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## Dedication to David E. Lust

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## Dedication to David E. Lust

### Authors

South Dakota Law Review; Attorneys of Gunderson, Palmer, Nelson & Ashmore, LLP; Dusty Johnson; David S. Day; Tom Johnson; Steve Allender; and Thomas E. Simmons



DAVID E. LUST

The Board of Editors of the *South Dakota Law Review* is pleased to dedicate Volume 68 to the late David E. Lust.

David E. Lust was born in Aberdeen, South Dakota, in March 1968. He passed away unexpectedly in July of 2021 from a cardiac event.

Growing up, Mr. Lust was very involved in athletics, participating in football, basketball, and track. A college athlete, he attended Dartmouth College in Hanover, New Hampshire, graduating in 1990 with his Bachelor of Arts in political science. Upon graduation, he worked as an international business consultant, traveling throughout Europe and South America. Mr. Lust then pursued a Juris Doctor from the University of South Dakota School of Law,<sup>1</sup> working for Emeritus Professor David S. Day as his Research Assistant. In 1997, he graduated from law school, ranking second in his class. He then moved to Rapid City, where he clerked for the Honorable Richard Battey in United States District Court. After clerking, Mr. Lust joined the Gunderson, Palmer, Nelson & Ashmore law firm, practicing as a business attorney. In addition to representing his clients, Mr. Lust served the state of South Dakota for eleven years in the South Dakota Legislature. He served two terms as House Majority Leader.

Beyond his work as an attorney and legislator, Mr. Lust was an invested community member, serving on various boards and committees. Of particular note, Mr. Lust served on the board of Elevate Rapid City, an organization dedicated to economic development in Rapid City. Today, Elevate's downtown

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1. Now the University of South Dakota Knudson School of Law.

facility is named in Mr. Lust's honor: the David Lust Accelerator Building or the "DLAB," for short.

Mr. Lust is described by many to have been a man of deep faith and a man who put his family above all else. He married his wife, Becky, in 1995. He and Becky had four children together: Nicholas, Isabelle, Benjamin, and Samuel. He was an avid outdoorsman with a dry sense of humor.

Mr. Lust is described to have had a way with words—he was gentle, yet direct, and very effective. He was a leader who tackled issues head-on and with grace. He held those around him to a high standard, encouraging them to be better because he knew they could.

Mr. Lust's impact on his community, the legal profession, and beyond is long-lasting. Although Mr. Lust is gone, his legacy lives on.

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ATTORNEYS OF GUNDERSON, PALMER, NELSON & ASHMORE, LLP<sup>†</sup>

The legal profession provides a unique opportunity to meet and work with exceptional people in the field of law, community development, family, and philanthropy. It is rare though to meet somebody like David Lust, who embodied exceptionalism in all these areas. David came to the law firm of Gunderson, Palmer, Nelson & Ashmore as an intern in 1996. After completing law school at the University of South Dakota, he served as a law clerk for United States District Court Judge Richard H. Battey. After completion of a federal clerkship, he returned to Gunderson, Palmer, Nelson & Ashmore, where he practiced for more than twenty-two years.

Certainly, David's potential was obvious from that internship, but it is doubtful anyone at the firm when he began his practice would realize the impact he would make on the local bar, the local community, and them personally, all while raising his own family in a way that anyone would be proud to emulate.

David served people. He served clients through consultation and representation to the point that he often became a close confidant on all things. He served his community through volunteerism on numerous boards. He served the bar on various committees. He served the state as a state representative and state House majority leader. He served God through service in church and by often attending two church services a weekend, that of his family's denomination and his wife's family's denomination. A close confidant of so many, it was remarked on his passing that more than a hundred people lost their best friend that day.

Abraham Lincoln is credited with saying that a lawyer's time and advice is his stock in trade. David gave generously of his stock in trade in ways that

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<sup>†</sup> Gunderson, Palmer, Nelson & Ashmore, LLP has offices located in Rapid City and Pierre, South Dakota and consists of twenty-three attorneys.

marveled those who knew him. While a successful lawyer, he made time to also provide leadership at the state legislature and in changing the community and state where he lived. Through leadership and individual encouragement, he set a light to inspire those around him to be better. He realized success of projects comes from support and relentlessly sought to bring people into community causes. He adroitly encouraged others to join in and take part. So subtle his approach that after a lunch with David, one often found himself volunteering for an organization he had had little knowledge of when lunch started. He recognized people's potential and helped them recognize it themselves.

