

HARVARD LAW REVIEW

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IN MEMORIAM: DANIEL J. MELTZER

The editors of the *Harvard Law Review* respectfully dedicate this issue to Professor Daniel J. Meltzer.

*Judge David J. Barron**

I miss Dan terribly, and I think about him often. I cannot help, in doing so, but think about his love and admiration for his family. But I also remember him as a colleague.

Dan was a soft-spoken person, and he never tried to dominate a room. But he was a large presence for those who worked with him. He wasn't the first to speak. Nor was he strategically waiting to be the last. What he said, though, always commanded attention. And it stayed with you long after he said it.

When I think about working with Dan, I mostly have a picture of him listening. Taking in what was being said. Weighing it carefully — and only then asking a few crucial questions. Advising. He was gifted at it. As gifted at it as anybody I have ever come across. I am hardly alone in thinking that. He was an advisor to so many, and a treasured one at that.

This quality — the ability to listen, to probe, to question, to make an argument without seeming to make one at all — also shines through in Dan's scholarship. Dan was one of those who inherited perhaps the greatest casebook of modern times. That casebook was known more than anything for the challenging questions that followed each case excerpt. They were hard questions, and interesting, too. The questions — assuming that you could follow them — inspired you to ask questions of your own, on the thought that you had to ask more to un-

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derstand what was at stake. Dan was a natural heir to a casebook like that.

Dan's capacity to anticipate the response to a point — and the response that would follow the response — was unsurpassed. But Dan was not a debater. He was a questioner. And he was the person who, by example, most taught me the difference between the two. But while this capacity to think through a problem to its core came easily to Dan, it did not leave him unable to make a decision. He had views — and some strong ones. He also knew a good argument when he heard one, and he was as good as anyone at helping you figure out what it was.

And so while Dan's scholarly articles had a distinctive, probing quality, he was not afraid to take positions that might be unpopular. Asked to give a speech at Duke Law School soon after he left the White House, where he served at the start of the Obama Administration, Dan could not resist questioning the decision that the Administration had just made to refuse to defend a statute that Congress had passed.

The article that grew from that talk, though, was not really an argument for defending the statute.¹ Like everything Dan wrote, this article was an extended look at a hard issue that considered all the angles — legal, practical, political, moral, historical. The result was an article that left its readers feeling as though they had just engaged in a very stimulating conversation with a very thoughtful person. Which of course, is exactly what those readers had just done.

Dan's scholarship speaks for itself. But there was another professional legacy that Dan left that I had the privilege of seeing up close and that is not so visible. As I have mentioned, Dan, at the end of his too-brief career, served as a lawyer in the White House. He was the Deputy Counsel to the President at the very start of the Obama presidency.

Dan came to that post as an academic through and through. He had taught by then for more than thirty years. His most recent stint in government had been in the Carter Administration. That meant Dan met with some skepticism in his new role.

Academics were not held in high regard — at least not in principle — in this environment. His new colleagues were former litigators and prosecutors — many with long political résumés. They were not predisposed to think that a professor would have a clue about the way that real decisions must be made.

¹ See Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012).

But by the end of the transition — during which he oversaw the process of drafting the first set of executive orders — Dan had won the respect and admiration of the other lawyers in the Administration. He had done so because he had no ego and incredible judgment. He also had an amazing ability to listen and question and, by doing so, to get others to do the same. Dan took time to ask the extra question. He paused to reflect on the underlying principle. He was respectful of those with a different view. He might even make reference to a law review article. And — like any good teacher — he was quick to take a conversation back to the salient point if it started to stray.

In other words, Dan won over his new colleagues not by showing them that he was no academic. He won them over by exemplifying the very qualities that made him such a great scholar.

The professional legacy that I have in mind, then, was this. Dan showed that the much-remarked-upon divide between the academic world and the practical world of lawyering is not nearly as unbridgeable as, in recent times, it has seemed to be. Dan gave academics a good name in a place where their standing was not so high. And, as a result, by the time that Dan left Washington, there weren't many who had worked with him who had not come to appreciate the role of the scholar.

I was working in the Department of Justice at the time. I saw how Dan singlehandedly helped to dissolve that academic/practical divide. And I — like the other academic lawyers in the Administration — benefited greatly from the good light that Dan cast on those with a background not all that unlike his own.

But there was another — and related — legacy that Dan left through his work in Washington that I also witnessed. In an interview with the Harvard Law School alumni magazine soon after he returned to Cambridge, Dan remarked on the excitement of working in the White House. But when asked what made him most proud of his time in D.C., he said that it was, among other things, “the relationship that our office established with the Department of Justice, in which we sought to respect the department’s independence and our shared commitment to compliance with the law while also striving to ensure that the president’s views and concerns were given appropriate consideration when the administration was formulating its legal positions.”²

I do not know for sure why Dan chose to single out that accomplishment. But I suspect the reason must have some connection to his family legacy. His uncle had come to the Department of Justice

² Elaine McArdle, *Stories from the West Wing*, HARV. L. TODAY: HARV. L. BULLETIN (Jan. 21, 2011), <http://today.law.harvard.edu/feature/stories-from-the-west-wing> [<http://perma.cc/9N6T-PCKB>].

nearly forty years before to restore that Department's integrity, and the rule of law more generally, in the wake of Watergate. Dan arrived in Washington at a very different time, of course. But in subtle ways, day after day, Dan, too, worked to ensure respect for the independence of the Department in service of both the rule of law and the Administration's larger goals. I saw him do it again and again — through the protective phone call, the passing nod of encouragement to stake out a position that might garner resistance, the well-timed heads-up, the wise suggestion to rethink a position.

There is no way to prove that Dan succeeded in this effort to bridge politics and law, any more than there is a way to prove that he successfully showed how to bridge the worlds of academia and legal practice. But speak to any of the lawyers who worked with him during his brief time in Washington. Whether they were working in the agencies, on the Hill, or in the White House, and whether they were political appointees or long-time civil servants, they will tell you. Dan most surely did honor his family's legacy — as both a lawyer and a scholar — while working in the White House. And that is yet another reason why those lucky enough to have worked with him were honored to have done so.

