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The Master Mason: How Professor Baldus Built a Bridge from Learning to Law and the Legacy of Equal Justice He Leaves Behind

*James E. Baker**

I am struggling. I am struggling with Dave's death. I am also struggling to write a festschrift for Dave. Don't get me wrong; his life and work warrant celebration and recognition. He was a great friend, mentor, scholar, and advocate. But there are challenges.

The first challenge is that I would rather have delivered my comments in person. I expected to. A eulogy is not what I had in mind; celebration with Dave and Joyce is. And, while it is entirely appropriate to celebrate the life and passing of a wise elder, Dave was so much more. He was a man of all ages and no age at all. One of the many reasons that his death is tragic is that he retained a child's curiosity for new knowledge. Like a child, he bore no bias. His was an open mind. And this mind had so much more to do and to give.

The second challenge is that Dave was a modest man, in all the right ways. Some people who are modest still hope nonetheless for a bit of recognition. I think Dave, however, secretly abhorred the prospect of a festschrift. Indeed, when I talked to him about it in the spring, he said he was quite willing to entertain such a recognition—so long as no one talked about him! I don't know German, but I did have a suspicion that the whole idea behind a festschrift *was* to talk about him.

Thus, I feel somewhat sheepish—almost disloyal—now writing and talking about Dave behind his back. He was a loyal friend. He was the kind of friend you would want on your right or your left in combat if you were a soldier. If you were in trouble, there was no better person to come to your aid, either as a lawyer in front of a court, or a friend on the other end of the phone or computer. Dave's modesty would have made him cringe and squirm at a festschrift, which of course, would have been much of the fun. But while Dave's modesty should be noted, there is nothing modest about

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his contributions as a teacher and as a lawyer. That warrants celebration. We should understand and take note of those contributions in order to carry forth his legacy.

The third problem is that Dave's chosen field—the death penalty—does not at first lend itself to the sort of “good stories” that would remind us about what we valued about Dave's friendship, or that would make us smile rather than cry. But as it turns out, Dave's story—his life's work—is a good story. It is a story about due process and the meaning of justice. There is no better story in the law. With Dave's forgiveness, allow me to share a piece of it.

The American educator, Alfred Whitney Griswold, wrote:

The American people do not sufficiently understand the rule of law because it has never been properly explained to them. The legal profession has not succeeded in explaining it perhaps because it has been too busy with ad hoc issues and winning cases. The teaching profession has not succeeded in explaining it perhaps because it has not sensed its true importance. If the two great pillars of society, law and learning, are to stand, the professional representatives of each must come to the aid of the other.¹

Never mind the fact that Griswold wrote these lines in 1954. When I first read them, I thought about how they might apply today. Then I thought of Dave.

If law and learning are the two great pillars of society, Dave was their master mason. His work shaped both pillars. Moreover, not only did he contribute to the shape and strength of each individual pillar, he made a unique contribution to the arch connecting the two. He did so as a teacher, a lawyer, and as that rare combination of both, linking the academic study of social science and statistics to the practical application of litigation. All the while, he reminded us that these pillars reach for the sky because learning pursues the truth and law seeks justice.

What made Dave an extraordinary educator-lawyer and master mason? A number of reasons immediately come to mind.

First, Dave was an expert in his field. In fact, he was *the* expert on the death penalty and proportionality review. “Comparative proportionality review,” in his words, “is the process in which a state court compares the facts and circumstances of a death sentence case with other death-eligible cases that result in either death or lesser sentences.”² To understand and explain that process, he mastered the necessary and challenging fields of social science and statistics. He wrote at least nineteen articles on the subject, as well as eight book chapters, thirteen reports to various

1. A. Whitney Griswold in *Education: The Need for Law*, TIME, Dec. 20, 1954, at 54.

2. David Baldus, Luncheon Address, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 SETON HALL L. REV. 1582, 1586 (1996).