David did not seek awards and applause. He felt a purpose to those around him that did not include self-aggrandizement. The possibility of recognition did not motivate him to do good work for others. Rather, the simple satisfaction to have done good work for others was enough.

A partnership is a business entity, but in the practice of law it is often something more. A law partner is often a business associate, friend, mentor, confidant, and mental and intellectual supporter. David was all these to his law partners, other lawyers, and to all those intersecting his life.

Loss comes to all. Few professions teach this as well as the practice of law. It is said when you lose someone of David's caliber you do not really replace them as you learn to carry on without them. While that is true, with somebody like David it is also true that those who knew him will never truly carry on without him because they will always carry with them the influence he had on their lives and the inspiration from the examples he set. Like the stone falling into a pond, the stone is gone, but the ripples continue.

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CONGRESSMAN DUSTY JOHNSON<sup>†</sup>

### **Reflections On My Friend, David Lust**

The fifteen-year friendship between David and myself was no sure-thing. Young politicians often view each other as threats. Ambition and strong personalities can block friendships even when there is not jealousy. And in our case, there was jealousy. David had his face and physique, and I was stuck with mine. But the friendship came naturally, nonetheless. I learned from David. His dry humor, the way he analyzed and communicated, that mischievous smile, and how he always seemed to be in control of himself.

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<sup>†</sup> U.S. Representative, South Dakota.

## I. ON THE COURT

The “in control” part was particularly noteworthy. I noticed it first on the basketball court. Early in our Pierre era we played on Tuesday nights during session. I was perhaps faster than David on the court—he called me “White Lightning”—but in every other aspect of the game, he was superior. He was so smooth, so in control.

I started to notice how true that was off the court as well. He was a remarkable legislator. He did not get carried away, did not make decisions based on anger or frustration. He was so smooth, so in control.

## II. ADULT IN THE ROOM

It was not always easy for David, the in-control, adult in the room, to lead the raucous and tumultuous House caucus. He was good at it, but there were times it was not particularly enjoyable for him.

The four years David was leader were also the four years I was Chief of Staff to the Governor. During session we talked every single day about issues large and small. Once, we had a plan to meet in his office after the end of session that day. I wandered down there at the appointed hour, but his door was shut and the voice of an opinionated and hard-to-please legislator was coming through the door. Over the course of the next ten minutes, this legislator’s voice kept getting louder and more out of control. This guy was screaming, which usually worked for him. He often got his way with volume and bluster. Majority Leader Lust was not backing down though. I could not hear what he was saying, but when he spoke, his voice, even if a little raised, was in control. The other legislator, his face red with rage, slammed open the door and stormed out of the office. David emerged differently, in control, and ready to get to work on our negotiations. As we walked together into his office, though, he could not help but make one reference to his discomfort at his position. “Dusty, do you know the difference between this job and a colonoscopy? Nothing.”

## III. HARD DECISIONS

I remember the conviction David showed in the earliest days of his tenure as majority leader. Governor Daugaard had announced his plans to eliminate a \$127 million budget deficit through cuts, but he could not do it without the legislature. I was meeting with David and a few other influential House members to gauge their willingness to move forward. One leader talked about the political risks, about how many voters would be upset by the cuts, about how that anger might affect the elections. David was not tempted by the political calculation of the situation. “Our duty,” he said, “is to do the right thing.” The reflective silence that followed left no doubt that everyone in the room understood he was right. David was in control of that room, as he often was when our state leaders gathered

to make the tough decisions on education, safety, taxes, transportation. We have the state we have today because of David Lust.

#### IV. AT BOB'S LOUNGE

There was one time when David was not quite in control. We were at the famous Pierre pub called Bob's Lounge. It was towards the end of a long session. He and I started to talk about the trade-offs men and women make when they are in public office. He spoke about Nick, Isabelle, Benjamin, and Samuel. I spoke about Max, Ben, and Owen. We spoke about our wives. It was one of those real, emotional, authentic moments. I was not fully in control, and neither was David. Instead, it was his big heart that was on display then.

#### V. COMFORT AND STRENGTH

I saw that same big heart two weeks before David died when he texted me after getting a sense that Washington D.C. might be wearing me down, just a bit. "Dusty," he wrote, "I sense your optimism is slipping. Keep focusing on solving problems. You'll find comfort and strength there." I was touched by that message. "Keep focusing on solving problems. You'll find comfort and strength there."