*Richard H. Fallon, Jr.**

One of the greatest joys and privileges of my life has been to count Dan Meltzer as my friend. Before I came to Harvard Law School in 1982, I had spent time at Oxford, where I studied Aristotle. Aristotle made a list of virtues, including those that manifest themselves in intellectual life and those that manifest themselves in practical activities. Dan had all of Aristotle's virtues. More recently, *New York Times* columnist David Brooks has distinguished résumé virtues, or ones that produce professional achievement, from eulogy virtues, which earn the love and admiration of friends and family. Dan had both résumé virtues and eulogy virtues in spades.

Indeed, based on the thirty-three years that I knew Dan, I can think of only one virtue that he lacked. I will speak the open secret and then say no more about it: Dan was sartorially challenged. His combinations of shirts, ties, pants, and jackets were sometimes so mismatched that I wondered if he might have set out to achieve that effect — maybe so as not to appear too annoyingly perfect.

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With regard to the résumé virtues, Dan was the foremost federal courts scholar of his generation. His occupation of that status sometimes made my life challenging because it left me always competing to be, at most, the second-best. But he made me a better scholar both by his example and by his generosity of time and insight. People often tell me that the pieces I coauthored with Dan are my best work ever in the federal courts field. This was no accident.

Dan was also an exemplary teacher. The Law School's best and wisest students sought out his classes because they knew that Dan would exhibit an incomparable rigor in the classroom and that he would make them better thinkers, better lawyers, and better people. He also displayed a legendary classroom wit. One of the best students Dan ever had — someone who is himself a Harvard Law School professor today — loves to tell the story of a time when Dan once pressed him for a yes-or-no answer to a question. The student, Jonathan Zittrain, answered yes. Dan paused for a second and said: "Can anyone think of a shorter and more accurate answer than Mr. Zittrain's?"

I am confident that Dan would not have made that remark to a weaker or more vulnerable student. But he recognized Jonathan's extraordinary intellect and wanted to make him even a better, and a better-prepared, student than he was already. Judging from the course of Jonathan's splendid career, I am sure that Dan, at the very least, did him no harm.

As for the nonacademic résumé virtues, Dan compiled a remarkable record of accomplishment and service — in a variety of administrative roles at Harvard Law School, with the American Law Institute, and as Deputy White House Counsel. He was on a first-name basis with the leaders of American academia, governors, senators, cabinet members, Supreme Court Justices, and the president of the Boston Red Sox. He was known by his first name to the President of the United States.

Yet if Dan walked with kings, he never lost what Kipling called "the common touch." He despised pomposity and pretense. The only cutting stories I ever heard him tell revealed his revulsion at displays of arrogance or cruelty by the gifted and powerful. And, as befit his lack of pretension, he was always on the lookout for a bargain. I recall many an occasion on which he came into my office to tell me enthusiastically of how he had just discovered the cheapest haircuts in Cambridge or a place to buy neckties at incredibly low prices. Wanting to be a supportive friend, I never told him that I might have guessed.

Among Dan's many personal virtues was his incomparable gift for friendship. I have never known anyone else to touch so many people so deeply. Since Dan's death, a number of people have asked me if I was his best friend. The corridors of Harvard Law School, Washing-

ton, D.C., and I'm sure a number of other places are crowded with Dan's best friends.

Dan also had the best practical judgment of anyone I have ever known. I sought his advice with embarrassing frequency because it was invariably good and, when the occasion called for it, witty.

I once had a former student who used to complain, every time he saw me, that I had given him the lowest grade he ever got. Dan's advice: "Tell him somebody had to do it."

On another occasion I asked Dan to read a draft of a tribute I had written upon the retirement of a judge for whom I had clerked. I told him I was worried that my praise was too effusive and lacked academic integrity. Dan's answer: "A retirement tribute is not an affidavit."

His advice was just as good on the many occasions when I went to him, believing that I was faced with two bad choices, A and B, to get his view on which I should select. More often than not, he would identify some third option, C, better than either A or B, that would never have occurred to me.

Besides having superb practical judgment, Dan was unfailingly generous with his time and advice. Of the times when I sought Dan's counsel, one stands out in my memory. In the late 1980s, my wife Jenny and I wanted to buy a new house, but no matter how often I did the math, we kept coming up about \$20,000 short. As usual, I went to ask Dan if he could think of something that I could not. On that occasion he said he wanted to reflect some more. A day later, after consulting with his wife, Ellen, he came back and volunteered to lend me \$20,000.

I am quite sure that Aristotle, the great philosopher of practical wisdom, would not have approved of this gesture. Dan's offer to take me on as a credit risk at that point in my financial history marked the only instance in which I ever saw him display poor judgment. Given my financial situation at the time, even the banks that brought us the subprime mortgage crisis had turned me away. But Dan's offer was wholly characteristic of him in another way — as an exhibition of his overriding generosity.

I cannot conclude without saying a few words about Dan's central priority and his greatest source of joy. Dan loved his family above all else. In this respect, I think again of Aristotle, because Aristotle believed that in order to flourish as a human being, as Dan certainly did, it was necessary not only to possess talent and virtues, but also to be lucky. In his marriage to Ellen Semonoff, and in the children with which they were blessed, Dan could not have been luckier. His abiding love and admiration for Ellen uplifted him, as his love and admiration uplifted her. If not for their children Joshua and Jonathan, I might have been able to say that I never heard Dan boast. Though he was unfailingly modest about his own virtues and accomplishments, it could be very hard to keep him quiet about Joshua's and Jonathan's.

He also adored his daughter-in-law Shannon and his granddaughter Delilah.

And he had the satisfaction, I like to think — though he never would have acknowledged it — of knowing how widely he was admired and loved. Yogi Berra once said, “you should always go to other people’s funerals; otherwise they won’t come to yours.” Of the throng who attended the celebration of Dan’s life and work at the Law School last spring, none was there for that reason.