government bodies, and numerous other works. His work has been cited in over 280 court cases. And, if you search existing law review articles for “death penalty and proportionality review,” Dave Baldus is cited 159 times. His work and role in *McCleskey v. Kemp*³ are well known, and in any event, better recounted by others. His work with state courts, in South Dakota, California, and New Jersey, is, perhaps, less well known.⁴

For my part, I believe I first heard of Dave Baldus while attending a meeting at the Department of Justice. Attorney General Janet Reno mentioned “the Baldus study.” She wanted to know what it said, and understand its conclusions, before addressing a pending policy matter. I was not a criminal lawyer and was in the room by chance to brief on a national security matter, but I got the message. “Baldus,” whoever that might be, was a respected figure. The name itself sounded intimidating.

Thus, when I knew I would meet Professor Baldus for the first time in the faculty lounge at The University of Iowa College of Law, I was expecting some combination of Clarence Darrow and Erwin Griswold. It was literally a few minutes into a conversation while sitting on one of those odd couch-like chairs before I realized that the interesting, unassuming, and friendly man I was talking to was, in fact, “Baldus.” I was not disappointed—only surprised. How unusual to find someone so accomplished, so knowledgeable, and so at the top of their field who was also so modest.

A second reason Dave was an extraordinary educator and lawyer was because he was an extraordinary person. If he had an ego, it must have fallen off that “boat” of his (special emphasis applied to the quotations!) into Lake McBride. The greatest lawyers I have known in the Washington game are those lawyers who either have no ego, in which case they probably have not found their way to Washington, or those lawyers who could subordinate ego to the greater good. Dave was no exception to this rule. His focus on the truth and his interest in learning were so keen that he didn’t care from whence they came. Nor did he care who got the credit. One finds this in his articles, which readily acknowledge the contributions of others. It is also evident in his citations, which reference articles other than his own.

Nor have I met a teacher more eager to encourage and celebrate his students’ ideas and achievements as much as he did his own. In fact, I suspect that Dave cared more about the success of his mentees as teachers than he did his own. Certainly that is what he conveyed. I teach today, and I love to teach, in part, because Dave was so encouraging, effusive, and enthusiastic when I started out. He was always in my corner and I knew it. As

3. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

4. *See, e.g., In re Proportionality Review Project*, 735 A.2d 528 (N.J. 1999) (New Jersey Supreme Court hearings reviewing Professor Baldus’ advisory report); *In re Proportionality Review Project (II)*, 757 A.2d 168 (N.J. 2000) (same).

a result, he helped me find my teacher's voice as I am sure he helped so many others.

That brings up another trait that marked him as a lawyer, educator, and friend. He was dogged-diligent. In all that he did and all that he was, he was diligent. When he started his study of proportionality review and the military death penalty there was no fact he did not want to know about military culture so as to ensure he did not miss or misperceive a factor that might influence prosecutorial decision-making.

Why are the chevrons up? Why are they down? Why is boat jumping an offense? Why did your court say *this* in 1952? Why did William Winthrop say *that* in 1920? How would a captain interact with a major? How about a major with a colonel? A colonel with a general?

The questions came like machine gun fire. I have to confess that there were times when I would duck into the bathroom when I saw Dave coming up the hall. One time I even crawled under my desk. He always had more questions—he was never content to stop learning. Of course, I cherished these conversations, as I did all my conversations with Dave. I learned so much, all while he was pretending to be the student.

Dave was dogged-diligent in his focus as well. Seven days a week the office door was open, always that one-inch ajar that said “professor at work, but you are welcome to come in.” He could at one time spend the entire day walking around with his bike band affixed to his pants, but at the same time pull an essential fact or case from his mind. He could do the same in his office, instantly finding the memo or study he was looking for from beneath three cardboard boxes, eleven accordion files, and last week's lunch. I once made the mistake of telling him I liked to run. Not only did I receive fifty years of geological survey maps and trails, but I literally had strangers calling me two years later in Washington. They would say, “Professor Baldus made me call to tell you I found a great running trail out by North Liberty.” As I said, Dave was a friend you would want on your side, just as he was the lawyer you would want on your side.