As I reflect on his legacy, I am struck by how much "comfort and strength" he provided to his family, his friends, his coworkers, and the statehouse. David was a talented, mature, in-control leader. He provided so many of us with the "comfort and strength" we needed to be our best. I miss him terribly, but I am grateful that his life made us better.

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DAVID S. DAY<sup>†</sup>

### **David Lust: Reflections and a Rølvaag Essay**

David Lust had deep and venerable roots in South Dakota, particularly the Aberdeen area. When my spouse, Lynne, and I arrived at the USD Law School in the 1980s, I made an effort to learn about South Dakota. I read, of course, *Giants in the Earth* by Ole Edvart Rølvaag.<sup>2</sup> I mention this because, in a conversation with David in the 1990s, he commented, with considerable confidence, that he thought the Rølvaag story was "overrated." I always wanted to return someday to

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<sup>†</sup> Professor (ret.), University of South Dakota Law School. BA, JD, University of Iowa.

2. Based on the advice of a fellow Iowan, the late Deming Smith, I also read the rest of the "Rølvaag trilogy:" PEDER VICTORIUS and THEIR FATHERS' GOD. After reading the history of South Dakota and the history of USD, I was "hooked" on the early history of South Dakota.

that topic with him. Regrettably, that did not happen. As we all have experienced, other parts of our lives got in the way.<sup>3</sup>

I appreciate this opportunity to write about David. He was a memorable law student. David was, moreover, an outstanding Teaching Assistant. I was also privileged to observe David in his parental, lawyerly, and legislative roles. Please recognize that my remarks and reflections here are an attempt to synthesize my observations and reflections about David—to honor his memory and his family.

## I. “STATES’ RIGHTS” AND THE SECOND AMENDMENT

My experience with David really started in the fall of his second year—in Constitutional Law. It was a strong group of students. David was willing to participate in class, but he wasn’t a big talker. To accommodate requests from some “Federalists” in the class, I had added that fall a couple of class sessions on the Second Amendment. The class was debating whether the Second Amendment recognized an “individual right” (like Justice Antonin Scalia contended) or only a right to bear arms while in a federal militia (as Justice John Paul Stevens, Professor Laurence Tribe, and most of the legal academy contended).<sup>4</sup> The discussion seemed to wind down, and I decided to end a few minutes early (for once).

Then, David raised his hand. When I recognized him, he confidently asserted: “Both sides are wrong. The Second Amendment provides a right to the States.” There was no reference to “states’ rights” in the assigned materials. So, I thought that David must have come up with the “States’ Rights” theory on some independent basis. I made a comment to the effect: “So, Mr. Lust, you are offering the ‘George Wallace theory’ of the Second Amendment.” David understood my reference to former Alabama Governor Wallace, and he grinned. With the end of the class, I deferred any further consideration to the next day.

After class in the hall, David said he didn’t have any more to add; he had only wanted to “shake up” the class discussion. Thus, I learned that David was, at times, an intellectual rebel. I asked where he got the “States’ Rights” theory. David responded that he thought of it while having a beer in downtown Vermillion.<sup>5</sup> Such is the chemistry of inspiration.

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3. I did the tour of Rølvaag locations in eastern South Dakota, and I read a biography of Rølvaag. An update: The “Rølvaag house” was located at the Augustana University campus in Sioux Falls. Rølvaag was, I believe, a student at Augustana Academy when he immigrated to South Dakota. The “House” was recently moved to Iowa to permit Augustana to build a hockey arena for a new athletic program.

4. For what it was worth, I agreed with Scalia, but I kept it to myself. I had thought the Second Amendment was an “individual right” ever since law school at the University of Iowa. It was, as former students will recognize, somewhat ironic for me to agree with Justice Scalia.

5. See *infra* note 7. The class had, like all Constitutional Law courses, discussed the scope of federal government powers and the Tenth Amendment.