Aristotle, whom I had studied before I met Dan, believed that there are a few great-souled human beings who exemplify virtue. More than that, Aristotle thought that the best way to learn how one ought to live was to study those wise and virtuous people and try to systematize what they knew and did instinctively. When I came to Harvard Law School in 1982, I thought that Aristotle was wrong to believe that morality and goodness are best defined by example. But that was before I met Dan.

Missing Dan immeasurably, I stand in awe of the footprints that he has left behind through his scholarship, his teaching, his public service, his family, and, perhaps most of all, through his example of a life lived superbly well.

Vicki C. Jackson & Robert S. Taylor***

Dan combined brilliance of mind and clarity of thinking with superb judgment, about law and about life. He was at the center of numerous webs of friendships, and we count ourselves as extremely lucky to have been among his many close friends. Dan and Bob were friends and roommates beginning sophomore year at Harvard College, through Harvard Law School (where both were on the *Law Review*); Vicki joined the friendship circle when she met Bob, while clerking for Justice Marshall along with Ellen Semonoff, who had also been on the *Law Review* with Dan and Bob and who married Dan a few years later.

That Dan would become a brilliant legal scholar and gifted teacher seemed obvious in college and law school. His father, Bernard Meltzer, was himself a towering figure in legal academe, and his uncle, who lived just a few houses away, was Edward Levi. Seeing Dan and his father together, each taking delight in the other’s company and con-

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versation, made it clear that Dan himself would be right at home as an academic.

As a student, Dan was always questioning, looking for connections and consistency, searching for the whole but often finding gaps. Never content merely to tear apart and show the weakness of an argument, he always tried to build a coherent whole. That was a particular challenge for a first-year law student, but Dan would regularly linger after class to talk with his professors, posing questions that troubled him but that more often than not thrilled his professors, revealing a student interested in the most exquisite questions of law.

Dan had so many gifts, including the gift for friendship. He was like an information hub about people in his circles: friends from college, friends from law school, friends from before college, friends from Williams & Connolly, friends from his stint as a special assistant at HEW (the federal Department of Health, Education, and Welfare, later separated in two), friends from his time working as Principal Deputy White House Counsel — friends from so many parts of his life. Even in places he worked only briefly, he somehow emerged with friends for life. Dan made and kept friends wherever he found himself — and not just with people working at his level, or at levels “above” him, but with people who worked for him, at levels “below” him.

Why was this?

For one thing, Dan moved through life with a seemingly effortless degree of thoughtfulness toward the people around him. Dan remembered things that were important to other people and frequently made comments, or took actions, that showed how much he cared about their well-being. A very small example: When Vicki was deciding to leave Georgetown for Harvard Law School, Dan and Ellen played important roles in her decision to do so. Thereafter, Vicki regularly chatted with Dan about the ups and downs of her move to HLS and in one conversation mentioned that the removal of paper cups by the coffee machine on the third floor of Griswold Hall diminished its value as a locus for informal conversations among faculty members. Vicki thought no more about the conversation; it had been one of those brief rants about a minor irritant in life. But a few days later, a dark blue china coffee mug appeared on Vicki’s desk, with a note from Dan, suggesting that she should use the cup to visit the coffee machine and talk with people nearby as often as she liked. A small gesture — but one that revealed the quality of thoughtfulness that Dan displayed in so many ways to his friends and family. Vicki still has the cup and thinks of Dan every time she uses it.

Dan engaged with the lives of his friends in large ways, as well as through countless small, thoughtful gestures. In 1994, our family, which included three young children, visited Dan and Ellen and their sons, Joshua and Jonathan, in a home they had rented in the South of France for Dan’s sabbatical year. One night, somehow, the four of us

adults were able to go out to a Michelin two-star restaurant. At dinner, Dan asked Bob what he wanted to do when he grew up. As usual, Bob initially fobbed off the question with a quick joke. But Dan persisted: no really, it is time you enter the government. A serious conversation ensued, in which Bob and Dan explored various ideas and circled in on the possibility of Bob spending some time either in the Department of Defense or the Department of Energy as the agency's environmental counsel. With Dan's urging, Bob applied for a recently created position as the first Deputy General Counsel (Environment and Installations) at DOD, got the job — and discovered he loved being a senior-level government lawyer, as Dan had predicted. By prodding and challenging, with humor and thoughtfulness, Dan led Bob to challenge himself and to abandon the comfort of an established practice to find far greater professional satisfaction. Bob worked at DOD from 1995 through the end of 2001, and has been there again since early 2009, this time as Principal Deputy General Counsel (and two stints as Acting General Counsel). As "PDGC," Bob worked on an almost daily basis with Dan during his service as Principal Deputy White House Counsel, on such issues as Guantanamo, the use of military force, and Don't Ask, Don't Tell repeal.

Dan's lively and playful spirit was central to his friendships. He was just enormous fun to be with. He loved pinball, and a good whiskey. There was his tradition of celebrating Kentucky Derby Day. The central feature of Dan's Derby Day parties were the mint juleps, of course. Although Dan joked and mused about someday owning a race horse, his principal interest seemed to be bringing his friends together in celebration. Dan's playfulness came out in myriad ways. In college, Bob and Dan were in an English class together and had to write a paper on the W.B. Yeats poem "Lapis Lazuli." Several of their friends were visiting in their dorm room, and Dan had a sudden inspiration: He organized the group (most of whom had not read the poem) to write an essay, one sentence at a time, going around the room. (Of course, given their ethical standards, Dan and Bob each separately wrote a paper of his own as well.) The collective effort was so entertaining, Dan talked to their friendly teaching assistant and he referred the collective paper to another T.A. to grade; the "objective" T.A. knew something was up, and gave the collective paper a split grade — an A for creativity and an F for content.

