

2008

How Do You Retire a Person like Melvyn

Wendy E. Wagner

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Wendy E. Wagner, *How Do You Retire a Person like Melvyn*, 58 Case W. Rsrv. L. Rev. 1011 (2008)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol58/iss4/6>

This Tribute is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

HOW DO YOU RETIRE A PERSON LIKE MELVYN?*

Wendy E. Wagner[†]

Melvyn Durchslag has probably been the single, most important force in my academic career, so it is a particular honor as well as a daunting task to write a short tribute by way of thanks. Mel was instrumental in hiring me at Case; just coming off a sabbatical from an associate dean position, he was assigned the unenviable task of hosting me—a prospective entry level candidate—for a long weekend. After convincing me that Case would be a terrific place to begin my academic career based on his own stellar collegial qualities, Mel then helped me navigate a seven-year-long tenure process. During those years, Mel mentored me as a rookie teacher; co-taught several innovative courses with me; read my long, incoherent draft articles; calmed me down after faculty meetings; and most important, became one of my best friends. But beyond those notable roles, Mel also served in the very significant position as Chair of the Promotion and Tenure committee that presided over my tenure decision, and he ultimately succeeded in convincing the faculty to vote me through. Even after I left Case for Texas, Mel and his wife Susan remained very close friends, sharing many meals and outings together—some even in Texas—in a relationship that has become much closer to “family” than “friend.”

So, given this long and deep collegial relationship, I feel well qualified to speak to some of Mel’s unique professional attributes.

* For those who did not catch the clumsy parallel, the title is fashioned after the song lyric, “How Do you Solve a Problem like Maria?” from the Rodgers and Hammerstein musical, *The Sound of Music. Maria*, in RODGERS AND HAMMERSTEIN’S THE SOUND OF MUSIC (Twentieth Century-Fox Film Corporation 1965).

† Joe A. Worsham Centennial Professor of Law, University of Texas School of Law. I joined the Case Western Reserve University faculty on a joint appointment basis in July 2008.

Yet I hasten to add that many others have the same relationship with Mel. He has mentored and co-taught with many other rookie teachers; read stacks of incoherent articles, some of which may have been as bad as mine; secured tenure for many besides me; and invited dozens of colleagues and hundreds of students to meals and other gatherings; and has been a wonderful friend to all of us. In short, I am not alone in having been touched by Mel. He is an exceedingly generous person. I am just one of the lucky few able to publish their experience in a law review issue dedicated to him.

In delivering on this assignment—in trying to isolate the essence of Mel—I have come to realize, ironically, that the occasion of his purported “retirement” spotlights what is particularly unique and special about him. Mel told me he was planning to retire late last summer. He said that life is too short and that he wanted to be more in control of his schedule and to have more fun. At the time, I accepted his assessment at face value, feeling both envious of Mel for his decision and also quite sorry for the school and the students who would no longer benefit from his remarkable example. I expected that upon retirement Mel would enjoy a much different quality of life. Rather than a daily commute into work, he would instead linger over morning routines of fresh coffee, newspapers, and exercise; he would cook even more extravagant gourmet meals for family and friends; he would scuba dive for several more weeks each winter in even more diverse and wonderful tropical venues; and of course he and Susan would float along in their sailboat in the Great Lakes for at least another month in addition to their usual six to eight week annual summer sojourn. No more exams. No more new preparations and new cases to fit into old teaching scripts. No more conferences and law review editors. And best of all, no more faculty meetings, committees, or associate deaning! Mel was going to be free of these chains that bind the rest of us.

But then it dawned on me that the very quality I admire (and envy) most about Mel is his ability to find the fun in everything. His articles are *not* written by a person who is intent on padding a C.V. or “getting his name out there.” They are written by a person who loves playing with ideas and conceptualizing ways to effect positive social change. He takes great delight in teaching and even went so far as to admit (once) that he enjoys some aspects of grading. And while it is a stretch to suggest that he finds fun in all aspects of institutional service, I actually think that even there he has carved out niches where he finds real pleasure. He is so effective at developing tenure files and guiding candidates through the tenure process, for example,

it is hard to believe he isn't enjoying the assignment. And his knack for asking impossible questions in faculty meetings seems to be one that he secretly relishes and finds immensely entertaining.

In short, Mel does the work, and a lot of it, because he loves it and finds it fun. He wouldn't do it otherwise. So, if he thinks his life and routines are going to change dramatically when the paychecks stop coming in, I suspect he is in for a surprise—"retirement" for Mel will probably mean that he sheds only the most unpleasant aspects of the job and reallocates that time to pro bono work with his friends at the ACLU.