## II. TEACHING ASSISTANT

David was, with a GPA class rank of number two, an outstanding student. He did very well in Constitutional Law and First Amendment Rights. He applied to be my Research Assistant (“TA”). I was happy to have him. I warned him that, under my class policies, I wanted the students to ask their questions first to the TA. The TA was, in this course, a “screener.” There could be, in some years, many questions. In light of learning about David’s rebel side, I felt compelled to add: “You do need to give the students the best available “Bar Review” answer—something middle-of-the-road.” He laughed. David’s response: “I can handle that.”<sup>6</sup>

## III. VISION AS A LAWYER AND PUBLICATION

Sometime in David’s second year, he approached me about writing a paper. He said he wanted to analyze an Eighth Circuit ruling about the City of Brookings’s decision to “privatize,” for purposes of the First Amendment, a city-owned park for a weekend. I agreed to the paper topic, subject to my normal rules.

David’s paper exceeded my expectations. Later, David, who was on the Moot Court Board, asked if I thought he could revise his paper into a Law Review casenote. I said I had had students do that (*e.g.*, Kathy Ford and Hope Matchan). David followed the *South Dakota Law Review*’s procedures. He was subsequently selected for publication. Then, much to the pleasure of David’s Moot Court colleagues, the *South Dakota Law Review* awarded David the Casenote of the Year Award.<sup>7</sup>

In his paper and casenote, David used an intellectual scalpel to dissect the Eighth Circuit opinion. He forcefully critiqued the majority’s reasoning. Like the best in legal literature, David’s casenote was an “easy” read.

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6. Readers will note, again, David’s robust self-confidence in a new role.

7. The citation is: David Lust, Note, *What To Do When Faced With A Novel State Action Question? Punt: The Eight Circuit’s Decision in Reinhart v. City of Brookings*, 42 S.D. L. REV. 508 (1997). The public forum law was, at that time, rather straightforward. State and local government cannot evade the requirements of the First Amendment simply by “privatizing” a “public forum.” See *Lebron v. Nat’l Railroad Passenger Corp.*, 513 U.S. 374 (1995). See generally David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143 (1992). For his casenote, David extensively researched the public forum doctrine. I drew on that for a couple of articles.

Until my retirement, I continued to recommend to the First Amendment students that they read the Lust casenote<sup>8</sup> because it actually addressed Free Speech issues. I also cited it in the Con Law casebook.<sup>9</sup>

David was the type of student and TA that makes a law professor *look* successful. Such success is not automatic in a small school like the USD Law School. I think of David, and my other TAs, when moments of such success happened.<sup>10</sup>

#### IV. THE LAWYER-LEGISLATOR

I was fortunate to continue contact with David and Becky when, after graduation, they went to Rapid City. There were regular calls and letters. The substantive communications tended to focus on children—theirs and mine.

I was pleased to get calls from David from Pierre, where he was Republican Majority Leader. He knew that I was generally “critical” of the States’ Rights philosophy (now sometimes called “federalism”), but David used me as a “sounding board” to prepare for hearings or speeches. He was very concerned about the status of higher education in South Dakota, and we discussed it a number of times.

Over the years, I have had the opportunity to work on a number of cases with former students. During David’s post-legislative career, he talked about trying to find cases for us to work together.<sup>11</sup> David wanted to do a First Amendment case, like his casenote. We were still looking for a case . . .

#### V. REFLECTIONS

I was impressed on many occasions that David had the courage to try new projects (like his casenote or being a TA), and he had tenacity in pursuit of his

8. There was, of course, another reason to recommend the Lust casenote. I believe reading very good examples is an excellent way to learn how to write a law review article. For example, when I started my casenote process in the summer after first-year, I worked as an Iowa City “playground director” in the morning, took the required Federal Income Tax course at 1:00 p.m., and then had the afternoon for law review. To initiate my learning process, I found the best available air-conditioning (for Iowa City in 1975). I sat there each afternoon, and I read all the prior year’s casenotes. (Incidentally, the best air-conditioning was a bar in downtown Iowa City where I had spent some time.) See *supra* note 4. I do not specifically remember, but I imagine I told David about my casenote experience. I wish he was here to lecture the law students on how to do a casenote. In any case, law students can continue to use David’s casenote as a positive model.

9. DAVID CRUMP ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1309 (6th ed. 2014).

10. I make a point to remember why these successes happen. Often, it is because of your students or your TA. I was fortunate to have many such students and TAs.

11. David “joked” that he wanted to see what, if anything, I remembered from Latham & Watkins. (During his summer judicial internship, in Los Angeles, David had become familiar with Latham & Watkins before he was in class with me.) I assured him that I had forgotten many things from my time there. However, one thing I learned at Latham & Watkins was that, even when busy billing hours, you should seize the “interesting” case. Take the pro bono case.