Dan was as intellectually generous as he was playful. As a fledgling federal courts scholar, Vicki not only benefitted from Dan's incisive and nuanced scholarship, but she was also on the receiving end of Dan's careful, probing, but gentle comments on her first major published article, and on many others of her published works. But Dan was generous to so many — not only friends he had known for a long time. We ran into a former student of Dan's, now a law professor elsewhere, at his memorial service, who flew in because of the generos-

ity he extended to her when she was looking for her first teaching position; she felt she could not *not* come. Indeed, the memorial service overflowed with people from around the country who felt not only great admiration and respect for Dan, but also deep affection.

Dan's capacity for friendship was related, we think, to his very clear sense of values and priorities in life — and at the center of these was his family. Dan was always close to his parents, and to his two sisters. But at the absolute center of Dan's life were Ellen, and their two children Joshua and Jonathan, and in recent years Josh's wife Shannon, and granddaughter Delilah. We recall one evening visiting with Dan and Ellen at their home in Cambridge. The four of us were seated in their living room, after a dinner out somewhere. At the time, Harvard was in the dean search that led to Elena Kagan's appointment. We pressed Dan on his interest in becoming Dean, because we both thought he would be a magnificent Dean. But Dan quite calmly said he had thought about it, and had decided that he did not want to be Dean, though he would be happy to help whoever was Dean. He explained that it was not a difficult decision for him to come to: he had asked himself whether he would prefer to spend his evenings out fundraising with alumni, or home talking with Ellen. And there was no question about it. Ellen and her company were what he wanted — not being Dean.

We wholeheartedly agree with Professor Fallon's tribute to Dan's many virtues and add this observation: Dan's virtues were in balance. Dan once wrote that "no one is better able to see all sides of a question than David [Shapiro]."³ But Dan himself had a phenomenal ability to "see all sides of a question" and to bring both legal and emotional intelligence to the resolution of real world problems. His balance, and groundedness, were a large part of what made his judgment so sound, and his counsel so eagerly sought by others — students, colleagues, friends, family, deans, and the President he served.

Dan faced his third battle with cancer with a combination of intellectual clarity and emotional integrity and courage. He recognized the "bad hand" he had been dealt with respect to his health, while at the same time reveling in his good fortune — in the opportunities he had to do work that enthralled him, and most of all in the love and pride he had for his family. As he and his doctors fought their hardest to stave off the cancer, at the cost of devastating effects to his body, he continued to enjoy life and to bring joy to others, especially his family. Very few of us will be able to face such a challenge with the grace that he did.

³ Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1891 (2004).

Dan was frequently sought after to write tributes to others, because of his gentle wisdom, wit, and thoughtfulness. He wrote moving tributes to many, including, at Harvard, to Jim Vorenberg, David Shapiro, and Paul Bator. But in his tribute to Judge Carl McGowan, for whom Dan had clerked on the U.S. Court of Appeals for the D.C. Circuit, Dan wrote words that seem to us to apply with great force to Dan himself:

There remained something secondary about his achievements — not in their richness or significance, which few could match, but rather in the place they occupied in the Judge’s character, and in the impression that he left on others. My deepest memory is not of his brilliance, or of his skill as a lawyer or judge, but is rather of his humanity — a humanity magnified all the more by its having survived intact in the midst of his extraordinary accomplishments and the recognition that they rightfully received.

Dan concluded, “His life was replete with public achievement and public service, and with a particular form of personal enrichment — enrichment of the lives of others, of everyone he touched.”⁴ As usual, Dan found just the right words to help his friends express their love and admiration for him, and to try to give others some sense of the great void Dan’s death leaves in the hearts of so many.

*Justice Elena Kagan**

I am honored and grateful to participate in this memorial issue for Dan Meltzer, as fine a man as I’ve ever known and as true a friend.

But here’s a problem: I don’t know how to write a remembrance like this one without first asking Dan what to say. Really, I’m not sure I know how to do much of anything without first asking Dan. But as to eulogies in particular, Dan was always my source of insight and wisdom. Many (too many) times as Dean of Harvard Law School, I was called on to preside over a memorial service or pen a memorial essay for a deceased colleague. And when that occurred, I would invariably go to Dan and seek his counsel, and he would know exactly the right thing to say.

Now I have to admit that what I most remember him telling me on those occasions was that “a eulogy is not an affidavit.” That was a fa-

⁴ Daniel J. Meltzer, *In Memoriam: Carl McGowan, 1911-1987*, 82 NW. U. L. REV. 218, 218, 221 (1988).

* Associate Justice, Supreme Court of the United States.

vorite expression of his; I heard it more than once. And it usually struck me as sound advice.

But the suggestion is utterly inapt when it comes to eulogizing Dan himself. Because the difficulty in doing that is the very opposite of what the adage implies. The challenge for me here is how to succeed in expressing the God's honest truth about Dan. How to put into words just how remarkable he was — what a unique blend of kindness and generosity and judgment and wisdom. How to describe the countless ways he improved the communities he was part of, Harvard Law School high among them. And how to convey how much I loved him.

Maybe the place to start is with Dan's most material contribution to Harvard Law — fittingly, the site of his memorial service a few months ago. The building is called the Wasserstein-Caspersen Center (or WCC), and it has become the undisputed hub of HLS — the principal teaching space and meeting place, the main studying, lawyering, and gathering venue of the school. And it is, quite literally, *The House That Dan Built*.

It was Dan who went door to door to door to talk with faculty, staff, and students in order to figure out what kinds of spaces the Law School needed. He listened patiently to scores, or even hundreds, of people. And then he worked with the architects every day for months to make his vision of what the building could accomplish a reality — to make sure that the WCC would provide the kind of central spaces, and so create the kind of community, that the school had never had before.

And it was Dan who took those architectural plans in hand and sold them to the City of Cambridge. I had occasion, at Dan's funeral, to talk a bit with the City Manager. He told me (not that I needed telling) that the WCC — but let's call it, just this once, the Meltzer Center, for the person who most made it happen — would never have gone up except for all the work Dan did with the neighborhood and City. This is, after all, Cambridge, Mass.: Not to cast aspersions, but a homeowner can hardly paint her front door without acquiring a fistful of permits. How could the Law School hope to get approval to construct a 250,000-square-foot building (plus five levels of underground parking!) on the street serving as the central artery of the City? It happened only because night after night after night Dan went to neighborhood meetings, and talked there with residents and officials, and somehow — miraculously — persuaded them that the new building was a good idea.

