
TRIBUTE TO PROFESSOR MARK J. PETTIT, JR.

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When the BU School of Law community lost Professor Mark Pettit, Jr. last summer, we lost a great teacher, perhaps the best law teacher in the United States. His classes sang even when he was not singing. I have an overwhelming feeling of gratitude at having been Mark's friend and colleague for the past thirty-four years. When my friends at the Mandel Legal Aid Clinic at the University of Chicago Law School learned I would be teaching at BU Law, they urged me to seek Mark out. Mark taught there as a clinical instructor before he came to BU, and his former colleagues told me that Mark was a great person, a fantastic colleague, a great law teacher. Mark proved worthy of their praise on many different levels.

We all know how great Mark was in the classroom. This quiet, unassuming fellow became a rock star in the classroom. He sometimes used props, and he sometimes sang, but he always used his incredible skills as a lawyer and teacher to lead his students in their quest to think like lawyers. He was respectful and kind, but insistent that students move out of their comfort zones into a greater appreciation of legal concepts and the social and economic importance of the law. Both in and out of the classroom, Mark was completely devoted to his students, and, of course, they were his biggest fans.

Mark was also the ideal institutional citizen. It may be inside baseball to non-faculty members, but law schools run on the hard work of often under-appreciated faculty colleagues who put in countless hours on sometimes dreary and tedious committee work. Mark was a leader in that respect. Not surprising in light of his devotion to students, Mark's greatest contributions on the administrative side were in the admissions arena. He chaired the admissions committee for years, carefully reading thousands of files, looking, as our current Admissions Director put it, for reasons to admit people, not for reasons to reject them. Mark also represented the school at preview days, conducting mock law classes for accepted students that showed the best our teaching faculty had to offer. Mark was instrumental in shaping decades of classes at BU Law, and the fruits of his efforts are on display world-wide in the accomplishments of our alumni.

Another aspect of institutional citizenship is the willingness and ability to give advice to colleagues, especially junior faculty members on their way to tenure. Mark was incredibly generous with this time and energy. He gave me, and many others, valuable advice on teaching and he also helped me immensely with my

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early efforts at scholarship. I came into law teaching with the idea that I was going to change the law school world by applying critical methodologies both in the classroom and in my scholarship. On my first few publications, although I had what I still think were some good ideas, the writing was terrible and the papers were completely unorganized. On my first paper, Mark did a line edit and he wrote out a list of the topics of each paragraph to show how disorganized it was and how I could rearrange them into something approaching coherence. It was a life saver, or at least a career saver, and embodied his generous spirit.

One secret that many people might not realize about Mark is that in addition to being a gifted teacher, he was also an accomplished legal scholar. If it had been a higher priority for him, he might have become one of the most highly valued private law scholars in the United States. Mark was a master at traditional legal scholarship in which the scholar analyzes a large body of case law and distills principles that can be used to explain the goals of the law, criticizes aberrant cases and points to promising future paths the law might take. I recall very clearly a conversation he and I had in the late 1980s in which I challenged that methodology and he responded that he thought that was what good legal scholarship was all about. I'm still not convinced that it's *all* about that sort of analysis, but as I have mellowed from my younger, bomb-throwing, days, I have recognized that traditional legal scholarship is of immense value in the common law world. As German legal philosopher Jurgen Habermas once commented at a conference I attended,¹ Americans are steeped in an empirical examination of the law, in contrast to the European tendency to ignore the actual workings of the legal system in favor of a highly abstract theoretical approach.

Anyone interested in contract damages would do well to read Mark's 1987 article *Private Advantage and Public Power: Reexamining the Expectation and Reliance Interests in Contract Damages*.² In this excellent piece of legal scholarship, Mark takes on one of the biggest issues in contract law at the time, namely whether in the fifty years following Fuller and Purdue's 1937 attack on the expectation measure of contract damages,³ the case for that measure had been made. After analyzing the work of numerous luminaries of contract scholarship⁴ and taking on the economic analysis that had recently come into

¹ Conference on American and German Traditions of Sociological Jurisprudence and Critical Legal Thought, Bremen, Germany (July 1986).