Dave was also open-minded. Said another way, he was a liberal in the old-fashioned sense of the word, defined as one who is open to new ideas without preconception and continues to believe that the answer to a bad idea is a better idea. He never judged a book by its cover. He needed to read the book first. Or, more precisely in Dave's case, he needed to read the book, then read every book cited in the footnotes, followed by an exhaustive two-year statistical study of the conclusions contained in the book.

Senator Daniel Patrick Moynihan quipped that “everyone is entitled to their own opinion, but they are not entitled to their own facts.”⁵ Dave was all about facts. And while he may have had opinions over a glass of wine with

5. 153 CONG. REC. 2782 (2007).

Joyce in his sunroom, as a professor and lawyer he only had facts and analysis.

In a discipline where passions run high, he was also objective and dispassionate. Dave spoke with his facts and his data, not with his adverbs and adjectives. Consider what passes as Dave's most critical comment in a book review about statistical analysis: "Occasionally, the theme's development takes on a tone of advocacy rather than of dispassionate demonstration."⁶ That was as mean as the man got, but to those who knew Dave, that was also strong medicine. It was only in the context of this festschrift that I realized that Dave had used almost identical language with me when I asked him to comment on a draft speech prepared for the Iowa Council on Foreign Relations. He also indicated just which arguments needed another look. I remember at the time feeling deflated, but then elated, thankful that Dave had called it as he saw it. I rewrote the speech, head to toe.

Dave always followed where the evidence led, rather than marshalling the evidence to support preconceived ideas. He trusted his audience to reach their own conclusions—what they needed were facts. This commitment was based on what he called "the superiority of quantitative methods over intuition as a basis for policy making,"⁷ but always informed by a reliable estimate of "the possibility and the range of possible error."⁸ Students of proportionality review also needed an understanding of the relevant principles of social science. "Social science research is relevant to death penalty decision-making," Baldus wrote, "because these institutions purport to be rational, principled, and guided by facts. And when the facts are in dispute, the basic idea is that the side with the better evidence should carry the day."⁹

He was fearless in pursuing facts—in pursuing the truth. I recall him marching into our Court's annual legal conference editing his presentation as he walked. Then he slid his pirate patch over the one eye and proceeded to ask a skeptical audience of 200 military lawyers for help. "Tell me what I need to know, and tell me where to find it." They were stunned. Where was the condemnation? Where was the academic bias? Where was the politics? Dave didn't want to scold. He didn't want to make a point. He wanted facts. That was the basic idea. If the audience expected something else from the professor with the slightly un-regulation hairdo, they didn't know Dave.

6. David C. Baldus, Book Review, 5 AM. B. FOUND. RES. J. 409, 416 (1980) (reviewing MICHAEL O. FINKELSTEIN, *QUANTITATIVE METHODS IN LAW: STUDIES IN THE APPLICATION OF MATHEMATICAL PROBABILITY AND STATISTICS TO LEGAL PROBLEMS* (1978) and *STATISTICS AND PUBLIC POLICY* (William B. Fairley & Frederick Mosteller eds., 1977)).

7. *Id.* at 409.

8. *Id.* at 420.

9. David C. Baldus, Keynote Address, *The Death Penalty Dialogue Between Law and Social Science*, 70 IND. L.J. 1033, 1033 (1995).

They didn't know of his respect for military service and for a military institution committed to law and constitutional loyalty.¹⁰

For a guy who loved a good conversation about the Rule Against Perpetuities, or whatever it's called, Dave wrote and thought in plain English and crisp outlines. Consider how quickly and clearly he explains the meaning of equal justice.