But maybe it wasn't so miraculous, after all — because Dan was the most persuasive person I've ever met. Not because he was the world's best talker: He wasn't at all the kind of guy who could sell you snake oil. Rather, because he was the world's wisest man. He could look at a problem and explore its every dimension. He would step in

and look at its particulars, step back and look at the big picture, consider the psychology of the people involved, consider the ethics of the situation, and then reason his way to the perfect thing to do: the thing that would work best, the thing that made most sense, the thing that was just . . . right.

I know this because when I was Dean of HLS I brought every problem I had to Dan — and just in the nature of places like HLS, I had a lot of problems. When I became Dean, I made Dan my Vice Dean of Physical Planning; that's why he led the WCC building project. But truly? Dan was my Vice Dean of Everything. I hardly made a move without asking his advice. And the mistakes I made were, pretty much invariably, when I didn't take it.

I remember once near the beginning of my deanship, I was obsessing to him about how to present something awkward to the faculty — maybe I could say it this way, maybe I could spin it that way, maybe I really didn't have to say anything at all. And Dan listened patiently,⁵ and then he said, “well, I kind of think, when in doubt, tell the truth.” Which seemed like something I should have thought of myself. And maybe the next time a similar situation arose, I *did* think of it myself, just because I knew how Dan would react. He was the kind of person who made everyone around him better. He certainly did that for me. During my deanship, and afterward too, he was my North Star.

Dan himself didn't want to be *the* Dean. I've never known a person to seek less credit and to need less recognition. As brilliant and accomplished as he was, he yet had no ego to speak of. He was the kind of person who was happy for someone else to be out front. But behind the scenes he was the indispensable man. He cared deeply, with an understated passion, about Harvard Law School, and he worked unstintingly to make it all it was capable of becoming.

Of course, Dan exemplified many values of the Law School. He had a razor-sharp intellect, as powerful an analytic tool as any I've encountered. He was, along with his esteemed co-author Richard Fallon, the greatest federal courts scholar of his generation. He was a superb and totally committed teacher, as his thousands of students can attest. (I always used to wonder, though, why most of his Criminal Law hypotheticals involved different ways of harming the dean.) Even beyond the times he spent in Washington, he worked on all manner of projects to ensure that the law would serve the public interest. But

⁵ I see, on rereading, that this is the second time in two pages I have described Dan as “listening patiently.” The repetition is warranted. That is just what Dan did — listen attentively and thoughtfully, and often at length, to everyone around him. Indeed, I think he listened in a kind of stereo — for content, for tone, and for underlying intent. Part of the reason Dan always knew so much was that he had listened so hard.

still, what I prized most — from the admittedly partial perspective of a dean — was that, year in and year out, Dan served as Harvard Law School's wise man extraordinaire. I'll feel forever grateful for all he did to make me look good and (more important) make the Law School better.

And I'll always feel blessed to have been his friend. Dan had a very special capacity for friendship. He made friends wherever he went, and then he kept them. He had his boyhood friends, and his college friends, and his law school friends, and his faculty colleague friends, and his Washington friends. And even as he became middle aged — when all the rest of us have given up on the business — he just kept making new and great friends.

That was, I think, for two main reasons. The first is that Dan was wonderful company. I fear that in writing about him, I've made him seem some sage and solemn graybeard type. But in fact he had a wry and wicked sense of humor; he was an astute and amused observer of human foibles, including his own; he was interested in everything and interesting about it all; and as a result, he was really good fun to be around.

The second reason Dan had friends all over was his singular kindness — his invariable, seemingly inborn generosity. The first time I met Dan was a few years after I graduated from HLS, when I was interviewing for a job there. I didn't get that job. But a few days after I received that news, I got a note in the mail from Dan. I'm not usually a keeper of such things, but I kept that note, and I dug it out after he died. He had found the perfect way of telling me why the sky hadn't fallen, and the perfect way of giving me confidence about what would follow. And I think he did something like that every day of his life for someone. He cared about other people, and paid attention to what they wanted and needed, and tried to do all he could to support them.

And in fact even when he was most ill, in these last couple of years, I sometimes got off the phone with Dan and realized that *he* had spent more time bucking *me* up than the reverse. To his last day, Dan never became less Dan, never became less gracious and generous to all those around him.

The people he loved best, of course, were Ellen and Josh and Jonathan, and in these last few years his daughter-in-law Shannon and new granddaughter Delilah. Ellen's and Dan's marriage was a lifelong partnership and a lifelong romance. He wrote to his Harvard twenty-fifth reunion class that he wasn't "capable of feeling complete without her," and no one who ever saw them together doubted that was true. And he was so incredibly proud of his sons, and so delighted in their character and their company, as well as their accomplishments. When he talked about them, his whole face lit up.

And what I most want them to know is this: In the months after Dan's death, I heard from scores of people, at Harvard and in Washington, saying (in the same simple phrase, over and over again) that their hearts are broken. I don't think I've ever known anyone so deeply admired (revered, really) and so deeply loved. I don't think I've ever known anyone who was for so many others a model, of how to live a life full of wisdom and integrity and kindness. He was certainly that for me. Knowing Dan, learning from Dan, and loving Dan was one of the great gifts of my life. I think about him all the time — about what he would do and what he would say — and miss him very much.



*David F. Levi**

It is hard for me to speak or write about Dan. It is hard to keep my composure even now, several months after his death, as I edit the memorial remarks written in the grip of grief. And it is hard to do justice to his deep goodness and wisdom.

It is also hard not to give in to feelings that he left us too soon, which he did, and that in leaving too soon he somehow was cheated. But he was not cheated. He had it all in every sense — in the gifts he had as a person and in the gifts that were brought to him every day by his wonderful sons, Josh and Jonathan, by his daughter-in-law, Shannon, and his granddaughter, Delilah, and his remarkable spouse, Ellen.