I probably did not tell him enough, but I learned a lot from working with David as a TA and on his paper/casenote. I am sure that working on a case with him would have been the same.

goals. As his career evolved, David had become an accomplished lawyer and public servant. Again, tenacity and vision.

I will miss his intellect (contrarian and otherwise), leadership, and friendship. I remain impressed with David's vision and determination. David's eyes were always set toward the future—of Country, State, and family. These were, of course, prominent characteristics of the South Dakota Rølvaag experience. We will remember David as an authentic heir to the South Dakota heritage.

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TOM JOHNSON<sup>†</sup>

### **Lust's Legacy Lives On**

I first met David Lust when I interviewed for the CEO position at Elevate Rapid City in the summer of 2019. David was chairman at the time, and his goal was as ambitious as it gets. He was trying to get the organization off the ground, bringing several nonprofits together, and he wanted to create a national model for community and economic development. It was something that had never been done before in the region. Elevate (as I later learned it was called for short) was looking for its first CEO. The board eventually landed on me, and it is a title I still hold today, almost four years after meeting David.

Lust was not somebody you easily forgot. He had one of those faces—the kind where no matter how old he was, he looked twenty-five forever. He also had this grin that disarmed you without you even knowing it. And he was not afraid to use it. Probably the best way to describe David, the way that most people would describe him if they passed you on the street, was that the guy was both boyishly charming and devastatingly effective.

The world is full, of course, of smart, talented people. And David was certainly both. You do not graduate from Dartmouth without being exceedingly clever. You do not graduate from law school at the University of South Dakota without natural gifts. But you also do not get anything done as a lawyer in western South Dakota without being good with people and without getting them to care.

And that is where David's talents were truly world-class. The stuff you read about David is true—he served in the South Dakota Legislature for eleven years, served as majority leader, worked across the aisle (strange in today's political climate), and helped both former and current Governors. But what you may not know is that he served his community in dozens of roles, from volunteer to board member, and he gave pro-bono services to the nonprofits he worked with that probably mounted in the tens of thousands of dollars. In the early days of Elevate, for instance, David gave hundreds of hours to us by drafting bylaws and documents to help us comply with South Dakota law. I kept waiting for the bill.

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<sup>†</sup> CEO of Elevate Rapid City.

The bill never came. When I finally asked him about it after a few months, he shrugged, grinned that famous grin, and said, “Tom, if you’d like to get a bill, I can arrange it.” Being the CEO of a nonprofit, I knew to never bring the subject up again.

David Lust had another superpower that made him as effective as anyone I have ever met. It is probably one of the reasons he was able to hone his wry grin and dry sense of humor. David had this way of saying the hard things, the things that needed to be said, the things that everyone wanted to say but could not, without pissing people off. It is a talent rarer than a white buffalo, but David used it to weave in and out of difficult conversations constantly. No one could stay mad at him for long, no matter what he said, no matter what he did. I am often asked how Elevate merged numerous nonprofits into a national model for economic development, how Elevate was able to raise almost eight million dollars, and how Elevate was able to navigate a pandemic so successfully. My answer: find another David Lust.

A week before David’s passing, we met to talk about the future of Elevate Rapid City. I complained about the housing crisis, the workforce crisis, and any other crisis I could think of at the time (I was probably venting to him as I usually did). He flashed that grin once again. “No one ever said this job was going to be easy,” he told me. “If it were, we would have picked someone else. But we picked you. So, let’s get it done.” He did not need to say another word. He just needed to keep smiling, which, of course, he always did. That smile of his stays with me now. And I think it always will.

Sometimes I get to the office early. I drive to our downtown facility, which now bears David’s name. It is called the David Lust Accelerator Building, also affectionately known as the DLAB for short. I get there at 3 or 4 a.m., when I am thinking about the future of the Black Hills, when I am thinking about the vast and awesome responsibility we all have to elevate the region for everyone. It was a responsibility David faced every day of his career.

The building is empty, all 40,000 square feet of the place. I stand in the middle of our events space. I close my eyes. I breathe deeply. And I know David’s work remains, that it will never be forgotten. It lives within all of us who had the chance to know him, who had the chance to work with him, who had the chance to see that smile of his change South Dakota forever and for the better.

