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MELVYN R. DURCHSLAG: SCHOLAR, COLLEAGUE, MENTOR, FRIEND

Jonathan L. Entin[†]

Can Mel Durchslag possibly be retiring? I vividly remember meeting him for the first time, almost twenty-five years ago, at dinner the night before my interview. Although I knew that we had attended the same law school—more years apart than our chronological ages might suggest¹—that evening I learned that my Property teacher had been one of his fellow students. I also heard some good stories about a few of my other professors, several of whom had also taught Mel while another had grown up near him and followed a similar career path.²

Since then I have come to know Mel as much more than the senior faculty member in my field. Indeed, it has been more than a little odd to find him becoming my peer the longer I have been his colleague.³ He generously agreed to let me, the rawest of rookies, teach Constitutional Law II, our First Amendment course, annually for over a dozen years even though he loved that wonderful class and could easily have objected to the dean's giving it to a newcomer or held it against me when I came up for promotion. But, naturally, he never did so. Sometimes we both taught the course. One year we even had a

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¹ The relative closeness of our birth dates does not explain my incredulity at Mel's retirement. See *infra* note 3 and accompanying text.

² Only later did I learn that Mel had been a pretty good athlete in his youth. He was, for example, the catcher on a high school baseball team whose iconoclastic ace pitcher went on to notable success (as well as a fair amount of controversy) in the major leagues. See JIM BOUTON, *BALL FOUR* (Leonard Shecter ed., John Wiley & Sons, Inc. 2000) (1970).

³ Cf. ARTHUR L. STINCHCOMBE, *CONSTRUCTING SOCIAL THEORIES* vii (1968) (remarking about one prominent scholar that "I have been a bit bewildered by his becoming a contemporary as I grow older").

friendly bet on who could cover fewer pages. While (as usual) Mel didn't exactly sprint through the material, he almost cheerfully paid off the bet by delivering a box of macaroni and cheese to me.

Mel's generosity has continued throughout my two dozen years on the faculty. He has consistently supported my classroom efforts in the basic Constitutional Law course, always being generous with advice and insights about teaching and organizational matters even in his last semester at the lectern. Moreover, he has provided invaluable suggestions on many of my manuscripts. The usual author's disclaimer applies with special force to my acknowledgments of his help. He has returned the favor, so to speak, by asking me for comments on a lot of his writings, but I'm sure I gave him less than I got in return.

These are not the only ways that Mel has taught me about what it means to be a real academic and vital contributor to the institution. Over the years, he has chaired every major law school committee (and many minor ones), including the Curriculum Committee when we completely reorganized our first-year program. Mel kept us focused on that challenging task and almost single-handedly kept the process from going off the rails several times. He also largely defined the position of associate dean for academic affairs when he assumed that role two decades ago. In fact, he did such a good job as academic dean that he was asked to return to the position last year on an interim basis. Stepping in once more, he helped my colleague Sharona Hoffman learn the ropes last fall and worked with me while she was away on sabbatical last spring. Both of us have relied heavily on his vast institutional memory in performing our administrative responsibilities.

Members of the legal academy tend not to define themselves in terms of administration and committee work, though. We are teachers and scholars first. Mel has been a remarkable teacher who in a very real sense pioneered in bridging the gap between practice and theory. He joined the faculty in 1970, fresh from several years of practice with a law firm and service as a Reginald Heber Smith Fellow with the Legal Aid Society of Cleveland doing test-case and law-reform litigation. On his arrival he helped to start our legal clinic, which has now grown to include eight full-time colleagues, while simultaneously teaching in the classroom. His early courses included Agency and Partnership, but he focused largely on Constitutional Law. In addition to Con Law I and II, Mel has taught State and Local Government, Land Use, and seminars in constitutional theory, federalism, and equality. Although he had formally left the clinic

before I arrived, for several years after I got here he also taught an innovative First Amendment lab as an offshoot of Con Law II in which a small group of students did legal research on issues in pending cases that had been referred to him by the Cleveland ACLU. More recently, several colleagues have used a similar teaching model to develop other labs in areas as diverse as international war crimes, urban development, and corporate governance. Meanwhile, working with three colleagues, Mel developed a fascinating yearlong course called Selected Problems in Environmental Law and Policy that combined aspects of environmental law, administrative law, and state and local government as well as advanced legal research and a bit of international law and law and economics.⁴ I know firsthand how well this course worked, because it culminated in a lengthy simulated agency hearing at which I presided as the students presented extensive written and oral arguments.