And we weren't cheated either, because he was such a present person, attentive and always there for each of us. Still, and of course, we wanted much more.

Dan and I grew up together. Four houses apart, first cousins, three months between us. His parents were my parents and vice versa. Our fathers had been law professor and student, then roommates in Washington, D.C., during the war, then colleagues, then brothers-in-law. At some early point we realized that the Levi household was run on distinctly more liberal lines than the Meltzer household when it came to such matters as chores and bedtimes. This discovery led to a certain amount of unsuccessful scheming which now we call "regulatory arbitrage."

The Levis and Meltzers were part of an extended clan of family, not to mention an extraordinarily close group of law school and Uni-

* Dean and Professor of Law, Duke University School of Law.

versity faculty, living their lives together in the intense atmosphere of Hyde Park and the University of Chicago. Many of them had never lived for any length of time outside of the square mile of the University campus. They went to the Lab School and often on to the College and University. Maybe Dan's devotion to family and his sense of self-confidence, his secure sense that he was loved and never alone in the world, stems from this part of his growing up in the midst of so many close friends and relations.

Dan and I started down the well-trod path of our parents, brothers, and sisters. We went to the Lab School from nursery school through high school. We were in that postwar generation that came of age in the late 1960s and experienced not only the three horrific assassinations and the dissent and deceit surrounding the Vietnam War but also the hope of the civil rights movement. The place of law in such a fallen world seemed important.

Dan was sixteen when we left for Harvard College together. There was considerable doubt in our two households that anyone could get a serious education at such a place. It soon became apparent that Dan was not just getting a good education but that he was smarter and more capable than everyone else.

He excelled in the classroom, and he enjoyed his many friends, many of whom became friends for life. There is an art to friendship and Dan had mastered it. He was attentive. And he was appreciative. Because he was so secure in himself, he could admire others and take true enjoyment in their successes and talents. What a wonderful quality that is in a person, a colleague, a friend. There is a kind of humility in that.

Above all else, Dan became a kind and gentle person. I have received many notes and calls about Dan and every time it is Dan's abiding kindness, his deep decency and sweetness that is mentioned and remembered. And there is a powerful lesson in that.

Dan's extraordinary quality as a lawyer and a person grew from these foundations and early days. And his excellence as a lawyer and law professor was of a piece with his sterling character as a person. They were mutually reinforcing. How wonderful to think that by being a better lawyer one could be a better person and that by being a better person one could also be a better lawyer. This runs counter to what many believe, yet Dan's example is a powerful data point that can also be a model and an inspiration. It is to me.

Maybe it is harder now in a time of specialization for lawyers, including law professors, to have the big view and the wealth of different experiences to draw upon. Perhaps law professors are more "academic" and less sophisticated in the ways of the world, and perhaps lawyers are more narrowly focused on their areas of specialization and less able to see beyond. But as Dan's life and career demonstrate, it is still possible to break through the constraints and to achieve complete-

ness as a person and a lawyer. It takes dedication, in Dan's case dedication to his family and friends on the one hand and to his students, to his scholarship, to his School, to his colleagues, and to his country on the other.


One could see in Dan that practical wisdom and striving for excellence that distinguishes the great lawyer, the great person. To paraphrase Justice Holmes, Dan had the ability to see far and to see the details, to carefully work through a problem and get it as right as possible; and he had the modesty and character to let his work and his words speak for themselves.

Now his work and words speak to us of the possibility of wholeness and goodness and excellence, of the possibility of the academic lawyer and the lawyer academic, the unity of action and intellect. As my colleague Jamie Boyle wrote to me, trying to help me grasp this theme about the wholeness and goodness we see in Dan, it is "about how being a mensch and being a professional, a caring humble person and a serious intellectual, are actually part and parcel of the same noble enterprise."

After our sophomore year in college, Dan and I came back to Chicago for the summer. Harvard had been in an uproar for two years over the Vietnam War. It was hard to focus. Both of us thought it might be good to take a class at the University of Chicago. I can't remember what Dan took. I took Victorian poetry with Norman Maclean. He wasn't famous then, but he was a beloved teacher. He told me once never to shy away from using the word "beautiful," if it fit. In his most famous story, he ends by telling us something about the enduring power of love and thought and beauty:

Eventually all things merge into one and a river runs through it. The river was cut by the world's great flood and runs over rocks from the basement of time. On some of the rocks are timeless raindrops. Under the rocks are the words, and some of the words are [Dan's].⁶

He was beautiful.



⁶ NORMAN MACLEAN, *A RIVER RUNS THROUGH IT AND OTHER STORIES* 104 (25th anniversary ed., 2001).

*Martha Minow**

Dan exemplified the very best of this place even as he constantly and in every way made this place better. The top student and president of the *Law Review* became the beloved Story Professor of Law and wisest advisor to not one, not two, but three deans. Dan shared with all lucky enough to know him the most superb judgment and rigorous analysis. His unparalleled devotion to public service led him to work in the Department of Health, Education, and Welfare; the Iran-Contra prosecution; the Judicial Conference of the United States; the President's Intelligence Advisory Board; and the White House Counsel's Office. Faculty and staff, deans and students, nonprofit organizations and judges, Presidents and other public leaders sought out Dan for his exceptional counsel and wisdom. And he brought sheer kindness to each interaction.

He made the world better in countless ways. Teacher and mentor to hundreds of students; trusted and sagacious academic colleague; outstanding legal scholar and collaborator; and distinguished lawyer in public service and private practice, he demonstrated what it is to act with integrity, to reason with clarity, and to greet all with generosity. Frankly, it is not unheard of in the academic world for people to think rather well of themselves and, indeed, to think a lot about themselves. Dan was the opposite: no ego, although he had every reason to be proud of his talents and accomplishments. His generosity seemed effortless and boundless. No matter what he was doing, he would put it aside to give advice, or simply listen. What a privilege it was to know Dan and to work alongside him. As he nurtured relationships with colleagues, with students, with people who held powerful positions, and with people without positions of prestige or authority, Dan made the communities in which he worked more effective but also more human and more meaningful.