In the context of the criminal justice system, the idea of equal justice manifests itself first in a commitment to comparable treatment of similarly situated defendants, without regard to race or socioeconomic status. . . . The commitment to equal justice also contemplates substantially comparable treatment of similarly situated defendants without regard to race.¹¹

His essays, which cover more esoteric topics like Bayesian theory, are just as easy to follow. You can see the outline. You do not need to take oxygen mid-sentence. His e-mail communications were much the same, but even shorter. He appears to have been tweeting in the days of the main frame computer with punch cards; a funny thought given Dave's love of dense legal conversation. Dave wanted the law to be accessible and encouraged others to make the law accessible as well, evidenced by the manner in which he noted in a book review: "By my count approximately 11 of the book's 18 articles can be substantially understood by the diligent reader without a background in regression and probability."¹²

Another reason Dave was a master mason is because he possessed the modesty that comes from knowing how much he did not know and had yet to learn. You can't very well search for the truth if you are convinced you already know it. Dave loved new ideas. And he loved old ideas cast in new light. It is hard to dispute the conclusion of Professor Timothy Kaufman-Osborn, of Whitman College, that Dave Baldus was "the preeminent student of comparative proportionality review."¹³ "Preeminent" is nice. "Student" is even better. It captures who Dave was. He was brilliant but at the same time possessed an insatiable child's curiosity, always willing and eager to learn without preconception or bias. He was a life-long student; every day offered a new class.

10. Dave served in the Army Security Agency, which at the time was the Army's Signals Intelligence branch. If you look ASA up on Wikipedia you will find that it was "composed primarily of soldiers with high scores on Army intelligence tests." But if you asked Dave about it, he would convey some funny story about Army life as well as a keen respect for service, but never a detail about his actual work. Loyalty, for Dave, extended to all aspects of his character, including his Army commitments. For a humorous, and entirely speculative, look at what Dave's ASA Army experience might have been like consider TRACY KIDDER, *MY DETACHMENT* (2005).

11. *When Symbols Clash*, *supra* note 2, at 1585.

12. Book Review, *supra* note 6, at 412 (emphasis omitted).

13. Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 WASH. L. REV. 775, 815 (2004).

Finally, and most of all, Dave Baldus was a great teacher and lawyer because he successfully bridged the two great pillars of society—law and learning. He never lost sight of the big picture nor the need to make this connection. Education provides the tools to make, apply, and evaluate the law. He connected the two by mastering social science and statistics, and then educating his students, the courts, and the public in the relevance of social science to decision-making and the relevance of statistics to appraising the result. Through those disciplines, he showed us how decisions are actually made and how, from a myriad of individual decisions, a pattern may yet emerge when we look up from the task of “ad hoc issues and winning cases.” This alone would mark a career for celebration.

But Dave did something more through the power of his example. In the harsh reality of death penalty jurisprudence, he never lost sight of his compassion. He did not proclaim it. He lived it. He understood, as Clarence Darrow wrote that “[a]s a rule, it is the poor and the weak and the friendless who furnish the victims of the law.”¹⁴ What is more, he never let us lose sight of the big issues, of equal justice under law. He did not proclaim it; he lived it. Dave was admired by practitioners and judges, by students and friends, for combining the pursuit of knowledge with the pursuit of justice. He was that arch between learning and the law, between social science and the law, and between “ad hoc issues and winning cases” and what it means for a society to be just and fair.

It is no surprise, then, that Dave is the teacher who set the bar for me with respect to criminal law and what it means to be a judge. I have Dave in mind when reading petitions. I have Dave in mind when deciding cases. And, I have Dave in mind when writing opinions. I had just sent him a batch of opinions in May 2011 and was looking forward to hearing back.

Like all students, I was part apprehension and part anticipation. How would he respond? Would it satisfy his keen analytic eye? Most importantly, would I live up to his ideal of the law, an ideal that rests on three essential pillars: an unwavering commitment to allowing the facts to drive conclusions; an undying commitment to equal justice under the law and the ability to articulate what that means in plain English; and, in a word, civility. In a most contentious area of the law—capital punishment—he was unflinchingly courteous and civil in his written and spoken words. For these reasons, I will miss Dave Baldus. But for these same reasons, I also know that he will always be present in my courtroom.

14. Clarence Darrow, *Defense Lawyer Clarence Darrow Answers a Supporter of Capital Punishment* (Oct. 27, 1924), in WILLIAM SAFIRE, *LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY* 373 (2004).