David Lust’s legacy lives on.

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MAYOR STEVE ALLENDER<sup>†</sup>

To many, David Lust was a local attorney. To others, a former state legislator. He is not only known for those roles, however. He is known best as a community leader, advocate, and friend.

Before I ran for mayor in 2015, I had heard of David but did not know him personally. One of my campaign supporters arranged a meeting where David was present. David asked me why I wanted to run for mayor, and I shared with him my thoughts. He politely and succinctly told me, “Not good enough.”

He went on to talk to me about my platform, how campaigns work, and gave advice on how to bridge the gap between constituent and elected official. His advice was thoughtful and insightful, and everything he said proved to be true.

When I was elected in 2015, I had regular involvement with David. He was almost always involved in economic development efforts. He was always looking out for our community, looking to the future, and he regularly and willingly gave of his time and energy. He served on boards and committees and was always available to provide sound advice and direction on a wide range of matters.

A few years ago, David provided expert representation of a local businessman and member of the city’s airport board during official proceedings to remove one of our city council members from office. This was a very intense period in our city’s history, and David showed the utmost professionalism, respect, and integrity that was demanded during those delicate proceedings.

David genuinely cared about our community, and he was never afraid to roll up his sleeves and put words into actions, to see projects through, and take on difficult issues.

The news of his passing came as a shock to anyone who knew him. He was fit, he used tremendous self-discipline, and was constantly optimistic. We have all benefited from knowing him, and we will continue to benefit as a result of his legacy.

David was the consummate professional, a great man, and a model public servant. But this was not a role for him. It was a way of life. He took pride in his family, his community, and his profession. David had an easy-going personality but with a steely-eyed determination for developing and producing the best possible result or solution. He led by example. We can all do well to learn from David’s leadership style but most importantly, his approach to life.

Today, his son Benjamin is part of the Rapid City Youth City Council. A spitting image of David, one cannot help but assume this young man is destined for greatness. He is after all, along with his other three children, following a great example.

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<sup>†</sup> Mayor, Rapid City, South Dakota.

THOMAS E. SIMMONS<sup>†</sup>

### The Last Email

It was 2021, midway through July, when I received David's second-to-last email. It read in part:

Haven't heard from you in a while and I'm guessing you have been in RC<sup>12</sup> at some point.

What is up with you and the kids? . . . <sup>13</sup>



David and I knew each other for more than two decades. We met as law students at USD during my 2L year. Our study carrels were adjacent. Later, our law offices would share a common wall.

David was eleven months my junior, but he enjoyed a year's seniority over me in law school. He was like a charming, athletic, better-looking, more composed, thriftier, and brighter junior brother.

David and I were both somewhat non-traditional law students. We had each had professional work experiences that preceded our respective law school matriculations. I had been a schoolteacher; he had been an international business consultant. I had grown up in Rapid City. He had grown up in Aberdeen. I was a bookworm while he had been a football star.<sup>14</sup>

Our friendship was not linked by interests or backgrounds. I think it was simply that we grew to care for one another; a friendship for its own sake. We took account of each other's well-being.<sup>15</sup> We grew closer as the years went on.

Following our law school days, David and I enjoyed a proximity to each another in Rapid City. David clerked for Judge Battey; I clerked for Judge Bogue. Ours were two-year clerkships. Afterwards, David accepted a position at the Gunderson Palmer law firm. I followed him there a year later.

Only rarely did David and I spend leisure time together. He taught me how to cast a fly rod one afternoon, though I remained a jig-and-worm fisherman thereafter. On firm retreats we might enjoy food and drink together. But our friendship was not based on shared activities outside of the office.

<sup>†</sup> Professor, University of South Dakota Knudson School of Law. Professor Emeritus Jonathan Van Patten assisted me with the difficult process of writing this essay. He is, *inter alia*, an editor par excellence. I owe him my gratitude but take sole responsibility for any errors or omissions.

12. RC is an abbreviation for Rapid City.

13. E-mail from David E. Lust, Gunderson, Palmer, Nelson & Ashmore, LLP, to author (July 13, 2021, 11:40 CDT) (on file with author).