Mel's ability to make each project, class, and idea fun is an unmistakable theme of his career. If you pick up any one of Mel's articles, you will notice a quality in it that is unlike most law review articles. In the prose and even the footnotes, there is an energetic presence; a person engaging with a new, provocative issue or prodding another to look at the problems through a new lens. Each article makes a distinct contribution to the life of ideas, tackling intellectual ground that others typically avoid or don't see nearly as clearly as Mel.¹ Mel is not content to be merely an arm chair theorist, though; instead he digs deeply into the facts and sometimes even collects original data to shed light on the issues.² In all of his work, moreover, Mel consistently writes in a light-hearted, fun-loving way. He is not out to get somebody to elevate his own stock, although his analyses have undermined a number of well-held

¹ A partial sampling of the issues he has taken on include: property tax abatements, *see, e.g.*, Melvyn R. Durchslag, *Property Tax Abatement for Low-Income Housing: An Idea whose Time May Never Arrive*, 30 HARV. J. ON LEGIS. 367 (1993) [hereinafter Durchslag, *Property Tax Abatement*]; the Eleventh Amendment, *see, e.g.*, MELVYN R. DURCHSLAG, STATE SOVEREIGN IMMUNITY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2002); voting rights, *see, e.g.*, Melvyn R. Durchslag, *United States v. Hays: An Essay on Standing to Challenge Majority-Minority Voting Districts*, 65 U. CIN. L. REV. 341 (1997); takings, *see, e.g.*, Melvyn R. Durchslag, *Will the Real Alfonso Lopez Please Stand Up: A Reply to Professor Nagel*, 46 CASE. W. RES. L. REV. 671 (1996); federalism, *see, e.g.*, Melvyn R. Durchslag, *Accommodation by Declaration*, 33 LOY. L.A. L. REV. 1375 (2000); and local land use, *see, e.g.*, Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464 (2000) [hereinafter Durchslag, *Forgotten Federalism*].

² *See, e.g.*, 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, 246 (2005) (examining the role that *The Federalist* played in all of the Supreme Court cases in which it has been cited over time in order to gain purchase on questions like whether "*The Federalist* [has] taken on increased significance [in Supreme Court jurisprudence] in recent years"); Durchslag, *Property Tax Abatement*, *supra* note 1 (integrating empirical studies into his analysis that calls into question the wisdom and effectiveness of property tax abatements for low-income housing); *see also* 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, 655-56 (2001) [hereinafter Durchslag, *Village of Euclid*] (collecting five months of zoning decisions in a local newspaper to determine if they were consistent with outcomes predicted by public choice theory and concluding that they were not).

positions.³ Instead, in his wistful, Midwestern, collegial way, Mel simply asks a lot of hard questions, and asks them only because he is sincerely interested in the answers and wants to engage in the debate.⁴

Given his enthusiasm for the enterprise, it is hard to believe—even though Mel insists it to be true—that he will stop writing. In fact, I’d wager that his productivity will remain just as strong. I don’t think he can resist questioning those who oversimplify or overcomplicate issues or those who ignore the social implications of their superficial analyses. He just won’t be able to keep his mouth shut. Of course, in his usual way he will approach the gaping holes in someone else’s analysis with a light-hearted “What makes you think that?” sort of jab. But his analysis will be devastating, all the more because it is done so diplomatically and with such respect for the other’s position.

It is similarly difficult to believe that Mel will stay out of the classroom. He is a natural teacher and engages passionately with his audiences on difficult and important ideas. His students adore him. Anybody that has seen him teach will agree that he will be

³ See, e.g., Durchslag, *Property Tax Abatement*, *supra* note 1, at 381 (concluding that “even if all that Alpert proposed to do with tax abatements ensures that their benefits inure only to low-income housing consumers, there is little political reward for expending capital in that way. Even if there were, the economics of the real estate tax system makes success unlikely.”); Durchslag, *Forgotten Federalism*, *supra* note 1, at 521 (arguing that the Court’s “failure to account for the state’s interest in protecting its citizens from nonnuisance-related harms (or even granting them the benefits of a variety of ‘lifestyle’ amenities) is both normatively improper and inconsistent with the Court’s approach to analyzing the scope of nonproperty-based individual liberties claims” and that instead “the Court [should] apply to property rights the same distinction it seems to apply to other rights, even so-called fundamental rights—the distinction between the imposition of a cost and a denial of the right”); Durchslag, *Village of Euclid*, *supra* note 2 (observing that the Court’s taking jurisprudence is premised on the assumption that local governments act in public choice fashion and raising a number of reasons to doubt that this theoretical model accurately captures reality). In his *Village of Euclid* article, Mel concludes a fascinating analysis of the paucity of the evidence supporting a public choice model for local government behavior in his typical provocative and pithy way:

If it is not already apparent, let me be clear. I am deeply suspicious of overarching explanatory theories that purport to decide or even explain decisions across a broad spectrum. Human behavior and motivations are far too complex for such simplicity. But these theories are useful as a way of beginning to think about complex problems, and, as long as they remain draped in policy judgment clothing, they are relatively harmless. Policy judgments are rarely if ever set in stone. Constitutional judgments are of a different order. They are set in stone, even if it is sandstone that can, over time, be rubbed away. Consequently, those committed to constitutional federalism as a system of governance should think long and hard before embracing the public choice explanatory model as a constitutional *fait accompli*.

Id. at 660–61.

⁴ See, e.g., Melvyn R. Durchslag, *The Inevitability (and Desirability?) of Avoidance: A Response to Dean Kloppenberg*, 56 CASE W. RES. L. REV. 1043, 1045 (2006) (“I simply want to raise some questions that have troubled me about the position that avoidance costs us more than we receive back in benefits.”).

hard-pressed to give it up. I myself have seen him give countless guest lectures in my own courses and attended a number of conferences with him. In each of these settings, Mel rose to the podium with a burst of energy, many smiles and smirks, and the unmistakable appearance of having one whale of a good time. The only thing out of kilter was his hair.

For a rare academic like Mel who works hard each day because he loves what he's doing, retirement has got to be anti-climactic. His income stream will be different, but the rest will be business as usual.