Mel's scholarship has been equally wide ranging and eclectic. He has published a book and several articles on the Eleventh Amendment⁵ and on other aspects of federalism.⁶ Beyond that, Mel has written thoughtfully and provocatively about community development,⁷ voting rights,⁸ and various issues in constitutional law and theory.⁹ He also has explored discrimination in health care¹⁰ and

⁴ See Christine A. Corcos, Melvyn R. Durchslag, Andrew P. Morriss & Wendy E. Wagner, *Teaching a Megacourse: Adventures in Environmental Policy, Team Teaching, and Group Grading*, 47 J. LEGAL EDUC. 224 (1997).

⁵ E.g., MELVYN R. DURCHSLAG, STATE SOVEREIGN IMMUNITY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2002); Melvyn R. Durchslag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577 (1994); Melvyn R. Durchslag, *Welfare Litigation, the Eleventh Amendment and State Sovereignty: Some Reflections on Dandridge v. Williams*, 26 CASE W. RES. L. REV. 60 (1975).

⁶ E.g., Melvyn R. Durchslag, *Accommodation by Declaration*, 33 LOY. L.A. L. REV. 1375 (2000); Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464 (2000); Melvyn R. Durchslag, *Will the Real Alfonso Lopez Please Stand Up: A Reply to Professor Nagel*, 46 CASE W. RES. L. REV. 671 (1996)

⁷ E.g., Melvyn R. Durchslag, *Charitable Community Development Corporations and The Tax Reform Act of 1969*, 23 CASE W. RES. L. REV. 76 (1971); Melvyn R. Durchslag & Peter D. Junger, *HUD and the Human Environment: A Preliminary Analysis of the Impact of the National Environmental Policy Act of 1969 upon the Department of Housing and Urban Development*, 58 IOWA L. REV. 805 (1973); Melvyn R. Durchslag, *Property Tax Abatement for Low-Income Housing: An Idea Whose Time May Never Arrive*, 30 HARV. J. ON LEGIS. 367 (1993); Melvyn R. Durchslag, *Village of Euclid v. Ambler Realty Co., Seventy-Five Years Later: This Is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645 (2001).

⁸ E.g., Melvyn R. Durchslag, Salyer, Ball, and Holt: *Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE W. RES. L. REV. 1 (1982); Melvyn R. Durchslag, *United States v. Hays: An Essay on Standing to Challenge Majority-Minority Voting Districts*, 65 U. CIN. L. REV. 341 (1997).

⁹ E.g., Melvyn R. Durchslag, *Constraints on Equal Access to Fundamental Liberties: Another Look at Professor Michelman's Theory of Minimum Protection*, 19 GA. L. REV. 1041 (1985); Melvyn R. Durchslag, *Misuse of Separation of Powers Theory in Cases Outside the System of Freedom of Expression*, 38 CASE W. RES. L. REV. 496 (1988).

cast a jaundiced eye on the Supreme Court's references to the Federalist Papers in constitutional interpretation.¹¹ My favorite of all Mel's works is a creative and sophisticated critique of the Supreme Court's reluctance to uphold individual-liberties claims if doing so might limit the autonomy of state and local governments.¹² Mel argued that the Court should be more willing to recognize individual rights but also to fashion remedies for rights violations that reflect appropriate concern for the interests of state and local governments.¹³ This argument anticipated a large body of commentary that has taken the Court to task for refusing to recognize substantive rights out of concern for the financial, institutional, and political costs associated with broad-based remedies.¹⁴

In short, Mel Durchslag has had an enormous impact on the Case Western Reserve University School of Law. The faculty resolution recommending him for appointment as professor emeritus described him as "a model institutional citizen," which surely understates what he has done for generations of students and colleagues. We will miss him enormously when he retires. Fortunately, Mel will be retired but not entirely absent. He will retain an office and engage himself with our new Center for Social Justice while taking on new outside challenges and spending more time with his family and on his boat. He deserves this after all that he has done for us. Thanks for everything, Mel.

¹⁰ See Maxwell J. Mehlman, Melvyn R. Durchslag & Duncan Neuhauser, *When Do Health Care Decisions Discriminate against Persons with Disabilities?*, 22 J. HEALTH POL., POL'Y & L. 1385 (1997).

¹¹ Melvyn R. Durchslag, *The Supreme Court and The Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243 (2005) (concluding that *The Federalist Papers* have rarely been decisive to the outcome of Supreme Court cases but noting a sharp increase in citations since the retirement of Chief Justice Warren and suggesting factors that might account for increasing invocation of *The Federalist Papers* under Chief Justices Burger and Rehnquist).

¹² Melvyn R. Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723 (1979) (discussing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Paul v. Davis, 424 U.S. 693 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972); Younger v. Harris, 401 U.S. 37 (1971); and Dandridge v. Williams, 397 U.S. 471 (1970)).

¹³ *Id.*

¹⁴ See, e.g., Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006); Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).