14. David had also been a track star and an excellent basketball player.

15. See ARISTOTLE, NICOMACHEAN ETHICS bk. VIII, at 3 (W.D. Ross, trans., 2006) (c. 350 BCE), <https://perma.cc/TG29-FGHP> ("Now those who wish well to their friends for their sake are most truly friends; for they do this by reason of own nature and not incidentally[.]").

Nor was it founded on coordinated efforts as lawyers. There was one large transaction on which we worked closely together early on, but otherwise, we never shared a file. His focus was on corporate law business litigation while mine was estate planning and probate.

As we matured as attorneys at Gunderson Palmer, our families took shape. He and Becky produced four precocious offspring (Nicholas, Isabelle, Ben, and Sam); Lin and I, two (Ethan and Ella). Our children's lives overlapped with things like ice skating lessons and the Suzuki strings program.

Toward the end of our time together at the firm, I made a trip to Pierre to testify in favor of a bill that David had sponsored as State House Majority Leader.<sup>16</sup> A reading was scheduled before the House Judiciary Committee, of which David was a member.<sup>17</sup> I was the last proponent to testify, and I remained at the podium as the committee chair turned to questions. One legislator posed a question better addressed to David, so he stepped down from the elliptical dais to testify alongside me.

It was unplanned and unusual; two individuals at the podium, but the Committee Chair, Roger Hunt gave us his endorsement: "There's room for two. Go right ahead."<sup>18</sup> I shifted to allow David to share the microphone.<sup>19</sup> As he sat down next to me, he quipped: "Mr. Chairman . . . this is how we are in our office. Despite—and in addition to—all the credentials he mentioned, [Tom] is one of my law partners [and] our offices are right next to each other, so this is a very comfortable position for me."<sup>20</sup>

It generated a healthy laugh from David's lawmaking peers.<sup>21</sup> David and I chuckled, too. My memory of that moment recalls David's good humor and how well-liked he was. And it encapsulates the bond we shared. It was, as David said, very comfortable.

That moment stands out in my memory because it was one of the rare times when David and I pursued an activity together. Somehow, our friendship flourished just by proximity and by talking to each other. But on this occasion, we were elbow-to-elbow, pursuing a common aim, supporting one another, with each man contributing to his friend's strengths. We were teammates. The bill passed.<sup>22</sup>

When I announced that I would be leaving the Gunderson Palmer firm for academia, David was genuinely glum about my departure. Thereafter, he occasionally sent me an email that tried (half-seriously) to coax me back. When Marty Jackley and Matt Naasz returned to the firm, David quoted John Belushi's

16. H.R. 1062, 2011 Leg., 86th Sess. (S.D. 2011); S.D. Sess. Laws, ch. 135 §§ 500-04, codified at SDCL §§ 29A-5-108-09 (based on the Uniform Adult Guardianship and Protective Proceedings Act (2007)).

17. *House Bill 1062*, S.D. LEGISLATURE, <https://perma.cc/H5XX-Y484> (last visited Nov. 16, 2022).

18. *Podcast*, S.D. PUBLIC BROADCASTING, <https://sdpb.sd.gov/sdpbpcast/2011/hju15.mp3#t=235> (last visited Nov. 16, 2022).

19. *Id.*

20. *Id.* beginning at 21:10.

21. *Id.* beginning at 21:27.

22. See H.R. 1062, 2011 Leg., 86th Sess. (S.D. 2011); S.D. Sess. Laws, ch. 135 §§ 500-04, codified at SDCL §§ 29A-5-108-09.

character in *The Blues Brothers*: “We’re putting the band back together”—which made me smile.<sup>23</sup>

After my move away from Rapid City, David and I saw a lot less of each other. We visited from time to time and updated one another sporadically. Our interactions lessened. But although I neglected to tend to our friendship as much as I should have, distance failed to erode it.<sup>24</sup> Our friendship remained very important to me. I can honestly say David held a place in my heart because I can distinctly feel the hole he used to occupy in it.

David’s July 2021 email to me was mostly focused on family. Most of our conversations over the years would too. Our shared concern for the other’s welfare and families was what connected us most. So, I responded to David by confirming that Lin and our children were doing well. David replied, filling in family data and concluding with seven words:

When are you headed out this way?<sup>25</sup>



I did owe David a visit, but I decided to defer answering until I had solidified a plan to drive back to Rapid City and lock down a lunch date. Ten days later, I was still fiddling with my calendar when an email from Professor Emeritus Roger Baron’s list serv registered itself in my inbox with this bleak subject line:

David Lust (obit forthcoming)<sup>26</sup>

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23. THE BLUES BROTHERS (Universal Pictures 1980).