Colleague David Shapiro shares these thoughts about working with Dan on the magisterial work, *Hart & Wechsler's Federal Courts*:

This collaboration has been the most enjoyable, and enriching, experience of my academic life. Working with Dan for some three decades on five editions of the Hart & Wechsler book has been a joy from every aspect. Dan's own contributions to every edition set the bar high for his collaborators. His chapters, almost always the first to come in, were beautifully crafted and challenging not just for students, but for teachers and those who wanted to explore further the tough questions that he raised. Even on this latest edition, just now going to press, Dan maintained his own

* Morgan and Helen Chu Dean and Professor of Law, Harvard Law School.

high standards and carried more than his share of the load despite the terrible burden of his illness.⁷

David continues:

As a reader and critic of the work of his co-authors, Dan was matchless. Generous and rigorous at the same time, Dan would catch everything from a wrongly italicized comma to a paragraph or section that managed to open up an issue but fell short of penetrating to its core. One left a session with him happy in the knowledge that while there was a lot of work still to do, Dan's comments and suggestions would be an invaluable guide.

White House colleague Danielle Gray describes Dan as "a lawyer's lawyer."⁸ In the transition team for President-elect Obama, Dan led the effort on many of the immediate Executive Orders — from signing statements and detention policy to setting up new White House offices on faith and social innovation to establishing rules for appointees on ethics. And:

[B]y the time Dan left [his job as Principal Deputy White House Counsel], no one could imagine anyone doing that job better. . . . [B]y the end of his tenure, you understood that you couldn't ask for a better set of qualities — his integrity, his decency, his commitment to understanding problems backwards and forwards, inside and out, and his gentle and soft touch in dealing with his colleagues, lawyers and non-lawyers, alike.

She continues: "Dan understood the personal nature of this job. The importance of going to a policy aide's office, to explain in person concerns or to brainstorm possible solutions. The importance of not only telling White House staff 'no,' but also being ready to explain possible alternatives."

I have heard from judges, from the chair of the federal sentencing commission, from law professors, from an army general, from staff at Harvard, from his neighbors, from Cambridge community leaders, from lawyers around the country, and from the extraordinary network known as "friends and family of Dan Meltzer." Over and over again, people report that they do what they do and are where they are because of his encouragement and guidance. I have come to understand that criminal law classes around the country would be much less interesting, less coherent, and less elegantly crafted without his meticulous and thoughtful class notes, generously shared with scores of new criminal law teachers.

Professor Hillary Sale was Dan's student and research assistant here and recalls how even as she pursued work far from his field, he made "job market phone calls on my behalf, setting me up with [an-

⁷ Email from David Shapiro to Martha Minow (June 7, 2015) (on file with author). This email is the source for his further comments quoted in this paragraph.

⁸ Email from Danielle Gray to Martha Minow (June 15, 2015) (on file with author). This email is the source for her further comments in this and the subsequent paragraph.

other colleague] to advise on content” or her research.⁹ She recalled how he reached out when she started teaching, “keeping track of my first day in the classroom in order to send an email on that day,” and later “taking me around the American Law Institute and introducing me to people” and then “taking my daughter to the White House/West Wing complete with white house chocolates and M & M’s.”

Such kindness seldom comes along with absolute tough-mindedness. Perhaps it is the combination of excellences that made Dan so extraordinary. Dan’s capacity to have the long view, his generosity toward positions that were not his own, his distinctive alertness to the demands of actual institutions, and his absolutely razor-sharp analytic power, in combination, made him truly great. These qualities also informed his influential and enduring scholarly contributions. Take just one example. After returning from his post in the White House, Dan wrote about the challenging question of whether the executive branch of the federal government should defend against constitutional challenge every Congressional action out of step with the views of the members of the executive branch.¹⁰ The executive branch members might be sympathetic to the constitutional challenge; they might also disagree with the policy at issue. Dan — as Professor Meltzer — analyzed the problem with characteristic attention to multiple layers of analysis. Treating the problem in terms of separation of powers, he rooted the answer in the executive branch’s responsibility to enforce and defend federal statutes. Underscoring the independent duties of the executive branch to assess the constitutionality of statutes, he distinguished this role from the obligation of courts to reach final judgments, and identified the task of the executive to include offering a defense of statutes where reasonable arguments about their constitutionality exist.

Digging into the rationales for the traditional presumption that statutes will be enforced and in turn defended if challenged in court and acknowledging the departures from that general practice, the article articulated institutional practices and norms; considered the relationship between executive branch career lawyers and political appointees, as well as relations between the executive branch and Congress; and examined the benefits of institutional continuity within the executive branch and the relationship between the executive branch and Congress. With persistent attention to counterarguments, the article also delved into an alternative world, one in which each administration proceeding anew, refusing to enforce and defend acts of Congress

⁹ Email from Hillary Sale to Martha Minow (June 9, 2015) (on file with author). This email is the source for her further comments noted in this paragraph.

¹⁰ See Meltzer, *supra* note 1.

with which it disagreed. The article is honest about the common risk that people treat as a constitutional defect the aspects of policies that they do not like. It is alert to contemporary political polarization and its impact on constitutional argument. And it sets a high standard for judges and lawyers alike, calling upon them to proceed with candor and integrity when addressing the constitutionality of policies with which they disagree. It urges judgment in the contexts of institutional life and history. The article epitomizes Dan's own discipline, candor, and integrity. He showed how short-term thinking could unravel the practices and institutions that make law and life work.

Dan had an unerring sense of perspective and at the same time a capacity to value each small gesture and each day. He showed appreciation to those who work tirelessly, even those working behind the scenes. When he returned from the White House, he said, "I never got to the point where it didn't feel a little bit special to be walking into the West Wing every morning."