² Mark Pettit, Jr., *Private Advantage and Public Power: Reexamining the Expectation and Reliance Interests in Contract Damages*, 38 HASTINGS L.J. 417 (1987).

³ See Lon L. Fuller & William R. Purdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1937).

⁴ Among others, Mark's article discusses Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979), Charles Fried, *Contract as Promise* (1981), Theodore Eisenberg, *The Bargain Principle and Its Limits*, 95 HAR. L. REV. 741 (1982), E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970), and Ian Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983).

vogue,⁵ Mark concluded that the case had not been made for the expectation measure of damages except when the expectation measure represented the best approximation of what he called “lost opportunity reliance measure” of damages.⁶

The “lost opportunity reliance measure” is a measure of damages that takes as its touchstone the notion that damages for breach of contract should put the non-breaching party in the position they would have been in had the contract not been formed, which means that the non-breaching party should receive damages to compensate for the loss of the opportunity to make an alternative contract that was displaced by the one that was breached. Sometimes this entails full expectation damages but often it does not. In his article, not only did Mark make a persuasive case for his measure, he demonstrated that the case for alternative theories had not been made even in the work of the most highly respected contract law scholars of the twentieth century.

Another piece of Mark’s scholarship I recommend to those interested in contract law is his wider-ranging 1999 article *Freedom, Freedom of Contract, and the “Rise and Fall.”*⁷ This paper addresses whether contemporary contract law has restricted freedom of contract and whether any narrowing of freedom of contract has resulted in a reduction of freedom more generally. In this paper, Mark did an excellent job of questioning the view that freedom of contract declined in the century before its publication, pointing out, for example, that women and minorities in the United States enjoyed an unprecedented ability to enter into contractual relationships.⁸ He also questioned the correlation between freedom of contract and freedom more generally, pointing out, inter alia, that restrictions on contractual rights may enhance freedom from coercion and thus increase liberty.⁹

I would like to conclude on a more personal note. Mark was a great friend, someone I looked to for personal advice on many things, especially when I started coaching my kids’ sports teams. Mark volunteered countless hours coaching his kids’ teams, and I always trusted his judgment on issues that arose on that front.

Years ago, Mark introduced me to bird watching. In early May 2018, we set out together with our colleague Michael Harper to Mount Auburn Cemetery, a bird watching mecca, on what I suspected would be our last birding trip together. It was great to spend the time with Mark reminiscing, but he really could not engage in much of the activity. Walking was tiring and looking up through the

⁵ See Pettit, *supra* note 2 at 432-35 (discussing Pareto Efficiency and Kaldor-Hicks efficiency) (citing, inter alia, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS(1983)).

⁶ See Pettit, *supra* note 2 at 453-68.

⁷ Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall,”* 79 B.U. L. REV. 263 (1999).

⁸ Pettit, *supra* note 7 at 306-11, 353.

⁹ *Id.* at 288.

binoculars was dizzying. But in his usual fashion he was a great sport about it and we made the most of it.

My favorite bird watching story with Mark was during one of our runs along the muddy river in Brookline. I hated running but loved the comradery with the group of faculty that often ran together. On this occasion, it was just Mark and I and suddenly Mark pointed off in the distance into the river and said "I think that's a great blue heron or maybe an egret." As we approached, we realized it was just a piece of plastic sheeting hanging on a branch stuck in the river. We always joked how the plastic sheet heron was the one bird no other birder had ever discovered in the great muddy river.

I miss Mark so much already and I know that I am but one among thousands of people who feel privileged to have known him. His colleagues and former students will always cherish the opportunity we had to learn from him and with him. If we are so fortunate, Mark's influence will always be where it belongs in our lives, everywhere.