfulness, cultivation of a judicial perspective, and sympathy and detachment in counseling—all of this in the service of a hugely interesting enterprise. And remember, too, that to find happiness in that enterprise, you must enter upon it with enthusiasm and intensity, with that fierce concentration of attention that in fact constitutes love. In your pursuit of the law, think of yourself a little bit like a suitor. Be ardent. Let yourself fall in love with the law.⁴

I would like to digress for a moment to relate the rest of Paul's February 21 note to me, because it will gladden and reassure you about the bravery and elegance of Paul's life in these last months:

I haven't had the energy to do anything about the Article III piece [that is the manuscript of his Indiana Harris lectures]. I hope to next week. If I don't, after I'm gone, it can be printed pretty much as is, with just cites added, don't you think?P

There is a music to the life that was Paul's. He was a musician, after all, and he worked hard, with the ardor of a suitor, to use his phrase, to make his whole life and every part of it a graceful and beautiful thing. To those of us who have heard it, the melody will stay in our hearts and minds. We will hum it, and others will catch the tune and be caught up in it. The melody will go on and on.

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⁴ Id at 7.

† Adapted from remarks given at a memorial service for Paul Bator at The University of Chicago Law School, March 4, 1989.