Dan was the consummate grown-up; he also was witty and playful. He was the first colleague to visit me when, as a new mother, I needed any and all advice about how to be there at home and at work and how to protect and guide a child through life. He took that moment to demonstrate how to work an animal pop-up toy. A genius with the wry quip, he lightened hard moments. He wrote me with glee about being sprung from the hospital, conjuring up a jailhouse break.

With his extraordinary wife Ellen and remarkable sons Joshua and Jonathan by his side, Dan battled his cancer with grace and courage. He said he was dealt a bad hand, and with three bouts of cancer, he was. But he also was quick to remind me of how lucky he felt. He reveled in the blessings of his family. He was thrilled to share news of daughter-in-law Shannon and then of granddaughter Delilah. He remained optimistic throughout, leaving us all with a model for how to bring our best selves to every day. The absence of this great man, true mensch, and exceptional friend is already felt so deeply and widely throughout our community, our School, our profession, and our nation.

W.S. Merwin's poem, "Elegy," says in its entirety:

Who would I show it to¹¹

So simple — and cut off in midsentence — the poet captures loss in form and content. The person to whom the elegy is dedicated is not there to see it, and the loss then is not just of the person but also of the person with whom to share the loss. This poem is in my mind each time I walk by Dan's office. I miss his advice and conversation, his humor and his perspective. I am heartbroken. I am also struck by how many people here and across the country have said they feel the

¹¹ W.S. MERWIN, *Elegy*, in *COLLECTED POEMS 1952–1993*, at 400 (2013).

same way. I've heard, though, that sometimes, a broken heart can open. It now falls to us to try to increase the kindness and generosity in the world and to be the wise and thoughtful people he showed us how to be.

*Donald B. Verrilli, Jr.**

Generations of Harvard Law School students and faculty knew Dan Meltzer as a master teacher, a profoundly influential scholar, and a wise and thoughtful counselor and mentor. But I first came to know Dan in a different place and in a different role when he came to Washington, D.C., at the beginning of 2009 to serve as Deputy Counsel to the President.

Though not even seven full years have passed, it is easy now to forget just how dire our national condition was when Dan arrived in Washington to take up his position as Deputy Counsel: an economy shedding a million jobs a month; a plummeting stock market; an unsteady financial system; an automobile industry teetering on the brink of insolvency; one vexing, intractable national security problem after another. And on top of that, a new President was taking office with a hugely ambitious policy agenda of health care reform, financial regulatory reform, and so much more.

Dan was part of an extraordinarily able and energized group that had joined the new Administration, inspired to serve the public and eager to tackle these daunting challenges. Each of us had our defined role to play. We held down one position or another, responsible for one particular issue or another. But Dan's role was different. Dan was the hub of the operation and we were all spokes. He was at the center of every legal issue that mattered. And those of us who worked with Dan in our various roles came to appreciate very quickly that Dan was simply the best lawyer we had ever encountered. There was no one smarter. He saw the legal traps, the glitches, the risks of unintended consequences that no one else saw. And he was never satisfied until a problem had been thought all the way through. He matched that analytical rigor with exquisitely good judgment, and a remarkably keen appreciation of the practicalities that bore on every decision we faced. Perhaps the most impressive thing about Dan was his range: he would glide effortlessly from wrestling with Larry Summers over the details

* Solicitor General of the United States.

of financial industry reform, to hammering out our legal positions on Guantanamo detainees, to guiding the process for selecting Supreme Court nominees. That was just all in a day's work for Dan. A lot of us who had spent our lives in the "real world" were frankly a bit astonished that a "career academic" could be so wise and so effective at so many things all at once.

To a person, those of us who worked with Dan during his White House tenure appreciated at the time just how lucky we were to have the chance to collaborate with such a remarkable colleague. But what made all of us love Dan so much, and what makes us so grateful for our time with him, was not what Dan accomplished (though he accomplished much) but the way he went about accomplishing it. The essential point about Dan is that it was never, ever about Dan. As hard as he would push to get things right — and as many steps ahead of you as Dan invariably was — he would never lose his patience, never condescend, never claim credit (even when the credit was indisputably his to claim). He steered things to just the right place and left the credit to others. His was such a kind and generous spirit. It is a mark of Dan's character that so many deep and enduring friendships blossomed during that brief year and a half of public service in Washington. As recent as it was, and as fleeting as it was in the great scheme of things, my friendship with Dan was one of the great friendships of my life. What a gift.

In my memory, the episode that epitomizes Dan came on the morning of March 29, 2012 — right after the three days of oral argument in the health care case. I was sitting alone in my office that morning, feeling that the roof had caved in, that I was buried under the rubble, and that I was never going to get out from under it. And then Dan showed up. To this day, I'm not sure why he had come by or why he was even in Washington that day, as he had returned to teaching at Harvard by that time. But there he was, in my office. Dan calmly and methodically cleared away the rubble; he extended his hand and pulled me back up on my feet; he dusted me off and he got me going again. At about that time it became apparent to me that Dan was making a point of saying to people that he thought I was a pretty good lawyer. I think the reason he started saying it was because he understood that by vouching for me he would help me. Dan was a genuinely modest man. But I believe that deep down Dan understood and appreciated just how much those who knew him revered him: how much they revered his judgment, how much they revered his intellect, how much they revered his integrity. So I am confident that Dan understood that when he vouched for you that really meant something. I think he knew exactly what he was doing.

With age comes a deepening appreciation of the importance, and the rarity, of great friendships. And while the loss of an old friend can bring deep pain, I must say that I feel Dan's loss acutely because our

friendship was something new in my life — a friendship full of promise on which I had quickly come to rely for support, for guidance, for perspective, and for humor. The acuteness of the loss is in one sense a measure of what a gift it was to have Dan Meltzer in my life. But it is not a full measure. The gift of Dan's friendship was so much greater and so much more enduring than the pain of losing him. Dan Meltzer helped make me a better version of who I am — just as he doubtless did for so many of his Harvard students and faculty colleagues over the years. That, ultimately, is the measure of a great man. And Dan Meltzer was a great man.