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## Tribute to Curt Berger

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## TRIBUTE TO CURT BERGER

*Joan Williams\**

I was in Chile when I received the e-mail telling me of Curt's death. He was the same generation as my father, who had died two years earlier. They knew each other when both were active in housing and planning circles in New York City in the 1950s. I met Curt a quarter century later when I was awarded a fellowship to study urban history at Columbia. My father (who was pushing me toward law school) had sent me to talk with Curt. At the time I saw him simply as my father's friend; he did not command my fervent interest.

I next encountered him five years later when, as a new law professor, I was looking for a property casebook. Dukeminier and Krier was new and glitzy, but I came from a line of dirt lawyers, had majored in history, and had worked as an environmental and transportation planner before law school; I was troubled by both the politics and the history contained in Dukeminier and Krier. The Berger casebook stood out for several reasons. I liked the way it explored the links between property, poverty, and power, and I appreciated its complex understandings of the role of urban and environmental planning in a democratic society. Its use of leases, mortgages, and other real estate documents taught important skills; moreover, it linked them with an analysis of the distribution of power between landlords and tenants, home buyers and banks. The casebook showed students, rather than told them, that property law is about the creation and manipulation of entrenched power relationships.

But what impressed me most about the Berger casebook was something simple: When Curt asked a question in the notes, he answered it. This seems a small thing, but to me it was not. Barely two years out of law school, I remembered my confusion when faced with conventional casebooks. How on earth was I supposed to know the answers to the questions that the casebook posed, I wondered? There inevitably was the odd zealot who claimed to look up all the note cases, but most of us did not. Why ask a question of a student who did not have the information required to answer it? This was one of the many demoralizing mysteries of law school I had vowed not to recreate.

Curt's gentleness and decency also drew me to the casebook. These qualities governed our working relationship as we wrote the fourth edition. They were combined with a third quality that astonished me: an extraordinary intellectual openness. I suggested including materials on the distribution of income in the world's most unequal industrialized society; the disappearance of black family farms; the ecology of beachfront development; and the systematic impoverishment of women and children. Curt listened, and consequently critical race theory, intellectual

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history, feminist jurisprudence, the commodification debates, environmental studies, and racial geography entered the book. When Curt cut material, he exercised an uncanny sense of how much was enough, providing the moderation and balance that kept the book firmly in the mainstream.

We had systematic differences in perspective that reflected a shift in the law professoriat. His generation entered law teaching as lawyers first and foremost; I entered it as an academic, with deep roots in the humanities and intent on cross-disciplinary perspectives. Yet, he respected what my generation had to offer: When he read Patricia Williams's work in connection with the appointments process at Columbia, he made sure we had excerpts in the casebook.

Curt not only listened; he placed himself in the new era. One day after he had begun to use the new materials, Curt returned to his office to find an anonymous note complaining that the casebook was biased; the evidence cited was that it always referred back to "her" rather than to "him." "We didn't do that," he protested; "we use the two about equally." Equality as bias: The message was not lost on him.

Sometimes it was staggering to find out how well he listened. Several years after he had begun teaching the landlord-tenant materials, which included Barbara Bezdek's searing description of the Baltimore landlord-tenant court as a collection court for landlords,<sup>1</sup> I discovered that not only was he taking his students to court, he had also talked with Judge Judith Kaye, Chief Judge of the New York Court of Appeals, about the need for improvements.

During the period when I worked with him, Curt was passionate about servitudes, having played a major role in the Third Restatement of Property (Servitudes).<sup>2</sup> To hear him talk about the Restatement reminded me of my father: He had a similar confidence in the ability of people of good will to get together and systematize a truly irrational area of the law; to persuade courts to abandon the habits of centuries through the allure of clear thinking; to solve social problems armed only with intelligence, perseverance, and commitment. In an age of irrationalism and incommensurability, he shared with my father an optimism that remains deeply appealing.

Curt also accepted my intellectual eclecticism, my love of history and philosophy, even my defection to gender studies, in ways my father had found difficult to accept. Curt's openness reflected a firm sense of self and a commitment to the kind of decency that seems somehow old-fashioned today. The message I received from him was that I had something to offer but that he did, too, and his respect for me would be diminished if I did not recognize that.

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1. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra L. Rev. 533 (1992).

2. Restatement (Third) of Property: Servitudes (1989).

I feel privileged to have worked with Curt, guided by his grounding in the practice of real estate and land planning law, by his readiness to believe that ingrained injustices can be changed, by his example of how to fight a battle—to really fight it, to win—yet maintain an atmosphere of mutual respect. Curt's special gift was his insistence on humanizing his opponents. Toward the end of his life he marveled at the loss of civility that had entered the legal academy. We once discussed a widely supported candidacy that had been blocked in a way he found shocking: "There was no doubt as to the quality of the work," he said. He was not accusatory; he was trying to understand the end of something: a consensus on what constitutes important work. He could not accept the rancor that has often accompanied the growing diversity of legal scholarship. Nor should we.

In the last decade, law has been an extraordinarily fertile field: It has offered a freedom from disciplinary boundaries most disciplines lost long ago. But the price of that freedom has been civility. In a profession where an understanding of incommensurability is an accepted mark of intellectual sophistication, there has been a stark lack of mutual respect for divergent intellectual projects. More often, colleagues have bridged the gaps created by incommensurability only with vicious and personalized attacks.

Curt provided a different model. "He was a wise soul with a reverence about people and ideas," noted Dean Judith Wegner of North Carolina Law School, who served as president of the American Association of Law Schools two years after Curt.<sup>3</sup> "Curt was at his finest—civil and deliberating" in working through divisive issues within the AALS.<sup>4</sup> "He brought a certain reflectiveness and openness to bear on any issue."<sup>5</sup> She remembered a rafting trip she and others had taken with Curt, where they marveled at his vast knowledge of birds: "His spirit had the lightness of a bird; he was so respectful and taken by beauty and willing to be open to it in that fundamental way—to be open to the moment. Curt's birdwatching was emblematic of his close attentiveness to the delicacy and fragility of life."<sup>6</sup>

Birdwatching was also emblematic of the fact that Curt had a life. Curt went to Antarctica, to Costa Rica, to Chile, and was birdwatching—always birdwatching—in the years we worked closely together on the casebook. In a profession where lawyers often feel they have no lives outside the office, a profession that elevates lawyers obsessed with winning even at the cost of demonizing their opponents, Curt never forgot that he would have to live in the atmosphere created, even after the heat

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3. Telephone interview with Judith Wegner, Dean, University of North Carolina School of Law (Feb. 17, 1999).

4. *Id.*

5. *Id.*

6. *Id.*

of battle. "He was such a heroic figure to me," said Dean Wegner. "I will miss him forever."<sup>7</sup>

I miss him, too. Like my father, Curt was a gentle man of the old school. His friendship helped buffer me from my father's death; his memory will guide me as I learn to welcome younger scholars not as a threat but as a source of enrichment. And so it was that, looking over the mountains in Santiago and learning that Curt too was gone, I felt that I had lost my father twice.

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7. *Id.*