24. See ARISTOTLE, *supra* note 4, at 4 (“This kind of friendship, then, is perfect both in respect of duration and in all other respects, and in it each gets from each in all respects the same as, or something like what, he gives; which is what ought to happen between friends.”).

25. E-mail from David E. Lust, Gunderson, Palmer, Nelson & Ashmore, LLP, to author (July 13, 2021, 4:26 CDT) (on file with author) [hereinafter Last Email].

26. Posting of Roger Baron, Professor Emeritus, University of South Dakota, [usdlaw-list@usd.edu](mailto:usdlaw-list@usd.edu) to [tom.e.simmons@usd.edu](mailto:tom.e.simmons@usd.edu) (July 23, 2021, 5:32 CDT) (on file with author). The announcement contained the initial report of David’s death from the *Argus Leader*:

A longtime South Dakota lawmaker and former House majority leader died unexpectedly Friday, prompting tributes from state political leaders from around the state.

David Lust died during the overnight hours Friday morning of a suspected heart attack, his law office confirmed to the *Argus Leader*. Lust was a partner at the Rapid City firm Gunderson, Palmer, Nelson & Ashmore.

He was 53.

“David was such a strong leader for our state, his community, and our law firm, and most importantly a loving father and husband,” former Attorney General and current law partner Marty Jackley said in an email to the *Argus Leader*. “We have all lost the statesman we came to admire in Majority Leader Lust, the community has lost a strong voice, and I have lost my dear friend. Our thoughts and prayers remain with Becky and their family.”

*Id.* (quoting Joe Sneve-Jonathan Ellis, *Death of Former House Majority Leader David Lust Stuns South Dakota Political World*, ARGUS LEADER (July 23, 2021), <https://perma.cc/2VBA-JE7F>).



I felt a blankness as I clicked on it, unable to connect the two subjects—David and obituary. They did not belong together. I opened the email, read the announcement, and climbed the stairs. I tried to announce his passing to Lin, and a wave of loss swept over us. We imagined the suffering of Becky and their children. I cried. Later, at the memorial service, I marveled at Becky’s strength and how their children had grown.

Sixteen months later, David’s last email remains. It is there at the bottom, the oldest email in my inbox—like the husband’s old truck in the widow’s garage that she cannot discard. When the editors of the *South Dakota Law Review* announced the joint dedication to Terry Westergaard and David Lust, I undertook this dedication to preserve David’s email within it before hovering over the tiny trash icon and letting it go. But his question remains unanswered. *When are you headed out this way?*<sup>27</sup>

It seems to re-ask itself. It seems to suggest that its author is no longer referring to Rapid City as a rendezvous point. Maybe “this way” signifies another place. Though I still owe my departed friend an answer, it cannot be sent to Rapid City, nor delivered to him electronically.

David Lust was a good man. He was a very fine lawyer; a virtuous husband and father; a man of deep faith. He was my better. It seems to me that if there are circles in heaven like those which Dante sketched, David ought to be placed a canto higher than I in the hereafter.<sup>28</sup> Hopefully, one day, we will exchange many words and enjoy an endless lunch together. It is this thought which allows me to let go of his last email with these words, joined to prayer:

I miss you, David. I will be seeing you.

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27. Last Email, *supra* note 25.

28. DANTE ALIGHIERI, *PARADISO passim* (Anchor ed., Robert & Jean Hollander, trans., 2007) (1472). Beatrice guides Dante through nine heavenly spheres. *See also John* 14:2 (Jubilee Bible 2000) (“In my Father’s house are many dwelling places; if it were not so, I would have told you.”) (emphasis in original). Pope Benedict XVI has emphasized:

If heaven depends on being in Christ, then it must involve co-being with all those who, together, constitute the body of Christ. Heaven is a stranger to isolation. It is the open society of the communion of saints, and in this way a fulfillment of all human communion. This is not by way of competition with the perfect disclosure of God’s Face, but, on the contrary, its very consequence.

JOSEPH RATZINGER, *ESCHATOLOGY: DEATH AND ETERNAL LIFE* 235 (Michael Waldstein trans., Aidan Nichols, O.P. ed., Catholic University of America Press 2d ed. 1988) (1977).

