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In Memoriam: Bernard D. Meltzer (1914-2007)

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Richard A. Posner†

When I started teaching at the University of Chicago Law School in 1969, the dominant figures on the faculty (besides Dean Phil C. Neal) were Philip Kurland and, even more so, Bernard Meltzer. They set the tone for the law school. The tone was that of the Harvard Law School as I remembered it from my time there as a student, a decade earlier (1959–1962). I did not much like that tone at either time, but that was my youthful rebelliousness.

After a quarter century as a judge, I have come to appreciate the great strengths that Meltzer brought to legal teaching and scholarship, and to lament the passing of the model of the academic lawyer that he exemplified.

What has happened since the 1960s—that watershed decade in modern American history—is the growing apart, especially but not only at the elite law schools, of the lawyer and the judge on the one hand and the law professor on the other hand. Law professors used to identify primarily with the legal profession and secondarily with the university. The sequence has been reversed. Law professors in that earlier era were hired after a few years of practice, on the basis of evidence (heavily weighted by performance as a law student) of possessing superlative skills of legal analysis. A law professor was expected to be a superb lawyer and to see his primary role as instructing generations of law students so that they would become good, and some of them superb, lawyers—instructing them by precept but also by example, by being a role model; and the role was that of a practicing lawyer. The scholarship that law professors did tended to be either pedagogical, as in the editing of casebooks, or to be of service to the practicing bar and the judiciary, as in the writing of legal treatises, articles on points of law, and contributions to legal reform, exemplified by the American Law Institute's restatements of the law.

By the late 1960s this model was almost a century old and ripe for challenge. The challenges came from two directions, which though opposed to each other turned out to be complementary in their effect on the traditional model. One, the direction from social science, and in particular from economics, complained because the conventional model did not enable its practitioners to articulate concrete social goals for law and to test legal doctrines against those goals. Conven-

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tional analysis could not tell judges and legislators when, for example, the rule of tort liability should be negligence and when strict liability; or how to decide when a land use should be deemed a nuisance, when a preliminary injunction should be granted and when denied, when solicitations by police to commit a crime should be deemed entrapment, whether a rescuer of a lost item should have a legal claim to the reward posted by the owner though unaware of the offer of the reward, or whether spendthrift trusts should be allowed because they reduce, or forbidden because they increase, the likelihood of bankruptcy.

The second challenge, the challenge inspired by the left-wing politics that helped to define the late 1960s and early 1970s, complained that the conventional approach was a mask for decisions reached on base political grounds. The "crits" resurrected the legal realism of the 1920s and 1930s in a more strident form and rejected the legal-process school of the 1950s that had sought to reconcile legal realism with traditional theories of law.

These challenges to the conventional model of the law professor's vocation so far succeeded as to bring about a fundamental change in the character of legal teaching and scholarship and the method of recruitment into academic law. From the challenge mounted by social science came a novel emphasis on basing legal scholarship on the insights of other fields, such as economics, philosophy, and history, and from the challenge mounted by the Left came a reinforcing skepticism about the capacity of conventional legal analysis to yield intellectually cogent answers to legal questions. These ideologically opposed challenges complemented each other by agreeing that the traditional model was narrow and stale.

The model was largely buried in these twin avalanches, especially in the elite law schools. The older generation, the generation committed to the conventional model, responded in part with bitterness and in part with silence. Not all, of course, and signally not Bernie Meltzer, who carried on imperturbably and into extreme old age in the style of the famous "old school" professors, such as James Casner, Barton Leach, and Robert Braucher at Harvard, and of Harvard judges such as Felix Frankfurter and Learned Hand (Hand of the Bill of Right lectures, in particular). Meltzer was in fact a favorite of Frankfurter, who taught Meltzer at Harvard (where Meltzer took an LL.M., after graduating first in his class from the University of Chicago Law School.) Meltzer's skillful cross-examinations at Nuremberg marked him as a master of practical lawyering, and he continued to demonstrate that mastery throughout his academic career.

In exemplifying the traditional model of the engaged, the worldly, teacher-scholar, Meltzer reminded us of its strengths. Even at the most intellectually ambitious of the modern law schools, a large majority of

students will become and remain practicing lawyers; and there is a good deal more to the practice of law than economics, or philosophy, or feminism, or theories of race. There is the knack of reading cases and statutes creatively, there is a largish body of basic legal concepts that every practicing lawyer should internalize, there is a bag of rhetorical tricks to be acquired along with a professional demeanor, a procedural system to be mastered, a subtle sense (“judgment”) of just how far one can go in stretching the limits of established legal doctrines to be absorbed. These things cannot be the entirety of the modern lawyer’s professional equipment, and their inculcation cannot be the entirety of a first-rate modern legal education, because the law has become too deeply interfused with the methods and insights of other fields—and the law schools are still lagging badly in attempting to overcome the shameful aversion of most law students to statistics, math, science, and technology. Maybe at the law schools that have the brightest students only a third of the instruction should be in the traditional mold. But to reach that level the law schools will have to start hiring teachers who identify more strongly with the practicing profession than they do with academia.

The loss is not only in the kind of teaching that Meltzer exemplified, but also in his style of scholarship. In a system of case law, which is the dominant American system of law even in primarily statutory fields such as labor, which was Meltzer’s principal field of teaching and scholarship, the principles and rules of law are not found in authoritative texts—in legal codes—but instead have to be inferred from statutory and constitutional texts, yes, but even more from judicial opinions, whether they are common law opinions or statutory or constitutional glosses. Inferred law is “unwritten” in the significant sense that it is constructed by the judges and lawyers from scattered, sometimes inconsistent, and often ambiguous, incomplete, or poorly informed materials, mainly, as I said, judicial opinions. The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability (not only brains and knowledge and judgment, but also *Sitzfleisch*) to organize dispersed, fragmentary, prolix, and rebarbative materials. These are tasks that lack the theoretical breadth or ambition of scholarship in more typically academic fields. Yet they are of inestimable importance to the legal system and of greater social value than much esoteric interdisciplinary legal scholarship.

Because of the enormous financial rewards that today await the successful practitioner, and the alienation of the academic legal profession from the practice of law, superlawyers of the caliber of Bernie Meltzer will no longer dominate law school faculties. He was almost

the last survivor of an era. With his example before us, we can reflect on what has been lost and consider how some of it might be regained.